

“Parting is Such Sweet Sorrow”: Musings on Adjustment of Status Portability!¹

By Angelo A. Paparelli and Janet J. Lee

The recent enactment of the American Competitiveness in the Twenty-first Century Act (“AC21”)² has evoked a range of emotions from employers, as they delight over the opportunities to hire or transfer more foreign workers while fretting whether their key foreign employees will be lured away by competitors. The adjustment of status (“AOS”) “portability” provision³ has surely created the possibility that employee departures may become bittersweet moments for employers. On the one hand, there is the sting of having expended substantial resources to assist an employee in obtaining lawful permanent residence only to see the worker depart near the end of the process. On the other, the employer who hires this employee gains a windfall. These are only some of the opportunities and concerns arising from the AOS portability provision. This article is not intended to cover all of them; rather, it will offer selected musings on some of the relevant issues.

Adjustment of Status Portability – Traction and Attraction

Under §204 of the Immigration and Nationality Act (“INA”), an employer may file an immigrant visa petition with the Immigration and Naturalization Service (“INS”)⁴ to employ an alien entitled to classification as an outstanding professor or researcher, a multinational executive or manager, a member of a profession holding an advanced degree or alien of exceptional ability, or a skilled worker, professional or other worker.⁵ Once an employment-based petition is approved, a sponsored worker whose immigrant visa priority date is current and who is otherwise qualified may file for adjustment of status.⁶ Section 106(c)(1)

¹ The quoted reference is from William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

² Public Law No. 106-313, October 17, 2000 (hereinafter AC21).

³ § 106(c), AC21, amending INA §§204, 212(a)(5)(A).

⁴ Technically, §204 of the INA confers authority to accept and adjudicate immigrant visa petitions on the Attorney General; but the Commissioner of INS is the designee of the Attorney General to receive and adjudicate such petitions. See INA § 1 03, 8 CFR § 2.1.

⁵ INA § 204(a)(1)(D). Each classification is defined under INA § 203(b)(1)(B), (b)(1)(C), (b)(2), (b)(3).

⁶ INA § 245.

of AC21 amends §204 of the INA by providing that if an individual's application for AOS "has been filed and remained unadjudicated for 180 days or more," the immigrant visa petition will remain valid "with respect to a new job if the individual changes jobs or employers [and] if the new job is in the same or a similar occupational classification as the job for which the petition was filed."⁷ Section 106(c)(2) also provides that when an individual changes positions or employment under § 106(c)(1), the labor certification for the original position will likewise remain valid.⁸

A Preliminary Word of Caution

Attorneys, employers and foreign workers should exercise care in deciding whether or not to take immediate action based on the AOS portability provision of the new law. Agency guidance to date has been informal, inconsistent and not fully developed.⁹ 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 which 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 AOS 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.¹⁰

Effective Date

Given that § 106 does not specify an effective date, this provision may be subject to three possible interpretations. The section could conceivably apply: 1) to any application for AOS pending on October 17, 2000; 2) to any application for AOS filed on or after October 17; or 3) to labor certifications filed on or after October 17. Principles of statutory construction provide that 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."¹¹ Arguably, the plain language of the

⁷ § 106(c)(1), Title I, AC21, amending INA § 204.

⁸ § 106(c)(2), Title I, AC21, amending INA § 212(a)(5)(A).

⁹ The INS has recently released Questions and Answers regarding changes to the H-1B Program. The INS indicates that it is unlikely that the agency will publish implementing regulations before March 2001.

¹⁰ 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.

¹¹ Robinson v. Shell Oil Company, 519 U.S. 337 (1997).

statute supports the interpretation that §106(c) should apply to all applications for AOS that were pending on October 17, because every such application “has been filed and remained unadjudicated.” On the other hand, one could argue that given Congress’ specific inclusion of a retroactivity provision in §105 (the section authorizing H-IB portability),¹² the lack of a similar provision under §106 may suggest an intent that AOS portability should apply prospectively.

Yet, as the hallowed treatise teaches, “[f]aithful interpretation. . . demands the avoidance of strained, unreasonable or absurd meanings in view of the text and purport of the whole instrument.”¹³ In looking at the different sections of AC21, the advocate can argue that Congress intended the statute, as a whole, to eliminate present backlogs and to avoid the negative impact that current backlogs have on AOS applicants. For example, Title II of AC21 states Congress’ purpose of providing the INS with mechanisms to “eliminate the current backlog in the processing of immigration benefit applications within 1 year after enactment of this AC21”¹⁴ Moreover, § 106 taken together with other provisions of AC21,¹⁵ was intended to address concerns 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 U.S. until a final decision is made” should not be forced to leave the country simply on account of “entirely unreasonable administrative delays.”¹⁶ A reasonable interpretation of the statute as a whole would suggest, therefore, that the AOS portability provision was included in § 106 to allow sponsored workers to progress in their careers despite unreasonable administrative delays.

