District Judge Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PRITISH MADHAVAN, *et al.*, Plaintiffs, v. UR JADDOU, Director of the U.S. Citizenship and Immigration Services; ANTHONY J. BLINKEN, Secretary of the U.S. Department of State, Defendants.	Case No. 2:22-cv-933-TSZ DECLARATION OF ANDREW PARKER

I, Andrew Parker, hereby declare under penalty of perjury, as follows:

1. I am the Branch Chief of the Residence and Admissibility Branch (RAB) within the Office of Policy & Strategy (OP&S) of U.S. Citizenship and Immigration Services (USCIS). As Branch Chief, I oversee the agency's policies for employment-based (EB) adjustment of status and coordinate on visa policy with the Department of State (DOS).

2. I have served as the Branch Chief of RAB since October of 2019. Prior to assuming my role as Branch Chief of RAB, I served as an Adjudications Officer within the Residence and Naturalization Division of OP&S for two years, where I was the lead subject matter expert on employment-based adjustment of status and the coordinator of our visa policy efforts with the DOS. Prior to my work with OP&S, I served as a Supervisory Immigration

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Services Officer at the Baltimore Field Office of USCIS. I started my career with USCIS as an Immigration Services Officer at the Baltimore Field Office in 2012.

3. I submit this declaration in order to provide an overview of the visa allocation process and the USCIS efforts (along with its partners at the Department of State) to utilize the available employment-based visas in fiscal year (FY) 2022. The matters contained in this declaration are based upon my personal knowledge and on information provided to me by the DOS and other USCIS employees in the course of my official duties as Branch Chief of RAB.

The Visa Allocation Process

Overall Limits

4. The Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537, governs how foreign nationals obtain visas to enter and permanently reside in the United States. INA § 201, 8 U.S.C. § 1151, establishes a maximum number of noncitizens who "may be issued immigrant visas or who may otherwise acquire the status" of a Lawful Permanent Resident (LPR) within a fiscal year for the family-sponsored, EB, and diversity visa categories. Congress established five EB categories, which are described in INA § 203(b), 8 U.S.C. § 1153(b). The five categories are made up of priority workers (EB1), members of professions holding advanced degrees or of exceptional ability (EB2), skilled workers, professionals, and other workers (EB3), special immigrants, comprised mainly of special immigrant juveniles, ministers of religion, and religious workers (EB4), and employment creation immigrants (EB5).

5. Under INA § 201(d), 8 U.S.C. § 1151(d), the worldwide level of EB immigrants for a fiscal year (FY) is 140,000 plus, as noted under section 201(d)(1)(C), the "difference (if any) between the maximum number of visas which may be issued under section 203(a) [1153(a)] (relating to family-sponsored immigrants) during the previous fiscal year and the number of visas issued under that section during that year." In FY 2021, the difference between the available family- sponsored visa numbers and the number of visas issued was 141,507. As a result, the FY 2022 EB annual limit is 140,000 plus 141,507, or 281,507. DOS published this official determination of the FY 2022 EB annual limit in the September 2022 Visa Bulletin.

Fall up/Fall Down

6. Under INA § 203(b), 8 U.S.C. 1153(b), Congress divides the overall EB annual limit between the five employment-based categories based on fixed percentages. EB1, EB2, and EB3 each receive 28.6% of the overall limit, and EB4 and EB5 each receive 7.1% of the overall limit.

