

## Frequently Asked Questions on Employment-Based Immigrant Visa Priority Dates

*Revised July 5, 2007*

In an unprecedented series of events, the U.S. Department of State (DOS) announced on June 13, 2007 that as of July 1, 2007, every employment-based immigrant visa category (except for the “other worker” category for low-skilled workers) would be listed as “current,” meaning that beginning on Monday, July 2, beneficiaries of Form I-140 petitions for immigrant workers would be eligible to submit applications for adjustment of status to permanent residence to U.S. Citizenship and Immigration Services (USCIS). Then, on July 2, DOS announced that due to unexpected backlog reduction efforts by U.S. Citizenship and Immigration Services (USCIS) during the month of June, immigrant visas in all employment-based categories are unavailable for the remainder of Fiscal Year (FY) 2007. Shortly thereafter, USCIS also announced on July 2 that effective immediately, it would reject all employment-based adjustment applications.

This guidance discusses the implications of the DOS’s two announcements about visa availability for July and answers some frequently asked questions.

### **PRIORITY DATES AND THE VISA BULLETIN IN GENERAL**

#### ***Q.1. How is immigrant visa availability for a particular month determined?***

A.1. The U.S. Department of State (DOS) is responsible for determining the availability of immigrant visas each month. Employment-based immigrant visa numbers are subject to an annual quota of 140,000 per year (for principals and their family members), as well as complex statutory formulas that regulate the number of visas that can be allocated to each employment-based preference category annually, the number of visas that can be allocated in each quarter of the year and the number of visas that can be allocated annually to natives of individual countries. On the basis of these formulas, DOS is responsible for determining the allocation of immigrant visas each month.

To determine immigrant visa availability for a given month, DOS confers with the Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS) to forecast the demand for immigrant visas for the coming month. If there are not enough numbers to satisfy the demand for a particular category, that category is designated as “current” for a given month. If demand exceeds supply, the State Department sets a cutoff date for the category; only those foreign nationals whose priority dates are earlier than the cutoff date are eligible to apply for an immigrant visa abroad or for adjustment of status. Where no further visas are available to a specific immigrant visa subcategory or country of chargeability, the subcategory is designated as “unavailable.”

During the second week of each month, the State Department issues a Visa Bulletin, which sets forth immigrant visa availability for the forthcoming month. A foreign national whose priority date

is current for that month is eligible to file an application for adjustment of status or an immigrant visa application as of the first day of the particular month.

***Q.2. Why did the State Department initially decide to make most employment-based immigrant categories current in July?***

A.2. Typically, advances in priority date cutoffs are made due to lower than expected demand for visa numbers from USCIS (which processes applications for adjustment of status to permanent residence filed by foreign nationals in the United States) and from U.S. consular posts (which process applications for immigrant visas filed by foreign nationals outside of the United States).

The Department of State suggested in its original July Visa Bulletin that it was making categories current in an effort to generate increased demand by USCIS for visa numbers for adjustment of status cases, and to maximize visa number use under the annual numerical limit in FY 2007. DOS based its initial projections about visa usage on USCIS adjudication patterns from earlier in the year; USCIS had indicated that backlogs in security checks were an obstacle to speedier adjudications of adjustment applications.

**WHERE DID THE VISAS GO?**

***Q.3. Why did the State Department revise its July Visa Bulletin? Where did the visas go?***

A.3. FRAGOMEN learned shortly after the July Visa Bulletin was issued in mid-June that there were still approximately 40,000 immigrant visa numbers left in the employment-based pool for FY 2007. However, for reasons that are still unclear, USCIS greatly accelerated its adjudications after DOS's June 13 announcement. A government source has indicated, for example, that in the first eight months of this fiscal year, USCIS approved a total of approximately 66,000 adjustment of status applications. In June alone, however, the agency approved 60,000 applications, 18,000 of which were approved on Sunday, July 1.

Together with immigrant visas issued by U.S. consular posts abroad, the total number of immigrant visa numbers allocated to USCIS for adjustment of status applications actually exceeds the annual worldwide limit of 140,000 employment-based immigrant visas. Note, however, that while USCIS is allocated visa numbers after an adjustment of status application is approved, consular posts are provided with visa numbers in advance of scheduled immigrant visa interviews, and if a case is denied or the foreign national fails to appear at the interview, the unused number is returned to DOS for re-allocation. In any event, based on these figures, DOS found it necessary to revise its July Visa Bulletin to indicate that no further visas are available for the remainder of the fiscal year.

***Q.4. Why did USCIS announce, in response to DOS's July 2 revision of its July Visa Bulletin, that it would reject any employment-based adjustment applications it received starting on July 2?***

A.4. Federal regulations do not allow for the filing of adjustment of status applications when immigrant visa numbers are unavailable. For this reason, USCIS determined that, once the State Department's revised its Visa Bulletin for the month of July to indicate that there were no more available visa numbers in the employment-based immigrant visa categories, it had to reject any employment-based adjustment applications filed on or after July 2, 2007.