Another argument for an expansive reading of the statute may be made based on public policy. “A narrow construction should not be permitted to undermine the public policy sought to be served.”¹⁷ To be sure, there exists a public policy of protecting the U.S. labor market through a recruitment testing process

¹² § 105 of AC21 provides that H-IB portability applies to “petitions filed before, on, or after the date of enactment of this Act.”

¹³ Singer, Normal J., *Statutes and Statutory Construction* § 56A:01 (6th ed. 2000).

¹⁴ § 202, Title II, *Immigration Services and Infrastructure Improvements*, 8 V.S.C. § 1571.

¹⁵ § 104(c) of AC21 provides that an alien may be granted an extension of H-IB 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-IB 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).

¹⁶ Report of the Senate Committee of the Judiciary, *Section-By-Section Analysis*, April 11, 2000.

¹⁷ Singer, Norman J., *Statutes and Statutory Construction* § 56.01 (6th ed. 2000).

known as labor certification. This policy, however, has its limits, as evidenced by the existence of the National Interest waiver and other categories exempt from labor certification.¹⁸ Another important public policy is the right of the individual to change jobs,¹⁹ and to be free from indentured servitude?²⁰ If a government agency is unable or unwilling to adjudicate an adjustment of status application within a reasonable time (which Congress determined to be 180 days²¹), the public policy favoring a labor certification should yield, and the worker should be allowed to change positions or employment (while remaining in the same occupational classification).

Thus, based on statutory interpretation of AC21, taken as a whole, and an analysis of the public policies underpinning the law, Congress seemingly expressed an intent that this remedial legislation should take effect immediately and apply to all pending adjustment applications.

Advising the Parties Involved

Although ethical issues involving dual representation are implicated by § 106 of AC21, this article is not intended to address them.²² Rather, the practical considerations regarding portability from each party's perspective are discussed.

The Initial Employer's Perspective. After a worker's resignation, the sponsoring employer may try to substitute another alien on the labor certification. Generally, the substitute alien worker must have satisfied "all of the minimum education, training, or experience requirements, as stated in Part A of the original Form ETA 750 filed by the employer, at the time the original labor certification application was

¹⁸ Such as first preference employment-based visas and Schedule A, Group II under INA §203(b)(2)(B)(i), INA § 203(b)(1)(A), 20 CFR § 656.10.

¹⁹ See, e.g., *IVI Environmental Inc. v. McGovern*, 269 A.D. 2d. 497, 707 N.Y.S. 2d. 107 (2000), where the Court refused to issue a temporary injunction against a former employee based on the employer's failure to show irreparable harm if a restrictive covenant were not enforced.

²⁰ Among the courts holding that the Thirteenth Amendment to the U.S. Constitution prohibition against slavery is not limited solely to States, the Second Circuit ruled that involuntary servitude of any individual is prohibited. *V.S. v. Shackney*, 333 F.2d 475 (2nd Cir. 1964).

²¹ §202(b), Title II, Immigration Services and Infrastructure Improvements.

²² For a detailed discussion on the issue of dual representation, see Paparelli, Haight & Hake, "A voiding or Accepting Risks in H-IB/LCA Practice: Part 11," No. 92-12, Immigration Briefings, December 1992. Also see Hake, "Dual Representation and Immigration Practices," 5 Geo. Immigr. LJ. 581-639 (1991); Maggio, "Basic Ethical Issues in Labor Certification Cases," in David Stanton Manual on Labor Certification: The Nuts and Bolts on How to Prepare Labor Certification Theory and Practice (2nd ed. 2000).

submitted to the state employment office.²³ Whether this procedure remains available post-AC21 is questionable. Section 106(c)(2) provides that a labor certification will “remain valid with respect to a new job” if the beneficiary changes to a job that is in the “same or similar occupational classification as the job for which the certification was issued.” Although this provision does not expressly revoke the employer’s right to substitute another alien when the initial alien worker changes employment, attorneys and their clients must weigh the risks very carefully before making the decision to substitute another alien worker in the labor certification. In light of the AOS portability provision, the INS or the Department of Labor (“DOL”) may take the position that substitution of aliens is no longer permitted?²⁴

The New Employer. The new employer also runs certain risks. For example, the new employer should be concerned whether the worker’s AOS application might be rejected, as this determination is made at the discretion of the Attorney General and requires compliance with a variety of statutory requirements.²⁵ Moreover, as of the date of the filing of the application, the worker must be present in lawful admission in the U.S., must have maintained, continuously, a lawful status, must not have engaged in unauthorized employment, and must not have otherwise violated the terms and conditions of his or her most recent admission to the U.S. for at least 180 days?²⁶ Thus, the new employer should probably take steps to investigate the employee’s immigration history and assess the likelihood that his or her application might be denied.

