

# Business Immigration

Winter 2004 *An Update*

## EB-3 Retrogression Kicks Up Storm

- *FAQ on Impact*



### 1. What is Retrogression?

To understand the concept of Retrogression, one has to understand how visa numbers are allocated. From time to time, the Department of State halts processing of Adjustment Applications to balance the per country allocations of immigrant visas. In other words, pipeline cases are taken into account from previous years and certain country nationals are precluded from applying Applications to Adjust Status.

In simple terms, Retrogression is the act of having people in a queue wait for their turn to be admitted. It is analogous to waiting at an airport to be boarded. Everyone will ultimately be allowed to board, but will have to wait their turn.

Section 201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual **employment-based preference** immigrants is at least **140,000**.

Section 202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. This simply means that no single country will be allotted more immigrant visas than the limit set.

Further, The visa prorating provisions of Section 202 (e) apply to allocations for a foreign state or dependent area when visa demand exceeds the per-country limit. These provisions apply at present to the following oversubscribed chargeability areas: INDIA, MEXICO, and PHILIPPINES.

### Q2. What are EB2 and EB3?

The Employment based Second Preference and Employment Based Third Preference categories are categories under which an individual qualifies for an immigrant visa.

Members of the Professions Holding Advanced Degrees [read Master's or higher degree] or Persons of Exceptional Ability are classified under the Employment Based Second Preference.

Skilled Workers [individuals with a minimum of 2 years of experience], Professionals [persons with Bachelor's degree], and Other Workers fall under the Employment Based Third Preference.

### Q3. Am I eligible for EB-2 if I have a Bachelor's degree?

Individuals with a Bachelor's degree and at least 5 years of progressive experience may qualify for the Employment based Second Preference.

### Q4. When do I make a selection for the EB-2 or EB-3 category?

The minimum qualification for the position in item 14 of Form ETA750A is used to determine whether the position qualifies as EB-2 or EB-3. For instance, if Master's or Equivalent is listed in the 'College Degree' in item 14, then the position qualifies as EB-2.

### Q5. Do I qualify for EB-2 if I have a Master's degree?

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(Continued from page 1)

Not necessarily. The position must require a Master's or higher degree. If the position has not normally required a Master's degree, then the Employer may not be able to justify why a Master's degree is required in your case. In other words, the standard minimum requirement for the position must be a Master's degree or equivalent.

**Q6. Is it possible to amend the Application for Labor Certification?**

Yes, it is possible to amend the Application for Labor Certification anytime prior to certification. However, the Department of Labor may view the change as material and require that the employer submit a new Application forcing the Employee to lose the priority date. Care must be taken while seeking an amendment so as not to materially alter the position.

**Q7. Is it possible to amend the Application for Labor Certification after it is certified, or at the I-140 stage?**

It is not possible to amend a certified Application for Labor Certification. It is also extremely difficult to amend the I-140 Petition. The U.S.C.I.S. is likely to question the amendment extensively and is generally not recommended.

**Q8. How far have the EB-3 numbers retrogressed?**

The visa numbers for India, China and Philippines have retrogressed to January 1, 2002.

**Q9. Will the Visa Numbers advance and if so, when?**

The State Department has indicated that the earliest it foresees movement in the newly retrogressed employment-based third preference per-country limits would be March 2005, but that "April is probably more realistic." This is more a reflection on the limitations of the process used to count the numbers than an indication of when there in fact might be movement.

**Q10. Have visa numbers retrogressed in the past?**

Yes, until FY 2000, visa numbers routinely retrogressed. In fact, family categories continue to retrogress from time to time.

**Q11. I have an EB-3 LC currently pending. Will I be affected by the retrogression?**

The retrogression does not immediately affect you. Until

your LC is certified, you are not entitled to file an Application to Adjust Status. Therefore, you are not immediately affected by the retrogression. In all probability, your dates may be current by the time your Application is certified.

**Q12. Will the new PERM regulations help?**

Under PERM, the LC is likely to be certified in a very short time. It may be possible for your Employer, if you qualify, to file an Application for an EB-2 position and take advantage of dates that are current for that category.

