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take a number: the u.s. state department dramatically alters waiting times for indian nationals awaiting employment-based green cards

MSK Client Alert

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The Green Card Bakery

Imagine you discovered a bakery that made cakes and cookies so irresistibly delicious, customers would wait in line for years to buy them. Now imagine that at the door of the bakery there were two number-ticket dispensers, one that dispensed red tickets and one, reserved for certain qualified customers, that dispensed blue tickets. Imagine that the people at the very front of the red ticket line have been waiting since January 2003 – for some, more than a decade! Because the people at the very front of the blue-ticket line have been waiting only since September 2004, many people with red tickets want to change their tickets to blue ones. Now imagine that the baker walks out and tells the red-ticket people sorry, but your line is not moving forward at all, not at all – no cookies for you. However, he tells the lucky folks in the blue-ticket line that they are now serving anyone with a blue ticket who has been waiting since January 2008 or longer (i.e., anyone waiting since 2004, 2005, 2006, and 2007) that they can have their fill of cookies. Imagine how the people in the red-ticket line must feel, and how many of them would do anything in order to obtain blue tickets.

This is precisely what just happened in the world of employment-based permanent resident cases (green cards), where the baker, the U.S. State Department, has just announced that Indian nationals (people born in India, regardless of citizenship in another country) in the EB-2 category (the blue-ticket people) would be able to complete green card processing if they have been waiting since January 2008 or longer, whereas, previously, the backlog went all the way back to September 2004. However, folks in the EB-3 category (the red-ticket people), some of whom have been waiting since January 2003, did not see the dates move forward at all – not even by one day. This

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development affects only Indian nationals, who are a substantial number of the total number of individuals waiting for U.S. employment-based green cards.

For many years now, significant numbers of Indian nationals in the EB-3 category who have been waiting for years for green cards have been seeking ways to change to the EB-2 category. However, with the State Department's recent announcement, the incentive to change from EB-3 to EB-2 has intensified tremendously. As a result, employers who sponsor Indian nationals for green cards may be facing increased pressures to "convert" green cards from the EB-3 to EB-2 category. Although the wait times for individuals with pending green card applications from other countries are significantly less severe, employers may receive similar requests for "conversion" from individuals from countries besides India whose cases have been waiting in the EB-3 queue. EB-3 for individuals from countries other than India, China, Mexico, and the Philippines ("EB-3 Worldwide") goes back to January 1, 2009, comparatively much better than India – but certainly not as good as "EB-2 Worldwide" for which there is currently no queue at all.

This client bulletin will hopefully serve to explain the differences between the two categories and to outline what changing a green card category entails. It is highly technical, but employers of Indian nationals with pending green card petitions are wise to have a basic understanding of these issues, because the current circumstances will undoubtedly lead to many requests for a conversion application.

EB-2 versus EB-3

What do the terms "EB-2" and "EB-3" mean anyway? The "EB" part is simple because it means employment-based – a petition by an employer for an alien employee for U.S. permanent residence (a "green card"). "Two" and "three" are categories under the relevant statutes and regulations. There are other categories not to be discussed here, but "EB-2" and "EB-3" apply to most employment-based immigration cases. "EB-3" means the employer is petitioning for the alien worker to fill a job that requires for entry two or more years of experience or a U.S. bachelor's degree (or foreign equivalent degree) plus less than five years of experience. "EB-2" means a U.S. master's degree (or foreign equivalent degree) or a U.S. bachelors' degree plus five or more years of experience as an entry requirement. The same rules apply to nationals of all foreign countries – however, because of high demand, the waiting list for people from India, China, Mexico, and the Philippines is calculated separately. India's lines are traditionally the longest in the employment-based category, as their demand in that category is the highest.

When an employer files a labor certification application with the US Department of Labor as the first step in an employee's permanent-residence application process, the date that the application is initially filed eventually becomes the employee's "priority date." In other words, it is considered the date when the alien employee establishes his or her place in line. As long as the labor certification filed on the priority date is approved by the Department of Labor, and the subsequent immigrant visa petition filed with USCIS is also approved, the priority date sticks with the alien employee and establishes his or her place in line even if he or she becomes the recipient of a new labor-certification petition filed years later.

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The Big Jump: Nearly Four Years

Given the rules above, it is hardly surprising that, given a jump in the EB-2 category of nearly four years, with movement of not even one day in the EB-3 category, many Indian nationals with long-pending EB-3 cases may wish for their employers to file new EB-2 cases on their behalf. This is especially true because many with EB-3 cases have been waiting since far longer than January 2008. Accordingly, for those individuals with pre-2008 EB-3 cases, a new EB-2 approval would make them currently eligible to complete processing for a green card.

So the question becomes one of whether a foreign national with a long-pending EB-3 case is amenable to "conversion" to an EB-2 case and an "expedited" path to a green card. This is largely a fact-driven determination, which requires a complex analysis of the employee's educational attainments, job experience, and, equally importantly, the actual requirements of the job to be filled by the Indian national, and whether these requirements are feasible according to U.S. Department of Labor standards. Wages are extremely critical too, as one would expect that a wage offered to an individual in a job that requires an advanced degree or a high amount of experience would be a higher wage than one offered to an individual with a lesser academic degree or a smaller amount of professional experience. Another factor is the job's actual requirements – just because the alien employee possesses a master's degree, it does not necessarily mean that his or her job requires it. After all, one can have a Ph.D. degree and perform a job that requires no degree at all. So we must ask, do others in the company performing the same job also have master's degrees? Do others working elsewhere in the same field have master's degrees? Is an advanced degree really necessary to the requirements of the business? Why? These and other highly technical questions need be asked.

If it is decided that, now that it has been many years since the original EB-3 case was filed, the alien employee with a pending EB-3 permanent residency case does qualify for a more advanced EB-2 position, the employer has to begin the labor-certification process anew. This is true even though the priority date from the EB-3 case is preserved upon the filing and approval of an EB-2 case. However, the employer must file a completely new labor-certification case, first seeking a determination from the Department of Labor as to the prevailing wage, and then undertaking a comprehensive and good-faith recruitment effort for U.S. workers – through newspaper ads, online advertising, advertising with the state workforce development department, and more. The entirety of the cost of the recruitment, plus any attorneys' fees related to the labor-certification portion of the case, is the sole responsibility of the employer. The alien employee is not allowed to pay for or reimburse the employer for any such fees or costs.

It is difficult not to sympathize with the alien employee, who may have been waiting nearly or more than a decade for his or her green card, and who may be actively advocating, often along with his or her immediate supervisors, for a change of category. However, given that the significant costs of changing course from EB-3 to EB-2 fall exclusively on the employer, and there are not only the costs of recruitment to take into account, but issues of company-wide compensation amounts and policies, there is a lot for the employer to consider. First, whether the change would be feasible under the law and practicalities of labor-certification applications, but also whether it is affordable and worth it as a business decision. Given the complexity and the fact-driven nature of these situations, employers are recommended to withhold making any promises in this area until they have

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gathered the facts and discussed the issue thoroughly with an immigration attorney well-versed in employer-related permanent-residency cases.

MSK's Immigration Department has a very experienced, well-informed attorney staff who have filed hundreds of successful U.S. permanent-residency cases on behalf of employer clientele. Should situations such as those described above appear in your business, please contact us so that we may discuss with you the various issues and options you may have.

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