

# “A MOVEABLE FEAST”: NEW AND OLD PORTABILITY UNDER AC 21 § 105

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*“If you are lucky enough to have lived in Paris as a young man, then wherever you go for the rest of your life, it stays with you, for Paris is a moveable feast.”<sup>1</sup>*

Hemingway's Paris is likely not what Congress envisioned when it contemplated increased mobility for employees working in the United States under the employment based H-1B visa. Nevertheless, the enactment of the American Competitiveness in the Twenty-First Century Act (AC21)<sup>2</sup> has evoked a new sense of freedom in the business world since foreign workers and their prospective employers may now enjoy a “moveable feast” in AC21's H-1B portability provisions. As most readers know, AC21 provides greater flexibility for workers in H-1B status to change employers, and allows workers whose adjustment of status applications have been pending for 180 days or more to change to positions in the same or similar job classifications as their current positions. Humbly inspired by “Papa” Hemingway's lively account of life in Paris, the authors of this two-part article<sup>3</sup> will delve into the joy and perhaps the sorrow that AC21 's portability provisions may bring for employers, employees, and immigration lawyers.

When Congress suddenly authorized portability, many immigration practitioners were pleasantly surprised that a new day had dawned on employee movement. In reality, numerous forms of employee mobility have existed in a variety of settings under the immigration laws. For example, professional athletes who have entered the United States under either a-1 or P-1 status and who are traded from one sports organization to another are accorded interim employment authorization with the new team for up to 30 days after the trade occurs.<sup>4</sup> During that time, the new team must file a new Form I-129. If the petition is timely filed, the athlete is deemed to be in valid a-1 or P-1 status, and “employment shall continue to be authorized, until the petition is adjudicated.”<sup>5</sup> Other examples of employee mobility involve the ability to engage in appropriate concurrent employment when multiple petitions have been filed<sup>6</sup> and INS regulations in the academic environment.<sup>7</sup> Workers who enter the United States pursuant to consulting services agreements also enjoy a form of mobility,<sup>8</sup> as do intracompany transferees who are accorded status under a blanket L-1.<sup>9</sup>

This listing of various forms of portability continues with a reminder that H-1B workers have always been permitted to change employment, and in that sense, have been “portable”, albeit sometimes at a tortoise's pace. Thus, prior to enactment of § 105, these workers were previously required to wait until the Immigration and Naturalization Service (INS) approved a new petition.<sup>10</sup> Moreover, when an employee files an application for adjustment of status (AOS), he or she is able to apply for an employment authorization document (EAD),<sup>11</sup> the approval of which allows the worker to engage in “open market” employment.<sup>12</sup> Finally, the portability parade marches forward with another new law. Under § 401 of the new Visa Waiver Permanent Program Act (VWPP A), corporate restructurings provide additional opportunities for portability.<sup>13</sup>

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This new law states that an amended H-IB petition is not required where “the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner.”<sup>14</sup>

As these examples illustrate, the concept of worker mobility is not new, but rather an evolving principle of allowing ways for foreign workers to change employment in a diverse set of circumstances. While the portability provisions of AC21 have little legislative history, legal issues associated with employee mobility have existed in immigration law and are the tapestry against which AC21 can be examined. The available legislative history that does exist clarifies certain policies Congress believed were important in passing a law that would increase worker mobility.

### **A WORD OF CAUTION BEFORE THE JOURNEY**

Attorneys, employers and foreign workers should exercise care in deciding whether to take immediate action based on the portability provisions of AC21. Agency guidance to date has been informal, inconsistent and not fully developed.<sup>15</sup> Some practitioners are waxing enthusiastic over the new law,<sup>16</sup> but employers and their legal counsel should be cautious. In then-President Bill Clinton’s statement accompanying the signing of AC21, he expressed reservations regarding portability provisions (as well as the new authorization to extend H-IB stays beyond six years) based on a concern that these provisions “could weaken existing protections that ensure that the H-IB program does not undercut the wages and working conditions of D.S. workers and could also increase the vulnerability of H-IB workers to any unscrupulous employers using the program.”<sup>17</sup> President Clinton directed the INS, in consultation with the Departments of State and Labor, to monitor closely the impact of these new benefits.<sup>18</sup>

As a result, lawyers and their clients should proceed with extreme caution in individual cases, while recognizing that an attorney-client relationship may be imputed by law in many states with respect to at least two clients (the entity and the individual alien, and perhaps the family members as well). In light of the sparse legislative history, lawyerly arguments made to government agencies in connection with proposed rulemaking can be quite expansive and creative. In advising actual clients, however, attorneys must be particularly cautious. Under circumstances that offer no other alternatives, if a client is willing to adopt aggressive interpretations (with full disclosure and informed written consent), the client may decide to invoke portability, but the attorney must clearly communicate that the issue may ultimately require resolution in the courts. Clients must, therefore, be prepared to defend their position in litigation.<sup>19</sup>

### **PORTABILITY OF H-IB STATUS**

As previously mentioned, a procedure existed before the enactment of AC21 that permitted H-IB employees to change employers. Under this procedure, if a worker in H IB status wished to change employers, the new employer would submit an 1-129 petition, accompanied by a labor condition application (LCA), to the INS, requesting H-IB classification and extension of the worker’s stay in the United States?<sup>20</sup> If the INS approved the petition, the agency also granted an extension of stay and approved a change in employment authorization?<sup>21</sup> Section 105 of AC21 now allows H-IB workers to begin new employment upon the filing,<sup>22</sup> rather than approval, of the petition. Thus, H IB workers, in

theory, may change employment more quickly without awaiting the often slowly-issued INS approval notice.

Section 105 of AC21 amends § 214 of the Immigration and Nationality Act (INA)<sup>23</sup> by adding a new subsection, which provides that a qualifying nonimmigrant alien who was “previously issued a visa or otherwise provided” nonimmigrant H-1B status is authorized to accept new employment upon the filing of a new petition by the prospective employer on behalf of the nonimmigrant.<sup>24</sup> To be eligible for this “portability” provision, certain other requirements must be satisfied. First, the nonimmigrant alien must have been lawfully admitted into the United States.<sup>25</sup> Second, an employer must have filed a non-frivolous petition for new employment on the individual’s behalf before “the date of expiration of the period of stay authorized by the Attorney General.”<sup>26</sup> Third, subsequent to lawful admission and before the filing of such petition, the nonimmigrant must not have been employed without authorization in the United States.<sup>27</sup> Employment authorization continues for the alien until the new petition is adjudicated. If the new petition is denied, the authorization “shall cease.” Each of these requirements warrants careful scrutiny.

#### *Current H-1 B Status Required?*

Although at least one commentator differs,<sup>28</sup> it is not entirely clear whether a worker must currently be in H-1B status. Statutory interpretation begins with assessing whether the provision’s language has a “plain and unambiguous meaning.”<sup>29</sup> Moreover, the “plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>30</sup> Based on the phrase “previously issued a visa or otherwise provided” H-1B status, one could argue that an individual need not be in H-1B status at the time he or she desires to invoke the new portability provision. On the other hand, the phrase could be interpreted as only indicating that the worker has obtained H-1 B status before the filing of the new petition and will continue to be in H-1 B status after changing employment. Thus, the word “previously” does not necessarily encompass all prior instances when the worker obtained H-1B status.

Moreover, the “plain language” interpretation may not be consistent in the context of the statute as a whole. The caption of § 105 specifically states, “Increased Portability of H-1B Status.” Captions may be considered to interpret ambiguous provisions?<sup>31</sup> Captions are not to be construed, however, to limit the plain meaning of statutory text.<sup>32</sup> Certainly, requiring that workers must currently be in H-1B status is a more restrictive interpretation. Yet there are other sections of AC21 that provide for extension of H-1B worker status in cases of lengthy adjudication of their immigrant visa petitions or adjustment of status applications?<sup>33</sup> In this context, § 105 could be interpreted as providing a means for current H-1 B workers to have protection and flexibility in their employment.

This “plain language” interpretation also appears to fly in the face of the explicitly stated congressional intent. The legislative history suggests that the purpose of § 105 is to allow workers in H-1B status greater flexibility in changing employers.<sup>34</sup> The legislative history indicates that the portability provision under § 105 was specifically drafted to address concerns that workers in H-1B status were being exploited and had no effective redress because of the difficulty in changing employers. For example, the Senate Judiciary Committee’s report states that § 105 “allows an H-1B visa holder to change employers at the time a new employer files the initial paperwork, rather than requiring the visa holder to wait for the new H-1B application to be approved.”<sup>35</sup> Moreover, the report explains that the portability provision was a

response to “concerns raised about the potential for exploitation of H-IB visa holders as a result of a specific employer’s control over the employee’s legal status.”<sup>36</sup> In the final hours of his term as Senator, Spencer Abraham reiterated this sentiment to the INS, stating that AC21 “contained specific measures to provide for greater possible mobility for H-I B professionals as well as increased flexibility for employers.”<sup>37</sup>

The INS has not yet shed definitive light on this issue. The agency has suggested, however, that § 105 only covers workers currently in H-IB status. In a question and answer sheet summarizing the AC21, the INS stated that the portability provisions “allow a nonimmigrant alien previously issued an H-IB visa or otherwise accorded H-IB status to begin working for a new H-IB employer as soon as the new employer files an H-IB petition for the alien.”<sup>38</sup> The phrase “new H-IB employer” may be interpreted as suggesting that portability will involve a change of employer, not a change of status. However, without further explanation, it is not clear how the INS will interpret this provision in its regulations.

