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PROPOSAL FOR THE BIDEN ADMINISTRATION: USING THE DUAL DATE VISA BULLETIN TO ALLOW THE MAXIMUM NUMBER OF ADJUSTMENT OF STATUS FILINGS

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As a result of the existence of the per country limits, those born in India and China have been drastically affected by backlogs in the employment-based green card categories. 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 employment-based second preference (EB-2), those born in India have to wait for decades, and one study estimates the wait time to be 150 years!

It would be ideal for Congress to eliminate the per country limits and even add more visas to each preference category. Until Congress is able to act, it would be easy for the Biden administration to provide even greater relief through executive action. One easy fix is to advance the dates in the State Department's Visa Bulletin so that many more backlogged beneficiaries of approved petitions can apply for adjustment of status and get ameliorative relief. Other fixes could include allowing beneficiaries of petitions overseas to enter the US on parole, and protecting more derivative children from aging out under the Child Status Protection Act.

The State Department's October 2020 Visa Bulletin was thus refreshing. It advanced the Dates for Filing (DFF) for the India employment-based third preference (EB-3) from February 1, 2010 to January 1, 2015. This rapid movement allowed tens of thousands of beneficiaries of I-140 petitions who were languishing in the backlogs and born in India to file I-485 adjustment of

status applications. Although an I-485 application filed pursuant to a current DFF does not confer permanent residence, only the Final Action Dates (FAD) can, the DFF provides a number of significant benefits, such as allowing the applicant to "port" to a different job or employer in the same or similar occupational classification after 180 days pursuant to INA 204(j), obtain an Employment Authorization Document (EAD) that enables them to work in the United States, and request advance parole or travel permission. Even derivative family members can also get EADs and travel permission upon filing an I-485 application.

The January 1, 2015 DFF in the November 2020 Visa Bulletin continue to remain at January 1, 2015 date for the India EB-3, thus enabling many more in the backlogs to file I-485 applications and take advantage of job portability. While the advance to January 1, 2015 was a positive development, there is a legal basis to advance the DFF even further, perhaps to as close as current. The Biden administration should seriously consider this proposal.

INA 245(a)(3) allows for the filing of an adjustment of status application when the visa is "immediately available" to the applicant. 8 CFR 245.1(g)(1) links visa availability to the State Department's 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 CFR 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.

The State Department has historically never advanced priority dates based on certitude that a visa would actually become 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 State Department 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! Fortunately, under the current November 2020 Visa Bulletin, the beneficiary of an I-140 petition under EB-2 may "downgrade" by filing an I-140 under EB-3 and a concurrent I-485 application. Another example is when the State Department 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 State Department then retrogressed the EB dates substantially the following month, and those who filed under the India EB-3 in July-August 2007 waited for over a decade before they became eligible for green cards.

These two examples, among many, go to show that "immediately available" in INA 245(a)(3), according to the State Department, 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.

Under the dual filing dates system first introduced by the State Department in October 2015, USCIS acknowledges that availability of visas is based on an estimate of available visas for the fiscal year rather than immediate availability:

> *When we determine there are more immigrant visas available for the fiscal year than there are known applicants, you may use the Dates for Filing Applications chart to determine when to file an adjustment of status application with USCIS. Otherwise, you must use the Application Final Action Dates chart to determine when to file an adjustment of status application with USCIS.*

See https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-and-priority-dates

Taking this to its logical extreme, visa availability for establishing the DFF may be based on just one visa being saved in the backlogged preference category in the year, 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 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 under a DFF, and this would be consistent with INA 245(a)(3) as well as 8 CFR 245.1(g)(1). DFF could potentially advance and become current, thus allowing hundreds of thousands of beneficiaries of I-140 petitions to file I-485 applications.

This same logic can be extended to beneficiaries of family-based I-130 petitions.

8 CFR 245.1(g)(1) could be amended (shown in bold) to 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 ("'Dates for Filing") 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 Action 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.*

Parole of Beneficiaries of Approved I-130 and I-140 petitions

With respect to beneficiaries of approved I-130 and I-140 petitions who are

outside the US, they too can be paroled into the US upon their DFF becoming current. This would provide fairness to beneficiaries of approved petition who are within or outside the US.

