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MAKING THE CASE FOR EXPANDING A FOREIGN NATIONAL'S INTEREST IN AN I-140 PETITION

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Current regulations generally preclude beneficiaries from participating in employment-based immigrant visa proceedings, including post-adjudication motions and appeals. The employment-based immigrant visa petition is Form I-140 that is filed by an employer on behalf of a foreign national beneficiary who is being sponsored for permanent residency under the employment-based first, second and third preferences.

An interesting case arises, however, when a beneficiary exercises her right to job portability pursuant to §204(j) of the Immigration and Nationality Act (INA) and 8 CFR § 245.25(a)(2)(ii)(B). If a Request for Evidence (RFE) is subsequently issued on the underlying I-140, what rights does a Beneficiary have in regards to her ability to respond?

By way of background, INA §204(j) allows foreign workers who are being petitioned for a "green card" by their employer to change jobs once their I-485 adjustment of status application has been pending for 180 days or more. Furthermore, 8 CFR § 245.25(a)(2)(ii)(B) allows a beneficiary to port to a new employer based on an unadjudicated I-140, filed concurrently with an I-485 application, so long as it is approvable at the time of filing. 8 CFR § 245.25(a)(2)(ii)(B) provides in relevant part:

(2) Under section 204(j) of the Act, the applicant has a new offer of employment from the petitioning employer or a different U.S. employer, or a new offer based on self-employment, in the same or a similar occupational classification as the employment offered under the qualifying petition, provided that:

1. The alien's application to adjust status based on a qualifying petition has

been pending for 180 days or more; and

2. The qualifying immigrant visa petition:
    1. Has already been approved; or
    2. Is pending when the beneficiary notifies USCIS of a new job offer 180 days or more after the date the alien's adjustment of status application was filed, and the petition is subsequently approved:
        1. Adjudication of the pending petition shall be without regard to the requirement in 8 CFR 204.5(g)(2) to continuously establish the ability to pay the proffered wage after filing and until the beneficiary obtains lawful permanent residence; and
        2. The pending petition will be approved if it was eligible for approval at the time of filing and until the alien's adjustment of status application has been pending for 180 days, unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute; and
3. The approval of the qualifying petition has not been revoked.

In a best case scenario, the lack of intention to employ a beneficiary after the filing of an I-140 and I-485 does not preclude a petitioner from responding to an RFE issued on the underlying I-140 for a beneficiary who has already ported or who may port in the near future. This is because this intention – which is to no longer employ the beneficiary - was formed after the filing of the I-140 and I-485. Therefore, a petitioner may still seek to establish that the I-140 was approvable when filed pursuant to 8 CFR § 245.25(a)(2)(ii)(B), and indicate that it has no intention to permanently employ the beneficiary, so that a beneficiary may exercise job portability based on her pending I-485. Our firm recently had success in such a situation wherein a beneficiary of a previously filed I-140 and I-485 was able to work with a petitioner to respond to an RFE even though the beneficiary would not be employed permanently and had expressed an intention to port to a new job in the same occupational classification. After the I-140 had been erroneously denied on grounds not related to the lack of permanent employment, our firm assisted the beneficiary to successfully reopen the I-140 with the cooperation of the petitioner, and ultimately win approval of the I-140 and approval of the I-485 for the beneficiary.

The question remains, however, what recourse does a beneficiary have if the petitioner refuses to respond to an RFE, or otherwise cooperate with the

beneficiary? May a beneficiary, for example, file an I-290B notice of appeal or motion to reopen a subsequent denial of the I-140?

The answer may be found under existing USCIS policy. Under the Policy Memo promulgated on November 11, 2017, a Beneficiary becomes an "affected party" upon USCIS' favorable determination that the beneficiary is eligible to port. *See* USCIS, Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After *Matter of V-S-G- Inc.*, PM-602-0152, Nov. 11, 2017 at page 5. Thus, under the policy adopted by USCIS in *Matter of V-S-G- Inc.*, Beneficiaries, who are affected parties as defined in the *Matter of V-S-G- Inc*. decision, are entitled to a copy of any decision made by USCIS and may file an appeal or motion on Form I-290B with respect to a revoked Form I-140, even though existing form instructions generally preclude beneficiary filings.

