Welcome Changes For Cos. Hiring Foreign Talent: Part 3

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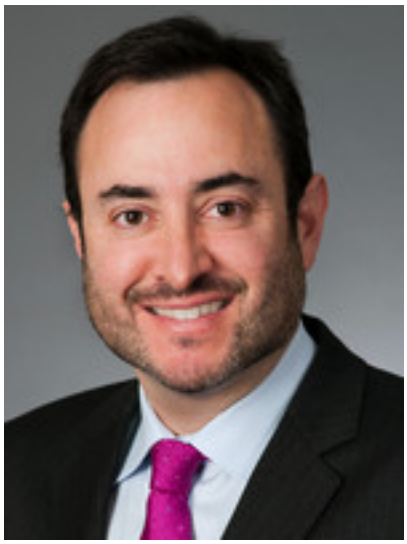
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This is the final article of a three-part series discussing a new immigration regulation, "The Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," which went into effect on Jan. 17, 2017.[1] The regulation implements various aspects of the American Competitiveness in the Twenty-First Century Act of 2000[2] (AC-21) and, among other things, clarifies how employers can recruit and hire candidates who are being sponsored by another employer for U.S. permanent residence (the "green card").

Part 1 of the series discusses an aspect of the regulation that now makes it easier for U.S. employers to recruit foreign talent that have been laid off by a prior sponsor in the preceding 60 days. Part 2 examines some of the questions surrounding a new type of temporary U.S. work permit designed to bridge a gap in employment authorization while the employee seeks alternate green card sponsorship.

Here, part 3 will explore a new regulation that clarifies when a new employer can take advantage of a prior employer's sponsorship without incurring the cost and risk of new sponsorship. Specifically, the rule allows employers to benefit from an employee's "priority date" (or place in the green card queue) from a prior sponsorship even where the prior sponsor is unable or unwilling to complete the process; waives the need for new sponsorship entirely when offering a candidate, who is in the final phase of the green card process, a job that is similar to the job offered by the prior sponsor; and diminishes the risk of gaps in work authorization when onboarding adjustment of status applicants whose work authorization cards will soon expire.

Overview of the Employment-Based Permanent Residence Process

The employment-based green card process usually concludes when U.S. Citizenship and

Immigration Services approves an application for adjustment of status to permanent residence using Form I-485 (an "adjustment of status" application), which is filed by the employee.

Before USCIS can adjudicate and approve an adjustment-of-status application, and in many cases before the agency can even accept it for processing, a U.S. employer must file an I-140 Petition for Alien Worker (the "immigrant petition"). The immigrant petition describes the position the sponsoring employer is offering to the foreign national employee and demonstrates that the employee meets the requirements for the position. Often, the immigrant petition can be filed only after the employer files, and the U.S. Department of Labor approves, a PERM application, whereby the DOL certifies that there are no qualified U.S. workers available to fill the position.[3]

The date the PERM application is filed with the DOL — or in cases where the law does not require a PERM application, the date the immigrant petition is filed with USCIS — becomes the foreign employee's "priority date."[4] When the demand for green cards exceeds the supply (as determined by the State Department on a monthly basis), USCIS will issue green cards based on a foreign national's priority date.

The methodology used by the State Department to determine when a green card is available is complex. Depending on where an employee was born, the type of job a U.S. employer sponsors him or her to fill, and the “priority date,” the wait for a green card can be extraordinarily long.

Only 7 percent of the annual allotment of 140,000 employment-based green cards can be issued to natives of any one country and their eligible dependents.[5] In addition to this per-country quota, the law imposes a five-tier preference category system that stratifies the annual allocation of green cards and favors foreign nationals with demonstrably high achievement in their fields, as well as multinational executives and managers.[6] The system also gives preference, although to a lesser extent, to those with advanced educational credentials.[7] For natives of certain populous countries with high emigration rates to the United States, like India and China, and/or for employees classified in lower preference categories, the sponsorship process is exceptionally long. Thus, even where USCIS has approved an immigrant petition on behalf of an employee, the employee and his or her eligible dependents may have to wait for several years before they can file applications for adjustment of status.

