

What Happens to Your Immigration Status if You Are Laid Off?

By Murali Bashyam Esq.

These are tough times. The country is in a recession and some people are losing their jobs. If a U.S. citizen or a Lawful Permanent Resident is laid off, they need to worry about paying their bills and finding another job. When a non-immigrant worker is laid off, they have more than just a job and bills to worry about – they need to worry about their immigration status and ability to remain in the United States as well. Over the past few weeks, our law firm has been asked various questions by our clients that relate to their immigration status and corporate obligations after a lay off.

Q: When does H-1B status expire in a layoff? Is there a grace period after being laid off?

Unfortunately, the United States Citizenship and Immigration Service (USCIS) has been pretty clear that there is no grace period for an H-1B employee who is terminated. Clients have heard rumors about a '10 day' grace period and often ask us whether this applies to them. A 10 day grace period exists after the expiration of the H-1B petition. The date the petition expires can be found on the employee's I-797 approval notice.

We would like to point out that the 10 day grace period only applies after the complete fulfillment of a person's H-1B status. Again, it does not apply to an employee who is terminated prior to the fulfillment of their status. For example, if a company decides not to extend a worker's H-1B status and lets it run out, the worker should have a 10 day period after the expiration date to settle their affairs in the U.S. or to find another job. That is because the H-1B worker was not terminated and worked until the end of their H-1B period of stay. Workers in H-1B status should make sure to compare the expiration date of their I-94 with the expiration date of their I-797 petition. Sometimes port-of-entry officers already add 10 days to the expiration date on the I-94. If that is the case, then the worker's status ends on that date and there is no grace period.

Q: Does an H-1B worker have any other options if laid off?

Yes, the worker can file for a change of status to B-1 business visitor. This application should be filed prior to the lay off while the H-1B non-immigrant worker is still 'in status'. If approved, the B-1 status allows a person to remain in the U.S. to look for another job. However, they cannot work while holding B-1 status. If a person holding B-1 business visitor status finds a job, the new employer must file an H-1B application and it must be approved before the person can begin working again. This H-1B petition will not be subject to the H-1B cap since the worker has previously been counted against the cap.

Q: What if an H-1B worker is laid off but expects to have another job offer in a few weeks?

The H-1B worker is considered to be 'out of status' if there is a gap between termination of employment and the filing of another H-1B application with a new employer. During the adjudication of the new H-1B application, a USCIS officer in his/her discretion can excuse

the gap if 1) the gap is not too long; 2) the worker has not otherwise violated their status; 3) not-excusing the gap will cause extreme hardship to the worker; and 4) the worker is not in removal proceedings. If the USCIS officer does not excuse the gap, they can still approve the H-1B petition but the worker must leave the U.S. and return with the new H-1B approval notice and valid H-1B visa to get back into status.

Our office has often asked the USCIS to excuse gaps in filing under these circumstances with success. Just make sure that the new H-1B filing is very up-front and honest about the termination of the H-1B worker's prior employment and the reason for the delay in filing the new H-1B application.

Q: What happens to a pending labor certification after a layoff?

A labor certification is employer specific and job specific and cannot be transferred to another employer. Therefore, it would become null and void after a termination. If, however, the employer has the honest intention of re-hiring the worker once his/her permanent residency application is ultimately approved and the worker has the intention of returning to work for the sponsoring employer, the labor certification will still be valid and will be processed by the Department of Labor. If this intention by the employer and employee does not exist, the employee will have to re-start the labor certification with a new employer.

Q. What happens to an approved I-140 Immigrant Petition for Alien Worker after a layoff?

Assuming that a worker only has an approved I-140 and no pending I-485 Adjustment of Status application, the I-140 would become null and void after a lay off. If the sponsoring employer has the intention of re-hiring the worker after the ultimate approval of the permanent residency application, the I-140 petition can continue to be processed. If this intention does not exist and the worker has to re-start the process with a new employer, the good news is that the worker can retain the original priority date from the old case for the new permanent residency application.

Q: What happens if an H-1B worker has an approved I-140 and their I-485 adjustment of status has been pending for over 180 days?

In this case, the worker would be covered under the American Competitiveness and Workforce Act (AC21). The worker could 'port' to another employer and continue with their residency application as long as the new position is the 'same or similar to' the original position listed in the labor certification. Currently, there are no USCIS regulations that define the 'same or similar' standard. If the job duties are basically close to what the worker was doing before, the worker should be covered under AC21.

Q: What obligations does a company have when laying off a worker in H-1B status?

A company must pay for the H-1B worker's reasonable transportation costs back to their home country. This means paying for a plane ticket only. This obligation does not extend to the H-1B worker's family members. A company should also withdraw the worker's H-

1B status by sending a letter requesting a withdrawal to the USCIS. In *DOL vs. Help Foundation of Omaha Inc.* (ALJ Case No. 2005-LCA-037, the Administrative Review Board found that an employer's obligation to pay the H-1B worker's wages continues even after termination of the worker unless a withdrawal request has been filed with the USCIS.

Q: Can an H-1B worker get unemployment benefits after a layoff?

Unemployment benefits are determined by state law. To get unemployment benefits, a worker must be able to return to work. If an H-1B worker is laid off, they no longer have legal work status in the United States. Therefore, a laid off worker in H-1B status may have a problem getting unemployment benefits. To determine whether or not a person is eligible to receive unemployment benefits, we recommend that laid off workers contact the local branch of the Department of Labor. Additional information can be found at <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp>.

There is no question that these are stressful times. If a worker is laid off, they may have options. It is strongly recommended that non-immigrant workers contact an attorney to discuss their immigration status if a layoff is imminent.

© Bashyam Spiro LLP 2009 (www.bashyamspiro.com)