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THE OPPORTUNITY TO BE HEARD: WHY NEW DHS PROPOSED REGULATIONS REGARDING I-140 PETITIONS SHOULD INCORPORATE AND EXPAND UPON THE RULE OF MANTENA V. JOHNSON

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As discussed in a previous post on this blog by Cyrus D. Mehta, DHS recently promulgated a proposed rule entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers". One of the key aspects of this proposed rule, which as discussed in Cyrus's blog post has disappointed many with its narrowness in various respects, relates to the status of I-140 petitions which a petitioning employer may cease to support. For the reasons I will explain, this aspect of the proposed rule, too, does not go far enough.

The proposed rule will make clear through amendments to 8 CFR 204.5(e)(2) that an I-140 petition will continue to confer a priority date unless it is revoked because of fraud or willful misrepresentation, invalidation or revocation of the underlying labor certification, or "A determination by USCIS that petition approval was in error", as proposed 8 CFR 204.5(e)(2)(iv) states. Even an I-140 petition that is withdrawn, for example, would continue to confer its priority date on all subsequent petitions filed for that beneficiary. In addition, withdrawal of the I-140 petition by the petitioning employer, or termination of the employer's business, would only lead to revocation of the petition, per proposed 8 CFR 205.1(a)(3)(iii)(C) and (D), if such withdrawal or termination were to occur less than 180 days after approval of the I-140 petition. Otherwise, in the face of a withdrawal or termination of the employer's business after those 180 days had passed, the petition would remain valid indefinitely. Thus, even a petition which an employer tries to withdraw after 180 days have passed could, under the proposed rule, be used as the basis for portability under INA

§204(j) as enacted by the American Competitiveness in the 21st Century Act ("AC21"), which, as discussed in numerous previous posts on this blog, provides the ability to proceed with employment-based adjustment based on a different job offer to that which underlay the I-140 so long as it is in a same or similar occupation and the adjustment application has been pending for 180 days.

While these provisions provide some insurance against a petitioning employer deliberately or inadvertently undermining §204(j) portability, however, they do not go far enough to accomplish that aim. It appears from the proposed rule that in making its determination whether "petition approval was in error", to quote again from proposed 8 CFR 204.5(e)(2)(iv), and so should no longer confer a priority date, USCIS would look to the I-140 petitioner for further information, even though that petitioner might lack any interest in providing it. Similarly, the rules regarding revocation of an I-140 petition on notice have not been changed by the proposed rule, and presumably would again involve notice to the petitioner. A hostile petitioner who would have wished to withdraw a petition, or a petitioner which had innocently gone out of business, could give rise to a revocation by failing to respond to notice from USCIS, and in so doing undermine the exercise of §204(j) portability.

This is not merely a theoretical concern. A recent precedential opinion of the U.S. Court of Appeals for the Second Circuit, *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015), published on December 30, 2015, demonstrates how this problem can arise under the current regulations.

The plaintiff in *Mantena* had been the beneficiary of an I-140 petition filed by Vision Systems Group (VSG). Roughly two years after filing her I-485 application for adjustment of status in July 2007, she sent a letter to USCIS requesting to exercise portability and substitute as a successor employer CNC Consulting, Inc. Nearly a year after that, the president of VSG pled guilty to mail fraud in connection with a different petition, which led USCIS to believe that all VSG petitions might be fraudulent. USCIS therefore sent Notices of Intent to Revoke (NOIRs) regarding, it appears, many or all VSG I-140 petitions, including Mantena's. The NOIR for Mantena's petition went unanswered – possibly because Mantena had, at that point, not worked for VSG in three years – so USCIS revoked the I-140 petition and then denied Mantena's I-485.

Following repeated attempts to resolve the issue by filing motions, Mantena brought a lawsuit in the U.S. District Court for the Southern District of New

York, claiming that the revocation of the I-140 petition and subsequent denial of her I-485 had violated the relevant regulations and deprived her of constitutionally protected due process rights. The district court ruled against her, but on appeal the Second Circuit ruled that USCIS had been required to notify either Mantena, or possibly her successor employer CNC, of the NOIR.

