

**Immigration Newswire**  
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**Should I Rely on USCIS's AC21 Guidance?**

Section 106(j) of the [American Competitiveness in the Twenty First Century Act \(AC21\)](#) states that where an I-485 application for adjustment of status has been filed and remained unadjudicated for 180 days or more, the I-485 will "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." The process of changing employers in this situation is known as "porting."

AC21 was passed over five years ago and the Department of Homeland Security has not yet implemented any new regulations to interpret AC21. USCIS has issued interpretive memoranda on AC21, but these memoranda are intended for internal use by USCIS personnel only; they cannot be relied upon in a court of law. Therefore, an alien has no assurance that the interpretation of AC21 upon which he has relied, even if articulated by USCIS, will be the interpretation of the Department of Justice if the alien is placed in Removal Proceedings.\*

One problem that arises in the application of AC21 section 106(j) is when an alien ports to a new employer in a same or similar occupational classification and, as a result, the I-140 petitioner withdraws the approved I-140 petition. The most recent [USCIS memo on AC21](#), issued on May 12, 2005, states that where the I-140 petitioner withdraws the underlying petition *after* 180 days have passed from the date of I-485 filing, the approved I-140 petition remains valid with respect to the new position. However, where the I-140 petitioner withdraws the petition *before* 180 days have passed, the I-140 petition does not remain valid and hence the I-485 adjustment of status application based upon it must be denied. This interpretation comports with the language of AC21.

In spite of the wording of AC21 and the USCIS memo interpreting it, several attorney-members of the American Immigration Lawyers Association are reporting that their clients have had I-485 adjustment of status applications denied where: (1) the alien ported to a new employer in the same or a similar occupational classification; (2) after their I-140 had been approved and after their I-485 had been pending for over 180 days; and (3) the I-140 petitioner had then withdrawn the approved I-140 petition. These denials are based on withdrawal of the underlying, approved I-140 petition. It appears that in these cases, the alien applying for adjustment of status did not notify USCIS of the change of employers. It is unclear whether, had they done so, it would have made a difference. It very well may have. While AC21 does not require an alien to notify

USCIS that he has ported, USCIS Service Centers have stated to liaisons from the American Immigration Lawyers Association that they prefer that I-485 applicants provide notification to USCIS when they invoke AC21 106(j) to port to new employment. We therefore strongly recommend that our clients who wish to port to new employment during the pendency of their adjustment applicants notify USCIS *immediately* upon doing so, and that they provide evidence that the new employment is in the same or a similar occupational classification. It would also be best for our clients to consult with our office before invoking this provision of AC21.

\* See our article entitled ["Recent BIA Decision Brings Into Question the Extent to Which Immigrants Can Rely on AC21"](#)

## **USCIS Reaches H-1B Exemption Cap for FY2007**

The H-1B Visa Reform Act of 2004 amended the Immigration and Nationality Act to exempt from the H-1B cap any alien who "has earned a master's or higher degree from a United States institution of higher education ... until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000."

Last year, for FY2006, the H-1B cap was reached on August 10, 2005; and the 20,000 H-1B numbers that were set aside for those with advanced U.S. degrees remained available for several months, until January 17, 2006.

This year (FY2007), the H-1B cap was reached on May 26, 2006 and USCIS announced recently that the Advanced Degree Exemption Cap of 20,000 has already been reached, on July 27, 2006.

Now that the 20,000 Advance Degree Exemption Cap has been reached, no new non-cap exempt H-1B petitions can be submitted until April 1, 2007, and then can only request a start date that is 1.) later than October 1, 2006, and 2.) no more than six months later than the date of filing.

(Cap exempt petitions include the following: (1) Any H-1B nonimmigrant who was already counted against the cap in the last six years will not be counted against the cap unless he would be eligible for a full 6 years of H-1B status at the time the petition is filed. Where multiple petitions are approved for 1 alien, the alien shall be counted only once; (2) Any H-1B petition filed by an institution of higher education will not be counted against the cap; and (3) H-1B petitions filed by nonprofit research organizations or governmental research organizations are not counted against the cap.)

Furthermore, USCIS headquarters has stated that there will be no "cap gap" legislation passed this year. Some years, Congress passes "cap gap" legislation to

assist those students in F-1 or J-1 status who, upon graduating from college, wish to change status to H-1B but who would go out of status due to the unavailability of H-1B visa numbers.

## **USCIS to Expand Premium Processing to Some I-140 Petitions**

The American Immigration Lawyers Association has confirmed with USCIS that USCIS plans to expand premium processing to "certain types" of I-140 petitions. [Premium processing](#) is an expedited adjudication procedure which allows the petitioner or applicant to pay a \$1,000 fee in addition to any required filing fees, and which guarantees adjudication within 15 calendar days. Premium processing also affords the attorney, applicant or petitioner direct telephone contact with an actual USCIS adjudicator rather than with a mindless drone available at USCIS's general 1-800 number.

It should be noted that the 15-day processing is only guaranteed so long as there are not any delays caused by security clearances or other unforeseen difficulties with the case. In the event that processing is delayed beyond 15 days, the \$1,000 premium processing fee will be refunded.

Currently premium processing is available only for petitions filed on form I-129.

It has not been announced which types of I-140 petitions will be covered by premium processing. The effective date is anticipated to be the end of August but the exact date has not been set.

