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AAO SAYS "NO" TO JOB PORTABILITY WHEN LABOR CERTIFICATION HAS BEEN SUBSTITUTED

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Given the crushing backlogs in the EB-2 preference for India and China, and the EB-3 for India, where the wait can exceed 30 years, one would hope that the United States Citizenship and Immigration Service's Appeals Administrative Office (AAO) would read INA § 204(j) more generously, which allows a foreign national to "port" to a new job in a same or similar occupation so long as the I-485 adjustment of status application has been pending for more than 180 days. This should happen even if the employer substituted another person on the labor certification after the original beneficiary left the employer.

Unfortunately, the AAO does not think so in an unpublished decision dated March 26, 2010, http://drop.io/aao_26mar10_substitution. Even though the Department of Labor got rid off labor substitutions on July 16, 2007, pursuant to 20 CFR § 656.30(c)(2), substitutions were permissible prior to that date, and many thousands of foreign nationals who are beneficiaries of labor certifications may have been substituted by their employers with other foreign nationals unbeknownst to them after they left the employer. If they have I-485 applications they can "port" to new jobs in a same or similar occupation without fear of the labor certification or the I-140 petition being invalidated, but after the recent AAO's decision, they are now in a very difficult predicament. This decision would have a disproportionate impact on people born in India and China who are caught in the EB quota backlogs.

The crux of the AAO's reasoning is that notwithstanding INA § 204(j), which was introduced by the American Competitiveness in the 21st Century Act of 2000 (AC 21) - legislation clearly intended by to ameliorate the hardships brought about by delays in processing and visa backlogs - the underlying labor

certification must still remain valid for the foreign national beneficiary. INA § 212(a)(5)(A)(i) requires an alien who seeks to enter the US to perform skilled or unskilled labor to have a labor certification. Hence, if the labor certification has been now substituted for another beneficiary, as was permissible prior to July 16, 2007, under the AAO's strained interpretation, there is no longer a valid labor certification and the requirements of INA § 212(a)(5)(A)(i) are no longer being fulfilled. According to the AAO, "USCIS cannot interpret sections 204(j) and 212(a)(5)(A)(iv) of the Act as allowing the adjustment of two aliens based on the same labor certification when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility."

We disagree. INA § 204(j) is broad and sweeping. It says:

A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status remains unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or occupational classification as the job for which the petition was filed.

Without the assistance of INA § 204(j), a labor certification can get invalidated in many ways. If the beneficiary moves to a new employer and does not intend to take up the job with the employer who filed the labor certification, it is no longer valid. Similarly, if the beneficiary does not intend to work in the area of employment, where the labor market was tested and the prevailing wage was based, the labor certification will get invalidated even if the beneficiary works for the same employer. This may be true even where the beneficiary is compelled to move to another area other than where the market was tested when an employer relocates, say from New York, where the labor market was unsuccessfully tested for qualified US workers, to California. Under all of these disqualifying circumstances, INA § 204(j) comes to the beneficiary's rescue notwithstanding the invalidation of the labor certification, so long as she or he is working in the same or similar occupation and an I-485 has been pending for more than 180 days. It thus strains logic when the AAO distinguishes these circumstances of labor certification invalidity from when the labor certification has been substituted by the employer with another foreign national beneficiary.

In our view, the AAO argument may be countered by explaining that once the adjustment has been on file for 180 days, the sponsoring employer lost any

remaining right to the labor certification ownership of which passed to original beneficiary. This AAO decision is a significant restriction on adjustment of status portability and, by making the foreign national prove a negative, that no one else has been substituted in, is fundamentally unfair. The foreign national after the 180 days should be said to have a property interest in the labor certification. Moreover, the AAO agreed that even if the employer revoked the subsequently filed and approved I-140 petition, it would not undermine the ability of the beneficiary to "port" under INA § 204(j). This is illogical to the extreme. If the I-140 is revoked, portability is still permitted, but if the labor certification is withdrawn or substituted for another beneficiary, it undermines portability. It would be consistent with INA 204(j) to argue that regardless of whether the labor certification or the I-140 have been withdrawn, both invalidating events should still allow the beneficiary to allow him or her to "port" to a same or similar occupation.

We also credit Quynh Nguyen's powerful observation that the AAO decision concludes by stating that the beneficiary who was taken out of the labor certification has not been able to show that the substituted beneficiary who ultimately adjusted status, based on the same underlying labor certification, did so illegitimately. This is after the AAO reasons that it is not possible for the original beneficiary to adjust once substitution occurs. A substituted beneficiary may legitimately substitute, but then may adjust status when actually inadmissible, but conceals the ground of inadmissibility. Even if the original beneficiary can now successfully point to the inadmissibility that was concealed, such as disqualifying criminal conduct or a false claim to citizenship, this in itself does not take away from the substitution, and Quynh correctly states that the AAO's conclusion is circular. Moreover, it would create an unsavory situation where the original beneficiary would be gunning for anything to show that the substituted beneficiary obtained the green card illegitimately.

Beyond this, as Quynh Nguyen cogently reminds us, the AAO reasoning suffers from the same fundamental fallacy as the labor certification process itself, namely imposing the impossible burden of proving that a negative exists. Even though labor certification is employer-specific while INA § 204(j) is alien-centric, the flexibility that must infuse both processes to make them work is stifled by an agency predilection for requiring proof of the unseen as a precondition for approval. In each case, the proper functioning of INA 212(a)(5)(A) is primordial.

