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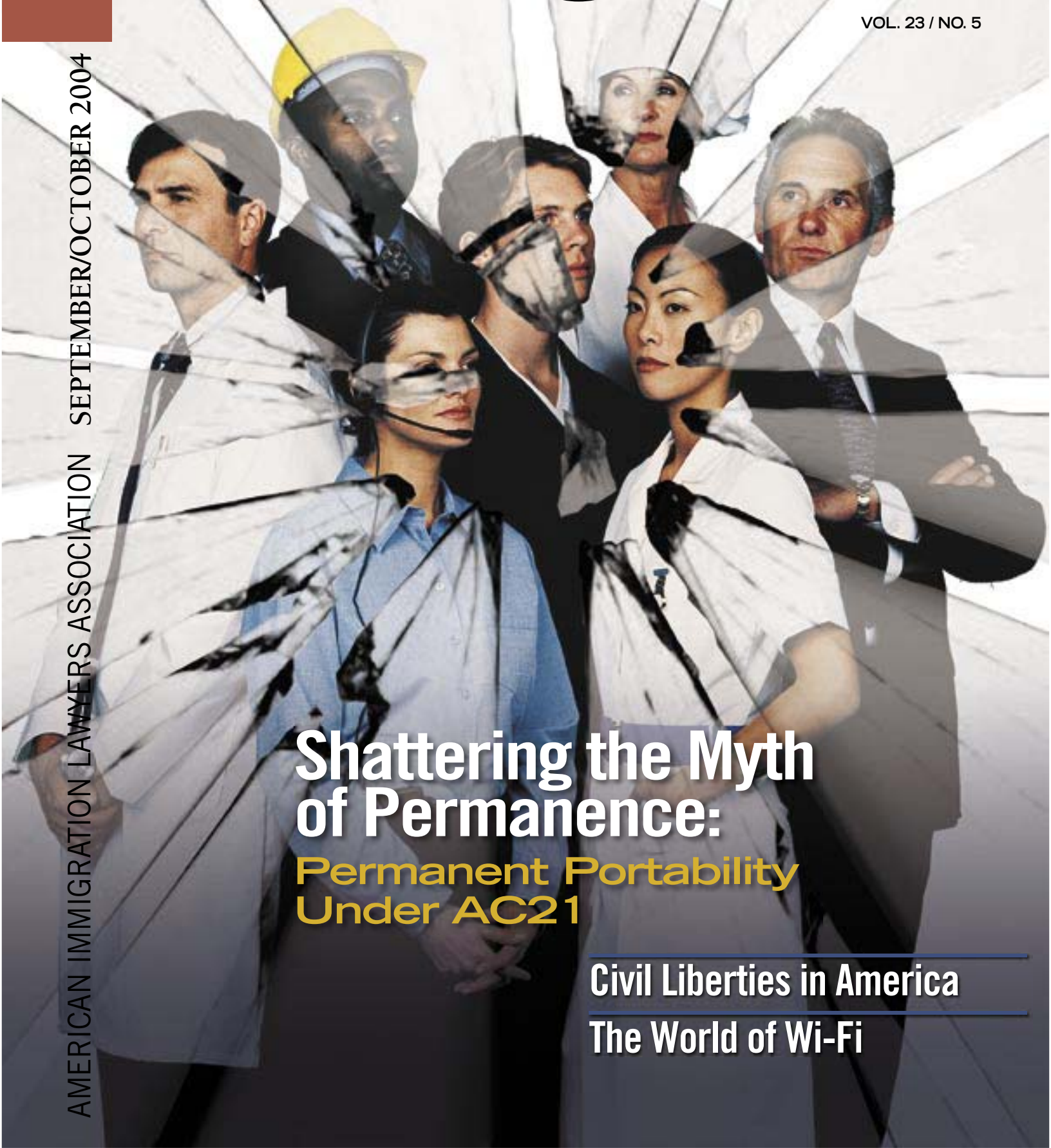