## FILING AND PROCESSING ISSUES

### ***Q.5. How does the rescission of the July Visa Bulletin affect adjustment applications that were sent to USCIS for receipt on July 2?***

A.5. Based on the information provided in the original July Visa Bulletin, tens of thousands of prospective immigrants spent considerable time and money, as did their employers and attorneys, in preparing their applications for adjustment of status to permanent residence and gathering the necessary supporting documents. Untold thousands of such applications were sent to USCIS via overnight courier for receipt on Monday, July 2, 2007, the first business day after the July 1 effective date of the July Visa Bulletin, and many others were poised to be submitted soon thereafter. Based on DOS's and USCIS's announcements on July 2, any employment-based adjustment applications received by USCIS on or after July 2 will be rejected and returned to the applicant or his/her attorney of record.

### ***Q.6. When can rejected adjustment applications be filed again?***

A.6. DOS has indicated that employment-based immigrant visa numbers will once again be made available beginning on October 1, 2007, under the FY 2008 annual numerical limitation. However, there are likely to be cut-off dates for all countries in the third employment-based category, and in other employment categories for persons born in countries with historically high demand for immigrant visas, such as China and India. It remains to be seen what cut-off dates, if any, will actually be imposed in October. As soon as the foreign national's priority date is current, any rejected adjustment application can be re-filed with USCIS.

### ***Q.7. If a Form I-140 immigrant worker petition was filed concurrently with the Form I-485 adjustment application, will it also be rejected?***

A.7. In response to entreaties by FRAGOMEN, the American Council on International Personnel (ACIP), and the American Immigration Lawyers Association (AILA), USCIS has agreed that for concurrent filings of Form I-485 adjustment applications and Form I-140 immigrant worker petitions, the agency will retain and process the I-140 petition if the I-140 filing fee was paid in a separate check. Unfortunately, if all filing fees were included in one check, USCIS has no mechanism to process the I-140 filing fee alone, so it will reject and return the entire application package, although employers can re-file the I-140 alone with a separate check.

Attorneys and employers should carefully monitor the status of any I-140 petitions that were filed concurrently with I-485 adjustment applications on July 2. The Department of Labor's new regulation on labor certification validity, which imposes a 180-day validity period on labor certifications, takes effect on July 16, 2007, and Form I-140 petitions must be filed within this period. It is not known how long it will take USCIS to sort through the thousands of applications it received on July 2 and issue receipt notices for any I-140s that were concurrently filed with adjustment applications. If the validity period of a labor certification will soon expire and no receipt notice for the I-140 has been received, consideration should be given to filing a new I-140. Note, however, that labor certification validity will not become an issue until the 180-day validity periods near conclusion, which will occur in mid-January 2008 at the earliest.

### ***Q.8. What will happen to any Form I-765 applications for employment authorization or Form I-131 applications for advance parole that were submitted with the adjustment application?***

A.8. Applications for employment authorization and advance parole will be rejected along with the adjustment application. Persons nearing the end of their authorized periods of stay in valid nonimmigrant status should consult with counsel about other options. Dependents who were applying for employment authorization should be advised that they will not be eligible for work authorization until such time as the principal's priority date is current and they can re-submit applications for adjustment of status.

***Q.9. Will adjustment applications re-filed later have to include new medical exam results and new photographs?***

A.9. Medical examination results are considered valid for up to one year, so the medical exam need not be updated so long as the adjustment application can be re-filed within one year of when the exam took place. If the adjustment application cannot be re-filed until after July 1, 2008, however, updated medical exam results must be submitted. In addition, photographs submitted with adjustment applications must have been taken within 30 days of the application. Accordingly, new photographs will have to be provided.

***Q.10. Will re-filed adjustment applications have to include the USCIS's new fees?***

A.10. The USCIS's new fee schedule is effective on July 30, 2007. Applications or petitions postmarked or otherwise filed on or after that date must include the new fee.

## LOOKING AHEAD

***Q.11. Is there any remedy for harm suffered by an employer or employee who relied on DOS's original July Visa Bulletin?***

A.11. The American Immigration Law Foundation (AILF) is considering filing a class action lawsuit in federal district court against both DOS and USCIS on behalf of individuals or employers who were harmed by the DOS's rescission of its July Visa Bulletin and by USCIS's subsequent rejection of adjustment applications received on July 2 and its announcement that it would reject any further employment-based adjustment applications filed by persons whose priority dates are not current under DOS's revised July Visa Bulletin. However, the probability of relief is remote and the form of relief is uncertain.

FRAGOMEN and the American Council on International Personnel (ACIP) will continue to work with the government at all levels for some kind of relief, but again the form of any potential relief is uncertain.

***Q.12. Should I-140 petitions continue to be filed?***

A.12. Yes, in most cases. Employers are urged to continue to file stand-alone I-140 petitions for eligible employees. This is particularly important in light of the Department of Labor's new regulation on labor certification validity imposing a 180-day validity period on labor certifications, which takes effect on July 16, 2007. Form I-140 petitions based on an approved labor certification must be filed within 180 days of the date the labor certification is approved. Note, however, that employers should consult with immigration counsel with respect to employees holding any nonimmigrant visa status that requires the employee to maintain nonimmigrant intent in the United States, since the filing of an I-140 petition on behalf of such an employee could create visa issuance or entry problems.

Similarly, employees are encouraged to gather all documentation needed in support of their adjustment applications so that, on October 1, 2007, employees in eligible visa categories can file their adjustment applications as soon as possible. In mid-September, DOS will issue its Visa Bulletin for October 2007 setting out visa availability for the beginning of the 2008 fiscal year.

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