TEXT OF JUNE 21, 2007, MEMORANDUM FROM SHAWN ORME, USCIS LIAISON CHAIR, TO MICHAEL AYTES AND DONALD NEUFELD REGARDING REJECTION OF "OTHER WORKER" ADJUSTMENT OF STATUS APPLICATIONS:

AILA is very concerned over the recent change in USCIS policy concerning filing of applications for adjustment of status based upon visa availability as shown in the current Visa Bulletin of the Department of State. We have been informed that USCIS HQ has instructed the Nebraska and Texas Service Centers to reject employment based I-485 applications in the third preference "Other Workers" based on a memo sent by the Department of State's Visa Office to USCIS advising that as of June 6, 2007, there would be no further authorization of visa numbers in this category.

This change in Service policy is not in accordance with the relevant regulation at 8 CFR 245.1(g)(1). Moreover, the lack of public notice of the change in policy has significant negative implications on public confidence in the transparency of USCIS policies and procedures. Additionally, failing to inform the public of the change in policy, if the policy is incorrect, places additional burdens on the Service Centers faced with rejecting applications the USCIS has determined are ineligible for filing.

REJECTING APPLICATIONS WHERE A VISA IS AVAILABLE ACCORDING TO THE CURRENT VISA BULLETIN IS CONTRARY TO REGULATION

Under section 245 of the INA, an alien may apply for adjustment of status if, *inter alia*, "(3) an immigrant visa is immediately available to him at the time his application is filed." The question is what the term "immediately available" means.

The regulation at 8 CFR 245.1(g) defines the term and instructs how to determine when an immigrant visa is immediately available under Sec. 245 of the INA. 8 CFR 245.1(g) states,

> "An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. **An immigrant visa is considered available for accepting and processing the application Form I-485 i[f] the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that that numbers for visa applicants in his or her category are current).** An immigrant visa is also considered immediately available if the applicant establishes eligibility for the benefits of Public Law 101-238. Information concerning the immediate availability of an immigrant visa may be obtained at any Service Office." (Emphasis added.)

There is no provision in the regulations to look beyond or behind the Visa Bulletin.

Reliance on the current Visa Bulletin is well-established. In 1994, the INS published a revision to 8 CFR Part 245 in response to enactment of section 245(i) of the Act. In the Supplementary Information provided with that regulation, the INS took the opportunity to revise its definition of "immediately available" to be consistent with that of the Department of State. The INS said:

> All applicants for adjustment of status under section 245 of the Act must have an immediately available immigrant visa number**. "Immediately available" for the purpose of accepting and processing the Form I-485 application filed by a preference alien is defined in 8 CFR 245.1(f) as being not later than the date shown in the current Department of State Bureau of Consular Affairs Visa Bulletin.** The Department of State, however, defines "immediately available" as being earlier than the date shown in the current Visa Bulletin. This rule amends 8 CFR 245.1(f) to bring the adjustment of status provision into accordance with the Department of State's definition. It also changes the name of the Visa Bulletin to reflect its current title. (Emphasis added.)

Again in 2002, the INS published a regulation that addressed the meaning of the term "immediately available," this time in connection with concurrent filing. In the 2002 rulemaking, the INS revised the definition to its current form:

> § 245.1 Eligibility.
> (g) * * *
> (1) * * * An immigrant visa is considered available for accepting and processing the application Form I-485 is the preference category applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current).
> * * *

There has been some discussion to suggest that USCIS believes that the memo issued by DOS to USCIS informing the Service that sufficient numbers in the "Other Workers" category were used by June 6, 2007, may serve as an "interim" Visa Bulletin or an amendment to Visa Bulletin in effect for June 2007. The memo issued by DOS to USCIS may not be construed to supersede or amend the current bulletin. AILA disagrees that there is legal authority to support the position that an internal communication between the DOS and USCIS may serve as public notice suspending the ability of "Other Worker" applicants to file adjustment of status applications and supersede the current Visa Bulletin. Because the term "immediately available" is defined by regulation, any attempt to redefine the term must be by rulemaking.

In addition to the clear language of 8 CFR 245.1(g) the USCIS Adjudicators Field Manual is also instructive in this matter. AFM 20.1 Note, further explains,

> Some discussion has arisen relative to which publication of the Visa Bulletin issued by the State Department on a monthly basis should be considered to be the

> "current" bulletin. The Visa Bulletin summarizes visa availability and is issued approximately the 10th day of each month indicating visa information for the following month. For purposes of adjustment of status applications, you should refer to the Visa Bulletin that is in effect for the calendar month in which the I-485 is filed, regardless of the printing and issuance of the following month's Visa Bulletin.

