



U.S. Citizenship
and Immigration
Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS
NATIONAL BENEFIT CENTER DIRECTOR

From: William R. Yates /S/
Associate Director of Operations
U.S. Citizenship and Immigration Services
Department of Homeland Security

Date: December 29, 2004

RE: Regression of E31 and E32 Visa Numbers for Applicants from Mainland China, India, and the Philippines

Rescission of March 31, 2004 Policy Memo re: Concurrent Adjudication of Concurrently Filed Form I-140s and Form I-485s

1. Purpose.

This memorandum provides guidance to the field on how to handle Form I-485 adjustment of status applications and concurrently filed Form I-140 immigrant visa petitions/I-485 adjustment of status applications that are affected by the visa number regression under the E31 skilled worker or the E32 professional categories for applicants from mainland China, India, and the Philippines. This memorandum also notifies the field that the March 31, 2004 policy memorandum issued by Fujie Ohata, Director Service Center Operations and entitled Procedural Instructions for Concurrent Adjudication of Concurrently Filed Form I-140, Immigrant Petition for Alien Worker and Form I-485, Application for Adjustment of Status is hereby rescinded. This guidance is effective immediately.

2. Background.

The January 2005 Visa Bulletin published by the Department of State (DOS) indicates that visa availability under the E31 and E32 categories for applicants from mainland China, India, and the Philippines has regressed to January 1, 2002. In recent years, all employment-based visa

categories have been “Current” for all countries, primarily as a result of The American Competitiveness in the Twenty-First Century Act (AC-21), Pub. L. 106-331, and changes in U.S. Citizenship and Immigration Services (USCIS) processing procedures that created a significant backlog of cases and a consequent reduction in demand for visa numbers.

In FY 2004, USCIS embarked on a major effort to reduce backlogs by the end of FY 2006. As a result, immigrant visa numbers have been allocated at a faster rate than in comparison to previous years. Section 201(a)(2) of the Immigration and Nationality Act (INA) states that not more than 27 percent of the employment-based annual limit may be used in each of the first three quarters of a fiscal year. Based on the rate of demand in the first quarter of FY 2005, DOS has determined that it is necessary to impose limits on the allocation of immigrant visa numbers to applicants from mainland China, India, and the Philippines during the second quarter of FY 2005, due to the high demand for E31 and E32 category visas in these countries.

As noted, this memorandum also rescinds the March 31, 2004, concurrent adjudication memorandum. USCIS has determined that, from an operational standpoint, the concurrent adjudication of the Form I-140 and Form I-485 has created administrative challenges and has not resulted in enhancements to customer service. Accordingly, USCIS has decided to rescind the March 31, 2004 memorandum. This decision will further USCIS’ goal of reducing backlogs in the adjudication of these forms.

3. Concurrent Filing, Concurrent Adjudication, and Withdrawal of the Form I-485.

(a) Concurrent Filing. As a result of the visa regression, beginning on January 1, 2005, and until further notice, affected applicants from mainland China, India, and the Philippines will not be able to file Form I-485 or concurrently file Form I-140 and Form I-485 unless an immigrant visa number is available, pursuant to the Visa Bulletin. Concurrent filings from applicants not affected by the visa regression will continue in accordance with established policies and procedures.

(b) Concurrent Adjudication. Effective immediately, the memorandum issued by Fujie Ohata, Director of Service Center Operations, dated March 31, 2004, entitled: Procedural Instructions for Concurrent Adjudication of Concurrently Filed Form I-140 Immigrant Petition for Alien Worker and Form I-485 Application for Adjustment of Status is rescinded. The Service Centers shall continue accepting concurrently filed Form I-140s and Form I-485s and ancillary applications (Form I-765 applications for employment authorization and Form I-131 applications for advance parole/travel documents), if a visa number is available and the remaining eligibility criteria have been met. Adjudication of the Form I-140, however, is no longer dependent on the adjudicative readiness of the Form I-485.

(c) Withdrawal of the Form I-485 by Applicants Affected by the Visa Regression. When an applicant withdraws the Form I-485 from a concurrent Form I-140/I-485 filing, the Service Centers will view the withdrawal as an indication that the applicant intends to pursue immigrant visa

processing overseas and adjudicate the Form I-140 petition before forwarding it to the National Visa Center.

