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U.S. Citizenship
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Services

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Draft Policy Memorandum

SUBJECT: Determining Whether a New Job is in “the Same or a Similar Occupational Classification” for Purposes of Section 204(j) Job Portability

Purpose

This policy memorandum (PM) provides additional guidance to Immigration Services Officers (ISOs) for determining, with respect to the job portability provisions in section 204(j) of the Immigration and Nationality Act (INA), whether one job is in “the same or a similar occupational classification” as another job. Specifically, this memorandum instructs ISOs on how they may use the U.S. Department of Labor’s (DOL’s) Standard Occupational Classification (SOC) codes and other evidence to determine if a new job is in the same or a similar occupational classification as the original job offer in an Immigrant Petition for Alien Worker (Form I-140 petition) submitted to U.S. Citizenship and Immigration Services (USCIS). The purpose of this memorandum is to promote consistency and efficiency in section 204(j) portability adjudications in accordance with the policy objectives described herein. Such adjudications require individualized assessments that consider the totality of the circumstances and are based on a preponderance of the evidence presented.

USCIS is issuing this memorandum for public review and feedback. Upon publication of the final memorandum, USCIS will update chapters 20.2 and 22.2 of the Adjudicator’s Field Manual (AFM).

Scope

This memorandum applies to and shall be used to guide determinations by all USCIS employees.

Authorities

- INA 204(j), 8 U.S.C. 1154(j)
- INA 212(a)(5)(A)(iv), 8 U.S.C. 1182(a)(5)(A)(iv)

Policy

I. Introduction

Congress enacted the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Public Law 106-313,¹ in large part to address various problems resulting from lengthy immigration processing delays.² Among those problems was the need for job flexibility for foreign workers in the United States experiencing delays and backlogs in the employment-based immigrant visa process. AC21 addressed that problem by, among other things, creating section 204(j) of the INA. Section 204(j) permits applicants for adjustment of status to that of lawful permanent resident who are beneficiaries of valid Form I-140 petitions to change jobs or employers in certain circumstances (“204(j) portability”).³ These individuals do not need employers to retest the labor market for the new position, if otherwise required, or to obtain new, approved petitions on their behalf.

Specifically, section 204(j) provides that the approval of a Form I-140 petition shall remain valid when an applicant changes jobs or employers, if:

- A Form I-485, Application to Adjust Status, on the basis of an employment-based immigrant visa petition⁴ has been filed and remained unadjudicated for 180 days or more; and
- The new job is in the same or a similar occupational classification as the job for which the petition was filed.

To establish that a new position is in the same or a similar occupational classification as the offer of employment for which a petition was filed,⁵ the applicant may submit evidence regarding: the

¹ In November 2002, AC21 was amended by the Twenty-First 21st Century Department of Justice Appropriations Authorization Act (the 21st Century DOJ Appropriations Act), Public Law 107-273.

² See generally S. REP. NO. 106-260, at 23 (2000) (recognizing the burden on foreign workers and the difficulties faced by U.S. employers in retaining these skilled workers caused by the “delays in labor certification and INS visa processing”).

³ See also AC21 106(c)(2) (adding INA 212(a)(5)(A)(iv), which provides similar protection with respect to an approved labor certification).

⁴ Section 204(j) erroneously refers to immigrant petitions filed under “INA 204(a)(1)(D),” rather than to INA 204(a)(1)(F). See *Matter of Al Wazzan*, 25 I. & N. Dec. 359, 361 (AAO 2010) (recognizing that section 204(a)(1)(D) has been redesignated as section 204(a)(1)(F)). The portability provision of INA 204(j) applies to employment-based immigrant petitions filed under INA 203(b)(1)(B) (“Outstanding Professors and Researchers”), INA 203(b)(1)(C) (“Certain Multinational Executives and Managers”), INA 203(b)(2) (“Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability”), and INA 203(b)(3) (“Skilled workers, professionals, and other workers”).

⁵ The petition must have been filed on behalf of a beneficiary who was entitled to the employment-based classification, and it must be approved prior to a favorable portability determination of the adjustment of status

DOL occupational classification codes assigned to the respective jobs; the job duties, skills, experience, education, training, licenses or certifications specifically required to perform the jobs; wages offered for each job; and any other material and credible evidence relevant to a determination of whether the new position is in the same or a similar occupational classification. Such evidence should be submitted to the office having jurisdiction over the pending Form I-485 and will be considered in connection with the Form I-485. If USCIS requires additional information to adjudicate a request for 204(j) portability, USCIS may issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) and allow the applicant to submit such information.

