

VISA RETROGRESSION | FREQUENTLY ASKED QUESTIONS

Background: By law, there is a quota or limit on the number of people who can be granted permanent residence status (green card) in any given year. This quota is based on two things: the employment-based category (EB-1, EB-2, or EB-3, etc.) (or the family based category for family-based cases), and "per country" limits, meaning that every country, no matter how large or small, is given the same percent of the worldwide quota. As a result, countries like China and India with large populations are then subject to longer waiting times than a person born in a neighboring country like Pakistan or Nepal. The number of spaces (sometimes referred to as "visa numbers") for a particular country, that are available at any given time, will depend on various factors, for example, how many immigrant visas have been issued at U.S. Embassies/Consulates abroad, how many I-485 adjustment of status applications have been approved for persons from that country in the U.S. during the prior month, etc. Such factors determine the movement of priority dates and, in turn, will affect the number of I-485 applications and immigrant visa applications that can be filed during the following month after the priority dates are released.

If the Visa Bulletin chart states "C" for a given category and country, that indicates that the numbers are current in the specific employment-based category, whether EB-1, EB-2, or EB-3, and that there is no waiting period for filing the I-485 application. If the numbers are backlogged as indicated on the Visa Bulletin, there will be a date (sometimes called a "cut-off date") listed. If the Priority Date is BEFORE the date indicated, then the foreign national is eligible to file the I-485 application for adjustment of status or the consular immigrant visa application during the particular month when the dates are current.

1. What is retrogression?

Retrogression refers to the situation where previously current dates on the quota bulletin go backwards and become unavailable. Retrogression can impact an individual at different times in the overall process. The individual's priority date must be current at two critical points in time: on the date that the I-485 application for adjustment of status is filed or application for immigrant visa at an Embassy/Consulate is filed AND it must also be current on the date when the case is actually adjudicated (i.e., the immigrant visa cannot be issued or the adjustment of status application cannot be approved if the quota bulletin is not current for the applicable priority date).

2. What is a priority date?

A priority date in an employment-based (EB) case requiring Labor Certification is the original date that the case was filed with the State Employment office under the pre-March 28, 2005 procedures or with the U.S. Department of Labor under the PERM system in place since March 28, 2005. For petitions that do not require a labor certification, the priority date is the date that the I-140 immigrant visa petition was filed with U.S. Citizenship and Immigration Services (USCIS).

To read the quota bulletin and determine if your priority date is current, you need to know (1) your priority date; (2) the EB category that you fall under.

3. What is the EB-1 Category?

The employment based categories are divided into five sections. The EB-1 category is for priority workers and includes the following categories: Extraordinary Ability Alien, Outstanding Researcher/Professor and Multinational Manager. Each of these categories has specific requirements under the regulations. Please refer to other sections of our web site for more details. None of the EB-1 classifications require that an employer file a labor certification. Furthermore, the Extraordinary Ability Alien category can be self-petitioning.

4. What is the EB-2 category?

The EB-2 category refers to degreed professionals. Generally, this category requires an employer to obtain a labor certificate showing that there are no qualified and available U.S. workers for the position. The labor certification must clearly state that the position requires an advanced degree professional which is defined as a position that requires either (1) a Master's degree or (2) a Bachelor's degree and 5 years of progressive experience. These requirements must be specifically stated on the labor certification. If they are not stated on the labor certification, then the case cannot be processed as an EB-2 regardless of the employee's qualifications.

Please note that some EB-2 cases may be eligible for a waiver of the labor certification requirement if it can be shown that such a waiver is in the National Interest or if the individual can show international recognition for exceptional ability. This is a very high standard and does not apply to the vast majority of cases. Please refer to other sections of our web site, relating to National Interest Waivers or Schedule A Group II, for more information.

5. What is the EB-3 category?

The EB-3 category, similar to the EB-2 category, requires the employer to obtain a labor certification showing that there were no qualified U.S. workers available for the position. The EB-3 category is divided into three categories: "skilled workers, professionals, and other workers." How an individual falls into the categories is dictated by the requirements listed on the employer's labor certification. If the labor certification states that the requirements are at least a Bachelor's degree, then the position will be classified as a "professional." If the requirements indicate that at least 2 years of employment experience and no degree is required, then the position will be designated a "skilled worker." If the requirements are less than two years of experience and no degree is required, it will fall into the "other worker" category. The "professional" and "skilled worker" categories are treated the same under the quota bulletin. The "other worker" category has a different priority date track to follow.