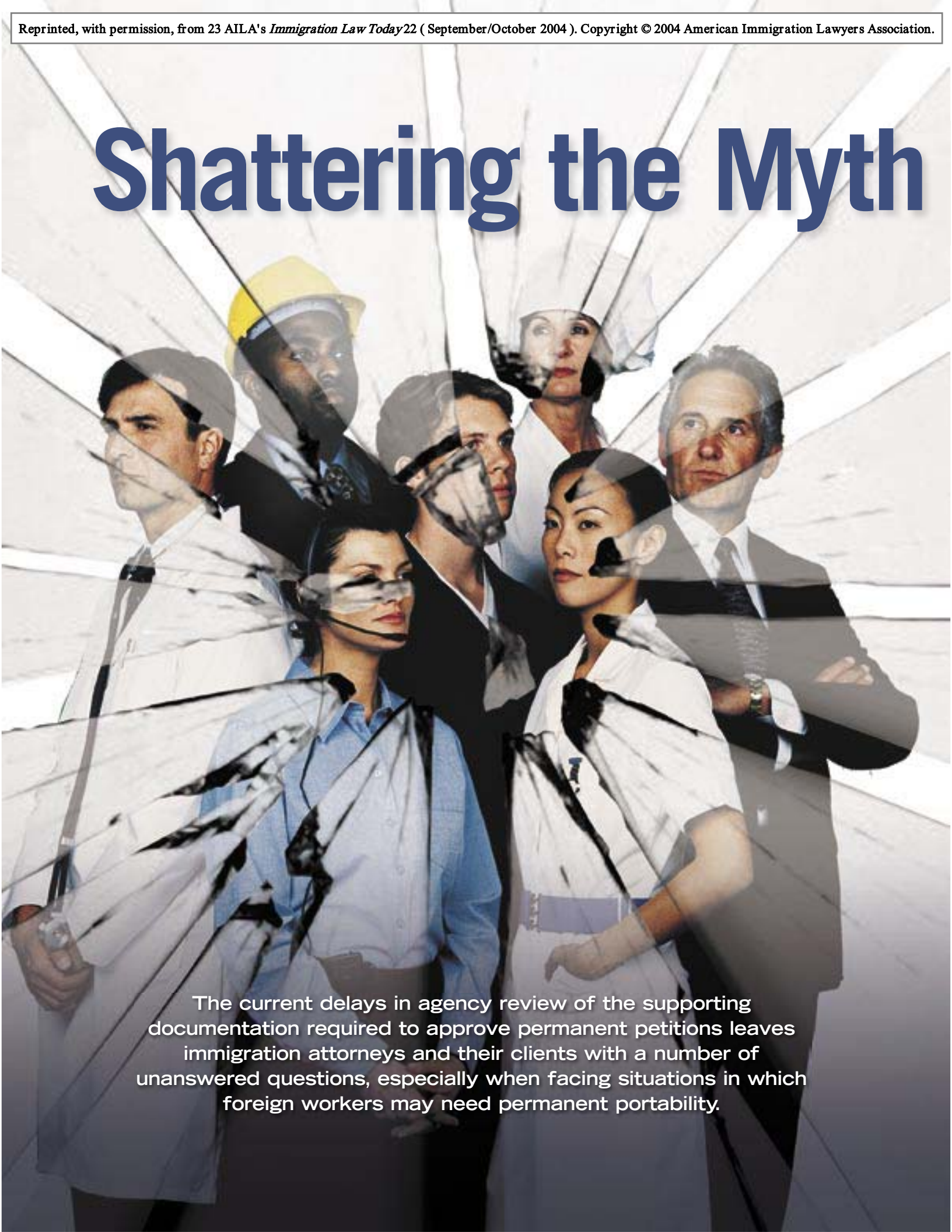
# Shattering the Myth of Permanence:

## Permanent Portability Under AC21

## Civil Liberties in America

## The World of Wi-Fi

# Shattering the Myth



The current delays in agency review of the supporting documentation required to approve permanent petitions leaves immigration attorneys and their clients with a number of unanswered questions, especially when facing situations in which foreign workers may need permanent portability.

# of Permanence

## Permanent Portability Under AC21

**By Eric Fleischmann**

IMMIGRATION LAW IS BUILT ON A NUMBER OF MYTHS. Prime among these is the concept that a permanent job offer made to a foreign worker will remain open and unchanged during the years it may take the worker to obtain permanent resident status. In reality, each career has many twists and turns. A new hire can start with one job title and set of responsibilities, then grow to accept broadened duties over time. However, until the passage of the American Competitiveness in the 21st Century Act (AC21)[1] in October 2000, the employer of a foreign worker was generally required to honor the myth of permanence and confirm that the original job offer—often certified by the Department of Labor (DOL)—remained open until a reasonable time after the worker acquired a green card.

