JACKSON & HERTOGS
IMMIGRATION AND NATIONALITY LAW SERVICES

I-485 PORTABILITY UNDER AC21 | FREQUENTLY ASKED QUESTIONS

INTERFILING BACKGROUND INFORMATION

Under the AC21 amendments to the Immigration and Nationality Act, an "adjustment of status applicant can switch jobs or employers if:

- their Form I-485 application for "adjustment of status" has been filed and pending for 180 days or more,
- their Form I-140 immigrant visa petition anchoring the I-485 application is approved or likely to be approved, and
- the new job (either with the same or different employer) is in the same or similar occupational classification as the job for which the I-140 immigrant visa petition was filed.

Subsequent DHS regulations implementing AC21 clarified the I-485 portability benefit as follows:

- clarifies guidance on what constitutes the "same or similar occupational classification" to allow I-140 portability to different jobs and different employers, or different jobs with the same employer,
- confirms an I-140 immigrant visa petition's validity under certain circumstances despite an employer's withdrawal of the approved I-140 petition or the termination of the employer's business.

FREQUENTLY ASKED QUESTIONS

1. Does this I-485 portability provision apply to individuals whose adjustments are based on any employment-based immigrant visa petition?

Under the regulation put into effect on January 17, 2017, this portability provision applies to only under 1st, 2nd, and 3rd preference employment-based immigrant visa petitions filed by an employer. This means that employer-filed I-140 immigrant visa petitions for EB-1B Outstanding Researchers, EB-1C Multinational Managers, EB-2 workers holding advanced degrees, EB-2 aliens of exceptional ability, and EB-3 skilled workers and professionals qualify for this portability benefit.
The portability provisions do not necessarily pertain to classifications where the individual self-petitions, as can be done with the EB-1A Extraordinary Ability Alien and EB-2 National Interest Waiver classifications. However, beneficiaries in these latter classifications can change positions or employment so long as they are continuing to work in the same field as outlined in the extraordinary ability or national interest waiver petition.

2. Must the I-140 immigrant visa petition be approved before the I-485 portability provisions apply?

No. However, it is much safer to wait for the I-140 be approved, and to upgrade a pending I-140 immigrant visa petition to "premium processing", where possible. Where the I-485 has been pending for 180 days and the I-140 remains unapproved, USCIS will review the pending I-140 to establish that it is "approvable". USCIS has wide authority to determine what constitutes "approvable" when there is no approval yet issued. USCIS has indicated that I-140 petitions that would have been approvable but for an "ability to pay" problem arising **after** the 180-day period remain "approvable", provided the I-140 immigrant visa petition meets all other requirements.

3. What is considered "same or similar occupational classification"?

USCIS regulations define "same occupational classification" as "an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved." The regulation defines "similar occupational classification" as "an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved."
Under prior USCIS guidance, adjudicators were to consider, among other factors:

- the description of the job duties, the Department of Labor's Dictionary of Occupational Titles ("DOT") or Standard Occupational Classification ("SOC") code assigned to the initial I-140 petition,
- the appropriate DOT or SOC code for the new position, and
- whether there is a substantial discrepancy between the previously offered wage and the new wage.

While a difference in wages offered cannot in itself become the basis for denial, USCIS has indicated that a major difference in offered wages could be considered evidence that the new role is not in the same or similar occupational classification.

4. Must the adjustment applicant have a job offer with a new employer, or could self-employment count, provided the self-employment is in the same or similar occupational classification?

Yes, self-employment can benefit from AC21 I-485 portability. Under current regulations, adjustment applicants may "port" a pending employment-based Form I-485 "adjustment of status" application to a self-employment opportunity. The adjustment applicant must still meet all other "porting" requirements. The adjustment applicant must be able to demonstrate that the new job is in the same or similar occupational classification to that for which the I-140 petition was filed. The applicant must also be prepared to demonstrate that the new job is legitimate, and not merely an empty job description based on conjecture.
Finally, USCIS may inquire as to whether the I-140 petition represented the former employer's true intentions to employ the individual upon approval of permanent resident status. USCIS may also inquire as to whether the individual in fact intended to work for that employer when the I-140 petition and AOS applications were filed. Note that the adjustment applicant may not be merely job-seeking at the time the I-485 is adjudicated. The burden is placed upon the adjustment applicant to demonstrate a valid offer of employment at the time of I-485 adjudication. Given the additional analysis involved in a self-employment situation, a full-time position involving a job offer for employment (as opposed to an independent contracting role) with a new employer is preferable. "Self-employment" portability is therefore risky, though USCIS has approved "self-employment" I-485 portability requests in the past.

