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WHO SHOULD GET NOTICE WHEN AN I-140 PETITION IS REVOKED? IT'S THE WORKER, STUPID!

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The ability for a foreign national worker to move to a new job is crucial in an age of never ending backlogs in the employment-based (EB) immigrant visa preferences. If an I-485 application for adjustment of status has been filed and been pending for more than 180 days, under INA 204(j), the I-140 immigrant visa petition shall remain valid with respect to a new job if it is in the same or a similar occupational classification as the job for which the petition was filed. This means that so long as the worker "ports" to a same or similar job, the validity of the underlying labor certification and the I-140 petition is kept intact. The new employer is not required to restart the green card process on behalf of this worker who is the beneficiary of the approved I-140 petition filed by the former employer.

There are many who filed I-485 applications when the July 2007 visa bulletin was current, and then retrogressed, who are still waiting in the never ending EB-3 India backlog. For them, 204(j) job portability is a great blessing, although it can also have pitfalls. If the USCIS chooses to revoke the already approved I-140 petition because it suspects that the employer committed fraud, but the worker has now moved onto a new job, who should get notice o the USCIS's intent to revoke?

Courts seem to be agreeing that the original employer should not be the exclusive party receiving notice when the worker has ported to a new employer. The original employer no longer has any stake in the process and may also be antagonistic toward the beneficiary of the I-140 petition who has already left the employment many years ago. The beneficiary in addition to porting off the I-140 petition provided the adjustment application has been pending for 180 or more days, can also recapture the priority date of the

original I-140 and apply it to a new I-140 petition filed by the new employer. Thus, a worker who was sponsored by the original employer in the EB-3 can potentially re-boot into EB-2 through a new employer, and recapture the priority date applicable to the original I-140 petition. While the EB-2 may also be backlogged for India, it is not as dire as the EB-3. If the USCIS chooses to revoke the original I-140 petition, not only will the I-495 adjustment application be in jeopardy, but also the recaptured priority date, thus setting back the foreign worker by many years in the EB-3 green card backlog. It is thus imperative that someone other than the original employer get notification of the I-140 petition who will have no interest in challenging it, and may have also possibly gone out of business.

These were indeed the facts in the recent Seventh Circuit decision of *Musunuru v. Lynch*. Like the Second Circuit in *Mantena v. Johnson*, the Seventh Circuit agreed that the original employer should not be getting notice of the revocation despite the government asserting that under 8 CFR 103.3(a)(1)(iii)(B) only the petitioner is considered an "affected party." While in *Mantena*, the Second Circuit left open whether the new employer or the beneficiary of the I-140 petition should get notice, the Seventh circuit in *Musunuru* quite adamantly held that the beneficiary's current employer should get notice of the revocation. This is what the Seventh Circuit in *Musunuru* stated:

We so hold because Congress intends for a nonimmigrant worker's new employer to adopt the visa petition filed by his old employer when the worker changes employers under the statutory portability provision. Thus, to give effect to Congress's intention, the new employer must be treated as the de facto petitioner for the old employer's visa petition. As the de facto petitioner, the new employer is entitled under the regulations to pre-revocation notice and an opportunity to respond, as well as to administratively challenge a revocation decision.

While the Seventh Circuit is yet one more court that has held that the original employer is not exclusively entitled to notice of the revocation, it is disappointing that the court insisted that the new employer must be treated as a de facto petitioner. There is nothing in INA 204(j) that makes the new employer the de facto petitioner. Once the foreign national worker ports under INA 204(j), the pending green card process ought to belong to him or her. The whole idea of providing job mobility to workers caught in the EB backlog is to allow them to easily find a new employer in a same or similar field, on the

strength of an employment authorization document (EAD) ensuing from the pending I-485 application, and not to oblige the new employer to adopt the old petition. This could potentially pose an obstacle to much needed job mobility for the beleaguered EB worker who is trapped in the backlog.

While the USICS has yet to promulgate a rule implementing INA 204(j), the current policy of the USCIS is to transfer ownership of the pending green card application to the foreign worker who can demonstrate that s/he has moved to a job in a same or similar occupational classification under INA 204(j). Indeed, according to USCIS policy, such a worker can also port to self-employment. The most recent USCIS guidance on 204(j) portability in footnote 4 confirms long standing USCIS policy that allows a foreign worker to move to self-employment:

An alien may port to self -employment under section 204(j) of the INA as long as all eligibility requirements are satisfied. First, as with all other portability determinations, the employment must be in a "same or similar" occupational classification as the job for which the original I-140 petition was filed. Second, the adjustment applicant should provide sufficient evidence to confirm that the new employer and the job offer are legitimate. Third, as with any portability case, USCIS will focus on whether the I-140 petition represented the truly intended employment at the time of the filing of both the I-140 and the I-485. This means that, as of the time of the filing of the I-140 and at the time of filing the I-485 if not filed concurrently, the I-140 petitioner must have had the intent to employ the beneficiary, and the alien must also have intended to undertake the employment, upon adjustment. Adjudicators should not presume absence of such intent and may take the I-140 petition and supporting documents themselves as evidence of such intent, but in certain cases additional evidence or investigation may be appropriate. See Memorandum of Michael Aytes, Acting Director of Domestic Operations, USCIS, "Interim Guidance for Processing I-140 Employment-Based Immigrant Petitions and I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty -first Century Act of 2000 (AC21) (Public Law 106-313)" (Dec.27, 2005).

