

## August visa bulletin a shock for Indians awaiting US green cards on EB-1 category

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Last month, a group of 56 bipartisan US House representatives, led by Indian American Congressman Raja Krishnamoorthi and Congressman Larry Bucshon of Indiana, wrote to the Secretary of State Anthony Blinken and Department of Homeland Security Secretary Alejandro Mayorkas requesting the Biden administration to take executive action to provide relief to high-skilled employment-based visa holders who are faced with huge backlogs to get their permanent residence status or green cards.

The law-makers believe that this action will reduce the huge green card delays and provide relief to high-skilled employment-based visa holders, a large number of whom are Indians. The main demand in the appeal is to mark all dates for filing of employment-based visa applications as 'current'. This will allow applications to be filed regardless of applicant's country-based priority date, potentially making some eligible for employment authorization documents to change jobs, start businesses, and travel abroad without penalty. Thousands of highly skilled Indians are stuck on employment based green card queues for decades and over the past few months; with big job losses in US technology companies; many of them are facing the grim reality of having to move back to India.

The monthly visa bulletin by the US department of state for August 2023, has yet again highlighted that Indians working in the US, when compared to nationals from all other countries, are facing the longest backlogs for green cards and dealing with hardships and uncertainty. The biggest shock in the August bulletin came for applicants of the employment-based first (EB-1) visa, a category which applies to highly talented individuals who are on a fast track. This category saw significant retrogression, of 10 years, with final action date for Indians moving back to January 1, 2012; from February 1, 2022, in the previous month's bulletin. For the other employment categories, EB-2 and EB-3, there was no forward movement. Indians are facing more than 10 year delays with the final action dates at January 1, 2011 and January 1, 2009 for EB-2 and EB-3. The final action date for spouses and children of green card holders (F-2A category) has also retrogressed by three years.

“In the August 2023 visa bulleting, one of the main issues that hit Indians on green card queues hard was the significant retrogression of the priority date for EB-1. The priority date retrogressed by more than 10 years, going back to January 1, 2012. This means that Indian applicants in the EB-1 category have to wait much longer for their green card applications to be processed, causing delays and frustration. The sudden retrogression of the priority date in August 2023 has severely affected high-skilled applicants, as they have to wait much longer to move forward with their green card applications,” says Vineeta J Vibhakar, business immigration attorney based in California.

Delays in receiving green cards in all categories have significant negative consequences for applicants, their family members, and employers, feels Emily Neumann, attorney at law, at Houston based business immigration law firm Reddy & Neumann. “However, the extreme retrogression for EB-1 for Indians implies that even highly accomplished individuals will have to wait for ten years to get permanent residence status. This extended waiting period, based solely on their country of birth, affects even the best and brightest. For spouses and children of green card holders, obtaining a green card means being able to live and work in the United States. Some applicants might have made career or education decisions based on the anticipation of receiving their green cards soon. The retrogression can disrupt all these plans, until their priority dates become current again,” Neumann says.

Even though retrogression has happened in the EB-1 category in the past as well, legal experts are shocked about the August bulletin which is very drastic and brutal. “The priority dates for India-born nationals have been set back by 9 years and 11 months. Earlier in summer, the department of state had advised that due to oversubscription, the final action dates for Indian nationals will be retrogressed,” says Mishita Jethi, partner and attorney at law firm Chugh, LLP. Until recently, the demand in the EB-1 category for nationals from the ‘rest of the world’ (countries other than India, China, Vietnam, Philippines, Mexico, etc. which are usually subject to cut-off) was not as high as the number of visa numbers available. Hence Indian nationals were able to receive unused visa numbers from the rest of the world category. However, as the demand for the EB-1 category has increased even for the RoW category, India-born nationals are no longer able to receive the unused visa numbers from that category.

