

20.2: Petition Validity.

(a) General. Immigrant visa petitions are valid indefinitely until they are used as a vehicle for immigration or adjustment of status or until they are revoked. In specific cases, an approved petition may be “converted” to another classification. For detailed information on such cases, confer with applicable regulations in 8 CFR 204. In any instance where there is a significant lapse of time since the petition was approved, the adjudicator considering an application for adjustment (or a consular officer handling the immigrant visa case) should take appropriate steps to ensure the relationship, job offer, etc. on which the original approval was premised continues to exist. Occasionally, USCIS will receive such a petition back from a consular office with a request for follow-up action to reaffirm the facts of the petition. Such cases should be handled routinely, verifying the facts in the same manner as if a new petition were being considered.

(b) Approval of a Subsequent Petition. At times, a petitioner may resubmit a petition seeking the same benefit as the prior petition, although the earlier petition may remain valid. If such a petition is approvable, the remarks block of the petition should be noted to reflect the filing and approval dates of the first petition. The original priority date is assigned to the new petition.

(c) Validity after Revocation or Withdrawal. Pursuant to the provisions of section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313, the approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs, if:

- A Form I-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained unadjudicated for 180 days or more; and
- The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

If the Form I-140 has been approved and the Form I-485 has been filed and remained unadjudicated for 180 days or more (as measured from the form I-485 receipt date), the approved Form I-140 will remain valid even if the alien changes jobs or employers as long as the new offer of employment is in the same or similar occupation. If the Form I-485 has been pending for less than 180 days, then the approved Form I-140 shall not remain valid with respect to a new offer of employment.

Accordingly, if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of §106(c) of AC21. It is expected that the alien will have submitted evidence to the office having jurisdiction over the pending Form I-485 that the new offer of employment is in the same or similar occupational classification as the offer of employment for which the petition was filed. Accordingly, if the underlying approved Form I-140 is withdrawn, and the alien has not submitted evidence of a new qualifying offer of employment, the adjudicating officer must issue a Notice of Intent to Deny the pending Form I-485. See 8 CFR 103.2(b)(16)(i). If the evidence of a new qualifying offer of employment submitted in response to the Notice of Intent to Deny is timely filed and it appears that the alien has a new offer of employment in the same or similar occupation, the

USCIS may consider the approved Form I-140 to remain valid with respect to the new offer of employment and may continue regular processing of the Form I-485. If the applicant responds to the Notice of Intent to Deny, but has not established that the new offer of employment is in the same or similar occupation, the adjudicating officer may immediately deny the Form I-485. If the alien does not respond or fails to timely respond to the Notice of Intent to Deny, the adjudicating officer may immediately deny the Form I-485.

If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied. If at any time the USCIS revokes approval of the Form I-140 based on fraud, the alien will not be eligible for the job flexibility provisions of §106(c) of AC21 and the adjudicating officer may, in his or her discretion, deny the attached Form I-485 immediately. In all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment. It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of §106(c) of AC21 even if he or she has never been employed by the prior petitioning employer or the subsequent employer under section 204(j) of the Act.

(d) Form I-140 Petition Must be Approved Prior to a Favorable Determination of a §106(c) AC21 portability request. [Added AD08-06]. On October 18, 2005, USCIS designated *Matter of -*, AC Portability Issue in Denial of Adjustment Application, Decision 06-0002 (Jan. 12, 2005) as a USCIS Adopted Decision. This Administrative Appeals Office (AAO) decision established that a petition that is deniable, i.e., not approvable, whether or not the petition is denied 180 days or more after the filing of the adjustment of status application, cannot serve as the basis for approval of adjustment of status to permanent residence under the portability provision section 204(j) of the INA. An unadjudicated Form I-140 petition is not made valid merely through the act of filing the petition with USCIS or through the passage of 180 days. Rather, the petition must have been filed on behalf of an alien who was entitled to the employment-based classification at the time that the petition was filed, and therefore must be approved prior to a favorable determination of a Section 106(c) AC21 portability request.

(e) Determining Whether a New Job is in "the Same or a Similar Occupational Classification" for Purposes of Section 204(j) Job Portability [Revised March 18, 2016. PM-602-0122]. 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,¹ as 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."² 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."³

As explained more fully below, 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, the applicant may submit evidence regarding the DOL occupational classification codes assigned to the respective jobs or other material information from alternative resources; the job duties 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. A change to the same or a similar occupational classification may involve lateral movement, career progression, or porting to self-employment, either in the same or a different geographic location.

In part, this guidance is intended to assist ISOs on using SOC codes to help determine whether a job is in the same or a similar occupational classification for purposes of 204(j) portability. USCIS notes that SOC codes provide some measure of objectivity in such assessments and thus can help address uncertainty in the portability determination process. Nothing in this guidance, however, is intended to make SOC codes or their descriptions the only factor or a mandatory factor in portability determinations or to otherwise limit USCIS' flexibility to consider other relevant evidence.⁵

Standard Occupational Classification Codes

In making portability determinations, USCIS may refer to DOL's labor market expertise as reflected in its SOC system, which is used to organize occupational data and classify workers into distinct occupational categories.⁶ 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."⁷ All workers are classified into one of these 840 detailed occupations.⁸ Detailed occupations with similar job duties and, in some cases, skills, education, and/or training are generally grouped together in the same broad occupation.⁹

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.
 - **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") indicates 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.¹⁰ Managers (i.e., individuals who are primarily engaged in planning and directing) are generally classified in a separate major group - Major Group 11-0000.¹¹ 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 of the respective jobs; the skills, experience, education, training, licenses or certifications required for those jobs; the wages offered for those jobs; and any other material and credible evidence submitted by the applicant. Also, as noted above, as part of this analysis ISOs may reference DOL's SOC codes to compare the respective jobs, as well as relevant information in alternative resources.

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.¹²

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.¹³

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 should

generally 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 totality of the circumstances, the preponderance of the evidence indicates that favorable treatment is now warranted.¹⁴

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 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 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.¹⁶

In certain circumstances, 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.

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 positions.

In many circumstances, 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 circumstances, 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 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 Managers 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 Personal 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, Except Epidemiologist (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 reference 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 the 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 pay¹⁷ 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 in detail any substantial discrepancy in wages between the original position and the new position. In all instances, a difference in wages and any explanation for that difference shall be reviewed, along with all other evidence presented.