By enacting the permanent portability provisions of AC21, Congress shattered the myth of the permanent job and recognized that it was unrealistic to expect foreign workers to remain stationary despite the tidal flows of economic change. Responsible agencies, however, have reacted with their customary blend of written and oral pronouncements about the meaning of the statute, and have failed to promulgate codifying regulations upon which porting foreign workers can rely. While Congress may have hoped that the new law would push adjudicators to speed processing of permanent cases, instead we have seen increased processing delays.

Immigration attorneys have proposed a number of responses. Some suggest we take our lead from government officials and advise our clients to act with caution. Others recommend that we encourage responsible agencies to implement needed regulations. This author and others, instead, propose to do what we do best—accept the current state of flux as an opportunity to propose creative solutions to help our clients and aid them in assessing the related risks.

### Agency Action

The law by which Congress granted foreign workers the right to change their permanent jobs has few restrictions. AC21 permits foreign workers to "port," or move to a new job or employer, without affecting the validity of the underlying I-140 petition once the U.S. Citizenship and Immigration Services (USCIS) has failed to adjudicate the I-485 within 180 days. Congress used carefully crafted language to grant this right:

> *Increased Job Flexibility For Long Delayed Applicants For Adjustment Of Status*: … An [I-140 immigrant visa] petition … for an individual whose application for adjustment of status … has been filed and remained unadjudicated for 180 days shall remain valid with respect to a new job if the individual changes jobs or employers, if the new job is in the same or a similar occupational classification as the job for which the petition was filed.[2]

### ➤ The Cronin Memo

In an early agency comment on the law, Michael Cronin, legacy INS Acting Executive Associate Commissioner, Office of Programs, noted that AC21 grants foreign workers the right to move to a new job, under certain conditions. Cronin's June 19, 2001, memo stated that INS was "formulating proposed regulations to establish a policy framework on which to adjudicate AC21 §106(c) benefits." (AILA InfoNet Doc. No. 01062031.) However, no such regulations have been issued to date.

The memo noted that until those regulations are issued, "it is expected that an I-485 applicant notify the Service when they no longer intend to enter into employment with the employer who sponsored them on the I-140 petition." If a foreign worker failed to send the letter, "the Service should request a letter of employment from the new employer … verifying that the job offer exists [and with] … the new job title, job description and salary."

The memo stated that INS needed this information to determine if the job was "in the same or similar occupational →

classification as the original job" and to confirm that the foreign worker continued to earn sufficient income to avoid I-485 denial on grounds of inadmissibility as a public charge.

**PRACTICE POINTER: In some cases, service centers have sent I-485 permanent portability cases to the local offices for interview. There have been reports that some local offices have insisted that the new job must pay as much as the original job to qualify as "substantially similar," even where the primary reason for the lower wage is changes in the local economy, and lower prevailing wages. Practitioners whose clients ask whether a porting foreign worker must show that the new job pays as much as the one defined in the I-140 petition can use the language in the Cronin memo to argue that they need not, but rather the new job need only pay enough to avoid public-charge grounds of inadmissibility.**

In a tacit recognition of the importance of the issue, the memo also stated that until INS issued final regulations, "*adjudicators shall consult, on a case by case basis, with Headquarters before denying cases on the basis that the new job is not in the same or similar classification.*" (Emphasis added.)

The situation became more complex when INS issued concurrent-filing regulations in October 2001. (8 CFR §245.2(a)).These regulations restored an old procedure permitting foreign workers to file an I-485 application together with, or following, the underlying I-140 petition. The regulations made no mention of the AC21 permanent portability rule, and thus left unanswered many questions about the new filing procedure. Since that time, INS and its successor agency, USCIS, have issued a number of memoranda that discuss processing of permanent portability cases.