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. This 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).

II. Scope of this Memorandum and Revision to the Adjudicator’s Field Manual

To date, guidance on determining same or similar occupational classification(s) in 204(j) portability requests has been set forth in a series of memoranda dating back to 2001, as well as in information posted on the USCIS website. These documents consist of:

- Memorandum of Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, Immigration and Naturalization Service, “Initial Guidance for Processing H-1B 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);
- 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);
- 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);
- Memorandum of Michael Aytes, Acting Director of Domestic Operations, USCIS, “Interim Guidance for Processing I-140 Employment-Based Immigrant Petitions and I-

application. *See Al Wazzan*, 25 I. & N. Dec. 359. If a petition is not approved at the time of a portability request, ISOs should look to whether the petition was approvable at the time that the petition was filed.

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);⁶ and

- Questions about Same or Similar Occupational Classifications Under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), <http://www.uscis.gov/news/questions-and-answers/questions-about-same-or-similar-occupational-classifications-under-american-competitiveness-twenty-first-century-act-2000-ac21> (last updated on April 7, 2011).

The instant memorandum supersedes the sections within the above documents related to determining whether two positions are in the same or similar occupational classification(s). This guidance does not address other procedural requirements of the 204(j) portability determination.

In addition, USCIS will update chapters 20.2 and 22.2 of the AFM when it issues the final version of this memorandum.

III. Preponderance of the Evidence

An applicant for adjustment of status to that of a lawful permanent resident requesting 204(j) portability must establish that he or she meets the relevant eligibility requirements by a preponderance of the evidence.⁷ In other words, the applicant must show that his or her claim is more likely the case than not. This 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. Even if an ISO has some doubt about a claim, an applicant will have satisfied the standard of proof if he or she submits relevant, probative, and credible evidence, considered “individually and within the context of the totality of the evidence,” that leads an ISO to conclude that the claim is “more likely than not” or “probably true.”⁸

IV. Same or Similar Occupational Classification Determinations

In determining whether a new job is valid for purposes of 204(j) portability, USCIS must first determine by a preponderance of the evidence whether the new job is in *either* the *same* occupational classification or a *similar* occupational classification. Because the statute does not define the terms “same” or “similar,” we first look to their common dictionary definitions,⁹ as

⁶ The December 27, 2005 memorandum reissued prior guidance provided in a memorandum with the same title on May 12, 2005, without change except to clarify the answer to question 1 in Section I.

⁷ See *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

⁸ *Id.* at 376.

⁹ See *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002-03 (2012) (when a term goes undefined in a statute, an agency ordinarily should “give the term its ordinary meaning”).

well as the agency’s practice and experience in this context. With respect to whether two jobs are in the *same* occupational classification, USCIS looks to whether the jobs are “identical,” “resembling in every relevant respect,” or “the same kind of category or thing.”¹⁰ With respect to whether two jobs are in *similar* occupational classifications, USCIS looks to whether the jobs share essential qualities or have a “marked resemblance or likeness.”¹¹

Standard Occupational Classification Codes

In making these determinations, USCIS may refer to the labor market expertise of the Department of Labor (DOL) as reflected in its Standard Occupational Classification (SOC) system, which is used to organize occupational data and classify workers into distinct occupational categories.¹² Occupations are generally categorized based on the type of work performed and, in some cases, on the skills, education, and training required to perform the job. The SOC organizes all occupations into 23 “major groups,” which are then broken down in descending order into: 97 “minor groups,” 461 “broad occupations,” and 840 “detailed occupations.”¹³ All workers are classified into one of these 840 detailed occupations.¹⁴ Detailed occupations with similar job duties and, in some cases, skills, education, and/or training are generally grouped together in the same broad occupation.¹⁵

The SOC system is organized using numeric codes, which generally consist of six digits. Each digit or group of digits represents the level of similarity of positions. No occupation will be assigned to more than one category at the lowest level of the classification (sixth digit). For example, the SOC code for the detailed occupational classification of “web developer” is 15-1134 and is broken down as follows:

- [15]-1134: The first two digits (“15”) indicate the “major group” classification, which includes all computer and mathematical occupations.

