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BREAKTHROUGH IN MATTER OF V-S-G- INC.: AC21 BENEFICIARIES GIVEN OPPORTUNITY TO BE HEARD WHEN I-140 IS REVOKED

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The law generally recognizes that petitioners control their visa petitions. See 8 CFR 103.2(a)(3). A beneficiary cannot force a petitioner to pursue or maintain a visa petition. Therefore, USCIS communicates only with petitioners, not the beneficiaries, with respect to notifications such as Requests for Evidence, approvals, and even a Notice of Intent to Revoke (NOIR) of an approved petition. A beneficiary is not considered an affected party with legal standing with respect to filing appeals and motions. See 8 CFR 103.3(a)(1)(iii)(B).

However, the traditional distinction between a petitioner, beneficiary and affected party breaks down when the law allows the beneficiary to leave the original petitioner and port to a same or similar job under INA 204(j) that was enacted via the American Competitiveness in the Twenty-first Century Act of 2000 (AC21). Although the intent of the original employer who filed the petition to employ the beneficiary may cease to exist, the original petition still remains valid when the beneficiary ports to a same or similar job with a new employer.

The Appeals Administrative Office (AAO) has adopted *Matter of V-S-G-Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017), which now recognizes that beneficiaries who have ported to a same or similar to the job under INA 204(j) are entitled to receive notices pertaining to the potential revocation of their approved employment-based I-140 visa petition. The USCIS also issued accompanying guidance in the form of a Policy Memorandum on November 11, 2017. We previously advocated for this outcome here, here and here, and welcome the AAO's recognition that beneficiaries who have ported are entitled to notification and the opportunity to be heard when their approved I-140 petitions are in jeopardy.

The ability for a foreign national worker to move to a new job is crucial when there is a delay in the adjudication of the I-485 application for adjustment of status. If an I-485 application has been pending for more than 180 days, under INA 204(j), the I-140 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. Some I-485 applications have been pending for more than a decade, such as those in the class of July 2007, after the employment second (EB-2) and third preferences (EB-3) for India became current and then retrogressed. Even in the Trump era, I-485 applications filed are likely to remain pending for over 180 days as the beneficiary will be scheduled for personal interviews at the local USCIS office. 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. INA 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 of the USCIS's intent to revoke?

Matter of V-S-G-Inc. recognizes that a beneficiary who has ported is within the statute's zone of interests following the Supreme Court's decision in *Lexmark Int'l Inc. v. Static Control Components*, which held that a plaintiff has the ability to sue when his or her claim is within the zone of interests a statute or regulation protects. Courts have agreed that the original employer should not be the exclusive party receiving notice when the worker has ported to a new employer. Beneficiaries who have ported to new employers fall within INA 204(j)'s zone of interests and have standing to participate in visa revocation proceedings. See *Mantena v. Johnson* and *Kurupati v. USCIS*. 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-485 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.

The AAO in Matter of V-S-G- while endorsing the holdings in *Mantena v. Johnson* and *Kurupati v. USCIS*, disagreed with the Seventh Circuit's holding in in *Musunuru v. Lynch*. In *Musunuru, while recognizing the beneficiary of an approved I-140 petition as an affected party,* 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.

In a prior blog, I had argued against the holding in *Musumuru* that 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.

I am glad that the AAO in *Matter of V-S-G-* agrees with this position. The AAO correctly noted, "The new employer did not pay for the filing, is not responsible for maintaining the petition, is not liable for the original petitioner's compliance or malfeasance associated with it, and cannot withdraw the petition if it no

longer requires the beneficiary's services. Nor can the new employer prevent the beneficiary from porting to yet another employer (as happened here)." The fact that the new employer has to sign an I-485J Supplement J does not give it more interests in the original employer's petition. The new employer would in any event need to provide a letter confirming the new job offer. Form I-485J merely captures the same information that the new employer would provide in a letter relating to the job offer.

While the outcome in *Matter of V-S-G-* is positive for beneficiaries who have ported and who are entitled to notification, it did not go far enough. *Matter of V-S-G-* only recognized the beneficiary as an affected party in cases where he or she has exercised portability under INA 204(j). The AAO disagreed with the Sixth Circuit's holding in *Patel v. USCIS*, which held that the beneficiary of an I-140 petition even outside the porting context 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), according to the Sixth Circuit in *Patel*, 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. While a pending I-485 may bolster the beneficiary's interest in an I-140, it is not necessary. There exist old decisions that provided standing to the beneficiary of a labor certification, in the absence of a subsequent I-140 petition or an I-485 adjustment of status application. In *Ramirez v. Reich*, the DC Circuit Court of Appeals recognized the non-citizen'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, as it recognized the standing of the non-citizen but turned down the appeal due to the lack of participation of the employer, the employer's essentiality may have been obviated if the employer had indicated that the job offer was still available. Still, an even older 1984 case, *Gladysz v. Donovan*, provides further basis for non-citizen standing even if there is no pending I-485 application. In *Gladysz*, the non-citizen sought judicial review after the employer's labor certification had been denied, rather than challenged his ability to seek administrative review, and the court agreed that the plaintiff had standing as he was within the zone of interests protected under the Administrative Procedures Act.