#### *“Period of Stay Authorized By Attorney General”*

Although a worker likely must be in current H-IB status, there are situations in which this provision should be liberally construed. For example, if a worker is awaiting an extension of status, should he or she be able to accept new employment upon the filing of a new petition by a prospective employer? Section 105 provides that a non-frivolous petition for new employment must be filed “before the date of expiration of the period of stay authorized by the Attorney General.” This language is identical to that used for purposes of unlawful presence,<sup>39</sup> for which “period of stay authorized by the Attorney General” is defined as the date “noted on the arrival document issued at the port of entry.”<sup>40</sup> If this same definition were applied to § 105, it would provide further support for the position that in looking at the statute as a whole, the worker must be in H-IB status.

According to the INS, an extension of status applicant’s period of authorized stay “continues until the date the Service issues a decision.”<sup>41</sup> If an alien has been lawfully admitted in the United States, has timely filed an application for an extension of status and has not been employed without authorization, the alien’s first 120 days beyond the date noted on his or her 1-94 card will not be counted toward the three year bar while his or her application is pending.<sup>42</sup> Moreover, the INS has confirmed that if an alien has timely filed an application for extension of status, the “period of stay authorized by the Attorney General” will be the “entire period during which a timely filed, non-frivolous application of extension of stay or change of status is pending with the Service, provided the alien has not engaged in any unauthorized employment.”<sup>43</sup> According to the INS, if the alien’s application is approved, he or she will be granted a new period of authorized stay “retroactive to the date the previously authorized stay expired.”<sup>44</sup> However, if the application is denied because it was frivolous or because the alien engaged in unauthorized employment, the entire period after the expiration of the Form 1-94 that the alien was present in the United States will be considered unlawful presence.<sup>45</sup>

If this reasoning were applied to workers who wish to change employers while their timely filed application for extension of status is pending, they should be eligible for portability. When the prospective new employer files a petition, the worker would technically be present in the United States within the period of stay authorized by the Attorney General (or the AG’s delegate, the INS). Furthermore, the worker likely would possess employment authorization based on federal regulations providing that if an application for extension of stay is timely filed, the worker may continue employment authorization for up to 240 days

beginning on the date of the expiration of authorized period of stay.<sup>46</sup> On the other hand, even though the authorized period of stay encompasses the time during which the extension of status application is pending, the INS is required to grant a new period of stay retroactive to the date previously specified once the application is approved. Thus, one could argue that the authorized period of stay is conditioned upon the approval of the extension of status application, which the worker ostensibly would not obtain if a second employer files a new petition on his or her behalf. However, the fact that the worker is permitted to begin employment upon the filing of a petition provides a basis for arguing that the worker's period of authorized stay should be extended in the same manner as when an extension of status is filed.

A gap in employment also arguably should be covered. If the worker's employment is terminated before the end of the H-1B validity period, he or she may immediately find new employment. In this situation, the worker may have failed to maintain status because the first employment relationship ended. If the termination was the result of a layoff, the INS Regional Service Centers typically provide an informal 30 day grace period. Thus, if the worker finds new employment within one month of the termination, the individual arguably should be permitted to assert the portability provision and begin working upon the filing of a new petition (if the other statutory requirements are met). The employer should also note that federal regulations also allow admission for up to 10 days before and 10 days after validity period of the approved petition.<sup>47</sup> As a result, if the employee resigns before the filing of the petition, there should be at least a 10-day window in which the worker may assert the portability provision. There are risks with this course of action, however, as the Department of Labor (DOL) recently has taken the position that an individual may not begin employment unless a petition supported by a certified LCA has been filed.<sup>48</sup> Thus, a delay in obtaining a certified LCA could extend the filing beyond the 10-day grace period, and the worker arguably could be deemed to have violated status. Given these uncertainties, the prudent employer and H-1B worker may decide that - notwithstanding a theoretical eligibility for the benefit of § 105 - they will defer the start of employment until the INS notice of decision is actually in hand.

Other perplexing scenarios involve gaps in employment and the effect on the alien's obligation to maintain lawful nonimmigrant status. Consider the case of the indecisive alien courted by multiple employers. Suppose the INS approved an H-1B worker's change of employer and listed a date when authorized employment could lawfully commence. The approval notice, however, does not state the deadline when such employment, once authorized, must commence. The worker terminates his initial H-1B employment, but waits approximately one month before deciding to accept or decline the second employment opportunity. The individual may ultimately decide instead to accept employment with a third employer and wish to begin working upon the filing of the H-1B petition by invoking the portability provision. May the worker accept the third employer's offer of employment upon that employer's filing of a new H-1B petition? No regulation addresses the specific conditions imposed on an H-1B worker in order to maintain lawful status under the fact pattern just outlined.

One case (*Matter afLee*) held that the termination of the H-1B worker's employment constituted a failure to maintain status; but the facts were distinguishable from the suggested hypothetical.<sup>49</sup> Lee involved an H-1 group of musicians that disbanded in New York. The H-1 nonimmigrant then went to Los Angeles to live with friends and did not possess a return ticket to his foreign homeland (at a time when an intent to return to an unrelinquished permanent residence abroad was required under the H-1 category). Lee is distinguishable from the stated hypothetical, because the indecisive nonimmigrant in the hypothetical has

received an INS-approved change of H-1B employer but has postponed deciding whether to accept or decline the job. Moreover, unlike the alien in *Lee*, who merely ceased employment, the INS has issued two advisory letters that by analogy would allow the worker to return to the former H-1B employer.<sup>50</sup>

With regard to the potential relevance of the alien's state of mind or intention, the Board of Immigration Appeals (BIA) has stated that an individual's filing of an adjustment of status application while in F-1 status did not constitute a failure to maintain F-1 status.<sup>51</sup> This dictum, however, assumed that the individual would remain in school. Further, case law suggests that with regard to an individual admitted to the United States for a fixed period of time, "within that period his stay is not unlawful unless by his own conduct he violates one of the conditions of his admission."<sup>52</sup> There also is a non-binding INS advisory letter which states that in a reduction in force, H-1B workers are out of status on the date of termination even if they are paid a severance package over a later period of time.<sup>53</sup>

Under the scenario described above, it is likely that a reasonable time for decision on competing offers of employment could be properly inferred. One could argue that approximately one month is reasonable. Moreover, if the worker's delay in taking action was based in part on his or her attorney's advice and misunderstanding of a new and undeveloped area of immigration law, e.g., a misunderstanding of the impact of the nonbenching provision,<sup>54</sup> this factor as well might arguably be added to the totality of the circumstances and cause the INS to consider the alien's delay in commencing employment to be reasonable.

From the third employer's perspective, a reasonable argument can be made that the alien has not failed to maintain status. If a truthful disclosure is made to the INS, the agency will have an opportunity to object or request more information. If full disclosure is provided, the worker could not be accused of failing to provide full and truthful information "requested by the Service,"<sup>55</sup> be liable for a material misrepresentation that cuts off a line of inquiry,<sup>56</sup> or face a valid charge of having submitted a falsely made document.<sup>57</sup> Of course, if the prospective employer and the worker wish to proceed under the portability provision, each party must understand the risks involved. For example, the INS may deny the extension of stay or the worker might be required to explain the entire situation to the consular officer in attempting to obtain an H-1B visa stamp. To avoid the risks and uncertainty of this approach, the prospective employer and H-1B worker may wish to wait until the INS adjudicates the case rather than rely on portability.

#### *Worker Not Present In the Country*

Another situation that may prove problematic is when a worker who was in H-1B status has left the country. If the worker departed because of the six-year cap, he or she likely would be unable to return immediately and gain admission to the United States in H-1B status. Section 105 requires that the employee have been lawfully admitted in the United States. If the worker left the country because he or she spent six years in the United States in H-1B status, he or she may not seek extension, change status, or be readmitted in H-1B status unless he or she has physically been outside the United States for the immediate prior year.<sup>58</sup> Not surprisingly, the new I-129W form has been modified by the INS to flesh out absences more clearly. This form now includes under "Numerical Limitation Exemption Information" a box for a beneficiary who has been "previously granted status as an H-1B nonimmigrant in the past 6 years and not left the United States for more than a year after attaining such status."<sup>59</sup> If an employer

attempted to petition for H-1B status on behalf of an employee who has not been physically outside the United States for the immediate prior year, the petition may be found to be frivolous because the worker would not be eligible for H-1B status by operation of law.<sup>60</sup>

What if the worker left the country because his or her assignment ended before it had expired? The worker was “previously issued” H-1B status and may be eligible to receive another H-1B visa, but is not physically in the United States. Under a possible plain meaning interpretation of § 105, the fact that the worker was not currently in H-1B status may not be relevant, but he or she may not be able to satisfy the requirement that the petition be filed before the expiration of the authorized period of stay, if this period is defined as the expiration date designated on the I-94. An expansive interpretation would be that if the individual had previously worked in H-1B status, he or she was lawfully admitted and had worked with employment authorization. It remains to be seen how the INS will come out on this issue.

