CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HOW LONG CAN AN IMMIGRATION JUDGE CONTINUE A REMOVAL PROCEEDING FOR A LABOR CERTIFICATION TO GET APPROVED?

Posted on October 28, 2008 by Cyrus Mehta

By
Cyrus D. Mehta*

When a noncitizen who is out of status by overstaying a visa or entering without inspection is placed in removal proceedings, at issue is whether an Immigration Judge (IJ) can grant adjournments until such time that he or she is eligible for adjustment of status through the approval of a visa petition or labor certification application.

Even though a person may be out of status, he or she may still have a future claim to remain in the US permanently. Many noncitizens are subject to section 245(i) of the Immigration and Nationality Act (INA), which allows an individual who has violated status to still ultimately adjust status to permanent residence in the US. Under section 245(i), if a noncitizen was the subject of a labor certification or immigrant visa petition filed on or before April 30, 2001, such an individual will be permitted to adjust status in the US upon payment of a $1,000 penalty provided the immigrant visa is approved and this individual's priority date is current.[1]

For instance, an out of status individual may have been the subject of a labor certification that was filed by an employer on or before April 30, 2001. Sometime in 2002, this employer went out of business and did not pursue the labor certification. Fortunately, in 2006, a new employer filed a labor certification under the PERM system on behalf of this person. Thus, this individual can still claim to be "grandfathered" under Section 245(i) by virtue of the initial labor certification filing on April 30, 2001 so long as it was

"approvable when filed."[2] When the new labor certification is approved, this individual can hope to adjust status in the U.S. under section 245(i) provided the I-140 petition following the labor certification is approved and a visa number is currently available.

Similarly, an individual could be the subject of a family-based I-130 petition that was filed on or before April 30, 2001, and even though the I-130 petition is approved, this individual's priority date, which is established at the time of filing the I-130 petition (or the labor certification) has not yet become current. I-130 petitions filed under the Family 4 th preference can take longer then a decade for the date to become current.[3]

Under these circumstances, the individual who is waiting for either an approval of the petition or visa date to become current continues to remain out of status.[4]

If this person is apprehended by ICE enforcement, he or she will be placed in removal proceedings and will have to either challenge the charges before an Immigration Judge (IJ), but success is unlikely if it is clear that the respondent has overstayed a visa, or apply for relief against removal before the IJ, such as an application for adjustment of status. When noncitizens in such situations have requested a continuance to wait for their eligibility for adjustment, the IJs have adopted varying standards for granting or rejecting continuance. Essentially, pursuant to 8 C.F.R. section 1003.29, the IJ may grant a continuance for good cause shown. Under this provision, it is evident that the grant or denial of continuance remains solely within the broad discretion of the IJ.

In cases where an IJ has not continued the proceeding, and deported the noncitizen, many respondents have taken appeals to the Board of Immigration Affairs (BIA), which has mostly affirmed the IJ's denial of the continuance, and a few have also filed petitions for review in Courts of Appeals.

A recent decision from the US Court of Appeals for the Second Circuit in New York, *Rajah v. Mukasey*, No. 06-3493 (2 nd Cir. Sept. 24, 2008), 2008 WL 4350028, illustrates how even the federal courts are struggling to determine the standards for whether an IJ's denial of continuance was an abuse of discretion or not.

In *Rajah v. Mukasey*, Mohamed Rajah was the subject of a labor certification that

had not been approved after he had been apprehended by ICE while he reported for registration under the NSEERS program.[5] This labor certification was filed on or before April 30, 2001, and thus he was "grandfathered" under section 245(i).

After he was placed in removal proceedings, Mr. Rajah's request for continuances to await the approval of his labor certification was ultimately denied by an IJ in New York. The BIA found that the IJ properly denied Mr. Rajah's motion for a continuance based on the ground that "having adjourned the case for a year and a half was sufficient time."

The Second Circuit in *Rajah v. Mukasey*, acknowledged the inconsistencies in the decisions of the federal court in ruling whether an IJ abused his or discretion under the continuance.

In a previous case, *Morgan v. Gonzales*, 445 F.3d 549, 551-52 (2d Cir. 2006), the Second Circuit held that an IJ's refusal to grant a continuance would constitute an abuse of discretion under the following two scenarios: the IJ's decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding; or (2) the IJ's decision - though not necessarily the product of a legal error or a clearly erroneous factual finding - cannot be located within the range of permissible decisions.