DOL requires a sponsoring employer to show the absence of qualified, willing, and available US workers despite the fact that only the Secretary of Labor bears this burden of proof under INA Section 212(a)(5)(A). The AAO compels the foreign national who has ported under § 204(j) to become Sherlock Holmes and show that no one has used the labor certification to get the green card. In both instances, not only is such shifting of the burden of proof logically dubious, it is legally unjustified. The adjustment of status applicant who seeks the personal freedom and occupational mobility afforded by AC 21 has no way to find out what has happened to the labor certification he or she left behind; indeed, the notice of intent to revoke the I-140 petition only goes to the former employer who has no motive save honor to respond.

While the authors do not want the original beneficiary to get jeopardized when there is a substitution, it would likewise be fundamentally unfair for the legitimately substituted beneficiary to be robbed out of permanent residency and be similarly placed in jeopardy. There need not be a winner or a loser. Both can win. Thankfully, our good friend Angelo Paparelli and a colleague proposed the "cell mitosis" theory of labor certification. See Angelo A. Paparelli and Janet J. Lee, A Moveable Feast": An Analysis of New and Old Portability Under AC21 § 105, 6 Bender's Immigr. Bull. 111, 126 (Feb. 1, 2001) and available at http://www.ilw.com/articles/2001,1119-Paparelli.shtm.

In their refreshingly original article, this is how they articulate the "cell mitosis" theory of labor certification:

In fairness to all three parties, the labor certification should be treated as "divisible" under what can be called the "cell mitosis" theory. Under this theory, the labor certification would remain valid with respect to the employee's new job, and the sponsoring employer would also be permitted to substitute another alien worker on the labor certification. From the sponsoring employer's perspective, the conditions under which the labor certification was granted remain the same (other than the fact that the initial worker has resigned); there is still a demonstrated shortage of U.S. workers for the position. To require the employer to test the market again would be unfair and unduly burdensome. Thus, just as in the process of cell mitosis, each party (the sponsoring employer and initial beneficiary employee) should be able to retain the benefits flowing from the single approved labor certification.

Ironically, the AAO decision does precisely what the DOL did not like about the prior practice of alien substitution: "We acknowledge that after enactment of

AC 21, DOL's practice of substitution effectively created a race between the employer seeking to use the labor certification to fill the proffered position on a permanent basis and the alien beneficiary named on the labor certification..." Id. at 9. That is precisely the effect of the AAO decision. Ironic. We do not see why INA § 204(j) cannot be generously interpreted consistent with the "cell mitosis" theory to allow for one labor certification to provide the basis for two beneficiaries to adjust and obtain permanent residency and still be in harmony with both § 204(j) and § 212(a)(5)(a)(ii).

Finally, the reliance by the AAO on two decisions to argue that the USCIS has been precluded from approving a visa petition when the labor certification has been used by someone else is completely misplaced. Neither is a substitution of alien case. *Matter of Harry Bailen Builders*, *Inc*., 19 I&N Dec. 412, 414 (Comm. 1986) is a case where the foreign national abandoned lawful permanent resident (LPR) status and then wanted to come back using the original labor certification approval. In *Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006), the foreign national wanted to re-use the I-130 petition his mother filed after he had already acquired LPR status on this basis before being placed in removal. This was not a labor certification case at all which is very relevant since the AAO focused repeatedly on the idea that the whole logic of its ruling rested on the validity of the labor certification. Also there was no substitution of beneficiaries and no application of portability under § 204(j) in those cases. They were both the same people attempting to use the original approvals after they lost LPR status through removal or abandonment. These people already got their green cards and wanted to use the earlier petitions without starting over again, which is very different from an individual legitimately relying on INA § 204(j) only to find that the USCIS does not grant LPR under certain circumstances involving labor certification invalidity but allows it under other circumstances.

Not even the wisdom of Solomon allows us to separate the validity of the I-140 petition from the validity of the labor certification on which it rests. The AAO relies on INA § 212(a)(5)(A)(i), together with the policy behind the regulation that removed substitutions, 20 CFR § 650.30(c)(2) (that a labor certification can only be used by one alien) to deprive the appellant in the case sub judice of the ability to adjust status once an unknown substituted beneficiary has won the race to the green card . This fundamentally misunderstands the scope and purpose of INA § 204(j), which allows the adjustment applicant to move to

another job with another employer regardless of geographical location so long as the new job is in the same or similar occupational classification. Clearly, the DOL has not made any labor shortage determination with respect to this second role nor is this required. Such a foreign national therefore could not possibly rely upon the original labor certification filed by a different employer who might be located in a different city for a different job. That is why AC 21 allows the law itself to substitute for the original labor certification when the criteria for portability set forth in INA 204(j) have been satisfied. There is no conflict between AC 21 and DOL regulations if the AAO properly understood both.

The scope of this AAO ruling is difficult to determine but its implications for the future remain troubling. This is not the first time that the AAO has sought to curtail the flexibility afforded by INA 204(j). See for example, Herrera v. USCIS, which upheld AAO's position that the revocation of the I-140 trumps portability under INA § 204(j), http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus200979113434&Month=&From=Menu&Page=12&Year=All. And the AAO conveniently forgets this earlier decision in now holding that the invalidation of the labor certification is more fundamental than the invalidation of the I-140 petition. The result-oriented reasoning that sustains this administrative assault on AC 21 adjustment portability will doubtless make itself felt in other cases with other facts, much as the contorted definition of "employer" that the infamous Neufeld Memorandum applied to the H-1B context is migrating to other visa categories with similarly baleful results, http://drop.io/daq8dgf. Just as the AAO since New York State Department of Transportation, http://www.justice.gov/eoir/vll/intdec/vol22/3363.pdf, has rewritten the national interest waiver, this current decision reminds us to our sorrow that the law changes when the AAO wants it to change; Congress can remain silent.