AMERICAN IMMIGRATION LAWYERS ASSOCIATION

The Honorable Anthony Blinken
Secretary of State
Department of State
Washington, DC 20451

The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
Washington, DC 20528

July 31, 2023

RE: Administrative Actions to Remedy the Impact of the April 2023 Visa Bulletin Change

Dear Secretaries Blinken and Mayorkas,

On behalf of the American Immigration Lawyers Association, we respectfully request the U.S. Departments of State (DOS) and Homeland Security (DHS) take immediate steps to address the severe visa retrogression in the Employment-Based 4th Preference (EB-4) visa category caused by a recent Department of State change in interpretation. Without any notice, individuals pursuing lawful permanent residency as Special Immigrants, including religious workers, current and former U.S. Government employees abroad, officers and employees of international organizations, and certain special immigrant juveniles (SIJs), lost many years in the process which for many will cost them their chance at becoming a lawful permanent resident (LPR).

Established in 1946, AILA is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

***DOS Change in Interpretation without Advanced Noticed Caused Significant Harm***

On March 28, 2023, DOS issued a Federal Register Notice (88 FR 18252) announcing a revised interpretation of how immigrant visa numbers would be allocated pursuant to INA 202(a)(2) per

country limitations that took effect three days later.[1] In this announcement, DOS indicated that a prior interpretation that had been in effect for nearly 7 years had been mistaken. Since May 2016, when DOS was applying the per country limitations, it had prorated visa allocation to El Salvador, Honduras, and Guatemala (the "Northern Triangle" countries) based on demand from those countries exceeding the per country limitations of 7 percent in the EB-4 category. This meant that immigrant visas were available for EB-4 applicants from the Northern Triangle with priority dates of March 15, 2018 or earlier; whereas it was February 1, 2022 for applicants from the Rest of the World. With less than one week's notice DOS told the affected public that it had been misapplying the law, stating that it should only apply the per country proration if the demand from each of those countries exceeded 7 percent of the total number of family and employment immigrant visas, rather than 7 percent of the visas available in the EB-4 category, and made the correction beginning with the April 2023 Visa Bulletin. The result was that all of the countries in the EB-4 category moved to September 1, 2018, many of which had retrogressed from priority dates of February 2022.

**MARCH 2023 VISA BULLETIN FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CASES**

| Employment-based | All Chargeability Areas Except Those Listed | CHINA-mainland born | EL SALVADOR GUATEMALA HONDURAS | INDIA | MEXICO | PHILIPPINES |
|---|---|---|---|---|---|---|
| 4th | 01FEB22 | 01FEB22 | 15MAR18 | 01MAR21 | 01AUG20 | 01FEB22 |
| Certain Religious Workers | 01FEB22 | 01FEB22 | 15MAR18 | 01MAR21 | 01AUG20 | 01FEB22 |

**APRIL 2023 VISA BULLETIN FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CASES**

| Employment-based | All Chargeability Areas Except Those Listed | CHINA-mainland born | INDIA | MEXICO | PHILIPPINES |
|---|---|---|---|---|---|
| 4th | 01SEP18 | 01SEP18 | 01SEP18 | 01SEP18 | 01SEP18 |
| Certain Religious Workers | 01SEP18 | 01SEP18 | 01SEP18 | 01SEP18 | 01SEP18 |

This seemingly simple change has life-altering consequences for so many special immigrants, including Religious Workers and former diplomats. Although the Visa Bulletin reflects a 4-year

[1] Although the Federal Register Notice was not published until March 28, 2023, the impact of the interpretation was signaled in the April 2023 Visa Bulletin which was published on March 21, 2023. This publication date of the Visa Bulletin is much later than usual, leaving affected individuals less than 1 week to file any applications. Typically, DOS publishes the monthly Visa Bulletin the first or second week of the preceding month, which would allow the public approximately two- three weeks of notice if their priority dates were to retrogress so that they can quickly file their applications for adjustment of status or apply for an immigrant visa.