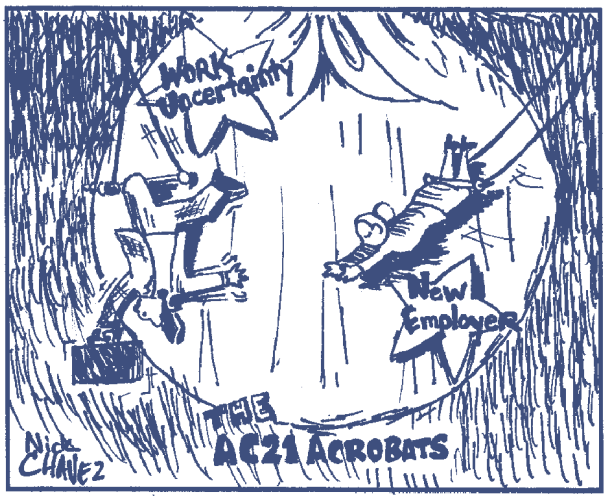
During a September 2002 ISD Teleconference, USCIS instructed its adjudicators to conduct prima facie review of I-140 petitions processed concurrently with I-485 adjustment applications. (AILA InfoNet Doc. No. 02100371.)

During a May 29, 2003, ISD Teleconference, it was stated that adjudicators typically conducted an initial review within two months from the date of filing, and if they sent a request for missing initial evidence, they held processing of related applications for work or travel authorization until they received a sufficient response. (AILA InfoNet Doc. No. 03060344.)

In some cases, the prima facie review led to quick approval of the I-140 petition, months or years before adjudication of the I-485 application. In other cases where the RFE was for "additional evidence," the adjudicator was not required to place a hold on processing of the concurrent applications for advance parole and work authorization.

### ➤ The Yates Memo

A February 28, 2003, memo from Deputy Executive Associate Commissioner William Yates, Immigration Services Division (ISD), confirmed that if an examiner denied the concurrently filed I-140, he or she should also deny the I-485 application. (AILA InfoNet Doc. No. 03030644.) In cases of long-pending I-485 applications, service center examiners frequently ask I-485 applicants for evidence of the continuing availability of the permanent position, which is generally issued as a request for evidence just prior to final approval of the adjustment.




*Note:* The standard USCIS request for evidence asks for evidence of current employment and prospects for future employment. The request rarely focuses on the key issue, which is the continuing intent of the employer to make the permanent position available for the foreign worker upon receipt of permanent resident status.

In August of 2003, Yates again looked at the issue, and in a new memorandum, he addressed cases in which both USCIS had approved the I-140 petition and the statutory 180 days had passed. (AILA InfoNet Doc. No. 03081114.) The memo confirmed the validity of the 2001 Cronin memo, and focused on situations where USCIS had approved the I-140 but the petitioner had subsequently withdrawn it. Yates stated that if the foreign worker already had submitted evidence of the similarity of the new job in the form of a letter from the new employer, USCIS could adjudicate and approve the I-485. If no letter was in the file at the time of adjudication, the examiner should give the foreign worker a chance to offer this evidence in response to a Notice of Intent to Deny the I-485.

### ➤ The Ohata Memo

On March 31, 2004, Fujie Ohata, Director of Service Center Operations, issued a memo stating that for concurrent I-140/I-485 cases, USCIS would no longer require examiners to conduct a prima facie review of the I-140 petition. (AILA InfoNet Doc. No. 04041668.) Rather, Ohata instructed that each of the "Service Center Directors, in his/her discretion may discontinue to do a prima facie review on concurrently filed cases or modify the scope of the review." The memo seemed to reflect an effort to speed up processing of these cases, and noted that USCIS should now track and report both I-140 and I-485 filings based on local I-140 processing times.

These policy memos and the implementation of new security checks following the terrorist attacks of late 2001 have resulted in delayed agency review of foreign worker qualification for permanent positions. In some cases, such as those where the permanent position was initially defined in an application for labor certification, USCIS does not review the foreign worker's qualifications supporting the I-140 petition for years from the date they might have initially been

reviewed by DOL (upon filing of the application for certification).

During the June 2004 AILA Annual Conference, Yates, perhaps in an attempt to assuage those critical of increasing USCIS delays, reiterated a June 17, 2004, USCIS Fact Sheet on backlog reduction programs aimed at reducing all adjudications to six months by September 2006. (AILA InfoNet Doc. No. 04062163.)

