LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]

I-140 PORTABILITY FOR EMPLOYMENT-BASED ADJUSTMENT APPLICANTS IN REMOVAL PROCEEDINGS: STRATEGIES FOR CHALLENGING *MATTER OF PEREZ-VARGAS*

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In 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).[3] Section § 106(c)(1) of AC 21 added a new "I-140 portability provision" to the Immigration and Nationality Act (INA): § 204(j) (8 U.S.C. § 1154(j)). This provision allows employment-based adjustment applicants whose applications have been significantly delayed to change jobs or employers while their adjustment applications are pending. Specifically, it provides that such individuals retain adjustment eligibility based on a prior visa petition (I-140) filed by their former employer if their new job is in the "same or similar" job classification.

In *Matter of Perez-Vargas*, 23 I&N Dec. 829, 834 (BIA 2005), the Board of Immigration Appeals (BIA or Board) held that immigration judges (IJs) lack jurisdiction to determine whether, under § 204(j), an adjustment applicant is performing the "same or similar" job as the job detailed in the immigrant visa petition. However, USCIS also will not adjudicate an adjustment application if the person is in proceedings. *See* 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1) (May 12, 2006) (clarifying respective jurisdiction of USCIS and IJs over adjustment applications). Consequently, under the BIA's *Perez-Vargas* decision, adjustment applicants in removal proceedings who qualify for portability under INA § 204(j) have no forum to pursue their adjustment applications.

Three courts of appeals now have rejected *Matter of Perez-Vargas*, in the only court decisions to-date. *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. 2007); and *Sung v. Keisler*, 505 F.3d 372 (5th Cir. 2007). The Fourth Circuit took the lead and vacated the BIA's decision in the *Perez-Vargas* case itself.[4] The Court

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[2] The authors wish to thank Howard Silverman of Ross, Silverman & Levy in Boston, Massachusetts for providing his employment-based immigrant visa expertise on this issue.

[3] Pub. L. No. 106-260, 114 Stat. 1251, 1254 (Oct. 17, 2000).

[4] The Legal Action Center appeared as *Amicus Curiae* in the case.

concluded that the BIA erred in tying the § 204(j) determination to the adjudication of an I-140 petition, over which an IJ has no jurisdiction. Instead, the Court held that the plain language of § 204(j) made clear that the portability determination was simply a fact-finding determination connected to the adjudication of an adjustment of status application. Because an IJ has jurisdiction over the adjustment application of a non-citizen in removal proceedings, the IJ has jurisdiction over the § 204(j) determination. *Perez-Vargas*, 478 F.3d at 194-95. The Fifth and Sixth Circuits applied similar reasoning in holding that IJs have jurisdiction to make § 204(j) determinations. *See Sung, supra; Matovski, supra.*

Even though the Fourth Circuit has vacated the BIA's decision in the *Perez-Vargas* case, the BIA apparently takes the position that precedent decisions that are vacated are still binding on all IJs and the BIA in cases arising in other circuits. Because of this position, the BIA's decision in *Perez-Vargas* continues to be enforced in all circuits other than the Fourth, Fifth and Sixth. This practice advisory discusses § 204(j) and the BIA's interpretation of this provision in *Matter of Perez-Vargas.* It also suggests practical and legal strategies that practitioners can employ before the immigration courts and Board and before the circuit courts to challenge the decision. Practitioners can also consult the Fourth, Fifth and Sixth Circuit decisions for additional support for the arguments discussed below.

AILF believes the BIA's interpretation of § 204(j) is unlawful and is interested in working with attorneys challenging *Matter of Perez-Vargas*. Please bring cases to the attention of AILF by emailing the AILF's Litigation Clearinghouse at clearinghouse@ailf.org.

The information in this advisory is accurate as of the date of the advisory. Readers are cautioned to check for new cases and legal developments. This practice advisory is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

What is AC 21 and why was it enacted?

The American Competitiveness in the Twenty-First Century Act of 2000 or "AC 21" amended and added to the INA. Through AC21, Congress enacted several changes to employment-based immigration to maintain and enhance the vitality of the American economy through employment of skilled foreign workers.[5]

Who is entitled to "port" under INA § 204(j)?