However, due to a quirk in the law, beneficiaries of I-130 petitions should be able to file I-485 applications upon being paroled in the US since parole is considered a lawful status for purpose of filing an I-485 application. See 8 CFR 245.1(d)(1)(v). On the other hand, beneficiaries of I-140 petitions will not be eligible to file an I-485 application, even if paroled, since INA 245(c)(7) requires one who is adjusting based on an employment-based petition to be in a lawful nonimmigrant status. Parole, unfortunately, is not considered a nonimmigrant status. Such employment-based beneficiaries may still be able to depart the US for consular processing of their immigrant visa once their FAD become current.

This proposal can be modelled on the Haitian Family Reunification Parole Program that allows certain beneficiaries of I-130 petitions from Haiti to be paroled into the US pursuant to INA 212(d)(5). See https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program. (The Filipino World War II Veterans Program also has a liberal parole policy for direct and derivative beneficiaries of I-130 petitions, https://www.uscis.gov/humanitarian/humanitarian-parole/filipino-world-war-ii-veterans-parole-program). Once the beneficiaries of I-130 petitions are paroled into the US, they can also apply for an EAD, and adjust status once their priority date becomes current. The HFRPP concept can be extended to beneficiaries of all I-130 and I-140 petitions, and parole eligibility can trigger when the filing date is current for each petition. Beneficiaries of I-130 petitions may file adjustment of status applications, as under the HFRPP, once they are paroled into the US. On the other hand, Beneficiaries of I-140 petitions, due to the limitation in INA 245(c)(7) would have to proceed overseas for consular processing once the FAD become current.

Protecting the Age of Child Under the Filing Date

The USCIS Policy Manual, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7, states that only the FAD protects the age of the child under the Child Status Protection Act (CSPA). Using the DFF to protect the age of the child who is nearing the age of

21 is clearly more advantageous – the date becomes available sooner than the FAD. Thus, if an I-485 application is filed pursuant to a DFF and the child ages out before the final date becomes available, the child will no longer be protected despite being permitted to file an I-485 application. The I-485 application will get denied, and if the child no longer has an underlying nonimmigrant status, can be put in great jeopardy through the commencement of removal proceedings, and even if removal proceedings are not commenced, can start accruing unlawful presence, which can trigger the 3 and 10 year bars to reentry. If the child filed the I-485 as a derivative with the parent, the parent can get approved for permanent residence when the final date becomes available while the child's application gets denied.

There is a clear legal basis to use the filing date to protect the age of a child under the CSPA:

INA 245(a)(3) only allows for the filing of an I-485 adjustment of status application when "an immigrant visa is immediately available." Yet, I-485 applications can be filed under the DFF rather than the FAD. As explained, the term "immigrant visa is immediately available" has been interpreted more broadly to encompass dates ahead of when a green card becomes available. 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 based on a Filing Date pursuant to 245(a)(3), then the interpretation regarding visa availability under 203(h)(1)(A) should be consistent, and so the Filing Date ought to freeze the age of the child, and the child may seek to acquire permanent residency within 1 year of visa availability, which can be either the Filing Date or the Final Action Date.

Unfortunately, USCIS disagrees. It justifies its position through the following

convoluted explanation that makes no sense: “If an applicant files based on the filing date chart prior to the date of visa availability according to the final date chart, USCIS considers the applicant to have met the sought to acquire requirement. However, the applicant’s CSPA age calculation is dependent on visa availability according to the final date chart. Applicants who file based on the filing date chart may not ultimately be eligible for CSPA if their calculated CSPA age based on the final dates chart is 21 or older.” The USCIS recognizes that the sought to acquire requirement is met when an I-485 is filed under the DFF, but only the FAD can freeze the age! This reasoning is inconsistent. If an applicant is allowed to meet the sought to acquire requirement from the DFF, the age should also similarly freeze on the DFF and not the FAD. Based on USCIS’s inconsistent logic, the I-485s of many children will get denied if they aged out before the FAD becomes available.

USCIS must reverse this policy by allowing CSPA protection based on the DFF.

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