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JULY 2007 VISA BULLETIN FIASCO: A POST-MORTEM

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by
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The government's sensible resolution of the July 2007 Visa Bulletin fiasco was met with jubilation from potential adjustment of status applicants who were earlier thwarted from filing. The August 2007 bulletin announced that the July 2007 Employment-based preferences, except for the Other Worker category, would again be current, and DHS further announced that the deadline for filing adjustment applications (Form I-485) will extend up to August 17, 2007.

It was clearly the remarkable advocacy of the immigrant community, particularly the grassroots organization, Immigration Voice, www.immigrationvoice.org, that forced the government to resolve the problem. The government was further forced into finding a solution when it faced law suits. A Chicago law firm, Azulay, Horn & Seiden, LLC, already filed a class action and the American Law Foundation too, www.ailf.org, was on its way to filing a major class action law suit in a federal district court in Seattle. AILF's well crafted complaint, if filed, would have put the government on the defensive, and it was thus wise for the government to buckle down rather than defend litigation that had the potential of resulting in a similar victory for the plaintiffs. Congresswoman Zoe Lofgren (D-CA) should also be complimented for aggressively pursuing the matter with DHS, along with the American Immigration Lawyers Association and its member lawyers who did not take the earlier government announcement of July 2, rendering all employment numbers unavailable, lying down. Indeed, many immigration attorneys continued to advise their clients to file I-485s despite the July 2 announcement- as it could potentially be of benefit if the AILF litigation was successful - which on hindsight was a good decision. It would ease their burden to rush to file by August 17.

Several issues still remain unresolved. Many people filed I-485 applications in a rush when they heard rumors that the visa numbers would close down in early July. Some filed I-485s without the medical report or without the proper form of birth certification. Mistakes could have also been made with respect to filing fee amounts. It is hoped that the USCIS does not reject these applications outright, and issues Requests for Evidence (RFE) for the missing documentation. If USCIS does not announce a lenient policy in this regard within the next few days, it may be advisable for those who filed I-485s with incomplete initial evidence to re-file the I-485 before August 17. By filing a duplicate I-485 application, it would act as an insurance policy if the prior I-485 got rejected after August 17. If both the I-485s are ultimately accepted, the applicant could still elect to withdraw the prior I-485 with the missing evidence.

The DHS further announced that the old filing fee for the I-485 would still be preserved until August 17, even though the I-485 filing fee will increase from $ 395 (including biometric fee) to $ 1010 (including biometric fee) as of July 30, 2007. It remains to be seen whether the old I-140 filing fee, if being filed concurrently with the I-485, will also be preserved until August 17. Moreover, the USCIS should also preserve the original fee for applications accompanying the I-485 application such as the Form I-131 (application for travel authorization) and Form I-765 (application for employment authorization).

Other issues also need to also be clarified. Suppose an applicant was accruing unlawful presence, and could have stopped the clock before 180 days by filing the I-485 on July 2, 2007, would he or she now be subject to the three year bar because the I-485 application can again only be filed from July 17 onwards? The inability to file on July 2 could also affect someone who was seeking the protection of Section 245(k) by filing the I-485 within the 180 days from the accrual of the status violation. A child who was aging out, and who could have been protected under the Child Status Protection Act by filing the 1-140/I-485 before turning 21 on July 2, may also be affected if the USCIS rejected both the I-140 along with the I-485. Of course, an applicant seeking protection under the CSPA would still be protected if only an I-140 petition was successfully filed before he or she reached 21. Finally, would those who establish priority dates between August 1 to 17 be able to file an I-485 application? The August 1-17 period is actually a grace period for those who were current in July 2007 or prior. Such a scenario is possible with respect to one who files an I-140/485 under one of the labor certification exempt categories between August 1 and

17, 2007. Theoretically, a PERM labor certification could also be filed after August 1 and be approved before August 17, resulting in a priority date post-July 31, although, as a practical matter, the PERM system is taking much longer to certify a labor certification.

Sadly, applicants within the EB-3 Other Worker category have been left out in the cold. They were unable to file after a few days after June 1 2007, despite the EB-3 Other Worker category being available for an October 1, 2001 cut off date for the entire month of June. Almost all of them are probably ineligible for the H-1B visa and would have greatly benefited by filing I-485 applications. Litigation still ought to be pursued on their behalf.

The final lesson from the fiasco is that the DHS solution is only a band-aid to a much deeper malaise afflicting the employment-based immigration system. There is clearly a huge demand for immigrant visas and a limited supply, which is further reduced by the per country limit. The expected deluge of I-485 prior to the extended deadline of August 17 will further increase the demand. Moreover, the USCIS has not been able to exhaust the entire 140,000 visa numbers in prior years. Jay Solomon, an Atlanta immigration attorney, estimated in June 2007 that the EB-3 preference for India would be backlogged by 7 years. With the new I-485 filings, these absurd waiting times will only increase. For further details into how the EB numbers are underutilized within the preferences and per country limits, I refer you to his insightful article, When will I get my "green card?, available on www.usimmlaw.com. It is hoped that Congress pays attention to this problem and increases the employment-based visa numbers especially in the EB-2 and EB-3 categories. Alternatively, if such a bill will not be politically palatable, given that the Senate's Comprehensive Immigration Reform recently bill went down in flames, Congress could still allow prior years' unused visa numbers to be presently utilized, eliminate the per country limits, allow family members to ride on the principal applicant's visa number (presently, each family member takes up one visa) and also allow individuals to file I-485 applications even if the visa numbers are not current.

Update: July 23, 2007

USCIS ISSUES FAQ ON ADJUSTMENT APPLICATIONS

On July 23, 2007, USCIS issued a FAQ addressing some of the issues that we

raised in the article. For instance, USCIS will reject adjustment applications with missing or incorrect filing fees or missing signature. The filing fees for Form I-765 and Form I-131 still remain in effect at $180 and $170 respectively between July 17 and August 17, 2007. On the other hand, the fee on the Form I-140, whether or not filed concurrently on or after July 30, 2007 will increase to $475. USCIS has also indicated that it will not accept I-485 applications under the July visa bulletin 107 if the priority date is August 1, 2007 or later. Finally, if the application was filed without the medical examination, USCIS has assured that it will not reject but it will issue a Request for Evidence.

FAQ

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