

October 10, 2006

## **Guidelines\* and Frequently Asked Questions On Visa Retrogression**

Heavy demand for employment-based permanent resident status can create backlogs and long waits to obtain “green cards,” sometimes due to retrogression of immigrant visa numbers. While retrogression and lengthy processing is frustrating, in many instances applicants and family can remain and work in the United States, and travel abroad, while waiting for quota backlogs to subside.

### **Q. What are the phases of employment-based immigrant cases?**

Applying for a permanent resident status and a so-called “green card” is a multi-phase process. Following are typical phases of the process:

- |         |   |
|---------|---|
| Phase 1 | Labor certification application (“Labor Cert,” currently submitted through the PERM process), <sup>1</sup> through which the employer demonstrates to the U.S. Department of Labor that there are no qualified, willing, and available U.S. workers for the job;  |
| Phase 2 | Immigrant petition for alien worker (I-140), to ask U.S. Citizenship & Immigration Services (“USCIS”) under the Department of Homeland Security to allow the employer to hire a specific foreign worker;  |
| Phase 3 | Adjustment of Status (I-485), for foreign nationals in the United States, to apply to USCIS to change the person’s temporary status (such as H-1B status) to permanent resident status to apply for a green card. U.S. work authorization Employment Authorization Document (as “EAD card”) and documentation to travel abroad (Advance Parole) are available for the beneficiary, spouse and minor children while waiting for the green card through Adjustment of Status, |
| or      | Consular processing, for background checks and other procedures to obtain the green card, by returning to the home country for interviews and   |

---

\* These materials are provided as general information. The contents do not constitute legal advice. Changes in U.S. law, policy, or procedure may render these materials inaccurate. Consult a qualified immigration attorney before seeking immigration benefits.

<sup>1</sup> The Labor Cert or Program Electronic Review Management (“PERM”) process is not discussed in detail here.

**Diane M. Butler**  
Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, Washington 98101-2338  
Phone: (206) 223-7715  
butlerd@lanepowell.com

## **Guidelines and FAQs on Visa Retrogression October 10, 2006**

final processing. No EAD card or Advance Parole is available through consular processing while waiting for the green card.

### **Q. What are immigrant visa quotas?**

U.S. immigration laws contain quotas for immigrants based on the category in which they are immigrating, and on their country of birth. Under the Immigration and Nationality Act (“INA”), there is an overall, worldwide annual quota for certain types of employment-based and family-based visas each fiscal year (October 1 to September 30). There are also per-country quotas. The primary beneficiary uses a quota number, and so does each family member who obtains permanent resident status through the person.

The worldwide level for annual employment-based “preference” category visas is 140,000, and for family-based preferences, 226,000. Each year, unused numbers are poured back into the visa number pot, potentially raising the number of visas available. However, these additions are not likely to be enough to fill the pot to supply adequate amounts when there is high demand in the employment-based preference categories.

The per-country limit is 7% of the total annual family-sponsored and employment-based preference limits  $((140,000 + 226,000) \times 7\% = 25,620)$ . That is, unless unused numbers are added, no more than 25,620 visas can be issued to persons born in a particular country per year, regardless of whether the country is India, with its large population and many immigrants to the United States, or a small country like Sweden.

The State Department Visa Office subdivides the annual preference and foreign state limitation into 12 monthly allotments. Each month, the Visa Office publishes the Visa Bulletin to provide information about the quotas and backlogs.

### **Q What are preference categories?**

In 1990, Congress created a priority system for granting permanent resident status to foreign nationals based on skills. There are five employment-based (“EB”) preference categories,<sup>2</sup> and the visas available for the categories are somewhat interdependent, as follows:

---

<sup>2</sup> Because the focus is on employment-based cases, family-based preference categories are not listed here.

**Guidelines and FAQs on Visa Retrogression  
October 10, 2006**

- First:**       **(EB-1) Priority Workers:** 28.6% of the worldwide employment-based preference level, plus any numbers not used for the fourth and fifth preferences (listed below). The EB-1 subcategories are the following:
- Extraordinary ability
  - Outstanding researcher
  - Multinational executive and manager
- Second:**   **(EB-2) Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability:** 28.6% of the worldwide employment-based preference level, plus any numbers not used by first preference. The EB-2 subcategories are the following:
- Individuals who have Labor Certs filed on their behalf, with a minimum requirement for the position of a Master's degree or a Bachelor's degree plus five years of progressively responsible experience
  - National interest waiver (no Labor Cert required)
  - Exceptional ability with advanced degree (Labor Cert required)
- Third:**       **(EB-3) Skilled Workers, Professionals, and Other Workers:** 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which are allocated to "Other Workers." The EB-3 subcategories are the following:
- Professionals, who have Labor Certs filed on their behalf, with a minimum requirement of at least a Bachelor's degree
  - Skilled workers where at least two years of experience is required
  - Other workers where fewer than two years of experience is required
- Fourth:**     **Certain Special Immigrants:** 7.1% of the worldwide level.
- Fifth:**       **Employment Creation:** 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers.

