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FOURTH CIRCUIT HOLDS THAT ADJUSTMENT APPLICANTS CAN EXERCISE JOB "PORTABILITY" IN REMOVAL PROCEEDINGS

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by
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On February 22, 2007, the US Court of Appeals for the Fourth Circuit in *Perez-Vargas v. Gonzales*, __ F.3d __, 2007 WL 529357 (4th Cir. Feb 22, 2007) (No. 05-2313) ruled that applicants with pending adjustment of status applications can exercise job portability while in removal proceedings. As a background, Congress enacted section 204(j) of the Immigration & Nationality Act ("INA") in 2006. This section provides:

> *A petition under subsection (a)(1)(D) of this section for an individual whose application for adjustment of status pursuant to section 1255 of this title has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.*[1]

Thus, section 204(j) allows those with adjustment of status applications pending for more than 180 days to continue with the permanent residency process despite changing jobs or employers, provided the new job is in the same occupational classification or one similar to that which was the subject of sponsorship by the original employer.

This provision has been a great boon for those who have experienced delays in the adjustment of status application process. For example, where an

adjustment of status applicant is fired from his or her job while the application remains pending, but quickly finds a new job in a similar occupation, he or she can continue the permanent residency process without the support of the original sponsoring employer. Presumably, the beneficial impact of section 204(j) should also be felt by those who have changed jobs or employers while their adjustment of status applications have remained pending in removal proceedings. However, in 2005, the Board of Immigration Appeals (BIA) held that an Immigration Judge (IJ) lacks jurisdiction to review portability situations under section 204(j). *See Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005).

In *Perez-Vargas*, the BIA reasoned that a determination of portability under section 204(j) involved the adjudication of an employment-based visa petition rather than an adjustment of status application. Thus, an IJ had no jurisdiction to make a "redetermination of the visa petition's validity," as such visa petition determinations are delegated to the DHS by regulation.

Fortunately, in *Perez-Vargas*, the Fourth Circuit disagreed with the BIA's conclusion that an IJ lacked jurisdiction to make a portability determination under section 204(j). The Court agreed with the petitioner that the BIA misapprehended the question before it by distinguishing jurisdiction to adjudicate an application for adjustment of status from jurisdiction to make a section 204(j) determination. According to the Fourth Circuit, section 204(j) is not a jurisdictional statute, and it does not provide for an independent administrative process. Since an IJ has exclusive jurisdiction to adjudicate applications for adjustment of status in removal proceedings, 8 C.F.R. § 1245.2(a)(1), the IJ also has jurisdiction to make a portability determination under section 204(j), according to the Court. Furthermore, the Court reasoned that section 204(j) does not distinguish between those whose adjustment applications are pending before the DHS and those whose adjustment applications are required to be filed with an IJ in removal proceedings. Non-citizens may also file an adjustment of status application in removal proceedings as relief against removal. According to the Court, the BIA's interpretation would effectively negate the beneficial impact of section 204(j) with respect to non-citizens in removal proceedings, an interpretation that runs contrary to the plain language of the statute.

The *Perez-Vargas* holding is only binding upon the BIA and IJs within the jurisdiction of the Fourth Circuit. In other jurisdictions, the BIA's interpretation would unfortunately remain binding on non-citizens asserting portability in

removal proceedings. However, *Perez-Vargas* is a great step forward in persuading the BIA to reverse itself, and provides persuasive authority for other Circuit Courts of Appeals when charged with interpreting the same section of the statute.

With respect to non-citizens seeking portability in removal proceedings outside of the Fourth Circuit, they must still rely on the mercy of the DHS attorney to consent to administrative closure of the proceedings, and ask DHS to determine the portability issue pursuant to section 204(j). In the unfortunate event that the DHS refuses to concede to administrative closure, the non-citizen will not be able to exercise portability in removal proceedings. Under these circumstances, the non-citizen should not hesitate to take the case up to the relevant Circuit Court of Appeal and attempt to obtain a decision similar to that Perez-Vargasobtained in the Fourth Circuit.

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[1]The cross-reference to subsection (a)(1)(D) appears to be in error. Subsection (a)(1)(F) seems to be the intended subsection.