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US IMMIGRATION & NATIONALITY LAW

THE PORTABILITY PARADOX

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by
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It is well settled that a non-citizen must have the requisite intent to work for his or her employer at the time of entry or adjustment of status under the second or third employment preferences. A non-citizen who does not have such a bona fide intent is potentially inadmissible under Section 212(a)(5) of the Immigration and Nationality Act (INA) or may be deportable after entry.[1]

Non-citizens who never reported to the certified job after entering the US as a permanent resident have been found deportable. For instance, in *Spyropoulos v. INS*, 590 F.2d 1 (1st Cir. 1978), a Greek national with Canadian citizenship, was offered a job as a cabinet maker in Washington DC. and the prospective employer obtained labor certification, but was unable to obtain confirmation of the job offer prior to entering the US. Upon arrival in the US, the respondent worked instead in Massachusetts as a woodworker and shortly thereafter with yet another employer as a machinist. The court upheld the lower Board of Immigration Appeals (BIA) reasoning that the respondent should have known that there were problems regarding the offer of employment before he entered the US and further held that he was excludable under Section 212(a)(5) as he never had an intent to take up the certified job.

On the other hand, there are also a long line of decisions holding that as long as the noncitizen took up the job or reported for work, and then left later due to a change in intention (as a result of finding a more attractive job elsewhere), this individual could not be found excludable or deportable. In *Matter of Cardoso*, 13 I.&N. Dec. 228 (BIA 1969), the respondent, a Portuguese citizen, was sponsored to work for a Rhode Island employer as a braider tender. Upon reporting to the employer with his wife for work, the foreman indicated that

there was a possibility that both would be laid off if they both worked for the employer. Based on the foreman's well intentioned advice, who also stated that he would keep the braider tender job offer open, the respondent worked elsewhere first as a shoe lace tipper and then as a bobbin machine operator. The BIA held that it could not impugn the validity of such an admission where a person reported for work and did not take up the job under the circumstances described above or if the person worked for some time with the certified employer but quit because he did not like the work or found a better job elsewhere.[2]

Yet, INA Section 204(j), enacted by Congress in 2000 through the American Competiveness in the 21st Century Act, permits a labor certification or an employment-based petition to remain valid when the adjustment of status application has been pending for 180 days or longer even if the noncitizen changes jobs provided it is in the "same or similar occupational classification" as the job described in the labor certification. AC21 turned the prior law topsy turvey in a positive way by allowing a noncitizen under special circumstances to change his or her intent even prior to obtaining permanent residence. [3]

Section 204(j), thus, trumps the rule that a noncitizen must have a bona fide intent to work for the employer who sponsored him or her. Section 204(j) is known as "portability" as it allows a noncitizen who has been waiting for an excessively long time for permanent resident status to change jobs within the same employer or even change employers provided it is in the same or similar occupation. According to guidance provided by the USCIS on portability,[4] such an applicant can also port to self-employment provided the new activity involves "same or similar" employment and the new job is legitimate. The examiner may focus, though, on whether at the time of filing the I-140 petition or the concurrent I-140 and I-485 whether the petition reflected the truly intended employment prior to portability.

Moreover, according to the same USCIS guidance, the applicant must have a valid offer of employment in order to port under Section 204(j) at the time of the adjudication of the application, but need not be working at this point. On the other hand, the noncitizen cannot be looking for employment during the adjudication of the application.

Thus, if an applicant legitimately ports under a pending adjustment of status

application, his or her intent to work for the sponsoring employer is no longer relevant. If on the other hand, the non-citizen did not exercise portability under Section 204(j), and the adjustment application is approved, it does not appear that he or she can exercise portability upon the acquisition of permanent residence. At this point, upon the approval of the adjustment application, the noncitizen must demonstrate that he or she had the intent to work for the employer. Not working for the employer, or reporting to work for that employer, if there was no porting prior to the adjudication of the application is no longer appears to be an option. Section 204(j) portability thus seems to put those in a favorable situation prior to the successful adjudication of the adjustment application. If such persons did not have an offer of same or similar employment prior to the approval of the adjustment application, they must demonstrate they had an intent to work for the sponsoring employer. Portability's paradox, thus, favors the person who was able to demonstrate a job offer in a same or similar job before adjudication of the application but not after. Furthermore, Section 204(j) only benefits an adjustment of status applicant. If the individual is overseas waiting for a visa appointment at the US consulate instead of adjusting status in the US, he or she cannot avail of this benefit.