If the Biden administration takes executive action based on the letter by the House representatives, to mark all dates for filing in the visa bulletin as “current”; regardless of the country of origin for employment based green card applicants; thousands of Indians stand to benefit. “If this really happens, it will reduce the crushing backlog and wait times, thereby providing much needed relief to applicants from India. This will give applicants and dependents eligibility for employment authorization document (EAD) and advance parole (AP), that will in turn open up pathways to change jobs without being tied to any particular employer; travel abroad and even start new businesses,” says Shilpa Gokare, managing partner, Gokare Law Firm, based in Alpharetta Georgia. These advantages become even more significant in the current economic environment with lay-offs in many companies/ “An advantage of applying for adjustment of status is the ability of apply for advance parole (AP) which allows visa holders to travel abroad without needing to get their visa stamps renewed. Since India-born nationals are typically on the longest queues for the green card, if this executive action is indeed taken, they will benefit the most,” says Jethi.

The US representatives have proposed that when new fiscal year green cards become available on October 1, they should be considered immediately available to anyone with an approved I-140 petition, regardless of the priority date. “The proposal offers several benefits, such as eligibility for employment authorization and advance parole for visa-free work and travel, job portability after 180 days, and protection of dependent children’s ages from aging out at 21. Additionally, US Citizenship and Immigration Services (USCIS) would receive filing fees from all applicants, potentially reducing processing times, better understanding the number of applicants in each category, and preventing wastage of visa numbers each year,” says Neumann. She, however, adds that implementing this proposal in October 2023 might be challenging. “As of March 2023, there were 685,243 approved employment-based petitions awaiting visa availability, which could generate a substantial number of adjustment of status applications. The current fee schedule does not require filing fees for initial and subsequent renewals of employment authorization and advance parole, potentially creating additional financial strain for USCIS and longer processing times,” Neumann says.

If such executive action were to be taken and effectively addressed the issues causing delays for Indians on green card queues, it could have a significant positive impact, however, the specific impact would depend on the details of the executive action taken. “With reduced processing times and advancing priority dates, more Indian applicants might be able to obtain green cards in a shorter time frame; but changes made to immigration policies or visa allocation would need to be carefully assessed for their effects on the overall immigration system,” says Vibhakar.

There are fears that the suggested changes, if implemented without preparation could create bottlenecks in the US immigration system. “The Biden administration should carefully roll this one out, after discussions, as USCIS will inevitably receive a flood of filings. Additional human resources will have to be allocated to process these, especially biometrics, EAD and AP. If this is implemented without proper planning and coordination, there will be enormous backlogs in EAD and AP processing. There has been some improvement in EAD processing after years of delays, and that should not slide back further,” says Gokare.

The US administration has used executive action to improve the immigration system due to congressional gridlock in the past. “Currently, there is already significant demand for available visas from approved immigrant petitions. Allowing hundreds of thousands of applicants to file in a single month may create challenges for the agency, especially considering existing difficulties with other programmes. There may be hesitancy from the administration and agency to implement such a change,” Neumann says.

While a letter from members of the House of Representatives can draw attention to an issue and advocate for executive action, it does not guarantee a specific outcome, feels Vibhakar. “The US immigration system is complex, and any changes to policies and procedures typically involve a lengthy legislative and administrative process,” she says.

Even though the August bulletin has bad news for Indians on green card queues; there are hopes that with the new fiscal year, a fresh batch of visa numbers will be available and the EB-1 India final action dates will return to a more logical timeline, beginning October 2023. The bulletin has, in fact, indicated that the final action date for India in the EB-1 category may advance in October, depending on the demand for EB-1 visas by Indian applicants and the FY-2024 annual limit on employment-based preference visas.

“In the August bulletin, the state department has also said that it is likely that in the October 2023 visa bulletin, EB-1 final action date for Indians will come back to February 1, 2022 (as in July 2023 bulletin). However, sometimes the forward movement of these dates do not pan out as anticipated due to unforeseen demands. We feel that if not in the October bulletin, at least in Q1 of FY 2024 (October 1 to December 31, 2023), EB-1 India final action dates will return to the earlier timeline,” says Santhosh Rao, India practice head of Gokare LPO Pvt Ltd, a business immigration law firm in Bengaluru.

