Revocation of H-1B Status

On January 21, 2009 Vermont Service Center [“VSC”] discussed the impact of a revocation of an H-1B petition on H-1B portability. It should be noted that VSC does not adjudicate portability. Eligibility for H-1B portability is defined at INA § 214(n) as follows:

1. The foreign national was lawfully admitted
2. The new petition is "non-frivolous"
3. The new petition was filed before the date of expiration of period of authorized stay
4. Subsequent to lawful admission, the foreign national has not been employed without authorization

If an H-1B nonimmigrant meets the above criteria, he would be eligible to work pursuant to H-1B portability even if he was not eligible for an extension or change of status. Let us take an example. An H-1B nonimmigrant is terminated from his H-1B employment on January 15th. In order to avoid monetary penalties, his H-1B employer requests revocation of the petition that same day, and it is automatically revoked under 8 C.F.R. § 214.2(h)(11)(ii).

Four weeks later, the alien finds a new employer who files a new, non-frivolous H-1B petition on his behalf. Since he has complied with INA §214(n), he is eligible to start working. What it means is that he may work "*until the new petition is adjudicated.*"

Upon the approval of the petition, authorization to accept employment pursuant to H-1B portability terminates, and, if the USCIS declines to favorably exercise discretion under 8 C.F.R. § 214.1(c)(4) to "forgive" the failure to maintain status and to grant an extension of stay, he instead will need to depart the U.S. and obtain an H-1B visa at a U.S. consulate. If he already has a valid H-1B visa from his former employer, he will need to depart the U.S. and, upon re-entry, present his old visa with the new I-797 at the port of entry.