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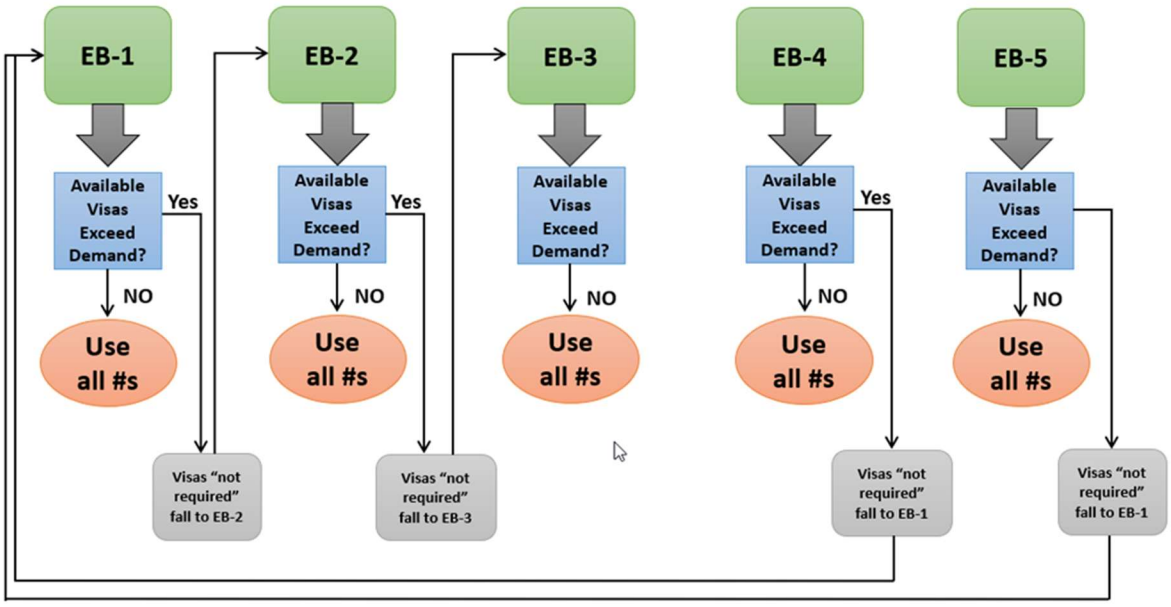
7. However, Congress also created statutory provisions in INA § 203(b), 8 U.S.C. 1153(b), which allow immigrant visas "not required" in a particular EB category to be made available in another EB category. These are colloquially referred to as the "fall up/fall down" provisions. Specifically, visas not required in EB4 and unreserved visas not required in EB5 are made available in EB1, visas not required in EB1 are made available in EB2, and visas not required in EB2 are made available in EB3. There is no provision in the statute making visas not required in EB3 available for another category. Please note that with the enactment of the "EB-5 Reform and Integrity Act of 2022" on March 15, 2022, Congress established special rules for the carryover of some unused EB5 visas from one fiscal year to the next. As a result, not all EB5 visas that are "not required" in that category can be made available in EB1. Here is an overly simplified visualization of the "fall up/fall down" statutory provisions:



8. During FY 2022, the "fall up/fall down" provisions resulted in additional visas being made available in EB2.

Per-Country Limits

9. Under INA § 202(a)(2), 8 U.S.C. § 1152(a)(2), "the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 [1153] in any fiscal year may not exceed seven percent (in the case of a single foreign state) or two percent (in the case of a dependent area) of the total number of such visas made available

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under such subsections in that fiscal year." Accordingly, there is a 7 percent annual per-country limit that applies to all of the family-sponsored and EB preference categories combined. The 7 percent per country limit does not apply on a per-category basis and does not apply to the employment-based or family-sponsored visas in isolation. For example, the sum of the family-sponsored and EB limit for FY 2022 is 507,507, a figure reached by taking the EB cap of 281,507 for FY 2022 and adding the 226,000 family-sponsored cap. Natives of a single foreign state may receive up to 7 percent of that total, or 35,525 visas. However, if natives of that single foreign state only use, for example, 5,000 family-sponsored visas, they could use 30,525 EB visas, divided in any way between the various EB categories. Currently, the countries that are subject to the 7 percent per country cap are China, India, Mexico, and the Philippines.

10. Further, under INA § 202(a)(5), 8 U.S.C. § 1152(a)(5), if the number of available visas within a particular EB category exceeds the demand for those visas within a calendar quarter, then the remaining visa numbers in that particular category may be used without regard to the per-country limit in INA § 202(a)(2). This exception has applied every fiscal year since the establishment of the current statutory scheme by the Immigration Act of 1990 to at least two out of the three main EB categories (first, second, and third preference) and in most years has applied to all three. During FY 2022, the exception of INA § 202(a)(5), 8 U.S.C. § 1152(a)(5), has resulted in additional EB1 visas for both India and China, and additional EB2 and EB3 visas for India. To give an idea of the scale of this exception when it applies, in FY 2021, Indian nationals used over 50% of all EB1 visas, 47% of the EB2 visas, and 27% of the EB3 visas.

