

Bordeau Immigration Law, LLC

9303 W. 75th Street, Suite 210
Overland Park, Kansas 66204
(913)432-9994

ATTORNEYS

Judy Bordeau, *licensed in Missouri and Kansas*
Lisa McBee, *licensed in Missouri*

IMMIGRANT VISA AVAILABILITY

In recent years, many individuals have become aware of the annual numerical limitation on new H-1B non-immigrant visas. Fewer individuals are aware that there is also an annual numerical limitation on immigrant visas for individuals seeking permanent residency in the United States, which has led to waiting lists in some categories for permanent residency. Although individuals already in the United States do not actually get an immigrant visa stamp in their passports, an immigrant visa number is assigned to their case before they get a green card. An immigrant visa is essentially the same thing as a “green card” or “permanent residency” card. Therefore, it is important that individuals in the permanent residency process understand the problems that have arisen in the context of the green card waiting lists, as explained below.

The US government limits the number of employment based immigrant visas (i.e. green cards) to approximately 140,000 in any year. The 140,000 immigrant visas are divided between the various employment-based preference categories (i.e. EB-1, EB-2, EB-3 [the preference categories are discussed in greater detail below]). In addition, within the overall allocation, there is also a per country limit of 25,620--which means that if more than 25,620 individuals apply from any one country, the per-country limit is reached. Therefore, from time-to-time, the demand for immigrant visas/green cards can exceed the supply, on a per-country basis, in a particular preference category and/or on a worldwide basis. When the demand for immigrant visas exceeds the supply, immigrant visas are not immediately available and a problem called “visa retrogression” occurs. In periods of visa retrogression, even when there is an approved labor certification and/or an approved I-140 immigrant visa petition, the individual essentially has to wait “in line” for his or her turn to file the last step of the permanent residency case, known as the I-485, or, if the I-485 is already on file when visa retrogression occurs, the individual will have to wait “in line” for the case to be approved. An individual’s place in line is determined by the priority date of the permanent residency petition. The priority date is the date the labor certification is filed (or, for those cases not requiring labor certification, the date of the filing of the I-140 petition).

At present, there is a waiting list in the Employment Based 3rd Preference category (EB-3 category), and also in the 2nd Preference category (EB-2 category) for individuals born in China or India, as explained in greater detail below. We began to see significant problems with waiting lists in July of 2005. In July of 2007, due to lower than expected demand, the government allowed everyone to file for adjustment of status, by temporarily suspending the waiting list. Estimates are that the government received more than 300,000 applications for adjustment of status during the 30 day period that the waiting list was suspended. The large number of filings has triggered even greater retrogression in some categories.

In the EB-3 category (May 1, 2012, immigrant visas are available worldwide for individuals with priority dates prior to May 1, 2006, with the exception of individuals born in China and India, which have earlier priority date requirements. China EB-3 dates are retrogressed to April 1, 2005; and India goes back to September 8, 2002. For individuals in the EB-3 category with relatively new cases, we are able to file the I-140 once the labor certification is approved and continue to seek extensions of H-1B work authorization; however, we are not able to file the I-485 until the priority date becomes current. For individuals with I-485 petitions currently pending, the I-485 will not be approved until the priority date becomes current again. Such individuals will be able to extend their H-1B petitions in one to 3 year increments (even after the expiration of the 6 years in H-1B status), and/or seek the annual interim benefits of Advance Parole or Employment Authorization; however the case will simply remain pending at the USCIS until the priority date becomes current once again.

In the EB-2 category (which includes positions requiring an advanced degree or a Bachelor's degree plus 5 years of progressive experience), effective May 1, 2012, immigrant visas are available for all countries except China and India. China and India are both retrogressed to August 15, 2001. **Note that in late 2011 and early 2012, priority dates advanced significantly for EB-2 China and India, but the USCIS received so many filings during that time that dates were subsequently retrogressed in May of 2012. The Visa Bulletin projects that EB-2 dates should advance again in October of 2012, which is the beginning of the government's 2013 fiscal year.**

In the EB-1 category, there is no visa retrogression for any country.

It is not possible to know at this point how quickly we will see change with visa availability in any category. The State Department and USCIS do not issue many comments on this question; however, the State Department publishes the "Visa Bulletin" every month with information about visa availability for the following month. When we have had problems with visa availability in the past, we have carefully tracked the Visa Bulletin on a month-to-month basis to see how quickly priority dates move forward. At the moment, it is very difficult to provide an accurate or predictable timeline as to how quickly the visa retrogression problem will improve. The Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_1770.html. It is typically published mid-month, showing availability for the following month.

There are some legislative proposals being discussed in Congress that may alleviate some of the harsher consequences of visa retrogression, including increasing the total number of employment based visas, only counting the principal applicant (and not the dependents) against the numerical quota, and/or allowing individuals affected by visa retrogression to at least file the I-485 while waiting for a visa to become available. I do not know whether any such proposals will become law; however, we are advocating that Congress adopt measures to help provide relief for this situation. You and your employer may want to contact your congressional representatives to encourage them to vote for legislation that would support employment based immigration. You can contact Congress at <http://www.congress.org/congressorg/home/>

BIL: May 2012 Visa Bulletin Information

