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Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director, Mailstop 2000
20 Massachusetts Avenue, NW
Washington, DC 20529-2000

Via e-mail: ope.feedback@uscis.dhs.gov

Re: PM-602-0122: Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability (November 20, 2015)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) jointly submit the following comments in response to the November 20, 2015, USCIS Draft Policy Memorandum, "Determining Whether a New Job is in 'the Same or a Similar Occupational Classification' for Purposes of Section 204(j) Job Portability" (PM-602-0122).

Founded in 1946, AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

We appreciate the opportunity to comment on this draft memorandum and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Background

As noted in the draft memorandum, the American Competitiveness in the Twenty-First Century Act (AC21) was enacted by Congress in 2000 in order to provide much needed solutions and job flexibility for the thousands of foreign workers whose applications for permanent residence are stuck in the employment-based immigrant visa backlogs.[1] INA §204(j) was created by AC21 to permit employment-based applicants for adjustment of status to change jobs or employers without having to retest the labor market or seek approval of a new I-140, Petition for Alien Worker if:

- A Form I-485, adjustment of status application has been filed and remains pending for 180 days or more; and

- The new job is in "the same or a similar occupational classification" as the job for which the underlying I-140 petition was approved.

Currently, in order "port" to a new job or employer in accordance with INA §204(j), the applicant may submit evidence (such as the DOL occupational classification codes for each job, a description of the job duties, and any other relevant evidence) to the office having jurisdiction over the pending adjustment application. When the I-485 application is ripe for adjudication, USCIS will consider any evidence presented, and may issue a Request for Evidence asking for confirmation that the adjustment applicant is continuing his/her employment with the sponsoring employer or requesting information regarding any new position before making the final determination as to whether the applicant is eligible for permanent residence.

In the draft memorandum, USCIS states: "[Despite the statutory flexibility provided in section 204(j) of the INA, stakeholders have raised concerns that the job portability provision is underutilized due to significant uncertainty concerning USCIS determinations in this area."[2] USCIS goes on to explain that the memorandum is "intended to address that uncertainty by providing additional guidance for determining whether two jobs are in the same or similar occupational classification(s)."[3]

Preliminarily, we note that AILA members overwhelmingly report few, if any, issues with the current process, which has been in place for more than 15 years. However, we understand and appreciate USCIS's desire to eliminate uncertainty within the broader stakeholder community. While we support the goals articulated in the introductory paragraphs of the draft memorandum, USCIS must ensure that the final memorandum and job portability procedures reflect the spirit of generosity and flexibility that Congress intended when it enacted AC21.

[1] Public Law 106-313 (Oct. 17, 2000).
[2] Draft Memorandum at 3.
[3] *Id.*

We also note that on December 31, 2015, DHS published proposed regulations in the Federal Register, "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers."[4] If adopted as drafted, an INA §204(j) implementing regulation (proposed 8 CFR §245.25(a)) would provide that an immigrant visa petition for the employment-based first (but not "extraordinary ability"), second, or third preference categories remains valid if the petition is approved and either:

1. The employment offer from the petitioning employer is continuing and remains bona fide; or

2. Pursuant to section 204(j), the beneficiary has a new offer of employment in the same or a similar occupational classification as the employment offer listed in the approved petition, the application for adjustment of status based on this petition has been pending for 180 days or more, and the approval of the petition has not been revoked.[5]

Under the second criterion of the proposed rule, the new offer of employment may be from the petitioning employer, from a different U.S. employer, or based on self-employment.[6] The Supplementary Information to the proposed rule notes that a new supplement to the application for adjustment of status (Supplement J) will be published to assist USCIS in making the "same or similar" determination.[7] Though no fee will be attached to the supplement, DHS may consider a fee in the future.[8]

The comment period for the proposed rule ends on February 29, 2016. Given the inherent overlap between the AC21 provisions in the proposed regulations, the policy positions articulated in the draft memorandum, and the creation of a new Supplement J to aid USCIS in making the "same or similar" determination, we urge USCIS to retain its current 204(j) portability procedures until the final AC21 regulations and Supplement J are published.

Preponderance of the Evidence

We thank USCIS for stating that the appropriate standard of proof in the 204(j) portability determination is "preponderance of the evidence" and for explaining that "[t]his is a lower standard of proof than that of 'clear and convincing evidence' or the 'beyond a reasonable doubt' standard. An applicant does not need to remove all doubt from the adjudication." Citing *Matter of Chawathe*, USCIS states that the petitioner must submit "relevant, probative, and credible evidence" which the adjudicator must assess both "individually and within the context of the totality of the evidence."[9] We appreciate the clear articulation of the standard of proof in the

[4] 80 Fed. Reg. 81900 (Dec. 31, 2015).
[5] Proposed 8 CFR §245.25(a).
[6] *Id*. In addition, given that porting to self-employment is specifically permitted by the 2005 Yates Memorandum and the 2005 Aytes memorandum discussed herein, the omission of any reference to self-employment in the current draft memorandum presumably reflects an oversight by USCIS.
[7] 80 Fed. Reg. at 81916.
[8] *Id*.
[9] 25 I&N Dec. 369, 375-376 (AAO 2010).

draft memorandum, and the placement of this section near the beginning of the memo, prior to the evidentiary discussion.