11. Here is a simplified illustration of how INA § 202(a)(5), 8 U.S.C. § 1152(a)(5), works in practice, with data for the EB2 category from FY 2016. In FY 2016, both China and India were subject to the overall 7% per country cap of INA § 202(a)(2), 8 U.S.C. § 1152(a)(2). However, in the EB2 category the exception of INA § 202(a)(5), 8 U.S.C. § 1152(a)(5) applied because the total number of visas available exceeded the number of qualified immigrants who could have been issued those visas were the per country cap to be applied. To put it plainly, there was not enough Rest of World demand to use the visas were the per country cap to be applied, and so the visas were made available without regard to the per country cap. This means that the visas that would otherwise go unused flow to the applicants with the earliest priority dates, in this case applicants chargeable to India. We can see that in FY 2016 for EB2, applicants chargeable to China received none of the visas that were made available under INA § 202(a)(5), 8 U.S.C. § 1152(a)(5), while applicants chargeable to India saw an increase of ~40% in their visa use.

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EB2	Visa Use FY 2016	% of the total
China	2,837	7%
India	3,930	10%
Rest of World	32,344	83%
Total	39,111	

Establishing a Final Action Date

12. When the amount of demand for a particular category/country exceeds the supply of visa numbers available, the category/country is considered "oversubscribed" and a visa availability cut-off date is established. The cut-off date is the priority date (the date upon which the underlying labor certification application was accepted for processing by the Department of Labor, or if exempt from a labor certification requirement, the date the immigrant visa petition was accepted for processing by USCIS) of the first applicant who could not be accommodated for a visa number. *See* 8 C.F.R. § 204.5(d). For example: if there are 3,000 visa numbers available for China EB2 and USCIS and DOS have demand from 8,000 applicants, then DOS needs to establish a cut-off date so that only 3,000 visa numbers would be allocated. The cut-off is the priority date of the 3001st applicant. Only persons with a priority date earlier than the cut-off date for their country/category have a visa available and may be approved for adjustment of status or issued an immigrant visa in a family-sponsored or employment-based preference category. *See* INA § 245(a), 8 U.S.C. § 1255(a). DOS publishes these cut-off dates in the Final Action Dates chart in the monthly Visa Bulletin. I note that this is an oversimplification of the process for setting the Final Action Dates. DOS, in collaboration with USCIS, will also account for a variety of complicating factors in establishing a Final Action Date. These include, for example, the potential that a certain percentage of applications will not be

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approved; accounting for noncitizens who have multiple pending applications in different categories; estimating and considering the number of family members who may decide to immigrate with the principal applicant[1]; and considering where applications are in the adjudication process and how likely they are to result in visa use in the immediate future. DOS and USCIS also must take into account adjustment of status applicants with multiple pending or approved petitions in different EB categories who may decide to transfer between categories based on which category seems most advantageous to them at any point in time.

13. Sometimes when DOS, in collaboration with USCIS, establishes a Final Action Date it results in retrogression. Retrogression is the term used to describe the backwards movement of a Final Action Date for a particular country or category from one month to the next. For example, in the July 2019 Visa Bulletin the Final Action Date for India EB3 was July 1, 2009. However, in the August 2019 Visa Bulletin the Final Action Date for India EB3 retrogressed to January 1, 2006. The effect of retrogression is to make visas available to a smaller population of applicants. DOS retrogresses a particular Final Action Date to ensure that visa use remains within the limits established by Congress and that visas within a particular queue (based on category and country of chargeability) are generally allocated to those with the earliest priority dates.

