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Changing Jobs While Green Card Application is Pending

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We have received numerous inquiries from therapists, nurses, domestics, teachers and other foreign workers who have been sponsored by US employers for a green card as to whether they can accept a new job offer while their case is pending with the Immigration Service.

Some of these workers needed to move to another employer because the sponsoring employer was going out of business. Others needed to move to take advantage of better working conditions or higher pay. But in all these cases, the foreign workers were reluctant to change jobs or employers out of fear that their employment-based immigration would be adversely affected.

Can a foreign worker change her job or employer while her green card application `is pending with the Immigration Service? The answer depends on whether the portability rule applies to the case.

In order to understand the portability rule, we must situate the foreign worker's I-485 application within the framework of employment-based immigration.

Usually, a foreign worker who is already in the US files an I-485 application for adjustment of status to permanent residency, which is technically the last step towards obtaining a green card. Procedurally, the I-485 application of the foreign worker may be submitted to the Immigration Service together with the petition for foreign worker or I-140 petition filed by the US employer. In essence, the legal basis for the I-485 application is the US employer's I-140 petition.

The portability rule is a provision in the American Competitivenes in the 21st Century Act of 2000 (AC21) that allows for "job flexibility for long delayed applicants for adjustment of status to permanent residents."

In a recent memo, the Immigration Service's Associate Director for Operations, William R. Yates clarified the applicability of the portability rule particularly in the context of two important factors: first, the delayed adjudication of the adjustment of status case (I-485); and second, porting off to the "same or similar" occupation.

Crucial 180-day period

If the I-485 has not been acted upon by the Immigration Service after 180 days from filing, the foreign worker may opt for portability and change jobs or employers even if the I-485 is based on the sponsorship of the previous employer.

An approved I-140 petition or labor certification will not be affected and remains valid when the foreign worker avails of the portability provision. The original I-140 or labor certification may also remain unaffected by portability even if the I-140 is still unapproved as long as it is approvable had it been adjudicated within 180 days.

Although porting off during the pendency of the I-140 petition is allowed, complications may occur as when the Immigration Service issues the sponsoring employer a Request for Further Evidence

(RFE) to clarify the initial petition. In such case, the I-140 could be denied if the sponsoring employer fails to respond to the RFE.

The I-140 petition will no longer be valid for portability if it is withdrawn by the employer during the 180 day period or if revoked or denied at any time. If the revocation, however is based on a withdrawal submitted after the 180-day period, the I-140 remains valid for portability.

"Same or Similar" Occupation

The Yates memo sends out mixed signals on how to interpret the term "same or similar occupation" in portability cases.

On one hand, it advises Immigration Service adjudicators to check the SOC/O*NET Code of the Department of Labor to determine whether the foreign worker is changing to the "same or similar" occupation. "SOC/O*NET" stands for "Standard Occupational Classification/ Occupational Information Network." It is a comprehensive listing of occupations, their respective characteristics and worker attributes.

Immigration practitioners are wary that reliance on the SOC/O*NET code may leave little room for flexibility in cases where the SOC/O*NET code of the previous job and the new one do not exactly match as with the case of a biologist and a college biology teacher.

On the other hand, the Yates memo states that adjudicators are to consider the job description in the initial I-140 petition or labor certification and compare it with that of the new employment to determine whether they are the same or similar occupations.

The Yates memo also clarifies whether certain aspects of the new employment should be considered in determining the issue of "same or similar occupation."

For one, the wage difference, as long as it is not "substantial," has no bearing on whether the new employment is the same or similar. The change in the geographical location of the new employment from that indicated in a labor certification is not determinative either.

Job Flexibility

The Yates memo confirms that the foreign worker may port off to self-employment. Moreover, the foreign worker need not be actually employed by the sponsoring employer to avail of the portability rule as the basis for adjustment of status is not actual or current employment but prospective employment.

As the memo explains, one of the major requirements in employment-based immigration is *bona fide* intent on the part of the I-140 petitioner to employ, and on the part of the foreign worker to be employed. In all portability cases, an offer of employment must have been *bona fide* at the time the I-140 was filed, and at the time the I-485 was filed, if not filed concurrently.