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MUSINGS ON THE OCTOBER 2019 STATE DEPARTMENT VISA BULLETIN IN LIGHT OF THE FAIRNESS FOR HIGH SKILLED IMMIGRANTS ACT

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The State Department Visa Bulletin for October 2019 reflects forward movement as anticipated with the beginning of the federal fiscal year, except for the employment-based first preference (EB-1). It also does not look promising for many EB categories involving India. According to Charlie Oppenheim, there is normally full recovery or almost full recovery of the Final Action Dates from the previous year. Low level of demand would allow for thousands of unused numbers from the EB-4 and EB-5 of the previous year to become available for use in the EB-1. Those numbers unfortunately have not been available in recent years, and the high demand for numbers has required the application of Final Action Dates for all countries, and the dates for China and India have actually retrogressed during the past year in EB-1. Mr. Oppenheim forecasts for the upcoming fiscal year that there is no expectation that there will be any extra unused numbers available to EB-1 India and EB-1 China in the foreseeable future, and he further anticipates that both EB-1 India and EB-1 China will be subject to their minimum statutory limits of (approximately) 2,803 visa numbers for at least the first half of fiscal year (FY) 2020.

Mr. Oppenheim also reminds AILA members that for planning purposes they should not expect any of the EB-1 categories to become current at any time in the foreseeable future. He further predicts that there will not be any movement for EB-1 India until January 2020 at the earliest. There has been little movement in the EB-2 and EB-3 for India as well as the EB-5. On the other hand, the EB-2 and EB-3 for the rest of the world have become current. The Family 2A continues to remain a bright spot and is current for all countries.

In another interesting development, USCIS has designated the filing charts for both family-sponsored and employment-based preference cases for October 2019. For the F2A category, there is a cutoff date listed on the Dates for Filing chart. However, the category is "current" on the Final Action Dates chart. USCIS has indicated that applicants in the F2A category may file using the Final Action Dates chart for October 2019. T

This is development is most welcome. One who is caught in the India EB-5 retrogression can nevertheless file an I-485 adjustment of status application under the EB-5 Filing Dates, which is current for India. By filing an I-485 application, the applicant can obtain employment authorization and travel permission while waiting for permanent residence in the United States. Despite the broader use of Filing Dates from October 2019, it is odd that the USCIS does not allow the freezing of the age of the child under the Child Status Protection Act based on the Filing Date being current rather than the Final Action Date. As explained in a prior blog, if the Filing Date cannot be used under the CSPA, a child would still be able to file an I-485 application under the Filing Date, but if the child ages out before the Final Action Date become current, the I-485 application of the child will get denied and this will put the child in serious jeopardy.

It is really disappointing that the EB-1, which was designed to attract persons of extraordinary ability, outstanding professors and researchers and high level multinational executives and managers has gotten jammed. EB-1 for India will now likely suffer the same fate as EB-2 and EB-3 for India. However, since I-485 applications can be filed based on the Filing Dates, an EB-1 with a priority date up to March 15, 2017 can file an I-485 application although the EB-1 India Final Action Date is an abysmal January 1, 2015. This is why HR 1044 , Fairness for High Skilled Immigrants Act, is awaited with so much anticipation by India and China born beneficiaries. The bill will eliminate the country caps. After it passed the House with an overwhelming majority on February 7, 2019, a similar version, S. 386, did not go through the Senate on September 19, 2019 through unanimous consent. Senator Perdue objected, and the bill's sponsor Senator Lee has indicated that he is trying to work with Perdue to address his concerns. On the other hand, those not born in India and China were pleased that the bill has not pass. While it will shorten the backlogs for those from India and China, people from the rest of the world claim that they will all of a sudden be subject to backlogs in the EB-2, EB-3 and EB-5.

As a result of the existence of the per country limits, those born in India and China have been drastically affected by backlogs. Each country is only entitled to 7 percent of the total allocation of visas under each preference. Thus, a country like Iceland with only about 330,000 people has the same allocation as India or China with populations of more than a billion people. For instance, in the EB-2, those born in India have to wait for decades, and one study estimates the wait time to be 150 years!