#### *“Non-frivolous” Petition Requirement*

The INS’ position regarding the threshold showing that must be made to constitute a “non-frivolous” petition has not been clearly defined. Thus far, the INS has stated that the H-1B petition must have “some basis in law or fact” to be considered “non-frivolous.”<sup>61</sup> Moreover, in a recent Memorandum, the INS further confirmed (in rather awkward language) that a non-frivolous petition is “one that is not without basis in law or fact.”<sup>62</sup> The INS indicated that its anticipated regulations would further define the standard.<sup>63</sup> The agency has previously dealt with this issue in the context of unlawful presence and of asylum law. For unlawful presence, the INS has taken the position that an extension of status will not be granted for petitions that lack some basis in law or fact.<sup>64</sup>

A body of case law regarding non-frivolous petitions also has developed under asylum law. Before the INS revised its asylum regulations in 1995, individuals were able to apply simultaneously for employment authorization and asylum.<sup>65</sup> As long as the asylum request was not “frivolous,” employment authorization was granted.<sup>66</sup> Furthermore, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) included a penalty for the filing of a frivolous asylum application. Under this provision, if the Attorney General determines that an alien has knowingly made a frivolous application for asylum, the alien may be permanently ineligible for any benefits as of the date of a final determination on such application.<sup>67</sup>

In the context of whether to grant employment authorization, the INS had interpreted “frivolous” asylum request as one that is “patently without substance,” and distinguished this evaluation from an inquiry into the merits of the asylum request.<sup>68</sup> This interpretation was subsequently found to be consistent with widely shared definitions of frivolousness applied in different court proceedings.<sup>69</sup> Moreover, the finding of frivolousness requires that the application be “clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent.”<sup>70</sup> Thus, a frivolous claim goes beyond a failure to state a claim, and may be characterized as embracing “not only the inarguable legal conclusion, but also the fanciful factual allegation.”<sup>71</sup>

Given that the INS has applied this rather low threshold consistently in a different arena, a more stringent interpretation of “non-frivolous” for H-1B portability purposes likely would be inappropriate. The generally

accepted standards would imply a certain level of bad faith on the part of the filing party. In light of the generally consistent application of what constitutes a frivolous petition, a well-supported petition should be “non-frivolous” even if it is denied on its substantive merits.

Nevertheless, in the context of the H-1B portability provision, employers should take care in ensuring that the new petition presents a solid case. The prospective employer and legal counsel should carefully assess the individual’s qualifications and the requirements of the job so that both clearly meet the “specialty occupation” standard. For example, H-1B petitions involving a specialty occupation must show that the requirement of a baccalaureate or higher degree (or its equivalent) is the normal standard for the petition, the degree requirement is common to the industry (or that the particular job is so complex that only an individual with the degree may perform the job duties), the employer normally requires the degree for the job, or the nature of the specific duties are so specialized that attainment of a baccalaureate or higher degree is usually associated with the position.<sup>72</sup> An employer should ensure that the position sought to be filled actually does involve such specialized duties, that the degree requirement is standard in the industry, and that the applicant can meet the degree requirement (preferably without reliance on the INS’ 3-for-1 rule on work experience equivalence.<sup>73</sup> If the employer were able to provide a sufficiently supported petition, even if the H-1B petition is not approved, there would be no arguable basis for finding that the petition was frivolous.

#### *Employer Due Diligence and Employment Discrimination Risks*

In its effort to evaluate these factors, how far may an employer go in inquiring about a worker’s status? Immigration law prohibits employers from requesting more or different documents for employment verification purposes.<sup>74</sup> This prohibition, however, should not prevent an employer from exercising due diligence in inquiring about an applicant’s qualifications for the job. Consider a situation where an employer hires a truck driver. The employer must ask applicants whether they hold a driver’s license, because they are required by law to have such documentation to work as a truck driver. An employer hiring a worker in H-1B status is in an analogous position, because the employer must assess the likelihood that the worker will be denied H-1B status (without which the individual would not be able to accept the position).

Employers, of course, must exercise caution in questioning applicants regarding their immigration status. Under Title VII of the Civil Rights Act, an employer is prohibited from discriminating against an individual based on his or her national origin (among other protected categories).<sup>75</sup> Moreover, Title VII specifically prohibits employers from limiting, segregating, or classifying applicants for employment “in any way which would deprive or tend to deprive any individual of employment opportunities because of such individual’s race, color, religion, sex, or national origin.”<sup>76</sup> Generally, the purpose of antidiscrimination law is to prevent barriers to employment opportunity based on an individual’s particular classification.<sup>77</sup> Protection for national origin is based on “the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>78</sup>

There is a distinction between this form of discrimination and questions regarding an individual’s eligibility for employment. The two, however, may overlap. As part of an individual’s prima facie case of discrimination, the individual may argue that despite his or her qualification, he or she was rejected for the position based on national origin.<sup>79</sup> The individual may support this contention with evidence that he or



she was asked inappropriate questions or subjected to offensive remarks during the application process. Employers should not ask questions regarding citizenship, place of birth or legal right to remain permanently in the United States. Employers may ask, however, if the applicant has authorization to work in the United States.<sup>80</sup> The employer must ensure that any inquiry into the worker's qualifications for H-1B status is done in a professional manner, and that it clearly communicates to the employee that requests for documents and additional information are made solely for the purpose of ensuring the proper filing of the H-1B petition on the worker's behalf. AC21 has created a situation in which continued employment authorization is attained only after the worker begins employment. Because there is a risk that this authorization could cease, both the new employer and applicant have an interest in ensuring that the new petition is clearly approvable. Thus, the employer may be able to defend against a national origin discrimination claim based on the position that the additional inquiry was made for a legitimate business reason, namely, ensuring the proper status and statutory eligibility for the worker's immediate and continued employment.

The difficulty may lie in whether courts will determine that the employer's refusal to hire a worker based on the low likelihood of success on an H-1B petition would be sufficient to establish discrimination. The worker could argue that the employer's assessment of the strength of the petition was a pretext for discrimination. On the other hand, the employer may counter that its assessment and conclusions were based on reasonable legal judgment by counsel. This position would need to be carefully crafted to avoid the appearance that the employer made presumptions about the foreign born worker's employment authorization. Such a perception could lead a jury to conclude that the worker's national origin, not his or her H-1B eligibility, led to the decision not to hire the worker.

#### *Transfers and Promotions with the Same or an Affiliated Employer*

Another issue that may arise is whether a transfer within the same company or between its divisions is covered under § 105 and whether the employer will be deemed to have filed a non-frivolous petition for attempting to do so? Section 105 states that an individual may "accept new employment upon the filing by the prospective employer of a new petition." When any material change to an H-1B worker's terms and conditions of employment occurs, the employer is required to file an amended or new petition accompanied by a current or new LCA.<sup>81</sup> Arguably, when the terms and conditions of a position are materially changed, the employee is starting "new employment." The employer, however, may not necessarily be considered a "prospective" employer. Nevertheless, an employee should be able to assert portability in these situations, based on a public policy argument. The legislative developments of the past months indicate that Congress' intent was to prevent workers from stagnating in their jobs because of delays outside their control. There is evidence that the various provisions of AC21 were intended to address concerns that individuals on H-1B visas may have been penalized because of administrative delays.<sup>82</sup> Moreover, § 401 of the VWPP A provides that an amended H-1B petition is not required in certain corporate reorganization. This suggests a contemporaneous congressional intent (albeit in separate legislation) to facilitate career progression for H-1B workers. Allowing workers to invoke the portability provision when transferring within the same company would best effectuate worker mobility and thus would avoid career stagnation.

The DOL, however, has created an apparent obstacle to this interpretation in its interim final regulations by taking a rather narrow view of what would constitute a termination of employment. The DOL regulations provide that a “bona fide” termination of the employment relationship is required to relieve the employer of liability for benching.<sup>83</sup> According to the DOL, a termination for purposes of the wage attestation on an LCA will be recognized only if the INS has been notified that the employment relationship has been terminated, the H-I B petition is canceled, and the employee has been provided with payment for transportation home.<sup>84</sup> The DOL’s position is that employment has not been terminated unless the worker either departs the United States or seeks a change of immigration status for which he or she may be eligible.<sup>85</sup> This position was clearly challenged at a recently convened DOL “Stakeholders’ Meeting.” At that meeting, representatives of the employer community indicated to the DOL that employers may wish to postpone the submission of notice of termination to the INS and the resulting INS revocation of an H-IB petition in order to ensure that an individual who changes jobs pursuant to the portability provision is safely situated with a new H-IB employer. The DOL reportedly responded that this practice may be dangerous and may subject the initial employer to back pay liability. Thus, it remains to be seen whether the DOL will budge on its interpretation that the cessation of the benching obligation can only occur upon the submission to the INS of a notice of H-IB employment termination.<sup>86</sup>

#### *Employment Verification*

Under § 105 of AC21, employment authorization is granted upon the “filing” of a new petition. When the individual begins employment, an I-9 compliance obligation is triggered.<sup>87</sup> The INS has indicated that the procedure for employment verification for this situation should be similar to situations in which an extension of stay has been timely filed. In those circumstances, the employer may continue employment authorization for up to 240 days after the expiration of the authorized period of stay. The individual may present a foreign passport and Form 1-94, and the employer may rely on the 1-797 Receipt Notice. When the individual’s extension is approved, an employer would reverify the 1-9 information.

Although waiting until the arrival of the INS receipt notice may produce the most reliable evidence that the new petition has been properly filed, this is not necessarily what is required by § 105. Rather, the individual is allowed to begin working “upon the filing” of the new petition. Thus, courier receipts confirming the filing arguably should be sufficient. The INS, however, has suggested that the employment verification procedure may involve attaching a copy of the notice of receipt form and a copy of the worker’s 194.<sup>88</sup> There has been some indication that the INS may require a Form 1-797 as evidence of “proper filing.” Although this cautious approach may be preferred by the INS, AC21 does not require this extra step. Former Senator Abraham’s letter to the INS urges the agency to reject this interpretation, as it would flout the intent of Congress in enacting portability.<sup>89</sup>

Employers’ 1-9 compliance concerns may be alleviated by the good faith compliance defense set forth in INA § 274A(b)(6).<sup>90</sup> If an employer engaged in a good faith attempt to satisfy the employment verification requirements, the technical or procedural failure to meet them should constitute an acceptable level of compliance. After the INS (or another enforcement agency) informs the employer of the basis for the failure to comply, the employer will have 10 business days within which to correct the failure. If the employer does not rectify the error, this defense will not apply.

