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There will be no issue on Monday, May 27, in observance of Memorial Day. Our next issue will be dated June 3, 2013.

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A SENSE OF TIMING ON AVAILABLE NUMBERS UNDER SENATE BILL 744 (COMPREHENSIVE IMMIGRATION REFORM)

by Alan Lee, Esq. *

With the current backlogs in the immigration scheme for family-based and employment-based permanent visas, the question arises as to when the new visas in the Gang of Eight's comprehensive immigration reform bill (S. 744) will come into effect and whether there will be enough of them. Presently, the legislation is going through the Judiciary Committee of the Senate where 300 amendments by senators were filed on May 7, and the Senate Judiciary Committee took up the 844-page immigration legislation on May 9. Markup of the bill (consideration of the amendments) is

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expected to take the balance of May. This article attempts to freeze the legislation as it stands today and gives a sense of when applicants who are stuck in the immigration queues can expect relief. We postulate for the article's purpose that the bill will remain roughly the same and that President Barack Obama signs it into effect by September 30, 2013, prior to the start of the new fiscal year on October 1, 2013.

FAMILY-SPONSORED VISAS

In the month of June 2013, the family-based (FB) F-1 preference (single sons and daughters over the age of 21 of U. S. citizens) has a seven-year backlog, F-2A (spouses and unmarried children under the age of 21 of lawful permanent residents) two years, F-2B (single sons and daughters of lawful permanent residents over the age of 21) eight years, F-3 (married sons and daughters of U. S. citizens) 10 to 11 years, and F-4 (siblings of U. S. citizens) 12 years. The Senate bill maintains the current overall number of 480,000 visas for FB cases with the floor of 226,000 for those who are not considered immediate relatives, which can drop to no less than 161,000 18 months after enactment, or sometime in the spring of 2015. (Immediate relatives or "IR" prior to the Senate bill are the parents, spouses, and unmarried children under the age of 21 of U. S. citizens.) With the bill's enactment, F-2A becomes part of IR immediately. Currently F-2A swallows up a minimum of 87,934 immigrant visas per year as the category is allowed 77% of the overall second preference limitation of the 114,200 visas minimally guaranteed to the category. One year after enactment, likely fall 2014, the per country quota for FB will rise from 7% to 15% mainly benefiting natives of Mexico and the Philippines. Beginning in Fiscal Year (FY) 2015 on October 1, 2014, Track 2 merit-based green cards[1] will be assigned to FB and employment-based (EB) petitions pending five years which were filed before enactment, F-3/F-4 petitions pending five years and filed after enactment, and long-term workers not admitted under W visas and here 10 years with lawful presence and authorization to work. S. 744 adds many Track 2 numbers to the visa scheme but does so not in terms of specific numbers but as a percentage of current events. FB cases would benefit for each of seven years from October 1, 2014, to September 30, 2021, in being allocated a number equal to 1/7 of the number of FB petitions filed before enactment and pending five years minus the number of spouses and children of LPRs pending on the date of enactment since those would have moved into the IR category.

On October 1, 2015, and thereafter, the FB categories would be benefited from recapturing for FB use the unused EB numbers from the previous year; recapturing unused FB numbers from FY 1992 to 2013 for FB use and eliminating the requirement of using up immigrant visa numbers for the dependents of principal applicants (family members). On that date, the F-3 category for persons age 32 and older will be eliminated along with the F-4 preference for those who have not yet filed by September 30, 2015.

Visa percentage allocation beginning October 1, 2013, will be F-1: 20%, F -2B: 20% plus drop-down (from the higher category), F3: 20% plus drop-down, and F4: 40% plus drop-down. This is in contrast to the current scheme in which F-1 and F-3 receive a little over 10% plus drop down, F-2B approximately 11.6% plus drop down, and F-4 28% plus drop-down. The new preference system as of October 1, 2015, will be F-1: 35%, F3: 25%, and F2B: 40%.

To ensure that those at the end of the line reach the beginning within 10 years, S .744 allocates Track 2 visas adequate to clear the entire backlog by 2023. It does this by directing that visas be allocated beginning on October 1, 2021, in a number equal to half of the F-3 and F-4 cases still pending on that date and, in the following year, beginning on October 1, 2022, in a number equal to the number of F-3 and F-4 cases still pending on that date.

EMPLOYMENT-BASED VISAS

In the month of June 2013, the employment-based (EB) first preference (extraordinary aliens, outstanding professors and researchers, and multinational transferees) is current, EB-2 (members of the professions holding advanced degrees or persons of exceptional ability) is current for most of the world although backed up for China and India-born except for petitions filed before July 15, 2008, and September 1, 2004, respectively; EB-3 (skilled workers and professionals) is backlogged to September 1, 2008, for most of the world with the exception of India (January 8, 2003) and the Philippines (September 22, 2006); and EB-W (other workers) is backed up to September 1, 2008, for most of the world except China (October 22, 2003), India (January 8, 2003), and the Philippines (September 22, 2006). The other two employment categories, EB- 4 for certain religious workers and EB-5 for investors, remain current and available.

