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THE PROPOSED USCIS GUIDANCE ON JOB PORTABILITY: GOOD, BAD OR UGLY?

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INA 204(j) was enacted on October 6, 2000 as part of the American Competitiveness in the 21st Century Act (AC 21). This provision is rather innovative as it allows for the beneficiary of an approved I-140 immigrant visa petition to exercise portability to a same or similar job if an I-485 adjustment application has been pending for more than 180 days. The purpose behind INA 204(j) is to provide job flexibility to foreign national workers when there have been delays in processing an application for permanent residency.

The actual verbiage in INA 204(j) for the benefit of readers is as follows:

A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

While Congress had contemplated a delay of 180 days as being intolerable, the delays can be far worse. For instance, one can file an I-485 application when the priority date becomes current, and then it may retrogress, resulting in the I-485 application remaining pending for years. A case in point is when applicants filed I-485 adjustment applications under the July 2007 visa bulletin, when it was current, and many under the India employment –based third preference are still pending after the dates retrogressed the following month in August 2007. With the new innovation in the Visa Bulletin starting October 2015 – resulting in a filing date and final action date – there will also likely be longer than 180 day waits after an I-485 application has been filed pursuant to a current filing date.

Given that 204(j) was created to promote job mobility for workers who would otherwise be stuck in the same job without any career progression, it is important that the USCIS broadly interpret whether "the new job is in the same or a similar occupational classification as the job for which the petition was filed." If the conditions of 204(j) are met, the labor certification and I-140 petition filed by the prior employer remain intact, and the worker can port and obtain the green card through a new job, provided it is same or similar to the one that was the subject of the labor certification and I-140 petition. INA 204(j) promotes job flexibility either with a new job through another employer or a different job with the same employer.

This is why the proposed guidance memo from the USCIS issued on November 20, 2015 has received so much attention. Once this guidance memo is finalized, and the public has until January 4, 2016, to comment, will the memo spoil the party or would it make it easier for foreign national employees with pending I-485 applications? Till now, at least in this author's experience with respect to meritorious cases and based on anecdotal information from other attorneys, it has generally been possible to make a winning argument that the job is same or similar without the need for a guidance memo, based on the plain language of 204(j). At the same time, many have been hesitant to change jobs due to the risk of the USCIS not accepting that they have moved to similar employment without proper guidance. The proposed guidance is not yet final, and there is scope to improve it so that workers can avail of optimum job mobility as Congress intended when enacting INA 204(j).

The proposed guidance first attempts to divine the plain language meaning of same or similar. With respect to the meaning of "same," there should be little difference in opinion. The two jobs have to be "identical", according to the Oxford English Dictionary or "resembling in every relevant respect", according to the Merriam-Webster Dictionary. Divining the plain meaning of "similar" becomes more contentious. The proposed guidance indicates that it could mean "alike in substance or essential, " according to the Merriam-Webster dictionary or it could mean "having a marked resemblance or likeness", according to the Oxford English Degree. The proposed guidance then selects the Oxford English Dictionary definition and pronounces that "similar" under 204(j) means "having a marked resemblance or likeness." But there are other definitions of "similar" that are broader than the Oxford English Dictionary's definition. For example, this author's version of the Oxford American Dictionary

includes one definition of "similar" as "resembling something but not the same." Why does USCIS choose only one definition over all others? "Resembling something but not the same" provides more flexibility than "having a marked resemblance or likeness." A Google search for the definition of "similar" reveals "resembling without being identical." Even this is a better definition to "having a marked resemblance or likeness" which is what the USCIS has selected for its proposed guidance. Rather than for the USCIS to select one definition of "similar" to others, it ought to allow applicants exercising portability to establish the definition of "similar" through any credible dictionary source.

The proposed guidance also slavishly adheres to the DOL's Standard Occupational Classification (SOC) codes. It is true that INA 204(j) requires that the job be in "the same or a similar occupational classification," but that does not mean that Congress said it must be the DOL's SOC. While the proposed memo also guides USCIS adjudicators to view other evidence, and properly reminds them to use the preponderance of evidence standard, there is a risk that a USCIS adjudicator may rely exclusively on the SOC codes of the occupation that was subject to the employer's sponsorship and the new occupation. Too much reliance on the SOC codes is problematic as it can lead to excessive rigidity, thus undermining an adjudicator's ability to provide flexibility to the applicant, which is what is intended in 204(j) . In an employer sponsored green card process involving labor certification, the DOL is notorious for not assigning a correct code. Note also that the SOC does not cover every occupation under the sun. The SOC is a successor to the now obsolete Dictionary of Occupational Titles (DOT), which covered many more occupations. The DOL has a tendency to assign an SOC with the objective of forcing the employer to pay the higher wage, and the duties described under an SOC occupation need not exactly match the duties of the actual position. For example, if an employer requests a prevailing wage determination and suggests the SOC code of 19-1042.00 corresponding with "Medical Scientists, Except Epidemiologists" , the DOL may instead assign "Natural Sciences Managers" corresponding to SOC code 11-9121. This may be the case even though the position primarily involves research in a distinct scientific field, with some coordination in planning the research with other colleagues in the research laboratory. While Clinical Research Coordinator (SOC Code 11-9121) may be a better match to such a position than Medical Scientists, Except Epidemiologists," there is no available wage date for that position, and so this