14. In establishing the EB3 Final Action Dates for India in the Visa Bulletin, DOS and USCIS shared data about the estimated available visa numbers and the pending demand in their inventories of immigrant visa applications (DOS) and adjustment of status applications (USCIS). The projected annual limit for EB3 India, an estimate of visa use, visas remaining, and USCIS pending inventory are as follows:

[1] Under INA 203(d), 8 U.S.C.1153(d), family members (spouses or children) receive visas in the same category and with the same priority date as the principal applicant. The visas used by derivative family members are subtracted from the annual limit. When a principal applicant and derivative family members apply for adjustment of status together, USCIS makes every effort to adjudicate the principal and derivative family members at the same time, but this is not always possible. If a Form I-485 of a derivative family member is deemed approvable and a visa number is not available, USCIS will request the visa number from DOS, but the case will remain pending until a visa number is available, DOS allocates it, and USCIS completes the adjudication. *See* Fiscal Year 2022 Employment-Based Adjustment of Status FAQs available at https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2022-employment-based-adjustment-of-status-faqs (last accessed August 31, 2022).

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Chargeable Country	Estimated Annual Limit	Visa Use through August 31, 2022	Estimated Visas Remaining in FY22, as of August 31, 2022	USCIS Inventory of Adjustment Applications (September 6, 2022)
India	12,700*	12,460**	240	24,736***

* For planning purposes, when establishing the Final Action Date in the November 2021 Visa Bulletin USCIS and DOS projected that during FY 2022 approximately 6,394 visa numbers would be distributed to EB3 Indian applicants through the operation of INA § 202(a)(5), 8 U.S.C. § 1152(a)(5). As USCIS noted previously, this number could increase or decrease based on EB3 visa use by applicants from countries other than India and China over the fiscal year. At this point in the fiscal year, this projection appears to be about 700 below where we will end up. Through August 31, 2022, EB3 Indian applicants have received 12,460 visas, and are on track to use approximately 12,700 visas.

** This total includes visas used upon approval of adjustment of status applications by USCIS as well as visas used upon immigrant visa issuance by DOS through consular processing. This is a preliminary estimate and subject to change. DOS will publish the official total for visa use by applicants chargeable to India in the EB3 category in the Annual Report of the Visa Office for FY 2022

*** While USCIS has adjudicated many India EB3 applications during FY 2022, a large portion of the reduction in inventory as compared to November 2021 is also due to applicants responding to the more advantageous EB2 Final Action Dates and transferring their pending applications from the EB3 to the EB2 category.

15. For example, the projected annual limit for EB2 India, an estimate of visa use, visas remaining, and USCIS pending inventory are as follows:

Chargeable Country	Estimated Annual Limit	Visa Use through August 31, 2022	Estimated Visas Remaining in FY22 as of August 31, 2022	USCIS Inventory of Adjustment Applications (September 6, 2022)
India	60,000*	57,214**	2,786***	39,627

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* This is a preliminary estimate and subject to change. While USCIS and DOS have used all available EB2 visas for FY 2022, the official total for visa use by applicants chargeable to India in the EB2 category will be published in the DOS Annual Report of the Visa Office for FY 2022.

** This total includes visas used upon approval of adjustment of status applications by USCIS as well as visas used upon immigrant visa issuance by DOS through consular processing. This is a preliminary estimate and subject to change. While USCIS and DOS have used all available EB2 visas for FY 2022, the official total for visa use by applicants chargeable to India in the EB2 category will be published in the DOS Annual Report of the Visa Office for FY 2022.

*** USCIS notes that as of September 6, 2022, there are no visas remaining for applicants from any country of chargeability in EB1 or EB2. Applicants chargeable to India in the EB2 category received at least 2,786 visas between September 1, 2022, and September 6, 2022.

16. The USCIS volume of pending adjustment of status applications far exceeds the visas available in the EB2 and EB3 categories for applicants chargeable to India. The same is true for applicants chargeable to China in EB2 and EB3. In addition, many noncitizens are in the queue for consular processing in these categories with DOS. As a result, in order to ensure that visa use will not exceed the available visas, DOS has imposed Final Action Dates for both countries in these two categories, as it has every month since August of 2007. This was accomplished as described in paragraph 11. USCIS and DOS reviewed the visas that remained available, and DOS set a Final Action Date that would allow the remaining visas to generally be issued to Indian and Chinese EB2 and EB3 applicants with the earliest priority dates while accounting for operational considerations at both agencies and the important goal of using all of the available EB visas. To be clear, there are not enough visas remaining available to provide one to every applicant with a pending adjustment of status or immigrant visa application who has a priority date earlier than the Final Action Date for their country and category in the Visa Bulletin. This is necessary to ensure that all of the available EB visas may be used before the end of the fiscal year because some applications will be denied, others require additional evidence, many do not yet have approved petitions, and for some other case-specific reasons may not be adjudicated before the end of the fiscal year. An apt comparison would be jury selection. While the goal is to have 12 jurors as well as some alternates, in order to reach this goal the court must begin the process with a much greater number of potential jurors.

