

PUBLICATION

Restrain Thy Hope About Employment Based Visa Numbers

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USCIS has made an admirable but confusing effort toward transparency by publishing a Question and Answer document reflecting the numbers of pending applicants for employment based adjustment of status to permanent residence, organized by their year of "priority date." We expect that clients and interested parties who are the subject of employment based labor certification applications or visa petitions may read, or read about, this document and related charts and become confused and perhaps unjustifiably hopeful about their likely wait for a visa number. We publish this alert to put the USCIS information into perspective and, sadly, leave readers with a more realistic impression that it is very difficult to know how long the wait for an employment based visa number might be. We ask readers not to feel obliged to take the time to read the USCIS document or this alert about it, and not to worry if the discussion below seems even more confusing than the USCIS chart. The bottom line: without congressional action, visa numbers likely will progress slowly.

The charts and explanation are confusing because they fail to clarify that the people with pending adjustment applications are not the universe of people affecting the waiting time for a visa number, in two different ways.

First, the charts do not include the employment based immigrants who will process from U.S. Consulates from abroad rather than through USCIS in the U.S. That excludes, for instance, Filipino nurses for whom there is no temporary visa and who will process from Manila, and Korean workers approved for meat processing. Admittedly, 90% of employment based visa number applicants complete the process within the U.S. (and USCIS says that), but USCIS does not clarify that workers planning to process abroad are invisible in the same queue for visa numbers as adjustment applicants.

Second, and more importantly, USCIS fails to clarify that the charts only show the workers who were lucky enough to have filed adjustment of status applications before these categories "retrogressed." The people who are represented in the charts slipped in during a past period in 2007 when USCIS and DOS, like the gods of Greek mythology, were engaged in arcane internecine squabbles with unintended confusing consequences for workers. For many reasons, not nearly all workers with priority dates before then were able or willing to file for adjustment. But now they resemble the proverbial "pig in a snake," in that USCIS cannot process their cases further until the State Department moves the "cut-off dates" past their priority dates (the dates those workers had their respective first filing toward permanent residence). As the State Department advances the cut-off dates, workers with priority dates earlier than the cut-off dates will file for adjustment. That will add to the wait for workers with later priority dates. And the effect will be significant.

USCIS instead, or in addition, should be publishing the number of I-140 petitions approved (and perhaps also pending), because this gives a fuller picture of the pipeline. Of course, not every approved I-140 petition results in actual permanent residence applications, and not every petition will be approved, so publishing the number of I-140 petitions might make things appear worse than they are. On the other hand, I-140 petitions reflect only the worker, whereas the worker's spouse and minor children will count against the annual limits for each category, so one would need to multiply relevant I-140 petitions by a factor of about 2.5 to account for the families after discounting for I-140 denials, withdrawals, and non-use (we do not have such rates to suggest for

these purposes). With hope, USCIS is providing I-140 pipeline data to the State Department for its purposes in setting cut-off dates in the Visa Bulletin each month.

Even publishing I-140 petition numbers would not present the full picture, which must include labor certification applications filed with the Department of Labor. Of course, once those are approved the employer must promptly file the I-140 petition to keep the labor certification from expiring, but the filing of the labor certification application marks the beneficiary worker's place in the queue for a visa number, and the Department of Labor is taking longer and longer to decide even the simplest and cleanest application and is taking much longer to decide cases subject to audit, supervised recruitment, or denial and appeal. Workers whose labor certifications are approved will end up ahead (in the visa number queue for the particular employment based preference category) of workers whose first filing (labor certification or I-140) was made later. Thus, pending labor certifications are also invisible in the USCIS charts.

Finally, we are intrigued by the presence of numbers in the row for third preference cases in the columns for 2008 and 2009. We are not aware of any month since 2007 during which priority dates have been later than 2006 for this preference for any country. Since a visa number must be available as shown in the State Department's monthly Visa Bulletin for a foreign national to file an application for adjustment, we do not see how such applications could have been legally filed.

Permanent resident candidates should appreciate USCIS' continued effort to be transparent, but they should know that the news is worse than the charts suggest.

How We Can Help

Immigration through an employer can be multifaceted, involving multiple government agencies and sophisticated interpretation of highly complex statutes, regulations, and evidence. We daily assist employers and foreign workers achieve their immigration goals through one of the 5 employment-based preferences listed above. Where it is possible, we strive to avoid the burdensome course of labor certification. We work with experts in the alien's field and with the alien herself to craft presentations about EB-1 or national interest waiver eligibility. Where labor certification is the only option, we successfully navigate employers each day through this intricate process. Meanwhile, we help the alien maintain temporary employment authorizing status.