Thus, there likely should not be a “knowing unauthorized hire” issue. Because the employer prepares the LCA and 1-129 petition, it is aware of the worker’s educational and work qualifications and, thus, would have a reasonable assurance that the petition was not frivolous and that it was properly filed. Moreover, when the employer files the petition and begins the individual’s employment relying on a courier bill, for example, the employer has made a good faith attempt to verify the worker’s employment authorization. In the new free world of H-IB portability, employers and employees alike are seeking to maximize the benefits created by this new law. To that end, it may be reasonable for an employer to rely on a courier bill so that an individual may begin working several weeks sooner than if he or she were required to wait for the INS’ formal receipt notice.

#### *Labor Condition Applications and 1-129 Petitions*

Before filing a petition for H-IB classification, the employer must “obtain a certification from the DOL that it has filed a labor condition application (LCA) in the occupational specialty in which the alien(s) will be employed.”<sup>91</sup> The DOL is required to certify an LCA within seven days of the submission of the application.<sup>92</sup> The DOL’s interim final regulations provide that an employer must submit a copy of the certified LCA to the INS with the 1-129 petition, and that the employer cannot allow a nonimmigrant worker to begin employment “until the new employer files a petition supported by a certified LCA.”<sup>93</sup> Moreover, the DOL regulations specifically state that a worker who changes employers under § 105 may not begin work “until the new employer files a petition supported by a certified LCA.”<sup>94</sup>

Despite the DOL’s position, the new employer should be permitted to submit an 1129 petition in situations where the LCA is not certified within seven days of the filing. Indeed, former Sen. Spencer Abraham’s letter to the INS stated that the DOL’s position is “a clearly inappropriate interpretation of the law and, in any event, it is INS, not DOL, which is required to interpret the portability provision.”<sup>95</sup> In situations where the LCA is not certified in seven days, the employer should be allowed to file the 1-129 petition and submit the certified LCA separately because the delay was based on the DOL’s failure to meet its statutory obligation to certify the LCA in a timely manner. Under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA),<sup>96</sup> the DOL’s entitlement to a portion of the fee for H-I B petitions requires confirmation to Congress of the seven-day LCA turnaround.<sup>97</sup> Given that the DOL receives a portion of the H-IB filing fee solely to meet the statutory requirement of certifying LCAs within seven days of their filing, the DOL’s failure to do so should not work against the employer. This argument is consistent with the spirit of AC21, given that the legislative history is replete with references to unjust consequences resulting from administrative delays.<sup>98</sup>

Furthermore, the filing of a Form 1-129 without a certified LCA should not prevent a “proper” filing of the new petition. An application or petition is properly filed when it is received at the Service office, stamped to show the time and date of actual receipt, the petition is properly signed and executed, and the required filing fee is attached.<sup>99</sup> This provision only states that an improperly filed petition is one that is not properly signed or is submitted with the wrong filing fee. Furthermore, the fact that the employer is awaiting the certification of the LCA should not necessarily render the petition frivolous.<sup>100</sup>

May the second employer designate on the 1-129 that the petition is for “concurrent” employment? Section 105 provides that an individual “may accept new employment,” and does not suggest that he or she must resign from previous employment. Given that the provision does not specifically state that the

worker must opt for one employer over another, the individual should be allowed to accept a new job as concurrent employment. The 1-129 form provides designation of “concurrent” employment, and there is no reason to believe that this concept no longer exists.

#### *Denial of the H-1B Petition*

Section 105 specifically states that employment authorization “shall cease” if the new petition is denied. The fact that the individual may lose employment authorization after beginning a new job poses a certain level of risk that the parties must assume. From the new employer’s perspective, if the H -1 B petition is denied, the employer would lose not only the cost of petitioning on behalf of the individual but the cost of its recruiting, orientation and the value the new employee brings to the company. If the worker’s employment verification was not properly documented, the employer also may face 1-9 liability. The employer likely faces fewer risks, however, than the individual, who may be required to return to his or her home country (possibly at his or her own expense ).<sup>101</sup> If the petition is denied and employment authorization ceases, the worker may attempt to return to his or her previous employer. Whether he or she will be able to return is uncertain and would depend on the actions taken by the previous employer. In light of these risks, if the prospective employer’s legal counsel does not represent the worker, he or she likely should be encouraged to seek counsel. Whether both the worker and new employer should be required to sign a disclosure and acknowledgment of these particular risks may be an issue to be addressed by the parties’ legal representatives.

With regard to when the employment authorization ceases, the language of the statute is that authorization “shall cease,” which could be read as connoting an action in the future. Rather than an immediate termination of the authorization, the petitioning employer as a matter of procedural due process should be entitled to receive actual notice of the denial before the employment authorization is deemed to have ended. The temporary employment authorization is analogous to the situation in which an employer timely files an extension of status for an H-1B worker. In those cases, employment authorization is automatically terminated “upon notification of the denial decision.”<sup>102</sup> Given that the INS has indicated that employment verification procedures for H-1B portability cases should follow those used in extension of status cases, the analogy is appropriate, and employment authorization should continue until the employer receives actual notice of the denial. Without actual notice of the INS’ denial of the petition, the employer and employee will not be aware that authorization has ceased, which in some respects is distinguishable from visa overstay cases under INA § 222(g). In these latter cases, the individual knows beforehand the precise date when the visa would become void. If the authorization ceases when the decision to deny the petition is made, most workers awaiting this determination would engage in unauthorized employment because they would not learn of the termination until they receive the notice. Certainly, a “practical safe harbor,”<sup>103</sup> should be provided, given the harsh consequences of the denial.

As mentioned, once the work authorization ends, the employee may wish to return to the first employer. For this to occur, the first employer must have the job available. By the time the new petition is denied and the individual’s new employment ends, the first job may have been filled. This is certainly a risk the employee faces in this competitive marketplace. The other risk the worker faces is that the initial employer may have already caused the DOL and the INS, respectively, to have revoked the LCA and the

H-IB petition that previously covered his or her employment.<sup>104</sup> If the employer learns that the employee wishes to return after the INS has been notified of the initial termination, should the employer be able to rescind the request for revocation and reactivate the petition? The employer may argue that the terms and requirements of the employment have not changed, and the petition has not yet been revoked (if this is still the case). The employer may explain that the changed circumstances previously reported no longer exist. Given that the DOL has taken a position that the employer must report the termination of employment to avoid the financial burden of the benching provision, the employee could effectively lose employment authorization if the employer is not able to rescind the request for revocation. Such a situation could discourage workers from asserting portability, as they may reasonably decide that the risk of losing employment authorization altogether is too great. Certainly, this result would defeat the purpose of the statute.

If the employee is unable to return to the initial employer, another risk the employee may face involves repatriation. If an employee is dismissed from employment before the agreed upon date, the employer must pay the reasonable costs of return transportation of the alien abroad.<sup>105</sup> If the alien worker voluntarily terminated employment before the expiration of the validity of the petition, he or she will not be considered to have been dismissed.<sup>106</sup> When an individual resigns from employment to begin working for a new employer, the initial employer should not be liable for repatriation costs. If the worker starts new employment upon the filing of a new petition, but the petition is later denied, the new employer should not be liable for repatriation costs as well. Since the new employer merely filed the petition, the subsequent denial should prevent the employer from being held liable as an H-IB employer. There should not be a finding that the employer terminated the worker from employment given that employment authorization ceased by operation of law. Thus, the employee ultimately would appear to be solely responsible for transportation home.

#### *Revoking the LCA*

With the above issues in mind, the initial employer must also decide whether to revoke the LCA. The possibility of the resigning worker's return to the initial employer may be a reason not to revoke the LCA, but if the employer's standard practice is to revoke the LCA, the employer may likely wish to continue.<sup>107</sup> However, the initial employer should consider the possibility that this practice may be considered to be against public policy. The Senate Judiciary Committee's report noted that Congress was concerned about H-IB employees being exploited based on their legal status.<sup>108</sup> By providing increased worker mobility, Congress likely intended to reduce the potential harm for employees to change employers. Moreover, given the potential liability employers may face for certain actions taken after the employment relationship ends, one could argue that revoking the LCA may violate public policy.

There are several other considerations in deciding whether to revoke the LCA. First, the employer must consider the importance of limiting liability under the LCA. A complaint regarding a failure to meet a condition or a misrepresentation made on the LCA must be filed no later than 12 months after "the date of the failure or misrepresentation."<sup>109</sup> The DOL's interim final H-IB regulations provide that if the employer withdraws the LCA, "the provisions of this part will no longer apply with respect to such application" with the exception of provisions involving the wage and working conditions requirement and no-strike/lockout provisions.<sup>110</sup> On a related matter, the DOL's position of requiring a bona fide termination to be relieved of

the obligation to pay wages during certain nonproductive time places employers in the position of being obliged to revoke the H-IB petition and LCA.<sup>111</sup> Second, the employer will want to avoid the possibility of gaining H-IB dependent status,<sup>112</sup> because such a determination will require the employer to meet additional attestation requirements, including a “no-layoff attestation” and “recruitment attestation.”<sup>113</sup> The employer would want to avoid situations in which H-IB petitions and LCAs filed on behalf of workers who are no longer employed with the company are counted toward the determination of H-IB dependent status. Both of these factors support the conclusion that the employer should revoke the LCA after the H-IB worker resigns from employment.