Same or Similar Occupational Classification Determinations

The draft memorandum begins the evidentiary discussion by citing the common dictionary definitions of the terms "same" and "similar." The draft memorandum states that in determining whether two jobs are the "same" occupational classification, USCIS will look to whether the two jobs are "identical," "resembling in every relevant respect," or are "the same kind of category or thing."[10] In determining whether two jobs are in "similar" occupational classifications, USCIS will look to whether the jobs "share essential qualities," or have a "marked resemblance or likeness.[11]

Standard Occupational Classification Codes

Though the draft memorandum states that adjudicators should look at "all relevant evidence"[12] when determining whether two occupations are the same or are similar, the memorandum also emphasizes the utility of the Department of Labor's (DOL) Standard Occupational Classification (SOC) codes in the adjudicatory process. According to the DOL, all workers can be classified into one of 840 "detailed occupations." Detailed occupations with similar job duties and, in some cases, skills, education, and/or training, are grouped together into "broad occupations." Each "broad occupation" is part of a larger "minor group" and each "minor group" is part of a "major group." So, for example, the SOC code for a "**Web Developer**," **15-1134** represents:

- **Major Group (15)**: Computer and Mathematical Occupations
- **Minor Group (1)**: Computer Occupations
- **Broad Occupation (13)**: Software Developers and Programmers
- **Detailed Occupation (4)**: Web Developers

While we understand the need to establish a baseline for the "same or similar" determination and agree that the SOC represents a reasonable framework for this type of analysis, we note that the SOCs were not established for this purpose and thus, there will be instances where the SOC codes will not be dispositive. Additionally, it is important to note that when DOL assigns an SOC code to a prevailing wage determination, which is a prerequisite to the labor certification process, the agency occasionally selects an incorrect or unsuitable SOC code and that in some instances where the employer is unable to obtain a new or corrected prevailing wage determination, the employer must file the labor certification with the inappropriate SOC code. Moreover, in the case of emerging occupations, such as those in the technology and health care sectors, employers are often forced to rely on inappropriate SOC codes due to the DOL's reluctance to assign an SOC code to an occupation that rightly falls under an "All Other" detailed occupation code.[13] Finally, for many individuals who have been stuck in the immigrant visa

[10] Draft Memorandum at 5.
[11] *Id*.
[12] Draft Memorandum at 6.
[13] For example, *Software Quality Assurance Engineers and Testers* (15-1199.01) fall under the detailed occupational category of 15-1199.00, *Computer Occupations, All Other*. DOL typically categorizes these positions as Software

backlogs for years (and for whom portability will be most attractive), the SOC code certified by DOL may no longer exist. Thus, while we appreciate the fact that the draft memorandum requires adjudicators to look at all relevant evidence, we ask that the final memorandum include additional language emphasizing these points so that adjudicators do not rely too heavily on SOC codes.

Matching Detailed Occupational Codes

The draft memorandum states that if the applicant establishes by a preponderance of the evidence that the detailed occupational codes describing the two positions are the same (all six digits of the code match), the adjudicator "may treat such evidence favorably" in determining whether the two positions are the same or similar, and that "[s]uch positions will generally be considered to be in the same … unless, upon review of the evidence presented and considering the totality of the circumstances, the preponderance of the evidence indicates that favorable treatment is not warranted."[14]

We disagree with this assessment. To state that, on the one hand, the "preponderance of the evidence" establishes that two occupations share the same occupational code, and then to go on to vaguely state that notwithstanding this, "favorable treatment [might not be] warranted" is not only confusing to adjudicators, it is also contrary to the evidentiary principles surrounding the application of the preponderance standard. Therefore, we urge USCIS to amend this language to reflect that where the preponderance of the evidence establishes that the detailed occupational codes for the two positions are the same, there is a presumption that 204(j) portability has been established, and USCIS adjudicators should look no further and accept that the job classifications are the same.

Different Detailed Occupational Codes within the Same Broad Occupation

The draft memorandum states that "if the applicant establishes by a preponderance of the evidence that the two jobs [] described [are] … within the same broad occupation code … "such positions will generally be considered to be in similar occupational classifications unless, upon review of the evidence and considering the totality of the circumstances, the preponderance of the evidence indicates that favorable treatment is not warranted."[15] The memorandum cites as an example, the broad occupational group of "Software Developers and Programmers" (15-1130) and states that the detailed occupations of Computer Programmers (15-1131), Software Developers, Applications (15-1132), Software Developers, Systems Software (15-1133), and Web Developers (15-1134) may be considered "similar" due to the "largely similar duties and areas of study associated with each classification."[16] As an example to the contrary, USCIS notes that the detailed occupations of Geographers (19-3092) and Political Scientists (19-3094), though found within the same broad occupational code, do not share similar duties, experience, and

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Developers (15-1132.00 and 15-1133.00), which have distinctly different job duties from Software Quality Assurance Engineers and Testers.

