Strategies for SIJS cases in light of adjustment backlog

By Sarah Bronstein and Michelle Mendez

Background

Historically, advocates representing children seeking Special Immigration Juvenile Status have not needed to pay attention to the Department of State *Visa Bulletin*. This is because the number of SIJS-based adjustment of status applications each year has rarely exceeded the maximum number of visas available. Recently, State has not needed to establish a cut-off date in this EB-4 employment-based preference category. That has changed. The May 2016 *Visa Bulletin* shows a Chart A "final action date" of Jan. 1, 2010, in this category for people from El Salvador, Guatemala and Honduras.

Children who were not in removal proceedings have historically been able to file the Form I-360, Petition for Amerasian, Widow(er) and Special Immigrant, and Form I-485, Application to Register Permanent Residence or Adjust Status at the same time. Filing both together is known as concurrent filing or one-step filing. Children in removal proceedings generally filed the I-360 first and then, due to jurisdictional issues, filed the I-485 once the I-360 had been approved and removal proceedings had been terminated. Generally, whether in removal proceedings or not, children were able to file quickly for adjustment of status following the approval of the I-360 because a visa was immediately available. However, beginning May 1, 2016, children from these three countries will no longer be able to file for adjustment of status concurrently with their I-360 or immediately after their I-360 is approved.

How Does the Visa Bulletin Work?

Children who have been approved for SIJS are able to take the second step and apply for adjustment of status once their priority date (the date they filed the I-360 petition) becomes current. Availability is determined by looking at the fourth preference employment-based category (EB-4) in the monthly *Visa Bulletin*. INA § 203(b)(4). There are about 10,000 visas available in this category annually. The State Department anticipates that the annual quota on visas in the EB-4 category is likely to be reached before the end of the fiscal year. Due to this category being oversubscribed for El Salvador, Guatemala and Honduras, the State Department established a cut-off date of Jan. 1, 2010, for SIJS recipients from those three countries who will be seeking lawful permanent residence in May 2016.

Chart A in the *Visa Bulletin*, Application Final Action Dates for Employment-Based Preference Cases, shows whether a visa is available for a certain preference category for applicants from certain countries. If a particular category is "current," meaning visas are available, that will be shown by a "C" in the relevant category. If a category is not current, only applicants whose priority dates fall before the date in the *Visa Bulletin* can be issued an immigrant visa, or in this case granted adjustment of status. Applicants for adjustment of status are eligible to apply for such auxiliary benefits as employment authorization and advance parole. In addition, depending on state and local policies, a recipient might be eligible for a driver's license or qualify for certain public benefits.

Chart B, Dates for Filing of Employment-Based Visa Applications, determines when a person may apply for adjustment of status in a particular preference category or when the National Visa Center can start consular processing. DOS publishes the succeeding month's *Visa Bulletin* in the middle of the current month.

One question is whether those filing an I-485 for USCIS can file if it is possible under Chart B or if the I-485 may only be filed if it is possible under Chart A. Within approximately a week of when the Visa Bulletin is announced, USCIS will report whether the filing dates on Chart B may be followed for those applying for adjustment of status with USCIS. While Chart B shows that the EB-4 category continues to be current for May in all chargeability areas and for nationals of all countries, USCIS announced that adjustment applicants in the employment-based categories will not be able to rely on Chart B in the May *Visa Bulletin*. This means that beginning May 1, 2016, SIJS recipients from those three countries can only file for adjustment of status if their I-360 was filed before Jan. 1, 2010.

Does the Jan. 1, 2010, final action date mean that children will have to wait six years to be able to apply for adjustment of status? No. That does not predict what the true wait time will be and we do not know the answer. The *Visa Bulletin* is unpredictable and changes monthly. Sometimes it jumps forward by two weeks or two months, sometimes it doesn't move at all. Sometimes it "retrogresses" or moves backward. It often jumps forward significantly in October, the beginning of a new fiscal year.

What does this mean?

