Adjusting to the New World of Portability Recruiting: Career-Flexibility for Long-Delayed Immigration Cases

By Angelo A. Paparelli and Kwang-yi Ger Gale*

U.S. employers know that the business world today poses risks, costs and worries, and, regrettably for many, offers precious little reward. The economy is in free-fall, the costs of energy and raw materials are rising, pricing power is feeble, globalization adds low-price competitors, layoffs are too often inevitable, and government regulations pose red-tape impediments to entities just trying to survive until the next uptick in GDP.

These days, immigration red tape – always a headache, even in good times – produces brain-convulsing migraines. Employers seeking foreign workers with coveted degrees and skill-sets now must surmount ever higher hurdles crafted by immigration bureaucrats who never had to make a payroll.

Employers must expend scarce capital on costly immigration filing fees, fatuous print-advertising charges in an era of internet referral-network recruiting, and government-mandated payment of immigration lawyers' fees that in times past were typically borne by foreign workers. These employers also must try to achieve their immigration-related hiring objectives despite H-1B lotteries; interminable backlogs caused by paltry immigrant visa quota numbers; the loss of labor-certification substitutions; overzealous U.S. Department of Labor (DOL) auditors; the endemic post-9/11 hostility of immigration adjudicators to many categories of employment-based petitions that, in an earlier era, were readily approved; boilerplate RFEs (requests for additional evidence), ill-considered NOIDs (Notices of Intent to Deny) and denial notices issued by U.S. Citizenship and Immigration Services (USCIS); a rubber-stamping Administrative Appeals Office; jurisdiction-stripped federal courts that cannot reverse discretionary denials by immigration officers; and other unpleasant surprises yet unseen.

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These challenges may make employers so dispirited that they may be tempted to forsake immigration hiring altogether. Yet amid the wreckage of employer-unfriendly immigration laws and procedures, one foreign-worker recruiting strategy remains easy, fast and cheap, although with risks that a hiring employer must consider. The silver lining in the recruitment hurricane is adjustment of status portability.

No other employment-based immigration strategy dispenses with labor-market testing and visa-petition requirements (for example, unlike the sponsoring employer of an immigrant petition, a new employer under adjustment of status portability need not demonstrate to USCIS the financial ability to pay the wages offered in the immigrant petition). No other strategy can so easily be achieved with the mere submission to USCIS of an appropriately worded (and of course, truthful) employment-verification letter. No other approach provides a delicious three-course repast: (1) the ability to forgo virtually all immigration procedures; (2) the chance to hire a highly-prized foreign worker; and (3) the gain of competitive advantage over an employer in the same industry who will lose that worker and who for naught carried the immigration-sponsorship burden.

Created in 2000 with the passage of the American Competitiveness in the 21st Century Act (AC-21)[1], adjustment portability essentially allows a green card applicant to become a free agent to pursue the same or a similar job as the one described in the approved labor certification application filed by the individual's current employer. Under the USCIS interpretations developed since the enactment of AC-21, the "job-flexibility" benefits of adjustment portability apply if the current employer's immigrant visa petition (Form I-140) has been approved and (as is typically the case) USCIS has not decided the individual's adjustment of status application within six months of its submission. [2]

The use of adjustment portability as a recruiting tool, despite its many advantages, can pose business risks. These risks, however, are entirely manageable and tolerable. This article will outline procedures employers may use in considering whether to hire candidates for employment by relying on adjustment of status (AOS) portability. Section 106(c) of AC-21 contains a provision which allows certain foreign nationals to "port" or move a "green-card" (lawful permanent resident) application to a new job or new employer if USCIS, the successor to the legacy immigration agency, the Immigration and Naturalization Service (INS), takes 180 days or more to decide on the individual's AOS application.[3]

[1] Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

[2] The adjustment of status (AOS) portability provision applies to the First, Second and Third Preference Employment-Based Immigrant Visa Categories. It does not apply, however, to so-called "Extraordinary Ability Aliens" under the First Preference Employment-Based Immigrant Visa Category (although it does include the two other First Preference sub-categories, Outstanding Professors or Researchers and Multinational Managers and Executives).