Currently a minimum of 140,000 visas for EB cases is available annually for the world. Assuming again enactment before October 1, 2013, the EB preferences will receive an annual boost from a minimum of 120,000 Track 1 merit-based green cards on October 1, 2013, under which the extra numbers (which could ultimately go as high as 250,000) for the first four fiscal years will be used for EB-3 backlog relief. One year after enactment, likely fall 2014, the per country quota for EB will be eliminated, chiefly benefiting natives of India and China. As stated above, the awarding of Track 2 merit-based green cards beginning in FY 2015 on October 1, 2014, would benefit EB petitions

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pending five years which were filed before enactment and long-term workers not admitted under W visas and in the U.S. for 10 years with lawful presence and authorization to work. Percentage-wise, EB cases would benefit for each of seven years from October 1, 2014, to September 30, 2021, in being annually allocated a number equal to 1/7 of the number of EB petitions filed before enactment and pending five years. In year five and afterwards, the Track 1 numbers will go into a Canadian-type tier 1 and tier 2 merit system in which points will be given for qualities which are deemed desirable of immigrants, and those scoring the highest under each track will obtain green cards. The diversity visa (DV) or visa lottery program is to be eliminated as of October 1, 2014, with those receiving notice of selection for FY 2013 and FY 2014 remaining eligible.

On October 1, 2015, and thereafter, the EB categories would benefit from recapturing for EB use the unused FB numbers from the previous year; recapturing unused EB numbers from FY 1992 to FY 2013 for EB use and eliminating the requirement of using up immigrant visa numbers for the dependents of principal applicants (family members). Capping all this, the new system on that date will also eliminate the visa number requirement for EB-1 extraordinary aliens, outstanding professors and researchers, and multinational executives and managers, PhDs, and physicians clear of the two-year foreign residency requirement as well as STEM (science, technology, engineering and math) graduate degree holders from U. S. institutions with job offers from U. S. employers in related fields who earned degrees within the five-year period before filing petitions. The new EB structure as of October 1, 2015 will be follows: EB-2: 40%, EB-3: 40%, special immigrants: 10%, and EB-5: 10%.

LIKELY EFFECT

In the first year after enactment (postulated as fall 2013), there would likely be much movement on the India EB-3 category as most of the 120,000 merit-based visas for four years would go to alleviate the backlog that now stretches back to 2002. The EB-3 India backlog was estimated by the National Foundation for American Policy at 210,000 in late 2011. At the same time, all of the FB categories would benefit from elimination of need for and redistribution for 18 months after enactment of approximately 88,000 visa numbers for the F-2A category. A year after enactment in fall 2014, the per country ceilings would be changed, further helping with backlog reduction. Shortly afterwards on October 1, 2014, other FB/EB categories would begin to be issued merit-based visas: EB petitions filed before enactment where the visas had not been issued within five years after the date of filing, FBs under the same conditions, F-3/F-4 filed after the date of enactment and pending five years, and the long-term workers not under W visas as described above. The DV program would end, releasing 55,000 visa numbers for EB use. October 1, 2015, would bring about the most major changes for backlog reduction. Recapture would come into effect releasing the pent-up hundreds of thousands of EB and FB numbers that were never used between FY 1992 and FY 2013 (the CIS Ombudsman's annual report to Congress in 2010 previously estimated the number of unused EB numbers between FY 1992 and FY 2009 to be 326,371 and FB numbers to be 241,928), and automatic recapture of unused visas would go into effect for every year after that. The recapture of so many numbers would benefit all FB and EB categories although not equally. According to the Department of State's (DOS') "Annual Report of the Immigrant Visa Applicants in the Family Sponsored and Employment-Based Preferences Registered at the National Visa Center as of November 1, 2012," there were 4,299,635 pending FB cases. The report listed EB cases at 113,058, but it should be borne in mind that most EB applicants are here and adjust status in the U.S., and those numbers would not be counted in the DOS report. Indeed, the DOS report contains the warning, "It is important to note that eighty-six percent of all Employment preference immigrants were processed as adjustment of status cases at CIS offices during FY 2012. Cases pending with CIS are not counted in the consular waiting list tally ... ." (The writer notes that many EB cases seeking adjustment would not be ready to file I-485 adjustment of status applications because their priority dates are not current, or their applications have been filed and are pending because of retrogression in the categories.) As of January 5, 2011, the U.S. Citizenship and Immigration Services (USCIS) inventory of I-485 pending cases was 167,610, as per the Congressional Research Service's December 2011 publication "Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings." The EB categories at that point would likely all become close to or current with the influx of numbers and the lifting of per country ceilings as the number of waiting cases is likely under 500,000 (especially as the publication points out that DOS tabulations of approved visa petitions pending with the National Visa Center not only represent principal applicants or petition beneficiaries but also their spouses and children who are entitled to derivative status under the INA). The additional minimum 480,000 total numbers under Track 2 for four years until September 30, 2017, allocation of 1/7 of visa numbers for seven fiscal years of the number of petitions filed before enactment, the recapture of over 300,000 EB numbers, and the redirection of 55,000 visa lottery numbers in October 2015 coupled with the lifting of per country ceilings in 2014,and exemption of dependents and many classes of EB applicants from the need for visa numbers almost guarantee that the EB categories will all be current and available before 2020. The EB categories will in all probability continue to remain current because of the forward-looking measures taken under the legislation. Removing the need for visa numbers for many classes of workers—extraordinary aliens, outstanding professors and researchers, multinational executives and managers, PhDs, physicians not bound by the J visa two-year home residence requirement, and graduate degree holders (with certain

conditions)—along with the dependents of all EB workers ensures a bright future for employment-based immigration.