Children from El Salvador, Guatemala and Honduras who have an approved I-360 can file an I-485 and an I-765 Application for Employment Authorization regardless of their priority date up until April 30, 2016. That falls on a Saturday, so the safest practice is to "file" – the USCIS receives the application – by April 29. It is wise to ensure the materials reach the Chicago lockbox by 3 p.m. on April 29. There are no visas available for those with a priority date on or after Jan. 1, 2010, so the I-485 cannot be approved. The child's I-485 will be held in abeyance until additional visas become available, perhaps in the new fiscal year. It is unclear whether USCIS will immediately request the biometrics, but those children with recent delinquency problems may benefit from having the time to prove rehabilitation before offering their biometrics. Although the I-485 will not be approved soon, it is still pending. Therefore, the I-765 still can still be approved, so the child can receive work authorization. Remember it is best practice for removal proceedings to have been terminated before you file the I-485 with USCIS. However, given the short timeframe, consider requesting termination from the court and simultaneously filing the I-485 with USCIS if the I-360 is pending or approved. Many USCIS field offices allow filing of the I-485 while removal proceedings are pending so long as those proceedings are terminated by the time of the adjustment interview, which will not become relevant for a while. For more discussion of these strategic concerns, see below.

SIJS recipients from El Salvador, Guatemala and Honduras who do not file an I-485 prior to April 30, 2016, may not file until their priority date becomes current. Advocates must check the *Visa Bulletin* monthly to determine when their client's priority date becomes current in the Final Action Date chart or whether USCIS is allowing applicants to use Chart B, Application Filing Dates. Filing an I-485 when the priority date is not current will result in USCIS rejecting the I-485 and the child wasting money on passport photos and medical exam, which will almost certainly expire by the time the priority date becomes current. This could also open the door to disciplinary action against the practitioner.

SIJS recipients who are from countries other than El Salvador, Guatemala and Honduras are not affected by the cut-off date in the May *Visa Bulletin* and may proceed with filing their I-485s. That is likely to change in coming months, so file as quickly as possible and check the *Visa Bulletin* monthly. DOS predicted that the India and Mexico EB-4 categories will become oversubscribed during the summer months.

Children from all countries who have not yet filed I-360s should file as soon as possible in order to establish their priority date.

To what does having an approved I-360 entitle you?

Children with an approved I-360 are considered paroled into the United States for purposes of establishing eligibility for adjustment of status. See INA § 245(h). Because they are deemed paroled, these children can adjust status despite having entered without inspection and not being eligible to adjust under INA § 245(i). However, approval of the I-360 does not confer any immigration status on the recipient and does not prevent removal from the United States.

What if I file the I-485 with a fee waiver request and it is erroneously rejected?

Advocates should always consider requesting a fee waiver for SIJS-based I-485 filing fees. When the fee waiver is processed and approved for an I-485, the date of receipt, not the date the fee waiver is approved, is the controlling date. This means that as long as the I-485 with the fee waiver request is received by April 29, 2016, it will be considered timely filed, even if the fee waiver is not granted until after April 29. In the past, erroneous denials of the fee waiver have led USCIS to reject the filing. Advocates have expressed concerns that erroneous denial of the fee waivers will cause applications to be rejected outside of the short filing window between now and April 29. CLINIC confirmed with the Ombudsman's Office at Citizenship and Immigration Services that the Chicago Lockbox staff is aware of this concern. If applications filed by April 29 are rejected because of erroneous fee waiver denials, USCIS will honor the original receipt date.

What should I do until April 29?

The procedural posture of the case will dictate the strategy. If the I-360 is pending while removal proceedings are pending, consider filing the I-485 with USCIS and filing a Motion to Terminate with the Immigration Court. For those with an approved I-360 in removal proceedings before Immigration Courts that are amenable to terminating proceedings in light of the *Visa Bulletin* backlog, also consider filing the I-485 with USCIS and filing a Motion to Terminate with the court. For those with an approved I-360 in removal proceedings before Immigration Courts that will not terminate proceedings, file the I-485 with a fee waiver request with the court. Remember that USCIS considers the date of receipt of the I-485 and the fee waiver as the filing date rather than the date when the fee waiver is approved. So the same principle should apply to I-485s and fee waiver requests filed with the court. It is unlikely that the Immigration Court will accept an

I-485 without a filing fee receipt or a request for a fee waiver. As a last resort and depending on the Immigration Court and DHS response to termination in these cases, advocates should consider double filing the I-485 with USCIS and the Immigration Court to ensure a receipt date by April 30.

