

PORATABILITY DURING ADJUSTMENT STATUS

The American Competitiveness in the 21st Century Act (AC21) allows adjustment of status applicants to change jobs or employers in the same or similar occupational classification after their applications are pending for 180 days. This allows people with adjustment applications to enjoy career mobility. In 2005, William Yates, Associate Director of Operations of USCIS issued a very important Memo on AC21. This article will focus on Mr. Yates' interpretations of the portability provisions of AC21.

1. Moving to a new employer when I-140 not yet approved

The key point is that an adjustment of status applicant can move to a new employer even if the I-140 is not yet approved. In this case, the USCIS examiner is instructed to determine if the I-140 petition is approvable or would have been approved had the case been adjudicated within 180 days. If the only issue relates to ability to pay or any other issue arising after the filing of the petition, the officer should approve the petition on its merits and then determine if the new job is in the same or similar occupation. Then the officer must adjudicate the adjustment of status application.

If additional evidence is needed, an RFE can be sent to try to resolve the issue. If the officer finds the case approvable, he or she will then move to the adjustment application.

Individuals who wish to exercise portability while the I-140 is pending should exercise great deal of caution because the old employer may be unwilling or unable to furnish the evidence required by the RFE.

2. Same or substantially similar occupations

The USCIS examiner must consider the job description on the labor certification or initial I-140 petition and the job duties of the new employment. The Memo advises the examiner to refer to the DOT/SOC code assigned the old and new position.

3. Requirements of the new employer

The new employer is not required to demonstrate an ability to pay the worker. Further, a difference in the wage alone cannot be used as basis for denial. However, a substantial difference may be considered as a factor in determining if the new employment is the same or similar occupation. Geographic location of the new employer is also not a factor

4. Self-Employment

An adjustment applicant is allowed to transfer to self-employment. However, USCIS indicated that it would look hard at these cases to see whether the job is the same or similar, whether the I-140 petitioner really intended to employ the adjustment applicant, and whether the adjustment applicant really intended to work for the petitioner.

5. Priority date

A question often asked is what happens to the applicant's priority date as a result of moving to a new employer. Nothing. The priority date remains the date of the filing of the initial labor certification or the filing of the I-140 when an approved labor certification is not required.

This article does not constitute legal advice but we hope this has been helpful in presenting your options while your adjustment application is pending. If you have any questions about your particular situation, contact us and let us assist you in preparing your case.

The Law Offices of Darren B. Silver & Associates concentrates exclusively to the practice of immigration and naturalization law. Mr. Silver has an extensive knowledge of all aspects of immigration law and procedures. His career in immigration includes a prior position as an Adjudications Officer for INS in Los Angeles, California. Mr. Silver served the INS for a period of three years, from 1992 through 1995. While working for INS, Mr. Silver assisted in recommending policy decisions, interviewing aliens for status changes and reviewed naturalization appeals.

The experience of working inside the INS has allowed Mr. Silver significant insight into maneuvering through the complex maze which makes up the Immigration Service. Mr. Silver formed the Law Offices of Darren B. Silver in 1996 and has maintained one of the most successful immigration practices in the country. Mr. Silver is an active member of the California Bar, the Los Angeles County Bar Association immigration section, American Bar Association and the American Immigration Lawyers Association (AILA).

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