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**Immigration Update – September 27, 2005**

Trow & Rahal, P.C. is pleased to provide this Immigration Update as a service to our clients and friends.

**New backlogs for employment-based applicants for permanent resident status:** The U.S. Department of State (DOS) has announced new waiting periods of 3 to 5 years for most employment-based applicants for permanent resident (green card) status, and even longer waiting periods for some applicants. These waiting periods are necessary to balance the limited annual supply of immigrant visas with a surge of applications emerging from backlog-clearing efforts by the U.S. Department of Labor (DOL) and the U.S. Citizenship and Immigration Services (CIS). As DOL and CIS have opened their floodgates upstream, DOS has been forced to close its floodgates downstream.

In the arcane terminology of immigration law, immigrant visa cutoff dates have retrogressed in the worldwide EB-3 category, and in the EB-1 and EB-2 categories for China and India. The EB-1 and EB-2 categories remain current for all other countries. EB-1 is for applicants of extraordinary ability, outstanding professors and researchers, and multinational managers. EB-2 is for applicants with post-graduate degrees or exceptional ability. EB-3 is for applicants with baccalaureate degrees or comparable job skills. There is a separate category for unskilled workers which has even longer backlogs than EB-3.

In plain English, applicants from all over the world who have waited years for DOL to process their labor certifications now face additional delays from the new DOS backlogs. Applicants who were born in China or India face even longer backlogs. Applicants in the EB-1 and EB-2 categories are not subject to these new backlogs, except those born in China or India. There are backlogs in EB-1 and EB-2 for natives of China and India, and longer backlogs for them in EB-3, because demand from those counties exceeds an annual limit on the number of people who may immigrate from any one country.

Time spent in the DOL backlog counts against the DOS backlog, once the DOL approves the labor certification. Applicants who have waited 4 years for a labor certification are ahead of those who have waited 3 years. Applicants who are just getting started with the DOL's new PERM program for labor certification face the longest delays.

For most applicants these new backlogs will create a multi-year gap from the time their labor certifications are approved by DOL to the time they can file adjustment of status applications with CIS. During this gap their employers will need to continue renewing their H-1B visa status.

September 27, 2005

Page 2

Fortunately, there is an exemption from the normal six-year limit on H-1B visa status for people whose labor certification has been pending for over one year. There is another exemption for people who are subject to the per-country limits that now apply to China and India. Unfortunately, there is no comparable exemption from the seven-year limit on L-1A visa status for people born in China or India who are applying as multinational managers in the EB-1 category.

For additional information, please refer to the list below of Frequently Asked Questions. This FAQ was provided by the Academy of Business Immigration Lawyers (ABIL), which is a think tank of managing partners of leading business immigration law firms in the U.S. and U.K. Steve Trow is a founding member of ABIL. The FAQ explains the concepts and terminology necessary to understand the immigrant visa cutoff dates in the DOS Visa Bulletin, which is published monthly at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html).

**Update on backlog reduction at the Department of Labor:** As of September 12, 2005, the DOL's Backlog Reduction Centers (BRCs) have received approximately 345,000 labor certification cases from local and regional offices. Some cases remain at the San Francisco and New York regional offices and are targeted to be moved by January 2006.

Once a BRC completes data entry on a transferred case, it sends a letter to verify the continued existence of the employer that filed the case and confirm that the employer wishes to continue processing of the application. There are at least 100,000 pending cases for which data entry has not been completed. During the next few months, the BRCs aim to complete data entry on these cases and issue letters to employers. These letters have a 45-day deadline for the employer to reply. Once the employer replies, the case is placed in a queue for further processing.

At present, the BRCs are only processing applications where recruitment was completed previously under traditional procedures or reduction in recruitment (RIR) procedures. It appears that the BRCs are only processing applications that are readily approvable, and are deferring work on cases that require additional recruitment or resolution of other issues such as low salaries or overly restrictive job requirements.