What if I can't file the I-485 prior to April 29?

Advocates may want to consider filing the I-485 along with a fee waiver request with the Immigration Court after April 29 and attempting to obtain an Employment Authorization Document based on that pending I-485. If the Immigration Court accepts the I-485 and grants the fee waiver request, submit a copy of the Immigration Court-stamped I-485 and the fee waiver approval to support the application for an EAD. Page five of the Form I-765 instructions note that "Form I-765 can be filed with a copy of the receipt notice or other evidence that Form I-485 is pending." A copy of Immigration Court-stamped I-485 along with the Notice of Hearing can be used as proof that the I-485 is pending during active removal proceedings. Note that USCIS may issue a Request for Further Evidence requesting the Texas Service Center-generated fee receipt notice even though that process generates the biometrics appointments that will not be relevant for some time. In such cases, comply with the Texas Service Center's "Instructions for Submitting Certain Applications in Immigration Court and for Providing Biometric and Biographic Information to USCIS." This is not a guaranteed strategy and time will tell whether all Immigration Courts will accept the I-485s after April 29 and whether the USCIS will issue an EAD notwithstanding the lack of a current priority date. However, USCIS should defer to the Immigration Court's decision to accept the I-485. It said in an earlier memorandum that "Individuals with pending applications for relief or protection before EOIR should continue to submit their I-765 application for an EAD in accordance with the instructions on the form."[1]

What should I do if my client is in removal proceedings?

Once USCIS approves the I-360, advocates will want to move to terminate based on the approved I-360. If the immigration judge denies termination, advocates should next move to administratively close. As a last resort, they should move for a continuance.

In addition to seeking termination, administrative closure, or a continuance, advocates should also consider termination strategies based on improper service of the Notice to Appear.[2] Advocates should also consider filing creative but non-frivolous asylum claims based on particular social group. File those claims with the USCIS Asylum Office with jurisdiction over the child's place of residence pursuant to the TVPRA of 2008. Whatever your chosen strategy, the immigration judges should not issue an order of removal in these cases, since they have many other options. Should a child receive a removal order due to this *Visa Bulletin* backlog, please notify Michelle Mendez at mmendez@cliniclegal.org.

The following analysis should assist advocates in briefing and arguing for administrative closure or a continuance.

Seek administrative closure

The immigration judge should grant administrative closure where the children have a pending or approved I-360. Administrative closure is a procedural tool created for the convenience of the Immigration Courts and the Board of Immigration Appeals. *Matter of Gutierrez,* 21 I&N Dec. 479, 480 (BIA 1996). This tool is used to regulate proceedings, that is, to manage an immigration judge's calendar (or the board's docket). *Matter of Avetisyan,* 25 I&N 688, 694 (BIA 2012). The case is administratively closed to allow an event that is relevant to immigration proceedings but is outside the control of the parties to occur, even if the event does not take place for many years. *Avetisyan,* 25 I&N at 692. In other words, administrative closure is a procedural mechanism to temporarily stop removal proceedings by removing the case from the immigration judge's or BIA's active docket or scheduling calendar. Remind the judge that it is highly inconvenient and a waste of limited resources to keep continuing a case until the fourth-preference employment-based category becomes current, since the docket can instead be easily managed via the administrative closure option.

Prove to the immigration judge that administrative closure is proper by relying on *Matter of Avetisyan,* 25 I&N 688 (BIA 2012). In this case, the BIA held that immigration judges and the board may administratively close removal proceedings, even if one of the parties objects, pursuant to the authority delegated by the attorney general and the responsibility to exercise that authority with independent judgment and discretion. When evaluating a request for administrative closure, the immigration judge should weigh all relevant factors presented in the case, including: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome

of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re-calendared before the immigration judge or the appeal is reinstated before the Board. *Id* at 696.