Section 204(j) is entitled "Special Provisions in Cases of Lengthy Adjudications" and provides:

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[5] Some legislative history regarding AC21 is located at Sen. Rep. No. 106-260 (April 11, 2000), available at 2000 WL 622763. Articles discussing the legislative history of AC21 and its purposes include: H. Ronald Klasko, *American Competiveness in the 21st Century: H-1Bs and Much More*, 77 Interpreter Releases, No. 47, Dec. 11, 2000; Eric Fleischmann, *Shattering the Myth of Permanence: Permanent Portability Under AC21*, 23 Immigration Law Today, No. 5 (September/October 2004); H. Ronald Klasko, *AC21 Strategies for Navigating in Unregulated Waters*, Vol. 2 Immigration and Nationality Law Handbook (2002-03 Edition).

> INA § 204(j):
> JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE-
> A petition under subsection (a)(1)(D) [sic][6] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

In sum, § 204(j) provides that certain employment-based adjustment applicants remain eligible for adjustment of status despite a change in job or employer if two factual predicates are met:

1. the adjustment application was pending for 180 days or more; and
2. the new job is "in the same or similar occupational classification as the job for which the immigrant petition was filed."

Where these factual predicates are met, the adjustment applicant can "port" or carry the adjustment application to the new job or employer.

Is an *approved* I-140 visa petition required to port under INA § 204(j)?

A previously issued version of this practice advisory suggested that § 204(j) required an approved I-140 visa petition. However, the text of § 204(j) simply provides that the visa petition remains valid; it does not distinguish between approved and pending (unadjudicated) I-140 visa petitions. As there is no express statutory requirement that the visa petition must be approved, IJs should apply § 204(j) when an I-140 visa petition and adjustment application are concurrently filed or almost concurrently filed (*i.e.* the adjustment application was filed while the I-140 visa petition was still pending) and both the petition and adjustment application have not been adjudicated for 180 days or more.

Notably, the former INS initially interpreted § 204(j) to require an approved I-140 petition. *See* Memorandum from William R. Yates, USCIS Acting Associate Director for Operations, to Regional and Service Center Directors (Aug. 4, 2003). However, USCIS has since reversed its position. *See* Memorandum from William R. Yates, USCIS Associate Director for Operations, to Regional and Service Center Directors (May 12, 2005) at p.3. Where a person has "ported off of an unapproved I-140 and I-1485 that has been pending for 180 days or more," USCIS first will adjudicate the unapproved visa petition and then adjudicate the adjustment of status application.

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[6] Section 204(a)(1)(D) appears to be a drafting error. The BIA correctly noted, and most immigration lawyers agree, that the intended subsection was INA § 204(a)(1)(F). This subsection relates to immigrant visa petitions seeking classification under certain first-preference and all second and third preference employment categories. *See Perez-Vargas*, 23 I&N Dec. at 830 n.3. This practice advisory treats the provision as if it reads § 204(a)(1)(F).

Are there regulations implementing INA § 204(j)?

No, to date, the government has not promulgated regulations implementing § 204(j).

Legacy INS has promulgated a number of memoranda containing guidance for USCIS' officers to determine "same or similar" job classification. Memorandum from Michael A. Pearson, Executive Associate Commissioner, INS Office or Field Operations, to all Service Center and Regional Directors and Glynco and Artesia Officer Development Training (June 19, 2001) (Pearson Memo); Memorandum from William R. Yates, USCIS Acting Associate Director for Operations, to Regional and Service Center Directors (Aug. 4, 2003); Memorandum from William R. Yates, USCIS Associate Director for Operations, to Regional and Service Center Directors (May 12, 2005).

Importantly, however, these memoranda do not have the force of law and apply only to USCIS officers, not to immigration judges.

What did the BIA hold in *Matter of Perez-Vargas*?

The Board held that IJs lack jurisdiction to determine whether an adjustment applicant is performing the "same or similar" job, and consequently, that IJs lack jurisdiction to determine whether the applicant is entitled to the presumption of continued validity of the underlying visa petition under INA § 204(j). The BIA gave two reasons in support of this conclusion: (1) because IJs lack jurisdiction to initially determine if the person was eligible for an immigrant visa; and (2) because IJs lack expertise in comparing employment responsibilities. *Perez-Vargas*, 23 I&N Dec. at 831-33.

IJs have historically lacked jurisdiction to adjudicate visa petitions so why is the BIA's decision in *Matter of Perez-Vargas* wrong?

