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GODOT HAS ARRIVED: EARLY ADJUSTMENT OF STATUS APPLICATIONS POSSIBLE UNDER THE OCTOBER 2015 VISA BULLETIN

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Gary Endelman and I have advocated for administrative fixes to improve the immigration system since March 2010. In The Tyranny of Priority Dates we proposed that foreign nationals 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. We wrote a follow up blog in August 2014 entitled DO WE REALLY HAVE TO WAIT FOR GODOT?: A LEGAL BASIS FOR EARLY FILING OF AN ADJUSTMENT OF STATUS APPLICATION little realizing that President Obama would announce major executive actions in November 2014. We also forcefully advocated this position in our response to the Visa Modernization proposals in January 2015.

As a background, INA § 245(a)(3) only allows for the filing of an I-485 adjustment of status application when the visa is "immediately available" to the applicant. It has always been linked to the monthly State Department Visa Bulletin, which announces dates based on actual visa availability. This has resulted in decade long backlogs in some preference categories. Systemic visa retrogress retards economic growth, prevents family unity and frustrates individual ambition all for no obvious national purpose. We advocated that there may be a different way of determining visa availability that would not be determined by when visas can actually be given, but when there is a possibility of visas becoming available in the near future, or when there is at least one unused visa remaining in the preference category. Under this new interpretation of visa availability, we proposed that there could be two filing dates: the first would be based on unused visas, and the second is when there are actual visas, which would result in a green card for the applicant.

Godot has finally arrived!

The U.S. Department of State, starting in October 2015, has issued a visa bulletin with two "application dates" for beneficiaries of family-based and employment based immigrant petitions. There is an application final action date when the beneficiary will be eligible to receive his/her green card, but there is also a date for filing visa or adjustment applications which is when the beneficiary will be eligible to ***file***, and if the beneficiary files an adjustment of status application, he or she will get the benefits thereof such as an Employment Authorization Document (EAD), advance parole and protection under the Child Status Protection Act (CSPA).

As an example, Indian born applicants with approved I-140 petitions in the EB-2 category whose priority dates are July 1, 2011 or earlier can begin submitting adjustment applications in October 2015 even though they would not get the actual green card until their priority dates are current under the application final action date table, which could be many years yet. In the meantime they could avail themselves of the benefits of an adjustment application, such as an EAD, advance parole and protecting the child from aging out under the CSPA. It bears repeating that only beneficiaries with priority dates of May 1, 2005 in the EB-2 category can actually *receive* their green card next month. This new version of the visa bulletin will greatly impact many who have been caught in the crushing backlogs.

Visa availability will no longer be defined by when visas are actually available. The October Visa Bulletin now views it more broadly as "dates for filing visa applications within a time frame justifying immediate action in the application process." The USCIS similarly views visa availability opaquely as "eligible applicants" who "are able to take one of the final steps in the process of becoming U.S. permanent residents." These new interpretations provide more flexibility for the State Department to move the filing date even further, and make it closer to current. The new way of interpreting visa availability makes it possible to file an adjustment of status application, along with all the accompanying benefits, and to even lock in the age of a child under the CSPA, whether the applicant is in the United States or processing at a US consulate. While I strongly advocate that the same interpretation concerning visa availability that applies to eligibility for adjustment of status should also apply to the CSPA, we need to await further confirmation from the government on CSPA eligibility.

Here are some preliminary observations after brainstorming with some of my esteemed colleagues at the Alliance of Business Immigration Lawyers, www.abil.com, although these are my own views. We must await further guidance from the DOS and USCIS to be sure, but must strongly advocate for these positions:

- I-485 adjustment applications filed under the new filing priority date will result in the same benefits, which is EAD, Advance Parole, 204(j) portability and CSPA protection.
- With respect to an "after acquired" spouse, where the principal already has a pending I-485, the spouse can file under the new filing priority date. Ultimately, both the principal and spouse's I-485 application will get adjudicated when the priority date of the principal become current under the final action priority date.
- There is no prohibition to filing a concurrent I-140/485 or I-130/485 under the filing priority date.
- With respect to a priority date that has been captured from an old EB petition, the same rules apply – you have to see whether the captured priority date coincides with the filing priority date or the final action priority date.
- There may be no need to submit a medical with an I-485 filed under the filing priority date, especially when there is a long interval (years) between the filing and the final action priority date.
- The new policy applies to both Family I-130 and Employment I-140 petitions.
- With respect to consular processing of cases, the filing priority date would be equally applicable, especially to lock in the age of a child under CSPA.
- Do we have to rush to file all our I-485s in October 2015 itself? The jury is not yet out whether the dual priority dates system would cause more backlogs and retrogression; although probably not, since the filing priority date, unlike the 2007 July Visa Bulletin, does not signify that visas are immediately available. We have enough time (around the 10th of the month) to wait and watch as to how the dates will progress in November and after that.

When Gary Endelman (who has since been appointed as an Immigration Judge) and I commented on the Visa Modernization proposals, we questioned whether

the government was truly serious about ameliorating some of the problems in the immigration system through administrative reform. The DOS and DHS have lived up to expectations. At the end of the day, immigration policy is both about fairness, as well as how the United States can attract and retain the best and the brightest regardless of nationality who wish to join us in writing the next chapter of our ongoing national story. There are two ways to achieve progress. Congress can change the law, which it persists in refusing to do, or the President can interpret the existing law in new ways, which he has done. Obviously, the innovations in the visa bulletin are still a band-aid. It would be desirable if applicants get their green cards rather than remain perpetual adjustment of status applicants. For that to change, for sweeping Comprehensive Immigration Reform to become reality, all of us must realize that immigration is not a problem to be controlled but an asset to be maximized.