4. Timely filed before the visa regression.

Applicants affected by the visa regression may continue to file the Form I-485 adjustment application (with ancillary applications) or concurrently file a Form I-140 immigrant visa petition and a Form I-485 adjustment application (with ancillary applications) until close of business on December 30, 2004, provided that they have a current priority date and are otherwise eligible to file.

Applications filed under this provision must be properly filed on or before December 30, 2004. Under 8 CFR 103.2(a)(7), an application will be considered to have been properly filed when it is physically received at a USCIS office and stamped with the time and date of actual receipt. USCIS is closed on December 31, 2004, as it is a federal holiday.

5. Fees and Data Entry.

(a) Fee receipting and data entry functions. All fee receipting and data entry functions shall be performed according to the standards applicable to the receiving location.

(b) Remittance of a Single Check for Multiple Filings. If a single check is remitted for multiple filings and the fee is incorrect and/or the priority date is not current, all of the filings shall be rejected. Filing receipts should not be issued for any of the filings.

(c) Remittance of Multiple Checks for Multiple Filings. If Form I-140 and Form I-485 are filed together with separate fees and there is no visa currently available, the Form I-140 and fee shall be accepted, but all relating Form I-485s and ancillary applications shall be rejected.

(d) Remittance of Multiple Checks for Principal Applicants and their Dependents. In the case of multiple checks, when the acceptance of the dependents' applications is contingent upon the acceptance of the principal's application, the principal's application shall be fed in first, followed by the dependents. If the principal's application is rejected, the dependents' applications must also be rejected.

(e) Acceptance of cash. All offices should continue their normal practice regarding the acceptance of cash.

6. Alternate Chargeability.

Applicants have been advised to flag a Form I-485 on the face of the application to identify it as one that should be handled under the rules applicable to alternate chargeability. Contract staff

will forward all cases identified as “Alternate Chargeability” to mailroom review for further review by USCIS staff.

Section 202(b) of the INA provides rules for determining whether an applicant may be “charged” to a country other than the one where he/she was born. These alternate chargeability rules are designed to ensure that children are not separated from their parents, that spouses are not separated from each other, and that individuals born during the temporary visit of their parents to a country where they have no residence are not adversely affected by “an accident of birth.” Note that while a child may be charged to his or her parent’s country of birth, the reciprocal is not true. A parent cannot be charged to the country where his/her child was born. For a complete discussion of the alternate chargeability rules, see Adjudicator Field Manual (AFM) Chapter 20.1(d).

If upon review, it is determined that a case may be covered by the provisions of section 202(b) of the INA, the Form I-485, along with any ancillary applications and concurrently filed petition will be accepted and handled under normal practice, provided that the beneficiary who is accompanying or following to join is not affected by the visa regression and otherwise meets the criteria set forth in section 202(b) of the INA.

7. Handling of Form I-140/I-485s Filed After Visa Numbers Have Regressed.

(a) Form I-485s filed separately. If there is no visa available when a Form I-485 is filed, the I-485 and fee shall be rejected.

(b) Form I-140s and Form I-485s filed together with one fee. If the Form I-140 and the Form I-485 are filed together with one fee and there is no visa currently available, the Form I-140, the relating Form I-485 and ancillary applications, along with fees, all shall be rejected.

(c) Form I-140s and Form I-485s filed together with separate fees. If the Form I-140 and Form I-485 are filed together with separate fees and there is no visa currently available, the relating Form I-485 and ancillary applications shall be rejected. The Form I-140 shall be accepted, if the correct fee has been remitted.

8. Pipeline Form I-485s.

“Pipeline” cases refer to those Form I-485s physically received on or before December 30, 2004, in the appropriate service office but subsequently affected by a regression.

Pipeline cases will be held in abeyance until such time as a visa number becomes available. Pipeline cases will be considered to be pending during this period, and applicants will be eligible to apply for interim benefits such as employment authorization and advance parole.

9. Contact Information.

Operational and policy questions regarding the guidance provided in this memorandum should be directed to Robert Genesoni and Bunnie Bryce, respectively, via DHS e-mail, through appropriate channels.