The new employer should also reverify the worker’s 1-9 information and monitor the employment authorization document to ensure that employment authorization has not expired while the application for adjustment of status is pending. Issues may also arise involving the worker’s ability to travel.²⁷ Moreover, the new employer should ensure that the worker’s new position is in the “same or similar occupational

²³ See Memorandum of Louis D. Crocetti, INS Associate Commissioner, dated March 7, 1996, reproduced in 73 Interpreter Releases 444 (April 8, 1996), Memorandum of Barbara Ann Farmer, Administrator, Department of Labor Office of Regional Management (dated March 22, 1996). Also see Kooritzkv v. Reich, 17 F.3d 1509 (D.C. Cir. 1994), in which the Court held that the Department of Labor improperly promulgated regulation prohibiting substitution of alien in labor certification. The Fifth Circuit also held that a six-month time limitation on substitution of a beneficiary was invalid, in part, because a labor certification is valid “indefinitely” under 20 CFR §655.30(a). Medellin v. Bustos, 854 F.2d 795 (5th Cir. 1988).

²⁴ The argument that substitution of aliens remains viable notwithstanding enactment of AC21 is discussed in the text *infra*.

²⁵ INA § 245(a) and § 245(c).

²⁶ INA § 245(k).

²⁷ For a detailed discussion on the AOS portability provision’s impact on travel issue, see a companion article published in this handbook by Eileen F. Morrison.

classification” as the job for which the labor certification was approved?²⁸ To assess this, the new employer and alien will wish to acquire a copy of the labor certification. This may be easier said than done, as the initial employer perhaps will not willingly provide this information. Moreover, the lawyer(s), who assisted in preparing the labor certification and who may be imputed under law as representative for both the initial employer and the beneficiary requesting the document, may well be caught in the crossfire.

The Employee’s Perspective. A worker applying for adjustment of status will likely assert that he or she is entitled to the benefits of the labor certification and the 1-140 petition notwithstanding a change of employer. In other words, the employee will likely maintain quite convincingly that §106 was intended to allow workers who are waiting for their AOS applications to be processed to change jobs without jeopardizing their chances of obtaining lawful permanent residence. But by permitting the labor certification and 1-140 petition to remain valid when a worker changes jobs or positions, §106(c) raises the issue of whether the worker is the sole beneficiary or perhaps even the “owner” of the labor certification. As mentioned above, pre-AC21 law allowed a procedure by which an employer could lawfully substitute another alien worker in a labor certification.²⁹ The employee may argue, however, that AC21 was intended to protect the public policy of allowing free movement of workers, and not to hold them in bondage. Thus, the worker will likely contend, the employer should not be permitted to seek substitution after the worker changes employment.

Although § 106(c) allows workers to change jobs after an AOS application has been pending for 180 days or more, this Congressional remedy does not necessarily reflect an intent to deprive the initial sponsoring employer of the benefits procured through the test of the labor market. Before an immigrant petition is filed for professionals holding advanced degree, individuals of exceptional ability in sciences, arts, or business, skilled workers, and professionals holding a baccalaureate degree, an approved labor certification is required.³⁰ In requesting a labor certification from the DOL, the employer must show (among other things) that there are insufficient workers who are “able, willing, qualified” to perform the job, and the employment of the alien worker will not adversely affect the wages and working conditions of individuals in the U.S. similarly employed.³¹ The employer must conduct recruitment efforts to find U.S. workers who are “able, willing, qualified” for the job.³² This procedure requires the employer to invest

²⁸ See discussion on labor certification issues in a companion article by George S. Newman.

²⁹ See fit 24.

³⁰ Certain “EB2” classifications, INA §§203(b)(2)(A), 203(b)(2)(B), 8 CFR §204.5(k), and “EB3” category, INA §§203(b)(3)(A)(i), 203(b)(3)(A)(ii), 8 CFR §204.5(1).

³¹ INA §212(a)(5)(A)(i). Also see 20 CFR §656, Subpart C, for the requirements for the labor certification process.