The final Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Workers rule ("High Skilled Worker Rule"),

which took effect on January 17, 2017, did not address notice and standing for I-140 beneficiaries under INA 204(j). *Matter of V-S-G-* now fills this gap. 8 CFR 205.1(b) and 205.2(b) and (c), which provide that automatic and notice-based revocations go solely to the petitioner, are no longer applicable when beneficiaries have pending I-485 applications under INA 204(j). The USCIS has instructed that revocation notices be sent to both the petitioner and beneficiary. The USCIS, however, does caution that when sending notification, certain non-public information cannot be shared with both parties such as the petitioner's non-public financial information, including federal tax returns or information about I-140s being filed on behalf of multiple beneficiaries. Under these circumstances, the beneficiary is supposed to get more generalized information. Whether this will be advantageous to the beneficiary who is provided modified information for purposes of rebutting an intention to revoke an I-140 petition remains to be seen. However, it would be a ground for appeal to the beneficiary whose I-140 was denied because he or she did not get sufficient information in order to provide an effective rebuttal. Still, the examples given in the Policy Memorandum under which the USCIS can revoke an approved I-140 are broad and under the following headings: material error in approving the petition; fraud or willful misrepresentation of material fact; lack of a bona fide job offer; adverse new information (from a site visit or adjustment interview; and invalidation of a labor certification. One can see this as an invitation for USCIS examiners to issue more NOIRs of approved I-140 petitions especially under the Trump administration, which has sought to curb or slow down legal immigration by imposing mandatory adjustment interviews and increasing site visits.

Matter of V-S-G and the accompanying policy guidance only deal with notification to beneficiaries who have approved I-140 petitions, which the USCIS seeks to revoke. It does not deal with beneficiaries who are porting off unadjudicated I-140 petitions and concurrently filed pending I-485 applications. 8 CFR 245.25 of the High Skilled Worker Rule clarifies and codifies long standing policies regarding how a beneficiary may port under INA 204(j). With respect to porting off an unadjudicated I-140 petition, 8 CFR 245.25(a)(2)(ii)(B) clearly provides for this by stating that the I-140 must still ultimately be approved by demonstrating that it was approvable at the time of filing and until the I-485 was pending for 180 days. The rule insists that it must still be demonstrated that the original petitioner had the ability to pay the proffered wage at the time

of filing the I-140 petition, but the original petitioner need not continue to show its ability to pay after filing and until the beneficiary obtains permanent residency. This makes sense since once the beneficiary has ported, the original petitioning employer should not be required to demonstrate its continued ability to pay the proffered wage after the filing of the I-140 petition and once the 180 days since the filing of the I-485 have passed.

Unfortunately, *Matter of V-S-G-* and the accompanying guidance fail to instruct USCIS on how to notify beneficiaries when the I-140 has not yet been approved, but the beneficiary has exercised portability under INA 204(j). Pursuant to *Matter of V-S-G*, the beneficiary has a legitimate interest in an unadjudicated I-140 too, and must be notified through a Request for Evidence (RFE) that is usually only sent to the employer. Accordingly, beneficiaries who have ported off an unadjudicated I-140 must insist on being notified regarding any RFE that may be sent to the employer and to be given the opportunity to respond to the RFE. If the relationship has not become antagonistic, the original employer may still respond to the RFE, even if the employer does not intend to employ the beneficiary upon acquiring permanent residency, and notify the USCIS that the beneficiary has or may be porting under 204(j) but is seeing to have the I-140 approved pursuant to 8 CFR 245.25(a)(2)(ii)(B). If the original employer has decided to not respond to the RFE, the USCIS must still give the beneficiary an opportunity to respond to the RFE in the same was as it has been instructed to do under *Matter of V-S-G-* with regards to an NOIR of an approved I-140 petition.

Beneficiaries have not been provided the same rights as employers in the I-140 petitioning process. *Matter of V-S-G-* following court decisions now recognize that an AC 21 beneficiary must be given an opportunity to be heard when the approved I-140 petition is in jeopardy. At the same time, the guidance accompanying *Matter of V-S-G-* could also incentivize USCIS officers to issue more NOIRs of approved I-140 petitions, although such notices would have to be provided to the original petitioner and to the beneficiary. While this is a significant first step, beneficiaries of employer-filed petitions must continue to advance their legitimate right to be heard even in other contexts, such as when the I-140 is still not yet approved or even when there is no pending I-485 application under INA 204(j).