

Email below received from the Chair of the American Immigration Lawyers Association (AILA) on November 6, 2022

Dear Office of Access and Information Services:

Thank you for providing and monitoring this Stakeholder's email box. I currently serve as the Chair of the American Immigration Lawyers Association (AILA)/USCIS Benefits Policy Committee. In this capacity, I write this email on behalf of AILA.

AILA commends USCIS for its accomplishments in adjudicating the extraordinary number of employment-based green cards available in FY2022. As FY2023 has recently commenced, we are writing to request additional guidance regarding employment-based green card adjudications for FY2023, particularly related to applicants for whom an immigrant visa was immediately available in August and September 2022, but who are no longer current as of October 1, 2022, due to visa retrogression.

Our membership has identified the following issues:

1. Dependent Adjustment of Status Filings

In some cases, USCIS approved the principal applicant's adjustment of status application but not the dependent family members' derivative applications, which remain pending. Due to the immigrant visa retrogression that occurred on October 1, 2022 (particularly in the India EB-2 category), some of these dependent family members could remain pending, in some cases for many years, until their Priority Date becomes current again. This situation places immense stress, uncertainty and hardship on many immigrant families, particularly in situations where the protracted delay in the adjudications of the green card application for the family members could be several years.

AILA respectfully requests USCIS to take the following actions:

- Update the Fiscal Year 2023 Employment-Based Adjustment of Status FAQs, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs>, with information regarding dependent family members who find themselves in this situation, including providing information about their ability to remain in the United States while their green card remains pending with USCIS.
- Develop and implement a special procedure for these dependent family members to mitigate the lengthy delay in the adjudication of their Form I-485 applications. For example, USCIS could help by expediting the Form I-485 applications for family members who refile under the family-based (F2A) visa category as spouses/children of permanent residents.

2. Pending Form I-485, Supplement J Transfer of Underlying Basis Filings

Applicants who requested to transfer the underlying basis by filing a Form I-485, Supplement J with USCIS in FY2022 and for whom the request remains pending with USCIS may now wish to withdraw that request. If these applicants would like to withdraw the Supplement J in order to remain in the visa category in which they originally filed, what is the best way for an applicant to notify USCIS of such a withdrawal? Would USCIS consider creating and implementing a formal process for withdrawal of these requests?

3. Adjustment of Status Applications Transferred to a local CIS Field Office

For FY22 applicants whose Form I-485 adjustment of status applications were current in FY2022 and were forwarded to a local USCIS Field Office, but whose Priority Dates retrogressed on October 1 prior to adjudication, has USCIS developed specific guidance in terms of which adjustment of status applications will remain at the USCIS Field Office, and which applications will be sent back to the National Benefits Center? For example, are the USCIS Field Offices retaining files based on certain Priority Dates?

4. USCIS Processing Steps Once Priority Date Becomes Current

Applicants who were current in FY2022 whose Priority Dates retrogressed on October 1, 2022, are anxiously watching the monthly State Department Visa Bulletin to monitor when their Priority Date will become current again. As Priority Dates progress in the coming months for applicants whose Priority Dates retrogressed on October 1, 2022, what steps should they take and what actions should they anticipate from USCIS on their Form I-485 applications once their Priority Date becomes current again?

5. Erroneous AOS Adjudications

AILA is aware of a number of adjustment of status applications that were erroneously adjudicated by USCIS in FY2022, at a time when USCIS was working as quickly as possible to adjudicate as many Forms I-485 before the end of the fiscal year. One example was of a case in which both the husband and wife had approved and current Forms I-140. Both were approved as beneficiaries of the other's Form I-140, but both were denied as principal beneficiaries. There are also examples in which cases were approved prematurely (e.g., approval before medical exam results submitted). Our members are concerned that these erroneous adjudications will negatively impact their clients at some point in the future, such as when their clients apply for naturalization. What is the best way for stakeholders to bring these cases to USCIS's attention? Would USCIS implement a streamlined process, benefitting both stakeholders and the agency, to submit these applications for resolution?

Thank you in advance for your consideration of these issues and we look forward to your reply. Please do not hesitate to contact me if you should require additional information or if you would like AILA to provide case numbers of examples of any of the above.

Sincerely,

Robin Dana O'Donoghue

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December 27, 2022

Robin Dana O'Donoghue
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Dear Ms. O'Donoghue:

Thank you for your November 6, 2022 email to U.S. Citizenship and Immigration Services (USCIS) regarding the processing of employment-based adjustment of status applications in fiscal year (FY) 2023. We appreciate your interest in this important issue and our shared goal, with our partners at Department of State (DOS), of using all of the available employment-based visas every fiscal year.

