

in this issue:

JANUARY 2008

Global Edition

A Littler Mendelson Newsletter
specifically for the Global Industry

State Department Issues February 2008 Visa Bulletin declaring India EB-2 Unavailable Effective Immediately

On January 9, 2008, the U.S. Department of State ("DOS") released the February 2008 Visa Bulletin. DOS explicitly announces that as of January 9, 2008, the annual limit of employment based second preference category (EB-2) immigrant visa numbers for Indian nationals has been reached and that the India EB-2 category is "unavailable" effective immediately. This is a departure from regular visa bulletins that provide only information about the visa availability for the referenced month. As a result of this news, individuals in the India EB-2 category who had a priority date that was current and expected the cutoff date to be viable until the end of the month (January 31) can no longer file an adjustment of status (AOS) application or obtain an immigrant visa at a US consulate abroad.

Furthermore, this means that USCIS will stop processing AOS cases that have already been filed for all individuals in the India EB-2 category until numbers are again available.

The monthly Visa Bulletin provides information on the availability of immigrant visa numbers (permanent residence or "Green Card"). The following is an explanation of the immigrant visa quota and the role of the Visa Bulletin, followed by FAQs.

General Employment Based Preference Categories Overview:

There are only a limited number of green cards issued by the United States in a fiscal year. The number is further narrowed by a person's preference category and country of birth. All individuals sponsored by employers are in one of the employment-based (EB) preference categories. The following are the EB preference categories:

The **EB-1** preference category is reserved for three types of individuals: (1) those who can meet stringent requirements by proving they have "extraordinary ability" in the arts, sciences or business, (2) "outstanding" researchers or professors, and (3) multinational managers/executives who have worked in a managerial/executive capacity abroad and will continue to do so in the United States for a multinational company.

The **EB-2** preference category is for individuals who have at least a U.S. Master's degree (or foreign degree equivalent) and will fill a position that requires at least a Master's degree. In lieu of the Master's degree, an individual can have, and the position can require, a U.S. Bachelor's degree (or foreign degree equivalent) and at least five years of post-baccalaureate progressively responsible experience.

The **EB-3** preference category is for individuals who have at least a U.S. Bachelor's degree (or equivalent) or two years of experience and will fill a position that requires either a Bachelor's degree or at least two years of experience

When there are more people in line for a Green Card within the same preference category and country than available green cards in a given fiscal year, a line forms. A person's place in that line is determined by the date of the initial filing in a Green Card case (either a labor certification or an I-140 preference petition, depending on the case) was filed. This date is known as the "priority date."

The Latest News for EB-1, EB-2, and EB-3 categories:

The Visa Bulletin lists the priority dates that are current. Any priority date older than the date listed is current, which means that the person

may file an I-485 application for Adjustment of Status or “consular process” to obtain permanent residence. Priority dates are volatile; they sometimes make rapid leaps ahead; sometimes they can move more slowly than calendar pace and even go backward.

EB-1 PREFERENCE CATEGORY

Below is the chart showing visa availability for individuals in the EB-1 preference category by country of birth (C stands for “Current” and “U” stands for “Unavailable”):

	All Other Countries	China	India	Mexico	Philippines
Feb 2008	C	C	C	C	C
Jan 2008	C	C	C	C	C
Dec 2007	C	C	C	C	C
Changes	None	None	None	None	None

All countries remain current in the EB-1 category.

EB-2 PREFERENCE CATEGORY

Below is the chart showing visa availability for individuals in the EB-2 preference category by country of birth (C stands for “Current” and U stands for “Unavailable”):

	All Other Countries	China	India	Mexico	Philippines
Feb 2008	C	1/1/03	U	C	C
Jan 2008	C	1/1/03	1/1/00	C	C
Dec 2007	1/1/07	1/1/03	1/1/02	C	C
Changes	None	None	-24 months	None	None

Demand for China EB-2 has leveled off, maintaining a cutoff date of January 1, 2003. Demand for India EB-2 remains high, prompting DOS to declare that as of January 9, 2008, the category is unavailable.

