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US IMMIGRATION & NATIONALITY LAW

THE ENIGMA OF BOKHARI V. HOLDER: WORK AUTHORIZATION IS NOT LAWFUL STATUS

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It has always been known that being authorized to work in the US is not the same thing as being in a lawful status. The Fifth Circuit Court of Appeals recently issued a decision in *Bokhari v. Holder*, No. 09-60538, September 29, 2010, confirming this enigma. Simply stated, the fact that Mr. Bokhari timely filed an L-1A extension, which allowed him to continue working in the United States, was not sufficient for him to establish lawful immigration status that would have permitted him to file an application to adjustment status to lawful permanent residence. While this decision defies logic and has raised the hackles of many in the immigration bar, it does not break new ground and has been consistent with USCIS's prior policy. The question is whether we should be affirming the status quo or continuing to litigate so that we can correct this contradiction. Read on.

Here are the facts in *Bokhari v. Holder*. On June 9, 2003, one day before his prior L-1A nonimmigrant visa status was due to expire, Mr. Bokhari's employer filed form I-129 to extend his L-1A status. Unfortunately, the USCIS denied the I-129 petition on March 19, 2004. Mr. Bokhari diligently filed an appeal on April 19, 2004 which too got denied on September 2, 2005. While Mr. Bokhari was unsuccessfully attempting to extend L-1A status, he took another stab by filing an I-140 petition for permanent residence under the multinational manager category on June 8, 2004, and simultaneously filed an I-485 application to adjust his status even while he was not in lawful status. We know that Mr. Bokhari filed the I-485 late – long after his L-1A status expired – but he claimed the protection of INA § 245(k). This provision allows an applicant who has failed to maintain status for less than 180 days to still file for adjustment of status. Mr. Bokhara's I-140 petition got approved on July 11, 2005, but his I-485 application

got denied on September 20, 2005 and DHS commenced removal proceedings against Mr. Bokhari.

The sole issue in the case was whether Mr. Bokhari was in unlawful immigration status for more than 180 days and was thus ineligible to adjust status. Mr. Bokhari argued that while his request to extend L-1A status was pending, he was in lawful status. He actually had a solid argument since 8 C.F.R. § 274a.12(b)(20) authorizes an alien to continue working while the extension request for a nonimmigrant work visa status remains pending for 240 days. Thus, even though his original L-1 status expired on June 10, 2003, Mr. Bokhari asserted that he continued to remain in lawful status until March 29, 2004, when DHS denied the I-129 extension request. As he filed his I-485 application on June 4, 2004, he claimed that he had not been in unlawful status for more than 180 days. DHS disagreed and argued that he failed to maintain lawful status from June 10, 2003, and even though he was authorized to continue working, such a grant of authorization under 8 CFR §274a.12(b)(20) was not tantamount to lawful immigration status.

The Fifth Circuit agreed with DHS. It relied on another regulation, 8 CFR § 245.1(d)(1)(ii), which defines "lawful immigration status" with regard to a nonimmigrant, as one "whose initial period of admission has not expired or whose nonimmigrant status has been extended." Hence, one whose status had not been extended, such as Mr. Bokhari's, was not in lawful immigration status. The Court pointed to other similar paradoxical situations where an alien may be granted stay of removal and be granted employment authorization, but still be considered illegal, *see United States v. Flores*, 404 F.3d 320 (5th Cir. 2005), and also relied on an old administrative decision, *see In re Teberen*, 15 I.&N. Dec. 689 (BIA 1976), which made clear that an extension application in itself did not confer lawful status, and thus an alien could still be found deportable during this period.

The USCIS has also long drawn a distinction between maintaining lawful status and being lawfully present in the United States, *See Unlawful Presence v. Out of Status*, http://bit.ly/ahjXpj. Even though someone may be thoroughly out of status, such as an F-1 visa student no longer enrolled in school, this student is not accruing unlawful presence for purposes of the 3 and 10 year bars pursuant to INA § 212(a)(9)(B), which triggers after one departs the US and only after accruing more than 180 days of unlawful presence. Similarly, an applicant for adjustment of status, whose underlying nonimmigrant L or H status has

expired, will not be considered unlawfully present for purposes of triggering the 3 and 10 year bars but will still not be considered to be in lawful status. This unfortunate individual might even be amenable to removal as a deportable alien pursuant to INA §237(a)(1)(C), see USCIS Consolidated Guidance on Unlawful Presence, http://bit.ly/c9xHs9.

