

IMMIGRATION LAW A Practice Focus

An October Shock

This month, the State Department dramatically changed visa cutoff dates.



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Getting an employment-based immigrant visa is like going to the deli. In theory, when a customer arrives, she gets a ticket with a number and waits. When her number is called, she orders a sandwich. The deli cannot produce sandwiches for all its customers at the same time, so it therefore prioritizes its sandwich production on a first-come, first-served basis.

In practice, for the past few years, no number was required to order a sandwich, and the deli took orders as soon as a customer walked through the door. The deli's workers did not, however, make the sandwiches, but instead sat around talking about sports. The deli's management has since ordered them to quit loafing, and the workers have now begun making the sandwiches again.

The problem is that there are so many customers, the deli's bread and bologna supply is in danger of running out, and the ticket system has to be restored.

A similar sort of problem is plaguing the issuance of employment-based immigrant visas. The U.S. State Department has issued an October 2005 bulletin with new information for fiscal year 2006 about the priority of processing visa applications. This information will come as a shock to many employers.

FIRST IN LINE

The changes arose because of the high volume of foreign nationals seeking permanent residence compared with the relative shortage of immigrant visas. In response, the State Department has imposed significant waiting periods before foreign nationals become eligible for permanent residence.

The State Department can issue a maximum of only 140,000 immigrant visas in all employment-based preference categories per fiscal year, with a per-country limit of 7 percent of the total. Preference for permanent residence is granted to the earliest-filed "green card" applications. The length of the waiting period depends on the individual's priority date—generally, the date on which the foreign national's alien employment certification application is filed.

The fact that, for the past three years, employment-based green-card applications were not cut off from any country in any category was the result of the failure of the U.S. Citizenship and Immigration Services (USCIS) to process enough green-card applications to threaten the available supply. As a result, not all of the available immigrant visas were used each year.

But now that the USCIS has reduced its inventory of pending green-card applications, the annual quotas for I-140 immigrant visas are being met. And so the State Department is announcing a range of cutoff dates for the processing of green-card applications.

The cutoff date system does not impose a prohibition on the filing of an I-140 immigrant petition or the approval of such a petition. Only the filing and approval of an adjustment-of-status application in the United States or an immigrant visa application with a U.S. consulate overseas are not permitted, unless and until the foreign national's priority date falls before the cutoff date specified by the State Department for his or her country of origin and preference category.

Such cutoff dates are reviewed every month. They may move forward or back, or remain static each month.

THE OCTOBER BULLETIN

The State Department's October 2005 Visa Bulletin has dramatically altered the calculus of cutoff dates. The bulletin provides critically important information concerning the timelines involved in obtaining employment-based permanent residence. It also announces a severe lengthening of these timelines for certain foreign nationals.

More specifically, the bulletin sets out a new series of cutoff dates that determine a foreign national's ability to file an adjustment-of-status or immigrant visa application. These dates will come as a considerable shock to employers and foreign national employees who have become accustomed over the past few years to seeing no cutoff dates for any employment-based category.

The bulletin's highlights are summarized below. Please note that the country to which an individual will be charged for cutoff date purposes will generally be the country of birth, not the country of current citizenship.

- The cutoff date for nationals of all countries other than India, China, Mexico, or the Philippines seeking EB-3 category visas has retrogressed to March 1, 2001.

This is perhaps the most significant announcement in the bulletin—that a cutoff date has, for the first time in recent memory, been imposed upon nationals of countries other than India, China, Mexico, or the Philippines in the EB-3 category. This category broadly comprises those persons whose alien employment certification applications do not require a master's or higher degree, or a bachelor's degree plus at least five years of progressive experience. Such persons will not be able to file adjustment-of-status or immigrant visa applications if their priority dates are on or after the cutoff date of March 1, 2001.

- The cutoff dates for nationals of India, China, Mexico, and the Philippines seeking EB-3 visas have also retrogressed. The cutoff date for India is Jan. 1, 1998; for China, May 1, 2000; for Mexico, Jan. 1, 2001; and for the Philippines, March 1, 2001.

