



The USCIS released I-485 inventory numbers earlier this year. Unsurprisingly this information promised much, but offered little as far as estimating the processing times for green cards. What this information did provide, however, is the indication that Green Card processing will take time for many, with some even waiting more than five years before they can see a green card within their sights. Given this lengthy wait time, a thought passes many employees prior to beginning their immigrant case: am I stuck with the same employer and the same position while my green card is being processing?

Waiting so many years for the precious green card is excruciating enough, but having to stay with the same employer in the same position, without any hopes of career advancement is downright cruel. In what could be considered a pragmatic recognition of this reality, in October 2000, Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Section 106(c) "the Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence" provision. This provision, commonly referred to as the "I-140 portability" provision, amends Section 204 (j) of the Immigration and Nationality Act. This amendment provides for an adjustment of status petition to remain valid if the individual changes jobs or employers provided the petition has been filed and remains adjudicated for 180 days or more and the new job is the same or similar occupational classification as the job for which the petition was filed. The key to this provision is the term "same or similar" occupational classification. If one can argue that the position is the same or similar- whether it is a promotion/demotion or even a change of employer, he/she could potentially avoid having to go through the headache of starting a new green card case with every job change.

The AC21 regulation requires an applicant to port to a same or similar position provided the adjustment petition has remained adjudicated for 180 days. However, the USCIS should not find that a foreign national is ineligible for I-140 portability simply because he or she switches employers prior to the 180 day mark. The USCIS recognizes that this type of employment is prospective and that the beneficiary need not ever have to be employed by the petitioner, thus dismissing the notion that an adjustment applicant be employed by the I-140 petitioner for at least 180 days in order to benefit from Section 106(c). However, in the same respect, the Service maintains that the offer of employment must be bona fide; that is, at the time the I-140 petition was filed the petitioner must have truly intended to the employ the beneficiary in the position offered and the beneficiary must have truly intended to undertake such employment.¹

¹ The requirement—evolved through decisional law—is that the I-140 beneficiary and adjustment applicant must possess the intent to work for the petitioner at the time the immigrant petition is filed and at the time the

Let's take a closer look at this phrase "same or similar". In a December 2005 Memorandum by William R. Yates, USCIS Associate Director for Operations², Yates reviewed this issue at length and came up with three factors USCIS adjudicators should consider when determining whether the new position is the "same or similar" as that that was listed either on the labor certification or I-140 petition. These factors include:

- A. Description of the job duties contained in the labor certification or initial I-140 petition
- B. The Dictionary of Occupational Titles (DOT) code and/or Standard Occupational Classification (SOC) code assigned to the initial position as compared to the DOT code and/or SOC code that could be assigned to the new position.³
- C. A substantial discrepancy between the previous and the new wage.

Congress implemented this same or similar standard to ensure that consistency in adjudication within the USCIS is maintained, while allowing green card applicants the flexibility for professional advancement. We now turn to some common career changes that could occur and take a deeper look as to how such changes can impact an applicant's green card processing.

I. Promotion/Demotion

If you are offered a promotion, or even a demotion, does the change in job duties impact your pending green card case? The easy answer, and one generally used by attorneys, is possibly. Adjudicators reviewing a petition will look at the classification codes⁴ published by the Department of Labor when comparing the two positions- the old one listed on the labor certification or I-140 and the new proffered position. They will compare the two codes to see if similarity exists. As this is a subjective adjudicator's determination, making the strongest argument as to the similarity between the positions is key. In terms of a promotion or demotion, generally the basic duties of the position remain unchanged. Perhaps additional supervisory duties will be added in the case of a promotion; or subtracted in the case of a demotion. Either way, provided it can be argued that the same or similar occupational classification exists, and no material change in duties have occurred, the adjudicators should find the new position to fall under the "same or similar" standard.

II. Salary Increase/Decrease

Under the Yates Memorandum, if there is a "substantial discrepancy" between the initial position's salary and the salary offered for the new position, this could weigh against a finding that the positions are the same or similar. As not much guidance has been provided on wage discrepancies, other than the discrepancy must be more than a mere difference, it is safe to assume that adjudicators are given considerable discretion in this regard.

adjustment of status application is approved. *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).

