

H-1B EXTENSIONS BEYOND SIXTH YEAR AND I-485 PORTABILITY UNDER AC-21 - FAQs

On October 17, 2000, the American Competitiveness in the 21st Century Act (“AC-21”) was signed into law. Although the USCIS has not issued regulations interpreting AC-21, it has issued policy memoranda which establish interim procedural guidelines for USCIS processing of new benefits under AC-21.

On November 2, 2002, President Bush signed a Department of Justice Appropriations bill which included several immigration measures including an expansion of one section of AC-21 § 106.

The following is a discussion of Sections 104 and 106 of AC-21 and USCIS memoranda dealing with extensions of H-1B status beyond the sixth (6th) year limit and with changing employers after filing an adjustment of status application. This discussion is intended to explain the significant changes and, to the extent possible without implementing federal regulations, to provide answers to common questions arising from these provisions.

Please note that this memorandum does not attempt to provide specific legal advice on any given case and we cautions you to seek advice from qualified legal counsel concerning the impact AC-21 may have on your particular set of circumstances.

What the law says under Section 104(c)

Section 104(c) is entitled “One Time Protection Under Per Country Ceiling”. Section 104(c) permits extensions of non-immigrant status to “any alien” who is (1) the beneficiary of an I-140 Employment Based (EB) petition filed on his/her behalf seeking classification under EB-1, EB-2 or EB-3, and (2) eligible to be granted “that status” but for the application of the per country quota limitations. Our interpretation of this provision is that extensions of non-immigrant status may be granted by USCIS if a person is prevented from filing for adjustment of status or an application for adjustment of status remains pending because the priority date on the beneficiary’s immigrant visa quota list has not been reached. In other words, if an I-140 immigration petition has been approved for you, but your priority date is not current at the time of filing the H-1B extension, such extensions of your H-1B status may be filed on your behalf in three-year increments until your application for adjustment of status has been filed and/or a final adjudication of it has been reached.

Questions arising under Section 104(c)

1. Does this section apply only to H-1B extensions?

Policy memoranda do not refer to any nonimmigrant visa other than the H category as being eligible for Section 104(c) benefits. Therefore, Section 104 extensions will only be granted to H-1B non immigrants unless future USCIS regulations state otherwise.

2. If a person has selected Consular Processing (CP), and does not intend to file for adjustment of status, can such an extension be filed?

The USCIS has indicated this may be done.

3. If a person has an approved I-140 with Company A, but has switched employment to Company B, can an extension be filed?

The USCIS has been approving H-1B extensions under these circumstances, but reserves the right to inquire as to the beneficiary’s plans to immigrate on the original I-140 immigrant petition.

4. Is there a limit to the number or duration of extensions permitted?

No. Despite the reference to a “one-time protection”, you may be granted more than one extension under this provision. Extensions under §104(c) may be granted for a period up to three years.

5. Are family members eligible for §104(c) extensions?

Yes. According to 2001 USCIS memorandum, H-4 dependents are also eligible for §104(c) extensions. Whenever possible, extensions should be filed concurrently with the principal H-1B worker’s extension request.

What the law says under Section 106(a)

This section is entitled “Special Provisions in Cases of Lengthy Adjudications”. This section permits extensions of H-1B status beyond the sixth year, provided 365 days or more have elapsed since either the filing of the labor certification, if required, or the I-140 immigrant visa petition. Subsection (b) permits extensions in increments of one (1) year until a final decision is reached on the alien’s application for lawful permanent residence (i.e., Form I-485).

Questions under Section 106(a)

1. Does this extension apply only to H-1B extensions?

Yes, the plain language of the statute limits its application to H-1B status holders only.

2. Must an Alien Employment Certification (AEC/PERM) or I-140 have been simply filed, or must it be approved 365 days ago before this section takes effect?

AC21 allows for an extension of H-1B status beyond the 6-year limit where 365 days or more have passed since the filing of any labor certification (when that is required) or I-140 petition. If this requirement has been met, you may be granted an extension under §106(a) on or prior to the date you reach the 6 year stay limit.

The types of cases where a labor certification is not required before the filing of the I-140 immigrant visa petition are extraordinary ability, outstanding researcher, national interest waiver Schedule A Group II, and multinational manager/executive petitions.

3. If a person has a pending I-140 and/or adjustment of status based on a job offer with Company A, but has changed employment to Company B, can an extension of H-1B status be filed under this section?

The USCIS has indicated this may be done.

4. What if the I-140 visa petition has been approved and the individual is waiting for an immigrant visa interview at a U.S. Consulate – can the employer submit an H-1B extension beyond the 6th year?

Yes.

5. What if the employee still has time left before the end of his/her 6th year—can the employer file an AC-21 extension of stay anticipating that the case will still be pending?

Yes. Extensions under §106(a) may only be granted in one-year increments, however USCIS prefers that a combined extension request for any remaining time left of the initial 6 year period, plus the one year extension be filed, rather than filing two separate petitions. Please note, however, that the total period of time requested on any H-1B petition may not exceed 3 years.

6. How early can an extension under this section be filed?

A foreign national in H-1B status will be eligible for an extension under this section if s/he meets the requirements listed above either on or before the requested start date on the H-1B extension application. As always, an H-1B petition may not be filed more than six months ahead of the requested start date of the petition.

