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US IMMIGRATION & NATIONALITY LAW

KHEDKAR V. USCIS AFFIRMS THAT EMPLOYEE ALSO HAS INTEREST IN AN I-140 PETITION FILED BY EMPLOYER

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Because an employment-based immigrant visa petition, or Form I-140, is filed by an employer on behalf of a foreign national employee who is being sponsored for permanent residency, there is sometimes a perception that both the I-140 petition and the underlying labor certification belong to the employer. They are initiated by the employer on behalf of the noncitizen employee or prospective employee who is referred to as the beneficiary. The I-140 petition is signed by the employer. Although one part of the labor certification is signed by the beneficiary, the employer still drives the labor certification process and files the application. It is the employer who also has the unilateral power to withdraw the labor certification or I-140 petition.

However, a recent U.S. District Court case, *Khedkar v. USCIS*, 552 F. Supp. 3d 1 (DDC 2021), reiterated the idea that a beneficiary also has an interest in the I-140 petition. Mr. Khedkar's employer, Deloitte, had filed an I-140 petition on his behalf classifying him as a multinational manager under INA § 203(b)(C), while Khedkar concurrently filed an adjustment of status application. Khedkar then joined another employer, Alpha Net Consulting LLC, in a similar position and filed an I-485 Supplement J to notify USICS that he was porting to a similar job. The USCIS issued a Request for Evidence but Khedkar's former employer, Deloitte, was not interested in responding after he had left the company. Khedkar then joined IBM and filed another I-485J. Khedkar did not realize that the USCIS had sent an RFE to Deloitte, which was not responded to. The USCIS denied the I-140 petition for failure to respond to the I-140 petition. Khedkar filed a motion to reopen with USCIS and then an appeal to the Administrative

Appeals Office, but both agencies did not recognize Khedkar as an affected party. Khedkar sought review under the Administrative Procedures Act in federal district court. The court agreed with Khedkar that USCIS should have issued the RFE to Khedkar rather than Deloitte after he provided notification to the USCIS about his porting through I-485 Supplement J. "The result is not only at odds with the portability provision's aim of encouraging job flexibility — it is unfair too," Judge Contreras said.

The court's decision in *Khedkar v. USCIS* is in keeping with a growing understanding that beneficiaries also have a legal interest in I-140 petitions as we also observed in a prior blog. Current regulations generally preclude beneficiaries from participating in employment-based immigrant visa proceedings, including post-adjudication motions and appeals. But this changes when a beneficiary exercises her right to job portability pursuant to INA §204(j) and 8 CFR § 245.25(a)(2)(ii)(B). If a Request for Evidence (RFE) is subsequently issued on the underlying I-140, the beneficiary may be entitled to this RFE as they may be able to respond to it even if the employer chooses not to.

INA §204(j) allows foreign workers who are being petitioned for permanent residence 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.

Even if a petitioner decides not to employ a beneficiary after the filing of an I-140 and I-485, this 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 petitioning employer 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 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 in successfully reopening the I-140 with the cooperation of the petitioner, and ultimately winning 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.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), 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.

In *Matter of V-S-G- Inc*., which we have discussed at length in a prior blog, 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. The 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 this position. The preamble notes that several commentators had expressed concern that individual beneficiaries of Form I-140s 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 a 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. This has been affirmed in *Khedkar* which remains an unpublished decision. 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*, 809 F.2d 721 (2015) and *Kurupati v. USCIS*, 775 F.3d 1255 (2014). As stated in *Khedkar 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.

Finally, employers and their attorneys who are reluctant to share a decision involving an I-140 petition with the beneficiary especially after they have ported should recognize that the beneficiary has an interest in the I-140 petition and would be deprived in responding to a request for evidence or a denial when courts have explicitly held that they can do so. The beneficiary may also need to know the job description in the labor certification to port to a same or similar job under INA § 204(j). They may also need the approval notice of the I-140 petition for purposes of obtaining a three-year H-1B extension under § 104(c) of the American Competitiveness in the 21st Century Act. Moreover, they may also need to know the priority date of this I-140 petition in case a new employer will

file a new I-140 petition on their behalf. *Khedkar v. USCIS* and other cases have affirmed the strong interest that the beneficiary who has ported under INA 204(j) has in an I-140 petition even if it was initiated and filed by the employer.

This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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