



ALTHOUGH THE OCTOBER 2023 VISA BULLETIN IS DISAPPOINTING, THE ADMINISTRATION STILL HAS THE OPTION TO ADVANCE THE DATES FOR FILING IN THE NEXT VISA BULLETIN

Posted on September 17, 2023 by Cyrus Mehta

By Cyrus D. Mehta

The [October 2023 Visa Bulletin](#) was disappointing. There was some expectation that the Administration would radically advance the Dates for Filing so that many more could file I-485 adjustment of status application, but that never happened notwithstanding a [bipartisan letter](#) signed by more than 50 Congresspersons advocating for this reform. It was hardly any consolation that the India EB-1 Final Action Dates moved from January 1, 2012 in the September 2023 Visa Bulletin to January 1, 2017 in the October Visa Bulletin and the India EB-3 Final Action Date moved from January 1, 2009 in the September 2023 Visa Bulletin to May 1, 2012 in the October Visa Bulletin. While the USCIS in the October Visa Bulletin has permitted filing I-485 applications under the Dates for Filing, they were still dishearteningly retrogressed for India born applicants at July 1, 2019 for EB-1, at May 15, 2012 for EB-2 and August 1, 2012 for EB-3. Interestingly, the [USCIS has stated](#) that the employment-based FY 2024 limit is 165,000, which is more than the 140,000 annual limit but not as significant as the increased limit resulting from the spillover from the family based preferences in prior recent years during Covid. This has resulted in many Final Action dates advancing from the September 2023 Visa Bulletin but the advances will not bring too much cheer to the backlogged community with the exception of the worldwide EB-1, whose Final Action Dates and Dates for Filing have become current.

Following the heels of the October 2023 Visa Bulletin, the USCIS posted a

[bulletin](#) entitled “USCIS Actions to Support Adjustment of Status Applicants Who are in H-1B Status in the United States” extolling all that it has done so far relieve H-1B beneficiaries in the crushing backlogs such as options following the termination of employment and broadening the ability of children under 21 to claim CSPA protection under the DFF. The USCIS has not done enough and more can surely be done. At the end of the bulletin USCIS states, “We will keep working within our legal authority to provide as much flexibility, predictability, and dignity as possible for all those waiting for their chance to become a lawful permanent resident and ultimately a U.S. citizen.” This claim sounds hollow unless the Administration starts taking bold action.

Long before the bipartisan Congressional letter was issued in July 2023, I have been advocating for advancing the Dates for Filing for several years. The State Department has 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. Although the administration disappointingly did not dramatically advance the DFF, it can do so in next month’s and subsequent visa bulletin.

Below is an extract from my recent [interview](#) with Stuart Anderson in Forbes entitled “Changing Visa Bulletin Can Save Immigrants and H-1B Visa Holders” that provides the blueprint for the Administration to advance the Dates for Filing:

Anderson: You [have written](#) that the State Department and the Biden administration could provide relief by changing the dates in the Visa Bulletin. Can you explain how this would work?

Mehta: The State Department Visa Bulletin consists of dual dates—Final Action Dates and Dates for Filing. The dates under the Final Action Dates determine when the green card can be issued to the foreign national, while the Dates for Filing indicate when the foreign national can file an I-485 application for adjustment of status. One easy fix is to advance the Dates for Filing to current so that many more backlogged beneficiaries of approved petitions can file I-485 adjustment of status applications.

Anderson: What would be the impact of this change?

Mehta: By being able to file I-145 applications, skilled foreign workers caught in the employment-based backlogs can get ameliorative relief

such as an employment authorization document (EAD), travel permission and be able to exercise job mobility under INA section 204(j). Spouses and minor children can also avail of work authorization and travel permission after they file their I-485 applications.

Many more of the children of these backlogged immigrants would also be able to protect their age if the date for filing is made current. While it would be ideal for Congress to provide more immigrant visas so that people become permanent residents, in the face of Congressional inaction, allowing skilled workers to file I-485 applications would give them and their families more mobility and flexibility.

Anderson: *Why do you believe the State Department has the legal authority to make this change in the Visa Bulletin?*

Mehta: *INA section 245(a)(3) allows for the filing of an adjustment of status application when “an immigrant visa is immediately available” to the applicant.*

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 Visa Bulletin, May 2012, a month later, the EB-2 cut-off dates for India and China retrogressed to August 15, 2007.

If the State Department were 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 Final Action Date 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, show that “immediately available” in INA section 245(a)(3), according to the State Department, has 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.

Anderson: *Why do you suggest that the Dates for Filing be advanced to “current”?*

Mehta: *Although INA section 245(a)(3) requires that an immigrant visa be immediately available to file an I-485, the Dates for Filing are based on an elastic view of visa availability and are generally ahead of the Final Action Dates by a few to several months. According to [U.S. Citizenship and Immigration Services](#): “If USCIS determines there are more immigrant visas available for a fiscal year than there are known applicants for such visas, we will state on this page that you may use the Dates for Filing chart.” While it is salutary that the Dates for Filing are ahead of the Final Action Dates by a few months based on an estimate of visa availability, there is no reason why the Dates for Filing cannot be set even more ahead of the Final Action Dates.*

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 a noncitizen beneficiary.

So long as there is one visa kept available, it would provide the legal basis for an I-485 filing under the Dates For Filing, and this would be consistent with INA section 245(a)(3). 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 point that I have tried to make about the Administration's elastic interpretation of "immediately available" under INA 245(a)(3) is underscored by the dates in the Family Second 2A Second Preference in the October 2023 Visa Bulletin. The Final Action Dates for the F2A in the Worldwide is February 8, 2019. On the other hand, the Dates for Filing for the F2A in the Worldwide is September 1, 2023. If the term "immediately available" was strictly construed, there would not be a 4+ year difference between the two dates but yet applicants under both the Final Action Dates and Dates for Filing are able to file I-485 applications under INA 245(a)(3).

Many were understandably both disappointed and outraged after the release of the October 2023 Visa Bulletin. Noted immigration attorney Greg Siskind [posted](#) this on X (formerly Twitter):

If Congress won't do its job, the Administration certainly has options. Allowing everyone to file to adjust (the [@cyrusmehta](#) theory) or get EADs and be free agents and not counting derivatives all have strong legal support. Those protesting and saying that USCIS can't legally do it have a status quo bias.

I agree. There is no need for this Administration which is otherwise pro immigrant to stonewall good ideas. It is hoped that some courageous folks within the Administration shatter the status quo and radically advance the

Dates for Filing in the next visa bulletin.