



PRACTICE ALERT:
APRIL 2023 VISA BULLETIN CHANGES IMPACTING SIJS RECIPIENTS¹

March 24, 2023

On March 22, 2023, the U.S. Department of State (“State Department”) released the [April 2023 Visa Bulletin](#), in which it announced significant changes to the way certain employment-based visas are allocated. Because children granted Special Immigrant Juvenile Status (“SIJS recipients”) receive visas through the employment-based fourth preference category (“EB-4”), these changes impact how long SIJS recipients have to wait before they can apply for adjustment of status (a “green card”). These changes will go into effect on April 1, 2023. Practitioners representing SIJS recipients should consider whether there are steps they can take before April 1, 2023, to advocate for impacted clients.

How do the changes reflected in the April 2023 Visa Bulletin impact SIJS recipients?

The [April 2023 Visa Bulletin](#)’s employment-based preference charts eliminate the previous separate category for applicants from El Salvador, Guatemala, and Honduras—a category that was first created in 2016. Instead, individuals from El Salvador, Guatemala, and Honduras who are seeking employment-based visas (including SIJS recipients from those countries) will now be included in the category titled “All Chargeability Areas Except Those Listed.” The only country-specific categories found in the April Visa Bulletin’s employment-based charts are for China, India, Mexico, and the Philippines.

While SIJS recipients from El Salvador, Guatemala, and Honduras will see their final action dates advance by some months, the April 2023 Visa Bulletin also brings significant visa retrogression for SIJS recipients from all other countries who are awaiting green cards. In order to demonstrate the impact of these changes, the below chart compares the EB-4 final action dates (the category relevant to SIJS recipients) for different geographic areas for three separate months—November 2022, March 2023, and April 2023:

¹ This is a publication of the [End SIJS Backlog Coalition](#), a project of the [National Immigration Project \(NIPNLG\)](#), 2023. This practice alert is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The practice alert is not a substitute for independent legal advice provided by legal counsel familiar with a client’s case.

	All Areas Except Those Listed	China	El Salvador, Guatemala, Honduras	India	Mexico	Philippines
November 2022	Current	Current	March 15, 2018	Current	September 15, 2020	Current
March 2023	February 1, 2022	February 1, 2022	March 15, 2018	March 1, 2021	August 1, 2020	February 1, 2022
April 2023	September 1, 2018 **now includes individuals from El Salvador, Guatemala, Honduras**	September 1, 2018	[category eliminated]	September 1, 2018	September 1, 2018	September 1, 2018

What reason did the State Department give for these changes?

In the April 2023 Visa Bulletin, the State Department refers to a [public notice](#) explaining these changes. That notice states that the State Department is making these changes in order to comply with the Department’s current interpretation of the Immigration and Nationality Act (“INA”). The notice states that the agency’s previous interpretation of how annual per-country caps operate was incorrect and these changes have been made to follow the law.

What is the State Department’s new interpretation of the relevant INA provisions?

Under INA § 202(a)(2), applicants from any given country may receive no more than 7 percent of the total employment and family-based visas available in a given year. A country becomes “oversubscribed” if, in a given year, there is more demand than visas available. INA § 202(e) directs that when a country is oversubscribed, the number of visas from that country for any given preference category is restricted. This is distinct from the statutory default, which involves issuing visas to applicants within any given preference category simply by order of earliest priority date.

Under the prior State Department interpretation, the 7 percent per-country cap was calculated based on the annual available visas in the EB-4 category alone. Based on this logic, in 2016 the State Department took the view that EB-4 applicants (which includes SIJS recipients) from El Salvador, Guatemala, and Honduras were oversubscribed.

The State Department will now calculate the 7 percent cap based on the total annual number of available family and employment-based visas combined. Because El Salvador, Guatemala, and Honduras do not reach this overall cap, no limit will be imposed within the EB-4 subcategory. ***With this method of calculation, more visas will be available to SIJS recipients from El***

Salvador, Guatemala, and Honduras. This has led to a several months jump forward in the final action dates for individuals from those countries in the EB-4 category. However, as noted above, the consequence is also a generalized retrogression for applicants from all other countries.

China, India, Mexico, and the Philippines will continue to be listed individually within the subcategory of EB-4 visas because these countries have reached the 7 percent per-country limit in all employment-based and family-based categories combined.

What steps should practitioners representing SIJS recipients consider taking before April 1, 2023?

If an SIJS recipient's priority date is current² based on the March 2023 Visa Bulletin but not the April 2023 Visa Bulletin, practitioners should consider filing the adjustment of status application so that it is received before April 1, 2023.³ If an individual whose priority date is current in March 2023 (but not April 2023) does not file the adjustment application in March 2023, they will have to wait to submit their adjustment application until their priority date becomes current again at some unknown time, which could be years into the future. It is important to remember that even if the individual is able to file the adjustment application before the visa category retrogresses on April 1, the immigration agency cannot actually adjudicate the adjustment application (and issue a green card) unless the applicant's priority date is current.

