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VICTORY IN EL BADRAWI V. USA: NARROWING THE DISCONNECT BETWEEN STATUS AND WORK AUTHORIZATION

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In *El Badrawi v. USA*, 07-cv-1074 (D. Conn. Dec. April 11, 2011), the United States District Court in Connecticut ruled that an H-1B worker who had timely sought an extension of that visa status, and who was authorized to continue working under 8 CFR § 274a.12(b)(20), could not be arrested or subjected to removal. Although a district court decision may not have precedential value beyond the plaintiff in the case, it is nevertheless extremely significant as it provides the stepping stone for other courts to also be similarly persuaded.

The Department of Homeland Security, and the former Immigration and Naturalization Service, have always taken the position that being authorized to work in the US is not the same thing as being in a lawful status. Moreover, the benefits granting agency within the DHS, the United States Citizenship and Immigration Services, has long drawn a distinction between maintaining lawful status and being lawfully present in the United States. For example, 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 under INA § 212(a)(9)(B) but will still not be considered to be in lawful status even though this applicant is authorized to work. 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.

The holding in *El Badrawi* is narrow, and has been rendered in the context of a claim against the government for a false arrest of an employee while he was seeking an extension of his H-1B visa status. In dismissing the government's motion for summary judgment, the court reaffirmed its prior holding in *Badrawi*

v. DHS, 579 F. Supp. 2d 249 (D. Conn. 2008) (*El Badrawi 1*), http://www.bibdaily.com/pdfs/El%20Badrawi%209-22-08.pdf, where the plaintiff claimed he was falsely arrested while an extension to extend H-1B status filed by his employer, University of Connecticut, was pending. . The court in *El Badrawi 1* found the government's position "bewildering" that the plaintiff was entitled to work in the United States pursuant to 8 CFR § 274a.12(b)(20) but not entitled to be physically present in the United States. In its most recent holding, which we will refer to as *El Badrawi II*, the court came down more strongly in favor of the plaintiff. The court's opinion revolves around the meaning of 8 CFR § 274a.12(b)(20), which the court aptly summarized as follows:

> *A nonimmigrant alien whose status has expired but who has filed a timely application for an extension of such stay.... authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay.*

The government contended that this regulation only applied to an alien's authorization to work in the US but it did not extend to the alien's authorization to remain in the US. The government also asserted that it always had the discretion to arrest, detain and remove such an alien. However, Judge Janet C. Hall, who wrote the opinion, gave short shrift to the government's interpretation of this regulation. Although a government agency is entitled to its interpretation of its own regulation, such deference can be set aside if it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). According to Judge Hall, "he fact that section 274a.12(b) pertains solely to aliens whose immigration status is based and conditioned upon their need to work in the country strongly indicates that the two rights go together here. An extension of only the right to work, without the right to remain in the country, is at odds with the nature and purpose of the affected work-based visa programs."

In the absence of any policy guidance from the government on this issue, Judge Hall also relied on a USCIS "Customer Guide" pamphlet, which clearly advised the public that if the application for an extension is received before one's status has expired, "you may continue your previously approved activities in the United States (including previously authorized work) for a maximum period of 240 days." This permission, according to Judge Hall, was not just limited to work but also to all "previously approved activities," such as being present and

temporarily residing in the US.

More significantly, the court also held that the government's proposed interpretation raised "grave" due process concerns. The fact that the DHS could arrest a law abiding alien who was complying with the rules was tantamount to a deprivation of liberty without due process under the Fifth Amendment. Here, the plaintiff, a Lebanese national, was arrested and detained from October 29, 2004 until December 22, 2004, when he was escorted out of the country after receiving a voluntary departure order from an Immigration Judge. Moreover, here there was no pre-enforcement notice provided to the plaintiff, and if there was any notice through the USCIS Customer Guide, it "plainly supports and fosters the expectation that aliens in El Badrawi's position may remain in the country while awaiting a determination on their timely filed extension applications." Judge Hall also noted the amicus brief of the American Immigration Council and the American Immigration Lawyers, which "highlights the substantial interest that employers have in the administration of the H-1B visa program, the lack of notice provided by the regulation at issue, and the hardship that the government's proposed interpretation would impose upon them."

While *El Badrawi II* may only apply to the plaintiff and is also limited to the circumstances of one in H-1B visa status timely applying for an extension of his or her status through the same employer, it does not mean that other persons in similar unfortunate circumstances as Mr. El Badrawi cannot use the same arguments in other administrative or litigation forums. After all, 8 CFR §274a.12(b)(20) provides the same work authorization rights to other nonimmigrant visa holders who are seeking extensions of their L-1, O, and TN statuses, to name a few. Also, if a person files an I-485 application for adjustment of status to permanent residence, he or she is also entitled to work authorization under a different regulatory provision, 8 CFR § 274a.12(c)(9), and if work authorization has been applied for and granted, the regulation states that such an alien will not be deemed to be an "unauthorized alien."

