UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

47th Annual Conference on Immigration and Nationality Law

November 2-3, 2023
Austin, TX

BECOMING WATER
How to Flow Around the Roadblocks Created by an Outdated and Dysfunctional System

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By

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Good lawyers, using all of their talents and skill, work every day—like water seeping through an earthen dam—to get around the plain words of the INA to advance their clients' interests.

Attorney General Jeff Sessions' remarks to new Immigration Judges, September 10, 2018[i]

As attorneys, we are daily asked to do the impossible to get our clients legal status in the United States. This article will outline some of the more obscure tools that we can use to benefit clients—and that are still being used today. The attorney who knows what to look for, and at a minimum, where to look for answers, will be better able to help their clients come to and remain in the United States legally. Any of the topics below could benefit from a lengthy article discussing the requirements. Rather than overwhelm, this article will attempt to point you in the right direction and provide you with citations to more in-depth materials.

Western Hemisphere Priority Dates

Western Hemisphere Priority Dates (WHPDs) exist because there used to be two immigration systems—one for individuals born in Western Hemisphere countries[ii] and one for everyone else in the world. In 1976, Congress changed the immigration system, effective January 1, 1977, in effect combining the two systems into one system[iii]. However, this change included a savings clause for those who were registered under the old Western Hemisphere system. Under the savings clause, a person who was registered as a Western Hemisphere immigrant could use that registration date as the priority date in conjunction with a petition under the new system.

Western Hemisphere immigrants had an easier time to register for immigration than many others. Parents of an infant born in the United States could apply to immigrate, and parents of lawful permanent residents were also eligible to immigrate. Derivatives of an immediate relative also received a priority date.[iv] An approved labor certification could be filed with a Consulate, and individuals who would not be employed in the US (i.e., immigrant investors) could register directly with the Consulate. As under the present system, siblings of US citizens, and adult children of US citizens could also be petitioned.

The principal immigrant did not have to immigrate in order to receive a priority date. Under the Western Hemisphere immigration system, registration was easy, and many times the individual changed their mind and decided not to immigrate. In those cases, the individual still had a WHPD registration.

The spouse and children of the principal applicant who were the spouse and child at the time of registration were also deemed registered under the WHPD system, whether they immigrated or not. The priority date, once established, continued even if the spouses divorced, or the children turned 21 or married.

Unlike the present system, children born after the date of immigration could use the date of the parent's immigration as their priority date, if the parents were married at the time the priority date was established. In other words, an individual can have a priority date that predates their date of birth.

Unique to the WHPD system, the Department of State allowed for the spouse and children acquired after immigration to obtain a WHPD in certain circumstances. The immigrant had to marry overseas and then resume a residence in the United States. In that circumstance, the spouse received the date of marriage as the priority date, and children born to that marriage obtained the date of birth as their priority date—even if their date of birth was after 1977.[v]

In 2023, the number of individuals who have a direct registration and are still interested in immigrating to the United States is quite small. However, there are still children of these individuals who benefit—and because of the nature or our immigration system, the spouse and minor children qualify as well.

So, how does this work on a practical basis? Let's look at a case that my office is handling now.

Ruby and Fabio are citizens of Columbia. Ruby and Fabio came to New York City in 1970 on tourist visas. They married in New York in 1972 and their first child, Claudia, was born in 1973 in New York City. Ruby and Fabio both immigrated in 1974 as the parents of baby Claudia. In 1976, the family moved back to Columbia. Ruby and Fabio's second child, Alejandro, was born on February 10, 1977. Alejandro married Catalina in 2023, and they have a son, Daniel, who is 8 years old. Catalina also has a daughter from a previous relationship, Sofia, who is now 20 years old. Alejandro is visiting the United States and wonders what options he has to remain.

Analysis

Claudia now resides in the United States and has filed an I-130 for Alejandro, but because of the backlogs in the FB-4 category, it will be several years before he can immigrate. However, because Alejandro was born to a marriage that existed at the time one of his parents immigrated (and actually both immigrated) he is entitled to the date of immigration as his priority date. Since a 1974 priority date is immediately available, and Alejandro is legally in the United States, he can file an adjustment of status application. Catalina and Daniel also qualify as family members and can also file for adjustment of status if they are lawfully present in the United States. Sofia does not qualify as Alejandro's stepchild, since Alejandro and Catalina married when Sofia was over age 18. Thus Sofia will have to immigrate separately. Sofia may be protected by the Child Status Protection Act, which we will discuss below.

Note that Alejandro's priority date is before his date of birth. Note as well that Alejandro is covered by the WHPD program even though he was born after January 1, 1977.

Child Status Protection Act

Title search: Becoming Water: How to Flow Around the Roadblocks Created by an Outdated and Dysfunctional System

First appeared as part of the conference materials for the
47th Annual Conference on Immigration and Nationality Law session
"Pulling an Adjustment Out of Your Hat"