² "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)", William R. Yates, 27 Dec. 2005 (posted on AILA InfoNet as Doc. No. 06092763 (Dec. 27, 2005).

³ The DOT code has now been replaced by the O'Net system.

⁴ O'Net system is found here: <http://online.onetcenter.org/>

SOC is found here: <http://www.bls.gov/SOC/>

There are a few factors, however, that could play into wage discrepancies and that should be explained to adjudicators when reviewing the filing. For example, often the initial petition has been filed many years ago with wages that were typical for that time period. With new positions, the market rate for that position may have changed, as we have seen recently, due to current economic conditions. If the change causes an increase in salary it is not as troublesome as if there is a decrease in salary levels. To substantial a difference may call into question the similarity between the occupations. This difference should be rationalized by factors extraneous to the occupational classification to be considered the same or similar.

Likewise, if there is a geographic change in job locations there could be an effect on the wage being offered. Prevailing wages information from the two different locations would be helpful to explain this wage difference is not the result of a difference in occupational classification.

III. Geographic Location Change

The Yates Memorandum also gives relief to those that are concerned that a change in geographic location from that that was given in the initial labor certification application or immigrant petition would negatively impact the processing of their green card case. Director Yates writes, "The relevant inquiry is if the new position is the same or similar occupational classification to the alien's I-140 employment when considering the alien's new position and job duties and not the geographic location of the new employment."⁵ This position is in line with the legislative intent behind the AC21 Regulation, namely, to provide relief to US employers and foreign nationals who have suffered as a result of USCIS processing delays. Congress presumably was fully aware of the labor certification process and its requirement that certification of the unavailability of willing and able American workers be made only for a specific geographic location. Despite this knowledge, however, noticeably absent from the AC21 regulation is a requirement that the geographic locations of the initial job opportunity and the ultimate job opportunity be one and the same. The regulation simply requires the positions be connected by a similarity of occupational classifications. This allowance evidences Congress' empathy towards foreign nationals unwillingly stuck in the lengthy green card process.

IV. Self-Employment

The USCIS has recognized that a foreign national can transition to self-employment whilst taking advantage of the I-140 portability provision. As this could create broad-sweeping interpretations, USCIS has placed defined limitations on the exercise of section 106(c) in these situations. If porting to self-employment, there are three conditions that must be met, namely:

- (1) the job in which the applicant employs himself/herself must be in the same or similar occupational classification as the job for which the original I-140 was filed,
- (2) the USCIS will confirm through an RFE to the applicant if the new employer and job offer are legitimate; and

⁵ See Yates Memo, *supra* Note 2.

- (3) USCIS will focus on whether the I-140 petition represented the truly intended employment at the time of the filing of both the I-140 and the I-485. In other words, as of the time of the filing of the I-140 and at the time of the filing of the I-485, if not filed concurrently, the I-140 petitioner must have had the intent to employ the beneficiary, and the beneficiary must have intended to undertake such employment, upon the granting of the green card. The Yates memo further clarifies that adjudicators should not presume absence of such intent, and may consider the I-140 and supporting documents as “prima facie” evidence of such intent. However, Yates does state that in some cases, though, additional investigation may be needed.⁶

Although these factors do not seem unduly burdensome on the surface, when porting to self-employment the assumption of extra duties and responsibilities could cause the USCIS officer to question whether the same or similar occupational classification continues to exist. For example, when an Italian chef for whom an I-140 petition has been filed by a restaurant decides to open her own restaurant, she will still draw upon the same cooking skills that had her qualify for the position described in the I-140. However, now with her own restaurant she may be spending most of her time carrying out administrative and managerial duties, rather than the actual cooking duties that were mentioned in the I-140 petition. This increase in duties may constitute a material change that could threaten the applicant’s ability to meet the occupational classification test.

The USCIS has recognized that job flexibility is required for the work environment. Statistics show that people change their careers on average 7 times during their lifetime. Career advancement is inherent in our upbringing. We are taught in an early age to “climb the corporate” ladder to success. To be inhibited from this advancement by bureaucratically imposed hindrances goes against our natural progression. Section 106(c) of the AC21 Regulation recognizes this and offers green card applicants the safe harbor needed to progress in their careers without fear that their case, and their years of waiting, will be lost.

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⁶ See Yates Memo, *supra* Note 2.