By H. Ronald Klasko

Portability: Freedom of Movement for Foreign National Employees

What Is H-1B Portability?

H-1B is an employer-specific temporary professional worker visa status that allows a foreign national (such as a professor, researcher, or systems analyst) to work only for the H-1B petitioning employer. If a new employer wishes to employ the H-1B, the new employer must file a new petition. Until 2000, the new employer could not commence employment of the H-1B until the petition was approved. However, in 2000 the concept of H-1B portability was introduced into law. Under this concept, the new employer can commence employment of the H-1B employee as soon as the new H-1B petition is filed, as long as the employee had previously been granted H-1B status with the same or any other employer. The foreign national can be employed under portability until a decision is made on the new H-1B petition. Assuming the new H-1B petition is approved, the employment can continue under the approved petition. If it is not approved, the employment must end.

Editor's Note: This article discusses the concept of H-1B and adjustment portability from the point of view of the hiring institution. As with all articles published in International Educator, *content herein reflects opinions of the author and is not endorsed by NAFSA: Association of International Educators and is not intended to be legal advice.*

Many questions can arise when determining if H-1B portability applies in specific situations. Some common questions include:

- Can someone in a status other than H-1B take advantage of portability?
- Must someone presently be in legal status to take advantage of portability?
- What are the rules for travel and reentry under portability?
- Can an H-4 spouse port?
- Can an H-1B port from a cap-exempt institution to a cap-subject employer?

Institutions may want to seek the advice of experienced counsel specializing in immigration law for answers to specific questions that may surface in unique circumstances.

Institutional Policy Issues

Portability is an option, not a requirement. Universities may choose to avail themselves of the portability benefits, or may choose to follow the traditional path of awaiting an H-1B approval notice before commencing employment of the new employee. Universities may prefer to set institutional policies on portability as opposed to dealing with the issue on an ad-hoc basis each time it occurs.

There are good reasons to take advantage of portability. Unless the university is willing to pay $1000 for "premium processing" that promises turnaround in 15 days or less, normal processing time for an H-1B petition is approximately four months. Furthermore, processing times vary so that the commencement

date of employment remains uncertain until the H-1B petition is approved. With portability, there is no need to wait and no uncertainty regarding the commencement date of employment. In addition, all of these benefits accrue without the payment of the $1000 premium processing fee.

The downside of portability is that universities commence employment of the portable employee without knowing for certain that the H-1B petition will ever be approved. If it is not approved, the employment would have to be terminated. In addition, U.S. Citizenship and Immigration Services (USCIS) has never amended its I-9 regulation to provide an acceptable document for the portable alien (although USCIS has stated that employers may use receipt notices for I-9 purposes).

Immigration attorneys are often called upon to advise institutions regarding policy in this area. As an attorney specializing in immigration law, I generally suggest commencing employment under portability unless there is some realistic chance of denial of the H-1B petition. This is rare for university H-1B petitions and can usually be determined at the time of filing.

Paying the government an extra $1000 to get adjudication within 15 days generally eliminates the need to take advantage of portability. It is certainly a reasonable policy decision for a university to decide to incur the added expense to know for certain that the H-1B petition is approved before commencing employment. This may be an across-the-board policy, or a case-by-case policy, depending on the date of need for the employee's services, the level of the position, and other issues.

If the university opts to use premium processing instead of portability, either on an individual or all H-1B cases, there is also the issue of who pays the $1000 fee. This again is a matter of institutional policy that is better determined in advance rather than dealt with separately and differently in each case.

Portability commences upon the filing of the H-1B petition. Technically, this occurs when the petition is received by USCIS, presumably the day after it is sent if an overnight courier service is used. Although an employer might wish to commence employment based upon a courier delivery receipt, I generally advise that the more prudent practice is to await USCIS' receipt notice. Such a receipt notice provides an official document to be placed in the file. The problem is that such receipt notices may be delayed by two, three, or more weeks, which has the unfortunate result of delaying the commencement of employment even though employment could properly begin under the language of the law.

