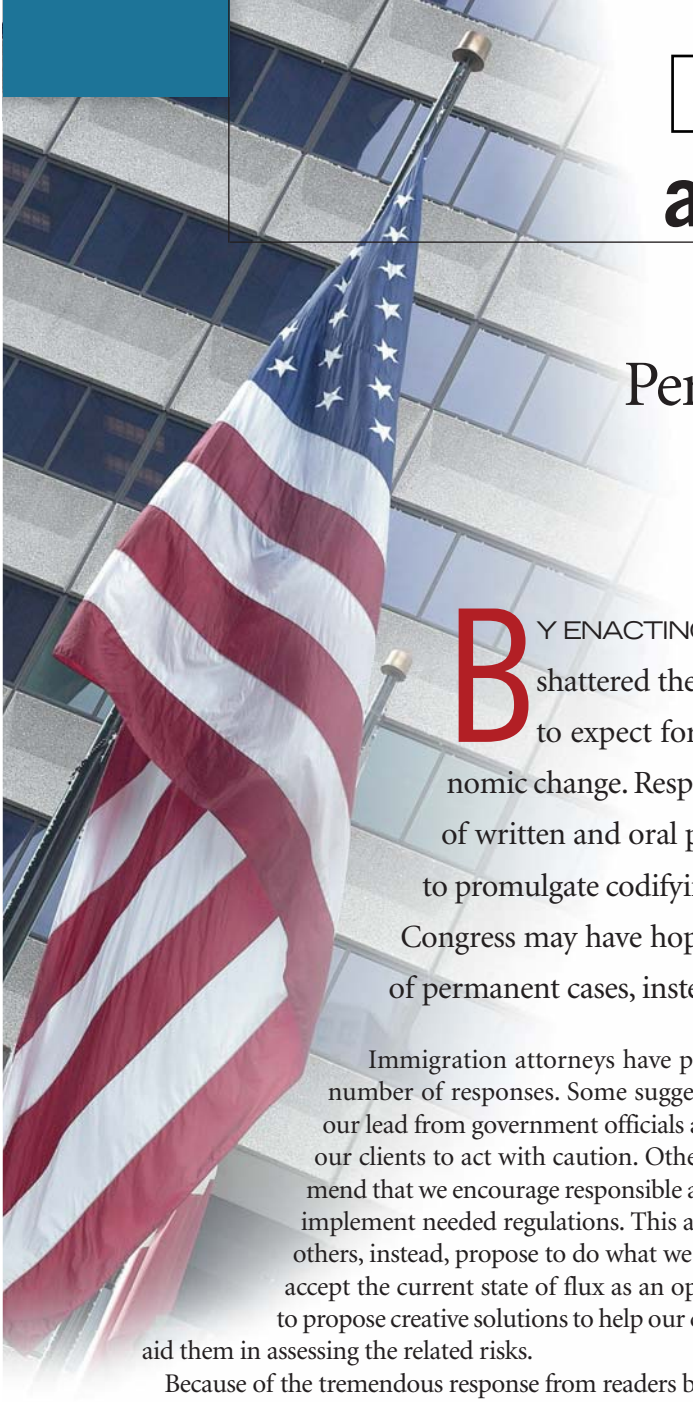
Permanent Portability Under AC21: A Q&A Follow-Up



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.

Because of the tremendous response from readers brought on by a previous article written by this author, "Shattering the Myth of Permanence: Permanent Portability Under AC21," 23 *ILT* 22 (Sept./Oct. 2004), this article serves as a follow-up with carefully researched answers to some of the questions received from readers.

Q In a Practice Pointer in your previous article, you wrote that "… 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." I was unaware that, even under portability, a person could self-petition. Could you elaborate on this or direct me to where I can find the regulations, proposed regulations, or memos on this?

—Susan Aikman, Silver Spring, Md.

A AC21 does not state that a new petition must be filed on behalf of the alien to permit porting to a new permanent job. The law merely states that the original petition remains "valid." USCIS reportedly is working on regulations that would address the timing and range of acceptable porting for both permanent and H-1B workers.

Statements by USCIS indicate that porting to a permanent job where the alien is self-employed will likely raise questions. At the December 2003 AILA conference in New York, one DHS representative noted that this could "raise a big red flag for an adjudicator of whether this is the same or similar occupation …, it might be an easy alternative for people who have not been able to locate new employment to argue that they are self-employed … so you are really going to have [to] present it carefully in your letter to the agency." (Quote from Schorr and Yale-Loehr, "Still Crazy After All These Years: AC21 in 2003," 1 *Immigration & Nationality Law Handbook* 381 (AILA, 2004–05 ed.)

Aliens considering porting to self-employment might take steps to prepare in advance of the move. They can buy or set up a corporation, line up contracts with customers, rent space, receive a regular salary, and take other steps to establish that they are independent and financially stable.

You might also caution clients of the risk that USCIS may carefully examine any porting letter about this type of job change. While AC21 does not require notice to USCIS, a letter would help document the change where the I-140 is still pending adjudication. If the alien decides against sending USCIS notice, you might recommend that he or she prepare documentation to help answer questions likely to arise at a future naturalization interview, with

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information about the new job title and description, as well as evidence of ability to pay a wage that would avoid public charge issues. It is also a good idea to file a prevailing wage request to document the similarity of the original and new jobs.

In the event that AC21 regulations prohibit porting to self-employment positions, USCIS should respect the appropriateness of previous actions by aliens in reliance on the language of AC21. Robert Deasy, AILA's USCIS Liaison Chair, reports that he has made this point in recent discussions with USCIS officials.

Q After a foreign national is approved for employment-based U.S. permanent residence, how long must he or she remain with the employer? My question relates specifically to the situation where the foreign national would leave employment voluntarily after permanent residence approval.

