THE JOB PORTABILITY REQUEST

By Gabriella Agostinelli, Esq.

Waiting for an employment-based green card can be a years-long and arduous process. For individuals who are already living and working in the U.S., circumstances may arise during this process that require a change of employment. With this fact in mind, Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) to address various problems stemming from lengthy immigration processing delays, including the need for job flexibility for foreign workers in the U.S. experiencing delays and backlogs in the employment-based immigrant visa process. AC21 created INA § 204(j) to allows certain individuals to change jobs or employers under specific circumstances ("204(j) portability"). We now explore this process below.

The Green Card Process

There are two central steps within an employment-based green card application process, which may be filed concurrently or sequentially:

STEP1: Filing a Form I-140 Immigrant Petition: Here, we are asking US Citizenship and Immigration Services (USCIS) to certify that an individual is *eligible* for a green card based on his or her employment.

STEP 2: Filing a Form I-485 Adjustment of Status Petition: We are requesting the *physical issuance* of the green card document for the individual given the approval in Step 1. During this process, the applicant will be issued interim work authorization in the form of an Employment Authorization Document (EAD).

Please note that in certain EB-2 and EB-3 cases, employers will have also needed to test the U.S. labor market and obtain a Labor Certification from the Department of Labor prior to submitting a Form I-140 petition on the beneficiary's behalf.

Portability: Who, What, When

INA § 204(j) dictates that once an individual's Form I-140 Immigrant Petition with the original employer is pending or approved, and the Form I-485 Adjustment of Status application has been pending at least 180 days, an individual may request to "port" to a new position with a new employer. In addition to allowing such individuals to change jobs, the major significance of INA § 204(j) is that new employers *do not* need to undergo the preliminary steps of the green card process (testing the U.S. labor market, obtaining a Labor Certification, submitting a new I-140 petition, etc.) before onboarding the foreign worker.

This "job portability request" must confirm receipt of a bona fide job offer from a new U.S. employer that is in the same or a similar occupational classification as the position for which the underlying Form I-140 was filed. A portability request should include a completed Form I-485 Supplement J along with a copy of Form I-797 Receipt Notice to establish that the Form I-485 has been pending for 180 days or more. A copy of Form I-797 showing the individual is the principal beneficiary of an approved or pending Form I-140 is also required. Finally, an individual and/or the new employer may submit any other evidence to demonstrate that the new position is in "the same or a similar occupational classification" as the job specified in the Form I-140 petition.

The government will issue a Form I-797 Receipt Notice upon receiving the portability request. This notice will confirm the new employer's business name and employer site. Over the next several months the beneficiary will generally be notified to attend an interview at a local USCIS office prior to receiving an approval on the underlying Form I-485 Adjustment of Status application.

The portability request may be submitted to USCIS before *or* after the foreign worker has commenced employment with the new employer. As long as the foreign worker has received his or her EAD while the adjustment of status application has been pending, he or she may begin working for the new employer at any time.

Please note that a job portability request is not required for individuals applying for permanent residence as Aliens of Extraordinary Ability or under the National Interest Waiver category.

"Same or Similar" Guidance

USCIS's March 18, 2016 Policy Memorandum (PM 602-0122.1) provides guidance for determining whether a new job is in "the Same or a Similar Occupational Classification" for purposes of section 204(j), Job Portability.

a. Burden of Proof:

The policy memorandum establishes that the "preponderance of the evidence" standard shall be used when evaluating each portability request. Here, the applicant must show that the factual circumstances of his or her claim are more likely to be true than not. Even if an USCIS has some doubt about a claim, an applicant will have satisfied the standard of proof if he or she submits relevant, probative, and credible evidence, considered "individually and within the context of the totality of the evidence," that leads an USCIS to conclude that the claim is "more likely than not" or "probably true."

b. Determining Whether a Position is "Same or Similar" Occupational Classification

As set forth above, to determine whether a new job is valid for purposes of 204(j) portability, USCIS must first determine by a preponderance of the evidence whether the new job is in either the same occupational classification or a similar occupational classification.

With respect to whether two jobs are in the "same" occupational classification, USCIS looks to whether the jobs are "identical," "resembling in every relevant respect," or "the same kind of category or thing." With respect to whether two jobs are in "similar" occupational classifications, USCIS looks to whether the jobs share essential qualities or have a "marked resemblance or likeness."

To establish that a new position is in the same or a similar occupational classification as the offer of employment for which a Form I-140 petition was filed, the worker may submit evidence of the following:

- The DOL occupational classification codes assigned to the respective jobs;
- The job duties for each job;
- The skills required for each job;
- The experience required for each job;
- The education required for each job;
- The training required for each job;
- The licenses or certifications specifically required to perform each job;
- The wages offered for each job; and
- Any other material and credible evidence relevant to a determination of whether the new position is in the same or a similar occupational classification.

The policy memorandum further states that an individual's progression in his career may easily fit the standards of being 'same or similar' including "when an individual moves into a more senior but related position that does not have a managerial or supervisory role (e.g., a promotion from a software engineer to a senior software engineer)." The memorandum confirms that in such cases, USCIS should consider whether the original position and the new position are in the same or similar occupational classification(s) consistent with the preceding section.

A portability request should include a detailed cover letter outlining the "same or similar" nature of the previous and new positions along with evidence in support of the above. Recommended evidence may include a copy of the previous I-140 petition, job descriptions for each job position, excerpts from the OOH or O*Net, a letter from a

supervisor at the new position confirming job details, and any other documentation showing that the positions are strongly comparable.

The Fear of Retaliation

Many foreign workers are reluctant to take advantage of INA(j) benefits under the fear that the original employer will "retaliate" against the worker for changing employers. This is a common fear especially when the original employer has invested significant resources into the green card application process.

In reality, the employee should have no reason to fear *so long as* the underlying Labor Certification (if applicable) and Form I-140 Immigrant Petition was prepared soundly and in good faith. It is true that the original employer may *request* to withdraw a Form I-140 at any time. However, if the Form I-140 has already been approved for at least 180 days, or an associated Form I-485 has been pending for at least 180 days, USCIS will *not* revoke the approved Form I-140 and the beneficiary will retain the priority date from the form. USCIS will consider the underlying *job offer* withdrawn, but the *Form I 140* will remain approved for purposes of INA 204(j) portability unless the original employer or the government can show fraud, material misrepresentation, invalidation or revocation of the underlying labor certification (PERM) or material error in the approval of the I-140 petition. Absent proof of the above, the I-140 and its priority date will remain valid.