The BIA's analysis is flawed because § 204(j) does not require the IJ to adjudicate the visa petition in the first instance. Rather, § 204(j) only applies in cases where USCIS has already determined the person qualifies for a first, second, or third preference employment-based classification. The provision expressly provides that an immigrant visa petition is preserved ("shall remain valid") if the following two conditions are met: (1) the adjustment application has been pending 180 days or more;[7] and (2) the applicant's new job is in the "same or similar" classification as his or her former job. Thus, the relevant question, which the BIA failed to analyze, is whether the person is entitled to the presumption of ongoing validity of the I-140 petition. *See Perez-Vargas*, 478 F.3d at 194 ("BIA misapprehended the question before it by failing to distinguish between jurisdiction to adjudicate an application for adjustment of status and jurisdiction to make a § 204(j) determination").

[7] Neither the government nor the respondent in *Perez-Vargas* disputed that IJ's have jurisdiction to determine whether this condition has been met.

Pursuant to their jurisdiction to adjudicate adjustment applications, IJs have jurisdiction to determine whether INA § 204(j)'s conditions have been met.[8] The adjudicator of an adjustment application is required to determine whether the person meets the statutory requirements of INA § 245, including the requirement that the person be "eligible to receive an immigrant visa" under INA § 245(a). For example, an IJ has jurisdiction to determine whether a family-based immigrant visa petition remains valid by examining whether the qualifying relationship continues to exist at the time the adjustment application is adjudicated.

Similarly, IJs have jurisdiction to determine whether two job classifications are the same or similar pursuant to their jurisdiction to adjudicate adjustment applications, namely, whether the person is eligible to receive an immigrant visa. *Perez-Vargas,* 478 F.3d at 195 (finding that the § 204(j) adjudication is a necessary part of this eligibility determination).

The BIA's decision does not address the scope of an IJ's jurisdiction to assess "same or similar" job classification as part of the IJ's adjustment jurisdiction. Had the BIA engaged in this analysis, it likely would have concluded that IJs have jurisdiction to apply § 204(j) for at least two reasons: (1) This conclusion is consistent with INA § 245(a)(2)'s mandate that the person be "eligible to receive an immigrant visa;" (2) It is also consistent with BIA case law indicating that IJs have historically reviewed the ongoing validity of visa petitions.

What is the impact of *Matter of Perez-Vargas*?

Simply stated, under the BIA's decision, employment-based adjustment applicants who have changed jobs or employers during the lengthy pendency of their adjustment application are without a forum in which to have the "same or similar" job classification issue assessed. *Matter of Perez-Vargas* provides that IJs lack jurisdiction to make this assessment. The regulations provide that DHS lacks jurisdiction to adjudicate adjustment applications when the applicant is in removal proceedings. 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1) (May 12, 2006). Thus, the Congressionally-provided right to change jobs or employers during the pendency of a lengthy adjustment application is nullified for these individuals. *Accord Perez-Vargas,* 478 F.3d at 195 (stating that the BIA's decision "would effectively deny the benefit of 204(j)" to adjustment applicants in removal proceedings).

Can I challenge the Board's interpretation of INA § 204(j)?

Yes. Importantly, challenges to the decision should be raised both before the IJ and/or the BIA to "exhaust" the issue and thus preserve the ability to challenge the BIA's interpretation before the courts of appeals on petition for review. Even if the issue was not raised before the IJ and/or BIA, some circuit courts nonetheless may review the issue under the futility exception to exhaustion. That is, a court could find that challenging the BIA's interpretation of § 204(j) in

[8] After a person is in proceedings, an immigration judge has exclusive jurisdiction over an adjustment application (except for the application of an "arriving alien"). 8 C.F.R. § 1245.2(a)(1)(i); *see also* 8 C.F.R. § 245.2(a)(1) (USCIS has no jurisdiction over an adjustment application if an IJ has jurisdiction over it). *And see* 8 C.F.R. § 1240.1(a) (providing that immigration judges have the sole authority to adjudicate applications for relief in proceedings, including adjustment of status applications).

Matter of Perez-Vargas before the IJ or BIA is futile, and thus not required, because IJs are bound by the decision and the BIA already has a position on the issue (*i.e.* the *Matter of Perez-Vargas* decision).

What legal arguments can I raise to challenge the Board's interpretation of INA § 204(j)?

