CLUE: HOW TO NAVIGATE EMPLOYMENT BASED IMMIGRATION-PERM-BASED I-140 PETITIONS

MODERATOR:

Cora Tekach

PANELISTS:

Sonal Verma

Becki Young

Khorzad Mehta

AILA
DC Chapter
2014 Fall Conference

Employer-Based Immigration Petitions Requiring PERM

- Individuals seeking to come to the United States to perform skilled or unskilled labor are inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General (now Secretary of Homeland Security) that there are not sufficient able, willing, qualified, and available US workers for the job offered and that the employment of the non-citizen will not adversely affect the wages and working conditions of US workers similarly employed.

- INA 212(a)(5)(A) [8 USC 1182(a)(5)(A)].

Employer-Based Immigration Petitions Requiring PERM

- Labor Certification is generally required when employers are sponsoring temporary workers for permanent immigration to the United States in the Employment Based Second (EB-2) and Employment Based Third (EB-3) categories;

- EB-2 Exception – National Interest Waiver.

Second Preference (EB-2)

- For members of the professions holding advanced degrees, or for persons with exceptional ability in the arts, sciences, or business who will substantially benefit the national economy or culture, who are "sought by an employer in the United States;" or

- "Exceptional ability" is defined as an expertise beyond that which is normally found in the profession;

- An advanced degree could include a master's degree or a bachelor's degree plus five years of progressive work experience in their field.

Third Preference (EB-3)

- For skilled workers, professionals, and "other workers;"
- "Skilled workers" are persons whose position requires a minimum of two years' training or work experience;
- "Professionals" fill positions requiring a baccalaureate degree or university equivalent;
- "Other workers" are persons in positions that require less than two years' training to engage in the work.

Adjustment of Status

- INA 245, 8 CFR 245;
- Permits a person to obtain permanent residency without having to proceed overseas to apply for an immigrant visa;
- Discretionary;
- Eligibility –
    - Must have been inspected and admitted or "paroled," be in lawful status;
    - Not have worked illegally in the United States subsequent to January 1, 1977;
    - Must be a visa number "immediately available" at the time of the application;
    - Must not be inadmissible to the United States.
- Concurrent Filing – 8 CFR 245.2(a)(2).

Visa number retrogression

- Visa number retrogression after filing of adjustment of status application
- Case is held in abeyance until a visa is available. *Hernandez v. Ashcroft,* 345 F.3d 824, 843–45 (9th Cir. 2003)
- Policy Memo (Interim), USCIS, PM-602-0015, Instructions for Handling Regressed Visa Number Adjustment of Status Cases (Dec. 15, 2010), *published on* AILA InfoNet at Doc. No. 11011164:
  - conduct and complete the interview;
  - ensure all security and background checks are completed;
  - ensure all eligibility and documentary requirements are met;

Visa number retrogression cont'd

- resolve all issues pertaining to the case including using an RFE if necessary;
- deny the case if warranted;
- if applicant is eligible and no visa number is immediately available complete a pre-adjudication worksheet but do not request allocation of a visa number; and
- update the case in the ICMS (Interim Case Management Solution) as retrogressed visa number.

Visa number retrogression cont'd

- Allowed to remain in the U.S. until a visa number is available under USCIS guidelines.

- While the case is awaiting availability of the visa, the application is eligible for advance parole and Employment Authorization.

AFM at 20.1(e).

Employer's Ability to Pay

Petitioning Employer Must Show the Ability to Pay the Proffered Wage:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

8 CFR 204.5(g)(2)

Other Legal Sources:

- Yates Memo, "Determination of Ability to Pay Under 8 CFR 204.5(g)(2)," May 4, 2004 (AILA Doc. 04051262);

- *Matter of Sonegawa*, 12 I&N 612 (BIA 1967).

When is the best time to analyze a company's ability to pay the proffered wage?

- At the time of initiation;
- Revisit at the time of filing to ensure that circumstances have not changed;
- Best to have frank discussion of financial obligations prior to investing time and money in the permanent residency process so that all parties are aware of what the expectations are;
- In the event of a merger or acquisition, the successor in interest must prove that the predecessor company had the ability to pay the proffered wage at the time of filing, and that the successor company had the ability to pay the proffered wage as of the date of transfer of ownership until the date the beneficiary attains permanent residence.

What primary evidentiary materials are to be used to support an employer's ability to pay the proffered wage?

- Copies of annual reports;
- Federal tax returns;
- Audited financial statements;
- Pay statements if beneficiary currently employed in nonimmigrant status (i.e. H or L status).

What alternatives can be used if the primary evidentiary materials are not available?