However, there is a reason not to revoke the LCA, which is in situations where the worker’s employment was covered by a “blanket LCA.”<sup>114</sup> DOL regulations permit employers to cover more than one intended position (“employment opportunity”) within the same occupation. A blanket LCA would cover more than one individual and maybe more than one intended place of employment. Thus, revoking the LCA in this situation would be impractical since other current H-IB employees would likely be covered.

#### *Recoupment of Cost*

When an employee changes employment under § 105 portability provision, should the initial employer try to recoup the costs of sponsoring the employee? The likely answer to this question is no. ACWIA prohibits an employer from imposing a penalty on individuals who terminate employment before the agreed upon date.<sup>115</sup> Under ACWIA, the Secretary of Labor shall determine “whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.”<sup>116</sup> The penalty for violating this provision is a fine of \$1,000 per violation and return of any money paid by the H-1B worker in violation of this provision.<sup>117</sup> The DOL’s interim final regulations distinguish between permissible liquidated damages and a penalty.<sup>118</sup> The DOL’s position is that even though state laws vary as to what constitutes liquidated damages, the laws generally “consider that penalties are amounts which are fixed or stipulated in the contract by the parties are reasonable approximations or estimates of such damage.”<sup>119</sup>

Furthermore, the agency provides that an employer may receive “bona fide” liquidated damages from H-1B non-immigrants, and may receive this amount from the worker as long as the reduction or deduction from wages satisfies the requirements for “authorized deductions.”<sup>120</sup> According to the DOL, a deduction from a worker’s pay may be made when it: (1) is required by law; (2) is made pursuant to a collective bargaining agreement or is “reasonable and customary in the occupation and/or area of employment”; or (3) meets certain requirements (such as obtaining a “voluntary, written authorization by the employee,,”).<sup>121</sup> The DOL also provides that deductions may not be made to recoup “business expenses,” including “attorney fees and other costs connected to the performance of H-1B programs.”<sup>122</sup>

Even if the DOL had not characterized attorneys’ fees as a business expense that cannot be deducted from the worker’s wage, an employer likely would not be able to recover a significant amount from the worker’s pay without violating the obligation to pay an H-1B worker the greater of the actual wage or prevailing wage.<sup>123</sup> The actual wage is the rate paid to “all other individuals with similar experience and qualifications for the specific employment in question.”<sup>124</sup> If the employee is required to pay attorneys’ fees, the employer could violate this provision because the worker’s compensation would fall below the actual wage. The argument would be that since U.S. workers would not incur these costs, attorneys’ fees obviously would not be deducted from their pay. It likely would not be prudent for an employer to attempt

to recover attorneys' fees from a departing H-1B worker's final paycheck. Apart from the DOL's current position, and the potential for violating actual wage payment requirements, many state laws restrict deductions from final paychecks. As a result, the amount the employer could recover likely would not be sufficient to justify the effort.

### *Travel Issues*

The INS has taken the position that an H-1B worker who has changed employers under the portability provision but has not yet received an approval notice for the new employment may travel and be readmitted to the United States if he or she satisfies certain prescribed conditions.<sup>125</sup> According to the INS, the individual must: (1) be "otherwise admissible"; (2) possess a valid, unexpired passport and visa (which includes a valid, unexpired visa endorsed with the name of the original petitioner)<sup>126</sup>; (3) establish that he or she was previously admitted as an H-1 B, or otherwise accorded H-1B status; and (4) present evidence that a new petition was timely filed.<sup>127</sup> The individual must present evidence that the new petition was filed prior to the expiration of the H-1B's previous period of admission. This evidence, the INS suggests, may be a dated Form 1797 receipt notice or "other credible evidence of timely filing that is validated through a CLAIMS query."<sup>128</sup>

These standards leave open the possibility of an H-1 B worker to re-enter the U.S. after a lengthy period of travel abroad, as long as a new petition was timely filed. Consider the situation in which an individual commences employment with Company A pursuant to an approved H-1B petition with a three-year validity period. When the worker entered the United States, he or she possessed an H-1B visa and obtained a Form 1-94 (arrival/departure record) with an expiration date which coincides with the final date of the H-1B petition validity period. Shortly after starting employment, he or she decides to accept a job offer from Company B. If the worker subsequently leaves the country, and does not return to the United States for a protracted period, it is arguable that the worker should be able to re-enter with the previously issued visa. The worker may maintain that as long as Company B's H-1B petition was filed within the H-1B's previous period of admission, he or she may be permitted to re-enter with the previously issued visa. Of course, the INS emphasized that the burden of proof remains with the individual to establish admissibility as an H-1B nonimmigrant and eligibility under AC21's portability provision. Given that the INS may take the position that the period of admission ends when the alien departs the U.S., a decision to opt for this approach would be made without the blessings of the authors.<sup>129</sup>

If an individual travels after beginning new employment, may he or she demand a visa in the new employer's name? The worker may try to present the Notice of Receipt and 1-94, and claim that he or she is qualified for H-1B status. To obtain an H-1B visa, the consular officer must be satisfied that the alien qualifies for H-1 B status.<sup>130</sup> The alien must present official evidence of the approval by the INS of a petition to accord such classification. The approval of a petition by the INS does not necessarily establish that the alien is eligible to receive a nonimmigrant visa.<sup>131</sup> If the officer knows or has reason to believe that an alien applying for an H-1B visa is not entitled to the approved classification, the officer must suspend action on the alien's application and submit a report to the approving INS office.<sup>132</sup> If the individual is refused, he or she may try to challenge the consular officer's decision in federal court.

Consular officers have discretion to issue a nonimmigrant visa based on a proper application. This power has consistently been held as not being subject to judicial review.<sup>133</sup> Despite the doctrine of consular

nonreviewability, there have been cases in which the court reviewed the consular officers' decisions and ruled that erroneous legal conclusions were reached in those cases.<sup>134</sup> Based on these decisions, the individual may try to argue that the refusal to issue a visa was an erroneous legal judgment. This position may be difficult to maintain, however, given that a court has distinguished one of these cases by finding that it involved a revocation of the visa and thus did not involve the granting of a visa.<sup>135</sup> Given that consular nonreviewability is an entrenched doctrine, an individual may have difficulty in convincing a court to review the refusal to issue a new visa. Ultimately, it may be advisable for workers to refrain from traveling after the filing of a new petition. This is particularly true in light of reports that individuals have been stranded abroad because INS inspectors have received no guidance on the new law from INS headquarters.

#### *Effective Date; Retroactivity*

Finally, § 105 provides that the portability provision "shall apply to petitions filed before, on, or after the date of enactment of this Act."<sup>136</sup> In the 1/01 Pearson Memo, the INS notes that "all aliens who meet the requirements [of § 105 portability] may benefit from the provisions effective immediately."<sup>137</sup> While recognizing that all aliens satisfying the eligibility requirements under the portability provision may assert this benefit, the INS did not explain the breadth of the retroactivity provision, but did acknowledge that the portability provision applies to H-1 B petitions filed "before, on, or after the date of enactment." To ascertain the potential reach of this provision, it is important to examine recent judicial pronouncements. Retroactive application of federal immigration legislation has repeatedly been upheld by the courts.<sup>138</sup> Although Congress has unfettered power over the admission or expulsion of aliens, the U.S. Supreme Court has recognized that retroactive application of legislation may raise due process concerns.<sup>139</sup> As a result, the retroactive application of an immigration statute must be rational, related to a legitimate governmental purpose to satisfy due process requirements.<sup>140</sup> In a recent unpublished decision, a federal appellate court addressed the effect of a retroactivity provision in an amendment to the INA granting the INS discretion to waive the oath and attachment requirements for naturalization with respect to disabled individuals "before, on, or after the date of enactment of this Act."<sup>141</sup> This case involved an individual who was unable to demonstrate that he was attached to the principles of the Constitution, understood the oath of allegiance or willing to take an oath because he suffered from Downs Syndrome. In November 1999, the INS issued the alien a certificate of citizenship in accordance with a judge's order. While the INS' appeal was pending, Congress amended the INA granting the INS discretion to provide a waiver. The Tenth Circuit Court of Appeals denied the INS' request to vacate the judge's decision based on the legislative development. The INS had taken the position that the alien was eligible for the waiver, but that he should be required to reapply in order to obtain it. According to the Court, the INS' determination of the alien's eligibility was sufficient to allow the waiver as to the application which was presented to the judge.<sup>142</sup> If the retroactivity provision of AC21 were to apply in the same manner, § 105 portability should "purge" unauthorized employment in situations where employers and workers "jumped the gun" by starting employment after the filing but before the approval of an H-1B change of employer.

Federal courts also have partially invalidated the retroactive application of provisions contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>143</sup> related to relief under former INA § 212(c).<sup>144</sup> The AEDPA significantly restricted the availability of discretionary relief from deportation by providing that aliens who were deportable because of convictions based on certain criminal offenses were



not eligible for a § 212(c) waiver, even if the offense occurred before the enactment of the AEDPA.<sup>145</sup> The application of this statute has been subject to repeated challenges, and courts have generally taken a restrictive approach.<sup>146</sup> One court, for example, concluded that § 440( d) may not apply to an alien who pleaded guilty to a criminal offense that occurred before enactment but was covered by the statute.<sup>147</sup> According to the court, if the alien could show that he entered into his guilty plea in reliance of the state of the law before the enactment of the AEDP A, the statute may not apply to his case.<sup>148</sup>

The underlying concern in these cases appears to be that retroactive application of the statute may violate the principle of fundamental fairness. AC21 would not create the same issues, however, given that the statute is designed to confer greater benefits to workers and employers. In that respect, the retroactive application of the H-1B portability provision would likely provide significant relief. For example, the retroactivity provision could cure a prior violation of status and allow an individual to be eligible for adjustment of status. Previously, if an H-1B worker had begun new employment before obtaining an approved 1-129,<sup>149</sup> he or she would have engaged in unauthorized employment, which could prevent the worker from applying for an adjustment of status.

