CRS Reports & Analysis

Legal Sidebar

Federal Court Weighs in on "VisaGate 2015": Part 1, the Visa Bulletin and Recent Revisions to It

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A federal district court in Washington State recently weighed in on the permissibility of certain changes made by the Department of State (DOS) to the October 2015 *Visa Bulletin* in an incident widely known as "VisaGate 2015." The upshot of the court's decision is that the federal government is not required—at least not at present—to abide by the initial version of the *Visa Bulletin* released by DOS on September 9, 2015. This version would have permitted more temporary alien guest workers (i.e., aliens with nonimmigrant visas) to file applications for adjustment to lawful permanent resident (LPR) status than are permitted to do so under the revised October *Bulletin*, released on September 25, 2015. Aliens who would have been eligible to file for adjustment (and thus receive certain immigration benefits) under the initial version, but are not eligible under the revised version, sued alleging that the supersession and replacement of the initial version runs afoul of the U.S. Constitution and federal statutes.

This two-part Sidebar explains the complex factual and legal issues implicated in "VisaGate 2015." In particular, Part 1 explains what the *Visa Bulletin* is and the revisions made to the October 2015 *Bulletin*. Part 2 discusses the legal challenge to DOS's reliance on the revised—rather than the initial—version of the October *Bulletin*, as well as certain questions remaining after the district court decision.

The *Visa Bulletin* in General

The *Visa Bulletin* is a monthly publication of the DOS that identifies when immigrant visas are available to aliens seeking either adjustment of status, in the case of aliens present within the United States, or admission to the United States as an LPR, in the case of aliens outside the United States. (It does not address the availability of nonimmigrant visas.) Aliens generally become eligible for immigrant visas based on petitions filed by qualifying family members or prospective employers. However, they may have to wait months or years after a petition is filed for a visa to become available because the Immigration and Nationality Act (INA) limits (with some exceptions) both the total number of visas issued per year and the number of visas issued to aliens from individual countries.

The *Bulletin* has historically established the date on which visas are seen to be available to individual aliens based on the date on which the visa petition for the alien was filed or, in the case of certain employment-based visas, the date on which a labor certification was filed. For example, if a monthly *Visa Bulletin* were to show a date of January 1, 2007, for a particular category of aliens, that would mean that aliens whose petitions or labor certifications had been filed before January 1, 2007, could begin the process of becoming LPRs, while those whose petitions or labor certifications were filed on or after that date could not.

Aliens do not become LPRs as soon as the *Visa Bulletin* reflects the filing date of the alien's visa petition or labor certification (commonly known as the alien's "priority date"). Rather, once the alien's priority date is reached, the alien may take certain steps that lead to an alien becoming a LPR. In the case of aliens already present in the United States (e.g., aliens present on nonimmigrant visas), this means filing a Form I-485, Application to Register Permanent Residence or Adjust Status. However, the mere opportunity to ***file*** a Form I-485 is significant because aliens who have applied for adjustment from a nonimmigrant status to LPR status are eligible for certain immigration benefits, including employment authorization documents (EADs) that are not tied to a specific employer. Other immigration benefits also

accrue after a Form I-485 is filed and has been pending for at least 180 days.

The October *Visa Bulletin*

Normally, there is only one *Visa Bulletin* for a month. However, for October 2015, DOS ended up issuing two versions. The initial version, issued on September 9, would have permitted a number of aliens to file Form I-485s who are not eligible to do so under the revised *Bulletin*, issued on September 25. The category of aliens from India seeking employment-based "second preference" visas (i.e., EB-2 visas)—available to those with advanced degrees or exceptional ability—illustrates this. Under the initial version of the October *Bulletin,* Indians seeking EB-2 visas who had petitions or labor certifications filed before July 1, 2011, were eligible to file Form I-485s. However, in the revised version, this date was changed to July 1, 2009, meaning that some Indians seeking EB-2 visas who had thought they were eligible to file for adjustment of status—and had incurred certain expenses in anticipation of filing—cannot file their applications in October 2015. The same is true for some other categories of aliens.

Certain aliens have filed a legal challenge seeking to compel the federal government to abide by the initial version of the October *Visa Bulletin*. That litigation is discussed in Part 2.

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Federal Court Weighs in on "VisaGate 2015": Part 2, the Court's Decision and Unresolved Issues

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As Part 1 of this Sidebar noted, the Department of State (DOS) recently rescinded and replaced the initial version of the October 2015 *Visa Bulletin*. This change prompted a legal challenge from certain aliens who would have been eligible to file a Form I-485 application for adjustment of status under the initial version of the *Bulletin*, but not the revised one. In its October 6, 2015, decision in *Mehta v. U.S. Department of State*, a federal district court in Washington State ruled against the challengers, declining to issue a temporary restraining order (TRO) that would have compelled the government to abide by the initial version of the October *Visa Bulletin*. (A TRO is a court order that requires the parties in a case to maintain a certain status until the court can hear further evidence and decide whether to issue a preliminary injunction.) However, the litigation in *Mehta* continues, and other legal questions related to "VisaGate 2015" also linger, as discussed below.

