

Employment-based Visa Retrogression - Is There An End In Sight?

For workers seeking permanent residence under the employment-based Third Preference “professionals” and “skilled workers” category this is an anxiety provoking time. The wait time for immigrant visa (“Green Card”) availability is approximately five years (May 1, 2001). Foreign nationals born in China and India are also experiencing significant backlogs in visa availability across the employment-based First Preference category (which covers Multinational Managers & Executives, Aliens with Extraordinary Ability and Outstanding Researchers) and Second Preference category (which covers workers coming to a position requiring an Advanced Degree). Wait times for visa availability for China and India First and Second Preference employment-based petitions run between 14 months to three years.

Wait times are based on the number of documentarily qualified applicants from a country of chargeability petitioning for a visa against the total number of immigrant visas allocated and available in a given category for that country of chargeability. An applicant establishes his/her place in the visa line through the filing of an application for labor certification or immigrant petition. Cut-off dates (backlogs) exist when total demand exceeds total allocated visas.

Given the lengthy wait times it is incumbent on employers to consider filing applications for employment-based sponsorship – be it an application for PERM labor certification or an immigrant petition – earlier rather than later in the foreign worker’s total nonimmigrant work authorized status. While visa availability has continued to advance there may come a time when it will halt or retrogress again. As the Department of State noted in its November 2005 Visa Bulletin, there are 40% fewer immigrant visas available in FY 2006 than there were in FY 2005. Further with faster processing of applications by the USCIS and efforts by the Department of Labor’s Backlog Elimination Centers to eliminate its backlog of an estimated 300,000 pending labor

Are you concerned about the wait time for Employment-based visa availability? Then

- ✓ file sponsorship applications earlier rather than later
- ✓ keep careful track of employees’ total allowable period of non-immigrant stay
- ✓ stay informed about upcoming congressional legislation reform

certifications, the demand for immigrant visas should remain steady and could spike dramatically in the next 12 to 24 months, causing further visa retrogression. Absent an increase in immigrant visa numbers from the current annual allocation of 140,000 the best strategy is to keep careful track of your employees’ total allowable period of nonimmigrant stay (be it in H-1B or L-1 work-authorized status).

H-1B nonimmigrants are allowed a maximum stay of up to six years. L-1 nonimmigrants are allowed a maximum stay of either five years (L-1B – specialized knowledge positions) or seven years (L-1A – managerial or executive positions). Present law allows H-1B nonimmigrants to extend their stay beyond the sixth year in one year increments if a labor certification or immigrant petition was filed on the H-1B worker’s behalf at least 365 days prior to the 6th year anniversary. It also allows H-1B workers to receive extensions of H-1B stay in increments of up to three years where an immigrant petition has been filed and approved on the H-1B worker’s behalf but where the H-1B worker is precluded from filing for adjustment of status due to per country limits on visa availability. Neither of these provisions are available to L-1 employees.

Is there hope on the horizon? Congress is currently debating major immigration reform and there are several pieces of legislation that could provide relief from the current immigrant visa backlogs. Section 501 of the proposed Comprehensive Immigration Reform Act of 2006 seeks to overhaul the immigrant visa allocation system. Under its provisions employment-based immigrant visa numbers would more

than double from 140,000 to 290,000 immigrant visas annually. Additionally, only principal applicants would be counted against the annual allocation. Dependent family members applying with the principal would not be counted under the annual cap. Further, more visas would be allocated to the employment-based Third Preference category (35% vs. 28.6% of the total numbers). Finally, Section 409 of the Comprehensive Immigration Reform Act would add a new immigrant subsection under employment-based Second Preference category for advanced degree professionals holding a degree in the science, technology, engineering or math who have been employed in the field in the US pursuant to a nonimmigrant visa for at least three years. Should these provisions pass, the immigrant visa backlogs could disappear or reduce rapidly.

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