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Visa Bulletin 2.0 and its Implications, Including For EB-5 Investors

Authors: Robert C. Divine
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On September 9, 2015, the U.S. Government pleasantly surprised the immigration world by publishing a new type of monthly Visa Bulletin for October 2015 with USCIS announcement about a new approach to the timing of the ability to take the last steps toward permanent residence. Bottom line: People otherwise eligible and present in the U.S. can file for "adjustment of status" and get interim work and travel documents significantly earlier than when their place in the queue for limited visa numbers is set for green card approval. Maybe USCIS will shed more light at the September 16 stakeholder meeting USCIS has established (click the link to register).

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Two Step Process. With apology, it takes a little background to understand what's happening and what else it might mean. The path to U.S. permanent residence normally involves two essential steps: first, establish to U.S. Citizenship & Immigration Services (USCIS) your substantive eligibility for a particular category (and yes, in certain employment based categories that in itself starts with a preliminary process of "labor certification" with the Department of Labor); and second, once you are at the front of any waiting list for limited "visa numbers" allocated annually by statute, show that you are at the front of the queue and are not "inadmissible" (that is, without certain criminal convictions, contagious diseases, or other attributes Congress has listed). That second step involves either: (1) for people who are in the U.S. and otherwise eligible, filing for "adjustment of status" on Form I-485 with USCIS; or (2) for people processing outside the U.S., applying for an immigrant visa at U.S. consulate abroad.

Visa Number Allocation Rules. The law makes visa numbers available in each category on a worldwide "first come, first served" based on when the first filing for eligibility was made for the applicant (I-130, labor certification, I-140, I-360, or I-526), and that filing date marking the place in the queue is the person's "priority date." But no country's natives are entitled to more than 7% of the world allocation in a category unless the rest of the world does not use up the rest of the annual allocation, so people born in countries using lots of visas will need to wait longer. There are some complicated rules about annually "unused" numbers "spilling down" or "spilling up" between categories. Some general government goals are to use up all the numbers in a given year (if demand is there), but not to go over the limit, and to try to spread the final interviews at consulates throughout the year to allow relatively level staffing and smooth processing. Not easy.

Visa Number Management Challenges. The Department of State (DOS) is technically in charge of managing the allocation of "visa numbers," and the way it has done so was conceived before adjustment of status within the U.S. became an option in 1950. It has published a Visa Bulletin each month with charts for the family and employment categories as the horizontal rows and the countries as the vertical columns. In the

grid's cells are published the "cut-off date" for the category and country (or group of countries), and any otherwise qualified applicant with a "priority date" that is earlier than the cut-off date is eligible to receive an actual visa number and be granted permanent resident. But unless people step up to apply, DOS can't really see how many people are eligible and where to draw the cut-off lines. It has approved petitions from USCIS for people who had told USCIS they intended to process for visas abroad, but some people won't pursue their cases, and it is hard for DOS to assess the real demand. So DOS has quietly and opaquely defined a separate set of "qualifying dates," which are later than the cut-off dates, and has invited applicants with priority dates earlier than the qualifying dates to start paying the visa application fees and submit data forms and documents to establish that they are "documentarily qualified." DOS would then use the picture from the resulting data to draw the cut-off dates and set interviews for applicants with priority dates before the cut-off dates. It works pretty well for the visa process.

Special Challenges with Adjustment. But adjustment of status applications are made to USCIS, an agency in a different Government department. In the past, the rules have allowed applicants to file for adjustment only after their priority date was before the cut-off date. Because DOS could not see into a pipeline of filings that had not yet been filed, it had inadequate data on which to set the cut-off dates. Because over 80% of applicants in the main employment categories tend to be already in the U.S. and thus use adjustment instead of visa processing, DOS was really just guessing about how many people would suddenly be eligible to receive permanent residence if it set a certain cut-off date.