HR 1044/S. 386 has unfortunately led to divisiveness in immigrant communities and even among immigration attorneys. If enacted, this bill would eliminate the per-country numerical limitation for all employment-based immigrants, and increase the per-country limitation for all family-sponsored immigrants from seven percent to 15 percent. One significant feature of this bill that distinguishes it from prior versions of this legislation is a "do no harm" provision. This provision states that no one who is the beneficiary of an employment-based immigrant visa petition approved before the bill's enactment shall receive a visa later than if the bill had never been enacted. Notably, the "do no harm" provision only applies to employment-based immigrants and does not apply to family-sponsored immigrants. The Senate version also includes a set-aside provision for no fewer than 5,000 visas for shortage occupations, as defined in 20 C.F.R. 656.5(a), which would include nurses and physical therapists, for Fiscal Years 2020-2028. It also retains the H-1B internet posting requirement proposed in the Grassley Amendment to S. 386, with some change. Specifically, the H-1B internet posting requirements will not apply to an H-1B nonimmigrant who has been counted against the H-1B cap and is not eligible for a full 6-year period or an H-1B nonimmigrant authorized for portability under INA 214(n). It also retains the “do no harm” provision for all EB petitions approved on the date of enactment and the three-year transition period for EB-2 and EB-3 immigrants, but does not include EB-5 immigrants in the transition period.

Notwithstanding the “do no harm” provision, there are fears that people born in all countries who apply after enactment will be subject to wait times, especially in the EB-2 and EB-3, which are now current for the rest of the world. While there is no way to accurately estimate the long term effect on wait times, a Wall Street Journal article cites a forthcoming analysis from the Migration Policy Institute indicating that “depending on the type of green card, the delay could be between 2.9 and 13.5 years.” This estimate, which has not been

published, does not take into consideration the recently introduced "do no harm" provisions or the carve outs for nurses. AILA is not aware of a comprehensive, independent, and publicly available analysis regarding how the House and Senate versions of the Fairness for High-Skilled Immigrants Act of 2019 would impact both the current employment-based and family-sponsored immigrant visa queues as well as future immigration flows.

The 1965 Immigration Act, which eliminated the national origin quotas of the 1924 Act, is justly celebrated as a civil rights measure that opened up the United States to global migration for the first time. The intention was to set the same percentages of caps for all countries. As a result of the limited supply of visas each year, and the increased demand from India and China, it has again indirectly created a national origins quota, where people from certain countries do not have the same opportunities as others to immigrate to the US. 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 EB-2 and EB-3 categories does not regulate your coming permanently to the United States; it makes it functionally impossible. Why should a country like India with a population of over a billion that sends many more skilled people to the US and are also in demand by US employers for those skills be subject to the same 7% per country limitation as Iceland that has 320,000 people? India, for example, is indeed a continent like Europe or Africa, with great diversity in religions. In addition to Hindus, there are millions of Muslims and Christians along with Sikhs, Buddhists, Jains, Jews and Zoroastrians. Besides Hindi and English as official languages, there are 22 regional languages. Still, each country within Europe gets 7% of the visas while India gets only 7%. So the contention that US will lose diversity if country caps are lifted can also be rebutted, though what is the most important consideration is whether demand for skills disproportionately from India are being fairly allocated under the per country limitations. They are not. The purpose of the 1965 Immigration Act was undoubtedly noble, but due to ossified per country limits over the years has led to invidious discrimination against Indians and Chinese, which essentially amounts to national origin discrimination that the 1965 Immigration Act sought to abolish.

