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WHEN IS A VISA "IMMEDIATELY AVAILABLE" FOR FILING AN ADJUSTMENT OF STATUS APPLICATION?

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Central in the Mehta v. DOS lawsuit is whether the administration is authorized to establish a dual date system in the Department of State's (DOS) Visa Bulletin, which it did for the first time in October 2015. When the DOS first issued the October 2015 Visa Bulletin on September 9, 2015, it established a filing date, which allowed applicants to file for adjustment of status much earlier than the final action date. On September 25, 2015, in a revised October 2015 Visa Bulletin, the administration abruptly moved back some of the filing dates by at least two years, thus depriving thousands from filing I-485 adjustment of status applications on October 1, 2015. A lawsuit was filed challenging this revision in the filing dates, including a motion for a temporary restraining order. The government has filed pleadings in opposition to the TRO, which includes a declaration from Charlie Oppenheim.

INA 245(a)(3) allows for the filing of an I-485 application for adjustment of status when the visa is "immediately available" to the applicant. 8 C.F.R. 245.1(g)(1) links visa availability to the Department of State's (DOS) monthly Visa Bulletin. Pursuant to this regulation, an I-485 application can only be submitted "if 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)." The term "immediately available" in INA 245(a)(3) has never been defined, except as in 8 C.F.R. 245.1(g)(1) by "a priority date on the waiting list which is earlier than the date shown in Bulletin" or if the date in the Bulletin is current for that category.

DOS has historically never advanced priority dates based on certitude that a visa would actually be available. There have been many instances when

applicants have filed an I-485 application in a particular month, only to later find that the dates have retrogressed. A good example is the April 2012 Visa Bulletin, when the EB-2 cut-off dates for India and China were May 1, 2010. In the very next May 2012 Visa Bulletin a month later, the EB-2 cut-off dates for India and China retrogressed to August 15, 2007. If the DOS was absolutely certain that applicants born in India and China who filed in April 2012 would receive their green cards, it would not have needed to retrogress dates back to August 15, 2007. Indeed, those EB-2 applicants who filed their I-485 applications in April 2012 are still waiting and have yet to receive their green cards even as of today! Another example is when the DOS announced that the July 2007 Visa Bulletin for EB-2 and EB-3 would become current. Hundreds of thousands filed during that period (which actually was the extended period from July 17, 2007 to August 17, 2007) . It was obvious that these applicants would not receive their green cards during that time frame. The DOS then retrogressed the EB dates substantially the following month, and those who filed under the India EB-3 in July-August 2007 are still waiting today.

These two examples, among many, go to show that "immediately available" in INA 245(a)(3), according to the DOS, have never meant that visas were actually available to be issued to applicants as soon as they filed. Rather, it has always been based on a notion of visa availability at some point of time in the future. The following extract from The Tyranny of Priority Dates, where Gary Endelman (who is now an Immigration Judge and is not participating in this blog) and I in 2010 proposed the concept of a provisional date for filing I-485 applications is worth noting:

It can be further argued that 245(a)(3), which requires that the alien have an available visa "at the time his application is filed," cannot be read literally to preclude the initial filing of an adjustment application when its conditions are not met, as opposed to merely precluding the approval of such application. Otherwise ordinary concurrent filing (such as an I-140 and I-485) even as it exists today would be impermissible, because, as immigration judges periodically point out in the course of denying motions for continuance, someone who does not have an approved visa petition necessarily does not have an available visa number.

As David Isaacson has observed, there are other contexts under existing law in which one cannot simply assume that the date of "application" or date of "filing" referred to in statute or regulation means the date the application papers are filed in the ordinary sense of the word. Rather, such terms sometimes mean something

closer to the date of final adjudication. So in In re Ortega-Cabrera, the examination of good moral character for the ten years "immediately preceding the date of the application" under INA § 240A(b)(1)(A) was held to entail examination of good moral character during the ten years immediately preceding the final decision in the case, not the ten years immediately preceding the date the application papers were initially filed as a physical matter. 23 I&N Dec. 793 (BIA 2005). Similarly, in In re Garcia, the Board of Immigration Appeals interpreted a regulation allowing special-rule cancellation for an alien who "has been physically present in the United States for a continuous period of years immediately preceding the date the application was filed," 8 C.F.R. § 1240.66(b)(2), to be satisfied where "the respondent accrued years of continuous physical presence prior to the issuance of a final administrative decision for purposes of establishing eligibility for relief." 24 I&N Dec. 179, 183 (BIA 2007).