difference between immigrant visa availability between the March and April Visa Bulletins, this does not equate to 3 additional years in the immigrant visa process. Rather it is likely that this will now cause an 11-year backlog for the most recent EB-4 applicants, with only 9,940 visas allocated for EB-4 every fiscal year and over 105,267 people in line and growing.[2] The impact of the backlog is real and significantly detrimental. For SIJS youth it means that they may have to wait nearly a decade to have any certainty for their status[3], which is an unacceptable extra burden on these children who have been abused and victimized already. For religious workers and the communities they currently serve as R-1 nonimmigrants, it means they will not be able to become lawful permanent residents before their nonimmigrant status expires and for most the only option is that they leave the communities to whom they minister for at least one year, if not permanently.[4] For former U.S. government employees abroad, this means that their wait and promise for U.S. permanent residency in exchange for 15 years of faithful service to our government is inexcusably delayed. And for retirees of international organizations in the United States and their dependent children this change may eliminate eligibility for permanent residence altogether.

Until recently, the EB-4 category for all countries except Mexico and the Northern Triangle has been current and if there was a change between current priority dates from one month to the next it was only for a few months.[5] For example, a religious worker from Brazil who had an approved I-360 with a priority date of January 15, 2021, in March 2023 could have reasonably expected to be able to file the adjustment application in April 2023. No one could have anticipated a nearly 3 ½ year change, especially with such little notice. However, AILA received multiple reports of individuals who had approved Form I-360 petitions and current priority dates in March 2023 and who were in the process of preparing to file their Adjustment of Status applications, but were unable to file prior to April 1, 2023 because of various circumstances, including not becoming aware of the change in the Visa Bulletin until it was too late. As a result, many of these individuals have significantly delayed or forever lost their chance to become LPRs.

The DOS's change in interpretation of how immigrant visa numbers will be allocated pursuant to INA 202(a)(2) per country limitations without sufficient advanced notice is unlawful and must be

[2] https://www.uscis.gov/sites/default/files/document/data/EB_I140_I360_I526_performancedata_FY2023_Q1_Q2.pdf.

[3] While SIJS from the Northern Triangle were already experience a decade long backlog, SIJS from other countries had relatively short wait times for an immigrant visas. Now these individuals suddenly face a long wait.

[4] R-1 religious workers are only permitted to be admitted to the United States for a maximum of 5 years. Once they exhaust their 5 years in R-1 status, they must leave the United States for 1 year before they are again eligible for an R-1. The R-1 time will be exhausted before their visa priority date will become current even if they filed the I-360 Petition on the first day they enter the United States in R-1 status. Many religious workers will have to leave the U.S. because they do not qualify for another nonimmigrants status. Religious organizations will see a disruption in services provided to the public—spiritual, evangelization, teaching children religion and/or secular subjects in elementary, high schools and college. Many religious workers are employed at agencies that provide services to all regardless of religion such as food panties, help for immigrants, medical services, and even nursing care in underserved areas. Many religious workers provide supplement services to those the federal and local governments cannot help due to sheer volume. There have been so many changes in the past 3 years due to the global pandemic, worker shortages and mental anxiety; this new change will have a further detrimental affect.

[5] For example, for the January 2023 Visa Bulletin, the date for Rest of the World was June 22, 2022, for February 2023 it was also June 22, 2022, and for March 2023 it was February 1, 2022.

immediately rectified. The United States Court of Appeals for the District of Columbia Circuit recently held that Department of State guidance regarding international adoptions created legal effects rather than only explaining pre-existing legal obligations and therefore comprised a legislative rule requiring notice and comment rulemaking. *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 114 (D.C. Cir. 2021). Similarly, DOS's change in the legal interpretation without public notice had significant legal effects on EB-4 applicants, and, therefore, it was unlawful and must be rectified immediately.

**The Departments of State and Homeland Security Must Take Immediate Steps to Rectify the Harm Created by this Change in Interpretation.**

Even though the DOS had been well aware of how it had been applying INA 202(a)(2) to the EB-4 category for nearly 7 years, it made the change without sufficient notice to the public and resulted in dire consequences to those affected. AILA believes that the Departments must take immediate action to rectify this harm.