The immigration system as it exists today is a mess and the status quo is

unacceptable. The bill is not at all perfect, but it at least aims to eliminate the invidious discrimination that has befallen Indians and Chinese in the EB categories. The easy passage of H.R. 1044 in the House in an otherwise political polarized environment, just like its predecessor HR 3012 in 2011, shows that there is concern about the unfairness and imbalance in the system towards certain countries. Things may work out better than expected if H.R. 1044 became law, though, and the fears of the critics may be exaggerated and overwrought. No published analysis has taken into consideration the "do no harm" and carve out provisions. We have lived without per country limits in recent times. Prior to Jan 1, 2005, the EB numbers were always current because the American Competitiveness in the 21st Century Act, enacted in 2000, recaptured 130,000 numbers from 1998 and 1999, and the per country limits were postponed under a formula until the demand outstripped the supply. The lack of per country limits helped, but we also had the additional unused numbers. However, at that time, we also had a surge under the 245(i) program, which we do not have today. The restrictionist organizations like CIS and FAIR know this, which is why they are opposing the passage of the bill. It is paradoxical that immigration attorneys who oppose this bill are on the same bandwagon as CIS and FAIR without fully well knowing the impact of the bills.

Even if H.R. 1044 imposes waiting times on others who were hitherto not affected in an unfair system while decreasing the wait times for Indians and Chinese, it is consistent with principles of fairness. As noted, there is no credible data as yet that opponents of the bill have cited to support the waiting times that will ensue for others under the bill. Still, we are aware of the atrociously long existing waiting times that the current system imposes on Indians. It is cruel to let someone languish for 70 years in the backlogs and then for their child to also languish for another 70 years. Under the current system, all EB-1s are already in waiting lines. Chinese, Vietnamese and Indians are also in waiting lines under EB-5. The EB-4 is currently unavailable for the whole world. The question is whether to kill H.R. 1044, and let Indians continue to languish for the rest of their lives and their children also continue to languish for their lives too (as it takes 150 years), or let is pass in order to provide relief to while continuing to reform the system with better solutions. While clearly not perfect, H.R. 1044 ought to be viewed as a down payment for further improvements in the system. H.R. 1044 would have at least gotten rid of the country limits, which over time, inadvertently result in national origin

discrimination. There is no moral justification in preserving country per limits as it hinders the ability of employers to hire people with the best skills, regardless of the country they come from. In the event that immigrants are made to wait under the new system, who may not only be Indians or Chinese, Congress will realize that the ultimate solution is to increase the overall visa numbers, rather than to maintain fossilized quotas that never change and are oblivious to economic and global realities.

The best solution is to do away with overall visa caps and country caps altogether. Let the market and employers determine who comes to the US based on their skills. The law already sets baseline standards such as a test of the labor market at the prevailing wage, or whether the person can seek an exemption by virtue of being extraordinary or working in the national interest. Quotas are thus superfluous and unnecessary. Removing all visa caps, on the other hand, is admittedly politically unrealistic. Then how about increasing the overall visa limits under each EB category, and also have a safety valve where the cap can increase if there is even more demand? If there is no consensus for an overall increase in the 140,000 visas that are allocated each year to employment-based immigrants, Congress may wish to exempt certain people from the numbers such as graduates with STEM degrees and some who qualify under EB-1 or the National Interest Waiver under EB-2, or better still, to not count dependent members separately. Another idea is to allow the filing of I-485 adjustment of status applications even if the priority date is not current. Yet another idea is to grant deferred action and employment authorization to deserving beneficiaries affected by the imbalance in the immigration system. All of these ideas have been explored in The Tyranny of Priority Dates that was published in 2011 and followed by How President Obama Can Erase Immigrant Visa Backlogs with a Stroke of a Pen in 2012, which provided for ways the administration could bring about reform without going through Congress. Since the publication of these articles, some ideas whether through uncanny coincidence or by accident came into fruition under the prior Obama administration such as the dual chart visa bulletin (that provides for a modest early adjustment filing), employment authorization under compelling circumstances and granting deferred action for certain non-citizens under DACA. In an ideal world, the same sort of deferred action could be given to children of backlogged beneficiaries who may age out. There is only so much that can be attained through administrative measures, and they are also

vulnerable to court challenges as we have seen with DACA and STEM OPT. If Congress steps in to specifically eliminate the counting of depravities and the filing of early I-485 applications, they can result in dramatic relief for those caught in the backlogs. All this will be preferable to HR 1044, but it has not materialized despite failed attempts over several years. S. 744 and the I Square Act provided for more comprehensive fixes, but they have fallen by the wayside. So can HR 1044 move ahead for now while there is a chance, while we all relentlessly continue to fight for further fixes please?