One could thus analogize and alternatively argue that the requirement of INA § 245(a)(3) that the alien have an available visa "at the time his application is filed" actually means that there must be an available visa at the time the application is finally adjudicated. In effect, what we are ultimately saying in both cases is that the official time of "filing" for statutory purposes does not have to correspond to the date when the application papers are physically submitted and ancillary benefits are granted. Although Section 6 of the 1976 Act to Amend the INA, Pub. L. No. 94-571 § 6, 90 Stat. 2703 (1976),substituted the word "filed" for the word "approved" in INA § 245(a)(3), it should not cripple our argument that the statutory moment of "filing" is not necessarily the same thing as the moment the papers are submitted or the moment that ancillary benefits are granted.

The October 2015 Visa Bulletin announced on September 9, 2015 replaced the single priority date with a filing date and a final action date. The final action date is when the beneficiary will be eligible to receive his/her green card, but the new filing date is when the beneficiary will be eligible to file an I-485 application consistent with 8 C.F.R. 245.1(g)(1), and if the beneficiary files an I-485 application, he or she will get the benefits thereof such as an Employment Authorization Document (EAD), advance parole and protection of the beneficiary's child from aging out under the Child Status Protection Act (CSPA).

Although this appears to be novel, the dual filing dates in the October 2015 Visa Bulletin essentially formalize DOS' historical practice. Under the filing date, it is now formally acknowledged that visa availability is not defined by when visas can actually be issued to the beneficiary. The October 2015 Visa Bulletin views visa availability more broadly, as has been the DOS' historic practice, as "dates

for filing visa applications within a time frame justifying immediate action in the application process." The United States Citizenship and Immigration Services (USCIS) announcement relating to the October 2015 Visa Bulletin, available at http://www.uscis.gov/news/uscis-announces-revised-procedures-determining-visa-availability-applicants-waiting-file-adjustment-status, also expansively interprets visa availability as "eligible applicants" who "are able to take one of the final steps in the process of becoming U.S. permanent residents." These DOS and USCIS announcements provide more flexibility for the DOS to move the filing dates forward, and possibly make them even current. Although both versions of the October 2015 Visa Bulletin indicate that DOS will consult with the USCIS, this is consistent with 22 C.F.R 42.51(b), which assigns primary responsibility to the DOS in controlling visas, but considering applicants for adjustment of status as reported by officers of the DHS.

Taking this to its logical extreme, visa availability for establishing the filing date may be based on just one visa being saved in the backlogged preference category, such as the India employment-based third preference (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 used 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 section 245(a)(3) as well as 8 C.F.R 245.1(g)(1). Filing dates could potentially advance and become current. Therefore, there was no legal basis to retrogress the priority dates in the revised October 2015 Visa Bulletin. Rather the government could have advanced them. My declaration in support of plaintiff's TRO in Mehta v. DOL further elaborates on the Thanksgiving turkey concept to provide a legal basis for the filing dates to move forward rather than backward. My declaration concludes, as follows:

Even if the government claims that it miscalculated the number of visas actually available regarding the filing date so as to justify moving the filing dates backwards, a filing date under the October 2015 Visa Bulletin can be established without regard to whether visas can actually be issued to an applicant. All that is needed is that a single visa should be potentially available for purposes of establishing the filing date. Accordingly, the DOS and the USCIS ought to have left intact the filing dates that were announced in the first version of the October 2015 Visa Bulletin.

Accordingly, the new filing date system established in the October 2015 Visa

Bulletin allows for the filing of an I-485 application without regard to whether visas can actually be issued. On October 1, 2015, which is the start of the new fiscal year, visas will be made available in each of the preferences as statutorily prescribed, as well as to the countries within each of the preferences. It is acknowledged that there will be more foreign national applicants needing the visas than the visas that will be made available for the fiscal year. However, the filing date ought to be established based on the fact that there is a visa available in the preference category. Even if the government claims that it miscalculated the number of visas actually available regarding the filing date so as to justify moving the filing dates backwards, a filing date under the October 2015 Visa Bulletin can be established without regard to whether visas can actually be issued to an applicant. All that is needed is that a visa should be potentially available for purposes of establishing the filing date.