The same, however, cannot be said for the FB categories that will in all probability still be faced with problems given the sheer size of the number of individuals immigrating to the United States in the future. Unlike the EB categories, the FB preferences present a possible second problem: processing. Coping with the visa demand can be done within the confines of the legislation even though all backlog relief will not begin to be completed until at least 2023. Even with all the modifications of S. 744, it is difficult to conceive of a time before 2023 when the remaining categories can become current or even come close to being open, especially F-4. As of November 1, 2012, the F-1 line held 288,705 registered immigrants, F-2B 486,597, F-3 830,906, and F-4 2,473,114. (There will of course be significant movement before 2023 to keep up everyone's spirits because of the recaptured numbers, dependent family members no longer requiring visa numbers, redistribution of F-2A numbers for 18 months after enactment (the category had 220,313 people in line as of November 1, 2012), and use of merit-based visas to assist with long-pending FB cases.) The second problem is the question of how to complete the consular or adjustment of status paperwork and interviews for millions of FB beneficiaries 10 years later at the same time when the legislation calls for beginning the processing of green cards for the estimated 11 million undocumented immigrants, most of whom will have presumably applied for and received registered provisional immigrant (RPI) status. Although it can be seen that separate agencies are involved in that the DOS through its consular posts will handle most of the FB cases while USCIS takes care of RPI adjustments, there is likely to be bleeding of FB cases to USCIS. The situation would be especially exacerbated if this or future legislation included an advancement of INA § 245(i) [8 USCA § 1255(i)] under which most undocumented immigrants with an independent basis to immigrate would be allowed to adjust status to permanent residence upon payment of a fine. Unlike the employment-based categories whose adjustment of status interviews can be waived, there is no tradition of USCIS waiving interviews during past legalization programs (unless one counts deferred action for childhood arrivals (DACA)[2] as one) or the DOS waiving immigrant visa interviews for anyone. One may see a situation in which FB immigrant visa applicants possessing visa availability or not requiring visa numbers are interminably delayed for lack of the agencies having enough hands on deck to handle the torrent of applications.

Notes

[1] Track 2 merit-based green cards are discussed in § 2302 of S. 744.

[2] DACA establishes a process to allow certain individuals who came to the U.S. as children and meet several key guidelines to request consideration of deferred action. See 89 Interpreter Releases 1194 (June 25, 2012). ■

1. USCIS Updates H-2B Cap Count for Second Half of FY 2013

On May 13, 2013, U.S. Citizenship and Immigration Services (USCIS) updated its statistics on the current cap count for H-2B nonimmigrant workers[3] for the second half of Fiscal Year (FY) 2013. USCIS reports that, as of May 10, 2013, it has approved 20,424 new beneficiaries for the second half of FY 2013 with 1,822 pending for a total of 22,246.

The cap for the second half of FY 2013 is 33,000; however, the targeted beneficiaries for the second half of FY 2013 is 44,000, the estimated number of beneficiaries needed to be included on petitions filed with USCIS to reach the H-2B cap with an allowance for withdrawals, denials, and revocations.

Notes

[3] The H-2B classification may be used for nonskilled temporary services and labor. ■

2. EOIR to Rollout Electronic Registration for Attorneys and Accredited Representatives on June 10; Will Host Stakeholder Meeting on June 7

The Executive Office for Immigration Review (EOIR) has issued a notice of implementation of the registration requirement for attorneys and accredited representatives appearing before immigration judges and the Board of Immigration Appeals (BIA or Board).[4] Attorneys and accredited representatives will be able to register beginning on June 10, 2013. After December 10, 2013, attorneys and accredited representatives must be registered in order to practice before the immigration courts and the Board and may be subject to administrative suspension, and even disciplinary sanctions, for failure to register. The registration program, called eRegistry, is part of a long-term agency plan to create an electronic case access and filing system for the immigration courts and the Board, which will enhance the EOIR's ability to schedule, track, and update cases.

At this time, the electronic registration requirements apply only to attorneys and to accredited representatives who are authorized to appear before the EOIR. This includes attorneys and accredited representatives who appear before both the EOIR and the Department of Homeland Security (DHS), but the registration requirements only pertain to their practice before the EOIR. Accredited representatives authorized to appear only before DHS, law students, law graduates, reputable individuals, and accredited foreign government officials will not be able to register at this time. In addition, law firms and recognized organizations will not be able to register.