Applying the *Avetisyan* factors to these cases proves that administrative closure is appropriate. First, the reason for administrative closure is as much for the convenience of the child as it is for the Immigration Court while the child awaits a visa. Second, any DHS opposition to administrative closure signals a failure to understand the *Visa Bulletin;* it is not a matter of if a visa become available but rather when it will become available. Third, once a state "juvenile" court predicate order has been issued, it is highly likely that USCIS will approve the I-360 if the advocate has done due diligence. Once USCIS approves the I-360, it is highly likely that the child will succeed in adjusting status, as these applicants are subject to fewer inadmissibility issues than other adjustment applicants. *See* INA §245(h)(2). Only the inadmissibility grounds at INA § 212(a)(2)(A), (B), and (C); 212(a)(3)(A), (B), (C) and (E) apply to SIJS-based adjustments. Fourth, the anticipated duration of the closure is unknown. "Demand for visa numbers can fluctuate from one month to another" and the *Visa Bulletin* is therefore a fluid chart.[3] Fifth, the child bears no responsibility in contributing to the current delay stemming from the backlog of visa applications for the countries of El Salvador, Guatemala, and Honduras. Sixth, the ultimate outcome of these children's removal proceedings when the case is re-calendared before the immigration judge is likely termination. Most children, the immigration judge, and the ICE Office of Chief Counsel prefer SIJ adjustments to proceed before USCIS. Even those cases that will proceed with adjustment before the Immigration Court will likely conclude in a grant of adjustment rather than an order of removal.

Lastly, the board went on to cite as an example of when administrative closure would be appropriate the case of someone who is the "beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization." *Id.* On the other hand, administrative closure would be inappropriate in purely speculative events or actions (such as a possible change in a law or regulation) or an event or action that is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family-based visa). *Id.* The current SIJS backlog resembles the former example and not the latter. Just like the immigrant spouse of a lawful permanent resident, these children are not immediate relatives and are subject to the fourth-preference employment-based preference category. Once USCIS approves the I-360, it is certain, not speculative, that these children will be placed in line to receive a visa and it is only a matter of time before the visas in this category become current.

Should the immigration judge or DHS argue that these cases are analogous to the "remote availability of a fourth-preference family-based visa" cited in *Avetisyan*, explain that in January 2012, when the board published this decision, the backlog for the category was more than 12 years and had been since April 2002. However, the fourth-preference employment category currently has a six-year backlog. This is liable to fluctuate based on the demand for visas in the countries of El Salvador, Guatemala, and Honduras. In comparison to the long backlog in the fourth-preference family-based category, the period of time these SIJS recipients will wait for a visa is much shorter and more predictable.

If the immigration judge administratively closes the case, continue to track the *Visa Bulletin* for the priority date of the I-360. When the I-360 priority date becomes current, file a Motion to Recalendar and to Terminate Proceedings with the Immigration Court and file the I-485 with USCIS. Alternatively, file a Motion to Recalendar with the Immigration Court and the I-485 with the Immigration Court. However, note that the immigration judge and DHS have traditionally preferred for USCIS to adjudicate SIJS-adjustments.

Seek a continuance until Oct. 3, 2016

The immigration judge should grant continuances in the cases of those children who have a pending or approved I-360. Immigration judges derive their broad discretionary authority over continuances from the regulations, which state that "[t]he immigration judge may grant a motion for continuance for good cause shown." 8 CFR § 1003.29. Three published decisions from the BIA provide guidance on what constitutes good cause for a continuance.

In *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), the board considered whether a respondent should be granted reopening or a continuance for the adjudication of a pending I-130. The respondent, Mr. Garcia, was a likely beneficiary of a visa petition conferring immediate eligibility for adjustment of status. The board held that he should have an opportunity to await the outcome of the visa petition decision before proceedings concluded, since that would result in "a substantial claim to relief from deportation under section 245 of the Act." *Id.* 656. The board held "that discretion should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen." *Id.* at 657.