How about an H-1B worker who is seeking an extension of H-1B status through a new employer? While the regulatory provision, 8 CFR §274a.12(b)(2), no longer applies, this person can invoke the protection of something much stronger – the statute itself. INA § 214(n) permits such a person the ability to "port" to a new employer upon the filing by the prospective employer of a new H-1B petition. While the H-1B petition is pending, such a person can accept

employment with the new employer who filed the H-1B petition. This person too if arrested, detained and placed in removal can make similar arguments, which is that INA § 214(n) authorizes him or her to work in the US during the pendency of the petition. Such a person may "port" even if there was a gap in H-1B status, and could make the claim that the ability remain employed in the US also allows him the right to remain here, see *H-1B Portability When There Is A Gap In Status*.

And why should the logic of *El Badrawi I* and *II* only hold when the affected alien is authorized to work under a regulatory or statutory provision? There are several situations where a person can legitimately extend or change status even if there is no authorization to work. Thus, a person in B-1 status can apply for an extension of that status. Or an F-1 student can apply for a change to H-1B status, or one who is previously in H-1B status may change to H-4 status because she may have a spouse in H-1B status and has taken a break in her work because she has just given birth to a baby. Why should a new mother who is legitimately changing status from H-1B to H-4 be susceptible to arrest, detention and removal just because there is no provision authorizing her to work in the US? Indeed, this mother is changing status to H-4 dependent precisely because she does not choose to work during this stage in her life, but the H-4 status will still enable her to lawfully reside in the US with her spouse and her child. Providing the government with unbridled discretion to arrest, detain and remove her while she has filed an application to change status would also gravely offend the Fifth Amendment's Due Process Clause.

A forceful due process argument can be made that if there is an established statutory or regulatory procedure to change or extend status, the government should not be permitted to deprive the person of his or her liberty during this interim period when it would be unable to do so prior to the status expiring or after the new status has been granted. The court in *El Badrawi II* relied on *Zadvydas v. Davis*, 533 U.S. 678 (2001), which has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." In *Zadvydas v. Davis,* the Supreme Court further held that indefinite detention is unconstitutional following a removal order beyond 6 months six months of detention because "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects." Also, take note of these powerful words from the

Supreme Court in *Bridges v. Wixon*, 326 U.S. 135, 164 (1945), "The impact of deportation…is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death."

Finally, the INA never defines "status," and it may be worth advocating for a unified definition of status. One needs to be in status to avoid removal, but also to apply for other benefits such as adjustment of status. In *Bokhari v. Holder*, 622 F.3d 357 (5th Cir. 2010), which Judge Hall distinguished, the issue was whether a person who had applied for an extension of his L-1A status, triggering 8 CFR §274a.12(b)(2), would be eligible to file an I-485 adjustment of status application. Mr. Bokhari was not facing removal; rather he argued that he should have been considered to have been maintaining status in order for him to be eligible to file an I-485 application. The regulation in question in *Bokhari v. Holder* was 8 CFR § 245.1(d)(1)(ii), which seemed to preclude Mr. Bokhari from demonstrating that he was maintaining status. 8 CFR § 245.1(d)(1)(ii) defines "lawful immigration status" for purposes of I-485 eligibility as an alien "whose initial period of admission has not expired or whose nonimmigrant status has been extended in accordance with part 214 of 8 CFR chapter 1." Hence, one whose status had not been extended, such as Mr. Bokhari's, was not in lawful immigration status. In a prior blog post, *The Enigma of Bokhari v. Holder: Work Authorization Is Not Status*, Gary Endelman and this writer argue that 8 CFR § 245.1(d)(1)(ii) may be *ultra vires* the statute, INA §245(c), as it does not allow persons who are in the process of seeking an extension of their status to demonstrate that they are not in "unlawful immigration status." Just as persons like Mr. El Badrawi should not fear arrest, detention and removal while they have applied for an extension of their H-1B status, so should they be able to demonstrate eligibility for filing an I-485 application for adjustment of status.

Such a unified theme can be left for another day, but at least for the present after the victory in *El Badrawi II*, it is heartening that the many thousands of H-1B visa holders who legitimately apply for extensions of their status have a good argument to make in the event of an arrest or being placed in removal proceedings.