

# **EB-2 Story**

## **India, China and the “Otherwise Unused Employment Visas Numbers**

### **Is the Visa Office Discriminating Against China? (Short Answer Is “No”)**

*courtesy of Jay Solomon*

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***The State Department is about to start allocating more than 12,000 extra visa numbers to EB-2 applicants. Most will go to applicants from India. The EB-2 India date in the May Visa Bulletin will advance for the first time since September 2010. EB-2 India and China may continue to advance for the rest of the fiscal year, though they are unlikely to pass December 2006.***

### **The Back Story**

There are about 140,000 employment-based visa numbers available for fiscal year 2011. Each independent country of the world is limited to no more than 7% of that total. There are five employment-related preference classifications, with each allocated a certain percentage of the total. The second preference (EB-2) is allocated 28.6% of the total.

### **Visas Are Issued in Priority Date Order**

Visas numbers are made available in priority date order within each preference classification without regard to the country of chargeability of the applicant. There is an exception for those countries which are expected to reach their 7% limitation within a fiscal year. Applicants from those countries are allocated visa numbers within preference categories.

### **So Why Is EB-2 for India and China Backlogged, while the Rest of the World Is Current?**

India and China are both expected to reach their 7% limitation in fiscal year 2011 based on the “reasonable estimates” of visa usage the Visa Office is permitted to make by law. INA §203(g). In fact, India had already reached its 2011 EB-2 allocation by April 2011, and China is well on track to utilize its entire allocation by July. This means that India and China are limited to no more than 28.6% of their entire country limitation in EB-2. Thus, even though the rest of the world is “current,” the China and India EB-2 cutoff dates are currently set to 2006 to manage the approximately 2,800 visas typically available under the EB-2 annual limit for each country subject to the 7% limitation.

## **When It Rains Visa Numbers ...**

The law provides that if the 140,000 employment-based visa numbers are not used, the extra visa numbers are to be *utilized without regard to the 7% per country limitation*.

The law also provides that unused visa numbers from EB-4 and EB-5 will be added to the EB-1 total, and unused EB-1 visa numbers become available for EB-2. Of course, visa numbers aren't "unused" until the fiscal year ends on September 30, but the law provides that the Visa Office can allocate visa numbers during the year based on reasonable expectations of usage.

Because of a drop in overall employment demand, particularly in EB-1, the Visa Office is currently estimating at least 12,000 extra visa numbers will be available for EB-2 this year. And those 12,000 numbers can now be considered for potential allocation without regard to the EB-2 per country limitation which otherwise affects India and China.

## **Where Do the Additional 12,000 EB-2 Numbers Go?**

By law, *the extra 12,000 EB-2 numbers are made available to the entire world in priority date order*. INA §203(e). And they are *allocated without regard to country of chargeability*.

The "current" EB-2 availability for countries other than India or China indicates that the demand from those countries is met from the base 28.6% allocation, without the need for extra numbers. *This leaves all 12,000 extra visa numbers to be utilized by India and China.*

By law, the 12,000 "otherwise unused" numbers which will be available for EB-2 in 2011 are allocated in priority date order. The law provides that they are allocated without regard to the per country limits once the State Department determines that country has reached its EB-2 limit.

There are at least 17,400 applicants who have filed, or who are ready to file EB-2 adjustment of status applications and whose priority dates are in calendar year 2006. For the most part, these are applicants who filed for adjustment of status in July or August 2007 when the Visa Bulletin reported EB-2 as "current" for every country, but whose applications could not be completed because of EB-2 retrogression for India and China. In addition, there are an unknown number of applicants with 2006 priority dates who have "upgraded" from EB-3 to EB-2 by filing new PERM applications and preference petitions. And there are an unknown number of applicants with approved EB-2 petitions who do not have pending adjustment of status applications.

There are tens of thousands of additional applicants who have priority dates subsequent to 2006.

*The 12,000 "otherwise unused" numbers will be fully utilized by those with 2006 priority dates.* Of the 17,400 presently "known" applicants, 13,200 are from India, and

4,200 are from China. We would therefore expect that about 75% of the applicants who would benefit would be from India. However, there are substantial numbers of Indian applicants whose priority dates are presently not current, but earlier than any China EB-2 applicant whose priority date is available.

As of March 2011, the EB-2 priority date from China is July 8, 2006 and India is two months behind at May 8, 2006. The EB-2 priority date for India will advance until either the 12,000 visa numbers are used, or until it becomes equal to the China EB-2 date. The China and India EB-2 dates will then advance together. In April (and for the next few months), India EB-2 will be earlier than China EB-2. *We would therefore expect India to benefit from more than 75% of the extra 12,000 EB-2 numbers because we believe more than 75% of those with the oldest EB-2 priority dates are from India.*

### **So Is the Visa Office Discriminating against China?**

If more than 75% of the “otherwise unused” visa numbers were allocated to India instead of split between India and China, would it mean the Visa Office discriminating against China? Is it favoring India? The answer is that **the Visa Office is not discriminating against or favoring any country in allocating the “otherwise unused” numbers. It is following the law.**

The law requires the “otherwise unused” visa numbers to be allocated in priority date order. There are more applicants from India than China with older priority dates. The applicants with the older priority dates will get the visa numbers first. That is the law. Those are the applicants who have waited the longest. Most of those are from India.

There are claims that *this somehow violates the anti-discrimination provisions of the INA* which provides that no person shall be discriminated against in their preference or priority classifications because of their country of birth (except for the per country limits which don't apply as to the “otherwise unused” numbers).

*It clearly does not.* The allocation of extra numbers is done by the Visa Office without regard to a person's nationality or country of birth. The allocation is made by “place in line,” or priority date, as required by law. The people who have waited the longest go first. That is the law. To give half the extra numbers to persons from one country and half to persons from another would violate the law.

Sharing the otherwise unused visa numbers equally between India and China would mean that someone from India with an older priority date would wait longer than an applicant from China, and that would violate the anti-discrimination provisions of the INA. Applicants from both countries are subject to the 7% limitation, which does take into account country of origin. That is the law. But the law does not provide for extending that discrimination to the otherwise unused visa numbers which fall through to EB-2.

Allocating the otherwise unused visa numbers by priority date and not by country is a requirement of the law - and it is not discriminatory.