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REDEFINING "IMMEDIATELY AVAILABILE" TO ALLOW EARLY FILING OF AN ADJUSTMENT OF STATUS APPLICATION

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We continue to blog on the salient ideas in our article, Tyranny of Priority Dates, published in BIB Daily, http://scr.bi/i0Lqkz, on March 25, 2010.

Would it not be advantageous if those caught in the crushing EB-2 or EB-3 backlogs could file an adjustment of status application, Form I-485, based on a broader definition of visa availability? It would only be more fair to allow someone to file an I-485 application sooner than many years later if all the conditions towards the green card have been fulfilled, such as labor certification and approval of the Form I-140. Upon filing of an I-485 application, one can enjoy the benefits of occupational mobility or "portability" under INA § 204(j) and children who are turning 21 can gain the protection of the Child Status Protection Act if their age is frozen below 21. Moreover, the applicant, including derivative family members, can also obtain employment authorization, which they otherwise would not be able to get on an H-4 dependent visa.

Unfortunately, INA § 245(a)(3) only allows the filing of an I-485 application when the visa is immediately available to the applicant, and this would need a Congressional fix. We know that Congress either NEVER makes any sensible fix or takes a very long time to do so. So, why not find a way for the immigration agency, 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(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, 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 Legal 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.

The authors propose the following amendments to 8 C.F.R. § 245(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.*

Once 8 C.F.R. § 245.1(g)(1) is amended to allow adjustment applications to be filed under INA § 245(a)(3), the authors propose similar amendments in the Department of State's Foreign Affairs Manual to even the playing field for beneficiaries of approved I-140 and I-130 petitions who are outside the U.S. so as not to give those here who are eligible for adjustment of status an unfair advantage. Since the visa will not be valid when issued in the absence of a current priority date, it will be necessary for USCIS to parole such visa applicants in to the United States. Since parole is not considered a legal admission, they will not be eligible for adjustment of status but will have to depart the United States and use the now-valid visa as a travel document to return when visa availability subsequently presents itself. The authors suggest the insertion of the following sentence, shown here in bold and deletion of an other sentence, in 9 Foreign Affairs Manual (FAM) 42.55 PN 1.1, as follows:

9 FAM 42.55 PN1.1 Qualifying Dates

"Qualifying dates" are established by the Department to ensure that applicants will not be officially informed of requisite supporting documentation requirements prematurely, i.e., prior to the time that the availability of a visa number within a reasonable period can be foreseen. Therefore, post or National Visa Center (NVC) will not officially and proactively notify applicants of additional processing requirements unless the qualifying date set by the Department (CA/VO/F/I) encompasses the alien's priority date. Otherwise, it is likely that some documents would be out-of date by the time a visa number is available and delay in final action would result. ***An immigrant visa is also considered available for provisional***

submission of the immigrant visa application on Form DS 230 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. Issuance of the immigrant visa for the appropriate category only occurs when there is a current priority date. ~~*Nevertheless, should an applicant or agent request information concerning additional processing requirements, this information may be provided at any time with a warning that some documents may expire if obtained too early in the process.*~~

If Congress wanted to ratify what the USCIS had done, it could certainly do so after the fact. Everything that we now consider to be the adjustment of status process could take place before the priority date becomes current. Nothing could be simpler. The reason to seek Congressional modification of INA § 245(a) is not because it is the only way forward but because, by enshrining such a procedural benefit in the INA itself, it will be a much more secure right, one not subject to administrative whim or unilateral repeal.

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