Yates noted some of the main points outlined in the Fact Sheet: pilot projects to improve efficiency, and a controversial field guidance to reduce the number of "unnecessary" requests for evidence. If USCIS's projections come to pass, the agency will eventually process I-485 applications within the 180-day cutoff imposed by AC21, and the potential for permanent porting will be moot.

The current delays in agency review of the supporting documentation required to approve permanent petitions leaves immigration attorneys and their clients with a number of unanswered questions, especially when facing situations in which foreign workers may need permanent portability. What follows is a summary of some of the notable issues and potential strategic solutions:

### Porting Prior to I-140 Approval

A foreign worker may ask if he or she can port to a new job once 180 days have passed but before USCIS approves the I-140 petition. The August 2003 Yates memo implicitly states that this is a risky proposition because the agency may later deny the I-140 on the merits, or because the petitioner may withdraw it before approval. While AC21 states that a permanent petition remains "valid" at day 181—so long as the I-485 remains unadjudicated—the Yates memo implies that until USCIS approves the I-140, it may consider the petition to have been deniable, and thus initially invalid, even if properly filed. Until USCIS issues regulations on AC21, or permits premium processing for prompt review and approval of I-140 petitions, this will remain a cause of concern for many.

There are a number of situations where a foreign worker may have particular reason to fear that the I-140 might be denied or withdrawn. In some cases, such as when the filing precedes a corporate bankruptcy or the foreign worker's departure for a new job, the petitioner may fail to answer a USCIS request for evidence, leading to I-140 denial. In other cases, when the I-140 is based on an approved application for labor certification, the employer may withdraw the petition to permit substitution of a new foreign worker to fill the certified permanent position.

*Note:* Some argue that AC21 should be read to permit porting after the 180-day mark even if the I-140 is not yet approved, on the grounds that USCIS delays could effectively defeat the →

purpose and spirit of the law. If Yates were to accept this position, a foreign worker or employer might be able to "lock-in" portability at the 181-day point by sending a letter to USCIS with details on any changes in the permanent job title, responsibilities, location, or wages. The letter could state that these changes constitute a minor, but real, change in the permanent job; while including a copy of a new State Employment Security Agency (SESA) prevailing wage and occupational classification determination as evidence that that new job is "substantially similar" to the old one; and concluding with a statement that the new job remains available to the foreign worker on a permanent basis, but that the company would like to withdraw the I-140 petition. (Withdrawal of an I-140 petition is made "upon written notice of the withdrawal filed by the petitioner, in employment-based preference cases, with any officer of the Service who is authorized to grant or deny petitions." 8 CFR §205.1(a)(3)(iii)(C).) The employer could then take the position that the withdrawn I-140 remains "valid" under AC21, even though not yet approved, and that USCIS must grant the foreign beneficiary the permanent job flexibility that Congress authorized.

AILA's Committee on USCIS Benefits has addressed this issue in a strongly worded memorandum addressed to Yates.[3] (AILA InfoNet Doc. No. 04031890.)The memo asked Yates to consider that a properly filed "bona fide" I-140 petition be considered valid, even if USCIS has failed to approve it by the 180-day mark.

## Porting Following I-140 Approval

As described above, USCIS has taken the position that the I-140 beneficiary should send USCIS notice of its changed intent once it has changed the foreign worker's permanent job.

**PRACTICE POINTER: Some attorneys take the position that without regulations, no letter is required. This approach might be advisable in several situations. For example, in circumstances in which the new "job" is self-employment, USCIS might not consider it to be approvable unless the foreign worker can establish a strong earnings record that would address the public charge issue. Another such circumstance is where the I-140 is for an EB-1 multinational manager and the new job is with a company outside of the group of companies that have the qualifying relationship for purposes of intracompany transferee visas. AC21 does not require the I-140 petitioner to advise USCIS that the foreign worker has ported, and the petitioner or worker can address any related issues if and when an examiner sends a request for evidence on the I-140, I-485, or during a subsequent naturalization interview.**

### ➤ Porting Years Later

While the right of permanent portability is established on day 181, AC21 does not give any termination date for the benefit. Thus, the law could be construed to mean that once a foreign worker obtains the right to port, he or she may leave the permanent employer, live in the United States for a while without working, and even leave for a new job abroad. Later, if USCIS deems the original I-485 application abandoned, the foreign worker can return to the United States for a similar job on a temporary visa, and then file a new I-485 application based on the initial I-140 petition—which remains valid indefinitely. Since the entire permanent process is forward looking, gaps in employment should not be a bar to porting.