From the employer's perspective, one wonders whether employers who were fined for premature hiring or for paperwork violations<sup>150</sup> may be eligible to claim a refund and correction of the record. The retroactive application of AC21 provides a legal basis for seeking a refund from these fines. To take this reasoning one step further, if an employer has been incarcerated for felony harboring, may he or she seek release from prison?<sup>151</sup> Unlike the AEDPA, retroactive application of this provision appears to have the potential of conferring greater benefits than had previously existed. Thus, there would not be an issue of a violation of fundamental fairness. A case involving imprisonment of an employer based on unauthorized employment covered by the portability provision may be rare, but the bottom line is that this retroactivity provision should be applied liberally. One never knows when it will result in a significant benefit for both the employer and employee.

## **CONCLUSION**

Time will tell whether § 105 may prove to be a bountiful gift for foreign professional workers and the U.S. business community. One thing, however, is clear from the enactment of AC21. Congress intended to liberate workers from time-consuming administrative processes and thereby allow employers to recruit and hire sorely needed personnel without bureaucratic delay. Perhaps AC21 will create an atmosphere where expatriate workers will more fully enjoy the professional opportunities offered by employers in the United States. Thus, as those in the artistic vanguard of the Roaring Twenties perceived Paris as their moveable feast, the high tech workers of the new millennium can now enjoy a nonimmigrant status that "stays" with them throughout their careers. For these workers, thanks to AC21, America has become a moveable feast.

<sup>1</sup> This is a quote from Ernest Hemingway to a friend, quoted in A.E. Hotchner, *Papa Hemingway: A Personal Memoir* (Carroll & Graf Publisher 1999). This quote provided the basis for and encapsulates the spirit of the posthumously published *A Moveable Feast*, Hemingway's account of his time in Paris in the 1920s (Simon & Schuster 1996).

<sup>2</sup> Pub. L. No. 106-313, 114 Stat. 1251 (hereinafter AC21).

<sup>3</sup> Part I addresses the issues arising from the H-1B portability provision under § 105 of AC21. Part II will cover the adjustment of status portability provision included in § 106 of AC21.

<sup>4</sup> INA § 101(15)(O)(i), INA § 101(15)(P)(i); 8 C.F.R. §§ 214.2(0)(2)(iv)(G), (p)(1)(iv)(C)(2).

<sup>5</sup> *Id.*

<sup>6</sup> Part 2 of Form I-129 provides as a basis for H-1B classification "new concurrent employment."

<sup>7</sup> For example, researchers and professors in J-1 status at one university may consult, lecture, teach or observe at another accredited educational institution. INA § 101(a)(15)(J); 22 C.F.R. § 62.20(g).

<sup>8</sup> C.F.R. § 214.2(h) provides that a U.S. agent may file a petition in cases involving workers who are traditionally self-employed or use agents to arrange short term employment on their behalf with numerous employers. See also Letter from Yvonne LaFleur, then-Chief, Business and Trade Services at INS' Office of Adjudications, to attorney H. Ronald Klasko (Feb. 9, 1996), reproduced in 73 *Interpreter Releases* 345 (Mar. 18, 1996).

<sup>9</sup> INA § 101(a)(15)(L); 8 C.F.R. § 214.2(l)(4)(i). See also Alan Tafapolsky & A. James Vazquez-Azpiri, *Global Warming: The L Blanket Program and the Transitional Corporation*, 99-04 *Immigr. Briefings* (Apr. 1999).

<sup>10</sup> 8 C.F.R. § 214.2(h)(2)(i)(D) currently provides that the prospective new employer must file a petition on I-129 requesting classification and extension of the alien's stay in the United States. If the petition is approved, the extension may be granted for the validity of the approved petition. The alien is not authorized to begin the employment with the new petitioner until the petition is approved. This regulation will surely change when the INS promulgates a rule implementing the portability provisions of AC21.

<sup>11</sup> C.F.R. § 274a.12(c)(9).

<sup>12</sup> See 64 *Fed. Reg.* 29,208 (June 1, 1999) (establishing open market employment concept); memorandum from Michael D. Cronin, Acting Associate Commissioner, Revision of March 14, 2000 Dual Intent Memorandum, File No. HQADJ 70/2.8.6, 2.8.12, 10.18 (May 16, 2000), reprinted in 5 *Bender's Immigr. Bull.* 530 (June 1, 2000).

<sup>13</sup> *Visa Waiver Permanent Program Act*, Pub. L. No. 106-396, § 401, 114 Stat. 1637. See also Alan Tafapolsky, Angelo A. Paparelli, A. James Vasquez-Azpiri, & Susan K. Wehrer, *Thriving on Change: How to Solve Immigration Problems in Merger & Acquisition Deals*, in A1LA, *New Rules for the New Millennium* (2001).

<sup>14</sup> *Visa Waiver Permanent Program Act*, Pub. L. No. 106-396, § 401, 114 Stat. 1637 (amending INA § 214(c)).

<sup>15</sup> See, e.g., INS Press Release, *Changes to the H-1B Program* (Nov. 21, 2000) (hereinafter INS H-1 B Press Release), available at <http://www.ins.usdoj.gov/graphics/publicaffairs/questsans/H1BChang.htm> (last visited Jan. 30, 2001). The press release indicates that it is unlikely that the agency will publish implementing regulations before March 2001. /d. at question and answer no. 13.

<sup>16</sup> See, e.g., H. Ronald Klasko, *American Competitiveness in the 21st Century: H-1 Bs and Much More*, 77 *Interpreter Releases* 1689 (Dec. 11, 2000).

<sup>17</sup> Statement by the President (Oct. 17, 2000) in conjunction with signing of S. 2045.

<sup>18</sup> *Id.*

<sup>19</sup> The reader will recall that legalization provisions created under the Immigration Reform and Control Act of 1986 are still in litigation some 15-plus years later.

<sup>20</sup> 8 C.F.R. § 214.2(h)(2)(i)(D).

<sup>21</sup> 8 C.F.R. § 214.2(h)(2)(ii)(D).

<sup>22</sup> 8 C.F.R. § 103.2(a)(7) provides that a petition is properly filed when it is stamped at a Service office showing the time and date of actual receipt, is properly signed and executed, and includes the required filing fee.

<sup>23</sup> INA § 214 addresses the admission of non immigrants into the United States. Among the provisions are descriptions of “specialty occupation,” numerical limitations, and the Attorney General’s authority to grant and extend a nonimmigrant’s stay.

<sup>24</sup> AC21 § 105(a) (adding INA § 214(m)).

<sup>25</sup> INA § 214(m)(2)(A) (as added by AC21 § 105(a)).

<sup>26</sup> INA § 214(m)(2)(B) (as added by AC21 § 105(a)).

<sup>27</sup> INA § 214(m)(2)(C) (as added by AC21 § 105(a)).

<sup>28</sup> According to Mr. Klasko, “The statutory language is quite clear that the alien does not presently have to be in H-1B status.” Klasko, *supra* note 16, at 1691.

<sup>29</sup> *Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997).

<sup>30</sup> *Id.* at 341. See also *Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998).

<sup>31</sup> *INS v. National Center for Immigrant’s Rights, Inc.*, 502 U.S. 183 (1991). Mr. Klasko has taken the position that the caption “applies to the fact that portability provisions only apply to present or former H-1Bs.” According to Mr. Klasko, “There is no implication that it prevents such H-1Bs from commencing work with new employers who file L-1, O1 or other petitions authorizing employment.” Klasko, *supra* note 16, at 1691. Between the worker not being required to be currently in H-1B status and not having to move to H-1B employment, one wonders: where is the “portability”?

<sup>32</sup> *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999).

<sup>33</sup> Section 104(c) of AC21 provides that an alien may be granted an extension of H-1B status, notwithstanding the 6-year cap, if he or she is a beneficiary of an employment based immigrant petition and “is eligible to be granted that status but for application of the per country limitations.” The extension may be authorized “until the alien’s application for adjustment of status has been processed and a decision made thereon.” Also, § 106 allows an extension of H-1B status in one year increments for an alien if 365 days or more have elapsed since the filing of a labor certification on the alien’s behalf (if the certification is required for an immigrant petition) or the filing of an immigrant petition under INA § 204(b).

<sup>34</sup> S. Rep. No. 106-260, at 22-23 (2000) (analyzing section 5 of S. 2045, the precursor to the present portability provision). Also, under the discussion on the purpose of S. 2045, the committee concluded that the country “needs to increase its access to skilled personnel immediately in order to prevent current needs from going unfilled.” *Id.* at 2-3.

<sup>35</sup> *Id.* at 22.

<sup>36</sup> *Id.* at 22-23.

<sup>37</sup> Letter from Senator Spencer Abraham to the Immigration and Naturalization Service (Jan. 1, 2001). Now serving as Secretary of Energy, Spencer Abraham has pledged to continue to exert his influence within the Bush Administration regarding immigration related matters.

<sup>38</sup> INS Press Release. *supra* note 15 (question and answer no. 10).