If the administration wishes to restore the filing dates in the October 2015 Visa Bulletin that were initially announced on September 9, 2015, and they should, there is a clear legal basis for doing so and it will be consistent with the DOS's historic interpretation of "immediately available" under INA 245(a)(3) and 8 C.F.R. 245.1(g)(1). Moreover, since "immediately available" has not been precisely defined and is ambiguous, under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), such a view of visa availability would constitute a permissible interpretation of the statute by the DOS, which is the federal agency that has been charged to primarily administer the control of visa numbers.In its opposition to the lawsuit, the government has not disavowed the elastic concept of visa availability through the dual date system. It justifies the revisions in the second October 2015 Visa Bulletin so as to bring the filing date within 8-12 months of the final action date, but does not provide any mathematical calculations, other than the fact that there has been a retrogression in the priority dates between the September and October visa bulletins. However, the notion of visa availability, as viewed by the government, under INA 245(a)(3) is still elastic, whether the applicant is 8-12 months away or 5 years away or 10 years away. It would be one thing if the government argued that its acceptance of I-485s would lead to their immediate approval and grants of green cards, but they instead assert that the revised filing dates move the applicant to within 8-12 months of the final action date. It would be significant if the INA or even a regulation said that visa availability is determined either by the fact that green cards should be immediately issued or should not be more

than 8-12 months from being issued, but there is none of that sort of precision in the INA or the 8 CFR. Accordingly, it is not outside the government's statutory authority to restore the September 9, 2015 dates or to even bring them to current under the elastic notion of visa availability, which is consistent with "immediately available" under INA 245(a)(3).

The October 2015 Visa Bulletin, according to the Oppenheim Declaration, imported the concept of qualifying dates for visa processing at consulates into filing dates, which would apply to both consular processing and adjustment of status applications. Prior to the October 2015 Visa Bulletin, qualifying dates for consular processing purposes apart from allowing the applicant to take the necessary steps for becoming documentarily qualified, did not have any legal significance in the sense that the child's age did not lock in under the Child Status Protection Act (CSPA) based on a qualifying date. Moreover, INA 245(a)(3) was only applicable to filing adjustment of status applications within the US, and this provision did not apply to qualifying dates. The October 2015 Visa Bulletin acknowledged the administration's broader understanding of viewing visa availability so as to allow applicants to file under INA 245(a)(3), and seek ancillary benefits such as 204(j) portability and also protecting the age of the childunder the CSPA. In effect, the qualifying date was elevated to have the same legal significance as the old priority date. Obviously, the government has not acknowledged this in its papers, but what the October 2015 Visa Bulletin did was legally significant, and the abrupt departure from the initially announced October 2015 Visa Bulletin was arbitrary and capricious causing hardship to thousands of applicants who were set to file I-485 applications, thus warranting a lawsuit under the Administrative Procedure Act and other grounds.

The whole idea of priority dates is not to prevent immigration but to regulate it. That is not what is happening today. If you are from Mexico or the Philippines, the family-based quotas delay permanent migration to the United States to such an extent that it is virtually blocked. The categories might just as well not exist for most people. If you are from China or India with an advanced degree, the implosion of the employment-based second preference (EB-2) and third Preference (EB-3) categories does not regulate your coming permanently to the United States; it makes it functionally impossible. While the bonds that unite family members can be expected to survive many years of waiting, and even this is painfully excruciating, how many employers will wait a decade for an

engineer or geophysicist? Will the business need still exist by the time the priority date becomes current? Will the business itself? In a labor certification case, what relevancy will a determination of unavailability concerning qualified American workers retain after such a long wait? Is it fair to keep the worker tied to a single employer for so long?

In conclusion, the elastic notion of visa availability that has always been practiced, and which has been formalized in the October 2015 Visa Bulletin, is consistent with Congressional intent to not prevent immigration. A broader interpretation of visa availability better serves the purposes of the INA, and it must prevail.