So what happened and why? So this week, as part of the "Executive Actions on Immigration" that President Obama had initiated in late 2014, USCIS and DOS announced that it was changing two things: (1) openly publishing in each monthly Visa Bulletin the separate set of "qualifying dates" previously used in the background by DOS to get visa applicants to queue up early, now re-naming them as "Dates for Filing Applications"; and (2) opening the use of those "filing dates" to applicants for adjustment of status within the U.S. Therefore, someone who is the "principal beneficiary" (main sponsoree) of an approved or even pending petition and whose priority date is now earlier than the "filing date" published in that month's Visa Bulletin can go ahead and file for adjustment of status, if otherwise eligible under some tricky rules, even though the priority date is still later than the published cut-off date, now called the "final action date." The idea is to allow DOS to be able to see actual, queued up and vetted final applications in both the USCIS and DOS systems to see how many people would qualify for actual approval based on a certain "final action" cut-off date. That way DOS should be able to manage the flow of actual visa allocations to give away the full allocated number in an orderly way over the course of each year and not go over the limit.

The implications are interesting and important.

Earlier Filings and Freedom. First, this means that a lot of people in the process for green cards who would have had to maintain temporary status in the U.S. and later file for adjustment can go ahead and file the last step earlier than under prior practice. By doing so, they will become eligible for interim cards allowing unrestricted work and international travel almost as if they already were permanent residents. Those whose eligibility is based on certain work sponsorship would need to maintain the plan to maintain or undertake that work once the green card is approved, but a special law allows people whose adjustment applications have been pending for 180 days to become free of that restriction and finish the green card process based on any employer's offer of work in the "same or similar occupation." So sponsored workers will become "free agents" sooner, and a new dynamic about employment sponsorship is introduced.

Derivatives, Too. Second, the spouse and unmarried children under age 21 who normally can derive green card eligibility from the "principal applicant" also can apply for adjustment or immigrant visa as early as the principal applicant, but only if they are applying in the same way. If the principal applicant is processing for a visa then the derivative can only go ahead with a visa process, and if the principal applicant is applying for

adjustment then the derivative can only go ahead with adjustment. The derivative can only choose to use the other process by waiting for the principal to complete his or her process to actual green card and then the derivative can proceed. For example, a child who is in the U.S. and finishing up F-1 student status cannot take advantage of sponsorship of the parent with a priority date earlier than the published "filing date" and file for adjustment within the U.S. if the parent is not also in the U.S., qualified, and filing for adjustment. It might be smarter for a family mainly outside the U.S. but with some people within the U.S. to join in the visa process to "get on record" as early as possible, especially for the child (see below for why).

Aging Out Protection Questions. There is a really tricky issue to be resolved about whether the filing of an adjustment application in the U.S. or the payment of an NVC fee bill as the first step in visa processing will "lock in" the "adjusted age" of a child under the Child Status Protection Act (CSPA) to avoid any chance of "aging out." The CSPA says that a child's "adjusted age" is deemed frozen while an immigrant petition is pending but that once the petition is approved the child's adjusted age resumes advancement until a visa number is available. The child can "lock in" the adjusted age and avoid "aging out" to 21 by filing for adjustment or paying the NVC fee bill within one year after the visa number becomes available. The question is whether a visa number is now deemed "available" for this CSPA purpose when the "filing date" has been reached but the "final action date" has not been reached. On one hand, allowing people to file early is just a mechanism for DOS to decide when to make visa numbers "available" by the setting of final action dates. Under that view, the early filing by a child would not lock in an adjusted age until the final action date was reached. On the other hand, DOS and USCIS arguably have redefined "visa availability" to be the point that the "filing date" is reached. After all, INA section 245(a)(3) and 8 CFR section 245.1(a) say that a person can only file an application for adjustment if "an immigrant visa is *immediately available* at the time of filing the application." So if USCIS is allowing adjustment filing based on "filing date" without changing the law or regulation, then USCIS and DOS must have decided that a visa number is "immediately available" at that point for CSPA purposes as well. Time will tell, and maybe even as soon as September 16. It seems worth the risk of a filing fee for a potentially aging out child to join an early filing (either in filing for adjustment or paying a visa fee bill) in the hope of protecting eligibility, but it might not work. And some people who previously were deemed aged out but had paid an NVC fee bill might have the chance to revive a CSPA claim.

