

AC-21 AND H-1B PORTABILITY

On October 17, 2000, the President signed the American Competitiveness in the 21st Century Act of 2000 ("AC-21"), which impacted both H-1B and permanent residency cases. One of the most important benefits AC-21 was the creation of H-1B visa "portability." AC-21 permits certain individuals originally authorized to perform H-1B employment with one employer to commence H-1B employment with a new employer upon the filing (not approval) of new petition if:

- (A) they were lawfully admitted into the United States;
- (B) their employer filed a nonfrivolous H-1B petition for new employment before the expiration date of their authorized period of stay;
and
- (C) subsequent to such lawful admission, were not been employed without authorization in the United States before the filing of such petition.

USCIS has yet to issue regulations specifying how the new H-1B employer would complete the Form I-9 in the "portability" context. For now, we are advising the employer to make a copy of both the person's current I-94 and H-1B filing fee receipt notice, attach them to the I-9, and to annotate the I-9 in Part 2, List C, "I-797C WAC #____ - employment authorized under AC-21." If/when the H-1B visa petition is approved, the employer will need to re-verify the I-9. If the petition is denied, the individual must stop his/her employment with the company immediately.

In H-1B portability employment scenarios, our office has been routinely sending out the filing receipts to you as we receive them. You will now receive a short memo attached to the change-of-employer receipts, which outlines the above issue.

USCIS guidance has stated that those with otherwise valid H-1B visas may depart the United States and be readmitted using the I-797 receipt notice of the newly filed H-1B visa petition. However, because of the vague nature of USCIS guidance, those planning international travel after having taken advantage of H-1B portability may wish to contact Jackson & Hertogs in advance of such travel.