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17. As a final piece of background information, USCIS notes that retrogression does not affect a noncitizen's place in what is commonly called the visa backlog, queue, or line. Whatever term is used, what we mean here is the pool of noncitizens and an applicant's place in that pool, all of whom are waiting for a visa to become available to them. There are actually many different queues, based on the respective immigrant visa categories and sometimes country of chargeability. To take a relevant example, a noncitizen enters the queue for visa availability in EB3 India with the acceptance for processing of a labor certification application with the Department of Labor. On that date, the noncitizen receives a "priority date" that determines their place in the queue. All of the steps that follow, including the approval of the labor certification application, the filing and approval of an immigrant visa petition by a prospective employer, and the filing of an adjustment of status application do not change the priority date or affect the noncitizen's place in the queue. That is set by the acceptance of the underlying labor certification application and never changes so long as the Form I-140 Immigrant Petition for Alien Workers is approved and the petition approval is not revoked for fraud or willful misrepresentation or based on a determination that the petition approval was based on a material error. *See* 8 C.F.R. § 204.5(e). If the India EB Final Action Date were to retrogress, it would not change the noncitizen's place in the queue. The noncitizen may still receive a visa when one becomes available to them based on their fixed priority date.

Addressing specific issues related to this action

18. In FY 2022, USCIS and DOS intend to use all of the available employment-based visa numbers. The two agencies have consistently stated that this is their goal, as it is every fiscal year, and USCIS remains committed to taking every viable policy and procedural action to maximize our use of all available visas by the end of the fiscal year.

19. Prior to the pandemic, the two agencies were generally successful in using the available employment-based visas. All figures listed below are publicly available and taken

from the DOS Annual Report of the Visa Office. USCIS and its partners at DOS have consistently used the available visas, with the exception of the first two fiscal years affected by the pandemic, and despite falling short of the overall annual limit in FY 2021, USCIS used 52% more employment-based visas than during a typical pre-pandemic fiscal year. These figures also demonstrate USCIS' ongoing prioritization of this workload. The agency, in response to the historic availability of employment-based immigrant visas and the challenges of the pandemic, has significantly increased the volume of employment-based adjustment of status applications it processes during a

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fiscal year.

Employment-Based Visa Number Use							
	DOS	**USCIS**	**Total**	**Annual Limit**	**Shortfall**	**DOS totals**	**Shortfall %**
FY 2015	21,613	122,339	143,952	144,796	844	143,952	0.58%
FY 2016	25,056	115,294	140,350	140,300	-50	140,350	-0.04%
FY 2017	23,814	115,790	139,604	140,000	396	139,604	0.28%
FY 2018	27,345	112,138	139,483	140,292	809	139,483	0.58%
FY 2019	28,538	112,048	140,586	141,905	1,319	140,586	0.93%
FY 2020	14,694	132,459	147,153	156,253	9,100	147,153	5.82%
FY 2021	19,779	175,728	195,507	262,288	66,781	195,507	25.46%

20. USCIS' current inventory alone would use all of the available visas in every category except EB5, and the agency is focused on putting this inventory into the hands of adjudicators. This is reflected in our visa use figures. USCIS and DOS are on track to use all of the available employment-based visas in FY 2022, setting records for employment-based visa use at both agencies. Through August 31, 2022, the two agencies have combined to use 263,510 employment-based visas (this is a preliminary estimate, subject to change). This left 16,490 employment-based visas available for use in September, of which 6,396 are reserved EB5 visas which carry over into the next fiscal year under INA § 203(b)(5)(B)(i)(II)(aa), 8 U.S.C. § 1153(b)(5)(B)(i)(II)(aa). In the previous four weeks (August 7 through September 4, 2022), USCIS has approved 43,543 employment-based adjustment of status applications, and this, combined with the efforts of our partners at DOS as they issue visas through consular processing, has us on pace to use all remaining employment-based immigrant visas before the end of this fiscal year.

