



## H-1B “rush” deadline approaching quickly. Make sure you are ready.

The annual H-1B rush begins on Tuesday, April 1st. The CIS has said that they expect to receive more H-1B petitions on the first day than there are quota numbers available. This means that once again there will be a lottery to determine which petitions will be selected for processing. Unlike previous years, the CIS also expects the special 20,000 supplemental quota for advanced degree graduates (the “masters cap exception”) from US schools also to fill on the first day.

As usual, we plan to have all of our H-1B filings prepared and ready to go well before the end of March. On Monday, March 31st, we will ship

them all off via overnight delivery so that they will arrive first thing in the morning on Tuesday, April 1st.

For beneficiaries with foreign degrees, it is particularly important that they obtain credentials evalua-

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tions early. Last year, we saw a last minute rush that resulted in many beneficiaries not being able to obtain evaluations in time for filing.

Those who have attended a college or university in the United States may

avoid this process by obtaining a transcript from the US school attended. Transcripts always contain credentials evaluations of all foreign college and university work. Not only is this far less expensive than obtaining a commercial credentials evaluation, but it is also preferred by the immigration service.

Finally, employers and beneficiaries alike need to be mindful of the fact that employment authorization for cases filed April 1st will not take effect until October 1st and beneficiaries must either remain in lawful status in the interim or go abroad and obtain an H-1B and return in October to begin work.

## FBI name checks in naturalization proceedings ruled illegal

The United States District Court for the Eastern District of Pennsylvania has consolidated a number of naturalization delay cases and is considering them as a group. These cases have collectively come to be known as the *Morcanu v. Mueller* cases.

Recently, in a stunning development, the court accepted the plaintiffs’ contentions that the CIS had no legal authority to require FBI name checks in naturalization proceedings. The court ordered the CIS either to drop the requirement, or go

through formal “notice and comment” rulemaking if they wish to continue the practice. This case is not binding outside of the district where it is being litigated, but it is likely to be followed by other courts around the country.

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### Special points of interest:

- The H-1B filing rush is coming.
- CIS FBI name check program ruled illegal in naturalization proceedings.
- CIS backs down on FBI name checks for AOS applicants
- There may be significant forward Visa Bulletin movement in the months ahead

## CIS announces that they will waive FBI name check results when they have been pending for more than 180 days.

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The CIS has been under increasing litigation pressure as a result of their FBI name check program. In case after case, they have been ordered to adjudicate long delayed applications within 60 days.

There has been considerable speculation that the “missing” FBI name checks were nothing more than an excuse for CIS inefficiency. Once case in particular, *Morcanu v. Mueller*, ultimately found that the CIS name check program was illegal.

Three weeks ago, in an admitted effort to head off an adverse decision in the *Morcanu* case, the CIS announced that it would begin adjudicating adjustment

of status applications where the FBI name check had been pending for more than 180 days.

Last year, the CIS reported that there

***“This ever-shrinking number of adjustment applications for which FBI name checks have been pending for more than 180 days validates the earlier speculation that this was never anything other than an excuse for CIS inefficiency.”***

were “hundreds of thousands” of applications that they were unable to close out due to missing FBI name checks. In recent litigation documents, that number was put at 54,000 such cases at

the Nebraska Service Center.

This past week, the CIS has lowered those numbers, first to 47,000 overall, and most recently 10,000 overall.

This ever-shrinking number of adjustment applications for which FBI name checks have been pending for more than 180 days validates the earlier speculation that this was never anything other than an excuse for CIS inefficiency.

The CIS has now asked that qualifying applicants wait until after March 10th to inquire about their cases. We are aggressively inquiring about all qualifying cases on behalf of our clients.

## Attorney certified I-140 consular processing as an alternative to CIS adjustment of status processing delays.

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CIS adjustment of status processing is and always has been slow. Presently, there are between 500,000 and 600,000 employment based adjustment of status applications pending with the CIS. In its best, most productive years, the CIS has never adjudicated more than 85,000 cases. The backlog is thus equal to at least *six years* of CIS productivity.

These numbers are not going to go away. The CIS has an existing, massive backlog of AOS applications. The CIS also has limited ability to process those pending applications. No matter how you do the math, some adjustment applicants are going to have to wait many years for a decision. That is a simple fact of life.

Adjustment of status applicants have two choices. They can simply wait—likely years for a CIS adjudication, or they can be proactive and get their cases closed out sooner.

As is discussed in the next article in this

Newsletter, there are but two factors controlling how long it will take for you to receive your green card: visa quota availability and the time needed administratively to process your application.

There is nothing that can be done about visa number availability, but there is a great deal that can be done about the time needed to process your case once visa numbers are available.

Consular processing permits a case to be processed almost to completion, pending only receipt of a visa number. When a visa number then becomes available, an interview is generally set within 45 days.

Many people ask if it is possible to initiate concurrent consular processing while keeping an application for adjustment of status active. The answer is yes. It is not only possible, many people do it.

The Department of State allows its consular posts to accept consular process-

ing immigrant visa applications on the basis of a complete copy of an approved I-140, together with the original I-140 approval notice.

In such cases, the applicant may continue to use his or her EAD and advance parole. Also, the Department of State has held that I-140 portability applies to those applicants who filed for AOS more than 180 days earlier and are now pursuing consular processing.

The procedure is not automatic. There are a number of technical requirements that must be fulfilled. Still, it is relatively easy to qualify for those who are interested.

This process effectively allows those who are proactive to have their processing completed as soon as visa numbers become available to them.

