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

INCLUDING EARLY ADJUSTMENT FILING IN PROPOSED DHS RULE IMPACTING HIGH-SKILLED WORKERS WOULD GIVE BIG BOOST TO DELAYED GREEN CARD APPLICANTS

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A proposed DHS rule entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers" has disappointed beneficiaries of I-140 employment-based immigration visa petitions who are caught in the crushing employment-based preferences. Everyone was waiting with bated breath about how the rule would allow beneficiaries to apply for an employment authorization document (EAD) based on an approved I-140 petitions. The proposed rule was announced on New Year's Eve, December 31, 2015, but the balloon hastily deflated well before New Year. EADs would be issued in a very niggardly manner. This blog's focus is not to explain every aspect of the proposed rule, and refers readers to Greg Siskind's detailed summary, but suggests that the DHS also consider adding a rule to allow early filing of an I-485 adjustment application. Including a rule that would allow early filing of an I-485 application, along with some of the ameliorative provisions in the proposed rule, would truly make the rule positively impactful to those who are seeking relief.

Under the proposed rule, DHS will provide EADs to beneficiaries in the United States on E-3, H-1B, H-1B1, L-1 or O-1 nonimmigrant status if they can demonstrate compelling circumstances. While compelling circumstances have not been defined in the rule, DHS has suggested that they include serious illness and disabilities, employer retaliation, other substantial harm to the applicant and significant disruption to the employer. Regarding what may constitute significant disruption; DHS has suggested loss of funding for grants that may invalidate a cap-exempt H-1B status or a corporate restructure that

may no longer render an L-1 visa status valid. The EAD will be renewed if such compelling circumstances continue to be met, or if the beneficiary's priority date is within one year of the official cut-off date.

As a result of these stringent standards, very few I-140 beneficiaries will be able to take advantage of this EAD provision. Furthermore, in order to keep the existing I-140 petition valid, the sponsoring employer must continue to offer the position to the beneficiary. While the recipient of an EAD can engage in open market employment, he or she must intend to work for the sponsoring employer upon the issuance of permanent residency. It is hoped that the final rule will provide a broader basis for beneficiaries of approved I-140 petitions to obtain EADs without needing to show compelling circumstances. INA 274A(h)(3) provides broad authorization to the DHS to issue work authorization to any non-citizen. While there is broad authority in the INA to issue an EAD, it is difficult to conceptualize how such a beneficiary may be able to port to another employer without a pending I-485 application. INA 204(j) requires an I-485 application to be pending for more than 180 days before a worker can change jobs in a same or similar occupational classification, while still keeping the I-140 petition and underlying labor certification intact. On the other hand, a new employer can re-sponsor a worker if he or she has an EAD through a new I-140 petition, while retaining the priority date of the old petition, upon which the worker can consular process for the immigrant visa if not in a valid nonimmigrant status at the time the final action date becomes current.

Although the centerpiece proposal is disappointing, there are some bright spots. I-140 petitions that have been approved for at least 180 days would not be subject to automatic revocation due to a business closure or withdrawal by the employer. DHS has invoked its discretion under INA 205 to retain an I-140 even if an employer withdraws it or the business closes. This assurance would allow workers who have pending I-485 applications for 180 days or more to safely exercise job portability under INA 204(j), although this dispensation is not possible if USCIS revokes the I-140 based on a prior error. Even those without pending I-485 applications could take advantage of this provision to obtain H-1B extensions beyond six years under the American Competitiveness in the 21st Century Act (AC 21). They would also be able to keep their priority dates if a new employer files another I-140 petition.

The proposed rule would also allow workers whose jobs are terminated a grace

period of 60 days if they are holding E-1, E-2, E-3, H-1B, H-1B1, L-1 or TN status. There will also be automatic extensions of an EAD for 180 days, but will take away the mandatory processing time for an EAD within 90 days.

Notwithstanding the stingy circumstances under which the DHS proposes to issue EADs to beneficiaries of approved I-140 petitions, the proposed rule could be salvaged, and truly resurrected, if workers can file early I-485 adjustment of status applications. While the proposed rule has not touched upon this, the DHS must revisit the innovation that was made in the October 2015 Visa Bulletin by creating a filing date and a final adjudication date. Although the filing dates got substantially pulled back in the EB-2 for India and China shortly before the new visa bulletin took effect on October 1, resulting in a lawsuit, DHS has a chance to redeem itself through this rule to truly benefit high skilled workers.

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. The Department of State (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, also known as the class of 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 Visa Bulletin in its new reincarnation, notwithstanding the pulling back of the filing dates prior to October 1, 2015, 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. While it is acknowledge that certain categories like the India EB-3 may have no visa availability whatsoever, DOS and DHS 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, the proposal to allow for an I-485 filing through a provisional filing date would be consistent with INA §245(a)(3).

The author has proposed the following amendments to 8 C.F.R. § 245.1(g)(1) in the past with Gary Endelman (who has since become an Immigration Judge), 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)* ***("final action date"). An immigrant visa is also considered available for submission of the I-485 application based on a provisional priority date ('filing date") without reference to the final action date. No provisional submission can be undertaken absent prior approval of the visa petition and only if all visas in the preference category have not been exhausted in the fiscal year. Final adjudication only occurs***

> ***when there is a current final adjudication 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.*

If early adjustment filing consistent with INA 245(a)(3) is included in the final rule, imagine how many more workers will benefit from it. Having an actual rule in place, as proposed, will prevent the shenanigans that obstructionists in the USCIS have engaged in by arbitrarily holding back the filing date, and in recent months, not even recognizing it for purposes of filing I-485 applications. While an EAD of an approved I-140 will also be beneficial, being able to port off a pending adjustment application under INA 204(j) would allow the retention of the earlier I-140 petition (and underlying labor certification), without the need for an employer to file a new labor certification and I-140 petition. The filing of the I-485 application would also be able to protect a child from aging out under the Child Status Protection Act, which an EAD off an approved I-140 would not be able to do. Folks whose filing date would not be current could still take advantage of the EAD based on an approved I-140, but for those who can file an early I-485, they would incur many more benefits, including the ability to exercise true portability and eventually adjust to permanent residence in the United States.