21. As it focuses on using all the available employment-based visas, USCIS has prioritized all visa-available, petition-approved applications for adjudication. Due to the pending inventory of adjustment of status applications with USCIS, and the effects of the application of INA § 202(a)(5), 8 U.S.C. § 1152(a)(5), this prioritization has benefitted nationals of China and India, but particularly India. See chart below. Since Indian and Chinese applicants make up such a large share of the visa-available, petition-approved workload, any

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prioritization of such a workload necessarily benefits applicants from those two countries. Given the USCIS and DOS focus on using all of the available visas, and the fact that the statute operates to provide additional visas to applicants chargeable to India and China, our success in using those visas directly benefits applicants from India and China. This is demonstrated by the visa use through August 31, 2022, which shows the high volume of visa use by applicants from those countries. USCIS and DOS are succeeding in using the available employment-based visas, and this success inevitably results in many of those visas flowing to applicants from India and China.

USCIS and DOS Visa Use through August 31, 2022*			
	EB1	EB2	EB3
India	20,936	57,214	12,460
China	11,082	8,393	6,366

* This is a preliminary estimate and subject to change. The official total for visa use will be published in the DOS Annual Report of the Visa Office for FY 2022

22. Apart from the general benefits flowing to applicants from India and China from the agencies' focus on using the available visas, the agencies took actions in 2022 that directly benefitted such applicants. In order to have sufficient demand to use the available visas in EB2, DOS, in collaboration with USCIS, rapidly advanced the India EB2 date to allow additional applications and the approval of those applications. USCIS simultaneously implemented a new process to allow individuals who applied in one category to transfer to another category (at the agency's discretion, and with certain eligibility criteria), and almost all of the applicants taking advantage of the new process are Indian EB3 applicants who now wish to transfer their applications to the EB2 category. USCIS also engaged in a robust public communications campaign, specifically encouraging eligible noncitizens to consider submitting such new applications and transfers in order to help the agency use all of the available visa numbers. These efforts were successful, and such new filings and "transfers of underlying basis" requests have resulted in additional approvals in the EB2 category, primarily for applicants from India with older priority dates from previously approved EB3 petitions that are retained and applied to subsequent EB2 petitions consistent with 8 C.F.R. § 204.5(e).

23. On September 6, 2022, DOS made EB1 and EB2 visas unavailable for further issuance or adjustment of status approval because the agencies had reached the annual limit for FY 2022 in those categories. USCIS expects that DOS will within the week make EB3 visas unavailable for further issuance or

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adjustment of status approval because the agencies will have reached the annual limit. USCIS expects that at some point before the end of FY 2022, DOS will similarly make EB4 visas unavailable for further issuance or adjustment of status approval. The agencies are working diligently to use the remaining EB5 visas and expect to use all of the remaining numbers except for those in the newly-created EB5 reserved subcategories, which carry over to the next fiscal year. As noted immediately below, this lack of visa availability will be temporary, lasting only until the start of the new fiscal year, for applicants in most categories.

24. Based on current projections, which are preliminary, USCIS expects that in FY 2023 the following will be true of the employment-based Final Action Dates in the October 2022 Visa Bulletin:

- EB1 will likely remain current (visas available without restrictions based on priority dates) for applicants from all countries, including India and China.
- EB2 will likely remain current for applicants from all countries other than India and China.
- EB2 will likely advance for China.
- EB2 will likely retrogress for India.
- EB3 will likely remain current for applicants from countries other than India and China.
- EB3 will likely advance for China.
- EB3 will likely advance for India.

25. USCIS notes that individuals with pending adjustment of status applications, such as the plaintiffs, are not required to maintain their nonimmigrant status in order to retain eligibility for adjustment on the pending application. As long as they have pending adjustment applications, the plaintiffs are eligible for regular renewals of employment authorization based on 8 C.F.R. § 274a.12(c)(9) and travel authorization without paying a filing fee. Any applicants with pending adjustment of status applications who already have available visas based on the Final Action Dates chart have also already locked in their calculated ages under the Child Status Protection Act and will not age out of eligibility to immigrate with their family.[2] USCIS also notes that having a pending adjustment of status application is such a significant benefit to noncitizens that advocates have encouraged the agency to allow hundreds of thousands of applicants to apply for adjustment even though visas are not available to them and it would not result in their becoming lawful permanent

[2] *See* USCIS Policy Manual, Volume 7, Part A, Chapter 7 – Child Status Protection Act (https://www.uscis.gov/policy- manual/volume-7-part-a-chapter-7).