6. My spouse is from a different country – does that affect my case?

Yes. Under a provision of immigration law known as "cross-charging", if your spouse was born in a country that is not subject to retrogression, you can "charge" against that country's visa quota. Please note that your spouse must be born in that country. If she/he became a citizen of that country after being born in a country that is subject to retrogression, you cannot cross-charge to your spouse.

7. I am a citizen of Canada, but was born in India – am I subject to the India country limits?

Yes. If your country of birth and country of citizenship are different, your country of birth determines which country's visa backlog you are counted against. The Visa Bulletin uses "nationality," not citizenship, to determine how to allocate visas by country.

8. How can I tell if my priority date is current or not?

Every month, the U.S. Department of State (DOS) publishes the Visa Bulletin. The Visa Dates indicate whether the dates are current or whether there is a backlog in order to file for the Adjustment of Status. The current Visa Bulletin can be found on our website, as well as on the DOS website at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

9. At what point do I need to be concerned that my priority date has retrogressed or is not current?

Please note that in addition to having a priority date that is current, you must also be otherwise ready to proceed to a step in the process that requires the priority date to be current. This ONLY occurs in the final stages of the green card process (i.e., the fact that priority dates are not current will not keep your employer from filing a labor certification or immigrant visa petition on your behalf). However, if your priority date is not current, you cannot proceed with filing an I-485 application for adjustment of status or applying at a U.S. Embassy/Consulate for an immigrant visa based on an approved immigrant visa petition.

For EB cases that require a labor certification, immigration is a three step process. The first step is the labor certification. Once that is approved, your employer can file an immigrant visa petition on your behalf. If your priority date is current at the time that the employer files its immigrant visa petition you can opt to file your application for adjustment of status concurrently. If the priority date retrogresses after you file, then you remain a pending applicant for adjustment of status and can apply for employment and travel authorization as a pending applicant or have your employer continue to maintain your nonimmigrant status. For EB cases that do not require a labor certification, your employer files the immigrant visa petition and you can choose to file your adjustment of status concurrently with that filing.

Please keep in mind that concurrently filing is not always recommended and the filing of an application for adjustment of status precludes your filing for an immigrant visa at a U.S. Embassy/Consulate.

10. Why was there no retrogression from June 2001 until January 2005?

Two things happened to alleviate the demand for visas during this period. First, U.S. Citizenship and Immigration Services processing procedures created significant backlog of cases and a consequent reduction in demand for visa numbers. Since USCIS was taking longer and longer to approve adjustment of status applications, they were not requesting visa numbers from the Department of State. The actual immigrant visa number is not accorded to an applicant until the USCIS or Embassy/Consulate is actually adjudicating and approving the application. Since the USCIS and Embassies/Consulates were slow to adjudicate, visas were not assigned. That led to a decrease in demand based on processing delays. The second factor was the passage of the American Competitiveness Act of the 21st Century (AC21) which was

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enacted on October 17, 2000. One provision of this law permitted the “recapture” of unused employment based visas from FY1999 and FY2000 to be “banked” for future fiscal years.

When an applicant who is physically present in the U.S. applies for adjustment of status, a visa number is allotted to that applicant from the per country quota when the application is approved. Similarly, when an applicant applies for an immigrant visa at a U.S. Embassy/Consulate, a visa number is deducted from the per country quota when that application is approved. Given the significant USCIS backlogs that we experienced since 2000 and the additional visa numbers that had been “banked,” we did not experience backlogs until January 2005.

11. How could the numbers have retrogressed so far as of January 2005?

In 2004, USCIS began efforts to reduce all backlogs by the end of 2006. In addition, the “banked” visa numbers were used. As a result immigrant visa numbers have been allocated at a much faster rate than in comparison to previous years. The Immigration and Nationality Act (INA) states that not more than 27% of the employment based annual limit may be used in each of the first three quarters of a fiscal year. Based on the rate of demand in the first quarter of 2005, DOS determined that it was necessary to impose limits on the allocation of immigrant visa numbers to applicants from China, India and the Philippines during the second quarter of 2005, due to the high demand for the EB-3 category visas from applicants of those countries.

12. Is there anything I can do to speed up things up so I can apply for my green card before my priority date retrogresses?

Unfortunately, no. As USCIS continues to process cases, it is possible that the numbers will retrogress even further and that individuals from countries other than China, India, and the Philippines will be impacted.

13. What happens to my pending I-485 application if my priority date becomes subject to retrogression?

If you (and any dependent family members) filed I-485 applications while you had a current priority date, your applications will remain pending at the USCIS. This means that you will continue to be eligible for advance parole and employment authorization based on the pending I-485; however, USCIS will not be able to approve the I-485 until your priority date is current and a visa number is available.