¹⁰ See, e.g., *Same Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/same> (last visited Sept. 10, 2015) (defining “same” as “identical” or “resembling in every relevant respect”); *Same Definition*, OED.COM, <http://www.oed.com/view/Entry/170362?redirectedFrom=same#eid> (last visited Sept. 10, 2015) (defining “same” as “identical”).

¹¹ See, e.g., *Similar Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/similar> (last visited Sept. 10, 2015) (defining “similar” as “alike in substance or essentials”); *Similar Definition*, OED.COM, <http://www.oed.com/view/Entry/179873?redirectedFrom=similar#eid> (last visited Sept. 10, 2015) (defining “similar” as “having a marked resemblance or likeness”).

¹² See U.S. Dep’t. of Labor, Bureau of Labor Statistics, Standard Occupational Classification, <http://www.bls.gov/soc/> (last visited Sept. 10, 2015). Note that the SOC codes are revised periodically. See U.S. Dep’t of Labor, Bureau of Labor Statistics, Standard Occupational Classification, 2018 SOC Revision Process, <http://www.bls.gov/soc/#revision> (last visited Sept. 10, 2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

- **Major Group:** 15-0000 *Computer and Mathematical Occupations*
- 15-[1]134: The third digit (“1”) indicates the “minor group” classification, which includes all computer occupations.
 - **Minor Group:** 15-1100 *Computer Occupations*
- 15-1[13]4: The fourth and fifth digits (“13”) indicate the “broad occupation” classification, which includes software developers and programmers.
 - **Broad occupation:** 15-1130 *Software Developers and Programmers*
- 15-113[4]: The sixth digit (“4”) indicates the “detailed occupation” classification, which includes only web developers.
 - **Detailed Occupation:** 15-1134 *Web Developers*

ISOs should also be aware of the distinct ways in which the SOC system classifies supervisors and managers of other workers. Supervisors of workers in major groups 13-0000 through 29-0000 are generally classified along with the workers they supervise, as such supervisors usually have work experience and perform activities similar to their supervisees.¹⁶ Managers (*i.e.*, individuals who are primarily engaged in planning and directing) are generally classified in a separate major group - Major Group 11-0000.¹⁷ Individuals classified in this major group are generally managers of individuals categorized in other major groups, and their duties may include supervision of such other individuals. For example, the SOC code 11-9041 is assigned to the detailed occupation “Architectural and Engineering Managers,” which covers individuals who “[p]lan, direct, or coordinate activities in such fields as architecture and engineering or research and development in these fields.” Under normal career progression, an individual in an occupation in a given major group may advance to a corresponding and related occupation in the major group for managers.

Using SOC Codes to Determine Same or Similar Occupational Classification(s)

When determining whether two jobs are in the same or similar occupational classification(s) for purposes of 204(j) portability, ISOs should look at all relevant evidence. As noted above, such evidence includes, but is not limited to: the job duties, skills, experience, education, training, licenses or certifications required for the respective jobs; wages offered for those jobs; and any

¹⁶ 2010 SOC User Guide, available at http://www.bls.gov/soc/soc_2010_class_prin_cod_guide.pdf (last visited Sept. 10, 2015).

¹⁷ See U.S. Dep’t. of Labor, Bureau of Labor Statistics, 2010 SOC User Guide: Classification Principles and Coding Guidelines (Jan. 2010) (2010 SOC User Guide), available at http://www.bls.gov/soc/soc_2010_class_prin_cod_guide.pdf (last visited Sept. 11, 2015); see also U.S. Dep’t. of Labor, Bureau of Labor Statistics, Standard Occupational Classification, 11-0000 Management Occupations, available at <http://www.bls.gov/soc/2010/soc110000.htm> (last visited Sept. 11, 2015).

other material and credible evidence submitted by the applicant.¹⁸ Also as noted above, as part of this analysis, ISOs may rely on the SOC codes to compare the respective jobs.