**DHS eases I-9 requirements for hiring Katrina victims:** The Department of Homeland Security (DHS) announced on September 6, 2005, that for the next 45 days it will not sanction employers for hiring victims of Hurricane Katrina who are otherwise eligible for employment, have been displaced or evacuated, and are unable to provide proof of identity or employment authorization. Employers still need to complete the I-9 employment eligibility verification form "as much as possible," the DHS said, but should note that the documentation normally required is not available due to Hurricane Katrina. At the end of the 45 day grace period the DHS plans to review this policy and may extend it. The DHS is still assessing damage from Hurricane Rita and has not yet announced whether this policy will be extended to Rita's victims. The full text of the DHS announcement is available at <http://www.dhs.gov/dhspublic/display?content=4788>.

**Steve Trow and Linda Rahal are named to The Best Lawyers in America:** We are pleased to announce that Steve Trow and Linda Rahal have been selected for inclusion in The Best Lawyers in America, 2006 edition. They are also listed in An International Who's Who of Corporate Immigration Lawyers, 2005 edition, and Washingtonian magazine's Top Lawyers in Washington,

September 27, 2005

Page 3

December 2004. All of these directories rely on nominations by other lawyers and independent research to identify top lawyers.

If you have any questions about the information in this newsletter, please contact one of the Trow & Rahal attorneys listed below.

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## **FREQUENTLY ASKED QUESTIONS ABOUT IMMIGRANT VISA QUOTA BACKLOGS, provided by the Academy of Business Immigration Lawyers**

### **1. WHAT IS THE “QUOTA BACKLOG”?**

The Immigration and Nationality Act sets limits on how many green card visas may be issued each Fiscal Year (October 1 through September 30) in all visa categories. In addition, in the employment-based area where immigration is based on employment and not family relationships or investment, nationals of each country may obtain immigrant visas (i.e., a green card), in different preference categories (i.e., EB-1, EB-2, EB-3). The law further provides that no one country may have more than a specific percentage of the total number of visas available annually. If these limits are exceeded in a particular category, for a particular nationality, a waiting list is created and applicants are placed on the list according to the date of their case filing. This date is called a "Priority Date." The priority date is the single most important factor in any immigration case.

### **2. WHAT ARE THE DIFFERENT EMPLOYMENT-BASED PREFERENCE CATEGORIES?**

Employment-Based First Preference (EB-1)  
Employment-Based Second Preference (EB-2)  
Employment-Based Third Preference (EB-3)  
Other Workers

### **3. WHAT DOES EB-1 MEAN?**

*Employment-Based First Preference (EB-1)* includes: (1) Persons with extraordinary ability in the sciences, arts, education, business and athletics (persons who have risen to the top of their profession); (2) Outstanding professors and researchers; and (3) Multi-national executives and managers.

### **4. WHAT DOES EB-2 MEAN?**

*Employment-Based Second Preference (EB-2)* includes: (1) Members of professions holding advanced degrees (Master's or Ph.D.) (The *position* must be one that requires a Master's or Ph.D. to perform the duties – the degree held by the individual does not determine whether or not it is an EB-2, rather it is the company's job requirements. Additionally, the immigration regulations provide that a job which requires a minimum of a Bachelor's degree PLUS five years of progressively responsible experience will be considered equivalent to a Master's level position and will qualify for EB-2.); and (2) Persons of exceptional ability in the sciences, arts or business. Persons of exceptional ability are those who have a degree of expertise above that which is ordinarily expected.

### **5. WHAT DOES EB-3 MEAN?**

*Employment-Based Third Preference (EB-3)* includes: (1) Professionals and skilled workers (bachelor's degree or two years of training). The *position* must require a minimum of a bachelor degree or two years of training.

## **6. WHAT DOES “OTHER WORKERS” MEAN?**

Other Workers includes positions that require less than two years of experience.

## **7. WHAT IS THE “PRIORITY DATE”?**

If your category is employment-based and requires a labor certification, the priority date is established on the date a labor certification is filed with the State Workforce Agency. If your category is employment-based but does not require a labor certification, then the priority date is established on the date the CIS receives the I-140 Immigrant Visa Petition. However, the priority date does not attach to your case until the I-140 has been approved.

## **8. WHY IS THE PRIORITY DATE IMPORTANT?**

In order for an individual to obtain an immigrant visa, a visa number must be available to you. This is referred to as the priority date being "current." The priority date is current if there is no backlog in the category, or if the priority date is earlier than the date listed as current in the State Department's monthly Visa Bulletin. This Bulletin is accessible at [www.travel.state.gov](http://www.travel.state.gov). You may sign up online to have the Visa Bulletin automatically e-mailed to you by the State Department each month.

