

Immigration Newswire

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Recap & Update on I-485 Filing Situation

On June 13, 2007, the Department of State published a Visa Bulletin stating that all employment-based cases would be current in July. However, on July 2, the Department of State published an "Update on July Visa Availability" on its website, stating that all employment-based visa numbers have been used up for the remainder of the fiscal year, and that no new numbers will be available until FY2008, which begins October 1. Despite the fact that the regulations require USCIS to continue to accept I-485 applications from individuals during the entire month that their priority date is current, USCIS treated the State Department's "Update on July Visa Availability" as a revised Visa Bulletin. On July 2, USCIS published a Press Release at <http://tinyurl.com/3blpew>, stating that they would reject any I-485 applications submitted in July.

On July 17, 2007, after receiving public pressure and being threatened with a class action by the American Immigration Law Foundation, USCIS retracted its policy of rejecting I-485 applications. They sought to ameliorate the situation by allowing any employment-based applicant who would have been eligible to file under the July Visa Bulletin to file I-485 applications until August 17, 2007. See "USCIS Update" at <http://tinyurl.com/3278c6>.

To complicate matters, the Department of Homeland Security has raised all filing fees, effective July 30. However, according to the "Update," USCIS will continue to charge the old filing fees on all employment-based I-485, I-765 (employment authorization) and I-131 (advance parole) applications filed pursuant to the July Visa Bulletin until August 17. Note that any I-140 petitions filed after July 30 require the higher filing fee, as do any I-765 and I-131 applications filed pursuant to a Visa Bulletin prior to July. Also, the higher filing fees apply to any family-based applications for adjustment of status, EAD, or Advance Parole filed after June 30.

USCIS has released two sets of FAQs to answer questions about processing procedures under this updated policy. They are available online at <http://tinyurl.com/2ubphh>.

Among other things, the FAQs make it clear that I-485 applications can be concurrently filed prior to August 17 even if the I-140 has been filed and the receipt notice has not yet been issued. In addition, I-765 and I-131 applications can now be concurrently filed, at the lower fee, with July I-485 applications for which receipt notices have not yet been issued.

Complications Stemming from this Situation

1. Where to submit concurrently filed I-140 and I-485s

At the same time that USCIS bungled the July I-485 filing situation and put a fee increase into effect, they also decided to change the filing address for I-140 petitions and I-485 applications, effective July 30. Filing instructions are located at the following addresses:

I-140 “Direct Filing” Instructions: <http://tinyurl.com/2o5hca>.

I-485 “Direct Filing” Instructions: <http://tinyurl.com/3yazec>.

The I-140 “direct filing” instructions base the place of filing on the location of the alien’s employment. Under the new I-485 filing guidelines, however, the place of filing is based on alien's residence. These instructions leave some ambiguity with regard to the appropriate place to file a concurrent I-140 and I-485 application. If the instructions are followed, the result would be that in some cases, the I-140 would be filed at one service center while filing the I-485 would be filed at a different service center on the same day. This creates a real problem in matching up the applications and ensuring that the I-485 is accepted for processing in the apparent absence of an accompanying I-140 petition. The instructions are not clear on this, and until we receive further guidance, we are continuing to file I-140 and I-485s together at the same address, based on the location of the alien’s proposed employment. We are seeking clarification on this issue. Meanwhile, USCIS is not rejecting improperly filed applications until August 28, a month after the filing instructions take effect.

2. Which version of the forms should be used?

Also coinciding with the July I-485 filing situation, USCIS has posted new versions of several forms, including form I-765, application for employment authorization, on its website. The forms have indicated that prior versions are unacceptable, which would require attorneys to re-do a lot of work on applications in process with their clients. However, a couple of days after these forms were posted, USCIS stated that they were posted by mistake and that old versions of the forms remain acceptable.

3. Suspension of E-Filing

With very little notice, USCIS suspended electronic filing of I-140 petitions on the eve of July 30, meaning that anyone who was relying on e-filing to produce a last minute July priority date and thus preserve eligibility to file an I-485 application by August 17, was out of luck.

4. Suspension of Premium Processing on I-140 Petitions

USCIS suspended I-140 Premium Processing for a one-month period starting July 2, in anticipation of a heavy volume of filings for which 15-day processing would be

impossible. This suspension was continued indefinitely once the I-485 filing deadline was extended into August.

5. *What if my spouse and I both have approved/ pending I-140s?*

Some of our clients who have pending or approved I-140 petitions also have a spouse with a pending/ approved I-140 petition. The question arises of which I-140 petition to attach the I-485 filing to. This determination depends on several factors, including which spouse has greater job security; whether one spouse wishes to leave his/her employer; whether one spouse is in a preference category for which visa numbers will become available more quickly, etc.

In a recent meeting with the American Immigration Lawyers Association (AILA), USCIS officials stated that while the regulations do not prohibit the filing of multiple adjustment of status applications by one alien, if one person does file two such applications, they may pick one to deny since both cannot be approved. USCIS also stated that where one alien is the principal applicant and the other is the derivative, the I-485 applications cannot be transferred to the other spouse's I-140 petition. Instead, the pending I-485s must be withdrawn and new I-485s must be filed with the other spouse listed as the principal applicant.

6. *Will my priority date become current again in October?*

USCIS advised via press release that new visa numbers will not be available again until October. This is because October 1 marks the beginning of the government's fiscal year. This statement has led to the mistaken impression among some that employment-based preference categories will become current again in October, allowing anyone to file. That is incredibly unlikely. We expect that when the October Visa Bulletin is published in mid-September, there will be severe retrogression.

7. *Now that my adjustment of status application has been submitted, when can I travel outside the United States?*

Travel abroad while an adjustment of status application is pending results in abandonment of the application unless the applicant either (1) has Advance Parole in hand prior to travel; or (2) is traveling on an H-1B/H-4 or L-1/L-2 visa and returning to the U.S. to resume that status after the travel. Those traveling on H or L status are required by regulation to carry their original I-485 receipt notice when traveling abroad. Due to the large volume of adjustment of status applications filed in June, July, and August, we anticipate a delay in the issuance of receipt notices. We do not know how long the delay will be. It is also impossible to predict how long it will take USCIS to issue Advance Parole documents for applications filed this summer.

In the past, Customs & Border Protection officers at the ports of entry have seemed unaware of the regulatory requirement that adjustment applicants traveling on H or L visas carry their original I-485 receipt notice. When our clients have presented their

receipt notices upon return from travel abroad, officers have not known what to do with them. However, we do not advise traveling without an I-485 receipt notice.

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