[14] Draft memorandum at 7-8.

[15] Draft memorandum at 8.

[16] *Id*.

educational backgrounds and thus, might not be found to be similar enough in nature for a 204(j) portability determination.[17]

With the establishment of a presumption, as described above, that two positions are the "same" for 204(j) portability purposes when the preponderance of the evidence establishes that the two SOC codes are an exact match, we agree that where the preponderance of the evidence indicates that different SOC codes within the same broad occupation apply, a review of the totality of the evidence to make a final determination on portability is appropriate.

Career Progression

We applaud USCIS for including this section on career progression which is helpful and particularly relevant and important for individuals whose applications for adjustment of status have been pending for long periods of time. The example of Cook/Food Service Manager is particularly illustrative of the fact that there are many instances in which the SOC codes might not match but the job is still "similar."

Differences in Wages

Although we appreciate the statement that salary should not be the sole determining factor as to whether two positions are similar, differences in wages should not be a factor at all in determining whether two positions are in "the same or a similar occupational classification." The legitimate variables that may be taken into account when establishing an employee's salary are infinite and include the current state of the economy, whether the business is a start-up/ emerging or is well-established, and the availability of non-monetary employee benefits. Therefore, the paragraph with the heading "Differences in Wages" should be stricken from the final memorandum. If this paragraph is retained, it must clearly state that a wage difference between the two occupations is not in and of itself dispositive. Toward that end, footnote 24 in the draft memorandum states "[A]n increase or decrease in pay ***may not*** be dispositive"; this should be corrected to state: "[A]n increase or decrease in pay ***is not*** dispositive."[18]

Superseded Memoranda and Other Documents

The draft memorandum states that the final guidance will supersede portions of several memoranda and documents that pertain to determining whether two positions are in the same or similar occupational classifications. We have reviewed each of these documents and note the following:

- Memorandum of Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, "Initial Guidance for Processing H-lB Petitions as Affected by the 'American Competitiveness in the Twenty First Century Act' (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)" (June 19, 2001).

[17] *Id*.
[18] Draft memorandum at 11.

Dictionary of Occupational Titles (DOT)/O*NET: This memorandum states:

> *To determine whether a new job is in the same or similar occupational classification as the original job for which the certification or, approval was initially made, the adjudicating officer may consult the Department of Labor's Dictionary of Occupational Titles or its online O*NET classification system or similar publications.*[19]

USCIS should incorporate similar language into the final "same or similar" policy memorandum as these DOL resources remain relevant and useful in making the 204(j) portability determination.

- Memorandum of William R. Yates, Acting Associate Director for Operations, Bureau of Citizenship and Immigration Services, "Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)" (Aug. 4, 2003).

  Memo Not Superseded: We suggest that the reference to this memorandum be deleted from the final guidance. This memo addresses the continuing validity of I-140 petitions after revocation or withdrawal, and does not contain guidance on the "same or similar" determination. Therefore, listing it here and noting that portions of it may be superseded is confusing and unnecessary.

- Memorandum of William R. Yates, Associate Director for Operations, USCIS, "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) (Public Law 106-313)" (May 12, 2005).

  Self-Employment Permitted: This memorandum confirms that self-employment is permitted under INA §204(j) as long as the employment is in a "same or similar" occupational classification.[20] Though we note that the proposed regulation published on December 31, 2015, if adopted, would confirm this, the draft memorandum makes no mention of self-employment as a viable possibility for 204(j) portability. USCIS should incorporate a paragraph into the final memorandum confirming that self-employment is permitted.

  Dictionary of Occupational Titles (DOT): This memorandum also references the Dictionary of Occupational Titles as a resource for determining whether two positions are "the same or similar."[21] As noted above, the final memorandum should incorporate language explaining that the DOT also has evidentiary value in the context of a 204(j) portability determination.

[19] 2001 Pearson Memorandum at 8.
[20] 2005 Yates Memorandum at 5-6.
[21] 2005 Yates Memorandum at 4.

Geographic Location Not Relevant: Finally, this memorandum clearly states that a difference in geographic location between the new and prior position is not a basis for denying portability. USCIS should include language to this effect in the final guidance.

- Memorandum of Michael Aytes, Acting Director of Domestic Operations, USCIS, "Interim Guidance for Processing I-140 Employment-Based Immigrant Petitions and I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)" (Dec. 27, 2005).

  Dictionary of Occupational Titles, Geographic Location, Self-Employment: The 2005 Aytes memorandum repeats the points listed above regarding the relevance of the DOT, the irrelevance of a change in geographic location, and the ability of an applicant to port to self-employment. As described above, the principles on these points outlined in this guidance should be incorporated into the final memorandum.

We appreciate the opportunity to comment on this draft policy memorandum, and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

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