## **9. CAN I GET AHEAD ON THE QUOTA BACKLOG LIST?**

There is no way to get ahead on the list, other than filing an Immigrant Visa Petition in a higher preference category, provided that the individual and position meet the criteria to do so. Otherwise, the individual must wait until eligible to apply along with others on the list before proceeding with filing the last step in the green card process. The last step is accomplished by filing an application to adjust status to that of a lawful permanent resident in the U.S., or by obtaining an immigrant visa at a U.S. Consulate abroad.

## **10. THE I-140 FILED ON MY BEHALF WAS BASED ON A LABOR CERTIFICATION SUBSTITUTION. WHAT IS MY PRIORITY DATE?**

The Priority Date is determined by the CIS. We will know the Priority Date upon issuance of an I-140 Petition Approval Notice.

## **11. WHAT IS THE DIFFERENCE BETWEEN THE VISA CATEGORY BEING “U” (UNAVAILABLE) AND “MM/DD/YY” (QUOTA BACKLOG)?**

Unavailable means that there are no more visas available at all for the month. If there is a date noted (i.e. 07-01-02), it is considered to be the cut-off date, and that means that there is a “quota backlog”. Only individuals who have a priority date earlier than the cut-off date may move forward with the permanent resident process.

## **12. WHAT DOES “C” MEAN?**

September 27, 2005

Page 6

“Current” – this means that there is no quota backlog in this category.

**13. WHAT DOES IT MEAN TO BE “CURRENT”?**

If there is a “C” in your employment-based category on the Visa Bulletin, then there is no quota backlog and you may proceed with your I-485 adjustment application or immigrant visa application.

**14. IF THE VISA BULLETIN SHOWS A DATE OF 6-1-02 AND MY PRIORITY DATE IS 6-1-02, IS MY PRIORITY DATE CURRENT?**

No. In order for the priority date to be current, it must be a date prior to the date published in the Visa Bulletin.

**15. HOW OFTEN DO THE BACKLOGS CHANGE AND WILL THEY IMPROVE?**

Each month, the State Department issues the Visa Bulletin, usually in the middle of the month. When the Visa Bulletin is issued, it will provide information that will take effect on the first day of the following month. (i.e., on 9-12-05, the DOS released the dates effective as of 10-1-05). Depending on the availability of immigrant visas, the priority dates in each category and for each country can change each month. However, please note that the priority dates can also stay the same. They can move very slowly or progress by several months or years. They can move forward or backward. Therefore, there is no way to anticipate what the priority date will be in a future month or when a category will become current.

**16. THE CUT-OFF DATE IS JANUARY 1, 2000. DOES THIS MEAN THAT IT WILL TAKE 5 YEARS BEFORE THE PRIORITY DATE WILL BECOME CURRENT?**

No. It all depends on how many visas are used. Please see the answer to the question above.

**17. I HAVE AN APPROVED I-140 PETITION WITH MY PREVIOUS EMPLOYER AND MY CURRENT EMPLOYER IS SPONSORING ME NOW FOR A GREEN CARD. WHAT IS MY PRIORITY DATE?**

You may use the Priority Date attached to the approved I-140 Petition. The Priority Date will be printed in the top portion of the Form I-797 Approval Notice. You may use this priority date when you are eligible to file your adjustment or immigrant visa application based on your current employer’s green card process.

**18. VISA AVAILABILITY IS BASED ON COUNTRY. IS THAT COUNTRY OF CITIZENSHIP OR COUNTRY OF BIRTH?**

Your country of *birth* is what determines your country of chargeability.

**19. MY SPOUSE WAS BORN IN A DIFFERENT COUNTRY THAN I WAS. SINCE THE I-485 IS BASED ON MY EMPLOYMENT, DOES MY SPOUSE’S COUNTRY OF BIRTH HELP ME?**

Your spouse's country of birth may also be used to determine chargeability. For instance, if you were born in India, but your spouse was born in France and there is a quota backlog for India, but no quota backlog for France in your preference category, you and your spouse may proceed with your immigrant process based on your spouse's country of birth.

