



IMMIGRATION ALERT

Retrogression of Priority Dates for Employment-based Third Preference Category

The United States Department of State has released its Visa Bulletin for January 2005. As expected, the “priority dates” for the employment-based third preference category for nationals from India, China and The Philippines have retrogressed. These priority dates, which have been current for several years, have retrogressed to January 1, 2002.

As a result of this retrogression, a national of India, China or The Philippines who is the beneficiary of an approved third-preference labor certification is prohibited from filing an I-485 Adjustment of Status application or a Consular Processing permanent residence application unless his or her priority date is current. An individual’s priority date is current if it falls on or before the priority date listed in the Visa Bulletin.

This Alert answers a number of questions about the retrogression of priority dates.

Why have the Priority Dates retrogressed?

The Immigration and Nationality Act limits the number of green cards which can be issued in any one fiscal year. These limits are categorized by nationality and type of application. In the past several years, USCIS delays in processing I-485 Adjustment of Status applications have meant that the annual quotas for each category have not been reached. However, in light of the improved processing of I-485 applications, the quotas have been reached in the third preference employment-based category.

How can I track the current Priority Date?

The Department of State publishes the Visa Bulletin online each month. It is accessible at http://travel.state.gov/visa/frvi_bulletincurrent.html. The Visa Bulletin is published in the middle of each month and lists the following month’s priority dates.



Is it possible that Priority Dates in other categories will retrogress in the future?

This is possible. The priority dates are determined by the Department of State based on the number of approved immigrant visas (green cards) in each category during the fiscal year. If USCIS processing of I-485 applications continues to improve, priority dates may retrogress in the employment-based first- or second-preference categories, or in the third-preference category for nationals of other countries.

How can I determine my priority date?

The priority date is set at the date when a labor certification application is filed on your behalf. If you are processing for permanent residence in a category that does not require a labor certification, the priority date is set at the date when an I-140 immigrant visa petition is filed on your behalf.

How do I determine if my Labor Certification was filed in the second-preference or third-preference category?



In general, a labor certification is classified in the second preference if it requires, at minimum, either a Master's degree or higher, OR a Bachelor's degree plus five years of progressive experience. All other labor certifications filed for skilled workers or professionals, which require a Bachelor's degree and less than five years of progressive experience, or no degree, fall into the third-preference category.

What if I am getting my green card without a Labor Certification?

If your green card process does not involve a labor certification, then you are in the first or second preference category. This means that your preference category has at this point NOT retrogressed. Because your category is current, you are not affected and will be permitted to file your Adjustment of Status application (or your Consular Processing application, as applicable).

If I have an approved third-preference labor certification with a priority date which is after January 1, 2002, is there anything that I can do?

Yes, you can file your I-140 immigrant visa petition and I-485 Adjustment of Status application on or before December 31, 2004. The retrogression does not take effect until January 1, 2005.

If I have a pending third-preference labor certification with a priority date which is after January 1, 2002, is there anything that I can do?

There is nothing that you can do at this time. At the time your labor certification is approved, the current priority date, as listed in the Visa Bulletin, will determine if you can file an I-485 Adjustment of Status application. If your priority date is not current, your employer can file an I-140 immigrant visa petition on your behalf, but you cannot file an I-485 adjustment of Status application until your priority date becomes current.



I have already filed an I-485 Adjustment of Status application based on an approved third-preference labor certification with a priority date that is after January 1, 2002. How will I be affected?

USCIS cannot approve your I-485 application until your priority date becomes current at some point in the future. However, if you have an underlying Employment Authorization Document (EAD) or Advance Parole, these documents continue to be valid. Moreover, you can apply for and also extend an EAD or Advance Parole for as long as your I-485 Application remains pending at USCIS, even if your priority date is not current.

Will I lose my status in the United States if I cannot file an I-485 Adjustment of Status application because my priority date is not current?



Most individuals will be able to maintain lawful status in the U.S. A foreign national in H-1B status can likely extend his or her H-1B status beyond the six year limit, if either (1) he or she has started the permanent residence process at least 365 days before reaching the six year limit in H-1B status; or (2) he or she has an approved labor certification and a pending I-140 preference petition but is unable to file an I-485 application because the priority date is not current. Foreign nationals who hold another visa status may not be able to extend status beyond their limit. For example, L-1A or L-1B visa holders cannot extend their L-1 status beyond the overall seven- or five-year limit due to permanent residence processing delays or priority date retrogression. L-1 visa holders in this situation should, if possible, convert their status to H-1B in order to protect their ability to extend their status in

the U.S. Other visa holders, such as O-1 or E-1/E-2, do not have an overall status limit and should be able to extend their nonimmigrant visa status while waiting to file an I-485 application.

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