1. ***Administrative Changes that will Help all EB-4 Applicants***

- *Advance the Visa Bulletin Dates.* The only remedy that will ensure that individuals do not fall out of status due solely to the harm inflicted by the DOS change is to return to the dates of the March Visa Bulletin to reopen the filing period until such time as proper notice is provided to the public. This will allow those who were caught unaware by the change and who were eligible to file their adjustment of status applications time to adjust to the change. DOS should advance the priority dates on the Visa Bulletin as far as possible to ensure that more people are able to file their applications. In the past, DOS has moved dates aggressively to ensure maximum usage of immigrant visas. Similarly, various legal theories have been proposed that would allow DOS to make all visas current until all visas are unavailable for the category.[6]

- *Grant Deferred Action.* DHS should grant deferred action and work authorization for those individuals with approved I-360s, but for whom a visa number is not immediately available, similar to what it currently does for SIJS.[7]

- *Authorize Employment in Compelling Circumstances.* DHS should extend employment authorization for compelling circumstances to individuals with approved I-360 petitions, as it currently does for individuals with an approved I-140 pursuant to 8 CFR 204.5(p).

2. ***Administrative Changes that will Help Religious Workers***

- *Provide Priority Date Retention.* In its effort to modernize the Adjustment of Status regulations, DHS should expand 8 CFR 204.5(e) to include beneficiaries of approved I-

[6] See http://blog.cyrusmehta.com/2020/11/proposal-for-the-biden-administrationusing-the-dual-date-visa-bulletin-to-allow-the-maximum-number-of-adjustment-of-status-filings.html.
[7] See https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles.

360s so that they can keep the priority date for a previously approved I-360 when filing an I-360 for a new position.

- *Limit the Time Outside the United States.* Current DHS regulations at 8 CFR 214.2(r)(6) requires that an individual who has spent 5 years in R-1 status must reside abroad for 1 year before eligibility for five more years of R-1 status. This is solely a regulatory requirement that is not based in statute and should be eliminated or reduced to 3 months or less. This will allow a religious organization to retain their religious worker without experiencing a significant gap in services due to immigration reasons.

**3.** ***Administrative Changes that will Help Diplomats and their Families***

- *Accept Adjustment of Status Filing for G-4 Nonimmigrants Regardless of Visa Availability.* Unlike other special immigrants, G-4 nonimmigrants (officers or employees of international organizations and their immediate families) have unique application requirements which are not contingent to visa availability pursuant to INA 101(a)(27(I)(i) and 8 CFR 101.5. Specifically, 8 CFR 101.5 (a) states that "**the date of application for adjustment of status is the closing date for computing the residence and physical presence requirement. The applicant must have complied with all requirements as of the date of application."** There is no requirement for filing the adjustment application based on visa availability or discussion of a priority date. Moreover, INA 101(a)(27)(I)(i) does not require that a petition be filed for the sons and daughters of former employees of international organizations but states that an application is made by filing an application for adjustment of status; further, the implementing regulation still in effect states that an application "shall be made on form I-485." However, the INA requires that the sons or daughters must submit their applications no later than their 25th birthday. Therefore, without accepting adjustment of status applications based only on the requirements of INA 101(a)(27)(I) and 8 CFR 101.5, these children will age out from eligibility.

  The statutory provision pertaining to retirees differs from sons and daughters in that it refers to both applying for a visa or adjustment of status for purposes of establishing the requisite time period of residence/physical presence *and* the filing of a petition for status, which must be filed no later than six months after the individual retirees. There has been no statutory interpretation as to whether the filing of the petition, i.e., I-360, is meant to close the date for computing the residence and physical presence requirement.

  The regulatory provision cited above, 8 CFR § 101.5(a), in fact, applies to sons and daughters as well as to retirees. USCIS should therefore also allow retirees of international organizations to file applications for adjustment of status in accordance with the language of the regulations. This is also the way INA Section 101(a)(27)(I)(iii) specifically instructs retirees-applicants to get in the queue for "green cards." To do so is consistent with also requiring them to file an I-360 petition and they should be permitted to file the petition and application concurrently, as do other employment-based immigrants.

