

Lawyer Insights

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EB-1 Backlogs: The New Reality

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As announced in the U.S. Department of State's January 2018 Visa Bulletin,¹ the employment-based first preference, or EB-1, category remains backlogged for all countries. Despite previous expectations that the backlogs would clear up by the new year, it appears that they are here to stay. The State Department's Chief of Visa Control and Reporting Division Charles Oppenheim recently told the American Immigration Lawyers Association, or AILA, that the final action dates for the EB-1 category would reach June 1, 2018, for all countries except China and India within the next eight to 12 months.²

If this prediction proves true, the EB-1 category will never become current this fiscal year. Such a prolonged backlog is not only unprecedented but alarming, as the employment-based second- and third-preference categories (EB-2 and EB-3) are current for all but those born in China, India or the Philippines. This means that a foreign-born Nobel Prize-winning scientist or a chief executive at a multinational corporation will now wait years to receive a green card, while an entry-level worker could receive a green card much sooner.

Background: What Is the Visa Bulletin?

The Visa Bulletin exists because there is a congressionally mandated limit of 140,000 employment-based immigrant visas, or green cards, available each fiscal year. In addition to a limit on total green cards available, distribution is further restricted by preference category and country of birth (no one country can receive more than 7 percent of the total — this explains the constant backlogs for those born in China and India). The first-preference category is reserved for aliens of extraordinary ability, outstanding professors and researchers, and multinational executives and managers. By definition, the first-preference category is given priority and, in theory, should be given the first shot at the available green cards, with the only restriction being the Immigration and Nationality Act's limit of 28.6 percent of the total, plus any numbers not used by the EB-4 and EB-5 categories.³

The Visa Bulletin aims to spread out filings over the course of the fiscal year, while ensuring that all allowed numbers are fully exhausted by the end of the fiscal year. Backlogs occur when there are more applicants than numbers available for a particular category/country and a cutoff date is set. To apply for a green card application based on the Visa Bulletin, an applicant's priority date must be before the date listed for the appropriate category. A priority date is the date a permanent labor certification program, or

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PERM, application (for EB2 and EB-3 categories) or immigrant petition (for EB-1, EB-4 and EB-5 cases) is submitted to the government.

Why Are the EB-1 Backlogs So Alarming?

While backlogs in the EB-1 category for those born in China or India have occurred frequently in recent years, one has to go back more than a decade to August 2007 to find a backlog in the EB-1 category for those born in all other countries. As many in the immigration profession may remember, 2007 was not a normal year for the Visa Bulletin. In the July 2007 Visa Bulletin, all countries and categories became current, resulting in hundreds of thousands of I485 applications flooding the U.S. Citizenship and Immigration Services' regional service centers. This surge in filings led to all categories and countries briefly becoming "unavailable" in August 2007, with backlogs in the EB-1 category continuing through September 2007.

Even past EB-1 backlogs for those born in China or India have always been brief, lasting only a few months at most. Such backlogs always disappeared by the beginning of the fiscal year and did not retrogress again until August or September. This year, the EB-1 backlog for China and India began in April and will most likely not return to current during this fiscal year. This is the first time in recent memory that the EB-1 backlog, even for those born in China or India, has continued into the beginning of the next fiscal year.

What Is Causing These Backlogs?

While no official explanation has been offered by the government, the main culprit appears to be higher than usual demand in the employment-based fourth and fifth-preference categories (EB-4 and EB-5). In the past, neither category met their congressionally mandated limits and the extra visa numbers "spilled over" to the EB-1 category. Last year, both EB-4 special immigrants and EB-5 investors exceeded supply.

The EB-4 category is a catch-all group that includes the subcategories of religious workers, special immigrant juveniles, broadcasters, Panama Canal Zone employees and Afghan and Iraqi translators, among others. However, the increase in EB-4 petitions is mostly due to the surge of "unaccompanied minors" from Central America admitted at the southern border in recent years. According to USCIS statistics, EB-4 petitions for special immigrant juveniles increased from 1,646 in 2010 to 20,914 in 2017.⁴ EB-5 filings for investors increased from 1,953 to 12,165 over the same period,⁵ driven by the growth of an entire industry to facilitate investments that lead to U.S. permanent residence.

In addition, there is increased usage of the EB-1 subcategory of multinational executive/managers as many seek to avoid the traditional backlogs of the EB-2 and EB-3 categories. Some employees even seek international assignments just to eventually qualify for the EB-1 category. Overall demand for immigrant visas has also increased as growing uncertainty over changing immigration policies has led many to seek permanent residence while they still can.

What Are the Practical Implications of the Backlogs?

In practice, the EB-1 backlogs mean that those who qualify for the category will not be able to submit applications for the last step of the green card process, the I-485 application to adjust status, until their priority date becomes current. The sponsored workers and their family members will now lose out on the

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numerous benefits that accompany the I-485, such as obtaining temporary employment and travel authorization. The uncertainty over when the backlogs will disappear is making it extremely difficult to plan an effective immigration strategy, especially for those reaching the end limits of their temporary status or whose children will soon reach 21 years old and age out of the process. Plans that were made before the backlogs began may now be obsolete and many employers and their lawyers are scrambling to find alternative solutions to prevent valued employees from departing.

Because of these new delays, employers wishing to sponsor an employee in the EB-1 category may want to lock in their priority date as soon as possible by submitting a stand-alone I-140 immigrant petition to the U.S. Citizenship and Immigration Services. In certain situations, other avenues for obtaining permanent residence may be more attractive, such as filing a PERM application or an EB-2 national interest waiver petition. However, without an increase in total green cards available, these strategies will just lead to eventual backlogs in the EB-2 and EB-3 categories.

What Can Be Done to Reduce the Backlogs?

The obvious solution, increasing the overall numbers of green cards available for all categories, is unlikely to happen in the current political environment. However, more modest changes to the laws and regulations could have a significant impact. Possible solutions include removing dependents from the EB total and only counting the sponsored workers, and/or removing special immigrant juveniles and other non-employment-related subcategories from the EB count.

The impact of any possible changes has not been thoroughly studied and any predicted outcomes are pure speculation. However, until something is done, the United States will continue to lose the best and brightest. Anxiety over immigration has already led many of the inventors, entrepreneurs and scientists that the country most needs to give up on a career in the United States and move on to a more welcoming immigration environment, like Canada.

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Notes

¹ Visa Bulletin For January 2019, US Department of States – Bureau of Consular Affairs, <https://travel.state.gov/content/travel/en/legal/visa-law0/visabulletin/2019/visa-bulletin-for-january-2019.html>.

² Check-in with DOS's Charlie Oppenheim, AILA Doc. No. 14071401 | Dated Nov. 19, 2018.

³ INA §201(D)(1).

⁴ I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status (Fiscal Year 2018, 3rd Quarter, April 1 - June 30, 2018), USCIS Immigration and Citizenship Data, https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=20661&field_native_doc_issue_date_value%255Bvalue%255D%255Bmonth%255D=&field_native_doc_issue_date_value_1%255Bvalue%255D%25

⁵ Immigrant Petition by Alien Entrepreneur (Form I-526) Quarterly Report (Fiscal Year 2018, 2nd Quarter, Jan. 1 - March 31, 2018), USCIS Immigration and Citizenship Data, https://www.uscis.gov/tools/reports-studies/immigration-forms-data?topic_id=20889&field_native_doc_issue_date_value%5Bvalue%5D%5Bmonth%5D=&field_native_doc_issue_date_value_1%5Bvalue%5D%5Byear%5D=&com

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