SIJS recipients with current priority dates who already have a pending adjustment of status application should consider taking action now to push the relevant agency—USCIS or the immigration court—to adjudicate their adjustment application immediately, before April 1. For adjustment applications pending in immigration court, practitioners should consider asking the ICE Office of the Principal Legal Advisor (the attorneys who represent DHS in immigration court) to join a motion for expedited adjudication on the papers. For adjustment applications pending with USCIS, practitioners should consider reaching out immediately to the [USCIS Contact Center](#) and making an expedite request on the basis of "[urgent humanitarian reasons](#)." Practitioners should be creative when arguing why USCIS should expedite, citing for example the impact of years of limbo on school prospects, the ability to age out of foster care, any known or potential impacts on the mental or physical health of the SIJS recipient, the client's desire to join the military, etc.

² For March 2023, USCIS is following the [filing date chart](#). Thus, children from El Salvador, Guatemala, and Honduras with priority dates before April 15, 2018, may file an adjustment application; children from Mexico with priority dates prior to September 1, 2020, may file; and children from all other countries with priority dates prior to March 1, 2022, may file.

³ SIJS recipients who are not in removal proceedings, as well as those in removal proceedings who have been classified as "arriving aliens," file their adjustment applications with USCIS. Those in removal proceedings (other than "arriving aliens") file their adjustment applications with the immigration court. Having a pending adjustment of status application makes the applicant eligible to apply for a work authorization (a "work permit"). While under current USCIS policy, many SIJS recipients in the visa backlog receive a grant of deferred action, which provides a separate basis for seeking a work permit, it may be preferable not to have to rely on discretionary deferred action for work authorization.

Is deferred action available to SIJS recipients subject to visa retrogression as of April 1, 2023?

Under a [2022 USCIS policy](#), SIJS recipients who lack a current priority date but who have an approved SIJS petition are eligible for a discretionary grant of deferred action by USCIS. Individuals granted deferred action are eligible to apply for a work permit. There is no process for applying for this type of deferred action; instead USCIS issues deferred action in eligible cases automatically. SIJS recipients whose priority dates were current and then retrogressed are eligible for consideration for deferred action. Practitioners with SIJS clients whose priority date has retrogressed but who do not receive a deferred action decision from USCIS can reach out to the [USCIS Contact Center](#). For more information on SIJS-based deferred action and work permits, see the [Coalition's FAQ](#) on that topic.

Where do we go from here?

The State Department's new interpretation of the relevant statutes demonstrates why SIJS recipients should not be subject to the numerical limitations imposed on the EB-4 category. In order to end the SIJS backlog, which now seriously harms all SIJS recipients from all countries, the INA must be amended to align with the original humanitarian intent of the SIJS statute by exempting SIJS recipients from the employment-based visa caps. Keeping the numerical limitations for SIJS recipients in the EB-4 category is not logical and leaves immigrant children and youth unable to promptly secure the permanency Congress intended for them. Please call your Congress member and ask them to co-sponsor the [Protect Vulnerable Immigrant Youth Act](#), which will be reintroduced this congressional session.

The [End SIJS Backlog Coalition](#) continues to organize impacted youth and advocate for the exemption of SIJS recipients from the EB numerical limitations through all possible legislative vehicles.

The [End SIJS Backlog Coalition](#) is a nationwide coalition of directly impacted youth and allied advocates seeking to eradicate the SIJS backlog legislatively, and in the meantime mitigate its worst harms through administrative reforms. To find out more and to join the Coalition, please visit sijbacklog.com or email rdavidson@nipnl.org.

**APPENDIX/POSTSCRIPT:
Follow Up Information Provided to Coalition by USCIS in June 2023**

On March 29, 2023, after the Coalition published the above Practice Alert, some Coalition members attended a stakeholder meeting hosted by USCIS and the State Department about the April 2023 Visa Bulletin changes' impact on Special Immigrant Juveniles. In June 2023, USCIS provided the Coalition the below answers to questions that Coalition members posed during and after the meeting. The first Q&A on the below document, concerning responding to USCIS Requests for Evidence (RFE) seeking a medical exam when an applicant's visa retrogressed after the RFE was issued, may be of particular interest to practitioners representing SIJS youth.

