
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, prior to 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.

It is our opinion that adjustment portability should be used 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.

To use Adjustment Portability, an Adjustment of Status applicant must have a valid offer of employment from the employer who sponsored or is sponsoring their I-140 to file an I-485 Adjustment of Status application. The individual's Adjustment of Status application must have been pending for at least 6 months. Clark Hill has 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. I-140 petitions that have been approved for 180 days or more will not be automatically revoked solely because the employer withdraws the I-140 petition or the employer's business has terminated. If an employer withdraws the I-140 before the I-140 and I-485 have been pending 180 days, the I-140 goes away and the applicant can no longer rely on the I-140 for Adjustment Portability.

Our office must review the following information before utilizing Adjustment Portability 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, 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, in order 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.

It is a best practice to submit the Adjustment of Status Portability form to USCIS around the time the employee begins working for the new employer, if not before.

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 a determination of a number of different factors.