
Retrogression Expanded and E-3 Visas Made Available

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The past few weeks have brought news to the immigration world, although most of it has not been good. The Department of State published its visa bulletin for October 2005, making it clear that foreign nationals of India and China will have to wait many years before receiving permanent residency, as will all foreign nationals with a third-preference designation. On the other hand, the new renewable E visas for Australian temporary workers are now available, which hopefully will ease some burden on the cap-restricted H-1s.

Visa Numbers Published

The new visa bulletin, listing numerically, limited visa numbers that will be available during October 2005 (the beginning of fiscal year 2006) is bad news for many people. Ironically, the cause of the mass retrogression is the increased functioning of the backlog reduction centers, which have effectively used available visa numbers with greater speed than in the past. As a result, the Department of State is forcing the adjudication of petitions for nationals from places that have exceeded their numerical limits to wait until new numbers become available (commonly known as "retrogression").

Specifically, for employment-based preferences (e.g., labor certifications and related petitions), no immigrant visa numbers are available for nationals of China or India in any of the first three preference categories, which include individuals with first preference, such as Nobel Prize winners or outstanding researchers. Third-preference petitions are now unavailable for foreign nationals of any country (third preference includes skilled workers, professionals and other workers with a bachelors-level degree or below). This means that until new numbers become available, no foreign nationals in these categories will receive green cards--the current wait is at least four years for foreign nationals and almost eight years for Indian nationals. Thus, the only foreign nationals who may file employment-based Form I-485, Application to Register Permanent Residence, are nationals of countries other than China and India in first or second preference (reserved for foreign nationals holding advanced degrees or persons of exceptional ability). All Form I-485s already filed for foreign nationals in categories with retrogression will be retained but will remain adjudicated until new visa numbers are issued. Such applicants will continue to be eligible for work authorization and advance parole documents until such time as their petitions are adjudicated.

E-3 Work Visas Now Available

Following the May 11, 2005, legislative enactment of the new E-3 visa category, on September 2, 2005, the US Department of State published its final rules establishing the procedures for Australian nationals and their families to obtain these highly sought after E-3 temporary work visas. Although similar to H-1Bs in their designation for specialty occupations, the E-3 visas have several advantages. Uniquely, E-3 visas may be obtained directly from the consular office, rather than from US Citizenship and Immigration Services (USCIS) like other employment-based visas. In addition, spouses of E-3 visa holders may obtain Employment Authorization Documents (EAD) to work in non-specialty occupations, and E-3 visas may be renewed indefinitely. Although the E-3 category is limited to 10,500 visas annually, only the principal applicant, and not his or her dependants or spouse, is counted against that limit.

To obtain one of the new visas, an Australian national must submit an approved original Labor Condition Application (LCA) from the Department of Labor (DOL) to the consular officer, together with Form DS-156, Form DS-157 (a specialized form for E-3 applications may be developed in the future), evidence of the alien's academic or other qualifying credentials, and a letter from the employer stating that the applicant will be engaged in work in a specialty occupation and will be paid the actual or prevailing wage of the position.

These rules became effective on the date of publication and individuals can begin applying for the visas immediately, although not all consular offices are accepting the applications at this time.

For more information on these and other immigration matters, contact WilmerHale's immigration group.