³² The DOL attempted to streamline the process by issuing General Administrative Letter 1-97, “Measure for Increasing Efficiency in the Permanent Labor Certification Process” (Oct. 1, 1996). GAL 1-97 allows employers to request a “Reduction in Recruitment,” after engaging in “real world” advertising.

significant resources to obtain the benefit of hiring a foreign worker on a permanent basis. If the labor certification remained valid only with respect to the worker's new employment and his or her pending AOS application, the employer would lose not only a valued employee but also the fruits of its efforts in testing the labor market. In fairness to the employer, the labor certification should be "divisible" under what can be called the "Cell Mitosis" theory.³³ Under this theory, the labor certification would remain valid with respect to the employee's new job, and the sponsoring employer would also be permitted to substitute another alien worker on the labor certification. From the sponsoring employer's perspective, the conditions under which the labor certification was granted remain the same (other than the fact that the initial worker has resigned); there is still a demonstrated shortage of U.S. workers for the position. To require the employer to test the market again would be unfair and unduly burdensome. Such a result, moreover, was not necessarily intended by Congress in enacting AC21, given that the issue of substitution was never addressed. Thus, just as in the process of cell mitosis, each party (the sponsoring employer and initial beneficiary employee) should be able to retain the benefits flowing from the single approved labor certification. Time will tell whether an enlightened INS or an open-minded federal judge will accept the Cell Mitosis theory.

The employee should also consider the issue of whether he or she must establish an intent to work for the initial sponsoring employer.³⁴ According to the INS, if a worker is adjusting status under an employment-based preference category that requires a job offer, "the fact that an applicant is able to work in the open-market does not alter the applicant's responsibility to demonstrate an intent to work for the petitioning employer."³⁵

Employment Policies

What does the AOS portability provision under AC21 portend for employers? Companies expend a great deal of time, money and effort in obtaining labor certification, procuring 1-140 petition approval and facilitating the submission of AOS applications for sponsored workers. Presumably, employers may justify the costs associated with seeking lawful permanent resident status for workers with a degree of assurance that these individuals will continue providing their needed skills without facing the six-year cap on nonimmigrant employment-based visas. Section 106(c) has created the possibility that an individual may change employment shortly after the employer incurs these costs, thereby causing a significant business loss to the sponsoring employer. An employer in this situation may wish to adopt defensive postures in an effort to mitigate harm. One such measure may be to attempt to recover attorneys' fees

³³ Mitosis: The process in cell division by which the nucleus divides, normally resulting in two new nuclei, each of which contains a complete copy of the parental chromosomes. The American Heritage Dictionary, Third Edition, Dell Publishing, 1994.

³⁴ See discussion on INS Issues by Eileen F. Morrison.

³⁵ Memorandum of Michael D. Cronin, Acting Associate Commissioner, amending March 14, 2000 Dual Intent Memorandum. See. 64 Fed. Reg. 104 (June 1, 1999).

and other costs related to the process of obtaining a labor certification and ultimately the filing of an adjustment of status, based on the premise that such costs are analogous to reimbursements for relocation costs or tuition fees.

Generally, parties may enter into written agreements providing that the employer may recover the costs of assisting a worker in relocation or tuition costs if he or she resigns before the end of a designated time period. The enforceability of tuition agreements appears to be based on whether the education is within the scope of the worker's employment?³⁶ An employer may argue that recouping the costs associated with the process of obtaining a green card is analogous to tuition reimbursement. An argument may be made that obtaining a labor certification is not necessarily a condition of employment in that a labor certification does not determine the worker's qualifications with respect to the skills required to perform his or her job. In opposing the employer's contention, an alien worker may argue that if he or she is eligible for an immigrant petition only under the EB2 or EB3 classification, the worker is only allowed to obtain permanent full-time employment as a beneficiary of a labor certification. Consequently, the worker will likely argue that obtaining a labor certification is a condition of employment.

An employer may also argue that recovery may be made through a deduction from the departing employee's final paycheck, which is also regulated by state laws.³⁷ Before following this course of action, the employer should note that recovery from a final paycheck will likely be very limited, given that there generally are restrictions on such deductions?³⁸ Moreover, the employer must also consider whether recovery through payroll deduction would violate the required wage requirements of immigration law. In

³⁶ The California Court of Appeal held that an agreement whereby a worker agreed to reimburse a portion of the tuition-related funds provided by her employer was a "'fringe benefit' not within the scope of her employment" and, thus, valid. Blackman v. Great American First Savings Bank, 284 Cal. Rptr. 491; 233 Cal. App. 3d 598 (1991). In Michigan, the state Supreme Court held that a tuition agreement was void because the training provided was a condition of employment. According to the court, an employer's offer to fund an employee's education and require reimbursement if he or she resigns after a specific period of time may be enforceable if the agreement is optional and, thus, not a condition of employment or continued employment. Sands Appliance Services, Inc. v. Wilson, 463 Mich. 231, 615 N.W.2d 241 (2000).