The holding in *Musunuru* does not square with USCIS policy that allows a worker to be self-employed under INA 204(j). In the context of self-employment, the worker can set up his or own company, but may also exercise 204(j) portability as a sole proprietor. Under these circumstances, there may not be a separate employer who has become the de facto new petitioner, unless the USCIS recognizes under these circumstances that the worker is the

de facto petitioner. The Seventh Circuit's holding is also not in line with the Sixth and the Eleventh Circuits. In 2014, the Eleventh Circuit Court of Appeals in *Kurupati v. USCIS* held that a foreign national had standing notwithstanding the USCIS rule in 8 CFR 103.3(a)(1)(iii)(B) that precluded the beneficiary from challenging the revocation of an I-140. The *Kurupati* court observed that the foreign national was clearly harmed as the revocation of the I-140 petition resulted in the denial of the I-485 adjustment application. The Court further observed that the notion of prudential standing, where a court may disregard standing based on prudence, has been discredited by the Supreme Court in *Lexmark International Inc. v. Static Control Components*, which held that the correct question to ask is whether the plaintiffs "fall within the class of plaintiffs whom Congress has authorized to sue." The Eleventh Circuit in *Kurupati* closely followed an earlier 2013 decision of the Sixth Circuit in *Patel v. USCIS* by holding that the beneficiary of an I-140 petition had standing because he or she suffered injury that was traceable to the USICS, namely, the loss of an opportunity to become a permanent resident. INA 203(b) makes the visa available directly to the immigrant, and not the employer, which suggests that Congress gave the beneficiary a stake in the outcome of the I-140. Moreover, after an I-140 is approved, the beneficiary can apply for permanent residency rather than a temporary status based on the employer's need for the beneficiary's services. Additionally, Congress also enacted INA 204(j) that allows the beneficiary to change jobs without starting the whole I-140 process all over again. Thus, under the question raised in *Lexmark*, Congress has authorized the beneficiary to challenge the denial of an I-140 petition, and thus this individual has standing without taking into consideration whether a court has discretion to allow it. This reasoning is further bolstered by INA 204(j), where the employer derives no further benefit from the employee's benefit to port to a new employer.

Even older decisions have recognized standing for the beneficiary in a labor certification application. In *Ramirez v. Reich*, the DC Circuit Court of Appeals recognized the beneficiary's standing to sue, but then denied the appeal since the employer's participation in the appeal of a labor certification denial was essential. While the holding in *Ramirez* was contradictory, it recognized the standing of the worker to seek review of the denial of a labor certification. An even older case, *Gladysz v. Donovan*, provided further basis for worker standing regarding a labor certification application. In *Gladysz*, the worker sought judicial

review after the employer's labor certification had been denied, rather than challenged his inability to seek administrative review under the applicable DOL regulations, and the court agreed that the worker had standing as he was within the zone of interests protected under the Administrative Procedures Act.

The Seventh Circuit decision in *Musunuru*, while good in principle as it allows someone other than the original petitioner form exclusively getting notification, may create additional burdens on new employers, thus hindering job mobility for backlogged workers. There is a possibility that if the new employer is treated as the de facto I-140 petition, it may have to continue to demonstrate ability to pay the worker, and may be subject to filing a new I-140 petition on behalf of the alien beneficiary. All this would run counter to the spirit and intention behind INA 204(j), which is clearly alien centric in nature and focuses on the ability of the foreign worker to exercise job mobility, and for the worker to demonstrate that he or she has sought a new job in an occupational classification that is same or similar to the one that was the subject of the I-140 petition. Already in the proposed rule, Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers, there is an unnecessary imposition on the new employer at new 8 CFR 245.25(b)(12)(i) and (ii) when the worker exercises 204(j) portability. The proposed rule requires the new employer to sign a written attestation describing the new employment offer, stating that the employer intends the applicant to commence employment within a reasonable period upon adjustment of status, and that the employment offer and the employment offer under the approved petition are in the same occupational classification.

This imposition on the new employer is quite unnecessary as it is the foreign worker who has been making the 204(j) case till now, supported by a new job offer letter from the new employer. The new employer is not required to make a 204(j) argument on behalf of the worker. Still, the new employer is not recognized as the de facto petitioner in the proposed rule. The Seventh Circuit's decision in *Musunuru* may change this, and possibly incentivize USCIS to impose further burdens on the de facto petitioner such as demonstrating the new employer's financial ability to pay the proffered wage. It is thus important to ensure that other courts do not follow the precise holding of *Musunuru*, and insist that the worker as the beneficiary of the I-140 petition be primarily entitled to notification. As advocated in a prior blog, the proposed rule must

include that the beneficiary of an I-140 petition has the right to receive and respond to any notice regarding potential revocation of the I-140 petition. The rule must specify that it is the beneficiary who should have this right, and not the new employer as the de facto petitioner. Such a regulatory change would once and for all settle the matter in favor of the worker who ought to be able to exercise job mobility unfettered under INA 204(j).