<sup>39</sup> An alien who has been unlawfully present in the United States for a period of 180 days or more, but less than one year, and voluntarily departs before the commencement of removal proceedings is barred from seeking admission to the United States for a period of three years. Moreover, if the alien has been unlawfully present for more than one year, he or she may not seek admission for a period of 10 years. An alien is unlawfully present and subject to the three and 10-year bars if he or she remains in the United States beyond “the period of stay authorized by the Attorney General,” INA §§ 212(a)(9)(B)(i), (a)(9)(B)(ii). See generally 1. Ira Burkemper, *The Impact of the IIRIRA’s Unlawful Presence and Overstay Provisions on Temporary Workers*, 76 Interpreter Releases 1749 (Dec. 13, 1999).

<sup>40</sup> Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, Period of Stay Authorized by the Attorney General after 120 tolling Period for Purposes of Section 212(a)(9)(B) of the Immigration and Nationality Act, File No. HQADN70/21.1.24-P (Mar. 3, 2000) (hereinafter 3/00 Pearson Memo), reprinted in 5 *Bender’s Immigr. Bull.* 286 (Mar. 15, 2000).

<sup>41</sup> *Id.*

<sup>42</sup> INA § 212(a)(9)(B)(iv).

<sup>43</sup> 3/00 Pearson Memo, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 8 C.F.R. § 274a.12(b)(20). Under this provision, if the application is adjudicated before the expiration of the 240-day period, and denied an extension of stay, the employment authorization “shall automatically terminate upon notification of the denial decision.” *Id.*

<sup>47</sup> 8 C.F.R. § 214.2(h)(13)(i)(A).

<sup>48</sup> See the recently released interim final rule issued by the DOL, 65 Fed. Reg. 80,110, 80,210 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.705(c)(4)). Issues related to LCAs are discussed below.

<sup>49</sup> See *Matter of Lee*, 11 I. & N. Dec. 601 (BIA 1966). For a general discussion of maintenance-of-status obligation, see Charles Gordon, Stanley Mailman, Steve YaleLoehr, *Immigration Law and Procedure* (New York: Matthew Bender, 2001) §12.07[2][c].

<sup>50</sup> See Letter from Yvonne LaFleur, Chief, Budget and Trade Services at INS’ Office of Adjudications, to attorney John S. Brendel (February 21, 1996), reproduced in 73 *Interpreter Releases* 286 (March 4, 1996) (stating that when two employers filed H-IB petitions for the same alien, both petitions remained valid after the alien began working for only one of the employers); Letter from John W. Brown, Acting Branch Chief, Business and Trade Services Branch, Benefits Division, to attorney Carolyn Fuchs (January 5, 1998), reproduced in 75 *Interpreter Releases* 185 (February 2, 1998) (stating that a parent company’s H-IB petition remained valid after the workers (on whose behalf the petition was filed) transferred to a subsidiary company which subsequently filed new H-IB petitions for them).

<sup>51</sup> See *Matter of Hosseinpour*, 15 I. & N. Dec. 191 (BIA 1975).

<sup>52</sup> See *Matter of Siffre*, 14 I. & N. 444 (BIA 1973).

<sup>53</sup> See Letter from Thomas W. Simmons, Chief, Business and Trade Branch, to attorney Harry Joe, reproduced in 76 *Interpreter Releases* 386 (March 8, 1999).

<sup>54</sup> INA § 212(n)(2)(c)(vi)(II); 65 Fed. Reg. 80169, 80218 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.731(c)(7)).

<sup>55</sup> 8 C.F.R. § 214.1 (f).

<sup>56</sup> INA § 212(a)(6)(C) provides that an alien is inadmissible if he or she “by fraud or willfully misrepresenting a material fact, seeks to procure a visa, other documentation, or admission into the United States.” See also 9 F AM 40.63, *Matter of S and BC* 9 I & N Dec. 436 (BIA; AG 1960) (holding that a misrepresentation is material if the alien is excludable on the true facts or the misrepresentation tends to cut off a line of inquiry that is relevant to the alien’s eligibility and which might have resulted in a proper finding that

the alien be excluded); *Kungys v. U.S.*, 485 U.S. 759 (1988) (holding that a misrepresentation is not material unless it “had a natural tendency to affect” an official decision”).

<sup>57</sup> INA § 274C(a) prohibits any individual or entity from knowingly forging documents or filing any application or document with knowledge or reckless disregard of the fact that it was falsely made.

<sup>58</sup> 8 C.F.R. § 214.2(h)(13)(iii)(A).

<sup>59</sup> INS Form 1-129W, at page 2.

<sup>60</sup> See below for discussion on “non-frivolous” petitions.

<sup>61</sup> INS H-IB Press Release, *supra* note 15 (question and answer no. II).

<sup>62</sup> Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, Interim Guidance for Processing H-1 B Applicants for Admissions as Affected by the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313, File No. HQOPS 70/20 (January 29, 2001) (hereinafter 1/01 Pearson Memo), available at <http://www.aila.org/infonet>.

<sup>63</sup> *Jd.* See also Sen. Abraham’s letter, *supra* note 37, noting that the INS is concerned with determining whether a petition is “non-frivolous.” He raised this issue in the context of whether an employer will be required to wait for a receipt notice before employing the HIB worker.

<sup>64</sup> See 3/00 Pearson Memo, *supra* note 40.

<sup>64</sup> See 3/00 Pearson Memo, *supra* note 40.

<sup>65</sup> For a discussion of these reform efforts, see Jeanne Butterfield, *The New Asylum Regulations: A Practitioner’s Guide*, 95-01 *Immigr. Briefings* (Jan. 1995).

<sup>66</sup> 8 C.F.R. § 208.7 (1990). Currently, 8 C.F.R. § 208.7 provides that an applicant must wait 150 days after the INS receives a complete application before the individual can apply for employment authorization. See also Daniel Home & L Ari Weitzhandler, *Asylum Law After the Illegal Immigration Reform and Immigrant Responsibility Act*, 9704 *Immigr. Briefmgs* (Apr. 1997).

<sup>67</sup> INA § 208(d)(6); 8 C.F.R. § 208.5.

<sup>68</sup> Memorandum from Richard E. Norton, INS Assoc. Commissioner, Work Authorization for Asylum Applicants, File No. CO 208-C (July 9, 1987), reproduced in 64 Interpreter Releases 886 (July 27, 1987).

<sup>69</sup> A Texas federal district court ruled that employment authorization may be rejected only if the underlying asylum application is “indisputably meritless” or “lacks an arguable basis in either fact or law.” *Ramos v. Thornburgh*, 732 F. Supp. 696, 705 (E.D. Tex. 1989). The U.S. Supreme Court has held that a finding of frivolousness with respect to a pleading must be based on whether it lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Denton v. Hernandez*, 504 U.S. 25 (1992).

<sup>70</sup> One court relied on this definition of “frivolous” taken from Black’s Law Dictionary (5th ed. 1979) to rule that merely denying an asylum request does not render the application frivolous. *Gilana v. Smith*, No. 81 C 3829, 1981 U.S. Dist. LEXIS 16824 (N.D. Ill. 1981).

<sup>71</sup> *Neitzke*, 490 U.S. at 325.

<sup>72</sup> 8 C.F.R. § 214.2(h)(4)(iii).

<sup>73</sup> 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

<sup>74</sup> INA § 274A.

<sup>75</sup> 42 U.S.C. § 2000e-2(a)(1) states that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

<sup>76</sup> 42 U.S.C. § 2000e-2(a)(2).

<sup>77</sup> See, e.g., *Griggs v. Duke Power Company*, 401 U.S. 431 (1971); *Espinoza v. Farah Manuf. Co. Inc.*, 414 U.S. 86 (1973).

<sup>78</sup> *Espinoza*, 414 U.S. at 88.

<sup>79</sup> The burden of proof for employment discrimination cases has been formulated through several landmark Supreme Court decisions. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

<sup>80</sup> For general guidance on the types of questions employers may ask in the application process, see Letter from John Trasvina, Special Counsel for Immigration Related Unfair Employment Practices, to Arnold Eagle, American Counsel on International Personnel, Inc. (Aug. 6, 1998), reproduced in 76 Interpreter Releases 1038 (July 2, 1999).

<sup>81</sup> 8 C.F.R. § 214.2(h)(2)(i)(E).

<sup>82</sup> The Semite Judiciary Committee noted that individuals on H-IB visas “whose adjustment to permanent resident on the basis of employment has progressed far enough to the stay in the United States until a final decision is made” should not be forced to leave the country simply on account of “entirely unreasonable administrative delays.” S. Rep. No. 106-260, at 23 (2000).

<sup>83</sup> 65 Fed. Reg. 80,110, 80,219 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.731 (c)(7)(ii)).

<sup>84</sup> *Id.* at 80,171 (Dec. 20, 2000) (supplementary information).

<sup>85</sup> *Id.*

<sup>86</sup> Summary of H-IB/LCA Stakeholders’ Meeting with DOL-ETA and DOL-ESA, Eleanor Pelta, Chair, DOLIETA Liaison Committee (January 16, 2001), available at <http://www.aila.org/infonet>.

<sup>87</sup> INA § 274A(b)(6); 8 C.F.R. § 274a.2.

<sup>88</sup> INS H-IB Press Release, *supra* note 15 (question and answer no. 12).

<sup>89</sup> Letter from Sen. Abraham to the INS, *supra* note 37.

<sup>90</sup> See also 8 C.F.R. § 274a.4.

<sup>91</sup> 8 C.F.R. § 214.2. INA § 212(n) sets forth the requirements for a labor condition application.

<sup>92</sup> INA § 212(n)(1)(G).