7. Where a labor certification is required and has been approved, must the I-140 petition be filed in order to qualify for an H-1B extension?

No. USCIS has indicated that a request for an H-1B extension beyond the 6-year limit should not be denied on the sole basis that an I-140 petition has not yet been filed. Please note that labor certifications are now valid for only 180 days, unless an I-140 petition is filed while the labor certification is valid. We would urge caution in relying on an approved but expired labor certification as the basis for an extension under §106(a).

8. Are H-4 dependents also eligible for an extension beyond the 6-year limit?

Yes. H-4 dependents are eligible provided the principal H-1B is eligible for an extension beyond the 6-year limit. This includes situations where the dependent may have held another status prior to becoming an H-4 dependent. However, in cases where a spouse holds his/her own H-1B status, he/she must meet all of the §106(a) requirements independently of the H-1B spouse’s eligibility, in order to qualify for a 7th year extension.

www.ac21portability.com

What the law says under Section 106(c)

This section is entitled “Increased Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence” and provides that an applicant for adjustment of status based on a job offer with one company can switch jobs or employers if the adjustment has been filed and is pending for 180 days or more provided that the I-140 is approved (or “approvable” if still pending), and the new job (either with the same or different employer) is in the “same or similar occupational classification as the job for which the petition was filed”.

Questions under Section 106(c)

1. Does this I-485 portability provision apply to individuals whose adjustments are based on any employment based petition?

The statute says any application filed pursuant to Section 245, which would seem to include all employment based cases.

2. Must the I-140 be approved before this section may apply?

No, however it is highly preferable that the I-140 be approved. Where the I-485 has been pending for 180 days and the I-140 remains unapproved, USCIS has indicated that it will review the pending I-140 to establish that it is approvable or would have been approvable had it been adjudicated within 180 days. USCIS has indicated that I-140 petitions that would have been approvable but for an ability to pay issue or any other issue that arises after the 180 day period should be approved regardless.

3. What is considered “same or similar occupational classification”?

USCIS guidance states that to determine whether a new job is “same or similar,” adjudicators should consider the description of the job duties, the Department of Labor’s DOT or SOC code assigned to the initial I-140 petition and the appropriate DOT or SOC code for the new position, and whether there is a substantial discrepancy between the previous and new wages. Please note that a difference in the wages offered cannot be used as a basis of denial, this would be considered as evidence of whether the new position was in the same or a similar occupational classification.

4. Must the individual have a job offer with a new employer, or could self-employment count, provided it is in same or similar occupational classification?

USCIS has indicated that as long as s/he meets the “porting” requirements, the individual applicant may become self-employed. The applicant must be able to demonstrate that the new job is the same or similar to that for which the I-140 petition was filed. The applicant must also be prepared to demonstrate that the new job is legitimate. Finally, USCIS will inquire as to whether the I-140 petition represented the former employer’s true intentions to employ the individual upon approval of permanent resident status, and also whether the individual intended to work for that employer at the time the I-140 petition and AOS applications were filed. Note that the individual cannot be looking for a job at the time the I-485 is adjudicated, and must be able to show there is a valid offer of employment at the time of adjudication. Given the additional analysis that could be involved in a self-employment situation, a position involving a job offer with a new employer is preferable and we believe that “self-employment” is likely risky.

5. If the individual is promoted to a different position, does this provision take effect?

Yes, moving to a different position that is similar in occupational classification can satisfy AC-21 AOS portability.

6. If the individual accepts a job with a new employer in a completely different part of the country, does this provision take effect?

Yes, but again, only if the new job is in the same or similar occupational classification. Geographic location of the employment is not a basis for denial of portability.

7. If the employer withdraws the I-140 after the individual leaves the employer, is the individual's adjustment application nevertheless protected under this I-485 portability provision?

It depends upon the timing of such a withdrawal. An I-140 is no longer valid for porting purposes if it is withdrawn when the I-485 has been pending for less than 180 days. However, if the employer withdraws the I-140 after the I-485 has been pending for more than 180 days, the individual could still "port". This is because both the I-140 and I-485 application focus on the prospective employment of the applicant. At the time of filing, the I-140 employer and adjustment applicant must have both intended for the applicant to undertake the employment at the time the adjustment is approved and permanent residency is granted. USCIS has indicated it will investigate such cases as it deems appropriate. Under these circumstances, it would be prudent to notify the USCIS of the porting before the USCIS receives the employer's withdrawal and to consult with an immigration attorney before any steps are taken.

8. When can an I-140 no longer be used for porting purposes?

The I-140 will not be valid for porting if: 1) it has been withdrawn before the I-485 has been pending for 180 days; or 2) it is denied or revoked at any time.

9. Do the same rules apply if an individual is processing his/her application through a Consulate?

Although the plain language of AC-21 states that the portability rules for permanent residency applications apply only to applications for adjustment of status, Department of State officials have indicated that consulates have considered AC21 section 106(c) portability as applying to consular immigrant processing as well. Nevertheless for a number of reasons, we recommend adjustment of status over consular processing.

Since many questions regarding AC-21 and the Appropriations Act still remain to be answered and we are relying on various Service memoranda, we strongly recommend that any individuals with potential AC-21 issues seek guidance from qualified legal counsel prior to taking affirmative action. We also recommend that individuals continue to check our website for further policy updates, including future USCIS regulations on AC-21.