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US IMMIGRATION & NATIONALITY LAW

BIDEN'S LAST AND BEST GIFT TO LEGAL IMMIGRANTS: ADVANCING THE FILING DATES IN THE 2025 JANUARY VISA BULLETIN TO CURRENT

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Donald Trump's recent reelection has sparked fears that restrictionist immigration policies will abound come January 20, 2025 onwards. During the time that remains of his presidency, President Biden can still act to safeguard the immigration system and implement policies that support and benefit immigrants through executive action. Cyrus Mehta has long advocated for one such solution – the advancement of the filing dates in the State Department's Visa Bulletin, allowing backlogged beneficiaries of approved petitions to file their I-485 adjustment of status applications. Although suggestions have been made regarding other policies that President Biden could implement to aid immigrants, advancement of the filing dates has not yet been proposed thus far. President Biden has one last chance to advance the filing dates in the January 2025 visa bulletin, which will be announced during December 2024. Adjustment of status applicants would also be able to avail of other ancillary benefits, such as obtaining employment authorization document (EAD) and advance parole, and the ability to exercise job portability under INA §204(j). Spouses and minor children of primary applicants can also EADs and advance parole after they file their I-485 applications. Allowing more backlogged beneficiaries to file their adjustment of status applications would also ensure that the ages of these individuals' children could be protected under USCIS's updated guidance relating to the Child Status Protection Act.

The total allocation of visa numbers in the employment and family based categories are woefully adequate. §201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at

least 140,000. INA §202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. These limits were established in the Immigration Act of 1990, and since then, the US Congress has not expanded these limits for well over three decades. In 1990, the worldwide web was not in existence, and since then, there have been an explosion in the number of jobs as a result of internet based technologies and so many related technologies as well as a demand for foreign skilled workers many of whom have been educated at US educational institutions. Yet, the US legal immigration system has not kept up to timely give green cards to immigrants who contribute to the country. Due to the per country limits, till recently it was only India and China that were backlogged in the employment based preferences, but now under the December 2024 Visa Bulletin all countries face backlogs in most of the employment preferences. Still, India bears the brunt disproportionately in the employment-based second and third preferences, and one study has estimated the wait time to be 150 years in the India EB-2!

It would be ideal for Congress to eliminate the per country limits and even add more visas to each preference category. But Congress had not acted since 1990, and Biden can advance the filing dates in the January 2025 Visa Bulletin to current. This would provide ameliorative relief many in the family and employment based backlogs who are already in the United States and are eligible for adjustment of status under INA § 245.

There is a legal basis for the significant advancement of the filing dates in the visa bulletin. INA §245(a)(3) allows for the filing of an adjustment of status application when "an immigrant visa is immediately available" to the applicant. 8 CFR 245.1(g)(1) links visa availability to the State Department's monthly Visa Bulletin. Pursuant to this regulation, an I-485 application can only be submitted "if 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)." The term "immediately available" in INA 245(a)(3) has never been defined, except as in 8 CFR 245.1(g)(1) by "a priority date on the waiting list which is earlier than the date shown in Bulletin", or if the date in the Bulletin is current for that category.

The State Department has often advanced priority dates although it was uncertain when a visa would actually become available. It is not uncommon for applicants to be eligible to file their I-485 applications in a particular month,

only for the dates to retrogress a month or two later. For example, in the April 2012 Visa Bulletin the EB-2 cut-off dates for India and China were May 1, 2010. A month later, the EB-2 cut-off dates for India and China retrogressed to August 15, 2007 in the May 2012 Visa Bulletin. If the State Department was absolutely certain that applicants born in India and China who filed in April 2012 would receive their green cards, it would not have needed to retrogress dates back to August 15, 2007. Another example is when the State Department announced that the July 2007 Visa Bulletin for EB-2 and EB-3 would become current. Hundreds of thousands of applicants filed during that period, but the State Department then retrogressed the EB dates substantially the following month, and those who filed under the India EB-3 in July-August 2007 waited for over a decade before they became eligible for green cards. More recently, the EB-2 India final action date was December 1, 2014 in the September 2022 Visa Bulletin. In the October 2022 Visa Bulletin for the following month, the FAD for EB-2 India was abruptly retrogressed to April 1, 2012, and then retrogressed even further to October 8, 2011 in the December 2022 Visa Bulletin. If a visa number was immediately available in September 2022, an applicant under EB-2 India with a priority date of December 1, 2014 or earlier should have been issued permanent residence.

These three examples, among many more, illustrate that "immediately available" in INA 245(a)(3), according to the State Department, have never meant that visas were actually available to be issued to applicants as soon as they filed. Rather, it has always been based on a notion of visa availability at some time in the future. Under the dual filing dates system first introduced by the State Department in October 2015, USCIS acknowledges that availability of visas is based on an estimate of available visas for the fiscal year rather than immediate availability:

> When we determine there are more immigrant visas available for the fiscal year than there are known applicants, you may use the Dates for Filing Applications chart to determine when to file an adjustment of status application with USCIS. Otherwise, you must use the Application Final Action Dates chart to determine when to file an adjustment of status application with USCIS.

Taking this to its logical extreme, visa availability for establishing the filing dates may be based on just one visa being saved in the backlogged preference category in the year, such as the India EB-3, like the proverbial Thanksgiving

turkey. Just like one turkey every Thanksgiving Day is pardoned by the President and not consumed, similarly one visa can also be left intact rather than used by a noncitizen beneficiary. So long as there is one visa kept available, it would provide a legal basis for an I-485 filing under a DFF, and this would be consistent with INA 245(a)(3) as well as 8 CFR 245.1(g)(1).

This same logic can also be extended to beneficiaries of family-based I-130 petitions. The Biden administration need only move the filing dates to current or close to current with an explanation in the January 2025 Visa Bulletin or through an accompanying USCIS policy memo. However, if it needs to do this through rulemaking, 8 CFR 245.1(g)(1) could be easily amended (shown in bold) through an Interim Final Rule to 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) **("Final Action Date"). An immigrant visa is also considered available for submission of the I-485 application based on a provisional priority date ("Dates for Filing") without reference to the Final Action Date. No provisional submission can be undertaken absent prior approval of the visa petition and only if all visas in the preference category have not been exhausted in the fiscal year. Final adjudication only occurs when there is a current Final Action 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.

Once the filing dates advance and result in adjustment of status filings, the new administration cannot reverse course on January 20, 2025. The visa bulletin for January 2025 would have to be respected until the end of the month. In the July 2007 visa bulletin, the EB-1, EB-2, and EB-3 categories were all initially "current", but the Department of State attempted to revise the visa

bulletin a few days later to indicate that far fewer visas were available. This mid-month change resulted in threatened lawsuits from immigration advocacy groups, and eligible applicants were allowed until August 17, 2007 to file based on the "current" dates.

Advancing the filing dates would be Biden's last, best gift to the backlogged community, many of whom are stuck in the employment- and family-based backlogs for years or even decades. Upon filing adjustment of status applications, they would be able to apply for an EAD and travel permission, exercise job portability, and their children would be protected under the Child Status Protection Act while waiting in the backlogs for permanent residence. Advancing the filing dates to current should not be viewed as a partisan move by a lame duck democratic presidential administration, but as a move that would greatly benefit beneficiaries of I-130 and I-140 petitions employed in corporate America, including at companies who heads are closely aligned with Trump such as Elon Musk's Tesla, Space X and X.com.

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