<sup>93</sup> 65 Fed. Reg. 80,110, 80,210 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.705(c)(4)).

<sup>94</sup> *Id.*

<sup>95</sup> Letter from Sen. Abraham to the INS, *supra* note 37.

<sup>96</sup> American Competitiveness and Workforce Improvement Act (ACWIA) (enacted as tit. IV of Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681).

<sup>97</sup> INA § 286(s)(6) provides that 6% of the amounts deposited in the H-1B nonimmigrant petitioner account are to be made available for the Secretary of Labor to reduce processing time for LCA applications. The Secretary is required to submit to Congress a report certifying that the Secretary “substantially complied” with the requirement that LCAs be certified within a seven-day period. In addition, the interim final regulations state that a portion of the increased fee was used to support the new faxback system. 65 Fed. Reg. at 80,134.

<sup>98</sup> See supra note 82 and accompanying text.

<sup>99</sup> 8 C.F.R. § 103.2(a)(7).

<sup>100</sup> See supra note 61 and accompanying text. Note that the interim final regulations state that the DOL believes that the bugs from the previous faxback system have been ironed out, and that the agency has implemented a system to address delays. 65 Fed. Reg. at 80,133. It does not address, however, the fact that any number of LCA certification 25 problems could delay the start of new employment, which could defeat the purpose of §105.

<sup>101</sup> See discussion on repatriation.

<sup>102</sup> 8 C.F.R. § 274a.12(b)(20).

<sup>103</sup> Letter from Sen. Abraham to the INS, supra note 37. Former Sen. Abraham emphasized the unfairness of immediate termination of employment authorization, noting that such a position would “create legal traps for either employees or employers.”

<sup>104</sup> See discussion below.

<sup>105</sup> INA § 214(c)(5)(A).

<sup>106</sup> *id.*; 8 C.F.R. § 214.2(h)(4)(iii)(E).

<sup>107</sup> 20 C.F.R. § 655.750(b)(1); 8 C.F.R. § 214.1(h)(11)(i).

<sup>108</sup> S. Rep. No. 106-260, at 22-23 (2000).

<sup>109</sup> INA § 212(n)(2)(A); 20 C.F.R. § 655.750(b)(1).

<sup>110</sup> 65 Fed. Reg. 80,110, 80,234 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.805(d)).

<sup>111</sup> *id.* at 80,171 (supplementary information).

<sup>112</sup> The definition of H-1B dependence is included in INA § 212(n)(3)(A). An H-1B dependent employer is one who: has 25 or fewer full-time equivalent employees who are employed in the United States and employs more than 7 H-1B nonimmigrants; has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States and employs more than 12 H-1B nonimmigrants; or has at least 51 full-time equivalent employees who are employed in the United States and employs H-1B nonimmigrants in a number that is equal to at least 15% of the number of such full-time equivalent employees.

<sup>113</sup> INA § 212(n)(1)(E)-(G); 65 Fed. Reg. 80,110, 80,223-31 (Dec. 20, 2000) (to be codified at 20 C.F.R. §§ 655.736-655.739).

<sup>114</sup> INA § 212(n)(2)(A); 20 C.F.R. § 655.750(b)(1); 65 Fed. Reg. 80,110, 80,213 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.730(c)(2)).

<sup>115</sup> INA § 212(n)(2)(C)(vi).

<sup>116</sup> INA § 212(n)(2)(C)(vi)(I). See also 65 Fed. Reg. 80,110, 80,219 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.731(c)(9) (discussing deductions and prohibited penalties).

<sup>117</sup> See 65 Fed. Reg. 80,236 (Dec. 20, 2000). For a discussion on the DOL’s proposed rule issued in January 1999, see Angelo Paparelli & Yoshiko Robertson, *The Labor Department’s Role in the H-1B Visa Program: Protector of Workers or Enemy of the Future?*, 76 *Interpreter Releases* 785 (May 24, 1999).

<sup>118</sup> 65 Fed. Reg. 80,110, 80,219 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.731(c)(1)(O)(i)(C)) (distinguishing between liquidated damages as “fixed or stipulated by the parties at the inception of the contract,” and penalties as amounts that are not “reasonable approximations or estimates of such damage”).

<sup>119</sup> *id.*

<sup>120</sup> *id.* (to be codified at 20 C.F.R. § 655.731(c)(9)).

<sup>121</sup> *id.*

<sup>122</sup> *fd.*

<sup>123</sup> INA § 212(n); 65 Fed. Reg. 80,110, 80,214 (Dec. 20, 2000) (to be codified at 20 C.F.R. § 655.731).

<sup>124</sup> *fd.*

<sup>125</sup> See 1101 Pearson Memo *supra* note 62.

<sup>126</sup> See The Department of State Unclassified Telegram to All Diplomatic and Consular Posts, SECST A TE W ASHDC (STATE 27960 - ROUTINE), providing that, based on the INS' position, an H-IB alien traveling abroad after accepting new employment under AC21 "will need a new visa only if the original visa has expired." According to the State Department, such a situation would be rare given that the visa and petition ordinarily share the same expiration date. The State Department provides that consular officers may issue a new visa when an applicant presents a valid passport, evidence of the validity of the old petition and evidence of the timely filing of the new petition. See also 1/01 Pearson Memo *supra* note 62, which states that the visa requirement would not apply to Canadians who are visa exempt under 22 C.F.R. § 41.2. According to the INS, visa exempt applicants may present a Form 1-94 (arrival/departure record) or a copy of the Form 1-797 approval notice with the original petition's validity dates. In the rare circumstance where the consular officer issues a new visa based on portability, the question arises of what the expiration date will be. Since the INS may not have approved the new employer's petition, there would not yet be a known petition validity date to serve as a guide for the consular officer.

<sup>127</sup> See 1/01 Pearson Memo *supra* note 62.

<sup>128</sup> The INS' Computer-Linked Application Information Management System (CLAIMS) records and tracks cases for immigration benefits, and serves as the agency's central source for document production. In recent years, the INS began tracking the number of H-IB petitions filed through CLAIMS, and focused greater efforts on supporting the CLAIMS database. See 75 Interpreter Releases 13 (January 5, 1998), 75 Interpreter Releases 261 (February 23, 1998).

<sup>129</sup> It should be noted that the INS has magnanimously stated that if the H-IB applicant asserting portability does not possess a Form 1-797 and the filing of a new petition cannot be confirmed by a CLAIMS query, he or she will not automatically be subject to expedited removal. The consequence of an order of expedited removal is that the alien would be inadmissible for five years. INA § 212(a)(9)(A)(i).

<sup>130</sup> 22 C.F.R. § 41.53 a .

<sup>131</sup> 22 C.F.R. § 41.53(b).

<sup>132</sup> 22 C.F.R. § 41.53(d).

<sup>133</sup> See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir. 1986). See also Angelo A. Paparelli & Mitchell Tilner, A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases, 65 Interpreter Releases 1027 (Oct. 7, 1988).

<sup>134</sup> *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986) (consular decision to revoke visa was erroneous); *Shimizu v. Dep't of State*, No. CV 89-2741-WMB (C.D. Cal. May 31, 1990), summarized in 67 Interpreter Releases 699 (June 25, 1990) (same).

<sup>135</sup> *Li Hing*, 800 F.2d at 971 (distinguishing *Wong*).

<sup>136</sup> AC 21 § 105(b).

<sup>137</sup> See 1 01 Pearson Memo, *supra* note 62.

<sup>138</sup> *Lehman v. United States*, 353 U.S. 685 (1957) (allowing deportation based on conviction that, because of conditional pardon, were not grounds for deportation when they occurred); *Marcello v. Bonds*, 349 U.S. 302 (1955) (allowing deportation based on conviction that was not grounds for deportation when it occurred).

<sup>139</sup> *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

<sup>140</sup> *Hamama v. INS*, 78 F.3d 233 (6th Cir. 1996).

<sup>141</sup> *Galvez-Letona v. Kirkpatrick*, No. 99-4195, 2001 U.S. App. LEXIS 1515 (10th Cir. Feb. 2, 2001). The amendment was signed into law on November 6, 2000, and amends INA § 337(a). Pub. 1. 106-448, 114 Stat. 1939.

<sup>142</sup> *Galvez-Letona*, 2001 U.S. App. LEXIS 1515 at \*8.

<sup>143</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. 1. No. 104132, 110 Stat. 1214.

<sup>144</sup> Until April 1, 1997, INA § 212(c) provided that aliens who were lawfully admitted for permanent residence, who temporarily proceeded abroad voluntarily and not under an order of deportation, and who

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were returning to a lawful unrelinquished domicile in the United States of seven consecutive years, could be admitted to the United States at the discretion of the Attorney General.

<sup>145</sup> AEDPA § 440(d) includes convictions for such offenses as aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, and multiple crimes of moral turpitude.

<sup>146</sup> See, e.g., *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998); *Sandoval v. Reno*, 166 F. 3d 225 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. § 2000); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999).

<sup>147</sup> *Magano-Pizano v. INS*, 200 F .3d 603 (9th Cir. 1999).

<sup>148</sup> 1d.

<sup>149</sup> In potentially curing unauthorized employment in situations where the individual “jumped the gun,” perhaps this is another example of portability - Congress just said so.

<sup>150</sup> INA § 274A(e)(4) provides that an individual or entity found to have employed an unauthorized alien is subject to fines ranging from \$250 to \$10,000.

<sup>151</sup> INA § 273 provides fines and imprisonment for any person who knowingly or in reckless disregard of the alien’s unlawful stay in the United States conceals, harbors, or shields from detection, such an alien.