Changing Jobs During the Pendency of the Green Card Process

Whenever an employer chooses to sponsor a foreign professional for an employment-based

green card, both parties must intend for the employee to remain working for the employer in the sponsored job once the green card has been approved, as well as for a reasonable period of time thereafter.[8] Assuming this requirement is met, if the employee then switches jobs or employers, he or she will not jeopardize his or her green card.

It is more complex, however, when an employer wants to hire a candidate whose green card process with another employer is still pending. In these circumstances, prospective employers should understand what obligations, including related costs, they will incur in order to hire the foreign professional, and, presumably, to offer him or her green card sponsorship as well.

Where a foreign national has not yet filed an application for adjustment of status, a new employer cannot simply take over the sponsorship process and avoid the costs and risks of new sponsorship. Once a prior employer's immigrant petition on behalf of a candidate has been approved, however, the new regulation confirms that the priority date associated with that petition, i.e., the employee's place in the green card queue, may move with the employee to a new employer.[9] This is the case even if the initial sponsoring employer goes out of business or notifies USCIS that it wishes to withdraw the approved petition.[10] So while the new employer may need to invest in new sponsorship, it can do so with a shorter time horizon since USCIS will treat the new case — for quota and priority date purposes — as if it was filed when the initial sponsor filed for the employee.

In situations where a candidate has already filed an application for adjustment of status with USCIS, the new regulation clarifies when a new employer can hire the candidate without the need for new sponsorship.[11] While many applications for adjustment of status are adjudicated and approved by USCIS in a matter of months, many employees, especially natives of India and China, may find their adjustment of status applications pending for protracted periods of time due to the unpredictably of the green card quota system. As a result, some of these individuals may seek new employment opportunities before their green card cases are approved.

Where a foreign professional has an adjustment of status application pending with USCIS, the regulation waives the need for new sponsorship — known as "adjustment-of-status portability" — when the adjustment-of-status application has been pending for at least 180 days; an immigrant petition has been approved on the candidate’s behalf, or a pending immigrant petition is ultimately approved; and the new employer is offering the candidate a full-time position that is in the same or a similar occupational classification as the job described in the immigrant petition filed by the prior employer.[12]

What is a "Same or Similar Occupational Classification"?

The passage of AC-21 statute by Congress was seen as a benefit to both U.S. employers and foreign professionals because it allowed for adjustment of status portability; however, its application has been unclear. Although the statute requires the new job be in the “same or similar occupational classification” as the job described in the immigrant petition filed by the prior employer, Congress provided no guidance on how USCIS should determine whether or not two jobs are the “same or similar.”

Despite the ambiguity, it was not until March 2016 that USCIS issued policy guidance[13] interpreting "same or similar occupational classification," and then it was almost a year later — in January 2017 — that the agency promulgated its final regulatory interpretation.[14] The 2016 guidance is a comprehensive, 21-page adjudicatory guide for USCIS officers, and includes revisions to relevant sections of the agency's Adjudicator's Field Manual[15] (collectively, the "2016 memo"). By contrast, the relevant provision of the final 2017 regulation is a mere two sentences:

> The term "same occupational classification" means an occupation that resembles in every relevant respect the occupation for which the underlying employment-based immigrant visa petition was approved. The term "similar occupational classification" means an occupation that shares essential qualities or has a marked resemblance or likeness with the occupation for which the underlying employment-based immigrant visa petition was approved.[16]

The new regulation also codifies the use of USCIS Form I-485, Supplement J,[17] which the new employer and foreign national can use to notify USCIS of the new job offer and to provide information about the new job so USCIS can determine if it is sufficiently similar to the position described in the immigrant petition. The final regulation does not obligate foreign nationals, or their new employers, to proactively submit Form I-485, Supplement J, in the event of a job change, but the agency may request the form at its discretion before adjudicating an adjustment-of-status application.[18] Since the implementation of the new regulation, there has been an uptick in requests for evidence (RFE) issued by the agency, requesting Form I-485, Supplement J, for petitions that have been pending with USCIS for extended periods.