[3] This provision regarding job flexibility for long-delayed AOS applicants has been codified at INA §204(j).

Before AC-21, foreign citizens sponsored for an employment-based green card who changed jobs or changed employers while the AOS application remained pending with the INS risked the denial of the AOS application or later loss of permanent resident status. The green card sponsorship involved a specific job opportunity, and a material change in the job duties had the effect of voiding or at least calling into question the underlying immigrant visa petition and AOS application.

Congress apparently decided that this produced an unfair outcome in situations where the adjudicating immigration agency took an unreasonably long time to decide on the pending AOS application. Section 106(c) grants the special portability privilege by providing that an employment-based I-140 immigrant visa petition and a labor certification (if one was used) shall remain valid even though a sponsored alien changes jobs or employers so long as one additional condition is met. This condition, discussed below, is that the new job or new employment be in the "same or a similar occupational classification" as the approved petition or labor certification.

An Independent Basis for Work Permission Is Still Needed.

The AOS portability provision does not itself authorize a change in employment automatically. Section 106(c) merely allows approval of an AOS application despite a change in jobs or employer. Thus, even if the AOS application is pending for 180 days or more, a change in jobs or employers before the AOS application is decided must occur in reliance on some independent basis for work permission, e.g., an "open-market" Employment Authorization Document (EAD) or an appropriate nonimmigrant work visa status (allowing employment with a particular sponsoring employer incident to status). Thus, as discussed below, if AOS portability is to be used in a given case, the new employer must decide whether to rely upon an open-market EAD as the basis to verify employment eligibility and hire the individual or to arrange to sponsor the alien's employment under an appropriate nonimmigrant work visa category.

USCIS Must Review Evidence to Verify New Employer's Job Offer.

The INS and its successor, USCIS, have issued policy guidance outlining the procedure for a new employer to assist an AOS applicant in securing the benefit of AOS portability.[4] Under current procedures, USCIS expects to receive notice that an AOS applicant no longer intends to be employed by the sponsoring employer that filed (a) the labor certification application (if the case involves labor certification); and/or (b) the I-140 immigrant visa petition.[5] This notice would be submitted by the AOS

[4] *See* Memorandum from Michael D. Cronin, Acting Executive Associate Commissioner, Office of Field Operations, USCIS File No. HQPGM 70/6.2.8, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)* (June 19, 2001) ("the 2001 Cronin Memorandum").

[5] This article will only address AOS portability adjudications decided by USCIS and its predecessor, INS. Readers should note, however, that Immigration Judges in a number of Federal Circuits have jurisdiction to apply adjustment portability in deciding whether to grant adjustment of status. *See, e.g.,* Sung v.

applicant either on his or her own initiative or in response to an RFE. USCIS also expects to receive or would request (by issuing an RFE) a letter from the new employer "verifying that the job offer exists" and containing "the new job title, job description and salary." The USCIS requires this information to "determine whether a new job is in the same or similar occupational classification and to determine whether the alien is admissible under the public charge ground of inadmissibility."

At this time, there is no precise guidance in terms of when the notice described above should be submitted. Thus, it is quite possible that an AOS application that has been pending for more than 180 days could be approved before an applicant who has recently changed jobs has submitted notice to the USCIS that he or she no longer intends to be employed by the sponsoring employer that filed the labor certification application or I-140 petition, and before the new employer has submitted verification of the new job offer. In such cases, it may be prudent to submit notice to the USCIS even after the AOS approval to show a good faith effort to comply with AOS portability procedures.

Employers Should Develop Policies on AOS Portability

Employers should exercise caution in considering employment applications from candidates who are AOS applicants in cases where adjustment portability does not or may not apply. These arise in the following situations:

(1) where the job with the new employer is not the same or a similar occupational classification as the job for which the applicant was initially sponsored for U.S. lawful permanent residence;

(2) where 180 days has not elapsed from the filing of the AOS application;

(3) where the alien harbored an undisclosed "pre-conceived intent" to work for a different company than the one that originally sponsored his or her labor certification or employment-based I-140 petition; or

(4) where the underlying approval of the employment-based petition or labor certification is or appears to be no longer valid.