—Donald H. Freiberg, San Jose

A The alien should remain in the permanent position for a reasonable period of time after the grant of permanent resident status to protect against allegations of inadmissibility or fraud under INA §§203(b), 212(a)(5)(A)(i), and 212(a)(6)(C)(i). The law does not define what period of time would be considered reasonable. One federal circuit court held that "it is appropriate to require that the alien intend to occupy the certificated occupation for a period of time that is reasonable in light both of the interest served by the statute and the interest in freedom to change employment" but that "to require that the alien intend to remain in the certified employment permanently would raise substantial constitutional problems." *Yui Sing Tse v. INS*, 596 F.2d 831, 835 (9th Cir. 1979).

In another case, where an alien started work in the permanent job upon approval of permanent status but left soon afterwards due to unpleasant working conditions, the court held that this was reasonable as "[t]here [is] no requirement in the law that a noncitizen who [takes] a job for which he has a labor certification must remain on the job any particular length of time." *Matter of Marcoux*, 12 I&N Dec. 827, 828 (BIA 1968).

AC21 permanent portability has no specific expiration date. One might, therefore, interpret the law to grant the right to port to a substantially similar new job at any time after the I-485 has been pending 180 days.

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Q I have often encountered difficulty with USCIS's district adjudication officers when the I-485 applicant has not yet started working for the sponsoring employer. I have maintained that the I-485 is fully approvable, based on a notarized affidavit, declaration, or affidavit from the sponsoring employer indicating its continuing intent to make the permanent position available upon approval of permanent resident status. Is there any case law, regulation, statute, or other authority that supports this position?

Usually, rather than fighting, we simply prevail upon the employer to allow the I-485 applicant to begin work, even though the sponsoring employer may not want the person to start work until it is sure →

that the person will be granted permanent resident status and thus be able to stay in the job permanently.

—John Alcorn, Irvine, Calif.

A There is plenty of support for your position that the permanent visa petition process is prospective. INA §203(b) in several places states that immigrant visas shall be made available to an "alien [who] seeks to enter the United States." The labor certification process is also forward-looking, as reflected in the new PERM regulation, which cites INA §212(a)(5)(A) and states that the Department of Labor must certify that the U.S. workforce does not have sufficient skilled workers "at the time of application for a visa and admission to the United States." 69 Fed. Reg. 77387 (Dec. 27, 2004). The Fifth Circuit has held that an alien need not be employed with the I-140 petitioner in order to establish the intention to take up employment covered by labor certification. *Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir. 1981). The August 2003 Yates Memo on AC21 also states that "there is no requirement in the statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of AC21 §106(c) even if he or she has never been employed by the pri-

or petitioning employer or the subsequent employer under section 204(j) of the Act." (AILA InfoNet Doc. No. 03081114.)

I agree with your conclusion that it is generally easiest if the employer hires the I-140 beneficiary in advance of I-485 approval. Otherwise, if the alien is currently in the United States, the USCIS examiners can justly question why the petitioner does not hire the alien now, as he or she should be able to obtain a work authorization document while the I-485 is pending. In some cases, the petitioner may be able to give a good reason why it cannot hire the worker now, such as a government contract that requires its workers be either U.S. citizens or permanent residents. In any event, the prospective employer must convince USCIS that it has real and continuing intent to hire the alien on a permanent basis.

Q The issue of I-140/I-485 portability has been a confusing area of law, and you have raised some quite interesting points of practice. There is one area, however, you touched upon but left without elaboration: the portability of EB-1–3 multinational executives. Can someone in this category port at all?

Also, can a multinational corporate executive work in a managerial capacity … in another company with no relation whatsoever with the petitioning company after the approval of I-140 in the EB-1 category and 180 days following filing of the I-485?

—Steve Qi, Monterey Park,Calif.

A AC21 explicitly grants EB-1 managers and executives the ability to port to new permanent positions. Section 106(c) added INA §204(j), which states that "a petition under subsection (a)(1)(D) … shall remain valid with respect to a new job …" The subsection it mentions, which was later redesignated as (a)(1)(F), refers to "any employer desiring and intending to employ within the United States an alien" falling within one of four categories: EB-2, EB-3, EB-1(B) [aka, EB-1-2] outstanding professors and researchers, and EB-1(C) [EB-1-3]executives and managers. While beneficiaries of I-140 petitions filed in a few categories—such as EB-1(A) [EB-1-1] extraordinary ability workers, EB-4 special workers, and EB-5 investors—are excluded by omission, multinational managers are explicitly granted the right of permanent portability.

Congress did not use language that restricts EB-1 managers more than EB-2 or EB-3 workers. AC21 §106(c)(1) states that the initial I-140 shall remain valid, provided that the new job is in a substantially similar occupational classification to "the job for which the petition was filed." Nearly identical language appears in AC21 §106(c)(2), which states that labor certification remains valid where the new job is substantially similar to "the job for which the certification was issued." The law does not state that the porting alien must remain in the same visa preference category, but rather permits them to move to a new job on the basis of the original I-140 petition—which is the basis for the preference determination.

Portable managers should thus be free to move to a job at a new company, unrelated to the old one, or from an executive to a managerial position, so long as they can show they remain in a substantially similar occupation. For example, a move from vice president of Operations to a new job as general manager might be acceptable if the Department of Labor classifies both within the same SOC classification, 11-1021, General and Operations Managers.

Michael Work, an AILA member in South Florida, reported that in 2004, some USCIS examiners in the Miami District office believed that AC21 did not apply to multinational managers. Following discussions with AILA Florida Chapter Chair Jeff Devore and AILA Liaison, however, that office confirmed that on advice from USCIS Headquarters, an EB-1 manager can port to an unrelated employer so long as the new job is substantially similar. ILT

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