The March 2016 memo instructs USCIS adjudicators to make the “same or similar”

determination by reviewing all relevant evidence when comparing the new position with the position described in the immigrant petition.[19] The memo outlines a variety of factors upon which adjudicators may rely when deciding whether positions are sufficiently similar. These include the duties of the position, the required skills and experience, wages, and whether the new job reflects expected career advancement from the prior job. A large portion of the memo, however, guides adjudicators on how to review and analyze the Standard Occupational Classification (SOC) system published by the DOL when making a “same or similar” determination.[20]

USCIS intentionally omitted reference to SOC codes in the final rule.[21] Form I-485, Supplement J, however, requires the new employer to indicate the SOC code it believes most closely matches the new job, and the form's instructions provide, "USCIS may refer to resources published by the [DOL] and its Bureau of Labor Statistics, or other relevant resources, to assist in determining whether the new offer of employment is in the same or similar occupational classification."[22]

Given that this issue necessarily arises in the final phase of the long and critically important — to employer and employee — green card process, employers should, where feasible, include a discussion of SOC codes when submitting Form I-485, Supplement J. Among other obviously important factors such as job duties, such a discussion can help validate the similarities between the current and prior positions. Where a comparison of SOC codes does not necessarily support a favorable comparison between jobs, however, there is ample support in the regulatory history that such a comparison is not required.

Employment Authorization

Adjustment-of-status applicants may, and typically do, request temporary employment authorization cards (EADs) when they file their applications. USCIS usually issues these cards within 90 days of filing. Importantly, EADs allow the new employer to onboard the employee without needing to identify and sponsor the employee for a nonimmigrant visa status, e.g., H-1B, for the remainder of the green card process. Thus, when hiring a foreign professional who is eligible for adjustment-of-status portability, the new employer should ask if the candidate has an EAD, and if so, when it expires.

In the past, when an EAD card was about to expire and the employee had not applied to renew the card at least three months in advance, there was a risk the candidate would face a gap in

work authorization and a delayed transition to the new employer until USCIS completed processing a new card. With the new AC-21 regulation, however, as long as the foreign professional files an application to renew his or her EAD card at any time before the prior EAD card expires, USCIS will consider the EAD card automatically extended for 180 days,[23] which is sufficient time for the agency to adjudicate and issue a new EAD, and it will also help ensure a seamless transition for the employee and his or her new employer.

With the passage of this new regulation, employers can more confidently estimate the investment required when recruiting candidates with pending permanent residence applications. The new rule will also assist foreign professionals, and their prospective employers, in making important decisions regarding the timing of job transitions.

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[1] 81 FR 82398, Nov. 18, 2016.

[2] Public Law 106-313, 114 Stat. 1251 (Oct. 17, 2000).

[3] 20 CFR 656.17.

[4] 8 CFR § 204.5(d).

[5] 8 U.S.C. § 1152(a)(2), INA § 202(a)(2); 8 U.S.C. § 1151(d)(1), INA § 201(d)(1).

[6] 8 U.S.C. § 1153(b), INA Sec. 203(b).

[7] Id.

[8] 8 CFR 245.25(a)(3).

[9] 8 CFR § 204.5(e).

[10] See 8 CFR 204.5(e)(2) for instances where a priority date can be lost, e.g., fraud, misrepresentation, revocation of labor certification, etc.

[11] 8 CFR § 245.25(a)(2).

[12] Id.

[13] Determining Whether a New Job is in “the Same or Similar Occupational Classification” for purposes of Section 204(j) Portability, PM-602-0122.1, March 18, 2016, available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2016/Final_Same_or_Similar_Policy_Final_Memorandum_3-18-16.pdf.

[14] Note, xvi, infra.

[15] USCIS Adjudicator's Field Manual, Chapter 20.2.

[16] 8 CFR § 245.25(a)(3).

[17] https://www.uscis.gov/i-485supj.

[18] 8 CFR § 245.25(a).

[19] Note xiii, supra, page 4-5.

[20] Id., paged 4-9.

[21] Note i, supra, at 82421.

[22] https://www.uscis.gov/i-485supjinstr.pdf.

[23] 8 CFR 274(a)(13)(d).