

Adjustment Portability

Foreign nationals who are awaiting completion of their employment-based green card applications through Adjustment of Status (AOS), may be eligible for adjustment portability. The “American Competitiveness in the Twenty-First Century Act of 2000” (commonly referred to as “AC21”), increases employment flexibility for those who qualify. Foreign nationals who have an employment-based Adjustment of Status (green card) application pending with US Citizenship and Immigration Services (USCIS) may change to a similar position with a different employer, provided they meet certain criteria.

Background

As a general rule, all employment-based green card applications are employer, employee, job duty and job location-specific. If any one of these factors has a material change, before green card issuance, the application is lost. This can result in significant processing delays. Adjustment portability provides for a limited exception to this general rule.

Currently, no regulations are implementing this new law. USCIS has issued a non-binding memorandum, but these can change without prior notice. Accordingly, it is Clark Hill's opinion that adjustment portability should be used cautiously, and only with the assistance of counsel.

Requirements

The adjustment portability provision of this law requires that the foreign national continue to work in the same or similar field, doing the same or very similar job, even if the company and job location have changed. We require certain documents before an effective evaluation of the risks can be determined in any case.

The individual's Adjustment of Status application must have been pending for at least 6 months, and it is preferred if the underlying I-140 Immigrant Worker Petition has been approved. We have observed cases that experienced problems when the I-140 was not approved before Adjustment Portability was utilized. As a result, we strongly prefer that the I-140 be approved to qualify for this option. However, recent non-binding discussions with USCIS confirm that if the I-140 is later revoked by the employer, and not for reasons involving fraud, the foreign national keeps his/her priority date. If the priority date is maintained, the I-140 should continue to be permitted for Adjustment Portability, if the other criteria are met. Our office must review the following information before utilizing this provision for our clients:

- Description of the proposed new position, salary, and work location address.
- Copies of all prior petitions including the Labor Certification, copy of I-140 Petition and approval, copy of I-485 Adjustment Petition and receipt, and an Employment Authorization Card. A copy of all prior temporary visa paperwork, including I-94 cards and Visas, are also useful. Applicants who do not have these can file a Freedom of Information Act (FOIA) request with USCIS. Our office can assist with those requests as well. Processing times fluctuate on FOIA requests.

Foreign nationals must remember to maintain valid Advance Parole documents, to allow for continued international travel while the adjustment is pending. Any temporary work status (H-1B, L-1, etc.) will become invalid once a change of employers begins. The same would be true for any dependent family members (spouse and children on an H-4 for example). This is particularly true if the H-4 spouse started working on his/her EAD card.

Note: The new employer and the foreign national should remember that if the rules for adjustment portability change, or if the individual's Adjustment is denied, the employee may not be allowed to continue working. Our assessment involves the determination of many different factors.



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