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Impact of I-140 Revocation

Submitted by admin on Jul 13th 2012

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13 July 2012

9.05 Mins

I have been meaning to share with you a few things about what we are noticing in the last few months, a whole flurry of I-140 denials, intents to revoke. It appears that USCIS has gone back and revisited even approved I-140's. What happens is, in these cases, an employee who has nothing to do with an employer's wrongdoing, if there is any wrongdoing in fact, gets stuck.

We represented a company?we've done this for three or four companies, but one company in particular comes to mind--they bought out another company?I think 100 or so employees--and I was actually involved in the merger and acquisition, and I suggested that they should escrow some money just to make sure that, if something goes wrong with the immigration compliance, we would have attorneys' fees to fight the problem. And it did work out because, in fact, there was a problem. What happened was the guy who sold the company had some issues?apparently, he had several companies?and he had some issues that were not brought to light until this company that hired us started filing their cases. When they started filing I-140's, USCIS came up with fraud allegations against the guy who sold the company. What happens in these cases is that the employees could lose the right to AC21 if the revocation is for fraud. They could lose their priority date if the revocation is for fraud. And they could lose their right to extend their H-1's if the revocation is for fraud. So the employee is the one who gets hurt the most. When we got retained--there were about 20-25 cases--we went in and argued it out with the government and, happily, all cases were approved. Each set of circumstances is unique. Sometimes we can get approvals and sometimes we cannot get approvals. This narrative doesn't mean we're always going to get approvals. I just want to talk to you guys and explain to you that this is happening. Don't think that just because you have an I-140 approval, you're good.

This morning, as I was going over the content on immigration.com, I noticed a comment on our forums. This person said this:

180 days on EAD will get over next week and I plan to go on AC21. Sponsoring employer is being inquired into for some fraud. No one knows exactly what's going on. He's going over to a new company.

These are his four questions. I think it's relevant to the whole community. That's why I'm recording this.

Will this fraud affect my I-485 application? Will I get an RFE?

First of all, no one can predict whether or not you will get an RFE. Whether the fraud will affect your I-485 depends on whether or not the I-140 is considered to be fraudulent. The biggest problem in these cases is because the I-140 is the employer's application. The employee does not get a notice, so before you know it, you get a Notice of Revocation of I-485 because, without your knowledge as an employee, the I-140 has been revoked. This is very unfortunate. It's a good idea for those of you who are moving or who want better information or handle on your I-140 to stay in touch with your lawyers. Make sure they know where you are and make sure they send a copy of the I-140 RFE. In Virginia, I am required by law to allow equal access to both the employer and the employee. So, if there is an RFE, by ethical obligation, I am required to give a copy to the employee as well. I am not sure if the Bar would frown upon redacting certain portions that might be very specific to the employer's tax history, etc. But normally, we need to give you enough information so that you can protect yourself, so that should be the ethical obligation for all lawyers. Therefore, you should be able to get some information if there is an I-140 revocation notice or intent to revoke issued by USCIS. The problem is, if the I-140 gets revoked for fraud, everything goes away--your right to carry forward your priority date, your right to get an H-1 extension, your right to do an AC21 successfully--all of that goes away. However, if the employer is willing to appeal, then while the appeal is pending, you can go ahead and keep getting your H-1 extensions.

Does it matter where you are shifting using AC21?

If this is a question related to geographical location, it does not.

Does a full time contracting offer matter?

You should not have a 1099. You should be on a W2.

Of course, there is a language in the Yates Memorandum of May 2005, which is the only

definitive memo on AC21, which talks about doing an AC21 transfer over to a company you yourself own, but there's a whole slew of issues connected with that. Actually, I think I have a lot of information on my blogs on this.

Does a big or a small company matter?

In my view, it does not matter. Not for AC21 purposes.

I want to add that there was a case recently from a federal court? I have the name of the case in my records-- where the court was quite offended by USCIS coming back after several years and revoking an I-140 that had already been approved. I think there are some really tricky legal problems with USCIS revoking cases that have long been settled. Be that as it may, all I can do is sensitize you to the issues and concerns.

Feel free to bring up whatever you have in our next free community conference call. Information about our free community conference calls is on the immigration.com website.

Good talking with all of you. Good luck.

Source URL (retrieved on 10 Aug 2020 - 13:37): <https://immigration.com/media/ac21-aos-portability/impact-i-140-revocation>