## **USCIS Local Offices Will No Longer Accept Employment Authorization Applications**

USCIS issued a [Public Notice](#) on July 28, 2006 notifying customers that as of October 1, 2006 local USCIS offices will no longer accept I-765 (employment authorization application) filings. All applications for Employment Authorization Documents (EADs) will be processed at a central facility that is capable of creating EAD cards with security features.

Aliens entitled to interim EAD cards due to USCIS processing delays may still file I-765 applications at local offices but the applications will be forwarded to the central EAD card processing facility and the applicant will receive the card by mail in approximately a week.

All applicants for renewal EAD cards should file the application approximately 100 days in advance of the expiration date of the current card, to avoid a lapse in employment authorization.

## **Real ID Act Amends the Terrorism Ground of Inadmissibility**

Section 212(a)(3)(B) of the Immigration & Nationality Act makes inadmissible to the United States any alien who has engaged in terrorist activity; who is likely to engage in terrorist activity after entry to the U.S.; who has incited terrorist activity with intent to cause death or serious bodily harm; who is a representative of a terrorist organization or a group that endorses terrorist activity; who is a member of a terrorist organization; who endorses or persuades others to endorse or support a terrorist organization; who has received military-type training from a terrorist organization; or who is the spouse or child of such a person.

Section 212(a)(3)(B)(vi)(III) of the Act defines "terrorist organization" to include an organization that has been designated as such by the Department of State *as well as* any group of "two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in..." certain activities.

The Real ID Act, Public Law 109-13 (H.R. 1268), has expanded the range of activities for which an organization meets the definition of a terrorist organization. Section 213(a)(3)(B)(iv) classifies as a terrorist organization any organization that commits an act that "the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or [terrorist] training."

Someone can thus be found inadmissible to the United States, and his or her spouse and children excluded as well, because he is a "member" of a group of two or more individuals that offers "material support" to an organization which itself engages in, or which has a subgroup that engages in, terrorist activities of which the alien "knew or should have known," regardless of whether the alien actually knew of those activities or not. According to section 212(a)(3)(B)(i)(VI) of the Act, such an alien can only overcome this by showing by "clear and convincing evidence" that he "did not know, and should not reasonably have known, that the organization was a terrorist organization."

Startlingly absent from section 212(a)(3) is a definition of the term "member." The Act broadly defines what can constitute a "terrorist organization," broadly defines what constitutes "material support" to such an organization, and then fails to specify at all what constitutes membership in such an organization. This leaves the government with nearly unfettered discretion to deny aliens admission to the United States on this ground.

In the 1952 U.S. Supreme Court decision Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Court decided a combined case regarding the deportation of three aliens from the United States pursuant to the Alien Registration Act. The Alien Registration Act, similarly to the current section 212(a)(3) of the Immigration and Nationality Act, made aliens deportable, not for membership in a terrorist organization, but in the Communist Party at a time when the party advocated government overthrow by force or violence. The first alien challenging the law

was a Greek national who had worked as an organizer for the Communist party and had written for its newspaper, but had since ended his membership. Nevertheless he continued to associate with members and to agree with Communist principles, although not with the use of force. The second alien challenging the law was an Italian national who had been a member of the Communist party for six years. He knew that the Communist party advocated a proletarian dictatorship, and that the use of violence was advocated, but he did not personally believe in the use of violence and did not know exactly what the party policy was. The third and final alien challenging the law was a Russian citizen who had been a member of the party for about a year. Her activities with the party were not significant and she never held office in the party. She claimed to have joined the party because of the injustice it was fighting, but knew very little of the party's principles.

The aliens attacked the law primarily on the ground that it deprived them of liberty without due process of law. However, the court refused to grant relief because,

any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Harisiades, 342 U.S. at 588. The rationale is based on the concept of separation of powers between the three branches of the federal government. Immigration is considered a political question in which the executive and legislative branches have primary authority and in which the courts should exercise judicial restraint. Thus, the court upheld the Alien Registration Act as constitutional. Based on this rationale, the court would likely find section 212(a)(3) of the current Immigration and Nationality Act, as modified by the Real ID Act, constitutional as well, at least as written.

### **US-VISIT To Be Extended To All Aliens Except For Canadian Visitors for Business or Pleasure**

The Department of Homeland Security published a proposed rule in the Federal Register on July 27, 2006 that would extend US-VISIT requirements to all aliens except for certain specially exempted aliens and Canadian citizens applying for admission as B1/B2 visitors for business or pleasure.

The Federal Register Proposed Rule aptly describes US-VISIT as an "integrated, automated, biometric entry and exit system that records the arrival and departure of aliens; verifies the identities of aliens; and authenticates travel documents presented by such aliens through the comparison of biometric identifiers. Aliens subject to US-VISIT may be required to provide fingerprints,

photographs, or other biometric identifiers upon arrival at, or departure from, the United States." See 71 Fed. Reg. 42605 (July 27, 2006).

Once the proposed rule becomes final, US-VISIT will be expanded to apply to lawful permanent residents, aliens seeking admission on immigrant visas, refugees and asylees, aliens paroled into the United States, and Canadian citizens issued an I-94, including aliens in C, D, F, H, I, J, L, M, O, P, Q-1 and Q-3, R, S, T, and TN nonimmigrant statuses. Specifically exempt are Canadian citizens entering as B1/B2 visitors for business or pleasure.

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