Immigration Law Update

THE DEBACLE SURROUNDING EMPLOYMENT-BASED VISA AVAILABILITY AND UNAVAILABILITY

Courtesy of Maggio & Kattar, P.C.

Now that the dust is starting to settle on the unconscionable and unprecedented visa number debacle witnessed at the beginning of this month, we can reflect on the chain of events surrounding the sudden news that employment-based immigrant visas were available and then -- puff - already allocated and unavailable.

The announcements from the Department of State (DOS) and the U.S. Citizenship and Immigration Services (USCIS) reflect much more than the flawed communication between two federal agencies that has been cited. Conflicting interests between the agency that manages visa issuance - DOS - and the agency that processes visa petitions and applications for adjustment of status - USCIS - were laid bare. And, there's more. Caught in the middle were thousands of highly skilled foreigners working here legally while waiting patiently for years to adjust their status to lawful permanent residents. Sponsoring employers also were caught in the middle of this mess.

So, how is the system supposed to work? What went wrong this time, and why did this happen?

By way of background, under the immigration laws, a maximum of 140,000 employment-based immigrant visas can be allocated each fiscal year, October 1st-September 30th. These visas are divided among several skill levels, known as preference categories, and also are limited by per-country quotas. The per-country limit is the reason for the backlog in certain countries with high immigration rates, such as Mexico, India, China, and the Philippines. Other backlogs in the individual preference categories result from the overall limit imposed by law.

There are two agencies involved in the immigrant visa process, the State Department and the Immigration Service. The DOS is the agency that has responsibility for maintaining the quota, or counting the number of visas used. DOS publishes its count and visa availability each month in the Visa Bulletin, which is released approximately 15 days before the first of every month. The USCIS defines the process for issuing green cards, and its regulations require USCIS to follow the current monthly *Visa Bulletin* in determining when to accept applications for adjustment of status.

Foreign nationals in the U.S. who have applied for and who are deemed eligible for an immigrant visa can adjust their status to that of a lawful permanent resident, or in other words, submit their final "green card" applications when their priority date (place in line) is current, according to the *Visa Bulletin*. Sometimes, priority dates move backwards, or retrogress, in the next-issued *Visa Bulletin*. If that happens, those who applied for adjustment of status when their priority date was current are not penalized; USCIS normally continues routine processing and retains the adjustment application until a visa number becomes available again. This is important because a pending adjustment applicant and dependents (spouse and minor children) are eligible for work authorization

and travel permits (advance parole), and those benefits are renewable until the underlying application is adjudicated.

Here's what happened. On June 13, 2007, the State Department published the *Visa Bulletin* for July 2007, announcing that all but one employment-based green card category would be "current" as of July. Why this great jump forward? DOS saw many unused visa numbers as the close of the 2007 fiscal year (September 30th) rapidly approached. Apparently, in prior years, DOS allocated visa numbers but because USCIS did not adjudicate enough pending adjustment applications - USCIS was plagued by delay - those employment-based visas were never used and thus were lost. Those visa numbers were wasted despite the fact that many foreign nationals had adjustment applications pending with USCIS and had been otherwise waiting for years. That's right. Thousands were not granted permanent resident status because USCIS just did not get around to acting upon their cases. How many people were affected by USCIS' inaction? According to reports, over 180,000 work-based visas have been lost during the last six years because the immigration agency fell behind in processing applications. DOS did not want this to occur this year, so it front-loaded the visa numbers, making it possible for a large number of individuals to file for adjustment. In so doing, DOS effectively pressured USCIS to adjudicate adjustment applications and thereby use all the remaining available visa numbers for fiscal year 2007.

Seemingly caught off guard, USCIS soon realized that it could not possibly adjudicate all of the applications it expected in a very short period of time. Under its rules, applicants can file concurrently for an employment-based immigrant visa (I-140) and for adjustment of status (I-485) if an immigrant visa is available to the applicant according to the DOS *Visa Bulletin*. Under other rules, USCIS must adjudicate an employment-based visa within 15 days if filed under premium processing. Expecting a barrage of concurrently filed I-140s and I-485s under premium processing because of this very small filing window, USCIS first suspended premium processing of I-140 applications. Next, USCIS announced that I-485s submitted must include medical examinations even though it had been its practice to allow medical exams to be submitted later. Suspending premium processing and requiring medical exams were tactics intended to slow down the receipt of adjustment applications in July. USCIS also did its own internal audit of cases in the pipeline and apparently estimated - but did not advise the public - that it already had enough applications pending to use up all the remaining visa numbers for 2007. USCIS also intimated - but did not tell the public - that it would reject applications rather than accept the applications until a visa number became available on October 1, 2007, the start of the next fiscal year. One can only assume that very substantial USCIS filing fees increases, which take effect on July 30, 2007, also played a role in its later announced decision to reject rather than accept such applications.

On July 2nd, the first day that visa numbers were to become available, DOS suddenly revised its *Visa Bulletin*, announcing that all employment-based immigrant visas for the fiscal year ending September 30, 2007 have been allocated. The announcement was perplexing and without precedent. Adding to the confusion, the revised *Visa Bulletin* indicated that all employment-based categories were now unavailable, even those for EB-1 priority workers and EB-2 members of the professions holding advanced degrees or persons of exceptional ability, preference categories that historically have been available (or "current"), except for China and India. That same day, USCIS announced, in convoluted government-speak, that it would no longer accept - it would reject -

adjustment applications even though the *Visa Bulletin* for July 2007 had showed that visas are available. Not only did this announcement cause tremendous uncertainty but it represented a significant departure from long established practice: for years, when employment-based applications had been filed in these circumstances, INS/USCIS accepted applications filed during the entire month that the *Visa Bulletin* showed availability even if the visa numbers actually run out during that month. However, in prior years, DOS did not issue a revised *Visa Bulletin*. By the end of the day on July 2nd, immigrants, employers, and immigration lawyers alike found it nearly impossible to decipher how to apply for a statutorily provided benefit. One week later, no new information has been released from the agencies despite Congressional and other inquiries.

As those involved know, the mid-June issuance of the July Visa Bulletin provoked immediate action from thousands. Employees, employers, and their attorneys rushed to obtain the necessary supporting documentation and undertook extraordinary and costly steps to assemble the required information to file adjustment applications with the USCIS by the end of July 2007, the one-month time frame provided by the *Visa Bulletin*. The "bait and switch" fiasco last week ultimately left hundreds of thousands of would be immigrants and their employers empty handed and still wondering, what next?

It is anticipated that a class action lawsuit will be filed challenging this behavior by the USCIS. This litigation likely will argue that the immigration agency violated its own regulations and its refusal to accept adjustment applications in July has no precedent in decades of legal practice. If successful, the July adjustment of status filing window may be opened for those applicants whose cases were rejected, and they may be able to re-file at some later point in time. Arguably, those whose applications were delivered on July 2nd - before any official notice was released to the public - stand the greatest chance of success. In theory, however, individuals may still be able to file in July and avail themselves of the July adjustment window. The decision, however, to file an adjustment of status application now in order to obtain a rejection notice within the coming month and thereby retain the possibility of an advantage later on down the road, must be individually made in consultation with an attorney.