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

NINTH CIRCUIT IN *HERRERA V. USICS* RULES THAT REVOCATION OF I-140 PETITION TRUMPS PORTABILITY

Posted on July 9, 2009 by Cyrus Mehta

by

Cyrus D. Mehta[*]

As the Employment-based categories remain hopelessly backlogged,[1] especially for those born in India and China in the Employment-based Second Preference (EB-2) and for the entire world in the Employment-Based Third Preference (EB-3),[2] the only silver lining is the ability of the applicant to exercise portability under INA ¤ 204(j).

Under INA ¤ 204(j), an I-140 petition[3] remains valid even if the alien has changed employers or jobs so long as an application for adjustment of status has been filed and remains unadjudicated for 180 days or more and that the applicant has changed jobs or employers in the same or similar occupational classification as the job for which the petition was filed.

Stated simply, an applicant for adjustment of status (Form I-485) can move to a new employer or change positions with the same employer who filed the I-140 petition as long as the new position is in a same or similar occupation as the original position.[4] This individual who has changed jobs can still continue to enjoy the benefits of the I-485 application and the ability to obtain permanent residency. ¤ 204(j), thus, allows one not to be imprisoned with an employer or in one position if an adjustment application is pending for more than 180 days. A delay of more than 180 days may be caused either due to inefficiency with United States Immigration and Citizenship Services (TUSCISУ), or more recently,

due the retrogression in visa numbers in the EB-2 and EB-3 categories.

A recent decision from the Ninth Circuit, *Herrera v. USCIS*, No. 08-55493, 2009 WL 1911596 (C.A. 9 (Cal.)), 2009 U.S. App. LEXIS 14592,[5] unfortunately, may render adjustment applicants who have exercised portability under INA ¤ 204(j) more vulnerable.

In *Herrera v. USCIS*, the petitioner in this case, Herrera, was the beneficiary of an approved I-140 petition, which was filed under INA ¤ 203(b)(1)(C) as an alien who seeks to work for a company Tin the capacity that is managerial or executive.У[6] At HerreraXs adjustment of status interview, the examining officer discovered that she was not truly employed in a managerial or executive capacity for the petitioning employer. The employer who filed the I-140 petition, Jugendstil, did not manufacture furniture, as it stated in the I-140 petition, but rather, engaged in interior designing services. Following the adjustment interview, and long after the adjustment application was pending for more than 180 days, Herrera exercised portability to a new employer. Unfortunately, a few months after she had exercised portability, the California Service Center (TCSCУ) issued a notice of intent to revoke HerreraXs previously approved I-140 petition. This notice, which was sent to the prior employer that filed the I-140 petition, alleged that Herrera did not work in a managerial or executive capacity due to the size of the petitioning entity (which had only 7 employees) and also because of her lack of managerial or executive job duties, which included visits to client sites. The CSC ultimately revoked the I-140 petition after giving Jugendstil an opportunity to respond. This indeed is anomalous, since the original I-140 petitioner, after the alien has exercised portability, may not have an incentive to respond. However, in this case, Jugendstil did appear to have an incentive to respond (and litigate the matter) as Herrera had TportedУ to Bay Area Bumpers, an affiliate of Jugendstil. The Administrative Appeals Office (AAO) affirmed the denial, and so did the federal district court.

At issue in *Herrera v. USCIS* was whether the governmentXs authority to revoke an I-140 petition under INA ¤ 205 survived portability under INA ¤ 204(j). INA ¤ 205 states, TThe Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.У

The Ninth Circuit agreed with the government that it continued to have the power to revoke a petition under INA ¤ 205 even though the alien may have successfully exercised portability under INA ¤ 204(j). The Ninth Circuit reasoned that in order to Tremain validУ under INA ¤ 204(j), the I-140 petition must have been valid from the start. If a petition should never have been approved, the petitioner was not and had never been valid. The Ninth Circuit also cited with approval an AAO decision, which previously held in 2005 that a petition that is deniable, or not approvable, will not be considered valid for purposes under INA ¤ 204(j).[7] Finally, the Ninth Circuit reasoned that if HerreraXs argument prevailed, it would have unintended practical consequences, which Congress never intended. For instance, an alien who exercised portability, such as Herrera, would be immune to revocation, but an alien who remained with the petitioning employer would not be able to be so immune. If the opposite were true, according to the Ninth Circuit, an applicant would have a huge incentive to change jobs in order to escape the revocation of an I-140 petition. Finally, the Ninth Circuit also examined the merits of the revocation, and held that the AAOXs decision was supported by substantial evidence.[8]

Based on the holding in *Herrera v. USCIS*, adjustment applicants who have exercised portability better beware in the event that the USCIS later decides to revoke your I-140 petition. 8 CFR ¤ 205.2 (a), which implements INA ¤ 205, gives authority to any Service officer to revoke a petition Twhen the necessity of revocation comes to the attention of the Service.У Also, under 8 CFR ¤ 205.2(b), the Service needs to only give notice to the petitioner of the revocation and an opportunity to rebut. An adjustment applicant who has exercised portability may not be so fortunate to have a petitioner who may be interested in responding to the notice of revocation, leave alone informing this individual who may no longer be within his or her prior employerXs orbit.