Dependent Adjustment of Status Filing

USCIS makes every effort to adjudicate the principal and derivative applicants at the same time, but this is not always possible. If we deem approvable a Form I-485 of a derivative applicant and a visa number is not available based on the Final Action Dates chart in the Visa Bulletin at the time we make that determination, the application will remain pending until a visa number is available; DOS allocates a visa; and USCIS completes the adjudication.

If the relevant visa availability cutoff date retrogressed, such that a visa number is not immediately available for the derivative applicant's pending adjustment of status application, USCIS will generally consider the derivative applicant to be "in a period of stay authorized" while the application is pending, and the applicant would not accrue unlawful presence while the application is pending. The derivative applicant also remains eligible to seek certain benefits based on the pending adjustment of status application, which includes:

- Applying for employment authorization: Employment authorization on the basis of a pending adjustment application, if granted, is not tied to a particular employer, position, or job classification, and is currently granted in increments of up to two years; and
- Applying for advance parole: Advance parole, if granted, authorizes the adjustment applicant to travel outside of the United States during the advance parole validity period

and to apply for parole into the United States upon return (at a U.S. port of entry) without the derivative's adjustment of status application being considered abandoned.

The USCIS employment-based (EB) frequently asked questions (FAQ) has a section dedicated to derivative family members. USCIS will consider the suggestion concerning expedited processing, in the context of F2A immigrant visa petitions filed on behalf of derivative family members where the principal adjusted status and the family members' applications have been affected by retrogression.

Pending Form I-485, Supplement J Transfer of Underlying Basis Filings

Applicants who requested to transfer the underlying basis of their Form I-485 with USCIS in FY 2022 and wish to withdraw that request and transfer to another basis, including a transfer back to the basis designated on the Form I-485 at the time of filing, may do so by submitting a new written transfer request.

If the applicant is requesting to transfer the underlying basis to a previously filed and approved Form I-140, Immigrant Petition for Alien Workers, the applicant should submit a Supplement J with the new transfer request to confirm the validity of the job offered in the immigrant petition that is being requested as the basis of the transfer request. Only one petition may form the basis of an adjustment application at any given time. A new Supplement J is generally required to confirm validity of the job offer.

If the applicant is requesting to transfer the underlying basis to a Form I-140 that remains pending, the applicant does need to submit a Supplement J. The USCIS website on FY 2023 Employment-Based Adjustment of Status FAQs, available online at <https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs>, provides more information regarding transfer of underlying basis requests.

Adjustment of Status Applications Transferred to a Local USCIS Field Office

USCIS has a process in place regarding the handling of Form I-485 applications with priority dates that are no longer current because the applicable visa availability cutoff date retrogressed. The Form I-485 application, when affected by retrogression, will generally be returned by the field office to the National Benefits Center (NBC) if the I-485 application is approvable but their priority date is no longer current because of retrogression. Once these cases have been returned to the NBC, the NBC will monitor the cases monthly for visa availability and generally complete the adjudication once the visa becomes available.

USCIS Processing Steps Once Priority Date Becomes Available

In the EB FAQ for FY 2023, USCIS has stated, "When a visa becomes available to you in the future based on the Final Action Date for your country and category as compared to your priority date, USCIS will be able to approve your adjustment of status application if you are admissible, merit a favorable exercise of discretion, and are otherwise eligible." When a visa

number becomes available, USCIS will review the file and complete the adjudication. This may include issuing a Request for Evidence (RFE) if the file lacks a valid Form I-693, or other supporting documentation. Applicants do not need to reach out to USCIS to inform the agency that a visa number is again available. However, if the underlying petition is approved and a visa number is again available, but the applicant knows that their previously filed Form I-485 does not have a valid Form I-693, applicants should consider obtaining a completed Form I-693 so that they are prepared to submit it as soon as they receive a RFE in order to expedite adjudication as much as possible.

Erroneous AOS Approvals

A noncitizen concerned that USCIS approved their adjustment of status application in error should reach out to the USCIS Contact Center at 1-800-375-5283 (TTY 1-800-767-1833).

Thank you again for your letter and interest in this important issue. Should you require any additional assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Ur M. Jaddou", followed by a horizontal line extending to the right.

Ur M. Jaddou
Director