In his August 2003 memo, Yates implicitly recognized the prospective nature of permanent job offers. However, he suggested that if USCIS had not yet approved the I-140 petition, the employer could not change intent, even if 180 days had passed: "the employer must have had the intent, *at the time the Form I-140 was approved*, to employ the beneficiary upon adjustment." (Emphasis added.) This view suggests that AC21 permits the foreign beneficiary—but not the employer—to change intent at day 181 and is without apparent basis in the law, which states that the I-140 shall remain valid "if the individual changes jobs or employers."

### ➤ Porting Through a Consulate

Some attorneys recommend that foreign workers chart a course to permanent porting through their home consulate. They file the I-140 petition with a request for consular processing, and "concurrently" file the I-485 and associated applications for work authorization and travel documents. Once 180 days have passed, if USCIS has approved the I-140 (which is essential if consular processing is to be used), the foreign worker is portable. The Department of

As time passes, agencies issue policies and procedures that cloud the language of the law. We then must navigate for years without regulations—the maps that could help us avoid rocky shoals.

State (DOS) issues the worker processing instructions following the approval of the I-140, and uses the interview process to determine if the new job is substantially similar to the original one. (AILA InfoNet Doc. No. 01061203.)

**PRACTICE POINTER: The attorney should attempt to verify the consulate's attitude toward green card portability before sending a foreign worker's file for consular processing. It is clear in AC21 that AOS is covered. It is unclear, however, whether DOS is bound to honor portability, especially in E-1 through E-3 cases where there could be issues raised if a consular officer does not think that changing to a different company is "the same or similar."**

## Advising an Alien Prior to Porting

In those cases in which the client calls in advance of taking a new permanent job, the attorney should provide an overview of the options, then help set a course based on the client's willingness to take risks:

### ➤ The Conservative Approach

Recommend that the worker wait to move to a new job until after USCIS approves the I-140 and the I-485 has been pending for 180 days. Help the client assess whether the new job is in a "substantially similar occupational classification" to the approved position. In cases where the I-140 was not based on a labor certification—such as a petition for a multinational manager or nurse—the attorney can file two prevailing wage determinations: the first to define the initial job and the second for the new one, then confirm that the DOL classifications (*Dictionary of Occupational Titles* (DOT) and O*NET code) are the same. Recommend that the worker not move to a new job or employer where the job codes do not match up, as the new job may fail the substantial similarity test.

### ➤ The Moderate Approach

Recommend that the worker move to a new job after USCIS approves the I-140, even if the I-485 has not yet been pending 180 days. Warn the client about the risk that USCIS will adjudicate the application to adjust before the key date. Assist the client in comparing new and old job classifications.

### ➤ The Aggressive Approach

Warn the worker of the risks involved in porting to a new job or employer before 180 days are up and before USCIS has approved the I-140. Be prepared to defend a client who ports at this early stage, and if USCIS issues a request for evidence on the I-140 and then denies the petition, appeal the denial to the Board of Immigration Appeals (BIA). Argue that the foreign worker's right to change intent and port to a new permanent job was vested at day 181, and that the subsequent denial of the I-140 should have been moot.[4]

## Conclusion

Immigration lawyers often must work in a fog. When Congress enacts a new law, we typically have only its sparse text to serve as a landmark by which we can direct our clients. As time passes, agencies issue policies and procedures that cloud the language of the law. We then must navigate for years without regulations—the maps that could help us avoid rocky shoals. We can only hope that, like Odysseus, we eventually lead our charges to the safe harbor of a permanent home.

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## Notes

[1] Pub. L. 106-313, 114 Stat. 1251.

[2] AC21, Section 106(c).

[3] Memorandum from Robert P. Deasy, Chair, AILA-USCIS Benefits Liaison Committee, March 18, 2004.

[4] In Philadelphia, Yates stated that he is reviewing the issue of permanent porting before approval of the I-140 petition and may address the subject in a future writing. ILT