Determining the appropriate SOC codes for the relevant jobs depends on the type of I-140 petition filed on behalf of the applicant for adjustment of status:

- For I-140 petitions that are supported by labor certifications from DOL, the SOC code for the original position will have been certified by DOL. The SOC code associated with the new position will need to be established by the applicant, with supporting evidence from the intending employer.
- For I-140 petitions that do not require labor certifications from DOL, the applicant must establish the proper SOC code for both the original position and the new position. With respect to the new position, the applicant should submit supporting evidence from the intending employer.¹⁹

With respect to SOC codes other than those certified by DOL in a labor certification, the burden is on the applicant to demonstrate by a preponderance of the evidence that the SOC code may properly be associated with the relevant position.²⁰

Matching Detailed Occupational Codes. If the applicant establishes by a preponderance of the evidence that the detailed occupational codes describing the original and new positions are the same (*i.e.*, those where all six digits of the code match), ISOs may treat such evidence favorably in determining whether the two positions are in the same or similar occupational classification(s) for 204(j) portability purposes. Such positions will generally be considered to be in the same occupational classification, unless, upon review of the evidence presented and considering the

¹⁸ ISOs may reference additional resources to determine whether two jobs are in the same or similar occupational classification(s), including, for example, the DOL Bureau of Labor Statistics’ Occupational Outlook Handbook, the DOL Employment & Training Administration sponsored Occupational Information Network (O*NET), or the DOL Bureau of Labor Statistics’ Occupational Employment Statistics database. Please note that other agencies using SOC codes may use different levels of aggregation, depending on their ability to collect data. For example, *Secondary School Teachers, Except Special and Career/Technical Education* (SOC code 25-2031) is a detailed occupation. Agencies wishing to collect more particular information on teachers by subject matter might use 25-2031.1 for secondary school *science* teachers or 25-2031.12 for secondary school *biology* teachers. Additional levels of detail also may be used to distinguish workers who have different training or years of experience. See 2010 SOC User Guide, available at http://www.bls.gov/soc/soc_2010_user_guide.pdf (last visited Sept. 11, 2015).

¹⁹ Certain employment-based immigrant visa classifications do not require that an underlying labor certification be certified by DOL. See INA 212(a)(5)(D) (requiring labor certifications for aliens seeking admission or adjustment of status under the EB-2 and EB-3 preference classifications, but not the EB-1 preference classification). See also INA 204(b) (providing that Form I-140 petitions filed under the EB-2 or EB-3 preference classifications, but not the EB-1 preference classification, may be approved only after consultation with DOL). For Schedule A occupations, the labor certification is filed with the I-140 petition to USCIS without prior DOL certification. See 8 CFR 204.5(k)(4)(i). Similarly, a DOL-labor certification is not required for EB-2 petitions seeking a national interest waiver. See INA 203(b)(2)(B)(i); 8 CFR 204.5(k)(4)(ii).

²⁰ See *Matter of Chawathe*, 25 I&N Dec. 369 at 375.

totality of the circumstances, the preponderance of the evidence indicates that favorable treatment is not warranted.²¹

Different Detailed Occupational Codes Within the Same Broad Occupation. Similarly, if the applicant establishes by a preponderance of the evidence that the two jobs are described by two distinct detailed occupation codes within the same broad occupation code, ISOs may treat such evidence favorably in determining whether the two positions are in similar occupational classifications. Again, 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.²² For example, the detailed occupations of *Computer Programmers* (15-1131); *Software Developers, Applications* (15-1132); *Software Developers, Systems Software* (15-1133); and *Web Developers* (15-1134), are found within the broad occupational group of *Software Developers and Programmers* (15-1130). These detailed occupations may be considered to be in similar occupational classifications given the largely similar duties and areas of study associated with each classification.²³

In certain instances, however, simply establishing that the two jobs are described within the same broad occupation may not be sufficient to establish by a preponderance of the evidence that the two jobs are in similar classifications. For example, the detailed occupations of *Geographers* (19-3092) and *Political Scientists* (19-3094) are found within the broad occupational code for *Miscellaneous Social Scientists and Related Workers* (19-3090). Although such occupations are grouped together in the same broad occupational code, the workers in those respective occupations largely do not share the same duties, experience and educational backgrounds. In such cases, the ISO may determine that the two jobs are not in similar occupational classifications for purposes of 204(j) portability.

²¹ Certain occupations may be classified in a catch-all “residual classification” for jobs that are otherwise not described in the SOC, such as detailed occupational code 15-1199 for *Computer Occupations, All Others*. Chester Levine et al., *Revising the Standard Occupational Classification System*, MONTHLY LABOR REV., May 1999, at 6. Under such circumstances, officers should carefully review the evidence to determine that the two positions are in the same or similar occupational classification(s).

