HINSHAW

When Employer Errs, Foreign National may Challenge Denial of Immigrant Visa Petition

3 min read
Oct 20, 2013

In a significant decision for workers currently in the U.S. in an employment-based non-immigrant status (e.g., H-1B, L), the Sixth Circuit Court of Appeals held earlier this month that a foreign national may individually seek review of a denial of a green card petition filed on his behalf by his employer. The decision, *Patel v. USCIS*, No. 12-1962 (6th Cir. Oct. 11, 2013), suggests a new opportunity for employment-based immigrant visa applicants—if an immigrant visa petition is denied, the alien may request review in federal court even if the employer (or, more likely, former employer) no longer wishes to pursue the visa. Perhaps more importantly, though, the case demonstrates the serious problems that can and often do result from an incorrectly filed immigrant petition.

First, a bit of procedural background. To become a permanent resident based upon employment, a foreign national and his or her employer must complete a three-step process:

Step One: The employer must apply to the U.S. Department of Labor by filing Form 9089, requesting a certification that there are no U.S. workers available for the job and that U.S. workers will not be adversely affected by the foreign national's employment.

Step Two: Once the Form 9089 is certified by the Department of Labor, the employer must file an immigrant visa petition (Form I-140) with United States Citizenship and Immigration Services (USCIS), with the certified Form 9089 attached.

Step Three: If USCIS approves the Form I-140, the foreign national must then personally file another form (Form I-485) with USCIS requesting to adjust his or her status from non-immigrant to immigrant.

The *Patel* case involved a problem at Step Two (the Form I-140). The foreign national in the case had initially begun the green card process with one employer, and had gotten so far as obtaining a certified Form 9089. That application eventually stalled, however, and so the foreign national got a new job in another state. His new employer agreed to re-start the process for him but, unfortunately, rather than obtaining a new labor certification on Form 9089, the new employer skipped to Step Two and filed the Form I-140 using the former employer's Form

9089. Because a labor certification is not transferable to a new employer, the Form I-140 was denied. The foreign national—individually and without the support of the employer—then filed a federal lawsuit seeking review of the decision to deny the Form I-140.

The district court dismissed the foreign national's suit based upon a lack of standing, and the foreign national appealed. The question before a panel of Sixth Circuit judges, therefore, was whether a foreign national may seek review of USCIS's decision to deny an immigrant visa petition *filed by the foreign national's employer on his behalf.* The panel held that he could. Specifically, the judges ruled that the foreign national had both "prudential" and "constitutional" standing to seek review—his interests were "within the zone of interests" that immigration law seeks to regulate (the "prudential" part), and he alleged an injury that could be alleviated by a favorable decision (the "constitutional" part). His case, therefore, was sent back to the district court for further consideration.

This case could be significant for those non-immigrants who find themselves in a difficult situation during an immigrant visa process. Even though the employer is the one filing at Steps One and Two, the foreign national has a clear independent right to seek review. The case is even more noteworthy, however, as a demonstration of the pitfalls of filing an incorrect immigrant or non-immigrant petition: Mr. Patel, even though he will have his day in court, will almost certainly not succeed in overturning the USCIS decision. An appropriate filed Form I-140, therefore, would have saved him and his employer time, money, and perhaps even a green card.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

Immigration

Related Capabilities

Immigration