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US IMMIGRATION & NATIONALITY LAW

DOES THE SIGNING OF THE I-485 SUPPLEMENT J BY A NEW EMPLOYER CONSTITUTE VISA SPONSORSHIP?

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Portability under Section 204(j) of the Immigration and Nationality Act (INA) allows certain employment-based green card applicants to change jobs or employers while their adjustment of status (Form I-485) application is pending. Portability becomes available once the I-485 has been pending for at least 180 days. It must be exercised by submitting Supplement J (Form I-485J), which confirms the new job offer and its compliance with the same or similar occupational classification as the original job offer that was the basis of Form I-140. Once an applicant's I-140 priority date is current, there is a race to file an I-485J before the I-485 is approved to ensure the new employment details are recognized and to avoid any potential complications in the adjustment process or later at the time of naturalization. Foreign nationals with backlogged Form I-140 priority dates are generally not envied by their counterparts whose priority dates are current or about to become current. Ironically, the latter group may find themselves green with envy, wishing their non-current priority date could afford them additional time to secure a job offer when faced with unemployment upon their I-140 priority date becoming current.

We've previously addressed the dilemma of a green card being approved prior to filing the I-485J, as well as the uncertainties faced by foreign nationals terminated during the "Twilight Zone" with an I-485 pending for less than 180 days. Yet, in exploring these issues, we may have overlooked a crucial element of the I-485J: the employer's willingness to endorse it. A laid-off worker with a distant priority date need not fear these dilemmas or uncertainties, even if their adjustment has been pending for less than 180 days. They can diligently pursue new opportunities for similar employment, assuming their I-765

application for an Employment Authorization Document (EAD) has been approved, and then request their new employer to execute an I-485J on their behalf. However, navigating this process may not be straightforward, particularly when addressing the standard screening question posed by employers to avoid a charge of discrimination or bias: “Do you now, or will you in the future, require sponsorship for employment visa status (e.g., H-1B visa status, etc.) to work legally for our company in the United States?”

Arguably, a foreign national employed under a valid EAD does not necessitate ‘sponsorship' for a visa. Yet, the new employer must execute an I-485J on their behalf. Is an I-485J synonymous with sponsorship? Technically speaking, probably not, though the new employer should be apprised of this material fact which raises the question of when it would be appropriate to raise this with the employer?

Answering the screening question in the negative can be defended, as signing an I-485J does not imply the type of 'employment visa' sponsorship the question typically refers to. While the need for an I-485J may not need to be disclosed during initial screening, could withholding this information until after signing the offer letter be justified? Introducing the I-485J requirement during the interview process, before the offer letter is finalized, could potentially complicate matters although the timing of such a disclosure should be determined on a case by case basis. From the foreign national’s perspective, it may be prudent to delay discussing the I-485J until after accepting the offer. However, if the employer learns of this requirement earlier and withdraws the offer, could the foreign national claim discrimination under INA 274B? Prevailing in such a claim is unlikely under these circumstances.

In the eyes of immigration practitioners, and employers who have been through the PERM process once or hundreds of times, hiring a foreign national with an approved I-140 and pending I-485 is a hard-to-pass-by bargain especially if they have the ideal sought after skills for the job. The new employer does not need to start the time consuming and costly PERM process anew and gets all the benefit of hiring a foreign national that has been vetted as qualified for the job by both the Department of Labor and USCIS. Surely, it would be silly for any employer to pass on hiring a prospective employee upon learning that just one simple form needs to be endorsed for the employer to take over an I-140 that another company spent significant time and resources to obtain. Although that might be the inherent reaction of the employer familiar

with immigration visa sponsorship, alarm bells might go off in the ears of the cautious employer that has never sponsored any foreign nationals. From the cautious employer's perspective, a signature in the employer's section on the I-485J could expose them to perjury. The I-485J contains one section that must be signed by the applicant and another section that must be signed by the prospective employer who has to describe the job title, duties, and the Standard Occupational Classification (SOC) code, which may be daunting for the employer to figure out, and even more so in light of signing under penalty of perjury.

An employer's unwillingness to attest to the contents of the I-485J under penalty of perjury may not be the only consideration. A fearless employer who has a hard time believing the government would bother bringing perjury charges against him for something like this would gladly sign off on an I-485J but for the form's request for information that is fundamentally at odds with the employer's business practices. Indeed, an employer who solely offers employment-at-will or who never specifies job duties or job duration in offer letters may be hesitant to change its longstanding practice and provide information in the I-485J it has never put in writing. The employer's unwillingness to endorse an I-485J because to do so would contradict its normal business practices would also cut against a claim that the employer engaged in discrimination. On the other hand, would a discrimination claim fare any better if the employer's long standing practice is to include job duties and job duration in its offer letters? From that employer's perspective, despite its long standing practice, denying an offer of employment to a foreign national in need of an I-485J is not commensurate with discrimination because a signature on the I-485J exposes it to perjury, a major liability that its long standing practice does not even contemplate.

The pre-2017 era prior to the requirement of I-485Js offered a simpler process for adjustment applicants who sought job flexibility. During that time, applicants were generally only required to demonstrate, if questioned during a naturalization interview, that they had moved to a same or similar job. However, this approach introduced uncertainty regarding whether applicants were obligated to disclose changes in employment. With the introduction of regulations like 8 CFR § 240.25(a) many years after the enactment of INA § 204(j), clarity has been enhanced: applicants can now use Form I-485J to affirmatively demonstrate ongoing employment with the sponsoring employer

or a new job in the same or similar occupation, after the application has been pending for 180 days. While not explicitly mandatory under 8 CFR § 240.25(a), the instructions on Form I-485J have effectively made it a requirement. However, although there is more certainty with the I-485J, applicants may find themselves penalized if the I-485J does not get submitted before the issuance of a green card. This creates a paradoxical situation where those who secured employment before their I-485 approval may benefit more than those who did not, assuming that the employer is not reluctant to sign its part the first place after being confronted with an I-485J asking for job duties and an SOC code.

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