²² According to DOL:

Broad occupations often include several detailed occupations that are difficult to distinguish without further information. For example, people may report their occupation as biologist or psychologist without identifying a concentration. Broad occupations, such as psychologist, include more detailed occupations, such as industrial-organizational psychologists, for those requiring further detail. For cases in which there is little confusion about the content of a detailed occupation, the broad occupation is the same as the detailed occupation. For example, because it is relatively easy to identify lawyers, the broad occupation, lawyers, is the same as the detailed occupation.

Id. at 39-40. Therefore, broad occupational codes may be helpful indicators that two positions are similar.

²³ See <http://www.bls.gov/soc/2010/soc151130.htm> (last visited on Sept. 10, 2015).

The burden is on the applicant to demonstrate that the relevant positions are in the same or similar occupational classification(s). When making such determinations, and when determining whether the relevant positions have been properly categorized by the applicant under the SOC, USCIS will review the evidence of each case and consider the totality of the circumstances.

Career Progression

USCIS recognizes that individuals earn opportunities for career advancement as they gain experience over time. As with other cases, cases involving career progression must be considered under the totality of the circumstances to determine whether the applicant has established by a preponderance of the evidence that the relevant positions are in similar occupational classifications for 204(j) portability purposes.

In many instances, an individual’s progress in his or her career may easily fit the standards discussed in the preceding section, such as when an individual moves into a more senior but related position that does not have a managerial or supervisory role (*e.g.*, a promotion from a software engineer to a senior software engineer). In such cases, ISOs should consider whether the original position and the new position are in the same or similar occupational classification(s) consistent with the preceding section.

In other instances, career progression may involve a different analysis, such as when an individual moves from a non-managerial and non-supervisory position into a managerial or supervisory role. In these cases, if evidence provided by applicants establishes that, in their new positions, they are primarily responsible for managing the same or similar functions of their original jobs or the work of individuals whose jobs are in the same or similar occupational classification(s) as the applicants’ original positions, ISOs may treat such evidence favorably in determining whether the two jobs are in similar occupational classifications for purposes of 204(j) portability. The following examples are illustrative:

Scenario A. If the occupation described in the original job offer was assigned the SOC code of 15-1132 for *Software Developers, Applications*, ISOs may determine that a new job offer described in the SOC code of 11-3021 for *Computer and Information Systems Managers* is in a similar occupational classification. This is because *Computer and Information Systems Managers* generally manage individuals in positions that fall within occupational classifications that are the same as or similar to the occupational classification of the original job offer (*e.g.*, *Computer Programmers* (15-1131); *Software Developers, Applications* (15-1132); *Software Developers, Systems Software* (15-1133); and *Web Developers* (15-1134), all of which are grouped together under the broad occupational code for *Software Developers and Programmers* (15-1130)).

Scenario B. If the occupation described in the original job offer was assigned the SOC code of 35-2014 for *Cooks, Restaurant*, ISOs may determine that a

new job offer described in the SOC code of 11-9051 for *Food Service Managers* is not in a similar occupational classification. This is because the duties of *Food Service Managers*—duties that include planning, directing, or coordinating activities of an organization that serves food and beverages—are generally different from those of *Restaurant Cooks*, who largely prepare meals. Moreover, the SOC code for *Food Service Managers* specifically excludes “Chefs and Head Cooks,” who supervise restaurant cooks and individuals in other similar positions.

There may be instances where the evidence, in light of the totality of the circumstances, warrants a favorable portability determination based on normal career progression even though the individual is not managing persons in jobs that are in the same or similar occupational classification(s) as the applicant’s original position. For example, if the evidence demonstrates that an applicant’s original job duties as a *Restaurant Cook* included ordering supplies, setting menu prices, and planning the daily menu, a change to a *Food Service Manager* position may be considered normal career progression if in the new job the applicant’s responsibilities will include ordering food and beverages, equipment, and supplies, as well as overseeing food preparation, portion sizes, and the overall presentation of food. While the applicant may not be directly supervising cooks in his or her new position, the applicant may provide evidence that he or she is overseeing some of the functions that a cook would perform to demonstrate that the two positions may be in similar occupational classifications.

As noted above, in all cases that involve career progression, ISOs must consider the totality of the circumstances to determine whether the preponderance of the evidence establishes that the two positions are in similar occupational classifications for 204(j) portability purposes.

