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DO WE REALLY HAVE TO WAIT FOR GODOT?: A LEGAL BASIS FOR EARLY FILING OF AN ADJUSTMENT OF STATUS APPLICATION

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While the Obama administration is working on unveiling administrative fixes to reform the immigration system, we wish to revive one idea, which we discussed in The Tyranny of Priority Dates.

We propose that aliens caught in the crushing employment-based (EB) or family-based (FB) backlogs could file an adjustment of status application, Form I-485, based on a broader definition of visa availability. It would promote efficiency, maximize transparency and enhance fundamental fairness by allowing 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, Form I-130 or Form I-526. We have also learned that the EB-5 for China has reached the cap, and there will be retrogression in the EB-5 in the same way that there has been retrogression in the EB-2 and EB-3 for India. Systemic visa retrogress retards economic growth, prevents family unity and frustrates individual ambition all for no obvious national purpose

Upon filing of an I-485 application, one can enjoy the benefits of "portability" under INA § 204(j) in some of the EB preferences 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.

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, and this would need a Congressional fix. 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. 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.*

Once 8 C.F.R. § 245.1(g)(1) is amended to allow adjustment applications to be filed under INA § 245(a)(3), we 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.

The authors suggest the insertion of the following sentence, shown here in bold and deletion of another 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.*~~

We believe our proposal would not be creating new visa categories, but simply allowing those who are already on the pathway to permanent residence, but hindered by the crushing priority date backlogs, to apply for adjustment of status or be paroled into the U.S. Another proposal is to allow the beneficiary of an approved I-140 to remain in the United States, and grant him or her an employment authorization document (EAD) if working in the same or similar occupation. While such a proposal allows one to avoid redefining visa availability in order to file an I-485 application, as we have suggested, we do not believe that a stand- alone I-140 petition can allow for portability under INA §204(j). Portability can only be exercised if there is an accompanying I-485 application. Still, at the same time, the government has authority to grant open market EADs to any category of aliens pursuant to INA §274A(h)(3). Under the broad authority that the government has to issue EADs pursuant to §274A(h)(3), the validity of the

underlying labor certification would no longer be relevant.

Our colleague David Isaacson suggests a blunter approach, which would avoid any regulatory amendments. The Department of State could similarly allow filing of adjustment applications by applicants with priority dates for which no visa number was realistically available, at any time it chose to do so, simply by declaring the relevant categories "current" in the Visa Bulletin as it did for July 2007. The most efficient time to do this would be in September, at the end of each fiscal year, when the measure could also be justified as a way to ensure that any remaining visa numbers for that fiscal year did not go unused. The Visa Bulletin cut-off dates for the rest of the fiscal year could theoretically then proceed normally, with dates for each October following naturally from whatever the dates had been in the August two months before.

Finally, we also urge serious consideration of our other proposal for not counting derivatives as a way to relieve the pressure in the EB and FB backlogs, and refer you to our blog entitled, Two Aces Up President Obama's Sleeve To Achieve Immigration Reform Without Congress – Not Counting Family Members And Parole In Place, http://blog.cyrusmehta.com/2014/06/two-aces-up-president-obamas-sleeve-to_29.html.

The fundamental point is that priority dates should be a way of controlling not preventing permanent migration to the United States. The very notion of a priority date suggests a realistic possibility of acquiring lawful permanent resident status. That is no longer the case for many immigrants in waiting. For this reason, since Congress will not act, the President must step forward. Now is the time.