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News & Types: Immigration Alerts

Priority Date Retrogression Will Cause a Significant Increase in "Green Card" Processing Times for Most Foreign Nationals (Updated September 2015)

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Practices: Immigration

In October 2005, the U.S. Department of State (DOS) significantly retrogressed the employment-based immigrant visa (a.k.a. employment "green cards") in many categories. The retrogression came as a surprise to many employers and foreign nationals because the DOS previously stated that it did not anticipate that these retrogressions would occur so early. Additionally, the DOS never indicated that the retrogressions would be so severe. However, due to the retrogressions, many foreign nationals will now be unable to commence and/or complete the last stage of the "green card" process (namely the adjustment of status process if completed in the United States) for many years until their priority dates become current.

Every year the government is allowed to issue a certain number of employment-based "green cards." When an employer files a Labor Certification Application with the DOL, the date of which the Application is received by the DOL is the foreign national's priority date. If the foreign national is exempt from the labor certification process, the date on which the USCIS receives the Immigrant Petition for Alien Worker (Form I-140) is the foreign national's priority date. Between 2001 and early 2005, the number of employment-based "green cards" available never exceeded demand due to the fact that the DOL and the USCIS were not timely or efficiently adjudicating their petitions and applications. However, since 2005, both the DOL and the USCIS have implemented backlog reduction programs to eliminate their backlogs. As the USCIS and DOL have begun to more expediently adjudicate their applications, the demand for employment-based "green cards" has begun to exceed the annual available supply. Therefore, the DOS has been forced to establish priority date cut-offs in many employment-based immigrant visa categories.

Additionally, the demand for employment-based "green cards" from nationals of certain countries (namely China, India and Mexico) has also exceeded the per-country limits on availability. Therefore, in addition to the priority dates, foreign nationals will also have to determine their country of chargeability in order to determine which priority date on the DOS' monthly Visa Bulletin applies to them. For most foreign nationals, country of chargeability is based on the country of birth, not the country of citizenship. For example, a foreign national who is born in India and has subsequently become a citizen of Canada is still chargeable to the priority date for

Indian nationals. A limited exception does apply for foreign nationals who are married to a spouse who was born in a country different than the principal foreign national's country of birth.

Since the severe retrogressions in October 2005, the DOS has advanced the priority dates in all employment-based categories which are retrogressed. However, the DOS has in many instances retrogressed the categories from month-to-month as quickly as it has advanced the categories. For example, in the October 2005 Visa Bulletin, the DOS retrogressed the employment-based third category (EB-3) for all foreign nationals (except for Chinese, Indian and Mexican nationals) to March 1st, 2001. Between January 2008 and June 2008, the DOS rapidly advanced the EB-3 category for all foreign nationals (except for Chinese, Indian and Mexican nationals) by more than three years to March 2006. However, the DOS then had to make the EB-3 category Unavailable from July 2008 through October 2008 because all of the available immigrant visa numbers had been used. Therefore, there is very little consistency in the advancement or retrogression of the employment-based categories. Additionally, the DOS consistently cautions that any future priority date movement may be slow or sporadic until the extent of the backlog of older cases can be first determined and then closed out. Unfortunately, it appears that the USCIS is not able to provide accurate information about its backlog. Therefore, DOS has to guess at the outstanding cases requiring immigrant visas. This has led to the current unpredictability in the priority date system. A detailed analysis about the current Visa Bulletin is contained on our firm's website at: http://www.masudafunai.com/showarea.aspx?Show=74. This information is updated on a monthly basis after the DOS releases its current Visa Bulletin.

Foreign nationals will have to wait for their priority date to become Current in order to commence the adjustment of status process and obtain an Employment Authorization Document (EAD) and/or Advanced Parole (AP) travel document. If the foreign nationals have been able to commence the adjustment of status process, but then their priority dates have retrogressed, they will not be able to complete the process until their priority dates again become Current. However, during this time, when they are waiting for their priority dates to become Current, they will be able to continue to extend their EAD and AP documents. Additionally, if their adjustment of status application has been pending for more than six months and their Form I-140 has been approved, their "green card" process will be portable so that they may commence employment in the same or similar occupation as the original offer with a new employer without the abandoning the "green card" process. However, if the foreign nationals have been unable to meet both of these conditions and change employers, they may have to commence the "green card" process again through their new employer and may not be able to retain their old priority date, depending upon the circumstances.

For H-1B nonimmigrants who may have to wait many years for their priority dates to become Current, they will be able to extend their status beyond the six-year maximum period of stay in H-1B classification as long as either: 1. They have commenced the "green card" process before they reached their fifth year in H-1B classification and their "green card" process has been pending for more than one year; or 2. They have had a Form I-140 Immigrant Petition for Alien Worker approved on their behalf and their priority date is not currently available.

For foreign nationals in L classification who will have to wait many years for their priority dates to become current, they may want to change their status to H-1B classification when the next H-1B quota becomes

available (earliest filing date is April 1, 2009 with an October 1, 2009 start date), unless the foreign national qualifies for one of the limited exceptions to the H-1B quota.

The DOS has indicated that the priority dates may have "slow or no forward movement" in the future because demand in many of the employment-based immigrant visa categories exceeds the supply of immigrant visas. The government is only able to approve approximately 40,000 EB-2 and 40,000 EB-3 immigrant visas each year with no country receiving more than 7% of the immigrant visas. The DOL has indicated that it has approved more than 260,000 labor certification applications as part of its backlog reduction efforts within the past three years. Additionally, the DOL has indicated that its PERM National Processing Centers have approved an additional 160,000 PERM applications since the creation of the PERM program in March 2005. As previously stated, the USCIS does not appear to be able to provide the DOS with exact information about the number of Form I-140 petitions that have been filed based upon these approved labor certification applications and the category (e.g. EB-2 vs. EB-3) and country of chargeability for the principal beneficiary of each of these Forms I-140. Therefore, without accurate information from the USCIS, the DOS has stated that it will be advancing the priority dates very conservatively in most of the retrogressed visa categories. Due to its cautious approach in the advancement of most of the retrogressed employment-based immigrant visa categories, the DOS made all of the employment-based immigrant visa categories Available in July 2007 in order to ensure that all of the employment-based immigrant visa numbers available in fiscal year 2007 were used by the end of the fiscal year on September 30, 2007. However, due to the tremendous controversy which was created by making all of the employment-based immigrant visa categories Available, it is assumed that the DOS will not repeat this action in the future. In order to ensure that all of the employment-based immigrant visa numbers in a fiscal year are used in the future, the DOS may have to more rapidly advance certain select employment-based immigrant visa categories, instead of making all of the categories Available. This occurred in 2008. However, due to the too rapid advancement of the EB-3 category in 2008, the EB-3 category became Unavailable during most of the last quarter of the government's 2008 fiscal year that ended on September 30, 2008.

Finally, priority date movement will also depend on whether a legislative change is enacted to increase the number of employment-based green cards available each year. For the past three years, Congress has debated Comprehensive Immigration Reform legislation. This legislation would have included a significant increase in the number of employment-based green cards available each year and may have exempted dependents from the employment-based green card numerical limitations. Although this legislation has not passed Congress, it is assumed that the legislation will be reintroduced in Congress in 2009 after the new Congress and presidential administration are installed.

Additional information about the movement of the employment-based priority dates and legislation to increase the availability of employment-based "green cards" will be contained in our firm's weekly Immigration Updates when it becomes available.