Whether the BIA's interpretation of INA § 204(j) is lawful requires a court to apply the two-step test set forth in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Simply stated, the *Chevron* test requires that, as a first step, a court evaluate whether Congress has made its intent clear in the statute. If it has, the court goes no farther; Congress' clear intent must be given effect. *Chevron* step two is reached only if Congress' intent is not clear. Where Congress' intent is ambiguous, the court must evaluate whether the agency's interpretation of the statute is a permissible one. To date, the courts have rejected *Matter of Perez-Vargas* under the first step of Chevron, finding that the BIA's interpretation conflicts with the plain language of the statute. *See Perez-Vargas*, 478 F.3d at 194; *Sung*, 505 F.3d at 376. There is also an alternative argument that the BIA's interpretation fails at step two of the *Chevron* test.

First, practitioners can argue that *Matter of Perez-Vargas* is wrong because it violates Congress' intention that adjustment applicants in proceedings benefit from I-140 portability. In demonstrating the clear intent of Congress, practitioners can point to the plain language of § 204(j) and traditional statutory construction rules. For example, the plain language of INA § 204(j) does not exclude adjustment applicants in proceedings. In addition, a court must presume that Congress enacted § 204(j) with knowledge of existing law (*i.e.* that IJs have jurisdiction over adjustment applications in proceedings); a court must give meaning to Congress' choice not to restrict § 204(j)'s applicability to affirmative adjustment applications (the negative implication rule); the court's analysis of Congress' intent should consider the legislative history of AC 21; and any ambiguity as to Congress' intent should be resolved in favor of the noncitizen (*i.e.* the rule of lenity). In making these arguments, practitioners should rely on the three circuit court decisions that have reached this result to date.

Second, if the court nevertheless concludes that congressional intent regarding § 204(j) is ambiguous, it must consider whether the BIA's interpretation of § 204(j) is a permissible construction of the statute. There are several arguments why the BIA's interpretation is impermissible. First, the decision is contrary to law because it conflicts with the regulations granting immigration judges authority to adjudicate relief applications, including adjustment of status applications. *See* n. 8, *infra*. Second, the BIA's claim that IJs lack needed expertise is baseless because this is the kind of factual determination that IJs make frequently, and no special expertise is required in assessing "same or similar" job classification. Third, the BIA's decision is unreasonable because it leads to an absurd result in that it nullifies the express benefit Congress afforded in enacting § 204(j): the right to change jobs or employers.

Are there any options, besides federal court litigation, for adjustment applicants in proceedings who are eligible to port under § 204(j)?

In footnote 7 of *Matter of Perez-Vargas*, the BIA notes that "it is incumbent upon the DHS to determine whether respondent's visa petition remains valid pursuant to INA § 204(j)." Of

course, the footnote is pure *dicta* and is not binding on USCIS. The BIA has no authority to instruct on USCIS' jurisdiction and/or responsibilities as the two agencies are in entirely separate executive departments (the BIA is within the Department of Justice and USCIS is within the Department of Homeland Security). Thus, the fact that the BIA believes that USCIS should assess the "same or similar" job classification issue, does not change the fact that the BIA's decision leaves adjustment applicants without a forum to pursue their adjustment applicants.

However, this footnote may provide a basis for an adjustment applicant to request from the IJ administrative closure,[9] an adjournment,[10] a continuance or that the removal case otherwise be held in abeyance while USCIS determines whether the visa remains valid by determining whether the new job or employer is the "same or similar" as the prior job or employer. Once USCIS has made this determination, the IJ could reactivate the removal case and make a final determination on the adjustment application. Currently, neither USCIS nor the immigration courts have been willing to accept this adjudicatory responsibility, but it is an alternative remedy that a practitioner could suggest.

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[9] Under current Board practice, the respondent must get the trial attorney to agree to administrative closure of the removal proceedings pending adjudication of the adjustment application. *See Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996) (indicating that both parties must agree to an administrative closure before an IJ can order it). AILF disagrees with the holding of *Gutierrez* requiring both parties to consent before an IJ can administratively close a case. A practitioner could consider seeking administrative closure even if the government does not agree, and could subsequently challenge *Gutierrez* should an appeal to federal court be necessary.

[10] Unlike administrative closure, for which there is no regulatory guidance, there is a regulation authorizing an IJ to adjourn a case at the request of either party. 8 C.F.R. § 1240.6. This regulation does not require the consent of both parties. Thus, it may be beneficial to cite this regulation in support of your request for an adjournment.