**20. BOTH MY WIFE AND I WERE BORN IN INDIA AND MY PRIORITY DATE IS NOT CURRENT. OUR CHILD WAS BORN IN THE UNITED KINGDOM AND THE PRIORITY DATE FOR THAT COUNTRY IS CURRENT. CAN WE USE OUR CHILD'S COUNTRY OF BIRTH FOR ELIGIBILITY?**

No. You can use your spouse's country of birth for eligibility. However, your child's country of birth cannot be used.

**21. I HAVE HEARD THAT ONLY THOSE INDIVIDUALS FROM INDIA AND CHINA ARE SUBJECT TO QUOTA BACKLOGS. I WAS NOT BORN IN ONE OF THOSE COUNTRIES. DO QUOTA BACKLOGS APPLY TO ME?**

Yes. Quota backlogs can apply to everyone, regardless of where they are from. While the backlogs have typically affected some countries more than others, note that on the October Visa Bulletin, the backlogs apply to all countries for the EB-3 preference category.

**22. MY EMPLOYER HAS A LABOR CERTIFICATION PENDING ON MY BEHALF. DO QUOTA BACKLOGS AFFECT THE PROCESSING OF THE APPLICATION?**

No. The labor certification process is not affected by quota backlogs.

**23. CAN I CHANGE THE VISA CATEGORY AND/OR REFILE THE LABOR CERTIFICATION TO GET AROUND THE QUOTA BACKLOGS?**

No. The visa category cannot be changed once the labor certification (or I-140 if there is no labor certification) has been filed. Also, since quota backlogs are based on the filing date, it is not in your interest to refile a case now and obtain a 2005 or later priority date.

**24. THE LABOR CERTIFICATION FILED ON MY BEHALF WAS APPROVED. CAN THE COMPANY STILL FILE THE I-140 PETITION IF THE PRIORITY DATE IS NOT CURRENT?**

Yes. The filing and adjudication of an I-140 is not affected by the quota backlogs.

**25. MY I-485 WAS ALREADY APPROVED. HOWEVER, MY DEPENDENT'S APPLICATION IS STILL PENDING AND MY PRIORITY DATE IS NO LONGER CURRENT. IS MY DEPENDENT'S APPLICATION AFFECTED BY THE QUOTA BACKLOG SINCE MY APPLICATION IS APPROVED?**

Yes. Even though your case was approved, your dependent's application is still based on your priority date. The CIS cannot approve the dependent's application until the priority date is current.

**26. THE QUOTA BACKLOGS WERE NOT IN AFFECT WHEN I FILED MY I-485 APPLICATION. DOES THIS OCTOBER QUOTA BACKLOG AFFECT ME?**

Yes. The CIS can work on the pending application. However, they cannot approve the application unless the priority date is current.

**27. THE I-140 AND I-485 WERE CONCURRENTLY FILED AND BOTH ARE PENDING AT CIS. WILL THE I-140 BE PROCESSED IF THE PRIORITY DATE IS NO LONGER CURRENT AND THE I-485 CANNOT BE APPROVED?**

Yes. The CIS will continue to process the I-140 and it can be approved, regardless of the quota backlog.

**28. CAN I INQUIRE REGARDING THE STATUS OF AN I-485 CURRENTLY PENDING AT CIS IF I AM SUBJECT TO A QUOTA BACKLOG?**

No. Under CIS guidelines, inquiries may not be made on a case unless the priority date is current.

**29. IF MY I-485 APPLICATION IS STILL PENDING, AND MY PRIORITY DATE IS NO LONGER CURRENT, WILL CIS STILL ISSUE A FINGERPRINT NOTICE AND/OR RFE?**

They may. CIS can still process the case but cannot approve it until the priority date is current. Therefore, you may receive requests for evidence or fingerprint appointments. It is important to comply with these requests. Even though the case cannot be approved, it can be denied for failure to provide information or show up for fingerprinting.

**30. MY I-485 HAS BEEN PENDING A LONG TIME DUE TO SECURITY AND BACKGROUND CHECKS. ONCE THEY CLEAR, CAN MY CASE BE APPROVED IF MY PRIORITY DATE IS NO LONGER CURRENT?**

No. Even though the only issue may have been the security and background checks, the CIS cannot approve the case until the priority date is current.