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residents.[3] The commenter describes having a pending adjustment of status application, even when visas are not available, as "ameliorative relief" rather than a state that causes harm to the applicant.

26. Given that the plaintiffs are all seeking visas in the EB2 and EB3 categories, the data shared concerning EB5 adjustment of status processing times at the California Service Center (CSC) has no relevance to their claims as EB1, 2, and 3 applications are not adjudicated there. USCIS notes that the reported processing times at the Texas and Nebraska Service Centers (TSC and NSC) for employment-based adjustment of status applications are long, and that between FY 2016 – FY 2022 the volume of employment-based adjustment of status applications adjudicated at the TSC and NSC has dropped. However, this is not evidence of a reduction in prioritization by the agency, but it is instead reflective of the transfer of this priority workload between operational directorates. FY 2016 was the last fiscal year in which EB1, EB2, and EB3 adjustment of status applications were adjudicated almost exclusively by the Service Center Operations Directorate (SCOPS). Beginning with adjustment of status applications filed on or after March 6, 2017, employment-based adjustment of status applications were adjudicated by the Field Operations Directorate (FOD). The gradual decrease in adjudications by the TSC/NSC in FY 2017-2020 was intentional, as the applications filed on or after March 6, 2017, were being adjudicated by FOD. The TSC/NSC were adjudicating only those older EB1, EB2, and EB3 applications (filed before March 6, 2017) that remained in their inventory, generally applications affected by visa retrogression. In March of 2020, the agency decided to return to a risk-based interview waiver determination for this workload. In January of 2021 some but not all of the workload transitioned back to SCOPS. Specifically, agency leadership decided that beginning on January 1, 2021, SCOPS would adjudicate adjustment of status applications filed concurrently with an underlying petition while FOD would adjudicate all employment-based adjustment of status applications not filed concurrently with an underlying petition. While this also involved the transfer of some pending adjustment of status applications from SCOPS to FOD (where the underlying Form I-140 remained pending with SCOPS), the initial transfer volumes were low (1,868 to the TSC and 659 to the NSC). In addition, concurrently filed adjustment of status applications received on or after January 1, 2021, were to be retained for adjudication at SCOPS. However, in order to use the available visas and best match the workload with the available resources, in FY 2021 and 2022 USCIS transferred significant volumes of visa-available, petition-approved employment-based adjustment of status applications from SCOPS

[3] *See* submission USCIS-2021-0004-6585, submitted in response to "Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input," 86 FR 20398 (Apr. 19, 2021) (available at https://downloads.regulations.gov/USCIS-2021-0004-6585/attachment_1.pdf).

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to FOD for adjudication. As USCIS has stated on its website, we continue to identify and transfer adjustment of status applications with approved petitions and available visas from the service centers to the Field Operations Directorate. We have not yet transferred all the files. We also approve thousands of new petitions linked to pending adjustment of status applications each week. If a service center has issued a Request for Evidence or is otherwise actively processing a pending benefit request, we may not transfer the file now, but we might transfer it later. As a result, some applications in EB1, EB2, and EB3 remain at the TSC and NSC for adjudication. These are the exceptions rather than the rule, and tend to be older applications with complex fact patterns. In Q3 of FY 2022, only 4% of all employment-based adjustment of status applications were adjudicated by SCOPS (according to an analysis by the USCIS Office of Performance and Quality), and many of these were religious workers/ministers of religion (EB4 categories) or EB5 applications which remain with SCOPS for adjudication.

27. FOD now adjudicates ninety-six percent of employment-based adjustment of status applications. Most visa-available, petition-approved applications that happen to be currently located at SCOPS are being transferred to FOD. Accordingly, focusing on the processing times at the CSC/TSC/NSC or CSC/TSC/NSC adjudication volumes fails to provide an accurate assessment of the agency's efforts or of how long the agency takes to process an employment-based adjustment of status application. As shown in the data above, USCIS has significantly increased the rate of employment-based adjustment of status adjudication over the past four years, and this year will be the highest ever in the history of the agency.