**Q13. Is the EB-2 category likely to retrogress?**

Yes, that may happen. However, at present, the Department of State has said that the EB-2 category is not likely to retrogress.

**Q14. I have completed 6 years on H-1B. Does this affect my ability to seek an extension under AC21?**

No, it does not. The American Competitiveness in the Twenty First Century Act allows for extension in three scenarios:

1. When 365 days or more have elapsed since the filing of an Application for Labor Certification;
2. When the Labor Certification Application is certified and an Immigrant Petition on Form I-140 has been filed, and 365 days or more have elapsed since the filing of the Application for Labor Certification;
3. When the Beneficiary is unable to Adjust due to unavailability of Visa Numbers

You will continue to be able to extend your H-1B beyond the sixth year if you qualify under any of the above-mentioned scenarios.

**Q15. When are EB-3 numbers likely to become current again?**

That information is a closely guarded secret and the Department of State has provided no indication of when that is likely.



## **Hurrah for Backlog Reduction – New Process Sounds Promising!**

After several false starts, clients can finally take heart in what appears to be an imminent move to implement PERM. If implemented, PERM is likely to go into effect in February/March, or April/May, depending on whether the Department of Labor decides to follow a 60 or 120 day window for final implementation. In the interim, this Article is designed to offer clarity on the backlog reduction plan that is being implemented in parallel.

Undoubtedly before PERM is instituted and running smoothly, the U.S. Department of Labor will proceed with its Backlog Reduction Plans announced earlier this year in July and covered by Kidambi & Associates, P.C. in numerous advisory e-mail updates, newsletters, and postings on our site at [www.kidambi.com](http://www.kidambi.com). In an earlier article, we covered the September 29th Memo from Assistant Secretary for Employment and Training, Emily Stover DeRocco. The Memo provided guidance on the transition of the labor certification process from the State Offices [SWAs] to the Backlog Reduction Centers [BRCs] in *Philadelphia* and *Dallas* and to the **National Processing Centers** [NPCs] in *Atlanta* and *Chicago*.

The Department of Labor (DOL) has four target areas it would like to address with the elimination of the SWAs: 1) Department of Labor and National Processing Center - Vision 2) Backlog Reduction Centers 3) PERM 4) SWA Role in Labor Certification.

### **LONG TERM VISION**

After PERM is instituted, the DOL will process all H-2A, H-2B and PERM cases at the NPCs. The goal was to have the H-2A and H-2B cases transferred by the end of the year. This goal appears to be sliding and may not be achieved on time.

### **BACKLOG REDUCTION CENTERS**

The purpose of the BRCs is to reduce the current 310,000 labor certification case backlog around the country that is largely believed to be the result of § 245(i) cases filed to meet the April 30, 2001 deadline. The BRCs opened with current staff from the regional offices in *Dallas* and *Philadelphia*.

Ten thousand cases from the Philadelphia Regional office were transferred to the Philadelphia BRC when it opened. An additional 20,000 cases from the San Francisco regional office are being sent to both the Philadelphia and Dallas BRCs. The stated objective is to reduce the backlog in two years. To achieve this objective, the BRCs are in the process of sending Center Receipt Notification Letters (CRNL) to the Attorney of Record and the Employer to determine whether a case is still viable.

### **PERM**

While we are waiting for final implementation of PERM, the NPCs will function as additional BRCs. In addition, *New York* and *San Francisco* regional offices are slated to continue processing labor certifications until at least January 2006.

### **SWA Role in Labor Certification**

SWAs are expected to continue to open and process cases received on or before December 30, 2004. December 31<sup>st</sup> is a holiday. After December 31, 2004, any applications received by the SWAs will be date stamped and logged to preserve the employer's filing date for subsequent processing and extensions of H classification (if necessary). Those cases would then be forwarded to one of the NPCs for processing at a later date.

It is the opinion of Kidambi & Associates, P.C. that backlog reduction is likely to expedite processing of applications overall and offer clients much needed respite from delays. PERM could be a mixed blessing in that while further expediting processing, it may offer fewer opportunities for candidates to qualify and obtain certification. However, a final analysis would have to wait until final regulations are published.