Indeed, in *Morgan v. Gonzales*, the Court found that the IJ did not abuse his discretion in denying a continuance so that a second petition to adjust status on the basis of a marriage could be adjudicated, where the marriage in question had already been determined not to be bona fide. Thus, if a respondent in a removal proceeding did not demonstrate that there was a bona fide petition, it would be within the discretion of the IJ to deny a continuance. Yet, the Second Circuit remained conflicted and cited another of its decisions, *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006) stating "whether a system that specifically provides for cancellation of removal on the basis of employment certification can escape being arbitrary and capricious where it does not afford adequate time for a petition to obtain such labor certification, or where there is no reasoned standard for what length of time would be adequate." *Id*. at 336 n. 5.

In a similar case in the Seventh Circuit Court of Appeals, *Subhan v. Ashcroft*, 383 F.3d 591 (7 th Cir. 2004), the Seventh Circuit found that an Immigration Judge

had abused his discretion when the ground for the decision was a pending labor certification. The Seventh Circuit noted that the IJ's denial was based simply on the fact that the labor authorities had not acted yet rather than issues particularized to the alien's circumstances such as the lack of bona fides of the labor certification or due to other grounds pertaining to national security or criminal issues. [6]

After surveying various decisions, the Second Circuit in *Rajah v. Mukasey* chose not to adopt a standard and decided to instead ask the BIA to adopt one. In this regard, the Second Circuit noted:

> *Rajah's labor certification having not been approved, IJ Nelson summarily denied Rajah's request for a continuance, as she earlier had indicated was her practice. Yet Rajah had provided the IJ with letter evidence that processing of labor certifications was extremely backlogged, and that the New York Department of Labor was that "working to the limits of abilities to process these applications as quickly as possible." The IJ, and the BIA, determined that the roughly eighteen month time span of Rajah's removal proceedings was "sufficient time" - but did not elaborate. Since most of the previous delays were not particularly linked to the labor certification, one might ask, sufficient for what?*
>
> *But still, it cannot be that the open-ended labor certification processes can give rise to endless continuances and delays. And after all, the IJ denied the continuance only after the labor certificate had been pending for three and half years and after multiple continuances during the eighteen months it was pending before the IJ - including an additional one month continuance after counsel had already been granted "one last" continuance for five months.*

Even though the Second Circuit did not establish a standard for IJs, it nevertheless expressed concerns regarding an IJ denying a continuance based on a pending labor certification. Based on the "range of permissible decisions" criterion fashioned by the Second Circuit in *Morgan*, it is hoped that the BIA will develop a generous standard for IJs to grant continuances especially when a noncitizen is subject to the benevolent impact of section 245(i). After all, Congress enacted section 245(i) to provide benefits to those who are out of status but were subject to labor certification or immigrant visa petitions filed on

or before April 30, 2001. Yet, section 245(i) presents a contradiction insofar that its beneficiary remains out of status until such time that the visa petition is approved and a visa number becomes available.

To alleviate concerns that the grant of continuance on a pending labor certification is speculative as the application may well be denied ultimately, the BIA has already fashioned a remedy in the context of unadjudicated I-130 Marriage-based petitions. In *Matter of Velarde-Pacheco,* 23 I&N Dec. 253 (BIA 2002), in the context of a motion to reopen within the 90-day statutory period, the BIA held that an unadjudicated I-130 petition based on marriage to a US citizen could nevertheless serve as the basis for a motion to reopen whether *inter alia* the motion presented clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide. Similarly, even though an IJ lacks the expertise of the DOL, he or she can make a prima facie finding that there is a bona fide application for labor certification that has been filed with the DOL[7]. For instance, an IJ can ascertain whether there is a genuine employer supporting the application and can also examine correspondence from the Department of Labor (DOL) to establish that the application is being vigorously pursued by the employer and is also being processed by the agency. Even if a labor certification is ultimately denied, the same type of "prima facie determination" can be made by the IJ to assess whether a timely appeal to the Board of Alien Labor Certification Appeals (BALCA) is bona fide.

