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US IMMIGRATION & NATIONALITY LAW

UPDATES ON CASE LAW REGARDING TPORTABILITYУ UNDER INA ¤ 204(J) AND THE ONE-YEAR DEADLINE FOR FILING AN ASYLUM CLAIM

Posted on August 25, 2007 by Cyrus Mehta

by
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This firm regularly posts articles that highlight and explain administrative and judicial decisions that affect the immigration status or pending applications of our clients. Two such matters that are of primary significance to our clients are job "portability" under section 204(j) of the Immigration and Nationality Act ("INA"), and the one-year filing deadline for asylum applications, INA § 208(a)(2)(B).[1] The former involves when and how an applicant for lawful permanent residence status, seeking to adjust his or her status based upon an approved employment-based visa petition, may continue to pursue the application despite having changed his or her position or employer; the latter provides a statutory bar to applicants for asylum who have filed their applications more than one year after the date of their last "arrival" in the United States.

A. JOB "PORTABILITY" UNDER INA § 204(j)

Early this year, we noted that the Fourth Circuit Court of Appeals overturned a decision of the Board of Immigration Appeals (“BIA”), *Matter of Perez-Vargas*, 23 I&N Dec. 289 (BIA 2005), which held that immigration judges lacked jurisdiction to review portability situations under section 204(j). *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). We explained that the Fourth Circuit found that section 204(j) is not a jurisdictional statute. Moreover, the court noted that section 204(j) does not create administrative processes for determining the portability issue independent of the adjudication of adjustment of status

applications. The court, therefore, concluded that because the regulations delegate exclusive jurisdiction over adjustment of status applications filed by non-citizens who are in removal proceedings to immigration judges, 8 C.F.R. § 1245.2(a)(1), a plain reading of the statute required that immigration judges also have jurisdiction to make section 204(j) "portability" determinations. In our article, we noted that the decision only abrogated *Matter of Perez-Vargas* with regard to applications brought within the jurisdiction of the Fourth Circuit. However, in June 2007, the Sixth Circuit also disagreed with the BIA on this issue.

In *Matovski v. Gonzales*, --- F.3d ---, 2007 WL 1713306 (6th Cir. June 15, 2007), the issues raised before the court were slightly different, as the petitioner's I-140 Petition for Alien Worker remained pending at the time the petitioner had exercised job "portability." Nevertheless, the court held, *inter alia*, that immigration judges possess jurisdiction to make "portability" determinations under section 204(j). Rather than use positive language, as the Fourth Circuit did by interpreting 8 C.F.R. § 1245.2(a)(1) to encompass portability determinations, the Sixth Circuit noted that no regulatory provision expressly forbids immigration judges from making "portability" determinations. The court explained that the express intent of Congress was to protect job-flexibility for applicants subjected to extensive delays in their applications before the Department of Labor and U.S. Citizenship and Immigration Services, and such is reflected in the mandatory language used in section 204(j) with regard to the continuing validity of an underlying visa petition, which provides no discretion to refuse to make "portability" determinations on the basis that the visa petition itself remains pending; in fact, informal guidance from the U.S. Department of Homeland Security ("DHS") – which the court noted has failed for more than 6 years since Congress enacted section 204(j) to implement formal regulations governing "portability" determinations for I-140 petitions – states that immigrant visa petitions will remain valid once the related non-citizen's adjustment of status application has been pending for more than 180 days.[2] Finally the court noted, as did the Fourth Circuit, that section 204(j) makes no distinction between applicant's who are in removal proceedings and those who are not.

B. THE ONE-YEAR DEADLINE FOR FILING AN ASYLUM CLAIM

In December 2005, we discussed the meaning of the term "arrival" in INA §

208(a)(2)(B) in the context of the final rule implementing the "Safe Third Country Agreement" between the United States and Canada. We called our readers' attention to an argument put forth by DHS attorneys that for purposes of the one-year bar stated in section 208(a)(2)(B), non-citizens who leave the U.S. to lodge asylum applications in Canada do not effect a new entry into the U.S. DHS argued that under the pre-IIRIRA, "*Fleuti* doctrine," the non-citizens had never actually departed the U.S. in order that they may make a new entry.[3] Our article explained the important distinction between the terms "entry" and "arrival" as they are used throughout the INA, and this distinction was central to the BIA's recent decision in *In Re R-D-*, 24 I&N Dec. 221 (BIA 2007). Here, the BIA upheld the decision of an immigration judge finding that a non-citizen who is admitted to Canada to pursue an application for asylum, remains there for several years without being detained, and returns to the U.S. after her application is denied, has effected a new "arrival" into the U.S. upon her return.

In its decision, the BIA distinguished *Matter of T-*, 6 I&N Dec. 638 (BIA 1955), which held that a lawful permanent resident who has been returned to the U.S. after being refused entry into any other country, and was confined to the ship on which he traveled, is not seeking to make a new entry into the U.S. The BIA found these facts completely inapposite to providing controlling authority in circumstances where a non-citizen is legally permitted to travel between the U.S. and another country. Furthermore, the BIA held that neither the Reciprocal Agreement Between the United States Immigration and Naturalization Service and the Canada Employment and Immigration Commission for the Exchange of Deportees Between the United States of America and Canada, nor the "Safe Third Country Agreement" or the regulations implementing it, mandated the status of a non-citizen upon returning to the U.S. Thus, the BIA found the respondent of *R-D-* to be an "arriving alien" who was not properly subject to the deportation charge stated in the Notice to Appear that initiated her removal proceedings. Although the respondent was not making an application for asylum as relief from removal, this decision may help future asylum applicants who would otherwise be barred by section 208(a)(2)(B) from from making their asylum applications in the U.S.

[1] See Cyrus Mehta, Fourth Circuit Holds That Adjustment Applicants Can Exercise Job 'Portability' in Removal Proceedings (February 23, 2007) and Christina B. LaBrie, Asylum and the One-Year Filing Deadline: What Constitutes

the Applicant's "Arrival" Into the United States? (December 16, 2005).

[2] Circuit Court Judge Alice Batchelder filed a dissented opinion in which she noted that the original I-140 determination is committed solely to DHS, and therefore, the immigration judge was required to defer to DHS' portability determination.

[3] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div C, 110 Stat. 3009 (1996). The "Fleuti doctrine" is discussed in the previous article.

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