Prior policy guidance confirms that reliance on the current Visa Bulletin is required. In support of this position AILA looks to USCIS most recent memorandum issued on the subject of visa retrogression and the acceptance of adjustment of status applications published on December 29, 2004, by William R. Yates, Associate Director of Operations[1]. Specifically, in the December 29, 2004, Yates memo, USCIS provided 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 were going to be affected by the visa retrogression under the E31 and E32 professional categories for applicants from mainland China, India and the Philippines in January 2005. The memo is clear that it is referencing the Visa Bulletin publicly issued by DOS and not an internal communication or other notice CIS must surely had received in advance of the issuance of the January 2005 Visa Bulletin in mid-December 2004.

In summary, the Yates memo, which follows the regulation, instructed the field to continue to accept I-485 adjustment of status filings for those applicants who would be affected by the visa retrogression in the following month's visa bulletin. Specifically, the memo permitted "applicants affected by the visa retrogression [to] continue to file the Form I-485 adjustment application (with ancillary applications) or concurrently file Form I-140 immigrant visa petition and a Form I-485 adjustment of 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."

The memo further instructed, "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 properly filed when it is physically received at a USCIS office and stamped with the time and date of actual receipt." Finally, the memo also addressed how the field should treat "pipeline" cases. "'Pipeline' cases refer to those Form I-485s <u>physically received</u> 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."

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[1] *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*, Memorandum, William R. Yates, Associate Director of Operations USCIS, HQOPRD 70/11.1, (December 29, 2004).

In addition to the December 29, 2004, Yates memo, USCIS has previously affirmed through policy guidance that reliance on the current Visa Bulletin is required. Notably, in policy guidance issued on February 14, 2003, in connection with implementation of the Child Status Protection Act (CSPA), Public Law 107-208, 116 Stat. 927, by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations[2], the Service reaffirmed the position that "[t]he date that a visa number becomes available is the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that preference category."

The Williams memo reinforces the language of the regulation as well as confirms the long standing Service policy of using the currently published Visa Bulletin to determine whether an immigrant visa is immediately available. Any other course of action, particularly in the calculation of CSPA benefits, would lead to confusion and make it virtually impossible for an applicant without access to internal DOS and USCIS communications to determine when his or her particular visa number became available.

THE LACK OF FORMAL NOTICE TO THE PUBLIC UNDERMINES CONFIDENCE IN THE TRANSPARENCY OF USCIS POLICY AND PROCEDURE, AND PLACES UNNECESSARY PROCESSING BURDENS ON THE USCIS

Stakeholders are only learning now that USCIS HQ instructed the NSC and TSC to reject adjustment of status applications in the EW category because they are receiving rejections. The public and stakeholders were not informed either prior to or at the time the policy was adopted. Failure to inform the public undermines reasonable expectations that the agency has policies and procedures that are reasonable and able to be known through reasonable investigation. To date, we do not believe that there is any public announcement of the change in policy.

In addition to transparency in the eyes of the public, this change in policy is one over which there is disagreement, and one which should have been made known to major stakeholders prior to, or at the time of, its adoption, in order to achieve agreement, if possible.

Finally, and setting aside for the moment the question whether the policy complies with the regulations, if this new policy is lawful, it is in the interests of the USCIS to announce it publicly, either prior to, or contemporaneous with its implementation, if only to reduce the costs entailed in rejecting the applications. We have discussed on many occasions the costs incurred with rejections. If there had been notice to the public, then, applications would not be submitted, and the USCIS would not be faced with the additional costs.

CONCLUSION

The policy of rejecting I-485 applications in a month where the Visa Bulletin shows availability is contrary to the regulations, and must be ceased immediately. Moreover,

[2] *The Child Status Protection Act – Memorandum Number 2*, Memorandum, Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, HQADN 70/6.1.1 (February 14, 2003).

those whose applications were improperly rejected must be received back in and placed in the processing queue. Finally, we again ask the USCIS to implement procedures that will result in the immediate dissemination of information to the public through all means, not just the USCIS website, including immediate notification to stakeholder organizations, when any change in policy or procedure is adopted.