# What are the chances of significant forward movement in Visa Bulletin cutoff dates?

Without question, the most important factor in visa cutoff date movement is demand. You are probably thinking “OK, next you are going to tell me that they sky is blue.” This issue is much more complex than it appears at first glance. Most people look at things like the number of labor certifications filed, or I-140s approved and think that can gain an understanding of demand from those figures. They are wrong.

Demand is driven almost entirely by one factor and one factor alone: CIS productivity. If the CIS does not adjudicate cases, demand drops significantly. If the CIS pushes out record numbers of completed cases, demand soars. Again, demand is determined almost entirely by CIS productivity.

The recent ratcheting down of the CIS estimate of cases available to be adjudicated in the wake of their changed policy on FBI name checks is highly significant. A year ago, when they said that number was in the hundreds of thousands, we all saw massive potential demand. A couple of weeks ago, when the number became 54,000, it still looked pretty substantial. This remained so even when they dropped the number to 47,000. Now that it has gone down to 10,000 (with “maybe” an additional 15,000 – or not), the reassessment raised eyebrows. If there are only 10,000 cases that are ready for adjudication as a result of the changed FBI name check results policy, then the prospective demand is far lower than anyone anticipated previously.

The State Department creates cutoff dates in response to actual and reasonably expected demand. Last year, the State Department warned that they were expecting upwards of 80,000 approved labor certifications “with very old priority dates” as a result of the Department of Labor’s backlog reduction effort. The actual number of such cases turned out to be less than 10,000, as the others were either withdrawn or

superseded by subsequent PERM filings for the same individuals.

Faced with a combination of far fewer labor certification approvals and customary CIS slow processing of pending adjustment of status cases, the State Department realized that the actual demand would fall well below the au-

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thorized quota. To remedy the situation, the State Department rapidly advanced cutoff dates to the point where all EB categories became “current” in the fourth fiscal quarter (July). They did this so that their overseas posts could take up the slack between the actual demand resulting from CIS adjudications (approximately 85,000) and the maximum quota limit of 140,000 visas.

Since about 85% of all employment based immigrants use adjustment of status to acquire permanent resident status, they had to factor this into their calculations. This resulted in significantly greater forward movement of cutoff dates than would otherwise be the case. The result was that some individuals who had filed PERM cases in early 2007 and opted for premium processing of their I-140 petitions were able to obtain immigrant status before the end of September, 2007. Just about everyone who processed overseas had more recent priority dates than those who received adjustment of status.

A year ago, I advised our clients through our newsletter that they should prepare for rapid cutoff date movement in the Summer of 2007. Those who

followed that advice either received green cards last year, or were in a position to file for them when cutoff dates became current. A week ago, I would have assessed the odds of us seeing similar forward movement this year at close to zero. In the wake of the CIS sharply revising its estimates downward, I think that we now are going to see significant forward movement in worldwide EB3, with it likely being “current” in July. That being the case, I now think that we could see India and China EB2 move forward significantly.

Never confuse the potential demand resulting from the enormous CIS backlog of pending cases with the actual demand that results from CIS adjudications. If the CIS is proceeding at a pace that will result in their customary 85,000 adjudications this year, then that is the demand. It doesn’t matter that they have another half million cases in their backlog, their demand is only 85,000. If so, then the Department of State will have to act once again to prevent quota numbers from being wasted. Considering that when cutoff dates are advanced, most people will opt for adjustment of status, the cutoff dates will have to move far beyond the dates they would ordinarily reach in order to make sure that there are enough people filing overseas to exhaust the quota.

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If you would like to read more about this subject, please visit the thread where this appears in the Immigration Information Discussion Forum by [clicking here](#).

## Gotcher & Gotcher, LLP

15300 Ventura Boulevard  
Suite 507  
Sherman Oaks, CA 91403

Phone: 818-990-4922  
Fax: 818-804-4074

E-mail: [admin@gotcherlaw.com](mailto:admin@gotcherlaw.com)

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## Join the discussions in the Immigration-Information Discussion Forum

The [Immigration-Information discussion forum](#) is active. This forum is available to the general public and is not intended as a substitute for the direct communications with us to which our clients are entitled. Still, it is a good place to go and discuss issues and ideas.

Some of the more active topics recently have include [Predicted Visa Bulletin Movement](#)—a detailed discussion of the likelihood of forward movement in Visa Bulletin movement in the upcoming months. This thread begins with a short article that describes certain known factors and then speculates on where things might go from there.

Another, similar thread, started a week or so later, is [What are the Chances of Substantial Movement in Cutoff Dates This Year?](#) This thread builds on the information in the earlier thread, as well as incorporates new information.

Another technical article that deals with adjustment of status adjudications and

Visa Bulletin Movement is [Cutoff date movement and AOS processing: The Hows and Whys](#).

This article deals with the technical aspects of visa quota allocation and how cutoff dates advance and retrogress. It discusses the specific numerical allocations and puts specific numbers into the mix.

*The Immigration-Information Discussion Forum is again active. Come and lend your voice to the community discussion.*

Another set of articles adjustment of status applicants may find interesting is the set of threads found in the sub-forum titled [I-140 Job Portability](#).

This sub-forum deals with issues involving job portability for adjustment of status applicants who have had cases

pending for more than 180 days and now wish to change jobs or employers.

To keep things in perspective, we have added new forum areas dealing with [Agency Corruption](#) and [Criminality](#) (criminal immigration related acts committed by private individuals).

We have also created new forums for [College and University Faculty](#) and [College and University Staff](#). These sub-forums have been established to discuss the unique issues involving faculty “special handling” PERM labor certifications as well as employment based first preference and second preference labor certification waiver petitions.

Please visit the Immigration-Information Discussion Forum and add your voice to the ongoing community discussions.