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THE DATES FOR FILING CHART IN THE VISA BULLETIN NOT ONLY PROTECTS CHILDREN FROM AGING OUT BUT CAN BE DRAMATICALLY ADVANCED TO ALLOW MANY MORE BACKLOGGED IMMIGRANTS TO FILE ADJUSTMENT OF STATUS APPLICATIONS

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On February 14, 2023, the USCIS issued updated guidance to indicate when an immigrant visa number "becomes available" for the purpose of calculating a noncitizen's age in certain situations under the Child Status Protection Act (CSPA). The guidance became on effective 2/14/23 and comments are due by 3/14/23.

Since October 2015, the State Department Visa Bulletin two different charts to determine visa availability – the Final Action Dates (FAD) chart and the Dates for Filing (DFF) chart. The DFF in the Visa Bulletin potentially 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 FAD is the date when permanent residency (the green card) can be granted. The Filing Date, if the USCIS so determines, allows for the early submission of an I-485 application prior to the date when the green card actually become available.

Prior to February 14, 2023, the USCIS maintained that the FAD protected the age of the child and not the DFF. 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 – but USCIS policy erroneously maintained since September 2018 that only the FAD could protect the age of the child. Thus, if an

I-485 application was filed pursuant to a DFF and the child aged out before the FAD became available, the child was no longer protected despite being permitted to file an I-485 application. The I-485 application got denied, and if the child no longer had an underlying nonimmigrant status, was placed in great jeopardy through the commencement of removal proceedings, and even if removal proceedings were not commenced, the child could start accruing unlawful presence, which triggered the 3- and 10-year bars to reentry. If the child filed the I-485 as a derivative with the parent, the parent could get approved for permanent residence when the FAD becomes available while the child's application got denied.

I had first advocated in my blog of September 22, 2018 entitled Recipe for Confusion: USCIS Says Only the Final Action Date Protects a Child's Age under the Child Status Protection Act that the DFF should protect the age of the child under the CSPA rather than the FAD. On August 24, 2018 the USCIS under the Trump administration explicitly stated in the USCIS Policy Manual that only the FAD could be used to calculate the age of the child. Subsequent blogs of mine protesting against this change are here and here. Brent Renison filed a lawsuit in Nakka v. USCIS again arguing that the DFF should be considered the point of time to protect the child's age and even AILA strongly advocated for this change, which can be found here and here. Several others also advocated on this issue.

The USCIS on February 14, 2023 at long last agreed to use the DFF to protect the age of the child. Those whose I-485 applications were denied under the old policy may file motions to reopen. I had argued that the term "an immigrant visa is immediately available" in INA 245(a)(3), which allows for the filing of an I-485 application, has not been defined. Allowing the filing of an I-485 under the DFF and ahead of the FAD suggests that the term "immigrant visa is immediately available" has been interpreted more broadly to encompass dates ahead of when a green card becomes available. Indeed, the Visa Bulletin describes the DFF as "dates for filing visa applications within a timeframe justifying immediate action in the application process." Under this permissible interpretation, I-485 applications can be filed pursuant to INA 245(a)(3) under the DFF. Applicants who file I-485s under both the Filing Date and the Final Action Date must satisfy INA 245(a)(3), which only permits the filing of an I-485 application when "an immigrant visa is immediately 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 DFF pursuant to 245(a)(3), then the interpretation regarding visa availability under 203(h)(1)(A) should be consistent, and so the USCIS in it updated policy guidance has stated that the DFF 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.

The new USCIS policy that recognized the DFF for freezing the age of the child acknowledged this:

> *"After the publication of the May 2018 guidance, the same applicant for adjustment of status could have a visa "immediately available" for purposes of filing the application but not have a visa "become available" for purposes of CSPA calculation. Applicants who filed based on the Dates for Filing chart would have to pay the fee and file the application for adjustment of status without knowing whether the CSPA would benefit them. To address this issue, USCIS has updated its policies, and now considers a visa available to calculate CSPA age at the same time USCIS considers a visa immediately available for accepting and processing the adjustment of status application. This update resolves any apparent contradiction between different dates in the visa bulletin and the statutory text regarding when a visa is "available."*

USCIS also instructs that those whose I-485 applications got denied because they were not permitted to use the DFF to determine their age may file motions to reopen. While the deadline to file a motion to reopen is 30 days, under 8 CFR 103.5(a)(1)(i) failing to file within 30 days after the denial may be excused if the

noncitizen demonstrates that the delay was reasonable and was beyond their control. Hence, those whose applications were denied prior to the change in the policy can request the USCIS to excuse a late filing as the delay was certainly beyond the control of the applicant. What about those who decided not to file an I-485 for their child because of the risks involved if the child aged out before the FAD became current? One can now look back at when the applicable DFF became current which can be used to freeze the age of the child, although under INA 203(h)(1)(A) the applicant should have also sought to acquire permanent resident status to fulfill the condition of freezing the age. If one year has already passed since the DFF became current, it might be possible to demonstrate extraordinary circumstances under Matter of O. Vazquez for failing to seek to acquire permanent resident status. Although the update to the USCIS Policy Manual has not specifically indicated whether this circumstance qualifies as an extraordinary circumstance, those who did not file I-485 applications within one year of visa availability because they could not predict that the policy would change and also feared that a denial of the I-485 if the FAD was unable to freeze the child's age should attempt to invoke the extraordinary circumstance exception.

State Department Must Also Update the FAM to be Consistent with the Updated USCIS Policy Guidance

Thus far, the State Department has not amended the Foreign Affairs Manual (FAM) to align with the new USCIS Policy. The FAM still states that the age of the child is determined when the FAD becomes current. A child who is processing for a visa at an overseas post should also be able to rely on the DFF rather than the FAD even if not filing an I-485 adjustment of status application in the US. If the visa became available under the DFF chart, then it should not matter whether the child is filing an I-485 application in the US or is processing for a visa overseas as the age of the child under the CSPA ought to be calculated based on when the visa became immediately available under INA 203(h)(1)(A).

Advancing the DFF Will Provide Relief to More Children and Backlogged Parents

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.

There is a legal basis to advance the DFF even further, perhaps to as close as current. This would allow many backlogged immigrants to file I-485 adjustment of status applications and get the benefits of adjustment of status such as the ability to port to a new job under INA 204(j), obtain travel permission and interim work authorization. Many more of the children of these backlogged immigrants would also be able to protect their age under the USCIS's updated guidance.

As noted, INA 245(a)(3) allows for the filing of an adjustment of status application when "an immigrant 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 may still potentially be waiting and have yet to receive their green cards even as of today! 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. More recently, the September 2022 Visa Bulletin has a cutoff date of December 1, 2014 for EB-2 India. In the next October 2022 Visa Bulletin the EB-2 India was abruptly retrogressed to April 1, 2012 and then further retrogressed to October 8, 2011. If a visa number was immediately available in September 2022, an applicant under EB-2 India with a priority date of December 1, 2014 or earlier should have been issued permanent residence.

These three 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.*

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 noncitizen 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.*

We appreciate that the Biden Administration has provided relief to hundreds of thousands of children by allowing them to use the more advantageous DFF so that they can get protection from aging out under the CSPA while their parent

remains in the backlogs. The Administration can go one step further by advancing the DFF so that hundreds of thousands more who are backlogged can file I-485 applications and their children can get further protection from aging out. Until Congress acts and adds much needed visa numbers to the employment and family based preferences, implementing this additional step will provide relief to many more in the backlogs.