



NUMBERS MADNESS

Posted on April 23, 2007 by Cyrus Mehta

by

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March was indeed a month of madness for immigration lawyers. We had to balance a number of very pressing concerns – the need to prepare hundreds of H-1B visa petitions so that they were received by the USCIS on April 2, 2007, the April 1, 2007 deadline to submit all RIR Conversion Requests to the Department of Labor, and the competitive desire to craft the perfect pool entry for the NCAA college basketball tournament. Thankfully for my employer and clients, the latter concern came to an abrupt end early in March when my top pick, the College of the Holy Cross, was dominated in the first round by Southern Illinois. My delusion that the little guy, my alma mater, could win it all quickly put me back to work. If only employers of other firms were so lucky!

Foolishly, immigration practitioners thought that the work load would ease up in April. It hasn't. April has proven to be just as maddening. Unlike March, this month is not defined by filing madness, but rather numbers madness.¹ For example, the Fiscal Year 2008 H-1B cap of 65,000 visas was reached on April 2nd. On April 12th, the USCIS conducted a lottery to determine which lucky H-1B numbers would be processed. In the middle of April, the Department of State issued its May Visa Bulletin showing both movement and unavailability for employment-based immigrant visas numbers. On April 10th, the Secured Knowledge, Innovative and Leadership (SKIL) Act of 2007 was introduced in the Senate to increase the number of H-1B non-immigrant visas and employment-based immigrant visas. These developments on visa numbers have led to phones ringing off the hook, and have assigned us the difficult task of explaining to clients the flummoxing² numbers game.

The following highlights some of my recent conversations with clients about

numbers madness:

Employer: I don't get it. Our H-1B petition was received on April 2, 2007. Why are we not guaranteed a visa if the case is approvable?

Wise Lawyer (in cryptic voice): Well, it's all about the numbers. Yours might be an unlucky one.

Potential Employee: My future employer tells me that my petition was not accepted by the H-1B lottery. My friend read on the internet that Congress just increased the numbers. So, will my case will be processed now?

Wise Lawyer: Sorry, son, those aren't real numbers. Have your boss send a letter to Congress, urging them to pass the SKIL Bill.

Employer: We filed a labor certification application for our employee three years ago. Why do we have to keep renewing his H-1B visa? Shouldn't he have a green card by now?

Wise Lawyer: No sir, he doesn't have a number. His priority date isn't current, so keep sending those filing fees to the USCIS!

Employee: I was born in India, but am a Canadian citizen and have a Master's Degree. Why can't I file my I-485 today?

Wise Lawyer: Canada's a nice place, but you, dear friend, are stuck with the Indian numbers.

These conversations are draining for all parties involved. It is extremely difficult to understand the significance of the numbers, how they move forward, how the caps are reached, where they stand today, how to position yourself to get a good number, etc. The following is offered to provide some explanation of the numbers game and hopefully give employers and employees a better understanding of where they stand in this conundrum.

What's up with the H-1B numbers?

It has been widely reported that the H-1B cap of 65,000 visas for Fiscal Year 2008 was reached on the first day that the USCIS accepted petitions for filing.³ According to a USCIS Press Release, 123,480 cap subject petitions were properly filed on April 2 nd and 3 rd – almost twice the number of visas available.⁴ All 123,480 petitions were assigned a “unique numerical identification number” and entered into a computer-generated lottery to select

65,000 lucky petitions for processing. If the gods looked positively on your “unique numerical identification number,” then your case won the April 12 th lottery and is now being processed. If the gods were not working in your favor that day, then your case will be returned to you with the relevant filing fees.

Employers should be advised that even if they received a receipt notice for an H-1B filing, their petition may not be one of the lucky 65,000. Any receipt notice dated prior to April 12, 2007 should be considered void insofar as the H-1B lottery is concerned. Also, if the Employer’s checks for filing fees were cashed prior to April 12, this too does not indicate that its petition was accepted for processing. April 12, 2007 is the operative date. An Employer will only know if its “unique numerical identification number” hit the jackpot if its I-797 Notice of Action reflects a notice date of on or after April 12, 2007. Checks that have been cashed will be refunded by the USCIS. All other checks will be returned to the Employer.

Unfortunately, the outlook is not so hot for Employers that filed in a timely manner (on the first day!) and did not win the lottery. Under the current system, these Employers will be precluded from filing new H-1B visa petitions for employees until April 1, 2008. Even if they file on that first day, their petitions will again be subject to the cap, and, if approved, will not allow the sponsored employees to start work until October 2008. In short, Employers face a gap of a year and a half before they can take on a new foreign employee in H-1B status. This has grave consequences for US businesses.

When will my green card number be current?

Like the H-1B program, the green card program is also subject to numbers caps. A green card number is connected to a priority date, which establishes an immigrant’s place in line for a visa. When an immigrant’s priority date becomes “current,” a number becomes available to him/her, and he/she can apply for the green card.

Almost every day, I am asked by a client when his/her visa number will become current. “How fast are the visa numbers moving forward? When will my number allow me to apply for the green card?” My explanation is never simple, and in fact, often leaves the client totally flummoxed!

Let me try to boil it down. The Immigration and Nationality Act (INA) provides only a limited number of immigrant visas under the family based and

employment based visa categories. INA § 201 limits the annual number of family sponsored visa to 226,000 and employment-based visas to 140,000. INA § 202 sets the per country limits. Every country in the world has the same number of visas available to it – roughly 25,620.⁵ Think about it. India, with a population of over 1 billion, has the same number of visas allocated to it as little Luxembourg, which has a population of approximately 465,000. Hence, huge backlogs plague countries like India, China, Mexico and the Phillipines. To illustrate this fact, the current visa date for a professional from India with an Advanced Degree is January 8, 2003 or before. This person must wait three to four years before filing for a green card. Our friend from Luxembourg, on the other hand, who has the same qualifications, is in a much better position. He is not subject to any backlogs. His visa number is current, allowing him to apply right away for permanent residence.