- There is no cutoff date for EB-2 visa applicants from all countries other than India and China. This means that such nationals can file adjustment-of-status or immigrant visa applications immediately and need not wait for forward movement in cutoff dates.

- There are cutoff dates for EB-2 applicants from India and China. The cutoff date for nationals of India has moved back to Nov. 1, 1999; the cutoff date for nationals of China has moved back to May 1, 2000.

- There is no cutoff date for EB-1 applicants from all countries other than India and China.

- There are now cutoff dates for EB-1 applicants from India and China: Aug. 1, 2002, and Jan. 1, 2000, respectively.

ANXIOUS EMPLOYEES

Employers can expect to be approached by concerned employees seeking reassurance that their priority date will “become current”—that is, their priority date will fall before the cutoff date—by a certain date in the future. Employees will try to predict when their priority date will become current based on analysis of past month-to-month movement in cutoff dates. Employers can expect to hear comments such as, “Priority dates have advanced six months since November. Therefore, I can expect my priority date to become current by March, so we should prepare my green-card application now.”

Unfortunately, nobody can accurately predict when a particular priority date will become current. Cutoff dates are highly elastic; they can either move forward in time, move backward in time, or remain the same for significant periods.

Of particular concern is whether a company's H-1B employees caught by a cutoff date retrogression will have to leave the United States. Although nonimmigrants in H-1B status are generally limited to a stay in the United States that does not exceed six years, there are two legal protections available to ensure that those who have started but not yet completed the green-card process when the six-year limit is reached can remain in this country.

First, under Section 104(c) of the American Competitiveness in the Twenty-First Century Act, individuals with approved I-140 petitions who are subject to per-country visa limitations are eligible for indefinite H-1B extensions in increments of three years until adjudication of their permanent-resident status. The I-140 petition must be approved for this section to apply, and the underlying alien employment certification application cannot have been used to support another individual's immigrant visa petition.

Second, Section 106(a) of the American Competitiveness in the Twenty-First Century Act allows H-1B nonimmigrants with pending alien employment certification applications or with I-140 petitions filed more than one year before their sixth-year anniversaries of H-1B stay to receive indefinite H-1B extensions in one-year increments. Such extensions can be received for as long as it takes for the green-card process to be completed.

Even if the business is not immediately going to lose the employee, however, problems still exist, at least for the employee. A person who has not filed an adjustment-of-status application and is terminated will not be able to use the lifeline afforded by the adjustment portability provision to join another employer and may, even if he or she finds another employer willing to file an H-1B petition, have to leave the United States.

POSSIBLE REMEDIES

There are other options that may help counteract the negative effect of this retrogression in cutoff dates set forth in the October 2005 Visa Bulletin.

One option is the use of “cross-chargeability.” If a national of a country with very early cutoff dates has a spouse who was born in a country with later cutoff dates (or no cutoff dates at all), then adjustment-of-status applications can be filed simultaneously for both individuals under the principle of cross-chargeability. Both visas will be charged against the yearly quota of the spouse's country of birth. An individual may also be charged to his or her parents' country of chargeability if the parents were residing only temporarily in another country on the date of the individual's birth.

Another option involves retention of a priority date. Current regulations allow an individual for whom an I-140 immigrant petition has been approved to retain the priority date granted to that petition for any subsequently filed immigrant petition, as long as the earlier petition has not been denied, revoked, or withdrawn.

Individuals in the process of filing a new alien employment certification application under the Labor Department's new Program Electronic Review Management (PERM) can also retain an earlier priority date accorded to a pending traditional or Reduction in Recruitment alien employment certification application, as long as the new PERM application is for an “identical” job opportunity.

MORE BACKLOGS TO COME?

It is unrealistic to expect that we will return to a situation where there are no cutoff dates for nationals of any country under any preference category.

In fact, severe as the backlogs currently appear, it is entirely possible that these backlogs will worsen in the future. There is even the possibility that cutoff dates will be imposed for nationals of countries other than the traditionally oversubscribed countries of India, China, Mexico, and the Philippines. It is also likely that the EB-3 category will again become unavailable for all persons later in the year.

Employers and employees will need to take account of these backlogs in their long-term planning and should take measures to mitigate the effect of the backlogs.

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