



NO LONGER SO FAST! AN EXAMINATION OF EB-1 RETROGRESSION FOR INDIAN AND CHINESE BORN FOREIGN NATIONALS

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One does not need a degree in public policy or law to understand the basic premise behind the concept that the United States ought to make the attraction of the best and brightest individuals a paramount immigration policy. By enabling the most talented and gifted individuals in the world to come to and work in the United States, the positive impact on society both economically and culturally ought to seem self-evident. However, on July 11, 2016, the Department of State (DOS) issued a visa bulletin which bodes poorly for many of those Indian and Chinese born foreign nationals the country should be actively recruiting.

The Employment-Based First Preference Category (EB-1), the visa category encompassing “priority workers” pursuant to section 203(b)(1) of the Immigration and Nationality Act, has retrogressed for the first time in nine years. The EB-1 category includes foreign nationals of extraordinary ability, outstanding professors or researchers, and multinational executives and managers. Retrogression refers to the backward movement of the “cut off” or “priority date” used by the DOS to determine when an immigrant visa will be made available to the alien.

Prior to the issuance of the [August 2016 Visa Bulletin](#) by the DOS, the priority date for Indian and Chinese nationals in the EB-1 category had remained “current” since October, 2007. In essence, this meant that foreign nationals who qualified under the EB-1 category, as will be detailed below, could immediately apply for an immigrant visa and adjust their status. However, in this Visa

Bulletin, the application final action dates (the dates that are generally used for determining whether a green card can be issued, and also more recently for determining whether an adjustment of status application can even be filed), retrogressed to January 01, 2010 for nationals of India and China. In the last 25 years, the EB-1 priority date has only retrogressed three and six times for India and China, respectively. This new retrogression means that as of August 01, 2016, if a foreign national did not submit their EB-1 immigrant petitions before January 01, 2010, then USCIS will not accept their adjustment of status applications until the backlog is cleared.

In addition to the priority date retrogression, the DOS and USCIS have created another layer of confusion to the unwary reader of the Visa Bulletin. In the [October 2015 Visa Bulletin](#), two separate charts were provided regarding the filing dates for employment-based visa petitions. The relevant dates are the "Application Final Action Dates" and the "Filing Dates." Simply put, the pertinent idea relative to this blog was that early-filings of Form I-485, Applications for Adjustment of Status based on an employment-based category may have been possible under the Filing Date even if the actual green card could not be issued. However, the implementation of this program has been confusing. As the [USCIS guidance](#) demonstrates, the definitive ruling on which of the two dates is to be relied on for purposes of filing an adjustment of status application, can theoretically change on a monthly basis, and therefore has created both tremendous confusion and uncertainty regarding the adjustment process for many foreign nationals. Thus, even if the Filing Date for EB-1 is current for all countries, including India and China, the USCIS has indicated that only the Final Action Dates can be used for purposes of filing an adjustment of status application.

One may ask, what are the practical implications for those Indian and Chinese born nationals who wish to adjust their status on the basis of an EB-1 petition? For starters, if the adjustment of status application is received at USCIS before the end of July 2016, the category will technically be current and the application will be accepted for processing. Although not much time remains, for qualified foreign nationals, a strategic filing before the end of July 2016 (note that July 30 and 31 fall on a Saturday and Sunday, and so it would be best if the application is received on Friday, July 29) could help save time waiting on the imminent backlog and would allow the applicant to take advantage of all the benefits that an applicant for adjustment of status is entitled to, such as work authorization,

travel permission and job portability. That being said, one should always take precautionary steps prior to filing an adjustment of status application. For instance, the idea of arriving in the United States on a visitor's visa and quickly applying for adjustment of status is highly inadvisable as it is important for the holder of a visitor's visa to demonstrate nonimmigrant intent. On the other hand, if one possesses a dual intent visa, such as an H-1B or L-1 visa, then it might be a good idea to enter the United States and apply for adjustment of status. Also, if there is a child aging out, it would make sense to also file the adjustment application prior to August 1, 2016 so as to freeze the age of a child under the Child Status Protection Act. If the child is based outside the US, and adjustment of status is not possible, one can also argue that the Filing Date, although not applicable for filing an adjustment of status application, can still be utilized for purposes of freezing the age of a child under CSPA by initiating and filing an application through the National Visa Center, as explained in this [blog](#). Finally, if an Indian or Chinese born applicant can cross charge to the spouse's or parent's country, other than India or China, then the EB-1 is still current for all of the other countries of the world.

The silver lining is that India and China born foreign nationals can look forward to October 1, 2016, when the new yearly allotment of green cards under the EB-1 category will be issued and the August 2016 Visa Bulletin has announced that the categories will again become current. In summation, the EB-1 retrogression for Indian and Chinese nationals may foreshadow an alarming trend, although in the past the EB-1 moved to current quite rapidly after it had retrogressed. The visa category which was dubbed the "fast-track" to an employment-based green card, may be slowing down. The EB-2 and EB-3 for India and China in recent years have been hopelessly backlogged, and the EB-1 provided a pathway to quick lawful permanent residence, provided one qualified. Let us hope that the EB-1 for India and China reverts to current and stays current from October 1, 2016 onwards. Otherwise, we will fast be going downhill in a broken immigration system!

(This blog is for informational purposes only and should not be viewed as a substitute for legal advice).

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