Further compounding the numbers backup is the rate at which the Department of Labor's (DOL) Backlog Elimination Center is approving labor certification applications. The DOL is processing labor certification applications at a record pace. Thousands of applications that have been stuck in a vacuum for three or four years are now being approved. An increase in approved labor certification applications means an increase in I-140 filings. It also means an increase in anxious employers and employees wanting to move forward on green card applications. As soon as one's number becomes available, he/she is quick to apply for permanent residence. This means that that per country caps fill more quickly, thereby threatening retrogression or unavailability.

Practically, where do green card visa numbers stand today? In mid April, the Department of State issued its May Visa Bulletin.⁶ Okay, the bad news first. The bulletin reports that the skilled "other worker" category will become completely unavailable in May and for the rest of the 2007 fiscal year. So, an unskilled worker who is eligible to file for permanent residence in April 2007 should submit his/her application in the next ten days as he/she will no longer be able to as of May 1 st. After May 1 st, the USCIS will not accept any skilled worker applications – even cases with very old priority dates.

Now for the not so bad news: the employment-based second preference category (EB-2), which provides permanent residence to professionals in positions that require an Advanced degree, remains current for all countries except for China and India. The current priority date for individuals from China

is April 22, 2005 and for those from India is January 8, 2003. Again, our friend from Luxembourg can apply today, while our friend from India is looking at a long wait.

If you think that the EB-2 situation presents a grim outlook for Chinese and Indian nationals, consider the outlook for Chinese, Indian and Mexican nationals qualifying under the employment-based third preference category (EB-3), which provides visas for professional and skilled workers. The May Visa Bulletin outlines their current priority dates as follows: India (May 8, 2001), China (August 1, 2002), Mexico (May 15, 2001). These workers are looking at a five to six year wait! On a positive note, if you are a professional or skilled worker from another country, there is some light at the end of the tunnel. The bulletin reveals significant advancement for them. The numbers jumped a full year, to August 1, 2003. As of May 1 st, those in this category with a priority date of August 1, 2003 or before will be at the front of the line and can apply for permanent residence.

Before singing a song of joy about this advancement, it is important to always be aware of threats of further retrogression and possible visa unavailability. Recall the discussion above about the thousands of recently approved labor certification applications. Also, consider those who have been waiting for years for their numbers to become available and now have current dates with the recent advances. All of these individuals are likely to rush to file after May 1 st. This will result in a record number of filings that may cause either retrogression or a meeting of the cap for the current fiscal year.

Will there be an increase in numbers?

So is there hope in sight? Will the numbers game ever end? Is it just a pipe dream to think that the numbers will increase?

There might be some hope. On April 10, 2007, Senator Cornyn introduced the SKIL Bill to the Senate. If passed, the SKIL Bill will provide significant relief in the tedious numbers game. The current draft increases the H-1B cap to 115,000 visas and creates a flexible system that adjusts with the market. It also exempts from the H-1B cap professionals with Advanced degrees (Master's or higher) from U.S. universities. Currently , there is a cap of 20,000 visas in this area.

Insofar as green card numbers are concerned, the SKIL Bill will increase the green card cap from 140,000 to 290,000 and allow unused visas to follow

forward. More significantly, the bill protects against the brain drain and exempts from the cap foreign national professionals with Advanced degrees from U.S. universities as well as those who have been awarded a medical specialty certification based on post-doctoral training and experience in the U.S. Also exempt from the cap are professionals who have earned Advanced degrees in science, technology, engineering or math and who have worked in the U.S. for at least three years in a related field. On this last exemption to the numbers cap, I can hear the chorus of IT professional singing, "Alleluia! God bless America!"

The SKIL Bill is an exciting piece of legislation, but readers, beware! It is only proposed legislation. Anything can happen in debate on the floor. Also, the bill is unlikely to stand alone. It will probably be attached to the final Comprehensive Immigration Reform (CIR) bill that will hopefully be presented to both houses of Congress this summer. If CIR dies, this too might die. The hope, however, is that if worse comes to worse, it has enough support that it will then be attached to an appropriations bill in the autumn. With our collective frustrations over the numbers, however, I wonder if we can even wait until the autumn.

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¹ By "numbers madness," I am not referring to the popular Mega Millions Numbers or the "the numbers" that are terrifying viewers of the hit television show, *Lost*.

² Stems from the word, flummox, which according to <http://www.dictionary.com>, means "to bewilder; confound, confuse." Flummox is the author's favorite word to describe confusing matters pertaining to immigration law. She started using it after hearing her employer use it in a

consultation. One does not hear it often in the United States. She believes her employer picked it up while studying in the United Kingdom. Her hope is that one day all Americans will embrace this wonderful word.

³ At the time that this article was published, the H-1B Master's Cap of 20,000 visas had not yet to been reached.

⁴ See <http://www.uscis.gov/files/pressrelease/H1Bfy08CapUpdate041307.pdf>

⁵ There are no limits on the number of immigrant visas available to immediate relatives of U.S. Citizens. This includes spouses of U.S. Citizens, parent pf U.S. citizens whose sons and daughters are over 21, and unmarried children of U.S. citizens who are under the age of 21. INA § 201(b)(2)(A)(i).

⁶ See http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html.