CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IF EVEN THE CHIEF JUSTICE CAN MISUNDERSTAND IMMIGRATION LAW, HOW CAN WE EXPECT STATES TO ENFORCE IT PROPERLY? REMOVAL ORDERS AND WORK AUTHORIZATION

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By David A. Isaacson

In part of the Supreme Court's recent decision in *Chamber of Commerce v. Whiting* upholding an Arizona law that imposed sanctions on employers (formally implemented as suspension or revocation of business licenses) for hiring "unauthorized alien" workers, the Court found that the Arizona law was not impliedly pre-empted because it tracks the federal definition of an "unauthorized alien" and insists that the state rely on the federal determination of an alien's status. According to the majority opinion, written by Chief Justice Roberts, the verification of an individual's "citizenship or immigration status" that the federal government is required to provide under 8 U.S.C. § 1373(c) is likely to be a sufficient determination under many circumstances. As the Chief Justice wrote for the Court, in response to the concern expressed in Justice Breyer's dissent that § 1373(c) "says nothing about work authorization":

But if a §1373(c) inquiry reveals that someone is a United States citizen, that certainly answers the question whether the individual is authorized to work. The same would be true if the response to a §1373(c) query disclosed that the individual was a lawful permanent resident alien or, on the other hand, had been ordered removed.

Chamber of Commerce v. Whiting, 563 U.S. ___ (2011), slip op. at 17.

The clear implication is that the Chief Justice, and the Court majority for which he wrote, believed that verification that an individual "had been ordered removed" would establish that individual's lack of authorization to work. As

explained below, this is incorrect. The fact that even the Chief Justice of the United States and a majority of the Supreme Court could make such a mistake is a vivid demonstration of the perils of involving non-specialists less qualified than Supreme Court Justices, such as state authorities, in determinations relating to immigration status and work authorization.

Under section 274A(h)(3) of the Immigration and Nationality Act ("INA"), the Attorney General and now the Secretary of Homeland Security have long had broad regulatory authority to determine who shall be authorized to work in the United States. That section says that "the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." This subsection (B) power to authorize employment has been exercised through the promulgation of regulations at 8 C.F.R. § 274a.12 (and related regulations at § 274a.13-14), which list many categories of aliens who are authorized to be employed incident to their status or can apply for and receive employment authorization. Although the existence of a removal order or ongoing removal proceedings certainly is not itself a basis for employment authorization, there are many regulatory bases for employment authorization that are not inconsistent with the existence of a removal order.

Perhaps the most common way for someone to have valid employment authorization despite having been ordered removed is when the person who has been ordered removed is challenging the removal order in federal court by a petition for review filed in the federal Court of Appeals for the appropriate Circuit (say, the Second Circuit if the case took place in New York). Pursuant to 8 C.F.R. § 274a.12(c), when employment authorization is based on the pendency of an application, the "validity period for an employment authorization document . . . may include any period when an administrative appeal or judicial review of an application or petition is pending." An asylum applicant who obtains employment authorization under 8 C.F.R. § 274a.12(c)(8), for example, may renew this employment authorization if the asylum application has been denied by an immigration judge and even the Board of Immigration Appeals ("BIA"), and the applicant has been ordered removed, but a court challenge to this denial of asylum and the accompanying removal order is pending. This seems only fair, given that it is hardly uncommon for a BIA denial of asylum to be overturned by a federal court, and the victim of this BIA error should not be

denied the right to work while the error is being corrected—but it means that one who has been ordered removed, and whose order of removal has not yet been vacated by a court, may well have valid employment authorization.

The same scenario can arise when an applicant for adjustment of status under INA § 245 or cancellation of removal for nonpermanent residents under INA § 240A(b) has his or her application denied by an immigration judge and the BIA, is ordered removed, and petitions for judicial review of the order of removal under 8 U.S.C. § 1252(a)(2)(D) on the ground that a legal or constitutional error has been made by the BIA in adjudicating the application. An applicant for adjustment of status can apply for employment authorization under 8 C.F.R. § 274a.12(c)(9), and an applicant for cancellation of removal can do so under 8 C.F.R. § 274a.12(c)(10). Both would be entitled, pursuant to the introductory language in 8 C.F.R. § 274a.12(c), to renew this employment authorization while their federal court case was pending, despite the fact that they had been ordered removed.