An adjustment application is mostly approved by an anonymous examiner at a distant USCIS Service Center in either Nebraska or Texas prior to the applicant knowing about it. Suppose the examiner approved the application at 10 am in the morning on February 13, 2009. It takes a few days for the applicant to receive the good news in the mail (although electronic notification is quicker). If the non-citizen had a bona fide offer in the same or similar job at 9 am on February 13, 2009, which he or she intended to take up, it can be argued that he or she had legitimately ported under Section 204(j). This individual still had a pending adjustment of status application. If on the other hand, this person received the offer of new employment in a same or similar job at 10.05 am, five minutes after the application was approved, he or she technically could not have taken advantage of Section 204(j) portability and would still need to demonstrate an intent to work for the sponsoring employer. At 10.05 am on February 13, this person was no longer an adjustment application and Section 204(j) technically only applies to pending adjustment applicants.

It is hoped that the USCIS will not penalize a non-citizen in such a predicament. And if the government still goes ahead by charging her with deportability, she

should challenge the charges and not give up until the matter is heard in a federal court of appeals. The best argument is that Congress did not intend to put this person who unfortunately changed her intention 5 minutes after the adjustment application was approved, but unbeknownst to her, in a worse off position as a person who was able to change his intention just prior to the adjudication of the application. Congress by enacting AC21 intended to ameliorate the plight of applicants who were waiting endlessly for their green card and it would be inequitable, perhaps bordering on involuntary servitude, for such a person to maintain an intent to work for the sponsoring employer for years on end. There are other provisions in AC21 that provide similar relief, such as extending the H-1B status beyond the six year limit, and thus it can be argued that the entire purpose of AC21 was to provide relief to professional and skilled non-citizens who are legally here but stuck in the pipeline for the green card. While the above example of porting occurring 5 minutes after the grant of permanent residency starkly demonstrates the absurdity of the disparity, the same benefit should broadly apply to persons who got the green card after an endless wait but changed their intention after receiving it. In any event, the moral of the story is that eligible adjustment applicants who intend to port should do so sooner than later.

Finally, it should be noted that the USCIS has yet to implement a procedure for purposes of notification when an adjustment applicant has ported, although the standard practice is to send a letter, along with evidence of the job offer, to the USCIS Service Center where the application is filed detailing the applicant's eligibility under Section 204(j). Hence, where the porting occurred prior to the grant of permanent residency, it is still advisable to immediately send notification specifically stating the precise time and day of the job offer in the same or similar occupation to insulate against any challenge down the road, particularly when the permanent resident files an application for naturalization some years later.

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[1] INA Section 212(a)(5) is a ground of inadmissibility against a noncitizen who seeks to either the US to perform skilled or unskilled labor without labor certification. Even if the employer obtained labor certification, it can be declared invalid if the noncitizen did not intend to work for the employer upon obtaining permanent resident status.

[2] *See also Matter of Marcoux*, 12 I.&N. Dec. 827 (BIA 1968) (respondent who left certified trainee weaver job after 5 days for a fiber glass repairer job because he did not like the former job was not found to be deportable because he still had a valid certification at time of entry).

[3] Under Section 204(j), only beneficiaries of EB-1 (except persons of extraordinary ability), EB-2 and EB-3 petitions can exercise portability.

[4] Memo, Michael Aytes, Acting Director of Domestic Operations, File No. HQPRD 70/6.2.8-P (December 27, 2005).