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

SOLUTIONS FOR THE FAMILY MEMBER WHO DID NOT GET THE EMPLOYMENT BASED GREEN CARD WITH THE PRINCIPAL FAMILY MEMBER ON SEPTEMBER 30, 2022

Posted on October 1, 2022 by Cyrus Mehta

By Cyrus D. Mehta & Jessica Paszko*

This past month, we said our goodbyes to summer beach days and cookouts, welcomed the crisp autumn weather, crossed our fingers for clients with current employment-based priority dates and hoped that they would be one of the lucky few to get their green cards before the end of Fiscal Year 2022. As discussed in an earlier blog, September 30, 2022 marked the end of Fiscal Year 2022 for the Department of State and the last day by which USCIS promised to use as many available employment-based visas as possible. We hope that the dream of obtaining a green card came true for many of our readers or clients of our readers. To those that have finally gotten their long awaited green cards, which for many have been over a decade in the making, we wish a big congratulations and extend an official welcome to the U.S. as lawful permanent residents. To those that are still waiting, we wish patience and good fortune for the new fiscal year.

Typically, principal and derivative adjustment applicants get approved at the same time. Unfortunately, the process for others is not as smooth. While many families begin this new month of October celebrating their new status as lawful permanent residents, other still wait to get adjusted themselves or for family members to get adjusted. Under the State Department Visa Bulletin of October 2022, the India Employment-Based Second Preference (EB-2) retrogressed to April 1, 2012. Until September 2022, the India EB-2 Final Action Date was December 1, 2014. If the beneficiary of an I-140 petition with a priority date

after April 1, 2012 and till December 1, 2014 did not adjust to permanent residence by September 30, 2022, this individual will have to wait until the date becomes current again. It would be even worse if the principal beneficiary adjusted by September 30, 2022 but not the spouse or the minor child. And far worse if both parents adjust status and not the minor child. For instance, if the principal beneficiary of an I-140 petition has a priority date of December 1, 2014, she would be eligible to adjust status on or before September 30, 2022. If she did not adjust status by that date, she will not be able to adjust status under the October 1, 2022 Visa Bulletin as the Final Action Date retrogressed to April 1, 2012. If the principal beneficiary adjusted status, but not the spouse and the minor child, then the spouse and minor child will no longer be eligible to adjust status on October 1, 2022 as their I-485 applications are linked to the priority date of the principal applicant. They will need to wait until the Final Action Date in a future Visa Bulletin reaches December 1, 2014.

Today, we endeavor to explore some of the options that may be available for family members who have been left out and who still have not been approved despite the approval of the rest of their family. Take for instance, a principal applicant who received his green card this past month but his spouse's application is still pending as of October 1, 2022, even though they both applied for adjustment of status at the same time, or a child whose application still remains pending even though both parents received their green cards. What can one do in such situations?

The first option, as always, is to wait and see and hope that the Final Action Date moves ahead after the October 1, 2022 Visa Bulletin for those family members left behind. They can continue to remain in the U.S. based on their pending I-485 application. However, given that once current priority dates have retrogressed, the prognosis for the near future seems to be grim, and the EB-2 is unlikely to move or move quickly enough in the first quarter of Fiscal Year 2023 even though there will an infusion of 60,000 visas beginning on October 1. Assuming the coming months of Fiscal Year 2023 are slow moving, a potential solution is for the freshly minted green card holders to file an I-130 petition on behalf of their left behind family members. Thankfully, the family preference (F2A) visa category for spouses and children (unmarried and under 21 years of age) of lawful permanent residents is current. Thus, principal applicants who have already received their green cards, may file I-130 petitions for eligible spouses and children and could potentially rely on their currently pending

adjustment applications by transferring the underlying basis of the I-485 to the new I-130 petition. This process is also known as interfiling. The USCIS Policy Manual at Chapter 8 contemplates this precise scenario:

> *The applicant who originally applied for adjustment based on a pending or approved employment-based petition and later married a U.S. citizen now prefers to adjust based on a family-based petition filed by the new U.S. citizen spouse.*

However, to be eligible for F2A, one needs to have maintained lawful nonimmigrant status at all times in the US. Once the principal beneficiary, who may have been in H-1B status, adjusted status, the derivative family member will no longer in in a valid nonimmigrant status. Fortunately, the I-485 application that was previously filed and which is the subject of the transfer of underlying basis is still pending and was filed while the spouse and child may have been in a nonimmigrant status such as H-4. The fact that the nonimmigrant status has extinguished upon the adjustment of the principal spouse should not matter if the underlying basis of the I-485 is being transferred to the I-130 petition and the applicant was in nonimmigrant status at the time of filing the I-485 application.

The plot thickens in cases where the applicant may have not been in lawful status at the time of filing the I-485 application but took advantage of INA § 245(k). INA § 245(k) allows one who is filing an I-485 under one of the five employment based preferences to still file an I-485 application so long as the violation was for a duration of 180 days or less since the last lawful admission. Hence, if the spouse or child were not in status for less than 180 days or at the time of filing the I-485 application, their I-485 might have been valid so long as it was filed in conjunction with the employment based I-140 petition. Unfortunately, one who is filing an I-485 as a family preference beneficiary must have maintained a lawful immigration status at all times. 8 CFR § 245.1(d)(1)(ii) defines “lawful immigration status” for purposes of I-485 eligibility as an alien “whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of 8 CFR chapter 1.” USCIS also interprets this requirement of being in valid nonimmigrant status at all times under INA § 245(c)(2) and § 245(c)(8) to prior stays in the US for family preference beneficiaries. The INA § 245(k) exception

would be unavailing to this person if the underlying basis of the I-485 application is transferred from the I-140 petition to the I-130 petition.

But all hope is not lost even under this scenario. The derivative family member can always go overseas for consular processing once the I-130 petition has been approved. While the EB-2 remains retrogressed, this person can remain in the U.S. on the I-485 application and continue to obtain work and travel authorization. If the Employment-Based (EB) date moves forward, she can adjust status under this I-485 application and not pursue the I-130 petition. If the EB date continues to remain retrogressed, then once the I-130 petition is approved (a process that can take anywhere from 6 months to 30 months), and an interview is scheduled at the U.S. consulate overseas, she can leave the U.S. and process for the immigrant visa and return as a permanent resident. If the I-130 takes long to process, then there is a good chance that the EB dates will advance and become current again before the I-130 gets approved. Under this unfortunate scenario, where delays are the norm, the left behind family member may still have options.

Obviously, this entire rigmarole can be avoided if the USCIS efficiently adjudicated I-485s applications of the whole family together and have not wasted green cards as they did in FY2021. This hardship could be further avoided if Congress allocated more visa numbers in the EB backlogs so that skilled beneficiaries of I-140 petitions do not have to wait endlessly for permanent residence.

Jessica Paszko is an Associate at Cyrus D. Mehta & Partners PLLC. She graduated with a J.D. degree from Brooklyn Law School in 2021.