**Guidelines and FAQs on Visa Retrogression  
October 10, 2006**

**Q. What does it mean for a country to be “oversubscribed”?**

Whenever the full numbers of visas per category or per country are granted in one fiscal year, and there are still beneficiaries waiting for a visa, the country becomes “oversubscribed.” Due to large populations and high interest in immigrating to the United States, traditionally oversubscribed countries are India, Mexico, Mainland China, and the Philippines. Backlogs develop, and processing cannot proceed for cases older than the established priority date cut-off.

**Q. What are “priority dates” and “cut-off dates”?**

A priority date is assigned on the date the relevant government authority received the pertinent application or petition. The priority date is determined based on the type of case. For an EB-2 or EB-3 Labor Cert case, the date the Department of Labor or State agency received the Labor Cert is the priority date. For other types of cases for which no Labor Cert is required, the date USCIS received the immigrant petition is the priority date.

The “cut-off date” for an oversubscribed category is the priority date of the first applicant whose case could not be processed due to the quota having been reached. Only applicants who have a priority date earlier than the cut-off date may be allotted a visa number. Applicants must wait until priority dates are “current” for their processing to proceed. In order for a priority date to be “current” and available to be processed, it must be a date prior to the priority date cut-off.

**Q. What does it mean to say that a visa category is “unavailable”?**

“U” or “unavailable” means that there are no more visas available at all for the month.

**Q. What is visa “retrogression”?**

When a preference category that previously was current suddenly has a priority date cut-off associated with it, retrogression has occurred.

**Q. How will visa retrogression affect a Labor Cert already filed?**

The primary implication of visa retrogression is that it will take longer than anticipated for the person to obtain a green card, but certain phases can proceed despite visa retrogression. Retrogression will not halt the process of a pending Labor Cert.

## **Guidelines and FAQs on Visa Retrogression October 10, 2006**

A person may have an approved Labor Cert from Phase 1, and have moved on to file the necessary documentation for the immigrant petition at Phase 2, but not be able to move forward to Phase 3 until visa numbers are available for the individual's employment-based preference category. For Phase 3 even to be filed, the priority date must be current, and, in addition, there must be a visa number available on the date of the final *approval*.

If a visa number is available and a case is filed, it is still not immune to retrogression delays. Thus, if a case is filed while visa numbers are available, and then the visa numbers retrogress while it is pending, the case will have to wait until the visa numbers become current again. The review and adjudication process will continue, but the case cannot be approved unless the priority date is current.

### **Q. Does retrogression mean my PERM case can't be filed?**

As indicated, Labor Certs, including PERM cases, are processed by the Department of Labor. While priority dates are assigned when a Labor Cert is filed, retrogression has no impact on the preparing, filing, or processing of a Labor Cert.

### **Q. What caused this retrogression?**

Employment-based categories, except for certain high-demand countries, had been current for many years, from June 2001 to December 2005. This sudden retrogression is largely the result of processing delays for Adjustment of Status (I-485) in Phase 3. Recently USCIS devised an I-485 backlog reduction program. But churning out approvals resulted in using up visas. The ironic impact has been to push the backup up the chain, so that now, I-485s cannot even be filed until the backlogs clear.

### **Q. So, how long will it take to get a green card?**

Due to the per country limits, the length of time to obtain a green card can depend on where a person was born, and how many other people from the country have applied for green cards. It also depends on the preference category. The EB-3 category has high demand, and there are more than 350,000 Labor Certs (both EB-2 and EB-3) pending in Department of Labor Backlog Elimination Centers for pre-PERM case applicants who have not yet been added to the pot. Unfortunately, the State Department has indicated that EB-3 numbers are likely to remain unavailable and might retrogress further for all nationalities. Therefore, it is not possible to

## **Guidelines and FAQs on Visa Retrogression October 10, 2006**

predict with any degree of accuracy how long it might take place to receive permanent resident status or a green card.

### **Q. Can a person with a Master's degree, or Bachelor's degree plus five years of progressive experience, switch preference categories to speed things up?**

If a Labor Cert that listed EB-3 requirements has already been approved, the case must be processed under the EB-3 quota. However, a person who is the beneficiary of multiple immigrant petitions is entitled to the earliest priority date. Therefore, if a subsequent case in an EB-1 or EB-2 category is filed, the person might be able to move up the priority date ladder.

### **Q. Can a person go through consular processing in the home country and avoid visa retrogression or speed things up?**

Department of State consular officers cannot approve immigrant applications for permanent residency at immigrant visa interviews until and unless the priority date is current on the date of the immigrant visa interview.