The DOS has mentioned in the August 2023 bulletin that it expects the final action dates to advance in the October 2023 visa bulletin – at least to the final action dates announced in the July 2023 visa bulletin. “However, DOS has cautioned that this advancement will depend completely on the demand for EB-1 visas by India-born applicants and the FY 2024 annual limit for employment-based visas. In other words, while we do expect to see some movement in the EB-1 category by October 2023, if the category continues to remain as oversubscribed as it is now (either because of applicants having multiple approved petitions in every category or because the RoW demands continues to remain as strong as it is now), the advancement may not be too significant,” warns Jethi.

While the improvement in the cutoff date expected in October 2023, advancing to at least February 1, 2022, offers some hope for relief, but the final outcome would depend on how many visas are utilised in the category and the annual numerical limit for FY 2024. “Going forward, the EB-1 category will be constrained to the typical 40,000 available green cards. With increased global demand, it is likely that the per-country numerical limit will be imposed, restricting the number of green cards available for individuals born in India. Further, the number of applicants vying for the EB-1 category from India has nearly doubled over the last decade. This suggests that a final action date will likely persist in the foreseeable future,” says Neumann.

### **What happened in the August visa bulletin**

**Monthly visa bulletin:** Every month, the department of state (DOS) publishes a visa bulletin. The dates in the bulletin show which green card applications can move to the final stage.

**The August 2023 bulletin:** saw a significant retrogression in these dates. Among others, the growing backlog of visa cases has pushed back the final action dates of many categories. The worst hit category for India-born nationals was the EB-1 category, which has now retrogressed to January 1, 2012. This means that those India-born nationals who wish to file for their adjustment of status (AOS) or apply for their green card application at a US consulate abroad will only be able to do so if their priority date is on or before January 1, 2012.

**EB1 visa:** This category is popular among highly skilled individuals, and the demand for green cards in this category has increased over the years. A high volume of applications can lead to increased processing times and backlogs. Over the last three years, the EB-1 category remained current for Indian nationals due to additional green cards made available from low family-based approvals during the COVID-19 pandemic. Normally, the EB-1 category is limited to around 40,000 green cards annually, but approvals were as high as 61,000 in the past three years. This surplus allowed India to receive more than the usual 7% allotment, as the per-country numerical limitation was not applied.

However, due to the high demand for EB-1 visas worldwide, the DOS could no longer issue EB-1 visas to Indian applicants without regard to the per-country numerical limitations. This contributed to the retrogression of the final action.

**Retrogression:** Visa retrogression occurs when more people apply for a visa in a particular category or country than there are visas available for that month. Retrogression typically occurs toward the end of the fiscal year as visa issuance approaches the annual category, or per-country limitations.

**Priority date:** This is the date when USCIS receives the applicant's petition. A particular priority date becomes "current" once it reaches the front of the line and a green card is available.

**Final action date:** This is when an US immigrant visa number will be available for a foreign national with a current priority date that month. The visa or green card cannot be issued unless the applicant's priority date is earlier than the final action date listed on the visa bulletin.

**Visa number caps:** Each fiscal year, the US government allocates limited visa numbers for each category, including EB-1. If the demand for EB-1 visas exceeds the available visa numbers, it can result in retrogression, where the priority dates for some applicants move backward, causing delays.

**Country-specific limits:** The US imposes per-country limits on the number of green cards issued in each category. If there is a significant number of applicants from one country, particularly India and China, who are eligible for EB-1 visas, the per-country limits could be reached, leading to delays for applicants from those countries.

**EAD:** Having an employment authorization document (Form I-766/EAD) proves that a foreigner is authorized to work in the United States for a specific time period.

**AP:** Advance parole allows the holder to travel back to the United States without applying for a visa.

**I-140 petition:** This form is used to petition for a non-citizen worker to become a permanent resident in the United States.