Under the INA as amended by AC21, the Second Circuit found, USCIS could not, when it was contemplating revocation of an I-140, notify only the former employer of an I-140 beneficiary who had already exercised portability to leave that employer. As the Second Circuit found,

> *By placing beneficiaries and successor employers in a position of either blind faith in the original petitioner's goodwill and due diligence or a forced and continued relationship with the now-disinterested and perhaps antagonistic original petitioner, such a scheme would completely undermine the aims of job flexibility that those amendments sought to create.*

Mantena, slip op. at 28-29. The Second Circuit in *Mantena* remanded to the district court for further consideration of whether the required notice should have gone to Mantena, CNC as her successor employer, or both, but held that in any event some such additional notice was required.

Mantena is not the first case to confront this sort of fact pattern. As discussed by Cyrus D. Mehta in his October 2015 post on this blog, "Don't You Dare Yank My Precious I-140 Petition Without Telling Me!", similar facts have been the subject of appellate decisions in the Ninth Circuit, Sixth Circuit, and Eleventh Circuit, as well as an ongoing appeal in the Seventh Circuit. The Second Circuit's decision in *Mantena* does a particularly good job, however, of explaining why additional notice of proposed revocation of an I-140 petition is required.

USCIS has the opportunity, in the final revisions to its proposed rule, to clarify and expand upon this holding of *Mantena*. The final amended regulations should provide that when an I-140 petition has been approved for more than 180 days, or an I-485 based on an I-140 petition has been pending for more than 180 days, the beneficiary of the I-140 petition has the right to receive and respond to any notice regarding potential revocation of the I-140 petition. This will safeguard the job flexibility interests which, as the Second Circuit noted, the AC21 permanent portability provisions were designed to secure in the first

place. And it will do so without unduly burdening successor employers, who may be willing only to hire their new employee but not to become too deeply enmeshed in the immigration paperwork and respond to notice regarding an I-140 petition.

Without the addition of *Mantena*'s rule, the current proposed regulations would leave I-140 beneficiaries "in a position of either blind faith in the original petitioner's goodwill and due diligence or a forced and continued relationship with the now-disinterested and perhaps antagonistic original petitioner," *Mantena*, slip op. at 28-29. A petitioner who is no longer interested, may no longer be in business, or may actively wish harm to the I-140 beneficiary, could quite likely fail to respond to an NOIR, leaving USCIS with the mistaken impression that a petition has been approved in error. This would, in those cases, destroy the benefits of stability that the proposed rule's changes to 8 CFR 204.5(e)(2) and 8 CFR 205.1(a)(3)(iii)(C) and (D) are intended to produce.

Of course, as *Mantena* itself held, this sort of notice may in fact be mandated by the statute, whether USCIS explicitly mentions it in the regulations or not. But it would be much more efficient for USCIS to incorporate this notice into the express terms of the regulations, rather than leaving the details to the vagaries of case-by-case litigation in different circuits.

USCIS has, in the past, sometimes acquiesced by memorandum in the employment-immigration-related holding of a Court of Appeals. In a July 15, 2015, memorandum, for example, USCIS accepted the decision of the Third Circuit in *Shalom Pentecostal Church v. Acting Secretary of DHS* striking down regulatory provisions that required qualifying experience for an I-360 religious worker petition to have been gained in "lawful status", which the Third Circuit had found to be *ultra vires* the statute. USCIS could take a similar route with regard to *Mantena*, which would be much better than nothing. But especially given that regulations on a related topic are being promulgated anyway, the best solution would be for a *Mantena*-style requirement of notice to an I-140 beneficiary to be incorporated into those new regulations.

As the Supreme Court has explained, "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly, 397 U.S. 254, 267 (1970)* (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). USCIS should amend the new proposed I-140 rules to provide this opportunity to I-140 beneficiaries.