Adjustment of Status Portability

The process of applying for permanent residence can be a lengthy one. A professor or a scholar may wish to seek new employment during this process. What are the issues for the professor or scholar, and what are the issues for the potential hiring institution?

The answers depend upon whether the foreign national is employer-sponsored or self-sponsored. If self-sponsored (extraordinary ability or national interest waiver) or if the employee is obtaining permanent residence through marriage, immigration lottery, or other nonemployer-sponsored methods, there are no issues. The employee can change employment in the middle of the process without affecting the ultimate approval of permanent residence.

However, if the foreign national is employer-sponsored (outstanding researcher or labor certification application), the issue of whether the employee can leave his existing employer and, if so, when, is critical to the ultimate success of his permanent residence application. Although originally unclear, the answer is now relatively straightforward. The alien can leave the sponsoring employer 180 days after the filing of the I-485 application for permanent residence as long as the I-140 employer immigrant petition has been approved. The only other stipulation is that the new position offered to the employee—whether with the same institution or with another, whether in the same geographical area or a different one, whether at the same salary or a different salary—is in the "same or similar occupation." If so, the change of employment will have no impact on the grant of permanent residence.

Institutional Policy Issues Regarding Hiring Foreign Nationals Under Adjustment Portability

Employing a foreign national who meets the criteria for being adjustment portable does not entail much risk to the hiring institution. The biggest issue is whether to have them commence employment with the employment authorization document that they were likely able to obtain during the adjustment of status process, or whether the hiring institution wishes to insist upon filing an H-1B petition on their behalf. The risk of commencing employment with the employment authorization document is that the foreign national will have no status if the adjustment of status is eventually denied.

Some of the issues are within the control of the hiring institution, and some are not. The hiring institution can certainly review the documentation of the permanent residence application to make certain that the I-140 is approved, that the I-485 has been pending 180 days, and that the position offered is in a "same or similar occupation." "Same or similar occupation" is not presently a defined term, but clearly the position offered does not have to be exactly the same as the sponsored position. For example, a professor who will be teaching different courses is still a professor and would be portable, and a biochemistry researcher who is doing different research but still in the area of biochemistry remains portable. The only risk, then, is the possible denial of the adjustment of status for reasons outside of the knowledge or control of the hiring institution, such as criminal grounds, previous immigration violations, fraud or misrepresentation issues, or other grounds of inadmissibility.

For these reasons, institutions may wish to have a policy insisting upon H-1B status for adjustment portable aliens with H-1B status. Even if the adjustment of status is ultimately denied, foreign nationals continue to have a status that allows them to work for the new employer. This decision can be less than straightforward if they are not presently in H-1B status. In such a situation, most likely they would have to leave the United States upon approval of the H-1B petition and return with an H-1B visa. Depending upon immigration history, country of nationality, countries visited, and prior access to sensitive technology, a foreign national may be subject to lengthy delays overseas while waiting for a security clearance prior to visa issuance. This can make the H-1B option untenable or impractical.

What if the university wants to hire a foreign national who has commenced the permanent residence process but who is not yet portable? If possible, the best policy is to wait until the prospective employee becomes portable. If this is not possible, the university may need to commence promptly a permanent residence application on behalf of the newly hired employee because the previous application would be of no benefit. If it is possible to wait until the employee becomes portable, that may be in the best interest of both the employee and the institution.

One very recent development is the availability of premium processing for employer-sponsored I-140 immigrant petitions. If the I-485 has been pending for 180 days and there has been a delay in the approval of the I-140, this may be an option for the employee.

Set Your Institutional Policies

The addition of portability into the immigration law in 2000 greatly enhanced the ability of employing institutions to hire foreign nationals who are presently under the sponsorship of a different employer. However, the decisions on whether to utilize portability are not always clear cut. As with most areas of immigration, it is beneficial for universities and research institutions to develop institutional policies on the various issues raised by portability both for H-1B employees and for adjustment of status applicants. And when in doubt, seek the advice of immigration attorneys specializing in these areas. **IE**

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