Like USCIS officials adjudicating Adjustment of Status applications, consular officers are required to report to the Department of State the immigrant visa numbers used. For Consular processing, immigrant processing time at U.S. consulates abroad ultimately depends upon how quickly a case moves through to an appointment at the particular consulate. This is generally a number of months, perhaps between four to eight months. A case cannot be approved at the consulate for an immigrant visa, however, unless there is a visa number available. Therefore, consular cases are also delayed by retrogression.

### **Q. What about family members?**

Spouses and minor children of preference immigrants are entitled to the same status, and the same order of consideration, if accompanying or following to join the principal. The priority date must be current for the family members' processing to proceed.

One way to move up the priority date ladder is to use the spouse's country as the country to which the visa quota is charged. Where the principal beneficiary is a native of a country for which a cut-off date is applicable, and where the principal's spouse is a native of a country that is not subject to a cut-off date, both the principal and derivative may be charged to the derivative's country of birth to prevent separation of the family and speed up processing.

**Guidelines and FAQs on Visa Retrogression  
October 10, 2006**

**Q. What can be done while waiting for backlogs to clear?**

Following are considerations for persons who might face visa retrogression:

- Consider options for obtaining permanent resident status through preference categories for which Labor Certs are unnecessary.
- If a Labor Cert is necessary, file as early as practical, considering company review, retention and other policies, to obtain an early priority date, and preserve the option of H-1B extensions beyond the sixth year.
- If approaching the sixth year in H-1B status with a Labor Cert pending for at least a year, file for an extension.
- If eligible to file for Phase 2 immigrant petition processing, file as soon as it is available.
- If eligible to file for Phase 3 Adjustment of Status, file as soon as possible.
- For persons with an approved Phase 2 immigrant petition who is prevented from filing an Adjustment of Status application due to application of worldwide or per-country quota, a three-year extension of H-1B status might be available.
- Focus on keeping status for self and family members current, and maintaining the right to remain and work in the United States until backlogs clear.
- Make sure to get legal advice before making job changes, within the company, or to a different company.

**Q. What are the current backlogs?**

The EB-3 category (professionals and skilled workers for whom Labor Certs are filed) has the most severe employment-based backlog, and it is worst for Indian, Chinese, Filipino, and Mexican citizens.

For current backlogs, see the chart below.

**Guidelines and FAQs on Visa Retrogression  
October 10, 2006**

**Following are the employment based priority date charts for the current and prior months:**

**IMMIGRANT NUMBERS FOR OCTOBER 2006**

	<b>All Chargeability Areas Except Those Listed</b>	<b>CH</b>	<b>IN</b>	<b>ME</b>	<b>PH</b>
<b>Employment-Based</b>					
1 <sup>st</sup>	C	C	C	C	C
2 <sup>nd</sup>	C	01APR05	15JUN02	C	C
3 <sup>rd</sup>	01MAY02	01MAY02	22APR01	01MAY01	01MAY02
Schedule A Workers	C	C	C	C	C
Other Workers	01JAN01	01JAN01	01JAN01	01JAN01	01JAN01
4 <sup>th</sup>	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5 <sup>th</sup>	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C

**Guidelines and FAQs on Visa Retrogression  
October 10, 2006**

**IMMIGRANT NUMBERS FOR MARCH 2006**

	<b>All Chargeability Areas Except Those Listed</b>	<b>CH</b>	<b>IN</b>	<b>ME</b>	<b>PH</b>
<b>Employment-Based</b>					
1 <sup>st</sup>	C	01JUL03	01JUL04	C	C
2 <sup>nd</sup>	C	01JUL02	01JAN02	C	C
3 <sup>rd</sup>	01MAY01	01MAY01	01JAN01	22MAR01	01MAY01
Schedule A Workers	C	C	C	C	C
Other Workers	01OCT01	01OCT01	01OCT01	01OCT01	01OCT01
4 <sup>th</sup>	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5 <sup>th</sup>	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C

## **Guidelines and FAQs on Visa Retrogression October 10, 2006**

### **Additional Resources**

The following additional resources provide information about employment-based visas and retrogression:

- The Visa Bulletin, found on State Department's website at [http://travel.state.gov/visa\\_bulletin.html](http://travel.state.gov/visa_bulletin.html), is a monthly publication describing the visa preference and listing numerical system and showing the worldwide movement of priority dates within the preference categories. The Visa Bulletin contains important information regarding State Department policies, regulations, and matters affecting visa issuance. It also provides diversity lottery program information.
- USCIS guidelines on Employment-Based Permanent Resident Status: <http://uscis.gov/graphics/services/employerinfo/Bull14final110303.pdf>
- For Department of Labor information and Labor Cert processing times, see <http://www.ows.doleta.gov/foreign/times.asp>
- For Lane Powell Hot Sheets on immigration and other topics, see <http://www.lanepowell.com/pubs/newsletters/index.asp?display=true&id=6&type=hs> and <http://www.lanepowell.com/people/attorneys/detail.asp?page=pubs&aid=22>