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SAVE THE CHILDREN UNDER THE NEW VISA BULLETIN

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The changes made to the priority date system in the October 2015 Visa Bulletin have been positive and will provide much relief to beneficiaries of visas petitions caught in the employment and family-based backlogs. There will be two dates for the very first time: a filing date and a final action date. The filing date will allow the filing of adjustment of status applications if eligible foreign nationals are in the United States and the filing of visa applications if they are outside the country. The final action date will be the date when green cards can actually be issued.

The October 2015 Visa Bulletin will thus allow the filing of applications prior to the date when green cards actually become available. Until now, the cut-off date was based on when visas were actually available. While there has been no official guidance, and many of the practice advisories issued make scant reference, it is important that we advocate that the age of the child also be protected under the Child Status Protection Act (CSPA) at the time that the filing date becomes current for the applicant. A child ceases to be considered a child upon turning 21, and can no longer immigrate as a derivative with the parent, especially when the parent is likely to be caught in the backlogs. It is thus important that the CSPA is made applicable to protect the child's age at the time of the earlier filing date. This will also promote legal consistency and harmony with respect to the broader definition of visa availability in the new visa bulletin. Readers are cautioned not to expect that this will happen, and the whole purpose of this blog is to advocate that children get CSPA protection under the new visa bulletin.

I celebrated the broadening of the interpretation of visa availability in my last blog, Godot Has Arrived: Early Adjustment Of Status Applications Possible Under The October 15, 2015 Visa Bulletin, and was also happy to note that these changes were consistent with what Gary Endelman (who is now an

Immigration Judge) and I have propounded since 2010 in The Tyranny of Priority Dates. As a background, INA 245(a)(3) only allows for the filing of an I-485 adjustment of status application when "an immigrant visa is immediately available." 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 earlier than before, along with all the accompanying benefits that arise, such as job portability under INA 204(j), work authorization for the principal and derivative family members and travel permission. Similarly, CSPA protection should also be made available to children who may age out at the time of the earlier filing date so as to maximize the chance for children to obtain their green cards with the parent.

Before the government finalizes all the details, I strongly advocate that if there is now a broader interpretation of visa availability for purpose of filing an I-485 adjustment application at the filing date, this same filing date should lock in the CSPA age too. Otherwise the whole scheme collapses like a house of cards if there is no consistency. If there must be visa availability to file an I-485 under INA 245(a)(3) in order to enjoy 204(j) portability, it makes sense to use the same new interpretation of visa availability to lock in the child's age at the filing date. Imagine filing an I-485 for a minor at the time of the filing date who is not protected under the CSPA, and once s/he ages out, is no longer eligible to even be an adjustment applicant, and has to leave the US while the parents can continue as adjustment applicants.

There's also no point in providing the earlier filing date in the new visa bulletin for immigrant visa applicants overseas, otherwise they get no tangible benefit, except to be able to lock in the child's age earlier at the time of the filing date under the CSPA. (There is potential for advocating that beneficiaries who have filed visa applications overseas under the earlier filing date be paroled into the US under INA 212(d)(5) while they wait for the final acceptance date to materialize, but I will reserve this for a future blog).

Under INA 203(h)(1)(A), which codified Section 3 of the CSPA, the age of the child under 21 is locked on the "date on which an immigrant visa number becomes available…but only if the has sought to acquire the status of an alien lawfully admitted for permanent residency within one year of such availability." If the child's age is over 21 years, it can be subtracted by the amount of time the applicable petition was pending. See INA 203(h)(1)(B).

Under INA 245(a)(3), an I-485 application can only be filed when an "immigrant visa is immediately available."

Therefore, there is no meaningful difference in the verbiage relating to visas availability – "immigrant visa becomes available" and "immigrant visa is immediately available" under INA 203(h)(1)(A) and INA 245(a)(3) respectively. If an adjustment application can be filed under the new interpretation of visa availability pursuant to 245(a)(3), then the interpretation regarding visa availability under 203(h)(1)(A) should be consistent.

Some of my esteemed colleagues have pointed out that one who does not seek to acquire permanent residency within the time of the filing date, but rather, seeks to acquire permanent residence within one year of the final action date may lose out under the CSPA. This may well be the case. However, it is far more advantageous for a child's age to be locked in at the earlier filing date than the final action date. In order to be consistent and for this scheme to withstand potential legal challenges, under the broader definition of visa availability which must be applied consistently, permanent residency should be sought within one year of the filing date rather than the final acceptance date.

Gary Endelman and I fine tuned our proposal in 2014 by advocating that visa availability ought to be based on the just one visa being saved in the backlogged preference category, 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 consumed by the foreign national beneficiary. So long as there is one visa kept available, it would provide the legal basis for an I-485 filing through the earlier filing date, and this would be consistent with INA §245(a)(3). Similarly, this new visa availability ought to also protect the child from aging out under INA 203(h)(1)(A). Filing dates could potentially advance and become current. Admittedly, it is not expected that the government will follow our "Thanksgiving turkey" proposal to the hilt, at least not yet, and it has been suggested by Greg

Siskind on his Twitter feed that the filing dates will not move much in the first few months. The filing of early I-485 applications will give Charlie Oppenheim at DOS a better sense of how visa numbers will actually be utilized for the rest of the year. "The goal of the changes is not to so much to allow people to file early as to have more accurate final action dates," according to Siskind.

Regardless of whether the DOS and USCIS wish to advance the filing dates rapidly or not, it is important to protect a child from aging out at the time of the earlier filing date. Apart from ensuring that the parent and child immigrate together, this consistency will also make the new visa bulletin legally sound.