Keisler, 2007 U.S. App. LEXIS 24646 (5th Cir. Oct. 22, 2007); Perez-Vargas v. Gonzales, 478 F.3d 191 (4th Cir. 2007); and Matovski v. Gonzales, 492 F.3d 722 (6th Cir. 2007), rejecting the Board of Immigration Appeals' holding in Matter of Perez Vargas, 23 I&N Dec. 829 (BIA Oct. 2005). While the governing law of portability is the same, procedures to apply for adjustment of status before an Immigration Judge (a topic outside the scope of this article) are vastly different from those in force within USCIS.

Is the New Job the Same as the Green-Card Sponsored Job or Is It in a Similar Occupational Classification?

The USCIS has stated that when making a determination if new employment is in the "same or similar" occupational classification as the employment in the initial I-140 petition, adjudicators should consider as factors the description of the job duties in the ETA 750A form (and presumably the substitute form, the ETA 9089 in a PERM labor certification) or the initial I-140 and the job duties of the new employment, the Dictionary of Occupational Titles (DOT) code and/or Standard Occupational Classification (SOC) code (both discussed below), and whether there is a "substantial discrepancy" between the previous and new wages.[6]

In earlier guidance, the USCIS had indicated that in order to determine whether a new job is in the same or a similar occupational classification "as the original job for which the certification or approval was initially made," the USCIS requires adjudicators to consult certain published sources. These are: the DOT, published by the Department of Labor, or the DOL's online O*NET classification system, or [other unspecified] similar publications."[7]

The DOT can be found and searched online at: http://www.oalj.dol.gov/libdot.htm. O*NET can be found and searched online at http://online.onetcenter.org. Another source that might be considered a "similar publication . . ." for purposes of the 2001 Memorandum would be the DOL's Occupational Outlook Handbook which can be found online at http://www.bls.gov/OCO . Of the three cited sources, the DOT and the OOH are less likely to be helpful because the DOT has not been updated for several years, and thus does not provide extensive discussion of more recently developed jobs, and the OOH contains only limited descriptions of specific jobs.

The O*NET may be the most useful in determining whether the portability standard ("the same or a similar occupational classification") has been satisfied. This source provides a code number from the SOC list, a "related occupations" search field and a "crosswalk" of similar occupations offering a pathway by DOT job code number from the O*NET.

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[6] See Memorandum from Michael Aytes, Acting Director of Domestic Operations, USCIS, File. No. HQPRD 70/6.2.8-P, *Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (December 27, 2005)("the 2005 Aytes Memorandum"). The 2005 Aytes Memorandum is actually a reissuance of an earlier Memorandum from William R. Yates, Associate Director for Operations, USCIS, File No. HQPRD 70/6.2.8-P, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (May 12, 2005) with one clarification regarding RFEs and post-filing issues for I-140 petitions.

[7] *See* the 2001 Cronin Memorandum , *supra* note 4, which provides that until INS issues regulations establishing a policy framework, adjudicators at the Regional Service Centers are required to consult, on a case by case basis, with Headquarters before denying cases for lack of job similarity.

Thus, it may be possible to take the DOT code number endorsed on pre-PERM labor certifications or the SOC code provided in response to a request for a PERM prevailing wage determination and use the O*NET crosswalk to determine job similarity for port. If the advertised and prospective jobs are the same or similar, then the immigration benefit of AOS portability may be available.

No Pre-Conceived Intent to Change Jobs or Employers.

Before AOS portability became law, the INS historically took the position that an alien filing an employment-based AOS application must intend to work for the sponsoring employer when lawful permanent resident status is granted, and must continue in the sponsored job for a reasonable period thereafter.[8] An alien who forms the intention – before the AOS application is decided – to change jobs or employers as soon as, or very shortly after, INS or USCIS approves the application risks removal (deportation) based on a charge of fraud or misrepresentation under INA § 212(a)(6)(C). The agency's accusations would be founded on the adjustment applicant's "pre-conceived" intent to switch jobs or employers and never work in the position described in the labor certification application for the required intent to work for the sponsoring employer. There is no fraud or misrepresentation, however, if an alien is presented for the first time with a new employment opportunity that arose only after the AOS application was filed.[9]

Initial Employer's Request for Withdrawal and INS or DOL Revocation of Approval.