specific SOC code cannot be assigned to the employer at least for purposes of determining the prevailing wage. It is time consuming for an employer to challenge the DOL's SOC code for the occupation, which normally requires the employer to take an appeal to BALCA and hope for reversal, which it did on the same facts in *Matter of General Anesthesia Specialists Partnership Medical Group*, 2013-PWD-0005 (Jan. 18, 2014). However, most employers are unwilling to appeal and take the SOC code that the DOL assigns.

Now imagine after a few years, the beneficiary of the approved labor certification wishes to port to a similar job under INA 204(j). The duties of the actual position have primarily involved research rather than managerial duties ascribed to "Natural Sciences Managers" in the SOC. There is some risk that the new occupation, if it is research oriented and applicable only to scientists, may according to a USCIS adjudicator, not comport with "Natural Sciences Managers," which was wrongly assigned to the position in the first instance. "Natural Science Managers" involve managerial duties of a non-scientific nature, and the duties do not necessarily involve front line scientific research. There is also a chance that the DOL may find that the occupation involves a combination of duties, and may assign the SOC code for the occupation with the higher wage. Thus , in *Matter of Emory University*, 2011-PWD-00001 (Feb. 27, 1012), while the employer who was sponsoring a foreign national for the position of "Supervisor, Clinical Genetics Laboratory" selected "Geneticist" corresponding with SOC code 19-1029, the DOL thought that since the occupation involved a combination of duties involving scientific research and coordination, it assigned "Natural Sciences Managers". If this individual now ports to a position that involves front line research in genetics, again there is a risk that the "same or similar" argument under INA 204(j) may not be accepted if he or she is not going to be taking up a position involving managerial duties under "Natural Sciences Manager." There are other problems in emphasizing the SOC code. Some occupations are emerging and may not even have SOC codes. Those stuck in the backlogs, if Congress does not expand the supply of immigrant visas, may not be able to receive green cards for several years, as we have seen with the "Class of 2007" pending adjustment applications. New occupations in the future might receive different SOC codes that do not conform to the major group or minor group occupations.

The proposed guidance explains how the SOC works by providing the example of "web developer" that corresponds with SOC code 15-1134. The first two

digits “15” is the major group classification, which includes all computer and mathematical occupations and corresponds with 15-0000. The third digit “1” indicates the minor group, which is all computer occupations and corresponds with 15-1100. The fourth and fifth digits “13” indicate the broad occupation, namely, software developers and programmers, which corresponds with 15-1130. The sixth digit “4” indicates the detailed occupation, which corresponds with 15-1134 – Web Developers. The proposed guidance then states that if the entire six digits match between the original position and the new position, then such positions will be treated favorably. The proposed guidance also states that if there is a different occupational code between the same broad occupations, denoting “13”, then it will generally be considered same or similar under 204(j). Examples of different codes within the broad occupations include Computer Programmers (15-1131); Software Developers, Applications (15-1132); Software Developers, Systems Software (15-1133) and Web Developers (15-1134). All of these occupations are found within the broad occupation of Software Developers and Programmers (15-1130). But what if the new job is in a different broad occupation, such as Computer Systems Engineers/Architects, which corresponds with SOC code 15-1199.02? The fourth and fifth digits are “19” and no longer “13”. Will this throw off the USCIS adjudicator, and will he or she now issue a Request for Evidence?

