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I-485 SUPPLEMENT J SHOULD NOT BE THE ONLY VEHICLE TO EXPRESS PORTABILITY

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It is well settled that noncitizens must have the requisite intent to work for their employers at the time of entry or adjustment of status under the employment second (EB-2) or employment third preferences (EB-3) unless they are exercising job portability under specific statutory provision. A noncitizen who does not have such a bona fide intent is potentially inadmissible under Section 212(a)(5) of the Immigration and Nationality Act (INA) or may be deportable after entry.

Noncitizens who never reported to the certified job after entering the US as a permanent resident have been found deportable. For instance, in *Spyropoulos v. INS*, 590 F.2d 1 (1st Cir. 1978), a Greek national with Canadian citizenship, was offered a job as a cabinet maker in Washington DC. and the prospective employer obtained labor certification, but was unable to obtain confirmation of the job offer prior to entering the US. Upon arrival in the US, the respondent worked instead in Massachusetts as a woodworker and shortly thereafter with yet another employer as a machinist. The court upheld the lower Board of Immigration Appeals (BIA) reasoning that the respondent should have known that there were problems regarding the offer of employment before he entered the US and further held that he was excludable under Section 212(a)(5) as he never had an intent to take up the certified job.

On the other hand, there are also a long line of decisions holding that as long as the noncitizen took up the job or reported for work, and then left later due to a change in intention (as a result of finding a more attractive job elsewhere), this individual could not be found excludable or deportable. In *Matter of Cardoso*, 13 I.&N. Dec. 228 (BIA 1969), the respondent, a Portuguese citizen, was

sponsored to work for a Rhode Island employer as a braider tender. Upon reporting to the employer with his wife for work, the foreman indicated that there was a possibility that both would be laid off if they both worked for the employer. Based on the foreman's well intentioned advice, who also stated that he would keep the braider tender job offer open, the respondent worked elsewhere first as a shoe lace tipper and then as a bobbin machine operator. The BIA held that it could not impugn the validity of such an admission where a person reported for work and did not take up the job under the circumstances described above or if the person worked for some time with the certified employer but quit because he did not like the work or found a better job elsewhere. *See also Matter of Marcoux*, 12 I.&N. Dec. 827 (BIA 1968) (respondent who left certified trainee weaver job after 5 days for a fiber glass repairer job because he did not like the former job was not found to be deportable because he still had a valid certification at time of entry).

Yet, INA Section 204(j), enacted by Congress in 2000 through the American Competitiveness in the 21st Century Act ("AC21"), provides job portability by leaving intact a labor certification or an employment-based I-140 petition when the I-485 adjustment of status application has been pending for 180 days or longer even if the noncitizen changes jobs provided it is in the "same or similar occupational classification" as the job described in the I-140 petition. AC21 turned the prior law topsy turvey in a positive way by allowing noncitizens under special circumstances to change their intent even prior to obtaining permanent residence.

Section 204(j), thus, overrides prior law that required a noncitizen to have a bona fide intent to work for the employer who sponsored him or her. Section 204(j) is known as "portability" as it allows an I-485 applicant whose application has been pending for 180 days or more to change jobs within the same employer or even change employers provided it is in the same or similar occupation. 8 CFR Section 240.25(a), which was promulgated on January 17, 2017, states that the applicant may affirmatively demonstrate to USCIS on Form I-485 Supplement J that either the job offer by the petitioning employer is continuing or that the applicant has a new offer of employment through the same employer or a different employer, or through self-employment, in the same or similar occupational classification as the employment offered under the I-140 petition. Although 8 CFR Section 240.25(a) does not make it mandatory to submit an I-485J, the instructions on the form make it mandatory

to submit the I-485J thus incorporating it into the regulation (although incorporation of form instructions into a regulation without notice and comment make them vulnerable to court challenge under the Administrative Procedures Act).

Thus, if an applicant legitimately ports under a pending I-485 application, his or her intent to work for the sponsoring employer is no longer relevant. If on the other hand, the noncitizen did not have an offer to work in a same or similar job under Section 204(j), and the I-485 application is is approved, it does not appear that the applicant can exercise portability upon the acquisition of permanent residence. At this point, upon the approval of the I-485 application, the noncitizen must demonstrate that he or she had the intent to work for the employer. Not working for the employer, or reporting to work for that employer, if there was no porting prior to the adjudication is not an option. Section 204(j) portability thus seems to put those in a favorable situation prior to the successful adjudication of the I-485 application. If such persons did not have an offer of same or similar employment prior to the approval of the adjustment application, they must demonstrate they had an intent to work for the sponsoring employer. Portability's paradox, as explained in a prior 2009 blog, thus favors the person who was able to demonstrate a job offer in a same or similar job before adjudication of the I-485 application and not after. Of course, this is unfair for an applicant who has waited several years and worked for the same employer only to be required to work for the same employer after lawful permanent residency is granted. Furthermore, Section 204(j) only benefits an I-485 applicant. If the individual is overseas waiting for a visa appointment at the US consulate instead of adjusting status in the US, he or she cannot avail of this benefit.