Matter of Garcia is analogous to the cases of children who

have a pending or approved I-360. Mr. Garcia was not yet the beneficiary of a visa petition, yet the board held that he should be given the opportunity to await the outcome of the visa petition. Mr. Garcia, who had been inspected and admitted, in addition to being the spouse of a U.S. citizen, was an immediate relative and thus not subject to the *Visa Bulletin*. Therefore, once the I-130 was approved, a visa was immediately available. Likewise, children with a pending I-360 should have the opportunity to await the outcome. Once the I-360 is approved, the visa availability inquiry becomes relevant because SIJS adjustment is subject to the fourth-preference employment category of the *Visa Bulletin*. Prior to May 2016 this category was current and a visa had been immediately available. Also, children with approved I-360s petitions are deemed paroled into the United States under INA § 245(h) and eligible to adjust status. While an approved I-360 does not confer immediate visa availability due to the backlog in the fourth-preference employment category, an approved SIJS-based I-360 is subject to fewer inadmissibility issues than other adjustment applicants, including those like Mr. Garcia. *See* INA §245(h)(2). Furthermore, SIJS relief, unlike family-based adjustment, takes into consideration the conditions in the home country and whether or not it is in the best interest of that child to be returned to the home country. This means that once USCIS approves the I-360, this results in "a substantial claim to relief from deportation under section 245 of the act" that is greater than the claim the board recognized Mr. Garcia as having. And like *Matter of Garcia*, it is not a question of *if* adjustment of status relief will be available in the future, but rather *when* it will be available, and it is possible that will be as early as Oct. 1, 2016, when more visas become available in the new fiscal year.

Following *Matter of Garcia*, the board decided *Matter of Hashmi,* 24 I&N Dec. 785 (BIA 2009), and held that in determining whether good cause exists to continue removal proceedings, immigration judges should consider a variety of factors, including: (1) the Department of Homeland Security's response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and any other relevant procedural factors. While all these factors may be relevant in a given case, the board said the "focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application." *Id*. at 790.

First, DHS opposition that is reasonable and supported by the record may warrant denial of a continuance. But if in the totality of the circumstances DHS opposition is unsupported, it should not "carry much weight." *Id*. at 791. If DHS opposes a continuance, ask the immigration judge for DHS to state his or her reasoning for the opposition, as required by *Hashmi*. Then ask the judge to analyze that opposition in the totality of the circumstances. Generally, any DHS objections to the continuance of cases with a pending or approved I-360 due to the lack of available relief signals a failure to understand the *Visa Bulletin* and this failure is unreasonable. Remind DHS of *Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978) and that a child with an approved I-360 places him or her in the same position as Mr. Garcia, who had a pending I-130.

Second, prior to the fourth-preference backlog, most immigration judges did not want to review the I-360 filings, as these are solely within the purview of USCIS. However, in light of the backlog and this *Hashmi* factor, consider submitting a copy of the I-360 receipt notice to present to the immigration judge. Should the judge demand more evidence that the I-360 is prima facie approvable, consider providing the bare minimum of the petition so that the sensitive case facts regarding the best interests of the child remain with the government entity and state juvenile courts as Congress intended. Do not submit the entire case filing that was submitted to the state juvenile court.

Third, the respondent's statutory eligibility for adjustment of status can be proven by filing the I-485 with the supporting documentation and a cover letter with the Immigration Court. Of course, the I-360 must be approved by this point. A benefit of submitting the I-485 to the Immigration Court under this factor of *Hashmi* is the potential for receiving an EAD, as previously discussed. To pursue this option, be sure to get your copy of the I-485 stamped by the Immigration Court.

Fourth, adjustment of status is a discretionary benefit and it is no different for children with approved I-360s. If there are any negative discretionary factors, consider submitting with the I-485 packet letters of support, proof of school enrollment and photographs of the child thriving in the United States.

Fifth, the reason for the continuance is primarily to await the visa availability, but it should also include a reminder of the vulnerabilities of this population, congressional intent to protect this population, and the current country conditions in El Salvador, Guatemala, and Honduras. Reports on the current country conditions in the Northern Triangle countries show that children, especially those who eluded gang demands and threats, face death. In no way is it in the best interests of these children to return, whether based on their subjective facts or generally.

