CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

LET'S HOPE THAT'S WHAT IT MEANS: DOES EXECUTIVE INITIATIVE REALLY PROVIDE FOR EARLY ADJUSTMENT OF STATUS?

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By Gary Endelman and Cyrus D. Mehta

Most of the commentary and attention on the recent blizzard of White House and DHS memoranda on immigration reform quite properly fell on executive initiatives to bring the undocumented and their parents in from the shadows. This is what the Administration clearly cares most about for logical political reasons. The White House perception, rightly or wrongly, is that the ever growing Hispanic constituency that the President wants to win over simply is not deeply concerned with having a more rational legal immigration system. Yet, there are a variety of positive steps that DHS Secretary Johnson outlined which do offer real benefits to workers and employers alike who know suffer from the sclerotic effects of chronic visa backlogs. The most promising innovation is the anticipated ability for the beneficiaries of approved I-140 petitions to apply for adjustment of status even in the absence of current priority dates. That, we all enthused, was something to rally round..

Now that we have had a chance to exhale, a nagging doubt clouds this emerging optimism: Is early adjustment of status really what is contemplated? While White House briefings and talking points certainly suggested this was the case, a stubborn yet deliberate reading of the various memoranda uncovers no explicit mention of early adjustment, only an intention to foster clarity, predictability, and transferability once the USCIS has approved an employment-based immigrant visa petition, Form I-140. DHS Secretary Johnson offers only the following:

> *" I direct that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of*

> *approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers."*

Some doubting voices now raise up the possibility that the next step after I-140 approval will fall short of I-485 submission, perhaps only going so far as to allow for the granting of advance parole travel permission and issuance of employment authorization documents. We do not know if such doubts are justified but write now to explain why, if true, this is a very bad idea especially if it is offered without early I-485 submission as an alternative.

Let's start with the reasons why allowing for early adjustment of status makes sense. We acknowledge that INA § 245(a) (3) only allows the filing of an I-485 application when the visa is "immediately available" to the applicant. What may be less well known, though no less important, is the fact that the INA itself offers no clue as to what "visa availability" means. While it has always been linked to the monthly State Department Visa Bulletin, this is not the only definition that can be employed. Therefore, we propose a way for USCIS to allow for an I-485 filing before the priority date becomes current, and still be faithful to § 245(a)(3).

The only regulation that defines visa availability is 8 C.F.R. § 245.1(g) (1), which provides:

An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the application Form I-485 the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current). An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.

Under 8 C.F.R. § 245.1(g)(1), why must visa availability be based solely on whether one has a priority date on the waiting list which is earlier shown in the Visa Bulletin? Why can't "immediately available" be re-defined based on a qualifying or provisional date? We are all so accustomed to paying obeisance to

the holy grail of "priority date" that we understandably overlook the fact that this all-important gatekeeper is nowhere defined. Given the collapse of the priority date system, an organizing principle that was never designed to accommodate the level of demand that we have now and will likely continue to experience, all of us must get used to thinking of it more as a journey than a concrete point in time. The adjustment application would only be approved when the provisional date becomes current, but the new definition of immediately available visa can encompass a continuum: a provisional date that leads to a final date, which is only when the foreign national can be granted lawful permanent resident status but the provisional date will still allow a filing as both provisional and final dates will fall under the new regulatory definition of immediately available. During this period, the I-485 application is properly filed under INA §245(a)(3) through the new definition of immediately available through the qualifying or provisional date.

We acknowledge that certain categories like the India EB-3 may have no visa availability whatsoever. Still, the State Department can reserve one visa in the India EB-3 like the proverbial Thanksgiving turkey, as we have proposed previously. Just like one turkey every Thanksgiving is pardoned by the President and not consumed, similarly one visa can also be left intact rather than consumed by the alien beneficiary. So long as there is one visa kept available, our proposal to allow for an I-485 filing through a provisional filing date would be consistent with INA §245(a)(3).

We propose the following amendments to 8 C.F.R. § 245.1(g)(1), shown here in bold, that would expand the definition of visa availability:

An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. An immigrant visa is considered available for accepting and processing the application Form I-485 the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current) ***("current priority date"). An immigrant visa is also considered available for provisional submission of the application Form I-485 based on a provisional priority date without reference to current priority date. No provisional submission can be undertaken absent prior approval of the visa petition and only if visas in***

the preference category have not been exhausted in the fiscal year. Final adjudication only occurs when there is a current priority date. *An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service office.*

Allowing early adjustment of status with companion work authorization, travel permission, and AC 21-like adjustment portability will make possible the green card on a provisional basis in all but name. However, this is not all. The most important benefit may be the freezing of children's ages under the formula created by the Child Status Protection Act (CSPA). If the White House will only grant EAD and Parole to I-140 beneficiaries, but stop short of allowing adjustment, then, on a massive scale, their children will turn 21, thereby aging out, long before the magic time for I-485 submission ever arrives. This is because Section 3 of the CSPA only speaks of freezing the child's age when the petition has been approved and the visa number has become available. Also, the child must seek to acquire lawful permanent resident status within one year following petition approval and visa availability. Since *Matter of O.Vazquez,* absent extraordinary circumstances, only the filing of the I-485 can do that. Under the current definition of visa availability, joined at the hip to the Visa Bulletin, they have no hope. Only through a modified definition coupled with the notion of provisional adjustment can they retain the CSPA age. This is why invocation of early adjustments themselves, not merely EAD and Parole, to beneficiaries of I-140 petitions is so manifestly necessary. However, precisely as in the INA, the CSPA contains no definition of visa availability. A change in the applicable regulatory meaning along the lines we suggest will apply to CSPA and prevent the children of I-140 beneficiaries from aging out. Granting the EAD and advance parole will sadly have no such effect. Only early adjustment can do that. This is especially relevant now since the Supreme Court in *Scialabba v. Cuellar De Osorio* substantially narrowed the utility of priority date retention. The redefinition of visa availability that we propose not only provides the legal underpinning for early adjustment of status but also allows the children of I-140 petition beneficiaries to derive a priceless immigration benefit through this family relationship that would otherwise be lost. Given the importance of preserving the age of a child under the CSPA, why only restrict early I-485 filings to beneficiaries of I-140 petitions? Our proposed redefinition of visa availability ought to also apply uniformly to beneficiaries of family based I-130 petitions too.

It is entirely possible that the White House may realize all of this and more. We would be most happy to be rendered redundant. The best advice is that which is entirely unnecessary. Yet, unless and until we see it in writing, perhaps the time for celebration should be postponed.

(*Guest author Gary Endelman is Senior Counsel at Foster*)