CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

WINTER BLUES: FREEZING THE AGE OF A CHILD UNDER THE DECEMBER 2015 VISA BULLETIN

Posted on December 7, 2015 by Cyrus Mehta

Although the State Department Visa Bulletin announced dual dates on September 9, 2015 – a filing date and a final action date – effective October 1 2015, the government has yet to clarify how these dates protect a derivative child from aging out (turning 21) under the Child Status Protection Act. If a derivative child turns 21, the child cannot automatically obtain permanent residency status with the parent, and thus the CSPA freezes the age of a child below 21.

The new filing date in the Visa Bulletin allows for the early filing of I-485 adjustment of status applications if eligible applicants 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 filing date thus allows for the early submission of adjustment applications prior to the date when green cards actually become available. Similarly for those who are outside the United States and processing for an immigrant visa overseas, the filing date should allow applicants to submit the DS 260 immigrant visa application.

Prior to the October 2015 Visa Bulletin, the cut-off date was based on the government's ability to issue a green card during that month. 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 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.

Notwithstanding the abrupt retrogression of the filing dates on September 25, 2015 that were first announced on September 9, 2015, thus impeding the ability of thousands who were ready to file adjustment applications on October 1, 2015, the dual date system still exists, albeit not as advantageously as before. The Visa Bulletin has been further undermined after the USCIS was given authority to determine filing dates for purposes of filing adjustment applications. One has to now also refer to http://www.uscis.gov/visabulletininfo to determine whether adjustment applicants can use the filing dates each month established by the State Department in the Visa Bulletin. For the first two months in 2015, October and November, the USCIS indicated that the filing dates could be used, but for December 2015, the USCIS abruptly announced without explanation that only the final action date could be used for filing I-485 applications. This has caused further confusion regarding the applicability of the CSPA.

As 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 Visa Bulletin in its new reincarnation 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. Thus, the government's argument that it made a mistake when announcing the more advantageous filing dates on September 9, 2015 in the lawsuit, Mehta v. DOL, makes no sense. Indeed, visa availability ought to be based on 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. 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.

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.

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.

Even though the filing date may not be available for submitting an adjustment

application under December 1, 2015, according to the USCIS, this should not preclude an applicant from claiming the earlier filing date for purposes of freezing the age of the child below 21 years. In order to meet all the conditions of freezing the age under the CSPA, the child should have also sought to acquire lawful permanent residency within one year of visa availability, which is arguably the filing date. However, what if the USCIS does not allow usage of the filing date for I-485 applications for more than a year? Does this mean that the child's age cannot be protected under the CSPA? One possibility is to seek permanent residency through consular processing, and file Form I-824, which enables consular processing of an approved I-130 or I-140 petition. The filing of Form I-824 would constitute evidence of seeking to acquire permanent residency within one year of visa availability, which is when the filing date became current. Even if the parent and child are unable to file an adjustment application, or even be able to obtain a green card imminently, filing the I-824 at least clearly fulfills the condition of seeking to acquire permanent residency within one year of visa availability. Once the USCIS allows usage of the filing date, an adjustment application can subsequently be filed, and the filing of the I-824 application to initiate consular processing would constitute solid evidence of the applicant seeking permanent residency within one year of visa availability.

Until there is more clarity, it makes sense to take advantage of the earlier filing date to protect the age of the child, and then seek to acquire permanent residency within one year of the filing date becoming current. Of course, given that there is no harmony between the DOS and the USCIS with respect to availability of filing dates, it may be possible to also claim the final action date for purposes of protecting the age of the child, and then seeking to acquire permanent residency within one year of the final action date becoming current. I had suggested in my earlier blog that permanent residency should only be sought within one year of the filing date becoming current so that the concept of visa availability be applied consistently. However, given that the USCIS has not permitted the filing of I-485 applications in the month of December 2015, although the State Department has released a filing date, a child applicant should take advantage of either the filing date or the final action date for purposes of CSPA protection.

There has undoubtedly been much confusion caused by the new Visa Bulletin that took effect on October 1, 2015. While there is an ongoing legal fight to

challenge the government's abrupt reversal of the filing dates on September 25, 2015, we must also force the government to agree with the interpretation that the CSPA should lock in a child's age based on the new filing date. In the months when the USCIS does not permit adjustment submissions based on the filing date, applicants should still be able to lock in the CSPA age based on the filing date in the Visa Bulletin, as well as based on the final action date, whichever is more advantageous. It is really surprising that the government has said nothing thus far, and hopefully, this blog should prompt a discussion.