



USCIS “Pivots” Which Investors Get Adjudicated First



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On January 31, 2020, USCIS suddenly announced that, starting on March 31, 2020, for any case not already assigned to an adjudicator, it will “prioritize” in assignment for adjudication I-526 petitions made by investors who are not subject to visa availability backlog, rather than in the haphazardly first-in-first-out policy applicable up to now.¹ USCIS has been falling farther and farther behind in those adjudications, so it reasoned that it should focus its limited resources on deciding cases for the investors who can actually make use of the approval.

Which cases really will get prioritized, at least for now?

For now, the only cases that will get thrown into a pile of delay will be those filed by investors born in mainland China and who cannot be “chargeable” to another country.² This is because USCIS is treating as “backlogged” only those

¹ USCIS stated that petitions already assigned to an adjudicator before that date will proceed with adjudication under prior policy.

² An investor can be chargeable to another country, and thereby escape the waiting list of his or her birth country, if either (1) he or she is married to a person born in another country, in which case they both can be treated as having been born in the spouse’s country, also called “cross-chargeability”; or (2) his or her parents were only temporarily present in the country of birth and permanently resided elsewhere, in which case the applicant is charged to the parents’ country of permanent residence at the time of birth. USCIS has instructed that an investor who will benefit from “alternate chargeability” should use the USCIS receipt notice for the I-526 filing and send an email to the IPO pointing out such chargeability and asking for prioritization.

countries that have a cut-off date in the “Dates for Filing” chart in the Visa Bulletin. China is the country whose nationals have filed the overwhelming percentage of I-526 petitions over the last decade, and for mainland China the April 2020 Visa Bulletin sets a cutoff date of May 15, 2015 in the Dates for Final Action chart and December 15, 2015 in the Dates for Filing chart. All of the other countries are “current” under both charts in the April 2020 Visa Bulletin.

As the new prioritization policy takes hold and USCIS actually starts adjudicating petitions newer than those filed by Chinese investors, it will approve enough to trigger immigrant visa or adjustment of status applications of investors born in Vietnam and India in enough numbers to trigger the law’s 7% per-country limit. Under that law, no more than 7% of the available 10,000 or so visas in the EB-5 preference category can be used up by the investors and their immigrating family members from any one country except to the extent that the rest of the world does not use up those numbers.³ On average, it only takes about 300 investors, when combined with their family members, to use up those 700 numbers causing a cutoff date in the Dates for Final Action chart. But the cut-off dates in the Dates for Filing chart are set with a design to trigger cases to begin being worked by the National Visa Center about a year before their visa numbers will become available in the Dates for Final Action chart. Thus, there may be a lag of a year or two before the I-526 petitions already in the USCIS adjudication queue will result in USCIS “prioritizing” other countries’ I-526 petitions away from those filed by Vietnam and India. It is conceivable that almost all of the Vietnam and India petitions in the USCIS adjudication queue could be adjudicated before the Visa Bulletin catches up to the bulge of those cases so that they

³ Once a country hits the 7% limit and the rest of the world within their respective 7% limits do not use up the rest of the worldwide allocation for the year, the remaining available numbers are allocated on a worldwide first-in-first-out basis, which means that the China-born investors who have been waiting the longest will use up those remaining numbers for the next many years.

never really suffer the delayed adjudication that China-born investors will experience.

How long will non-China petitions take to get adjudicated?

Meanwhile, during the last year or so USCIS has slowed its overall I-526 processing to a near stand-still, which it attributes to new time-consuming measures to enhance fraud detection and adjudication. If USCIS annual adjudication numbers remain small, then India and Vietnam will stay under 700 visa numbers usage per year without need for any Visa Bulletin cut-offs. If USCIS speeds up overall adjudications even to half of its rate in FY2019, it would get through in a year or two all of the 7,000+ I-526 petitions from countries other than China⁴ that USCIS has reported were pending as of October 1, 2019.⁵ It is conceivable (but unlikely) that USCIS could adjudicate quickly so many of those that a worldwide cut-off date could develop in Dates for Final Action, at least. Even if that phenomenon occurred, it would be short-lived, because those visa applicants from other than India and Vietnam would be satisfied by one or two years of visa allocations after 700 per country from China, Vietnam, and India.