28. Given where USCIS is adjudicating employment-based adjustment of status applications, USCIS agency-wide processing times are more indicative of what applicants can expect. We acknowledge that we do not publish agency-wide processing times in the same format as the Service Center specific times cited by the plaintiffs. However, the USCIS Office of Performance and Quality has prepared agency-wide processing times to give context to the plaintiffs' claims. Given that processing times are heavily influenced by a variety of factors, some of which are specific to the adjudicative process of a given category and the facts of individual cases, we are focusing on recent agency-wide processing times in the EB2 and EB3 categories. In August of 2022, the agency-wide processing time for EB2 and EB3 adjustment of status applications combined was 21.7 months (at the 80th percentile). For EB2, the August 80th percentile processing time was also 21.7 months, and for EB3 21.4 months. The plaintiffs' applications had generally been pending for just over 21 months in August, which is in line with the applications USCIS has been processing.

29. Somewhat counterintuitively, the agency-wide processing times have increased as the fiscal year progressed even though the number of EB2 and

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EB3 adjustment applications that USCIS approved or denied sharply increased. In Q1 of FY 2022, the combined EB2 and EB3 processing time was 14.0 for the 80th percentile. The processing times during Q2, 15.6 months, and in Q3, 18.7 months. As we have seen in August, the figure is 21.7 months. Why have the processing times increased at a time when USCIS is adjudicating more of these applications than at any time in its history? Processing times increased because a significant percentage of the applications we are adjudicating in the EB2 and EB3 categories were filed during October and November of 2020, which is when the plaintiffs also applied. Those two months saw the highest receipt volumes of EB adjustment of status applications in the last 15 years, with USCIS receiving more than 100,000 applications in India EB3 alone. Since a significant percentage of the EB2 and EB3 applications in our inventory that we are adjudicating in such large volumes were filed when the plaintiffs filed, the agency 80th percentile processing time for a given month will likely be close to the time difference between that month and November 1, 2020. This will likely remain the case until applications filed during that time period make up less than 20 percent of our approval volume. During August of 2022, applications filed in October and November 2020 made up 41.5 percent of our approvals in EB2 and 23.7 percent of our approvals in EB3. For applicants born in India and China, during August of 2022 applications filed in October and November 2020 made up 52.5 percent of our approvals in EB2 and 67.0 percent of our approvals in EB3. To summarize, the USCIS 80th percentile processing times for EB2 and EB3 reflect that the agency is aggressively working through applications filed in October and November of 2020 where visas are available and the underlying petitions approved. Until applications filed in October and November 2020 make up a smaller portion of our available inventory, agency-wide 80th percentile processing times for EB2 and EB3 adjustment applications will continue to reflect this reality.

30. To the extent that the plaintiffs claim that the CSC's adjudications of employment-based adjustment of status applications have dropped significantly, it is worth examining why this might be the case. The answer is straightforward – there was a lapse in the statutory authorization for the EB5 regional center program from June 30, 2021, through March 15, 2022. USCIS accepted no new petitions or adjustment of status applications based on the EB5 regional center program during that time, and did not approve any of the applications that remained pending while the program was not authorized. In FY 2021, prior to the lapse in authorization, USCIS was on track to adjudicate just over 1,400 EB5 adjustment of status applications, in line with historical norms. The regional center program typically makes up almost all EB5 visa use – see, for example, the Annual Report of the Visa Office for FY 2019 showing 9,064 visas used through investments channeled through the regional

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center program and only 414 to other EB5 applicants.[4] During a time period in which visas cannot be issued to EB5 regional center investors, there will be very few EB5 adjustment of status applications approved.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

Dated: September 6, 2022

Andrew Parker

ANDREW PARKER
Branch Chief of RAB
OP&S, USCIS

[4] Table V (Part I) Immigrant Visa Issued and Adjustment of Status Subject to Numerical Limitations Fiscal Year 2019, Dept. of State, available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport%20-%20TableV.pdf

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