5. Can I-485 portability occur when the adjustment applicant is promoted to a different position with the same employer?

Yes, moving to a different position similar in occupational classification with the same employer can satisfy AC21 AOS portability. Under current regulations, "similar occupational classification" means an occupation sharing essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved. DHS has stated in regulatory comments that "cases involving career progression must be considered under the totality of the circumstances to determine whether the applicant has established by a preponderance of the evidenced that the relevant positions are in similar occupational classifications."

6. If the individual accepts a job with a new employer in a completely different part of the country, does this provision take effect?

Yes, as long as the new job is in the same or similar occupational classification. Geographic location of the employment is not a basis for denial of portability.

7. If the employer withdraws the I-140 immigrant visa petition after the adjustment applicant leaves the employer, is the individual's adjustment application nevertheless protected under this I-485 portability provision?

It depends upon the timing of such a withdrawal. Under current regulations, if the employer withdraws its I-140 immigrant visa petition ***less*** than 180 days from the date the I-140 immigrant visa petition was ***approved*** and the I-485 application has not been pending for at least 180 days, the withdrawal results in a revocation.

- If the employer withdraws an I-140 immigrant visa petition before it has been approved, and before the I-485 has been pending at least 180 days, the withdrawal results in a revocation.
- If the employer withdraws its petition more than 180 days ***after*** approval of the I-140 immigrant visa petition, there is no revocation, and the individual can proceed with his/her immigration and port the process to new employment.
- If the employer withdraws its petition more than 180 days ***after*** the I-485 application was filed, there is no revocation and adjustment applicants can proceed with their immigration and port the process to new employment.

If the I-140 immigrant visa petition is revoked before 180 days from approval, the adjustment applicant does not retain a priority date, and must start the immigration path over.

Both the I-140 visa petition and I-485 adjustment of status application focus on the future employment of the applicant. At the time of filing of filing the I-485 adjustment of status application, the I-140 employer and adjustment applicant must have both intended for the applicant to undertake the employment at the time the Form I-485 adjustment application is approved. USCIS has indicated it will investigate such cases

as it deems appropriate. Under these circumstances, it would be prudent to notify the USCIS of the porting before the USCIS receives the employer's withdrawal and to consult with an immigration attorney before any steps are taken.

8. What happens if the petitioning employer's business terminates?

Similar to employer withdrawals of I-140 immigrant visa petitions, the I-140 immigrant visa petition will no longer be valid if the employer's business terminates:

- before 180 days since the filing of the Form I-485;
- before 180 days since the approval of the I-140 immigrant visa petition, (unless the Form I-485 has been pending for 180 days); or
- USCIS determines the Form I-140 was in fact not approvable at the time of filing for reasons such as fraud or mistaken approval.

Note that this does not necessarily include situations where there is a successor company in a merger or acquisition. These situations should be discussed with immigration counsel.

9. When can an I-140 immigrant visa petition no longer be used for I-485 porting purposes?

The I-140 immigrant visa petition will not be valid for porting the I-485 if: 1) the pending I-140 immigrant visa petition is withdrawn before the Form I-485 adjustment of status application has been pending for 180 days; or 2) the approved I-140 immigrant visa petition is withdrawn less than 180 days of approval, unless the I-485 has already been pending for 180 days; or (3) the I-140 immigrant visa petition is denied or revoked reasons such as fraud or mistaken approval.

10. Do the same rules apply if an individual is processing his/her application through a US consulate?

Although the plain language of AC21 states only references adjustment of status applications, Department of State officials have indicated that U.S. consulates have considered AC21 I-485 portability to apply to consular immigrant processing as well. For several reasons, Jackson & Hertogs continues to recommend adjustment of status over consular processing, as there are generally more protections to adjustment applicants than to immigrant visa applicants.

Please note that this FAQ does not provide specific legal advice on any given case. Jackson & Hertogs cautions you to seek individualized advice from qualified legal counsel for your particular set of circumstances.