

## Blog Post

# Retrogression and Further Delays Expected in the Employment-Based Immigrant Visa Process During May 2023

April 14, 2023

Employers sponsoring foreign nationals should be aware that some cut-off dates for filing immigrant visa applications in certain employment-based (EB) preference categories have recently “retrogressed” or moved backwards in time due to increased demand. The Department of State publishes a monthly Visa Bulletin, which appraises foreign nationals of the time to file their immigrant visa application. The date that a foreign national may submit their application depends on a combination of factors, including their country of birth; the Priority Date and EB preference category listed on the approved I-140 Immigrant Petition for Alien Worker; and the cut-off date on the relevant Visa Bulletin chart. Recent Visa Bulletins for March and April 2023 included retrogressed dates, and the Department of State warned that additional corrective action to limit the number of visas issued may be on the horizon. As predicted, the May 2023 Visa Bulletin, published on April 13, 2023, provides that the final action cut-off date for foreign nationals from all countries except India and China in the second EB preference category will retrogress by four and a half months to February 15, 2022. It also establishes a worldwide final action cut-off date of June 1, 2022, for the third EB preference category, significantly delaying the issuance of immigrant visas to foreign nationals that are otherwise eligible.

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## Background

The I-140 Immigrant Petition for Alien Worker is a mandatory step in the EB immigrant visa process for the first, second, and third EB preference categories. It is typically filed by the sponsoring employer on behalf of the foreign national employee to fill an open, full-time position in the United States for which there are no able, willing, qualified, and available U.S. workers. Notably, a foreign national in the first and second EB preference categories can self-petition (file an I-140 Immigrant Petition without a sponsoring employer) if they can demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim or that it would be in the interest of the United States to waive the labor certification requirement.

For employer-sponsored I-140 Immigrant Petitions, the employer must demonstrate to the satisfaction of the United States Citizenship & Immigration Services (USCIS) that the foreign national employee meets the minimum requirements for the offered position and that the employer has the ability to pay the proffered wage to the employee. Once the I-140 Petition is approved, the employer will receive an I-797 Notice of Action providing the Priority Date, which is generally the date when the employer filed the I-140 Petition with USCIS. The Priority Date helps determine the foreign national's place in the immigrant visa queue.

Notably, the I-140 Petition must be based on one of five EB preference categories:

- EB-1: Priority Workers
- EB-2: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability
- EB-3: Skilled Workers, Professionals, and Other Workers
- EB-4: Certain Special Immigrants

- EB-5: Employment Creation

The significance is that the Immigration and Nationality Act limits the number of immigrant visas that may be issued to foreign nationals each year based on the I-140 Petition's underlying EB preference category. If the demand for immigrant visas is greater than the supply of visas for a particular EB preference category, the Department of State will impose a cut-off date or retrogress that date to keep the allocation of visas within the statutory limits. A visa becomes available when the foreign national's Priority Date is earlier than the cut-off date indicated on the relevant Visa Bulletin chart for the foreign national's preference category and country of birth.

Employers should take note that retrogression has occurred in relation to certain foreign nationals in the second and third EB preference categories.

### The EB-2 Preference Category

Employers may petition for the full-time employment of foreign nationals in the second EB preference category if they hold an advanced degree (above a Bachelor's degree) or have exceptional ability (defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business"). In March 2023, the Department of State indicated that the demand for EB-2 immigrant visas has continued to increase since December 2022 and warned that corrective action may be taken to keep allocations within the maximum allowed for Fiscal Year 2023. Sure enough, the April 2023 Visa Bulletin showed retrogressed cut-off dates for foreign nationals in the second EB preference category who were born in Mexico, the Philippines, and the rest of the world (excluding China), from November 1, 2022, to July 1, 2022, with foreign nationals from India experiencing the most severe retrogression from October 8, 2011, to January 1, 2011. On April 13, 2023, the Department of State published the May 2023 Visa Bulletin,

showing further retrogression in the EB-2 preference category. Specifically, the final action cut-off dates for foreign nationals born in Mexico, the Philippines, and the rest of the world (excluding India and China) retrogressed by an additional four and a half months to February 15, 2022. The Department of State again cited to higher than expected demand and indicated that that adjustments would continue to be made, as necessary.

### The EB-3 Preference Category

The third EB preference category applies to professionals (foreign nationals with a Bachelor's degree), skilled workers (foreign nationals with at least 2 years of training or work experience), and other workers (foreign nationals with less than 2 years of training and work experience). In March 2023, the Department of State warned that increased demand for EB-3 immigrant visas may require cut-off dates or retrogression. Notably, the April 2023 Visa Bulletin shows that foreign nationals born in China were the only individuals who experienced retrogression. Nevertheless, additional corrective measures were expected in the coming months, as the Department of State previously indicated that increased demand may necessitate the establishment of a worldwide final action date (including Mexico and the Philippines). As promised, the May 2023 Visa Bulletin established a worldwide final action cut-off date of June 1, 2022, for the third EB preference category, excluding China and India. Further retrogression is expected as we continue to approach the end of Fiscal Year 2023.

### Implications for Employers

Employers should monitor Visa Bulletins each month to detect patterns and trends associated with immigrant visa processing times. By doing so, employers can plan ahead for extended periods without cover, minimize onboarding delays, and set expectations for incoming foreign national employees. For questions related to the immigrant

visa process, please contact your Akerman immigration lawyer.

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