Fortunately, the proposed memo does contemplate jobs with totally different codes can also be considered same or similar under the preponderance of evidence standard. For instance, the original job would be under 15-0000 for Computer and Mathematical Occupations while the new job may be under 17-0000 for Architecture and Engineering Occupations. Still, the proposed guidance cautions that some occupations under the same broad occupational code may fail the same or similar test. Thus, Geographers (19-3092) and Political Scientists (19-3090), while falling under the broad occupational code for Miscellaneous Social Scientists and Related Workers (19-3090), may not pass muster under 204(j). The proposed guidance also admirably takes into account career progression. Thus, a Software Developer (15-1132) may be promoted to a position corresponding with Computer and Information Systems Managers with an SOC Code of 11-3021. The new position would be considered similar to the old position since an Information Systems Manager would supervise Software Developers and other occupations within 15-1130. But what if this individual formed his or her own startup, where she is now the CEO and

spends about 49% of her time in general management functions, such as marketing and obtaining venture capital funding, and the remaining 51% of her time in supervising technical development of a software application. This person should also be able to qualify under the same or similar standard, but Chief Executive corresponds to SOC Code to 11-1011 rather than Computer and Information Systems Managers with an SOC Code of 11-3021. The proposed guidance provides an example of a Restaurant Cook (35-2014) progressing to Food Service Manager (11-9051), and indicates that this career progression may fail under the "same or similar" test as the Food Service Manager's duties are different from a Restaurant Cook. Again, the proposed memo relies on the fact that the SOC classification for Food Service Managers excludes "Chefs and Head Cooks," even though in reality a Food and Service Manager may supervise cooks. However, the proposed guidance grudgingly concedes that if the applicant can prove that the original duties of a Restaurant Cook included the duties of a Food Service Manager, such as ordering supplies, setting menu prices and planning the daily menu, then it may be considered a normal career progression. This may be difficult for an applicant to establish, and it may be easier for the applicant to establish that a Food Service Manager also supervises the cooks in a restaurant, but the adjudicator may rely on the SOC description, which clearly states that a Food Service Manager excludes Chefs and Head Cooks.

The USCIS guidance ought to give primacy to an evaluation of the job duties, requirements and skills between the two jobs, rather than on the SOC codes, and should also give weight to an applicant's credible argument that the positions are similar. If the USCIS insists on SOC Codes, they should be used as an aid to facilitate a determination on whether the position is same or similar, rather than insist that the SOC code drives the determination. We already have seen that if the USCIS asks its adjudicators to rely on formulaic governmental classifications, its adjudicators will likely exclusively rely on them rather than consider an applicant's plausible arguments in favor of granting the immigration benefit. A good example is the USCIS's rigid application of the Occupational Outlook Handbook (OOH)when evaluating whether an H-1B petition is a specialty occupation. If there is any whiff of reference in the OOH that one can qualify for an occupation through a generalized college degree, the USCIS pounces upon that in refusing H-1B classification notwithstanding the employer submitting credible evidence to the contrary that a person can

only qualify for the position with a bachelor's degree in a specialized field.

The proposed guidance also indicates that all prior memos are superseded relating to whether the two positions are in the same or similar occupational classification. "This guidance does not address other procedural requirements of the 204(j) portability determination" according to the proposed guidance. The Memo of Michael Aytes dated December 27, 2005 on AC 21, for example, does provide other useful guidance, which may be superseded, but which is essential to 204(j) portability and which has not been addressed in the proposed guidance. While those are procedural requirements of the 204(j) portability determination, they are conflated with same or similar guidance, and thus a USCIS adjudicator may disregard the prior guidance. For example, the Aytes Memo correctly indicates that a foreign national can port to self employment, provided the employment is in a "same or similar" occupational classification. The ability for an applicant to port into self employment or to his own startup should be preserved and emphasized in the final guidance, along with other invaluable guidance such as differences in geographical location should not be a basis for denial.

Given the long backlogs in the employment-based preferences, portability provides the only salvation. It may also be deployed in a proposed rule to provide employment authorization to beneficiaries of approved I-140 petitions (RIN:1615-AC05), and this may be conditioned on whether they have changed jobs within a same or similar occupation. Although INA 204(j) can only be invoked if there is a pending I-485 adjustment application, the DHS has authority under INA 247(h)(3) to provide employment authorization to broad groups of non-citizens under conditions that it can fashion, and also has broad discretion to determine whether an I-140 petition can or cannot be revoked under INA 205, and thus DHS can condition the grant of employment authorization, and the retention of the I-140 petition, based on whether the new job is same or similar to the prior job. Thus, the proposed guidance on INA 204(j) portability could have greater implications.

In conclusion, it is vitally important that foreign nationals stuck in the employment-based backlogs be provided with broad flexibility to change jobs, and so all stake holders ought to comment on or before January 4, 2016 the defects in the guidance, as suggested in this blog, in order to ensure that the final guidance affords maximum job flexibility to skilled legal immigrants caught in the crushing employment backlogs.