If the noncitizen has a bona fide labor certification application or immigrant visa petition that is pending, but has not been approved solely due to bureaucratic delays either at the DOL or at the USCIS, it would be inequitable to deport such a person just because he or she was unlucky to have been picked up by ICE before being able to file an application to adjust status to permanent residence. The inequities would be further compounded if an application or petition is approved, and the noncitizen is merely waiting for the visa number to become available.

• **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. He is also an Adjunct Associate Professor of Law at Brooklyn Law School where he will teach a course on Immigration and Work. Mr. Mehta has received an AV rating from Martindale-Hubbell and**

is listed in Chambers USA, International Who's Who of Corporate Immigration Lawyers, Best Lawyers and New York Super Lawyers. Mr. Mehta is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration related topics.

[1] To further clarify, under INA §245(i), an alien who was the subject of a labor certification or immigrant visa petition filed prior to April 30, 2001 can still adjust status in the US even if he or she entered without inspection or is not in status. If the labor certification on petition was filed after January 14, 1998, the alien must have been physically present in the US on December 21, 2000. The requirement of being physically present on December 21, 2000, does not apply to an alien who was the beneficiary of a labor certification or immigrant visa petition filed on or before January 14, 1998.

[2] "Approvable when filed" means as of the date of the filing the application for labor certification was "proper filed and meritorious when filed and nonfrivilous..." 8 C.F.R. §245.10(a)(3).

[3] The worldwide cut-off date for the Family 4 th preference, according to the November 2008 State Department Visa Bulletin, is November 15, 1997. The cut-off date for those born in The Philippines is March 22, 1986.

[4] The labor certification is not a petition. An approval of a labor certification is required before an employer can file an I-140 petition under INA section 203(b)(2), the Employment-based second preference, or under INA section 203(b)(3)(i)(ii) or (iii), the Employment-based third preference. Pursuant to 8 C.F.R. section 245.2(a)(2)(i)(B), the I-140 petition can be filed concurrently with an I-485 application to adjust status. However, if a noncitizen is in removal proceedings, the IJ may require that the I-140 petition be approved by United States Citizenship & Immigration Services (USCIS) before he or she can file the I-485 application in Immigration Court.

[5] As discussed in footnote 4 of the *Rajah v Mukasey* decision, the NSEERS program required all nonimmigrant males, aged 16 or older, from twenty-five

designated countries, to register with DHS, to submit various documents and information, and to be fingerprinted and photographed. *See* 8 C.F.R. sections 214.1(f), 264.1(f)(4). These aliens were required to report to DHS "upon arrival, approximately 30 days after arrival; every twelve months after arrival; upon certain events, such as a change of address, employment or school; and at the time they leave the United States." 67 Fed. Reg. 52,584 (Aug. 12, 2002). (The requirements of 30-day and one year residency reports were suspended by DHS in December 2003. *See* DHS, Fact Sheet: Changes to NSEERS, Dec. 1, 2003, *available at* http://www.dhs.gov/xnews/releases/press_release_0305.shtm). Morocco was one of the countries whose citizens were subject to NSEERS. *See* 67 Fed. Reg. 70,526 (Nov. 22, 2002). In a separate decision, *Rajah v. Mukasey*, WL 435002, the Second Circuit upheld the NSEERS program as being constitutional as it did not, *inter alia*, violate the aliens' Equal Protection guarantees and there was a national security basis for the program following the terrorists attacks of September 11, 2001.

[6] See also, *Ahmed v. Gonzales*, 465 F.3d 806 (7th Cir. 2006) (IJ abused discretion in not continuing proceedings where respondent had a family 4th preference petition pending and even though no labor certification was filed); *Cf. Zafar v. U.S. Attorney General*; 426 F.3d 1330 (11th Cir. 2005) (holding that denial of continuance because grandfathered alien did not yet proves immigrant visa is not absence of discretion).

[7]Counsel for the respondent in removal proceedings may have to also explain to the IJ that under the DOL regulations, an application cannot be filed immediately as there has to be a 30-day interval between the placement of a mandatory advertisement or the job order and the filing of the application. See 20 C.F.R. section 656.17(c). During the incipient stages, counsel can still submit evidence of the various recruitment steps that have been undertaken prior to the filing of the application, along with the prevailing wage determination from the State Workforce Agency to establish that the employer has taken steps to commence the labor certification process.