



News & Types: Client Advisories

Understanding When Your Priority Date is "Current" to File (and Be Approved) for a Green Card

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Each month, the U.S. Department of State (DOS) publishes a Visa Bulletin, which shows who is eligible to move forward in the Green Card process. The Visa Bulletin determines eligibility for filing and completing the Green Card process based on 1) Priority Date; 2) Country of Chargeability; and 3) Filing Category.

PRIORITY

DATE

A Priority Date essentially establishes an individual's place in line for applying for a Green Card.

When an employer files a PERM Labor Certification Application with the U.S. Department of Labor (DOL), the date on which the Application is received by the DOL establishes the individual's Priority Date in the employment-based Green Card process. If the individual is exempt from the labor certification process, the date on which the U.S. Citizenship and Immigration Services (USCIS) receives the Immigrant Petition for Alien Worker (Form I-140) establishes the individual's Priority Date in the employment-based green card process.

Each month, the Visa Bulletin provides a listing of which Priority Dates are "Current" (or available). A Priority Date is Current if it is earlier than the date listed on the Visa Bulletin. Please note that each month, Priority Dates may advance (or may retrogress) based upon the number of Green Cards still available and the number of applicants for the available Green Cards.

After the DOS releases the Visa Bulletin each month, the USCIS then releases AOS Filing Charts. If the Priority Date on the AOS Filing Chart is earlier than the date contained on the Chart, an eligible individual may then be able to file for AOS through the USCIS.

The Visa Bulletin provides "Dates of Filing" and "Final Action Dates". Each month, the USCIS will decide whether individuals may use "Dates of Filing" or "Final Action Dates" in order to file for AOS. Even if the USCIS allows the "Dates of Filing" to proceed with the filing of AOS applications, the USCIS may only approve AOS applications when the "Final Action Date" is Current.

COUNTRY OF CHARGEABILITY

In addition to the Priority Dates, individuals are also categorized by “country of chargeability”. An individual’s country of chargeability also affects whether that individual’s Priority Date is Current. For most individuals, country of chargeability is based on the country of birth, not the country of citizenship. For example, a foreign national who is born in India and has subsequently become a citizen of Canada is still chargeable to the priority date for Indian nationals. A limited exception applies for individuals who are married to a spouse who was born in a different country.

FILING/PREFERENCE CATEGORY

There are five employment-based Immigrant Visa categories, which also affect when a Priority Date is Current:

1. EB-1 –Extraordinary Ability; Outstanding Professors or Researchers; or Multinational Executives and Managers
2. EB-2 –Advanced Degree or Exceptional Ability (often a PERM-based filing)
3. EB-3 –Skilled, Professional, and Other Workers (often a PERM-based filing)
4. EB-4 –Religious Workers; Government Employees; and Special Juveniles
5. EB-5 –Investors meeting certain criteria

The Filing Category is determined based on the nature (which may include the employer requirements) of the position offered.

There is very little consistency in the predictability of which employment-based green card category will become Current more quickly than any other.

This lack of consistency is rooted in the fact that USCIS cannot provide the DOS with precise data on its AOS backlog. The DOS must therefore rely on estimates of pending cases, creating inconsistent or conservative movements in the Visa Bulletin.

HOW DOES THIS ALL COME TOGETHER? (APPROVAL VS. RETROGRESSION)

The DOS delays Green Card processing when there are more Green Card Applications than Green Cards available for issuance. This process is often referred to as “retrogression.” Due to retrogression, any individual whose Priority Date is not Current is unable to begin the last stage of the Green Card process (AOS or Immigrant Consular Processing). This delay can last years (and even decades) depending on the combination of the Priority Date, Country of Chargeability, and Filing Category.

Please note that even if an individual’s Priority Date becomes Available and he/she files for AOS, the Final Action Priority Date has to be Current in order for the USCIS to approve the AOS application. If the individual’s Priority Date retrogresses while the AOS Application is pending, he/she will not be able to complete the Green Card Process until the Final Action Priority Date becomes Current again. However, while the AOS application

is pending, the individual will be permitted to continue to extend the EAD and Advance Parole (AP) travel document while he/she waits for his/her Final Action Priority Date to become Current, which will allow them to continue to work and travel internationally.

Additional information about Green Card availability is available each month in the Masuda Funai Monthly Business Immigration Newsletter available at <https://www.masudafunai.com/articles>.

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