



MATTER OF HO REVISITED: PROTECTING ADJUSTMENT APPLICANTS IN REMOVAL PROCEEDINGS WHEN VISA NUMBERS ARE UNAVAILABLE

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The [October 2026 Visa Bulletin](#) created an unusual opening for some EB-4 applicants, including Special Immigrant Juveniles (SIJs), whose dates for filing have advanced to January 1, 2025. As a result, these individuals may be eligible to file Form I-485 under [USCIS's October 2026 guidance](#) permitting employment-based adjustment applicants to use the Dates for Filing chart, even though an immigrant visa is not currently available under the Final Action Dates chart. The EB-4 final action date in the October 2026 Visa Bulletin remains December 15, 2022. That filing opportunity, however, does not shield a noncitizen from DHS enforcement actions or placement in removal proceedings before a visa number becomes available for final approval of the adjustment application. For instance, an individual with a pending I-485 application filed when the Dates for Filing chart was current could still be detained while on a domestic flight within the United States. ICE has been coordinating with TSA to detain and charge as removable individuals with pending I-485 applications on the grounds that their initial visa status has expired or, in the case of an SIJ, that they entered without inspection.

That is where [Matter of Ho](#), 15 I&N Dec. 692 (BIA 1976), becomes relevant. In *Ho*, the Board held that where respondents were eligible for adjustment in all other respects, and the sole reason they could not obtain adjustment was that visa numbers that had been available when the applications were filed later became unavailable, the case should be held in abeyance rather than denied outright.

The Board expressly applied that principle in deportation proceedings, rejecting the notion that such protection disappears simply because the respondent seeks adjustment before an Immigration Judge rather than USCIS. *Ho* stands for the proposition that, when adjustment is otherwise approvable, the subsequent unavailability of a visa number should not defeat the application. Instead, adjudication should be paused until a visa number becomes available. The logic of *Ho* is therefore closely tied to whether visa availability is the only remaining obstacle to adjustment and whether no other issues remain to be resolved.

The same principle appears in [Matter of Briones](#), 24 I&N Dec. 355, 357 n.3 (BIA 2007), where the BIA, citing *Ho* in footnote 3, stated that a respondent who had a current priority date when the adjustment application was filed is not rendered ineligible by subsequent visa retrogression, although final approval must be held in abeyance. [EOIR's continuance guidance](#) likewise provides that cases filed when a visa was immediately available but later retrogressed should be held in abeyance. Federal case law has similarly treated *Ho* as binding Board precedent that Immigration Judges and the BIA must at least confront when retrogression is the only barrier to completion of adjustment processing. In *Masih v. Mukasey*, 536 F.3d 370, 373 (5th Cir. 2008), the Fifth Circuit reversed and remanded a denial of a continuance on abuse of discretion grounds where the agency failed to apply *Matter of Ho*.

Matter of Ho can be distinguished from [Matter of Pinzon Rozo](#), 29 I&N Dec. 507 (BIA 2026). *Pinzon Rozo* did not involve post-filing visa retrogression. The respondent there had an approved SIJ petition, but there was a nearly four-year gap between his priority date and the currently available visa date, so the BIA held that the Immigration Judge erred in granting a continuance to await a visa for an uncertain and lengthy period. Unlike *Matter of Ho*, *Pinzon Rozo* did not involve a visa-availability case, but instead involved an I-360 petition that had been filed when visa dates were not current, with the beneficiary waiting for the priority date to become current.

That distinction matters for SIJ and EB-4 respondents who file during a month like October 2026, when USCIS permits use of the Dates for Filing chart, and who are later put into proceedings, including after an ordinary domestic-travel encounter, before the Final Action Date is current. It also matters where the applicant properly filed and visa numbers later retrogressed before the Immigration Judge is ready to adjudicate the application. The argument is not

that filing an I-485 prevents DHS from issuing an NTA. Rather, once a properly filed adjustment application is pending and visa-number unavailability is the sole remaining obstacle, *Ho* and *Briones* provide the strongest basis for asking the court to continue proceedings or hold the application in abeyance.

Although this discussion arises in the EB-4 context, the same reasoning may extend to EB-2 and EB-3 beneficiaries who timely filed I-485 applications under the Dates for Filing chart and were later placed in removal proceedings after their underlying H-1B or L-1 status expired. Such applicants may have reasonably relied on the lawful period of stay authorized by their pending adjustment applications and on employment authorization issued through those applications, only to be charged by ICE with removability because their nonimmigrant status had lapsed. For these respondents as well, where the adjustment application was properly filed and visa-number unavailability is the only remaining impediment to final adjudication, counsel should invoke *Ho* and *Briones* in seeking a continuance or abeyance rather than denial of adjustment.

The harder question is whether an Immigration Judge must accept that argument when the case was filed with USCIS under the Dates for Filing chart, but the Final Action Date is not current by the time the court addresses adjustment. The best reading for respondents is that this situation is closer to *Ho* and *Briones* than to *Pinzon Rozo*, because the problem is later visa-number unavailability at the time of adjudication, not an initially speculative wait for visa eligibility.

Matter of Ho is newly important in the October 2026 EB-4 context and in other contexts in which an I-485 application was filed with an I-130, I-140, I-360, or I-526 petition when the Dates for Filing chart was current. Where the applicant was eligible to file, and the only thing preventing approval is the subsequent unavailability of a visa number, counsel should argue for abeyance or a continuance under *Ho* and *Briones* and distinguish *Pinzon Rozo* as a case involving a priority date that was never close to becoming current in the first place.

Where a respondent properly filed for adjustment, is eligible in all other respects, and later cannot obtain final approval solely because visa numbers are unavailable, counsel should argue for abeyance or a continuance under *Ho* and *Briones* and distinguish *Pinzon Rozo* as a case involving a priority date that was never close to becoming current in the first place. Under *Ho*, when visa-

number unavailability is the only obstacle, the case should be held in abeyance until visa availability returns rather than denied on that basis. Counsel can argue that this approach is consistent with the Board's longstanding treatment of visa retrogression and is particularly appropriate where the respondent complied with all legal requirements and visa-number unavailability arose only after the adjustment application was properly filed.

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