

Additional Guidance Issued on NVC Processing for EB-5 Based Applicants

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The Invest in the USA (IIUSA) EB-5 Conference, which took place on Oct. 10-11, 2016 in Los Angeles, California, featured Charlie Oppenheim, Chief of the Visa Control and Reporting Division of the U.S. Department of State as one of its speakers. Mr. Oppenheim discussed the movement of priority dates for the mainland China born EB-5 investors. Specifically, Mr. Oppenheim shared that the December 2016 Visa Bulletin will see the Final Adjudication (Chart A) cut-off date move forward slightly to March 22, 2014. The November 2016 Visa Bulletin, which was published last week, likewise saw a slight advance of the Chart A cut-off date to March 8, 2014. As we previously reported, NVC is expected to reach out to mainland China born EB-5 immigrant visa applicants in order to initiate the immigrant visa process based on the Dates for Filing Chart (Chart B) of the monthly Visa Bulletin, where the cut-off date has remained June 15, 2014.

Importantly, USCIS announced that applicants for adjustment of status in the EB-5 category must use the Final Adjudication priority date chart (Chart A) to determine eligibility for adjustment of status in the month of November, whereas the remainder of the employment-based adjustment of status applicants may use the priority dates as indicated in Chart B.

Additionally, at a recent meeting with the American Immigration Lawyers Association (AILA) State Department Liaison Committee, the State Department provided clarification regarding another important issue for the backlogged EB-5 investors. Specifically, the State Department reiterated that the final determination of eligibility of dependents under Child Status Protection Act (CSPA) is made at the time visas are available for adjudication, *i.e.*, based on Chart A. Therefore, the filing of an immigrant visa application (Form DS-260) or payment of the immigrant visa fee bill in and of themselves do not and will not guarantee that a dependent will not be found to have 'aged out,' or become ineligible to obtain permanent residence as the child of the investor. Instead, this dependent's age will be calculated by deducting the number of days the I-526 petition was pending with USCIS from the biological age of the dependent at the time of visa availability under Chart A of the Visa Bulletin. Per State Department clarification, in reviewing this, the submission of the Form DS-260 or payment of the visa fee bill would be considered to satisfy showing that the dependent "sought to acquire" his or her immigrant visa. This guidance specifically referenced the filing of DS-260 applications and payment of the visa fee bill based on the current priority date in Chart B and did not address the filing and payment made during the period of time when NVC continued to

process immigrant visa applications for backlogged cases shortly after I-526 petition approval. Presumably, proceeding under either scenario should satisfy the “sought to acquire” requirement if the steps were taken within one (1) year of the visa becoming available as determined by Chart A. We will provide further clarification on this important legal issue as updates become available.

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