

## Now Indians likely to face green card delays even for the fast track EB-1 category

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New Delhi: While getting a green card or permanent residence status for most Indians, working in the US, means a wait of several years and even decades; there are some individuals, who, because of top academic qualifications or exceptional talent, are lucky enough to be on a very fast track through the route of EB-1 visa applications.

However, now there's bad news for Indians who are on this category as well. In fact, according to a recent US visa bulletin, all countries will remain current, except for India and China, for the coveted EB-1 category, which will have a cut-off date of February 1, 2022. What this means is that for an Indian national to be able to receive a green card in January 2023, he or she would have had to file the EB-1 I-140 immigrant petition prior to February 2022, which means that the wait for a green card has increased by at least one year and probably more. Green card applicants with priority dates before the cut-off date can submit applications. Retrogression occurs when the cut-off dates that determine visa availability move backward instead of forward.

### What is an EB-1 visa

Some individuals may be eligible for an employment-based, first-preference US visa if they are of extraordinary ability; an outstanding professor or researcher; or are multinational executive or manager of a certain category. Each of the three occupational category has specific requirements.

Under the extraordinary ability category, which is sometimes referred to as the Einstein visa, applicants have to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim. They must meet at least three of 10 specialized criteria, or provide evidence of a one-time achievement (i.e., Pulitzer, Oscar, Olympic medal) as well as evidence showing that they will be continuing to work in the area of their expertise. No offer of employment or labour certification is required for this category.

Some outstanding professors and researchers, too, can qualify for this visa. They have to demonstrate international recognition for outstanding achievements in a particular academic field and must have at least three years' experience in teaching or research. They must be entering the United States in order to pursue tenure or tenure track teaching or a comparable research position at a university, institution of higher education, or private employer. They must meet at least two of six specified criteria and provide an offer of employment from the prospective US employer. The private employer must show documented accomplishments and that it employs at least 3 full-time researchers. No labour certification is required for this category.

Certain multinational managers or executives, too, can avail themselves of this visa category if they have been employed outside the US for at least one year in the three years preceding the green card petition or the most recent lawful non-immigrant admission if they are already working for the US petitioning employer. The petitioning employer must have been doing business for at least one year, have a qualifying relationship to the entity that the applicant worked for outside the US, and intend to employ them in a managerial or executive capacity. Labour certification is not required for this category.

### **Who are Indians getting EB-1 visas**

While the EB-1 has three sub-categories, most Indians qualify under the third one, EB-1C, which is used by multinational companies for their employees. “an individual who worked as a manager or executive outside the US can be transferred to a related business in the US and qualify for EB-1 if the US position is also managerial or executive,” Emily Neumann, managing partner at law firm Reddy & Neumann, a Houston-based law firm focused on US employment-based immigration, told the Times of India.

Diya Mathews, partner and attorney at law firm Chugh, LLP, explained that: “The vast majority of cases we see are in the third sub-category – multinational managers who are sponsored by their employer for a green card, the overwhelming majority of them being in the technology and science sectors.” For the two other categories of EB-1 outstanding professors or researchers or those with extraordinary ability – applicants often hold doctorate degrees; have received major awards; made contributions to their field; have authored articles in major publications, or have had others write about their work. “About 40% of approvals were in these two categories combined in the last year, whereas about 60% of the approvals for Indians were issued for managers or executives,” said Neumann.

### **The bad news**

The US state department has recently announced that for January 2023, the actual retrogression of the EB-1 category for India and China is February 1, 2022; while all other countries will remain current. “This means that only those individuals who have approved EB-1 I-140 petitions filed before February 2022 would be eligible for a green card. On the other hand, the department of state has a separate chart which governs when an individual may file their final stage green card application, and according to the chart, the cut off for filing the application has been set at June 2022. It is important to note that these “cut offs” (retrogression) are set by the department of state and not by US Citizenship and Immigration Services,” Mathews said.

The state department’s recent visa bulletin stating that for an Indian national to be able to receive a green card in January 2023, he or she would have had to file the EB-1 I-140 immigrant petition prior to February 2022, would make it appear that the wait has simply increased by one year. “However, this assumes that the cut-off date would move forward consistently in each visa bulletin going forward. Based on the ‘dates for filing chart’ in the January visa bulletin, this is not likely to be the case. While it is impossible to accurately predict priority date movement, the cut-off date may only advance from February to June 2022 by the end of this fiscal year on September 30, 2023”, Neumann said. She also feels that it is unclear whether the retrogression will end on October 1, 2023, when the next fiscal year begins. The number of petitions that have been submitted, the amount of visas that are available in each preference category and country of birth, and the rate at which visas are being used are only a few of the variables that the department of state considers when calculating the cut-off date.

### **Better times before**

In the early 2000s, Indian nationals utilized an average of 2,600 EB-1 green cards in each fiscal year. Fast forward to the five years preceding the COVID-19 pandemic, when Indians began using an average of 11,250 EB-1s per year. “Due to the increasing backlog in the EB-2 category, more and more Indian nationals are filing in the EB-1 category, which has historically been current. USCIS data published last month indicates that 6,737 EB-1 I-140 petitions were approved last fiscal year for those born in India. What we don’t know is how many petitions have already been submitted in the current fiscal year, which began on October 1, 2022, or how many EB-1 green cards may be utilized by the rest of the world,” Neumann said.

This is indeed very bad news for Indians, who face very long delays running into decades, to get green cards in other employment based (EB) categories. Historically, EB-1 has been the fastest category for Indians to get a green card. “That trend started to change in April 2018, when the EB-1 category for Indians drastically retrogressed to 2012. However, by April 2021 it became current again. And it remained current until this month. For as long as the category remained current, it was just a matter of filing the I-140 and adjustment applications together, and many individuals were lucky to get their green cards approved in under a year, utilizing the EB-1 category,” Mathews said. In fact, when the priority date has been current, it was usually possible to obtain a green card in the

EB-1 category in six to 18 months. The processing time could vary based on whether the I-140 and I-485 application were filed together, how long it took to obtain the I-140 approval, the service center processing the application, whether an interview was scheduled, and whether any request for additional evidence was issued. "There have been several instances of EB-1 retrogression for India over the years. Prior to 2018, retrogression most commonly occurred towards the end of a fiscal year (June through September) as the number of applicants exceeded the remaining number of visas. The retrogression usually lifted in October when the following fiscal year's green cards became available. However, most recently, a cut-off date was implemented for EB-1 India that lasted from April 2018 until April 2021. We may be facing a similar lasting retrogression this time around given the increased demand in this category," Neumann said with a note of caution.

Much higher than expected demand for employment based visas by Indians and others is being blamed for the recent retrogression. "Considering that the October 2022 visa bulletin, had already retrogressed India EB-2 final action and filing dates by more than 2 years, a further retrogression in the category was not expected before 2023. However, after evaluating, the USCIS seems to have received a higher-than-expected level of demand for EB-1 and EB-2 categories this year for other countries, which means that there will be even fewer additional numbers available to roll over to India in the EB-2 category," says Mumbai-based immigration lawyer Poorvi Chothani. With the US state department continuing to monitor these categories; and likely to make necessary changes; further retrogressions of EB-1, too, cannot be ruled out.