**31. DOESN'T CIS ASSIGN ME A VISA NUMBER WHEN THE CASE IS FILED?**

No. Immigrant visa numbers are not assigned to a case until right before approval.

**32. CAN I STILL OBTAIN EMPLOYMENT AUTHORIZATION DOCUMENTS (EADs) AND ADVANCE PAROLE (AP) TRAVEL DOCUMENTS IF MY I-485 IS PENDING AND I AM NOW SUBJECT TO A QUOTA BACKLOG?**

Yes. As long as you have a pending I-485 application at CIS, you are eligible to apply for and receive EAD and AP documents.

**33. MY ADJUSTMENT APPLICATION IS PENDING AND I RECENTLY MARRIED. CAN I ADD MY SPOUSE TO THE APPLICATION (I.E. CAN MY SPOUSE FILE FORM I-485) IF MY PRIORITY DATE IS NOT CURRENT?**

No. In order to add a dependent to the pending application, the priority date must be current.

**34. MY FINGERPRINTS HAVE ALREADY BEEN TAKEN. HOWEVER, DUE TO THE QUOTA BACKLOG, THEY MAY EXPIRE. WILL CIS REQUIRE ME TO REDO MY FINGERPRINTS ?**

Yes. Fingerprint results expire after 15 months. CIS will review the fingerprints at the time that they are ready to complete the adjudication of the I-485. If the results have expired, they will send out a new fingerprint appointment notice.

**35. IF THE CASE IS PENDING AT CIS AND CANNOT BE APPROVED DUE TO QUOTA BACKLOGS, WILL I BE REQUIRED TO PROVIDE ANY UPDATED INFORMATION OR DOCUMENTS?**

The CIS may ask for updated employment information. However, new photos and medical exams should not be required.

**36. IF I AM NOT ABLE TO FILE THE I-485 DUE TO QUOTA BACKLOGS, IS THERE ANOTHER WAY FOR MY H-4 SPOUSE TO OBTAIN WORK AUTHORIZATION?**

An I-765 (EAD) application cannot be filed unless an I-485 is pending. Therefore, your spouse will not be eligible for an EAD card and will need to seek employment sponsorship for work authorization.

**37. IF AN I-140 PETITION FILED ON MY BEHALF IS STILL PENDING AND MY PRIORITY DATE BECOMES CURRENT, MAY I FILE MY ADJUSTMENT APPLICATION?**

Yes, if you have an I-140 petition pending and your Priority Date becomes current, you and your dependents may file your adjustment applications as long as the Priority Dates remains current.

**38. I AM RUNNING OUT OF H-1B TIME. WHAT WILL HAPPEN TO MY H-1B STATUS IF THE QUOTA BACKLOG HOLDS UP MY GREEN CARD APPLICATION?**

If you have an approved I-140 and you are unable to proceed with the I-485 due to country-specific quota backlogs (e.g., for China or India), the company is eligible to apply for extension of H-1B time, in increments of three years, on your behalf. Your dependent's H-4 status may also be extended.

If you are not the beneficiary of an approved I-140 petition, you may still be able to obtain extensions, in one year increments, as long as the labor certification or I-140 petition has been pending more than 365 days.

**39. IF I AM NOT ABLE TO FILE THE I-485 AND THEN I LOSE MY JOB OR CHANGE JOBS, DOES ADJUSTMENT OF STATUS PORTABILITY PROTECT ME?**

No. In order to take advantage of adjustment portability, the I-140 Petition must be approved and the I-485 must be filed and pending over 180 days.

September 27, 2005

Page 10

**40. DUE TO THE QUOTA BACKLOGS, I WANT TO REVIEW MY OPTIONS FOR IMMIGRATING THROUGH A US CITIZEN. I HAVE MINOR US CITIZEN CHILDREN. I HAVE A US CITIZEN SPOUSE. CAN THEY SPONSOR ME FOR PERMANENT RESIDENCY?**

Yes, your US citizen spouse can sponsor you for permanent residency, but a US citizen child cannot sponsor you until the child is 21 years old. If you have a US citizen spouse or a US citizen child who is 21 or older, please contact us to discuss your options.