If USCIS does not allow adjustment of status applications to be filed, it is requiring retirees to leave the United States shortly after retirement, and in many cases will eliminate all possibility of their obtaining special immigrant status unless they can obtain a new nonimmigrant visa status to remain in the United States. This assumes that the retiree could still meet section INA § 101(a)(27)(I)(ii) requirement of maintaining G or N status for at least one-half of the 7 years before the date of application for adjustment of status, which appears unlikely if the current EB-4 backlog persists.

- *Interpret Filing an I-360 as "the closing date for computing the residence and physical presence requirement."* While a far less satisfactory solution, as an alternative to accepting adjustment of status applications, USCIS could interpret the filing of an I-360 petition as "the closing date for computing the residence and physical presence requirement." This would give sons and daughters of international organization employees at least an opportunity to become lawful permanent residents in the future.

### *4. Administrative Changes that will Help Special Immigrant Juveniles*

- *Permanently Protect SIJS Youth.* DHS should codify protections from removal and access to employment authorization for any SIJS youth that is unable to seek lawful permanent residence simply because a visa number is not immediately available.

- *Grant Work Authorization without Delay.* USCIS should allow SIJS youth to file a (c)(14) I-765 based on a grant of deferred action concurrently with the SIJS petition to reduce delays. These youth are already subject to waiting many years because of visa backlogs. They should not also be subject to the lengthy EAD wait times after I-360 approval. Allowing SIJS petitioners to file a (c)(14) I-765 concurrently with the I-360 would mirror USCIS policy for U visa petitioners.

- *Coordinate Cancellation of Removal Orders.* In cases where USCIS approves a SIJS petition for a child with a DHS-issued order (*e.g.* an expedited removal or reinstatement order), USCIS should, at the time the I-360 is approved, coordinate with Immigration and Custom Enforcement (ICE) to cancel that order. Canceling such orders would clear the way for adjustment of status and remove barriers that these vulnerable youth would otherwise face due to having unresolved removal orders. The Policy Manual contemplates USCIS coordinating with ICE to withdraw/rescind removal orders in the adjustment of status context generally; however, a more robust policy is warranted with respect to youth approved for SIJS who have DHS-issued orders. A policy directing USCIS officials to work with ICE to rescind DHS-issued orders upon SIJS petition approval would also align with DHS's treatment of other victim-based benefit applicants, namely U and T nonimmigrant status recipients. *See* 8 CFR § 214.14(c)(5)(i) (DHS-issued orders are "deemed canceled by operation of law as of the date of USCIS' approval of Form I-918"); 8 CFR § 214.11(d)(9)(i) (same with respect to Form I-914).

- *Establish a Parole Pathway for SIJS Youth Impacted by the DOS Change.* USCIS should coordinate with ICE to create a straightforward parole process for SIJS youth outside the

United States. Some of these youths were removed due to lack of visa availability because their priority date was not current—though their final action date was incorrectly calculated. Other SIJS youth may have left the United States without any removal order because it was unsustainable for them to remain in the United States without work authorization while awaiting a visa number.

## CONCLUSION

While we recognize that Congressional Action may be the only action that completely cures the harms caused by the DOS change in interpretation, we believe DOS and DHS must also take steps to mitigate those harms in the meantime. We kindly request the opportunity to discuss these recommendations and the Administration's plans to implement them. Please reach out to Sharvari (Shev) Dalal-Dheini, AILA's Director of Government Relations, at sdalal-dheini@aila.org or 202-507-7621 to discuss any questions or concerns.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

CC: Rena Bitter, Asst. Secretary for Consular Affairs, DOS

Julie Stufft, Deputy Asst. Secretary for Visa Services, DOS

Ur Jaddou, USCIS Director

Doug Rand, Senior Advisor to USCIS Director

Betsy Lawrence, Deputy Assistant to the President for Immigration

Royce Murray, Counselor to the Secretary of Homeland Security