Similarly, an initial sponsoring employer may seek to withdraw (request revocation of) an approved labor certification or approved I-140 petition. The sponsoring employer may do this merely to cut off its liability or responsibility under the immigration laws, or perhaps, because of a desire that the alien not gain a benefit that the employer believes is no longer deserved. Again, it is not clear whether or not such a request for withdrawal would be honored by the USCIS or the DOL on the grounds that it would contravene the public policy of job flexibility as reflected in AC-21.

The USCIS has issued guidance regarding when an I-140 petition is no longer valid for portability purposes, including situations where the I-140 is withdrawn before the alien's I-485 AOS application has been pending for 180 days, or when the I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after the I-485 had been pending for 180 days.[10] (This is

[8] *Faddah v. INS*, 553 F.2d 491 (5th Cir. 1977). *See also* 3 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure, at § 51.05[2].

[9] *See, e.g.,* Spyropoulos v. INS, 590 F.2d 1 (1st Cir. 1978); Matter of Poulin, 13 I&N Dec. 264 (BIA 1968); Matter of Marcoux, 12 I&N Dec. 827 (BIA 1968) for the evolution of the requirement that the AOS applicant intend to work for the petitioning employer.

[10] The 2005 Aytes Memorandum, *supra* note 6.

consistent with earlier policy guidance issued by the USCIS, indicating that if an employer withdraws an approved I-140 on or after the date that the I-485 AOS application has been pending for 180 days, the approved I-140 shall remain valid under the provisions of §106(c) of AC-21.)[11] The candidate for new employment should be made aware of these possible outcomes.

Need for Candidate's Sole Acceptance of Risk and Responsibility for Possible Adverse Outcome

Employers desiring to rely on the benefit of AOS portability will likely have no direct line of communication with the candidate's initial sponsoring employer. Thus, in most cases it will have no way of knowing whether either a withdrawal request, or USCIS or DOL revocation of approval, has occurred. The candidate may, or may not, know whether such action has taken place. At the very least, the candidate should be required to confirm – to the best of his/her knowledge – that no such action has occurred. In addition, the candidate should be required to acknowledge that he or she must solely accept the risk that AOS portability might be unsuccessful (and green card status might be lost) because the initial sponsoring employer substituted another alien into the labor certification while substitution was an available option[12] or persuaded USCIS or DOL to revoke an approved labor certification or immigrant visa petition in the case.

USCIS currently allows concurrent filing of an I-140 immigrant petition and I-485 AOS application. Thus, it is possible that a candidate may want to "port" to a new employer or position once the AOS application has been pending for 180 days, even though the concurrently filed I-140 petition has not yet been adjudicated. According to USCIS, even though an AOS application has been pending for 180 days a denied or deniable I-140 petition is not considered "valid" for purposes of AOS portability.[13] It remains, however, an open question whether the federal courts will agree with this interpretation.

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[11] See Memorandum from William R. Yates, Acting Associate Director for Operations, USCIS, File No. HQBCIS 70/6.2.8 – P, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)* (August 4, 2003)("the 2003 Yates Memorandum").

[12] In a Final Rule published in the Federal Register May 17, 2007, the Department of Labor amended its regulations to prohibit the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, effective July 16, 2007 (72 FR 27903).

[13] *See* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, File No. HQ 70/6.2, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277* (May 30, 2008)("the 2008 Neufeld Memorandum), stating that "[i]n order to be considered valid, an I-140 petition must have been filed on behalf of an alien who was entitled to the employment-based classification at the time that the petition was filed, and therefore must be approved prior to a favorable determination of a portability request made under INA §204(j)." The 2008

If an AOS applicant is denied adjustment of status, he or she ordinarily would be required to depart the United States unless the alien is eligible to be restored to nonimmigrant status. Reinstatement of nonimmigrant visa status normally is only allowed if the alien maintained valid nonimmigrant status while the AOS application was pending. This is obviously a factual question whose answer will vary from case to case. A departure from the U.S., possibly at a very inopportune time, could create hardships for the alien, his or her family members, and the new employer.

