



### **Frequently Asked Questions (FAQ):** **I-485 Portability pursuant to AC21**

On October 17, 2000, former President Clinton signed into law the American Competitiveness in the Twenty-First Century Act (AC21). It is important to keep in mind that the USCIS has not issued final regulations pertaining to AC21. To date, USCIS has only provided guidance with respect to AC21 issues via inter-agency and field memorandums. The “Frequently Asked Questions” below focus on the issue of I-485 Portability.

If you intend to hire an employee using I-485 Portability pursuant to AC21, please contact Younossi Law in advance to discuss portability eligibility and USCIS requirements upon an employment change pursuant to AC21 portability.

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**Q1: What are the permanent residency portability provisions in AC21?**

**A1:** The American Competitiveness in the Twenty-First Century Act (AC21) provides a mechanism which enables employment based applicants for permanent residency to “port” the permanent residency process begun by a prior employer to a new employer in certain circumstances. Specifically, the portability provision in AC21 provides that the labor certification or Form I-140 approval of an employment based petition shall remain valid if the applicant moves to a new employer if the following criteria are met:

- Form I-485 has been filed and remained un-adjudicated for 180 days or more.
- AND**
- The new position is in a same or similar occupational classification as the position listed in the underlying labor certification or Form I-140.

**Q2: What is Form I-140?**

**A2:** Form I-140 is an Immigrant Visa Petition that a petitioner employer files on behalf of a beneficiary employee. Any employment based green card process requires that Form I-140 be filed with the USCIS as the basis for any I-485 application. For certain visa categories, Form I-140 may be based on a petitioner employer’s labor certification filing. Regardless of whether a labor certification is required or not for the I-140 filing, the employment position listed in the I-140 contemplates a future prospective position that will be offered to the beneficiary employee upon approval of the permanent residency process.

**Q3: What is Form I-485?**

A3: Form I-485 is an Application to Adjust Status to Permanent Resident Status. For any employment based permanent residency process, the basis for filing Form I-485 is a filed Form I-140 Immigrant Visa Petition. Form I-485 can be concurrently filed with Form I-140 if there are no backlogs in the applicable visa category. The USCIS' approval of Form I-485 effectively changes a beneficiary employee's status to that of a permanent resident or "green card holder."

**Q4: How does AC21 allow portability of a permanent residency process?**

A4: Prior to AC21, beneficiary employees were required to remain employed with the petitioner employer that filed the I-140 petition on their behalf until the approval of the permanent residency and for a reasonable time thereafter. If the beneficiary employee changed positions while the permanent residency process was pending, the new employer would have to begin an entirely new permanent residency process for the beneficiary employer.

AC21's portability provisions allow an employee beneficiary to move to a new employer and keep intact the permanent residency process begun by their prior petitioner employer without the new employer having to file a new labor certification or I-140 on their behalf. The underlying permanent residency process may remain intact upon the employer change only if:

- Form I-485 has been filed with USCIS and remains pending (ie: has not been adjudicated) for at least 180 days
- AND**
- The new employment position is in a same/similar occupation as the employment position listed in the underlying Form I-140 or labor certification filed by the prior petitioner employer.

**Q5: How does the Government determine if a job is in the same or similar occupational class?**

A5: To determine whether the new employment position is in a same/similar occupation as employment position listed in the underlying Form I-140 or labor certification filed by the prior petitioner employer, USCIS will:

- Compare the new job's duties with the job duties listed in the underlying I-140 and labor certification;
- Compare the DOT (Dictionary of Occupational Titles) code or SOC (Standard Occupational Classification) code assigned to the original I-140 and/or labor certification and which code would be appropriate for the new position;
- Compare the offered salary between the previous and new employer; substantial discrepancies between the prior and new wage may be taken into consideration as a factor in determining whether or not the new employment is in a same/similar occupation.

**Q6: Does the new employer have to be in the same city?**

A6: No. The new employer can be located anywhere in the United States. The same or similar term does not include any reference to geographic location.

**Q7: Does the new employment have to offer the same salary?**

A7: No. A difference in wage offered on the approved labor certification or I-140 is allowed. However, USCIS has stated that a substantial discrepancy between the prior and new wage may be taken into consideration as a factor in determining whether or not the new employment is in a same/similar occupation.

**Q8: Can a beneficiary employee port his/her permanent residency process to a new employer if his/her I-485 has not been pending for 180 days?**

A8: USCIS has issued guidance indicating that the move to a new employer before the 180 days should not necessarily render a beneficiary employee ineligible to port his/her permanent residency process. However, it is important to note that changing employers at this juncture could ultimately jeopardize the permanent residency process. The USCIS has indicated that an I-140 is no longer valid for porting purposes when:

- The I-140 is withdrawn before the I-485 has been pending for at least 180 days.
- The I-140 is denied or revoked at any time.

Beneficiary employees who change employers prior to the 180 days of the I-485 filing risk the approvability of the permanent residence process in the event that: the prior employer withdraws the I-140 Petition; the USCIS denies the I-140 Petition on its merits; and/or issues a Request for Evidence on the I-140 Petition filing and the prior employer opts not to respond or does not respond in a manner that sufficiently addresses the USCIS inquiry. Failure to respond or incomplete responses to USCIS inquiries could lead to a denial of the I-140 petition which in turn leads to the USCIS denying the I-485 application.

**Q9: Can a beneficiary port his/her permanent residency process to a new employer if the prior employer's Form I-140 petition has not been approved?**

A9: USCIS has issued guidance indicating that while the I-140 Petition does not have to be approved when a portability request is made to the USCIS, the petition does have to be approved in order for USCIS to grant the portability request. An un-adjudicated Form I-140 Petition is not made "valid" merely through the act of filing the petition with the USCIS or via the passage of 180 days. A denied Form I-140 petition is also not considered valid regardless of when it was denied and regardless of whether a portability request was made to the USCIS.

As with the case of beneficiary employees who change employers prior to the 180 days of the I-485 filing, changing employers prior to the I-140 Petition approval also risks the approvability of the permanent residence process in the event that: the prior employer withdraws the I-140 Petition; the USCIS denies the I-140 Petition on its merits; and/or issues a Request for Evidence on the I-140 Petition filing and the prior employer opts not to respond or does not respond in a manner that sufficiently addresses the USCIS inquiry. As stated above, failure to respond or incomplete responses to USCIS inquiries could lead to a denial of the I-140 Petition which in turn leads to the USCIS denying the I-485 application.