Let us first consider the merits of the government's position. While an adjustment applicant is not in a lawful status, or for that matter, one whom like Mr. Bokhari has applied for an extension of nonimmigrant status, he or she is still in a period of stay authorized by the Attorney General. The whole notion of a "period of stay authorized by the Attorney General" was created by USCIS to cover the twilight period between the expiration of status and its renewal. The two ideas do not mean the same thing as one falls away when the other arrives, such as adjustment of status giving way to lawful permanent resident status or an L-1 extension giving way to L-1 status once the extension request is granted. If the two concepts mean the same thing, then we would not have need for these "periods of stay." Why do we have 8 C.F.R. §274a.12(b)(20)? It is to provide continued work authorization incident to previously approved status pending renewal of such status. In other words, allowing for continued work authorization is an interim relief measure until the status can be renewed. Once the extension is approved and the status is renewed, the need for such temporary measures drops away.

On the other hand, such a person who is in a "period of stay authorized by the Attorney General" is also vulnerable to removal. It makes no sense to allow one to stay and work in the United States under 8 C.F.R. §274a.12(b)(20) and then put him or her into removal proceeding. Moreover, those who are more susceptible to deportation in a post 9-11 world through illegal racial profiling, are likely to get snared if they have pending applications at the time of apprehension. This is what happened to the plaintiff, an Egyptian national, in *El Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008), http://www.bibdaily.com/pdfs/El%20Badrawi%209-22-08.pdf, who claimed he was falsely arrested while his employer, University of Connecticut, filed an extension to extend H-1B status. The court in *El Badrawi v. DHS* found the government's position "bewildering" that Mr. El Badrawi was entitled to work in the United States but not entitled to be physically present in the United States. Even though Mr. Bokhari relied heavily on El Badrawi v. DHS, the Fifth Circuit gave short shrift to this decision. While Mr. El Badrawi was not claiming any

entitlement to adjust status, his claim to be lawfully in the US and not be susceptible to arrest and deportation while his H-1B extension was pending was a legitimate one.

It is worth remembering that the INA never defines “status”. For this reason, consider the possibility that 8 CFR § §245.1(d)(1)(ii) may not be faithfully interpreting the statute. INA § 245(c)(2) only refers to an applicant not being eligible for adjustment of status because he or she is in “unlawful immigration status.” The authors credit the insight of David Isaacson who suggests that there must be a difference between "lawful immigration status" and "lawful nonimmigrant status, " which is a separate bar to adjustment under INA § 245(c)(7), so that an extension can be viewed as a lawful status for the purpose of preserving § 245 eligibility. After all, pursuant to 8 CFR 245.1 (d)(1)(ii), extension of nonimmigrant status would qualify as a lawful immigration status. When the extension is still pending, such lawful status can be viewed as remaining valid in a provisional sense pending final adjudication of the extension request; in the interlude between expiration and renewal, the extension keeps the nonimmigrant status alive, looking back at the past yet open to the future.

This interpretation provides non-resident aliens with a more realistic assurance of being able to stay lawfully in the United States while their extension applications remain pending under §274a.12(b)(2). Those who are specifically granted work authorization while they file extension applications, or who file I-485 applications, should be less susceptible to removal that the student who had dropped out of school. It is neither legally sound nor logically persuasive to place non-citizens, and their derivative family members in removal, if they have pending applications for extensions or adjustment applications. They should also be considered to be maintaining a lawful immigration status while their requests for an extension are pending. Nobody would like to constantly live in fear, especially if they were in the EB-3 preference, and applying for yet another extension beyond the 6th year H-1B limitation, to imagine that ICE could issue a Notice to Appear for a removal proceeding when a timely non-frivolous H-1B extension along with H-4 extensions of family members were in process.

Whether USCIS has a regulation or not granting work status, it is not good policy to render nonimmigrants who file timely applications be susceptible to removal from the US. However, not all such twilight statuses need to be deserving of such immunity, such as an F-1 student who has dropped out of

school, and who may not be accruing unlawful presence for purposes of the 3 and 10 year bar, but can still be put into removal. As opposed to such a student who has dropped out of school and not reinstated status, it would be wrong to deport a nonimmigrant who has been lawfully in the US and who has applied for a timely extension of status. It is hoped that in the future we will see more decisions that follow *El Badrawi v. DHS* rather than *Bokhari v. Holder*.