As we had previously blogged, in *Matter of V-S-G- Inc*. the beneficiary had changed employers and taken a new position after the adjustment of status application had been pending for more than 180 days. Meanwhile, the president of their original petitioning organization was convicted of mail fraud in connection with another USCIS petition. USCIS sent a notice of intent to revoke ("NOIR"). When the petitioner failed to respond to the NOIR, USCIS revoked the petitioner's approval due to the petitioner's failure to respond. Although *Matter of V-S-G-, Inc.* dealt with the issue of an NOIR of an approved I-140 petition, one could argue that the AAO should extend the holding in *Matter of V-S-G-* to a Beneficiary who successfully ports to a new employer while the underlying I-140 remains unadjudicated. This is because upon the filing of an I-485 Supplement J - required when the beneficiary ports or intends to port to a job in a same or similar occupational classification - the beneficiary becomes an "affected party," and should be given a copy of any RFE, as well as a copy of any subsequent denial of her I-140. Our argument for extending *Matter of V-S-G* is further supported by the promulgation of 8 CFR § 245.25(a)(2)(ii)(B), which enables the I-140 to be approved even if a job offer no longer exists so long as the I-140 was eligible for approval at the time of filing. *See* 8 CFR § 245.25(a)(2)(ii)(B)(2).

A review of the preamble to 8 CFR 245.25 published in the Federal Register, while not dispositive, also supports our position. The preamble notes that several commentators had expressed concern that individual Beneficiaries of Form I-140 are not provided notice when USCIS seeks to revoke the approval of those petitions. In response, DHS noted that it was considering administrative

action to address these concerns. *See* Federal Register /Vol. 81, No. 223 /Friday, November 18, 2016 /Rules and Regulations at page 82418 (hereinafter the "preamble"). Similar concerns were also raised in the preamble in the section entitled "Portability Under INA 204(j)" wherein the DHS states:

> *As a practical matter, petitioners have diminished incentives to address inquiries regarding qualifying Form I-140 petitions once beneficiaries have a new job offer that may qualify for INA 104(j) portability Accordingly, denying a qualifying Form I-140 petition for either ability to pay issues that occur after the time of filing, or for other petition eligibility issues that transpire after the associated application for adjustment of status has been pending for 180 days or more, would be contrary to the primary goal of AC21. Such a policy would in significant part defeat the aim to allow individuals the ability to change jobs and benefit from INA 204(j) so long as their associated application for adjustment of status has been pending for 180 days or more.*

In a perfect world, a beneficiary ought to be able to work with a petitioner for the purpose of responding to any RFE or NOIR issued on a previously filed I-140 and I-485 despite the petitioner's lack of intention to continue to employ the beneficiary. However, as a practical matter, a petitioning employer is likely to refuse to cooperate with a beneficiary who has already been terminated. Nonetheless, there exists a compelling argument that the beneficiary be allowed to respond due to the growing legal recognition of a beneficiary's interest in an I-140 approval where there is also a pending I-485. Although *Matter of V-S-G-*, Inc. dealt with the issue of an NOIR of an approved I-140 petition, it would be consistent with the holding to argue that if a beneficiary is able to successfully port to a new employer prior to the issuance of an RFE, that Beneficiary is also an "affected party" due to her interest in demonstrating that the I-140 was approvable as filed. USCIS ought to extend the holding in *Matter of V-S-G-* to any beneficiary who successfully ports while the underlying I-140 remains unadjudicated and was filed concurrently with an I-485 application. Such an extension would go a long way towards fulfilling one of the primary goals of AC21 by allowing individuals the ability to change jobs and benefit from INA 204(j). Even if the employer does not participate, a beneficiary should be allowed to respond to the RFE in order to establish that the I-140 was approvable when it was filed concurrently with an I-485 application. Such an extension of the holding of *Matter of V-S-G-* would also be in line with the

Supreme Court's decision in *Lexmark Int'l Inc. v. Static Control Components*, which held that a plaintiff has the ability to sue under the Administrative Procedure Act when his or her claim is within the zone of interests a statute or regulation protects. Other courts have agreed that the original employer should not be the exclusive party receiving notice relating to an I-140 petition when the foreign national employee has ported to a new employer. Beneficiaries who have ported to new employers fall within INA 204(j)'s zone of interests and have standing to participate in visa revocation proceedings. *See Mantena v. Johnson* and *Kurupati v. USCIS*. This logic should now extend to the ability of a foreign national beneficiary of an I-140 petition to be able to respond to an RFE even before it gets denied, especially since 8 CFR § 245.25(a)(2)(ii)(B)(2) permits the beneficiary to port based on a concurrently filed unadjudicated I-140 petition and I-485 application. This regulation, which was promulgated consistent with *Lexmark*, will carry little force if the beneficiary is not considered an affected party in order to challenge both an RFE and a denial.