But USCIS already will have assigned gobs of China cases to adjudicators before the prioritization policy takes effect, and it will take time for those cases to work through the adjudication system to make room for new cases more exclusively from elsewhere. Thus, one can guess that it will take at least two years to adjudicate the “other than China” petitions already filed. The impacts on officer productivity from COVID-19 protection measures may further slow the wheels.

⁴ USCIS has not reported on individual country numbers, even for India and Vietnam.

⁵ We can guess confidently that many petitions must have been filed between October 1, 2019 and November 21, 2019, when the new regulations nearly doubling the minimum investment took effect. Not surprisingly, it appears from industry information-sharing that very few petitions have been filed since November 21, 2019.

Continued On Page 19

USCIS “Pivots” Which Investors Get Adjudicated First

Continued From Page 18

What exceptions will be made?

USCIS has announced that if it approves expedite requests for any petitions (or for groups of petitions for an expedited project), the expediting will supersede any visa number-based prioritization. Petitioners who would receive swift adjudication under the prioritization cannot “opt out” of prioritization. It is not clear why anyone would want to do so, because a person with an approved I-526 can “slow walk” the visa process without having “termination of registration” as long as desired by sending the National Visa Center an annual notification that he or she does not wish to proceed yet.

Who wins and loses and how?

Obviously, investors who get “prioritized” and can immigrate more quickly will be delighted. Even for some visa-backlogged investors, this will have the happy effect of reducing the chances of a child’s “aging out” of eligibility while awaiting visa numbers and thus will be welcome.⁶

⁶ Generally, a child can qualify to immigrate with an EB-5 investor only if the child is under 21. Under the Child Status Protection Act (CSPA), however, the child’s age is locked in as of the date when the later of two events occurs: I-526 approval and availability of a visa number in the queue based on date of I-526 filing. Also under the CSPA, the child’s “adjusted age” for this purpose is reduced by the time it takes for USCIS to adjudicate the I-526 petition. In effect, a child’s adjusted age happily is frozen during

For other visa backlogged investors, however, it will be a very unwelcome and irritating increased wait to be told that they qualify based on their project plans and their source of funds.

In addition, the more non-Chinese petitioners who get through the adjudication pipeline and on to non-backlogged visa issuance, the slower China-born investors and their family have visa numbers available to them. Under the current environment under the new regulations, however, it does not appear that non-Chinese investors are flooding the system with new \$900,000 investments.

Moreover, this delayed adjudication for investors born in visa-backlogged countries has the surely unintended effect of eliminating the “priority date retention” protection that 2019 USCIS regulations had provided for investors who obtained I-526 approval. Before some investors could get a visa number and immigrate their project fizzled, failed, was fraught with fraud, or suffered termination of the sponsoring regional center, so that the investor lost the will or ability to proceed due to hopelessness of I-829 approval down the road or even due to immediate

the nail-biting time an I-526 petition awaits adjudication and then resumes advancing until a visa number becomes available. If the adjusted age exceeds 21 before that date, the child becomes ineligible to derive permanent residence with the parent investor (the dreaded “age out”).

I-526 revocation by USCIS. Under the new regulations, such investors could make a new investment and I-526 filing and retain their place in the visa number queue based on the earlier approved I-526 filing date. If USCIS delays the I-526 adjudication and meanwhile the project’s infeasibility is exposed, USCIS will deny the I-526 petition and “priority date retention” will be unavailable, so that the investor would need to start over at the back of the visa queue in a new investment and filing. USCIS has acknowledged this effect and refuses so far to make accommodation, such as by adjudicating I-526 petitions’ eligibility as of the time of investment rather than as of the time of decision.

What if legislation creates new numbers?

Congress is continually lobbied to increase visa numbers and reduce minimum investment levels. If those efforts become surprisingly successful, it would be critically important whether new numbers would be allocated using the same allotment category and per country limit. If so, China-born investors would continue to face longer waits for visa numbers (and through the USCIS policy, for I-526 adjudication), and their interest in the program might be less than if changes to allotment were included. ➤

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