Q&As following Special Immigrant Juvenile Stakeholder Briefing –
Changes to the Visa Bulletins 4th Preference Category
March 29, 2023

End SIJ Backlogs Stakeholder Follow up Questions

Q1. For SIJS recipients with pending adjustment applications who have received an RFE for a medical exam but as of April 1 no longer have a current priority date, how should they respond to the RFE? As you know, it may take years for their cases to be adjudicated and it is likely that their medical exam will expire during the wait time. We would like to urge USCIS to issue clear guidance that for SIJS-based adjustment of status cases subject to retrogression as of April 1, they do not need to respond to the RFE with a medical exam and the case will not be denied based for failure to respond to the RFE. A new RFE should be issued when the case is closer to being adjudicated. It would be helpful for USCIS to provide guidance on this issue ASAP as a number of impacted SIJS recipients are coming up on RFE response deadlines.

A1. USCIS recognizes that an immigration medical examination may expire prior to a visa becoming current because more than 2 years have elapsed since the civil surgeon signed the Form I-693. Thus, USCIS has issued guidance to adjudicators that they should not deny for failure to respond to an RFE that solely requests a Form I-693 if the visa regressed after issuance of the RFE or during the period to respond to the RFE. USCIS will issue a new RFE for the Form I-693 when a visa becomes current.

Q2. For SIJ recipients whose priority dates retrogressed on April 1, what steps will USCIS take to ensure that they are promptly considered for deferred action? We would urge USCIS to issue a deferred action decision as soon as possible for these cases.

A2. USCIS is working to ensure all SIJ-classified noncitizens newly eligible for consideration of deferred action as a result of the visa retrogression receive a timely decision on deferred action soon.

Q3. We understand that the 7% per country cap was mistakenly applied to the EB-4 category. Was the same mistake also made in the other EB categories? Can you explain how the INA 202(e) on provision on pro-rating works? Many practitioners, including those in our coalition, would appreciate a better understanding of how DOS applies the 202(e) provision, and how it interacts with 202(a)(5)(a). During last week's meeting, Andrew Parker mentioned a webinar that had been created on this topic and it seemed there would be verification of whether this webinar was public/shareable. We would be grateful for any webinar or other public stakeholder information session DOS and USCIS might offer on this topic.

A3. The U.S. Department of State's (DOS) Visa Bulletin for April 2023 available at: <https://travel.state.gov/content/travel/en/legal/visa-lawo/visa-bulletin/2023/visa-bulletin-for-april-2023.html> contains information regarding statutory numbers for preference immigrant visas. DOS also published a federal register notice (FRN) on March 28, 2023, explaining certain changes to the Final Action Dates and Dates for Filing for the Employment-Based Fourth Preference Immigrant Visa Category. You can access the FRN here: <https://www.govinfo.gov/content/pkg/FR-2023-03-28/pdf/2023-06252.pdf>. Regarding the webinar, we consulted with CISOMB and neither agency recorded the webinar at the time, so

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unfortunately, we cannot share a recording. We appreciate this suggestion as a topic for a future engagement.

ADDITIONAL ANSWERS TO LIVE QUESTIONS ASKED DURING MEETING

Q1. Will SIJ-classified noncitizens impacted by the visa retrogression get deferred action consideration after April 1st since a visa is no longer available to them?

A1. USCIS has been and will continue to consider deferred action for all SIJ-classified noncitizens who became newly eligible for consideration as a result of the April Visa Bulletin retrogression. USCIS will also continue to consider deferred action for all those SIJs who become newly eligible in any future retrogressions.

Q2. You may not realize the harm to SIJ-classified noncitizens from the Northern Central American countries that not making this correction with the Visa Bulletin earlier has had. If this had been fixed before October 2022, they would not have to wait another year.

A2. We estimate that few additional applicants from the Northern Triangle Countries would have been eligible to apply in FY 2023 even if the correction had been made in October 2022, given the recent history of the Visa Bulletin and USCIS' pending EB-4 inventory. Specifically, USCIS already had a large inventory of adjustment of status applications at the beginning of the fiscal year for whom visas were unavailable (after a retrogression in March 2022). It is unlikely that the dates in the Visa Bulletin would have exceeded that previous high-water mark even if DOS had made the correction at that time for this reason.

Q3. Can you discuss impact on oversubscribed countries, India and Mexico?

A3. At the moment, applicants from India and Mexico are subject to the same Final Action Dates as applicants from all other countries. The available visas will generally be allocated in priority date order, which means that, with a few exceptions, the visas will for the moment generally be allocated to applicants from El Salvador, Guatemala, and Honduras.

Q4. Why did ROW retrogress so dramatically from 2022 to 2018?

A4. The Final Action Date for EB-4 in the April Visa Bulletin was based on the pending inventory at both agencies and the remaining visas for FY 2023 as well as processing estimates. The date retrogressed for ROW because applicants from El Salvador, Guatemala, and Honduras are included in ROW, and they have older priority dates.

Q5. Will there be fewer visas available to Northern Triangle due to this change?

A5. No, as discussed during the engagement this will increase the number of EB-4 visas allocated to applicants from El Salvador, Guatemala, and Honduras in both the short and long term.