U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] **A** [redacted]

Date of this notice: 01/29/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A[redacted] Detroit

Date: JAN 29 2007

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: George P. Mann, Esquire

ON BEHALF OF DHS: Michael B. Dobson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] -
Nonimmigrant - violated conditions of status

APPLICATION: Remand; termination; administrative closure; withdrawal of grant of voluntary departure; adjustment of status

The respondent, a native and citizen of Lebanon, has filed an appeal from the decision of the Immigration Judge dated June 22, 2005, in which the Immigration Judge denied the respondent's application for adjustment of status. The respondent has also filed with the Board motions to remand, terminate proceedings, administratively close proceedings; and withdraw the voluntary departure granted by the Immigration Judge. The Department of Homeland Security ("DHS") has filed an opposition to the motions. For the reasons explained below, the record will be remanded.

At the time of the respondent's hearing before the Immigration Judge, he had an adjustment of status application that had been pending for more than 180 days (Tr. at 3, 6). He also had an approved employment-based visa petition (Form I-140) (Tr. at 6). The respondent acknowledged that he no longer worked for the employer who had filed the petition on his behalf, but he asserted that he qualified for adjustment of status because he had a new position that was the same or similar as the job for which the petition was filed. His new employer was present at the hearing and testified about the respondent's new job (Tr. at 23-27).

Section 204(j) of the Immigration and Nationality Act, 8 U.S.C. § 1154(j), provides that where an application for adjustment of status based upon an I-140 petition remains unadjudicated for 180 days or more, the applicant may proceed with adjustment, even if he changes jobs or employers as long as the position is in the same or a similar occupational classification as the job for which the petition was filed. The respondent argued that his approved employment-based visa petition was preserved under section 204(j) of the Act, and that the Immigration Judge had the authority to make a determination as to whether the respondent's job was the same or similar as his prior job. The

Immigration Judge, however, determined that she had no authority to make such a determination and denied his application for adjustment of status.

Subsequent to the Immigration Judge's decision in this matter, and while this appeal was pending, the Board issued a precedent decision that controls the respondent's case. In *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), the Board concluded that Immigration Judges have no authority to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Act after the alien's change in jobs or employers. Jurisdiction "lies with the DHS to determine whether the validity of an alien's approved employment-based visa petition is preserved under section 204(j) of the Act after the alien's change in jobs or employers." *Id.* at 831. In *Matter of Perez Vargas, supra*, we stated in a footnote:

> Inasmuch as the DOL[1] has clearly indicated its approval of the respondent's employment, and the respondent has asserted that he remains eligible for labor certification through his new employment, it is incumbent upon the DHS to determine whether the respondent's visa petition remains valid pursuant to section 204(j) of the Act.

Id. at 834 n.7. We cited the following in another footnote:

> *See* Paparelli & Lee, *supra*, at 581 (arguing that in order to reduce further administrative delays when an alien changes jobs, the best approach for implementing section 204(j) would be to allow the alien to obtain an advisory opinion from the INS (now the DHS) without requiring a formal adjudication in every case).

Id. at 833 n.4.

Considering the language quoted above, as well as the fact that the respondent's new employer has provided the respondent with a position that appears to be similar to the one he had with his former employer, we will vacate the Immigration Judge's decision and will remand this matter. On remand, the Immigration Judge shall provide the respondent with a reasonable opportunity to obtain a ruling from the DHS regarding his eligibility for adjustment pursuant to section 204(j) of the Act.

In light of our disposition of this matter, we need not address the respondent's motions. However, we will address the respondent's complaint that the Immigration Judge has physically returned written motions without ruling on them or maintaining the evidence that they were ever filed. The respondent's attorney has taken this opportunity to provide examples of other cases in which the same Immigration Judge has allegedly returned motions to the attorney without making their filing part of the record. With respect to the respondent's motion to reconsider, which was filed with the Immigration Judge on July 20, 2005, the Immigration Judge properly ruled that she lack jurisdiction over the motion, since at the time of her decision, jurisdiction had vested with the Board. *See* 8 C.F.R. § 1003.23(b). Although the respondent appears to claim that the Immigration Judge

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[1] Department of Labor.

did not rule on the motion, she clearly did rule on it as shown by the documents submitted by the respondent. The problem is that the motion and the ruling on the motion were not made part of the record. Accordingly, the Immigration Judge is directed to make all motions and the rulings on those motions part of the record of proceedings.

ORDER: The decision of the Immigration Judge is vacated.

FURTHER ORDER: The record is remanded for further proceedings consistent with this opinion, and for the entry of a new decision.

FOR THE BOARD