There are thousands of beneficiaries of EB-2 and EB-3 petitions whose I-485 applications have been pending even though the priority date of the I-140 petition under the Final Action Date in the State Department Visa Bulletin has become current. These applicants may also desire to change jobs either with the same employer or with a different employer in a same or similar occupational classification. If they are in the process of preparing and submitting I-485Js, and the USCIS approves the I-485 application, this applicant's green card should not get jeopardized only because the I-485J was not received before the USCIS approved the I-485 application but they otherwise had job offers in a same or similar occupational classification. It does

not make sense for this applicant to go back to the old job, which may not exist. It is also not good policy to rescind permanent residency only because the I-485J was not submitted before the I-485 application was approved. The USCIS should still be able to determine if the applicant ported under Section 204(j) based on other facts and circumstances even in the absence of the I-485J.

At this point, there is fortunately no anecdotal evidence that USCIS is initiating rescission proceedings if permanent residency was granted prior to the receipt of the I-485J. However, naturalization examiners have been known to question applicants if they did not take up the position that was the subject of the I-140 petition. If there has been an allegation that the applicant did not properly receive permanent residency, it has been possible to convince a naturalization examiner that the applicant changed to a job in a same or similar occupational classification and thus was properly granted permanent residence. It has also been demonstrated that the I-485J was only issued on January 17, 2017 and so there was no notification requirement prior to that date. However, those who file for naturalization in 2022 will not be able to argue that there was no notification requirement in the 5 years preceding the filing of the application as the I-485J has been in existence for the past 5 years. If such a person did not file the I-485J, the naturalization application should not be denied on the ground that the applicant was not properly admitted as a permanent resident 5 years ago. This person should be able to demonstrate on a case by case basis that the new job was in a same or similar occupational classification even if the I-485J was not submitted or acknowledged prior to the approval of the I-485 application.

A simple edit to the USCIS policy manual would resolve this issue and put to bed any anxiety:

> *In any situation where a Supplement J was not approved or filed before the adjustment of status was granted, USCIS shall not rescind, nor shall it initiate removal proceedings to revoke, the legal permanent residence of any applicant who used section 204(j) so long as the new job was, in fact, in a same or similar occupation as the job for which USCIS approved the I-140. Where the requirement of a same or similar occupation is met, but no Form I-485 Supplement J was filed, USCIS shall consider an applicant for naturalization to have been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of law,*

> *for purposes of section 318 of the INA, notwithstanding the absence of the Supplement J.*

This would be consistent with Section 204(j) as well as USCIS's own regulation at 8 CFR § 245.25(a) that does not make the I-485J mandatory. The failure to file an I-485J should not jeopardize permanent resident status if an applicant ports to a new job so long it can be determined that it is in a same or similar occupational classification. The I-485J should not be the only vehicle for an I-485 applicant to express portability as it would be absurd if USCIS approves the I-485 application one minute before the I-485J is received at USCIS and thwarts one's ability to port under INA 204(j). The I-485J was designed to provide a way for the applicant to notify the USCIS about portability, but it should not be mandatory, and ought not create peril and anxiety for the applicant. Now USCIS has also decided that filing I-485J is required with an interfiling request and this affects portability eligibility by starting the 180 day clock even though the I-485 has been pending for over 180 days. This is a ghost filing that is not supported in the INA or 8 CFR!

Congress did not intend to put an applicant in a worse off position as applicants who filed their I-485Js prior to the adjudication of the I-485 application. Congress by enacting AC21 intended to ameliorate the plight of applicants who were waiting endlessly for their green card and it would be inequitable, bordering on involuntary servitude, for such a person to maintain an intent to work for the sponsoring employer for years on end. There are other provisions in AC21 that provide similar relief, such as extending the H-1B status beyond the six year limit, and thus the entire purpose of AC21 was to provide relief to professional and skilled workers who are in the US here but caught in the green card backlogs. While the example of the grant of permanent residency without the submission of the I-485J starkly demonstrates the absurdity of the disparity when the person clearly had a job offer in a same or similar occupational classification, the same benefit should broadly apply to persons who got the green card after an endless wait as I-485 applicants but changed their intention after receiving it. It makes no sense to allow portability while the applicant is the subject of an I-485 application that has been pending for 180 or more days, but then restrict this benefit to one who obtains permanent residency and receives a job offer in a same or similar occupation shortly thereafter.