Given the foregoing uncertainties, the employer should only proceed to rely on AOS portability where the case appears clearly eligible and the foreign-worker job candidate acknowledges and solely accepts the possible risk of an adverse outcome (i.e., that the adjustment application may be denied). Even when the alien knowingly accepts such risks, business reasons may prompt the employer nonetheless to decline to hire a candidate based on AOS portability. These business issues should be addressed in consultation with the employer's legal counsel.

In order to evaluate a new hire under AOS portability, the employer should require that the prospective foreign worker (or his/her legal counsel or current or former employer) provide certain documents, noted below:

1. A USCIS Form I-797 Notice of Action confirming receipt of the alien's AOS application by USCIS on or after April 15, 2001 (the effective date of AC-21);

2. A copy of the current or former employer's I-140 petition and accompanying supporting documents (and the corresponding approval notice) listing Employment-Based ("EB") immigrant visa sponsorship in the EB-1(2), EB-1(3), EB-2 or EB-3 categories;

3. A copy of the current or former employer's approved labor certification (ETA 750 Parts A and B or ETA 9089) and accompanying supporting documents;

4. A job description for the proposed job with the new employer in order to determine if the "same or similar occupational classification" standard can be achieved;

Memorandum noted that on October 18, 2005, the USCIS had designated *Matter of X* (AAO Jan. 12, 2005) as a USCIS Adopted Decision. *Matter of X* established that a petition that is denied or deniable (i.e. not approvable) will not be considered "valid" and cannot serve as a basis for approval of adjustment of status to permanent resident under the portability provision of INA §204(j). The 2008 Neufeld Memorandum states: "An *unadjudicated* Form I-140 is not made 'valid' merely through the act of filing the petition with USCIS or through the passage of 180 days. A *denied* Form I-140 petition is also not considered valid regardless of whether the I-140 petition is denied 180 days or more after the filing of the adjustment of status application and regardless of when a request to invoke the portability provision of INA § 204(j) is made." The 2008 Neufeld Memorandum further noted that this guidance was being incorporated into the Adjudicator's Field Manual.

5. A declaration from the alien confirming that (a) to the best of his/her knowledge the current or former employer has not requested withdrawal of the I-140 petition, withdrawal of the labor certification, or substitution of another alien into the approved labor certification; and (b) the alien understands and solely accepts the risk that AOS portability may be denied; and

6. Any previously filed requests on behalf of the foreign worker to invoke adjustment portability (whether through self-employment or a prior interim employer).[14]

Employers should be aware that the foregoing request for documents ought not occur in connection with, or at the same time as, the Form I-9 (Employment Eligibility Verification) compliance process, in order to avoid any inference that the employer is engaging in a prohibited form of "document abuse" under INA § 274B(a)(6) (8 U.S.C. § 1324b(a)(6)). This section bars an employer from requesting "more or different documents" than are minimally required to complete an I-9. Just as a trucking company, for the purpose of complying with the motor vehicle laws, may lawfully ask to see a truck driver's state license to operate a truck, an employer seeking to invoke adjustment portability can legitimately request proof of eligibility to port. In the case of both the trucking company and the prospective employer under adjustment portability, the request for one or more additional documents is made for a legitimate reason and is not made in connection with the I-9 process or made for an unlawful purpose or motive prohibited under the antidiscrimination provisions of immigration laws.

Special Caution on AOS Portability

Reliance on AOS portability may greatly benefit an employer desiring to avoid the hassle, time and cost of sponsoring foreign workers for lawful permanent residence, but as with all things that touch on the abstruse field of immigration, caution and careful analysis are essential. As shown above, this salutary provision of law still carries with it significant risks. Only with hesitancy and after careful consideration should employers embrace the agreeable views of immigration bureaucrats, but in the area of AOS portability, businesses should accept the bedrock truth uttered by a legacy INS spokesperson, "Immigration law is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold."[15]

[14] The 2005 Aytes Memorandum, *supra* note 6.

[15] INS Spokeswoman Karen Kraushaar (quoted in The Washington Post, April 24, 2001, in an article entitled "Md. [Maryland] Family Ensnared in Immigration Maze - After Changes in Law, Couple Faces Deportation")