- If company employs 100+ workers, may use statement of financial officer or person in similar position with knowledge of company's financial position and authority to issue such statement;
- In certain instances, may also use profit/loss statements; bank account records; and/or personnel records;
- USCIS adjudicator may exercise discretion in accepting alternative evidentiary materials, but those must clearly establish ability to pay, otherwise, may deny without RFE;
- Bank statements alone are NOT sufficient;
- Depreciation deductions cannot be added back to income.

Further alternative methods to prove ability to pay

- Net Current Assets:
  - USCIS may review employer's net current assets – the difference between the employer's current assets and current liabilities (taken from the recent tax return).
  - If the total of the employer's net current assets, together with wages paid to the employee are greater than the proffered wage, then the petitioner is expected to meet its ability to pay.
- *Matter of Sonegawa*, 12 I&N 612 (BIA 1967):
  - USCIS may consider the overall magnitude of the petitioner's business activities, and may overlook financial losses if they were created by unexpected and uncharacteristic events, such as moving from one location to another and incurring rental costs for two locations for a period of time.

Alternative methods to prove ability to pay cont'd

- Replacing fee-based outsourced service with in-house services by employee:
  - If an employer can prove that it had the ability to pay fees for services provided by a third party, and will stop paying that third party to hire a full time employee for the same/similar services, that can be counted towards meeting the ability to pay requirement.
- Compensation of Officers:
  - Ability to pay can be established by reducing the compensation of officers in a corporation or by the election of a partner in a partnership to reduce their share of net income or profits.
  - The net income or profits of a partnership generally are to be divided between the partners. In order to use the net income of a partnership, the partners must agree to reduce their share in order to pay the beneficiary.

Employer Portability

Eligibility to submit a request to change employment under INA 204(j)- i.e. "Porting"

- An alien beneficiary of a **pending or approved Form I-140 petition** whose application for adjustment of status (Form I-485) has been **filed and remains un-adjudicated for 180 days** or more and who seeks to change jobs to a new job that is the **same or similar occupational classification** may **submit a request** to "port" under AC21.

Porting Issues

- What if the I-140 is withdrawn?
- What if I-485 is adjudicated in less than 180 days? (most currently are)
- What is a same or similar occupation? See http://www.uscis.gov/news/questions-and-answers/questions-about-same-or-similar-occupational-classifications-under-american-competitiveness-twenty-first-century-act-2000-ac21.
- Is there an affirmative obligation to submit a request to port?

How can an alien beneficiary submit a request to port under INA 204(j)?

- Mail to TSC or NSC, depending on where I-485 is pending;
- New G28, if applicable;
- I-140 approval notice or receipt notice;
- I-485 receipt notice;
- Letter from the new intended permanent employer, issued and signed by the appropriate authority within the new employer's organization who is authorized to make or confirm an offer of permanent employment, specifying:
  - job title and duties of the offered position
  - minimum educational or training requirements
  - date the alien beneficiary began (or will begin) employment
  - offered salary or wage.

When can you port under INA 204(j)?

- During PERM (labor certification) process? NO
- During I-140 process? NO
- If I-485 is filed but not yet pending 180 days? NO
- If I-485 if pending 180 days, but I-140 is not yet approved?
  Yes, but the I-140 must have been approvable when filed:
  - on behalf of an alien who was entitled to the employment-based classification;
  - contained a valid job offer at the time that the petition was filed;
- If I-485 is pending 180 days, and I-140 is approved? YES!

Maintaining and extending H-1B status after filing I-140 petition

AC21 provides for H-1B extensions beyond the sixth year in two circumstances:

(1) Section 104(c):

- *The beneficiary of an approved employment-based petition;*
- **eligible for permanent residence but-for the application of the per-country limits;**
- *may obtain extension of the H-1B status in three year increments;*
- *until the adjustment of status is decided;*
- With extension request, include the I-140 approval notice and a printout from the Visa Bulletin.

H-1B Extensions cont'd

(2) Section 106(a):

- *An H-1B worker on whose behalf a labor certification application or immigrant petition was filed more than 365 days ago;*
- *May obtain extension of the H-1B status in one year increments until the adjustment of status is decided;*
- With extension request, include proof of labor certification filing;
- Under current law there is no requirement that you file and adjustment once your priority date becomes current; this potentially could be a way to keep someone with inadmissibility issues in the country indefinitely.

Employer-Based Immigration Petitions Requiring PERM Summary:

(1) EB-2 and EB-3 Preference Categories

- Timing of Adjustment of Status
- Retrogression of Visas

(2) Employer's Ability to Pay

- When Assessed
- Types of Evidence – Primary and Alternative

(3) Changing Employers - "Porting"

- Eligibility and Timing
- Procedure

(4) Maintaining H-1B Status beyond 6th Year

- AC21
- Extension Requests