Lastly, as the board has stated, the "focus of the inquiry is the apparent ultimate likelihood of success on the adjustment application." Remind the immigration judge that an approved SIJS-based I-360 is subject to fewer inadmissibility issues

than other adjustment applicants and therefore it is highly likely that these children will succeed on their adjustment applications. *See* INA §245(h)(2). In *Matter of Rajah,* 25 I&N Dec. 127 (BIA 2009), the board expanded the *Hashmi* factors to the case of an employment-based visa petition awaiting adjudication. The board declined to remand the case to the immigration judge because the respondent had not established prima facie eligibility for adjustment of status. *Id.* at 138. The respondent who was seeking an employment-based visa was not prima facie eligible for adjustment of status because he did not have a pending labor certification and had therefore not yet begun the three-step employment-based adjustment process. The other two steps of the process are filing a Form I-140 (Immigrant Petition for Alien Worker) with USCIS once the labor certification is approved and, if USCIS approves the I-140 and a visa is immediately available, filing for adjustment of status under section 245(a). The SIJS-based adjustment process also requires three steps: obtaining the predicate order from the state juvenile court, approval of the I-360, and filing for adjustment of status under section 245(a). As a predicate order from the state juvenile court equates to the labor certification in the three-step adjustment process, mere proof of a pending request for SIJS factual findings predicate order with the state juvenile court should lead to a continuance, as the respondent will have shown that the three-step employment-based adjustment process has begun. Indeed, the BIA recently overturned Atlanta Immigration Court judges in four cases for failing to grant a continuance to children who wished to pursue the predicate order from the state juvenile court.[4] Remember, though, when providing proof of this pending request for SIJS factual findings predicate order, that you should provide the bare minimum. Preferably, this would consist of a print-out from your state judiciary internet case tracking system. This way, sensitive case facts about the best interests of the child remain with the government entity and state juvenile courts, which is what Congress intended.

Advocates have three precedential board cases on which they can rely to obtain a continuance for children who have undertaken the SIJS adjustment process. Those who have a pending or approved I-360, as well as those who have a request for SIJS factual findings predicate order pending with the state juvenile court should be able to uses these cases to support their motion. If the immigration judge grants a continuance until Oct. 3, 2016, or later and the I-360 priority date is current, move to terminate removal proceedings or be prepared to file the I485 with the Immigration Court at that hearing.

End notes

1 USCIS and USICE Fact Sheet: USCIS and ICE Procedures Implementing EOIR Regulations on Background and Security Checks on Individuals Seeking Relief or Protection from Removal In Immigration Court or Before the BIA, August 22, 2011, available at www.uscis.gov/sites/default/files/USCIS/Laws/Laws%20Static%20Files/EOIR_FactSheet_2011_FINAL.pdf.

2 *See* STRATEGIES FOR SUPPRESSING EVIDENCE AND TERMINATING REMOVAL PROCEEDINGS FOR CHILD CLIENTS, available at cliniclegal.org/sites/default/files/strategies_for_supressing_evidence_and_terminating_removal_proceedings_for_child_clients_with_appendices.pdf.

3 THE OPERATION OF THE IMMIGRANT NUMERICAL CONTROL SYSTEM, *available at* travel.state.gov/content/dam/visas/Immigrant%20Visa%20Control%20System_operation%20of.pdf.

4 *See* W-E-P-M-, AXXX XXX 859 (BIA July 15, 2015) (IJ erroneously denied continuance where respondent filed dependency petition in appropriate state court and a timely hearing was scheduled on the petition)

A-G-M-, AXXX XXX 127 (BIA July 2, 2015) (IJ should have granted short continuance to permit filing of dependency petition necessary to seek SIJ status); J-S-R-, AXXX XXX 304 (BIA June 30, 2015) (respondent demonstrated good cause for continuance by providing evidence of filing of dependency petition in state court required to seek SIJ status); R-S-P-, AXXX XXX 593 (BIA May 11, 2015) (respondent established good cause for continuance by presenting evidence that state juvenile court scheduled hearing that would determine eligibility for SIJ status). Thanks to Immigrant & Refugee Appellate Center, LLC.