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HIGH SKILLED WORKER RULE - IS THERE SCOPE FOR PORTING ON A LABOR CERTIFICATION?

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Our firm provided selected comments to the proposed DHS rule entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers." These comments are based primarily on three recent blogs:

Including Early Adjustment Filing in Proposed DHS Rule Impacting High-Skilled Workers Would Give Big Boost to Delayed Green Card Applicants

Preserving H-1B Extension For Spouse And Freezing Age Of Child In Rule Impacting High-Skilled Nonimmigrant Workers

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.

Our comments focused on areas that others may not have commented on, and may require the DHS and even the DOL to propose supplemental rules. However, if our comments are considered, they will greatly improve the proposed rule.

The centerpiece of the rule is to grant work authorization to beneficiaries of approved I-140 petitions who are caught in the crushing employment-based backlogs. The requirement of demonstrating compelling circumstances has disappointed beneficiaries, along with further restrictions relating to the renewal of the work authorization. We do hope that the DHS removes these restrictions so that deserving beneficiaries are able to easily obtain work authorization.

It would also be highly desirable for beneficiaries of such approved I-140 petitions to exercise job portability, and not be required to re-start the labor certification process through a new employer, even though the proposed rule allows for the retention of the old priority date under certain circumstances. Recognizing that INA 204(j) requires a pending I-485 adjustment application for 180 days, and thus the DHS may not be receptive to arguments that may justify portability, we proposed that DHS also consider promulgating a rule that would recognize the ability of applicants to file early adjustment applications based on a filing date that would be far ahead of the final action date in the State Department Visa Bulletin, even if theoretically one visa is only available in a preference category. The existence of a pending I-485 application would allow for true job mobility pursuant to INA 204(j). If DHS does not accept our proposal for an early adjustment filing, we have proposed in our comment the following innovation, which we reproduce below:

"Modifying Labor Certification Rules to Provide Greater Flexibility to Beneficiaries of Approved Labor Certifications

Finally, we take this opportunity to suggest that USCIS propose to another Executive Branch department, specifically, the Department of Labor ("DOL"), some regulatory changes which would mesh well with those that USCIS has proposed and assist in accomplishing the goals of the President's initiative.

First, we propose that the DOL should formalize a policy, previously suggested in some case law of the Board of Alien Labor Certification Appeals ("BALCA"), whereby an employer who wishes to offer an alien prospective employee a position which in substance has already been the subject of an approved labor certification, even for another employer, does not need to go through the entire labor certification process all over again.

In *Matter of Law Offices of Jean-Pierre Karnos*, 2003-INA-18, 2004 WL 1278081 (Bd. Alien Lab. Cert. App. 2004) , BALCA held that if "there is a bona fide job opportunity which remains the same, despite the change in employers," then "he absence of a contractual agreement between does not negate the fact that a bona fide job opportunity exists" and thus "the change in employers, when an adequate test of the labor market has been performed and when the position remains the same, does not offend the policies of labor certification." *Matter of Karnos*, 2004 WL 1278081 at *2-*3. This is, we would submit, consistent with the text and purpose of INA § 212(a)(5)(A), which focuses on the effect on U.S.

workers of the alien filling a particular position, rather than the identity of the employer who wishes to hire the alien to fill that position.

In *Matter of Karnos*, the lawyer who had operated the law office that was the original employer, Jean-Pierre Karnos, had died before a final decision was made on the application for labor certification. *Matter of Karnos*, 2004 WL 1278081 at *1. James G. Roche, Esq., continued to run a similar law firm under the name of the Law Offices of James Roche, but could not demonstrate that he had any formal contractual relationship with Mr. Karnos so as to assume ownership of Mr. Karnos's firm. Id. at *1-2. The initial Certifying Officer within the Department of Labor denied labor certification based on the difference in employers, as BALCA explained:

> *he CO stated that Mr. Roche was "unable to provide that he and Jean-Pierre Karnos had a written contractual or inheritance agreement." Therefore, the CO found that Mr. Roche was a separate employer and should not be entitled to the application signed by another party. The CO denied certification on the ground that two "distinctly different employers" were involved and there was no agreement to "attest to the legality of this condition."*

Matter of Karnos, 2004 WL 1278081 at *2.

In his request for review by BALCA, Mr. Roche clarified that while he could not establish a formal relationship with the late Mr. Karnos, "he was offering the same position of accountant, under the same terms and conditions, including the same wage, set forth in the original application." *Id.* BALCA agreed that this was sufficient:

> *In general, a new employer must file a new application unless the same job opportunity and the same area of intended employment are preserved. International Contractors, Inc. ; Germania Club, Inc., 1994-INA-391 (May 25, 1995). When the employer has clearly demonstrated that the job opportunity, including the wage paid, remains the same such that there is still a bona fide job opportunity, a new application is not required.*
>
> *In this case, there is a bona fide job opportunity and an adequate test of the labor market has been performed. The new Employer, Mr. Roche, has*

> *indicated that the duties of the job remain the same and that the salary is the same. The same job opportunity has been preserved. The absence of a contractual agreement between Mr. Karnos and Mr. Roche does not negate the fact that a bona fide job opportunity exists with Mr. Roche as the employer. The new Employer has clearly demonstrated that there is a bona fide job opportunity which remains the same, despite the change in employers.*
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> *Therefore, in light of the particular factual circumstances presented by this case, we hold that the change in employers, when an adequate test of the labor market has been performed and when the position remains the same, does not offend the policies of labor certification. The former Employer attempted to recruit a U.S. worker for the position and the new Employer has certified that the position remains the same as that originally petitioned for, in the same area of employment. In such circumstances, labor certification should not be denied solely on the change in employers. Thus, the CO improperly denied certification.*

Matter of Karnos, 2004 WL 1278081 at *2-*3.

DOL should amend the governing regulations to make explicit, and expand upon, the holding of *Matter of Karnos*. Where a new employer wishes to sponsor an employee for a position that remains the same, and is in the same area of employment, a new application for labor certification should not be required.

We also propose that DOL should add to Schedule A, at 20 CFR 656.5, a new "Group III" comprising persons who will be employed in a same or similar occupation to one for which they already have an approved labor certification from a different employer. Under such circumstances, it is reasonable for the Department of Labor to conclude on a categorical basis that there are not sufficient U.S. workers who are able, willing, qualified and available, and that the wages of United States workers similarly employed will not be adversely affected, because a similar determination has already been made in the process of granting the previously approved labor certification. New employers should under such circumstances therefore be able to process their labor certification through USCIS pursuant to 20 CFR 656.15. At the very least, even if DOL is not willing to have Schedule III cover such same or similar occupations

on a nationwide basis, it should cover instances in which the alien has an approved labor certification for a same or similar occupation, and the area of intended employment for the position covered by the Schedule III filing is within normal commuting distance of the area of intended employment for the position covered by the previously approved labor certification."