EB-3 PREFERENCE CATEGORY

Below is the chart showing visa availability for individuals in the EB-2 preference category by country of birth (C stands for “Current” and U stands for “Unavailable”):

	All Other Countries	China	India	Mexico	Philippines
Feb 2008	11/1/02	11/15/01	5/8/01	4/22/01	11/1/02
Jan 2008	10/15/02	11/1/01	5/1/01	4/22/01	10/15/02
Dec 2007	9/1/02	10/15/01	5/1/01	4/22/01	9/1/02
Changes	+17 days	+14 days	+7 days	None	+17 days

The demand on the EB-3 category continues to be heavy, although there is minor movement except for Mexico EB-3. All chargeability areas and the Philippines have advanced 17 days for a cutoff date of November 1, 2002. China EB-3 moved forward 14 days for a cutoff date of November 15, 2001. India EB-3 moved forward 7 days for a cutoff date of May 8, 2001. Mexico EB-3 did not move forward; cutoff date remains at April 22, 2001.

FAQs FOR EVERYONE:

1. Where can I find my priority date and preference category?

You should log into our database and click open your labor certification and/or I-140 case. There will be a selection for “Details/Dates” that will contain information on your priority date and preference category.

2. When will my priority date become current?

We do not know. The DOS issues a visa bulletin approximately the 15th of every month for the following month. We will be tracking these developments closely to determine immigrant visa availability. As illustrated in the changes from September to October, and October to November, priority dates do NOT move forward in real time; sometimes there is no advancement. Sometimes they have even moved backward and grown to include additional countries.

3. What if my spouse was born in a different country from me?

The law provides for “cross-chargeability,” meaning that you may rely on your spouse’s country of birth for determining whether your priority date is current. We will of course review your file to determine if the cross-chargeability applies to your case. For example, if you were born in India, you would be charged to “India” for priority date calculations. However, if your wife was born in Sri Lanka, you could use her chargeability country and be charged to “other” countries for priority date calculations.

FAQs FOR THOSE WHO DO NOT YET HAVE AN ADJUSTMENT OF STATUS CASE FILED:

4. What if my priority date is not yet current?

If you are from a country with a backlogged preference category, you may be extremely frustrated with this process. If you have an approved Labor Certification or I-140 immigrant petition and your priority date is not current, you will not be eligible to file for adjustment of status until the priority date is current. However, if your I-140 is approved, you can obtain an additional H extension beyond the sixth year for an additional THREE years while you wait for your priority date to become current. If your I-140 is not approved, you are eligible for annual H-1B extensions beyond the sixth year if your Labor Certification application was filed before the end of the fifth year of your H-1B status.

5. What if my priority date is current now and will remain current or will become current in February 2008?

If you have an approved Labor Certification or I-140 immigrant petition and your priority date is current, will remain current and/or become current in February 2008, we will proceed with preparation and filing of your adjustment of status application.

If you are eligible to proceed with filing adjustment of status, we strongly urge you to do so as quickly as possible, since the priority dates might move backward and cause you to lose your ability to file.

6. Can I use consular processing instead of adjustment of status?

No, the rules requiring a current priority date apply to both consular processing and adjustment of status.

7. Can we still file my I-140 immigrant petition even if we cannot file for adjustment of status?

Yes. While it is not possible to file “concurrently” your I-140 and adjustment of status unless your priority date is current, we can still file your I-140 separately, and CIS will process it even if your priority date is not current. Once the I-140 is approved we will need to wait for your priority date to become current to file your adjustment of status.

FAQs IF YOUR ADJUSTMENT OF STATUS APPLICATION IS ALREADY FILED AND PENDING:

8. What if my adjustment of status application is pending and my priority date is not current?

If your adjustment of status application is pending, it will remain pending until your priority date becomes current. You are still eligible for additional H extensions, and we may continue to file for H extensions on your behalf until you get permanent residence.

Please note that if your case is also currently delayed because of fingerprint or name clearance procedures, CIS might not respond to any inquiries regarding the status of these clearance procedures until your priority date is current.

9. What if my adjustment of status application is pending and my priority date is current?

If your adjustment of status application is pending and your priority date is current and will remain current through February 28, 2008 the CIS will proceed with processing your case, and we will make appropriate inquiries and follow up consistent with CIS processing times.

Regardless of where your case falls, you should know that Littler Global and other organizations are urging Congress to provide

more green cards. We will continue to monitor this issue and provide you with updates as we receive them.

The mission of Littler Mendelson's Immigration and Global Migration Practice Group is to facilitate the movement of employees across international borders. Our attorneys have extensive experience handling inbound, outbound and cross-border transactions for employers of all sizes—from the world's leading multinational companies to regional and local employers across the nation. And as part of the largest labor and employment law firm in the United States, we offer clients comprehensive mobility solutions that take into account their employment, benefits, tax and related HR needs. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com.
