DEMYSTIFYING THE VISA QUEUES

PRIORITY DATES, RETENTION, RETROGRESSION, AND FUTURE MOVEMENT OF VISA BULLETIN

AILA InfoNet Doc. No. 11110232. (Posted 11/2/11)

WE WILL COVER

- ABCs of priority dates
- Conversion of visa categories and priority date retention
- Visa retrogression
- Expectations on movement with the Visa Bulletin

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PRIORITY DATE: WHAT IS IT?

- The date on which the family-based or employment-based petition is properly filed with USCIS
- Properly filed defined in 8 CFR § 204.1(d)
- Preference immigrant subject to quotas: numerical limits per preference category per fiscal year
- For preference category immigrants, priority date determines the beneficiary's "place in line"
- Not an issue with immediate relatives

SIGNIFICANCE OF PRIORITY DATE

- The priority date must be “current” (a visa is immediately available) in order to file for adjustment of status or adjust status
- The priority date must be “current” to be scheduled for an immigrant visa interview with the consulate, though the NVC may begin the process a few months before that date

ASSESSING VISA AVAILABILITY

- Visa Bulletin is published each month by Department of State
- Lists cut-off date for each family and employment-based preference category
- A priority date is "current" if it is before the date listed on the Visa Bulletin for that category

OCTOBER 2011 VISA BULLETIN

Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	15JUN04	15JUN04	15JUN04	22MAR93	08JAN97
2A	08JAN09	08JAN09	08JAN09	15OCT08	08JAN09
2B	15JUL03	15JUL03	15JUL03	22NOV92	01MAY01
3rd	08SEP01	08SEP01	08SEP01	01DEC92	08JUN92
4th	15MAY00	15MAY00	15MAY00	08APR96	01AUG88

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AUTOMATIC CONVERSION OF VISA CATEGORIES

- 8 CFR § 204.2(i) provides for automatic conversion when:
  - child of USC marries (IR → F-3)
  - son/daughter of USC marries (F-1→ F-3)
  - child/son/daughter of USC divorces (F-3 → F-1, IR)
  - petitioner naturalizes, child under 21 (F-2A → IR)
  - petitioner naturalizes, child over 21 (F-2B → F-1)
- No separate petition required so no retention issue

VAWA SELF-PETITIONERS

- 8 CFR § 204.2(h)(2): VAWA self-petitioner may transfer priority date from prior I-130 petition filed by abuser spouse or parent, without regard to current validity of the visa petition (e.g. withdrawn, denied, approval revoked)
- 8 CFR § 204.2(i)(3): LPR abuser's naturalization will not affect self-petitioner's F-2A status

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OPT OUT OF AUTOMATIC CONVERSION

- F-2B beneficiary may opt out of conversion to F-1 when petitioner naturalizes
- Only relevant now for Filipinos
- F-2A who is over 21 (under 21 using CSPA) may not opt out of conversion to F-1 when petitioner naturalizes based on recent BIA decision, Zamora-Molina, 25 I&N Dec. 606 (BIA 2011)

EXAMPLE

Jose, an LPR from Mexico, filed an I-130 for his daughter, Yolisma. At the time, she was 17 years old. The I-130 was pending for four and a half years before it was approved. Yolisma is now 23, but according to her adjusted age, she is only 19 and is still in the F-2A category. Her visa is now current, but Jose naturalized last month. Yolisma converted to the first preference category and will be unable to opt out of this conversion to stay in the F-2A.

RETENTION OF PRIORITY DATES

- 8 CFR § 204.2(h)(2) states general rule:
- If same petitioner filing for same beneficiary in same visa category and first petition approved, retain priority date for second one
- Treated as reaffirmation or reinstatement
- Only if first petition not terminated or revoked

NO RETENTION IF REVOCATION OR TERMINATION

- 8 CFR § 205.1 provides for automatic revocation upon:
  - withdrawal of the petition
  - loss of petitioner's LPR status
  - death of petitioner or self-petitioner
  - death of the beneficiary
  - termination of the marriage in espousal petitions (not VAWA)
  - marriage of child/son/daughter in F-2A or F-2B category
- INA § 203(g) provides for termination of petition if fail to apply for visa within one year of notification

DERIVATIVE BENEFICIARIES

- Spouse and unmarried child under 21 of the principal beneficiary in preference categories
- Accorded same preference status
- Status determined on date principal immigrates
- May or may not have been named on I-130

