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# DON'T YOU DARE YANK MY PRECIOUS I-140 PETITION WITHOUT TELLING ME!

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The approved immigrant visa petition, Form I-140, is truly precious, especially when foreign nationals caught in the employment-based second and third preference backlogs have to wait for several years before they can get their green cards. The beneficiary of an I-140 petition can also "port" to a new employer after an I-485 adjustment of status application has been pending for 180 days. Once the beneficiary has ported and is no longer in contact with the former employer, the USCIS may discover that it improperly approved the I-140 petition and revoke it. Only the prior employer may get notification, which may no longer care to contest the grounds for revoking the I-140 or this employer may no longer even be in existence. The hapless foreign national who is enjoying job mobility under INA 204(j) does not know any better, but this individual may no longer be able to obtain permanent residency.

Should this foreign national beneficiary at least be notified about the I-140 being revoked and allowed to contest it? In 2009, the Ninth Circuit Court of Appeals in *Herrera v. USCIS* answered in the negative by holding that the government's authority to revoke an I-140 petition under INA 205 survived portability under INA 204(j). Since *Herrera*, progress has been made in favor of the foreign national's interest in the I-140 petition although it may have been filed by the employer. In 2014, the Eleventh Circuit Court of Appeals in *Kurupati v. USCIS* held that a foreign national had standing notwithstanding the USCIS rule in 8 CFR 103.3(a)(1)(iii)(B) that precluded the beneficiary from challenging the revocation of an I-140. The *Kurupati* court observed that the foreign national was clearly harmed as the revocation of the I-140 petition resulted in the denial of the I-485 adjustment application. The Court further observed that the notion of prudential standing, where a court may disregard standing based on prudence, has been discredited by the Supreme Court in *Lexmark*

*International Inc. v. Static Control Components*, which held that the correct question to ask is whether the plaintiffs "fall within the class of plaintiffs whom Congress has authorized to sue." The Eleventh Circuit in *Kurupati* closely followed an earlier 2013 decision of the Sixth Circuit in *Patel v. USCIS* by holding that the beneficiary of an I-140 petition had standing because he or she suffered injury that was traceable to the USICS, namely, the loss of an opportunity to become a permanent resident. INA 203(b) makes the visa available directly to the immigrant, and not the employer, which suggests that Congress gave the beneficiary a stake in the outcome of the I-140. Moreover, after an I-140 is approved, the beneficiary can apply for permanent residency rather than a temporary status based on the employer's need for the beneficiary's services. Additionally, Congress also enacted INA 204(j) that allows the beneficiary to change jobs without starting the whole I-140 process all over again. Thus, under the question raised in *Lexmark*, Congress has authorized the beneficiary to challenge the denial of an I-140 petition, and thus this individual has standing without taking into consideration whether a court has discretion to allow it. This reasoning is further bolstered by INA 204(j), where the employer derives no further benefit from the employee's benefit to port to a new employer.

Despite *Kurupati* and *Patel*, which gave standing to the beneficiary of an I-140 petition to challenge the revocation or denial, a federal district court in *Musunuru v. Lynch,* 81 F. Supp.3d 721 (2015) held to the contrary, that the beneficiary of an I-140 petition could not challenge the revocation of a prior I-140 as the applicable regulations only authorize the petitioning employer to be provided with notification and to challenge the revocation. The *Musunuru* Court also opined that unlike a non-citizen who is in removal proceedings and who would suffer a serious loss, and thus a right to be heard, an I-140 revocation does not cause the same loss. Obviously, the court's reasoning is wrong as the denial of an I-140 petition results in the denial of the I-485 adjustment application, which in turn can place the beneficiary in removal proceedings. Fortunately, Law360 reported that this case is on appeal in the Seventh Circuit, and at oral argument, "Circuit Judge Rovner seemed baffled by the whole case, however, saying it doesn't appear that Musunuru did anything wrong but was being punished for someone else's mistakes."

The prospect of the DHS promulgating a rule that would allow beneficiaries of an approved I-140 to apply for work authorization although they are not yet

able to file I-1-485 applications should not diminish the beneficiary's standing in case the I-140 is revoked. First, USCIS has authority under INA 274(a)(h)(3) to issue work authorization to any class of non-citizens. While an I-140 petition anchored by an I-485 would strengthen the standing claim, there are old decisions that provided standing to the beneficiary of a labor certification, in the absence of a subsequent I-140 petition or an I-485 adjustment of status application. In *Ramirez v. Reich*, the DC Circuit Court of Appeals recognized the non-citizen's standing to sue, but then denied the appeal since the employer's participation in the appeal of a labor certification denial was essential. While the holding in *Ramirez*was contradictory, as it recognized the standing of the non-citizen but turned down the appeal due to the lack of participation of the employer, the employer's essentiality is obviated if the non-citizen is allowed to detach from the sponsoring employer under a rule granting work authorization that replicates 204(j) portability, notwithstanding the lack of an I-485 application. Still, an even older 1984 case, *Gladysz v. Donovan* provides further basis for non-citizen standing even if there is no pending I-485 application. In *Gladysz*, the non-citizen sought judicial review after the employer's labor certification had been denied, rather than challenged his ability to seek administrative review, and the court agreed that the plaintiff had standing as he was within the zone of interests protected under the Administrative Procedures Act.

As courts are recognizing the non-citizen's interest in an I-140, employers may want to think twice before withdrawing an already approved I-140 petition even after the employee has left. Unlike an H-1B petition, there is no sanction for the employer who does not withdraw the I-140 petition. The I-140 petition allows the non-citizen to seek an H-1B extension through another employer beyond the maximum sixth year under the American Competitiveness in the 21st Century Act. It also allows the priority date on that I-140 petition to be transferred to a subsequently filed petition, and provides a measure of protection for one who wishes to port under INA 204(j). Courts have also recognized that the I-140 petition enables the beneficiary to seek benefits independent of the employer who sponsored him or her, and thus providing greater rights to the foreign national beneficiary in the I-140 is a step in the right direction, especially when backlogs in the employment preferences have resulted in longer and longer waits for the coveted green card.