Other Variations

Even in cases where SOC codes are not grouped together or the relevant positions do not reflect normal career progression, USCIS will review the evidence presented under the totality of the circumstances to determine if the two jobs can be considered to be in the same or similar occupational classification(s). For instance, an individual whose original job was coded within the major group code of 15-0000 for *Computer and Mathematical Occupations* may find a job in an engineering field, which is classified under the major group code of 17-0000 for *Architecture and Engineering Occupations*. If the preponderance of the evidence indicates that the two jobs share essential qualities or have a marked resemblance or likeness, the individual may be eligible to port to the new position.

USCIS also recognizes that variations in job duties arising from performing jobs for different employers, including employers in different economic sectors, do not necessarily preclude two positions from being in similar occupational classifications for purposes of 204(j) portability. For example, if the original position was for a *Financial Advisor* (13-2052) at a financial consulting firm, the applicant’s duties may have included reviewing financial information using knowledge of tax and investment strategies; assessing clients’ assets, liabilities, cash flow, taxes,

and financial objectives; and networking and business development. If the new position is for a *Financial Analyst* (13-2051) in-house with a pharmaceutical company, the job duties may involve reviewing and recommending the financial objectives of the organization, including tax planning and investment strategies. While the duties of the two positions differ to some degree, such positions may be similar to each other when viewed in the totality of the circumstances considering that: (1) the overarching duty of both positions is to apply accounting and investment principles in order to develop financial strategies, and (2) the same skills, experience and education may be required to perform both jobs.

As a further example, if the original position was for a *Microbiologist* (19-1022) at a Federal research laboratory, the applicant’s duties may have included: performing a full range of testing and assays in serology, virology, mycobacteriology, bacteriology, mycology, and parasitology; performing and documenting quality control protocols; and taking appropriate remedial action following established laboratory guidelines. If the new job offer is for a *Medical Scientist* (19-1042) at a private medical research laboratory, the duties may include laboratory diagnostic or analytic testing of patient specimens; performing quality control testing, instrument maintenance and troubleshooting; and verifying analytic accuracy, precision, sensitivity, and references ranges for test methods. When reviewing the evidence under the totality of the circumstances, the two positions may be considered similar because the primary duties involved share essential qualities or have a marked resemblance or likeness, particularly if they require similar education, experience, and skills to perform the associated duties, even though the two positions do not share the same broad occupation.

Differences in Wages

The wages offered for the original position and the new position may be considered in determining whether the two positions meet the requirements for 204(j) portability. The mere fact that both positions offer similar wages is not conclusive evidence to establish that the two positions are in the same or similar occupational classification(s). Likewise, a difference in salaries alone would not preclude an ISO from finding that two positions are similar. Allowances should be made for normal raises that occur through the passage of time to account for inflation or promotion. There can also be an allowance for a difference in pay²⁴ if such difference is related to varying rates of pay in different economic sectors or geographic locations, or is the result of other factors such as corporate mergers, size of employer, or differences in compensation structure. Additionally, there could be differences in wages in cases involving moves from for-profit employers to nonprofit employers, academic institutions, or public employers (or vice versa). USCIS will be able to perform its adjudicatory function most effectively if an applicant explains any substantial discrepancy in wages between the original position and the new position in detail. In all instances, a difference in wages and any explanation for that difference shall be reviewed, along with all other evidence presented and considering the totality of the circumstances.

²⁴ An increase or decrease in pay may not be dispositive.

V. Conclusion

Uncertainty surrounding what constitutes “the same or a similar occupational classification” may deter many foreign workers from changing employers, seeking new job opportunities, or even accepting promotions for fear that such action might invalidate their currently approved immigrant visa petitions. To help eliminate this uncertainty, USCIS issues this PM to provide agency guidance to ISOs reviewing cases and bring additional clarification to foreign workers and their employers with respect to the types of job changes that would be consistent with the job portability provision at section 204(j) of the INA, as well as the appropriate burden of proof by which the applicant must demonstrate that a new position is in the same or a similar occupational classification as the original position. By recognizing career progression and transitions to related jobs within a foreign worker’s field of endeavor, this PM offers foreign workers and their employers increased flexibility and stability as they pursue lawful permanent residence.

Implementation

Revisions to AFM Chapters 20.2 and 22.2 will be included upon issuance of the final memorandum.

To provide sufficient time for training of USCIS employees, USCIS intends to make this memorandum effective on March 21, 2016.

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

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