Finally, of most concern, is whether every revocation dooms the adjustment applicant who has TportedУ under INA ¤ 204(j). Not all revocations are caused by the fact that the petition may have not been valid from the very outset. For instance, under the automatic revocation provisions in 8 CFR ¤ 205.1(a)(3)(iii), an I-140 petition may be automatically revoked Tpon written notice of withdrawal filed by the petitioner, in employment-based preference cases, with any officer of the Service who is authorized to grant or deny petitions.У An employer may routinely, out of abundant caution, decide to inform the USCIS if

its employee leaves, even though he or she may legitimately assert portability as a pending adjustment applicant. Such a revocation of the I-140 ought to be distinguished from *Herrera v. USCIS* as the I-140 was valid from its inception but for the fact that the employer initiated the withdrawal. Similarly, another ground for automatic termination is upon the termination of the employerXs business.[9] It would not make sense to deny someone portability if the petitioning entity, which previously sponsored him or her, went out of business, but was viable at the time it had sponsored the alien. Indeed, one Q&A in the Aytes Memo, *supra*, at least addresses the issue of an employerXs withdrawal:[10]

TQuestion 11. When is an I-140 no longer valid for porting purposes?У

Answer: An I-140 petition is no longer valid for porting purposes when:

1. an I-140 is withdrawn before the alienXs I-485 has been pending 180 days, or
2. an I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days.У

It is hoped that *Herrera v. USCIS*, a classic instance of bad facts making bad law, does not affect those whose petitions have been revoked after the original employer submitted a withdrawal after an I-485 application was pending for more than 180 days. The Aytes Memo makes clear that this should not be the case. Less clear is whether a revocation caused by the termination of the employerXs business should have an impact on an adjustment applicantXs ability to exercise portability.[11] The Aytes Memo seems to suggest that such a person who has exercised portability may be jeopardized if the I-140 petition is revoked. It is one thing to deny portability to someone whose I-140 petition was never valid, although hopefully the individual who has ported ought to be given the ability to challenge the revocation in addition to the original petitioner.[12] On the other hand, there is absolutely no justification to deny portability when revocation of an I-140 petition occurs upon the business terminating, after it had been viable when the I-140 was filed and approved, or when the employer submits a notice of withdrawal of the I-140 petition after the I-485 has been pending for more than 180 days.

---

[*] **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] The latest July 2009 State Department Visa Bulletin can be found at http://travel.state.gov/visa/frvi/bulletin/bulletin_4512.html

[2] The criteria for the EB-2 and EB-3 preferences are provided for in ¤¤ 203(b)(2) and 203(b)(3) of the Immigration and Nationality Act (TINAУ).

[3] Only I-140 petitions filed under INA ¤¤ 203(b)(1)(B), 203(b)(1)(C), 203(b)(2) and 203(b)(3) can avail of the portability benefit under INA ¤ 204(j).

[4] For further details on how the government views Tsame or similarУ occupational classification, *See* Memo, Aytes, Acting Director of Domestic Operations, USCIS HQPRD 70/6.2.8-P (December 27, 2005) (TAytes MemoУ).

[5] The full text of the decision is available at http://www.metnews.com/sos.cgi?0709%2F08-55493

[6] *See* INA ¤ 101(a)(44)(A) for the definitions of Tmanagerial capacityУ or Texecutive capacity.У

[7] This decision, *Matter of Al Wazzan*, A95 253 422 (Jan. 12, 2005) dwelt on whether an alien could exercise portability after the I-140 petition had been denied and was being appealed at the AAO. It is also discussed in a USCIS Memo, which articulates that a TdeniableУ petition cannot confer portability under INA ¤ 204(j). *See* Memo, Donald Neufeld, Acting Assoc Dir., Domestic

Operations, HQ 70/6.2/AD 08-06 (May 30, 2008).

[8] The Ninth Circuit in recent years has upheld the AAO when denying L-1 petitions filed by small companies. *See E.g. Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063 (9th Cir. 2008); *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006).

[9] *See* 8 CFR ¤ 205.1(a)(3)(iii)(D).

[10] *See* Aytes Memo, *supra*. Curiously, the Aytes Memo was not discussed in *Herrera v. USCIS*. Instead, a prior 2003 Memo by William R. Yates was discussed, although the Aytes Memo has superseded prior USCIS memos on portability. The Aytes Memo, in response to Question 11, in essence affirms *Herrera v. USICS* (TB. an I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 daysУ).

[11] Similarly, the death of the petitioner may also have similar adverse implications on portability, 8 CFR ¤ 205.1(a)(3)(iii)(B), and like the termination of business automatic revocation provision, should not have an impact on an alienXs ability to exercise portability.

[12] It is recommended that 8 CFR ¤ 205.2 be amended to provide that notice of revocation be sent to the alien, rather than the petitioner or self-petitioner, where the alien has exercised portability under INA ¤ 204(j). Similarly, this alien should also be given an opportunity to appeal a revocation decsion to the AAO. Presently, under 8 CFR ¤ 205.2(d), only a petitioner or self-petitioner may appeal, not the alien. *Herrera v. USICS* did not examine the total and complete inability of the alien to challenge a revocation under the present regulatory framework.