The Plaintiffs' Claims in *Mehta*

In *Mehta*, certain aliens who were eligible to file Form I-485s under the initial version of the October *Bulletin*, but not under the revised version, sought to compel the federal government to abide by the initial version. The alien plaintiffs' claims were generally premised on the view that the *Visa Bulletins* are legally "binding policy statement[s]" that take "immediate legal and practical effect upon ... publication by shaping the conduct and expectations of regulated parties and agencies." Based on this characterization of the *Bulletin*, they alleged that the "abrupt rescission" of the October *Bulletin* and its replacement with a revised October *Bulletin* runs afoul of the Administrative Procedure Act (APA), in part, because it "retroactively altered" the plaintiffs' legal rights and left the plaintiffs "with no adequate notice of the agency's changed position." They also asserted that they had a "clearly established liberty interest" under the Due Process Clause of the Fifth Amendment in receiving adequate notice of agency actions affecting their rights and obligations under federal immigration law, and that they had been deprived of this right without any "process of law" (e.g., an opportunity for a hearing).

The District Court's Decision

The district court disagreed, denying the requested TRO because it viewed the plaintiffs as unlikely to succeed on the merits of their claims. This decision, in part, reflects what the court itself described as the "stringent standard" applied in determining success on the merits in cases seeking TROs. However, it also reflects the court's finding that the plaintiffs had not proven that the *Visa Bulletin* "determined the rights of adjustment applicants, the obligations of [the federal government] as to those applicants, and the legal consequences that flow from [DOS's] calculation of filing dates." Thus, the court declined to find that the *Bulletins* constituted "final agency actions" subject to judicial review under the APA. Alternatively, the court suggested that even if the *Bulletins* were seen to constitute final agency actions reviewable by the court, DOS had given a "plausible explanation" for its actions by noting that the October *Bulletin* had been revised because it "did not accurately reflect visa availability as required for [acceptance of] adjustment of status applications." (As noted below, Section 245(a) of the INA permits aliens who are already present in the United States in a nonimmigrant status to apply for adjustment to LPR status if an immigrant visa is "immediately available" to the alien. If a visa is not "immediately available," adjustment cannot be granted at that time.)

The court similarly found that the plaintiffs were unlikely to succeed on their Due Process Claim given the apparent lack of any legal precedent supporting the view that changes in a DOS bulletin "can trigger a violation of the Due Process Clause." The court also noted that DOS had produced evidence "clearly calling into question the reasonableness" of relying on the *Visa Bulletins* to create a legitimate claim of entitlement to apply for adjustment at a specific future date. In particular, the court noted that DOS had pointed to differences in priority dates for certain categories of aliens in the September and October *Bulletins* as evidence that aliens could not reasonably expect to rely on the dates given in the *Bulletin* because these dates can change from month to month.

Questions Remaining

The litigation in *Mehta* continues, notwithstanding the court's denial of a TRO, and the district court expressly left open the possibility that the plaintiffs may ultimately be able to prove certain arguments they could not prove when seeking the TRO (e.g., that the *Visa Bulletins* constitute final agency actions). Such a difference in outcome could occur either because the plaintiffs have more time to develop the factual and legal basis of their arguments, or because the courts apply different standards of review in deciding different types of challenges (e.g., TROs, preliminary injunctions, merit hearings).

On the other hand, while the *Mehta* plaintiffs seek the restoration of the filing dates given in the initial version of the October *Visa Bulletin*, others could potentially raise questions about whether these dates themselves reflect a permissible interpretation of the Immigration and Nationality Act (INA). Two provisions of the INA could be seen to give DOS certain discretion in setting priority dates. One of these—INA §245(a)—provides for an alien to file for adjustment to LPR status if a visa is "immediately available," but does not define what is meant by this term—which could be seen, under the precedent of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, to mean that the Executive has discretion in construing the term. The second provision—INA §203(g)—authorizes DOS to "make reasonable estimates of the anticipated number of visa to be issued during any quarter of any fiscal year ... and to rely upon such estimates in authorizing the issuance of visas." However, there does not appear to be any case law addressing how much leeway either provision affords DOS in setting the priority dates in the *Visa Bulletin*, and as DOS itself noted in responding to the *Mehta* plaintiffs' claims, the dates given in the initial version of the October *Visa Bulletin* represent an arguably significant departure from the dates given one month earlier in the September *Bulletin*. Such changes in agency practice sometimes factor into discussions of the permissibility of agency actions, as is discussed in CRS Report R43782, *Executive Discretion as to Immigration: Legal Overview*.

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