Another way that someone who has been ordered removed can obtain valid employment authorization based on a pending application stems from an anomaly created by the BIA's decision in *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009). In that case, the BIA recognized that USCIS often has jurisdiction over an application for adjustment of status filed by someone who has been ordered removed as an "arriving alien" (for example, after entering on advance parole based on a different application), but said that it would generally refuse to reopen such a removal order while the application for adjustment was pending before USCIS. That is, the BIA said that if, for example, someone enters on advance parole because of a pending employment-based adjustment application, then enters into a bona fide marriage with a U.S. citizen, and then is placed in removal proceedings following the denial of their employment-based adjustment application, an application for adjustment of status based on the marriage would go forward with USCIS independently of the removal proceedings before the Immigration Judge and BIA (in which the person would not be allowed to apply for adjustment of status based on the marriage as relief from removal). If someone who had already been ordered removed as an arriving alien more than 90 days ago applies for adjustment of status with USCIS, then according to *Matter of Yauri*, USCIS has jurisdiction to grant them adjustment of status notwithstanding the removal order, but in the meantime while the adjustment application is pending, the BIA generally will not reopen

the removal order. Someone with a pending adjustment application as an arriving alien under Matter of Yauri, therefore, can have been ordered removed by an immigration judge and the BIA, and yet have a perfectly valid application for adjustment of status pending before USCIS, based on which they may have employment authorization under 8 C.F.R. § 274a.12(c)(9). The peculiarity of a pending application before USCIS, valid employment authorization, and an outstanding removal order all existing at the same time (even absent federal court involvement or some similar complication) may be an argument against the BIA's refusal in *Matter of Yauri* to reopen removal orders based on applications for adjustment by an arriving alien, but as long as the rule of *Matter of Yauri* remains, this possibility will remain entirely plausible despite the applicant's best efforts to resolve his or her situation.

Yet another way for people who have been ordered removed to have valid employment authorization is if their removal to particular countries (usually their countries of nationality) has been withheld under INA § 241(b)(3) or under the Convention Against Torture, because they would, more likely than not, face persecution or torture in those countries. This often occurs, for example, when an otherwise meritorious application for asylum is rejected as untimely under the one-year deadline of INA § 208(a)(2)(B). Someone who has been granted withholding of removal can theoretically be removed to another country besides the country of feared persecution or torture, but it is very rare for this to happen in practice, since most countries will not simply volunteer to accept a deportee with whom they have no previous connection. While they remain in the United States for lack of a third country willing to accept them, withholding of removal grantees are entitled to employment authorization pursuant to INA § 274a.12(a)(10). They too, therefore, will be authorized to work despite the fact that they have been ordered removed.

In addition, there is a section of the regulations that explicitly contemplates the issuance of employment authorization to certain people who have been ordered removed simply because the order of removal cannot be executed, even when withholding of removal to a particular country has not been granted due to the threat of persecution or torture. Pursuant to 8 C.F.R. § 274a.12(c)(18):

An alien against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in section 241(a)(3) of the Act may be granted employment authorization in the discretion of

the district director only if the alien cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because the removal of the alien is otherwise impracticable or contrary to the public interest. Additional factors which may be considered by the district director in adjudicating the application for employment authorization include, but are not limited to, the following:
(i) The existence of economic necessity to be employed;
(ii) The existence of a dependent spouse and/or children in the United States who rely on the alien for support; and
(iii) The anticipated length of time before the alien can be removed from the United States.

For this reason, as well, one who has been ordered removed may nonetheless be authorized to accept employment.

It was therefore incorrect for the Court in Whiting to say that it "answers the question whether the individual is authorized to work . . . . if the response to a §1373(c) query disclosed that the individual . . . had been ordered removed." An individual may have been ordered removed, and yet nonetheless be authorized to work pursuant to 8 C.F.R. § 274a.12(a)(10), 8 C.F.R. § 274a.12(c)(8), 8 C.F.R. § 274a.12(c)(9), 8 C.F.R. § 274a.12(c)(10), or 8 C.F.R. § 274a.12(c)(14)—and even this is not intended as an exhaustive list of the regulatory provisions authorizing employment that may be applicable to someone against whom an order of removal has been entered. Disclosure that an individual has been ordered removed simply does not foreclose the possibility that the same individual is authorized to work.

The fact that even the Chief Justice of the United States could make this mistake may shed some light on why the prospect of state officials attempting to implement immigration law strikes many attorneys who work in the immigration field as highly inadvisable. Immigration law, both in the area of employment authorization and in other areas, is highly complex, and can confuse even specialists or legal generalists of the highest caliber. It seems reasonable to say, without fear of insult, that the legal education and acumen of most state law-enforcement officials as it relates to matters of federal law is often not going to meet the high standard required of a Justice of the U.S. Supreme Court. Thus, implementation of immigration law by such state officials is likely to lead to frequent errors.