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RETENTION FOR DERIVATIVE IF PETITIONER NATURALIZES

- 8 CFR § 204.2(i)(3)
- Derivative loses status when petitioner naturalizes; petitioner must file new I-130
- In any case of conversion from F-2A to IR upon naturalization of petitioner, retain priority date
- May be relevant if child marries before immigrating as IR

RETENTION IF F-2A DERIVATIVE AGES OUT

- 8 CFR § 204.2(a)(4)
- If derivative child in F-2A ages out (using CSPA age) prior to issuance of visa to principal beneficiary, LPR petitioner must file separate I-130 petition for son/daughter in F-2B category
- Son/daughter retains original priority date

EXAMPLE

Enrique, an LPR, filed an I-130 for his wife with their daughter, Louisa, named as a derivative. When the F-2A category became current, Louisa was 24 and had aged out. If Enrique files a separate I-130 for Louisa, he retains the original priority date for her.

QUESTIONS

- What is recommended that Enrique do in order to ensure retention? What documents does he submit with second I-130?
- What does he do if he filed w/o requesting original priority date? How fix the problem?
- What if Enrique later naturalizes and he files for Louisa in the F-1 category. Can he still retain original priority date with second I-130? Can combine 204.2(a)(4) with 204.2(i)(3)?

ANOTHER EXAMPLE

Enrique, an LPR, files one I-130 for his wife with their daughter, Louisa, named as a derivative. His wife chooses not to consular process because of unlawful presence bar. Enrique files a separate I-130 for Louisa.

- Can Enrique retain original priority date?
- Is Louisa considered "same beneficiary" under 8 CFR § 204.2(h)(2)?

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RETENTION IF OTHER DERIVATIVES AGE OUT

- INA § 203(h)(3): when derivatives age out, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition"
- USCS interpretation → only applies to F-2A's who age out, not to others
- Opposing view → applies to all derivatives

MATTER OF WANG
25 I&N Dec 28 (BIA 2009)

- Retention of priority date limited to same petitioner filing for same beneficiary in same preference category
- Only applies to F-2A derivatives
- No automatic conversion for other derivatives
- No Congressional intent to expand

EXAMPLE

Sam filed a 3rd preference petition for his married son, Juan. On the date Juan and his wife immigrated, their eldest daughter, Maria, was 24 and couldn't immigrate as a derivative. Juan filed a new I-130 for his daughter in the F-2B category. According to the BIA, Juan cannot retain the earlier priority date. Maria will be in the F-2B category with a recent priority date.

SPLIT IN FEDERAL CIRCUITS

- *Li v. Renaud*, 2011 U.S. App. LEXIS 13357 (2nd Cir, June 30, 2011)
- Statute unambiguous, so no deference to USCIS
- "Converted to the appropriate category" means to an available category, not to another family-sponsored category based on a petition filed by a different petitioner
- No appropriate category when derivative (other than F-2A) ages out
- Same conclusion as *Matter of Wang*

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SPLIT IN FEDERAL CIRCUITS

- *Cuellar de Osorio v Mayorkas*, 2011 U.S. App. LEXIS 18289 (9th Cir. Sept. 2, 2011)
- Statute is ambiguous as applied to F-3, F-4
- "convert" means same petitioner, beneficiary
- "automatic" means no new petition filed
- Legislative history inconclusive
- Found BIA decision in *Wang* permissible reading

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SPLIT IN FEDERAL CIRCUITS

- *Khalid v. Holder*, 2011 U.S. App. LEXIS 18622 (5th Cir. Sept. 8, 2011)
- Found statutory terms unambiguous
- Gave no deference to agency interpretation or BIA
- Held that 203(h)(3) applied to all derivatives, not just F-2As
- Derivative converts to F-2B upon LPR parent filing new I-130 and retains original priority date
- Now law in Louisiana, Mississippi, Texas

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QUESTIONS

- How is 8 CFR § 204.2(a)(4) affected by INA § 203(h)(4)? Still being applied? Government brief and Ninth Circuit state F-2A derivative no longer needs separate I-130 when ages out.
- How is USCIS implementing Fifth Circuit decision?
- What recommend to practitioners in states not affected by circuit court decisions?
- How is Department of State treating split in circuits?