



**U.S. Citizenship  
and Immigration  
Services**

December 27, 2022

Robin Dana O'Donoghue  
AILA USCIS Benefits Policy Committee Chair  
American Immigration Lawyers Association  
O'Donoghue Law, LLC  
2067 Massachusetts Ave., Fifth Floor  
Cambridge, MA 02140

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

**Robin Dana O'Donoghue**

Page 3

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", with a horizontal line extending to the right.

Ur M. Jaddou  
Director