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ADVANCING THE DATES FOR FILING IN THE STATE DEPARTMENT VISA BULLETIN WILL RESTORE BALANCE AND SANITY TO THE LEGAL IMMIGRATION SYSTEM

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The August 2023 Visa Bulletin is a disaster. Here are some of the highlights:

Establishment of Worldwide employment-based first preference (EB-1) final action date. Rest of World countries, Mexico, and Philippines will be subject to a final action date final action date of August 1, 2023. It is likely that in October the category will return to "Current" for these countries.

Retrogression in employment-based first preference (EB-1) for India. India will be subject to an EB-1 final action date of January 1, 2012. It is likely that in October the final action date will advance.

Retrogression in employment-based third preference (EB-3) for Rest of World countries, Mexico, and Philippines. The Rest of World, Mexico, and Philippines EB-3 final action date will retrogress in August to May 1, 2020.

Retrogression in family-based second preference (F-2A) for Rest of the World countries, China and India. The Rest of World, China, and India F2A final action date will retrogress to October 8, 2017.

.The bad news from the July 2023 Visa Bulletin continues into the August 2023 Visa Bulletin. The India EB-2 final action date remains retrogressed at January 1, 2011. The India EB-3 final action date remains retrogressed at January 1, 2009. Still, the corresponding dates for filing in the August 2023 visa bulletin are significantly more ahead than the final action date. For instance, the dates for filing for the F2A for all countries is current. The dates for filing for the EB-1

for the Rest of the World is current and for India is June 1, 2022. Yet, the USCIS has indicated that I-485 adjustment of status applications can only be filed in August 2023 under the dates for filing chart if they are family-based while I-485 adjustment of status applications can only be filed in August 2023 under the final action dates chart if they are employment-based.

The USCIS should allow I-485 applications related to both family and employment-based petitions to be filed under the dates for filing chart. Indeed, in the face of massive retrogression in the Visa Bulletin, the Biden administration does have the authority to move the dates for filing to current. However, even before taking this radical step, which has a legal basis, the administration should at least allow I-485 applications to be filed under the dates for filing in both the family and employment-based preferences.

The total allocation of visa numbers in the employment and family based categories are woefully adequate. §201 of the Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000. The worldwide level for annual employment-based preference immigrants is at least 140,000. INA §202 prescribes that the per-country limit for preference immigrants is set at 7% of the total annual family-sponsored and employment-based preference limits, i.e., 25,620. These limits were established in the Immigration Act of 1990, and since then, the US Congress has not expanded these limits for well over three decades. In 1990, the worldwide web was not in existence, and since then, there have been an explosion in the number of jobs as a result of internet based technologies and so many related technologies as well as a demand for foreign skilled workers many of whom have been educated at US educational institutions. Yet, the US legal immigration system has not kept up to timely give green cards to immigrants who contribute to the country. Due to the per country limits, till recently it was only India and China that were backlogged in the employment based preferences, but now under the August 2023 Visa Bulletin all countries face backlogs. Still, India bears the brunt disproportionately in the employment-based categories, and one study has estimated the wait time to be 150 years in the India EB-2!

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 for filing in the State Department's Visa Bulletin so that many more backlogged beneficiaries of

approved petitions can file I-485 adjustment of status applications and get ameliorative relief such as an employment authorization document (EAD), travel permission and to be able to exercise job portability under INA §204(j). Spouse and minor children can also avail of work authorization and travel permission after they file their I-485 applications.

There is a legal basis to advance the dates for filing even to 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 an EAD. Many more of the children of these backlogged immigrants would also be able to protect their age under the USCIS's updated guidance relating to the Child Status Protection Act.

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 had a final action date of December 1, 2014 for EB-2 India. In the next October 2022 Visa Bulletin the FAD for EB-2 India was abruptly retrogressed to April 1, 2012 and then further retrogressed to October 8, 2011 in the December 2022 Visa Bulletin. 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 DFF 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 dates for filing 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). This is

reflected in the August 2023 Visa Bulletin as the first visa in the India EB-3 has a priority date of January 1, 2009. Hence, there is one available visa in the India EB-3 skilled worker, otherwise it would have stated "Unavailable." The dates for filing could potentially advance and become current based on this available visa with a January 1, 2009 priority date in the India EB-3, 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.

The administration simply needs to move the dates for filing to current or close to current. It can undertake this executive action through a stroke of a pen. However, if it needs to do this through rulemaking 8 CFR 245.1(g)(1) could be easily 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.*

The Biden administration has provided relief to hundreds of thousands of foreign nationals through executive actions such as humanitarian parole, now enforcing deportation against low priority individuals and extending DACA. The administration recently announced a Family Reunification Parole Initiative for beneficiaries of approved I-130 petitions who are nationals of Colombia, El Salvador, Guatemala, & Honduras. Nationals of these countries can be considered for parole on a case-by-case basis for a period of up to three years while they wait to apply to become lawful permanent residents. This is an example of the administration using its executive authority to shape immigration policy in the absence of meaningful Congressional action to reform the system. Indeed, this initiative can serve as a template to allow beneficiaries of approved I-130, I-140, and I-526 petitions to be paroled into the US while they wait for a visa number to become available, which under the backlogs in the employment and family preference categories, can take several years to decades. The Biden administration ought to likewise advance the DFF to current so that beneficiaries of family and employment petitions can file I-485 applications and get the benefits of employment authorization, advance parole and the ability to port to a new employer if the job is same or similar to the position that was the subject of the sponsorship for the green card. There is also a parallel campaign to convince the administration to issue an EAD and advance parole for beneficiaries of approved I-140 petitions, although this should be done in conjunction with advancing the dates for filing so that applicants can also file I-485 applications. Once the I-485 is filed applicants would also be able to port to same or similar jobs under INA §204(j) and keep intact the underlying labor certification and I-140 petition. As we have shown in a related blog on the compelling circumstances EAD, if the EAD is not linked to an I-485 application and they do not have nonimmigrant status, holders of this EAD will have to leave the US to consular process for their immigrant visas and would also need another employer to sponsor them if they have left or cut ties with the original employer who sponsored them. This would entail getting the new employer to start the whole labor certification process, which is perilous these days if the employer as laid off workers.

The Supreme Court in *United States v. Texas* very recently rendered a blow to Texas and Louisiana in holding that they had no standing to challenge the Biden administration on federal immigration policy on enforcement priorities. As this analysis can also apply to challenges to other executive actions on

immigration by states not friendly to pro immigrant executive actions, the Biden administration should move boldly and advance the DFF in the State Department Visa bulletin to restore balance and some semblance of sanity to the legal immigration system in the US.