What's the Difference? Just how much earlier can people now apply than before? Stated like a lawyer: it depends. It seems like the new "filing dates" are relatively earlier than what we could only observe haphazardly in practice from the old "qualifying dates." And we only have this first October 2015 Visa Bulletin to go by. I can't really discern a formula or theme yet. And we must remember that the dates that are published show who is at the front of the queue today, and the queue might move forward faster or slower than regular time progression, depending on demand. DOS may have infused "inside knowledge" about demand in setting the dates with some kind of typical target variation between when filing and final action dates will be reached in practice. Anyway, the variations are significant. For instance, unmarried adult children born in the Philippines sponsored by U.S. citizens (F1) can file over 4 years older than under prior policy. For EB-5 professionals from India the spread is more than 6 years. Wow! But for EB-3 workers from most countries the spread is only two weeks. The average spread seems to be about a year.

EB-5 Dates for October-- What Ho? The October 2015 Visa Bulletin shows visas completely "unavailable" for regional center-sponsored investors in the chart for final action dates, because the repeatedly extended appropriations bill that created RCs is set to expire on September 30, 2015 and has not yet been renewed. The chart for Filing Dates has only one unified row for EB-5 showing "current" for all but mainland China natives with a date of May 1, 2015, which is about 17 months earlier than the Final Action Date. It is not clear why DOS did not show a separate row for regional center-sponsored applicants with "unavailable" for all countries. If anyone needed something in black and white as a wake-up call to what will result if the regional center legislation is not renewed, the October Visa Bulletin is it.

Wiggling to U.S. Early? In most cases, people who have filed for the green card process want to live here sooner rather than later. Let's face it: early filings toward the immigrant visa process might help save a derivative child's eligibility, and it queues people up for final action once the visa numbers really are available, but it does not get them here and doing what they want. But filing for adjustment does all that and affords unlimited work and travel authorization almost as good as a green card. So we can expect that people in the permanent residence process and their family (so they can file together) will be scheming to get to the U.S. and be here at the time or after their Filing Date is reached so they can file for those interim benefits. Those who don't already have a valid visa and need one must answer the DS-160 application question, "Has an immigrant petition been filed for you?" That's a red flag of "immigrant intent," though not necessarily fatal to an application, especially in categories that allow dual intent (tricky stuff). The one dumbest thing is to lie in answering that question, because there is a clear record, USCIS increasingly looks back at those applications in deciding adjustment applications, and having made an intentional and material representation in a visa application results in permanent inadmissibility for which a waiver for most EB-5 applicants will be unavailable. It is not clear whether a derivative beneficiary of a pending or approved immigrant petition must answer yes to that same DS-160 question. Port of entry interactions could become problematic for people seeking to jump the gun into the U.S. to take advantage of this program. Legal counsel may be important.

Medical Exam Timing. One other mechanical implication relates to medical examinations. Immigrant visa applicants obtain their medical exam shortly before visa interview, after Final Action Date is reached, so that won't be affected. But it has been the practice in the past to include a medical exam report in an initially filed adjustment application, because a visa number was already by requirement immediately available, so there would be no time for the exam to get stale unless the category "regressed" due to sudden demand or to USCIS delay in processing. Now it may be years before USCIS can approve an adjustment application after filing, and USCIS requires the exam to be no more than one year old when submitted and to be used for adjudication within one year from submission. So more applicants will choose not to include a medical exam report in their adjustment application. USCIS will need to develop a good system to request updated medicals shortly before priority dates are reached, or applicants will need to figure out how to make predictions and interfile the (new) medical exams and pester USCIS to acknowledge receipt for adjudication promptly once Final Action Date is reached.

Robert C. Divine leads the Global Immigration Group of Baker, Donelson, Bearman, Caldwell, & Berkowitz, P.C., a law firm of over 650 lawyers and public policy advisors with offices in 20 cities in the U.S. including Washington, D.C. Mr. Divine served from July 2004 until November 2006 as Chief Counsel and for a time Acting Director of U.S. Citizenship & Immigration Services (USCIS). He is the author of Immigration Practice, a 1,600 page practical treatise on all aspects of U.S. immigration law now in its Fifteenth Edition (see www.jurispub.com). He has practiced immigration law since 1986 and has served as Chair of various committees of the American Immigration Lawyers Association and currently serves on the EB-5 Committee. He has served six years as Vice President of the Association to Invest in the USA (IIUSA), an association for EB-5 regional centers. Under his leadership, Baker Donelson serves a wide range of legal needs for regional centers, developers, and investors, including immigration, securities, business, real estate, tax, international, government investigations, and litigation. His contacts and biography can be found at www.bakerdonelson.com/robert-c-divine.