³⁷ For example, California Labor Code §224 allows employer to deduct from wages when it is required or empowered so to do by state or federal law, or when the deduction does not reduce the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute.

³⁸ For example, Oregon law specifies the types of acceptable deductions from final paychecks, the amount of which is limited by state garnishment laws. ORS 652.140, ORS 23.185. In California, a deduction from a final paycheck may be made to repay indebtedness to the employer. If the employee had been paying installment amounts, the deduction must not constitute an accelerated payment to recover a full balance owed, For a detailed discussion on deductions under California law, see Simmons, Richard J., Wage and Hour Manual (7th ed. 1997).

the labor certification context, an employer is obligated to pay at least 95% of the prevailing wage.³⁹ An employer may not necessarily violate this requirement in situations where the employer deducts from the compensation of an alien worker who is paid at or above the prevailing wage. If the employer pays the attorneys' fees and other costs associated with assisting the worker in filing an AOS application, deducting these costs from wages arguably may not reduce his or her compensation below 95% of the prevailing wage. Another argument may be based on the timing of the required wage obligation, i.e., that the employer is not required to pay the prevailing wage under the labor certification until the worker obtains a green card.⁴⁰ Thus, if the worker leaves during the pendency of an adjustment of status application, the prevailing wage obligation is not yet even triggered. Notwithstanding these potential arguments, employers must understand that deductions from final paychecks will likely be so limited that the effort exerted will probably not be worth the risk of the low employee morale that such recoupment strategies will likely engender.

Readers should also note that the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") prohibits an employer from requiring a worker to pay a penalty for ceasing employment prior to an agreed upon date. Under ACWIA, the Secretary of Labor shall determine "whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.⁴¹ 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.⁴² Furthermore, in the DOL's interim final regulations, the agency states three situations in which deductions from wages may be authorized. According to the DOL, a deduction may be made when: it is required by law; it is made pursuant to a collective bargaining agreement or is "reasonable and customary in the occupation and/or area of employment"; or it meets certain requirements (such as obtaining a "voluntary, written authorization by the employee).⁴³ The DOL also provides that deductions

³⁹ 20 CFR 656.40(a)(2)(i). On Form ETA-750A, Box 22, the employer provides, "The wages offered equals or exceeds the prevailing wage and I guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." Practitioners have interpreted the phrase "at the time the alien begins work" to refer to commencement of work as a permanent resident.

⁴⁰ See fn. 40.

⁴¹ INA §212(n)(2)(C)(vi)(I). See also the recently released Interim Final Rule issued by the DOL, 65 Fed. Reg. 80,109, (to be codified at 20 CFR pts. 655 and 656). Deductions and prohibited penalties are addressed at 65 Fed. Reg. 80,219 (December 20, 2000).

⁴² See 65 Fed. Reg. 80,236 (Dec. 20,2000). For a discussion on the DOL's proposed rule issued in January 1999, see Paparelli & Robertson, "The Labor Department's Role in the H-1B Visa Program: Protector of Workers or Enemy of the Future," 76 Interpreter Releases 20 (May 24,1999).

⁴³ 65 Fed. Reg. 80,219 (Dec. 20, 2000).

may not be made to recoup “business expenses,” including “attorney fees and other costs connected to the performance of H-1B programs.”⁴⁴

Ultimately, even if an employer has an enforceable written agreement for reimbursement, collecting expenses from the former employee may not be worth the negative consequences to employee morale or the time and effort expended. The bottom line is that employers should adopt policies that make the workplace a desirable environment for employees. The increased opportunity for mobility under the new law does not necessarily mean that all workers will “jump ship.” If workers are treated with respect and adequately compensated, they will be less likely to seek other employment.⁴⁵

Conclusion

As with many late-term immigration “gifts” from our inscrutable Congress, AC21’s adjustment portability provision is both a saving grace and a royal headache. Employers can choose to become distraught at the prospect of losing key employees and kissing goodbye money spent on immigration fees and costs. Or, they can salivate at the prospect of windfall recoveries in landing adjustment applicants who have passed the six-month wait. Or better yet, the INS or a thoughtful judge will adopt an enlightened approach that allows a form of bittersweet portability - with amicable partings and alien substitution in labor certification cases. Only time, dear readers, will tell.

⁴⁴ Id.

⁴⁵ For suggested “best practices” to create the glue that keeps employees happy and non-mobile, see” 100 Best Companies to Work For,” Fortune Magazine, Jan. 10,2000.