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US IMMIGRATION & NATIONALITY LAW

THE PLIGHT OF H-1BS DURING 2008XS ECONOMIC DOWNTURN

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by
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Last week, on one of the most dramatic days in Wall Street's history, Merrill Lynch agreed to sell itself to Bank of America to ward off deepening financial crisis, while another prominent securities firm, Lehman Brothers, filed for bankruptcy protection and hurtled toward liquidation after it failed to find a buyer. These moves sent shock waves around the world and surely through the hearts of employees on H-1B visas who, in any economic downturn, are always the most vulnerable. News media portrayed grim images of several former employees of Lehman Brothers leaving their offices with only a cardboard box. In these tumultuous economic times, more and more H-1B visa holders find themselves suddenly scrambling to contact their immigration attorneys for advice on how they can maintain status in the US.

The H-1B visa is a temporary visa that allows a foreign national to work for an employer in a specialty occupation. A "specialty occupation" is defined as an occupation that requires a US bachelor's degree in a specialized area as the minimum requirement for entry into the field. Thus, the H-1B visa is limited to jobs that are highly skilled and specialized.

The foreign national is tied to the employer who has sponsored him or her for the H-1B visa. Once the employment is terminated, regardless of any arrangements for severance pay or benefits, the H-1B visa holder is no longer in status. Contrary to popular perception, the USCIS has stated that there is no grace period for an H-1B visa holder to look for another job. This individual also does not have a period of 10 days to depart the US, unless he or she has completed the authorized stay in H-1B status.

It is very important that an H-1B visa holder on the verge of termination file another H-1B petition through a new employer prior to his or her last date. Under the portability rules adopted by Congress in October 2000, one can start employment with a new employer after the *filing* of the H-1B application and does not have to wait until the petition is approved - a process that could take a few months.

In today's economic climate, it might be difficult to find another job before termination. Once an H-1B visa holder has fallen out of status, it is extremely difficult for him or her to extend status or change to another status. If new employment does indeed materialize after the individual has fallen out of status, he or she will have to leave the US and be re-admitted under the new H-1B approval, and possibly obtain a new visa too. At times, when the gap between two employers is not huge, the USCIS may exercise discretion and approve the H-1B extension of status despite a lapse in status.

However, the USCIS should be more flexible with regard to allowing an H-1B visa holder to find a new job in the US. It is unfair to expect an H-1B visa holder to suddenly leave the US after having been employed in the US for several years. The H-1B portability provision alluded to earlier, does allow for such flexibility but the USCIS has not yet interpreted it in the generous way that it has been written by Congress.

Many H-1B visa holders are also in the pipeline for green cards. If they are terminated, the employer could withdraw the labor certification or the I-140 immigrant visa petition. Unless an individual is in the final stage of the green card process – which is 180 days beyond the filing of an adjustment of status application – he or she can kiss goodbye to the green card. It will have to be started all over again through another employer.

If 180 days have passed since filing an application for adjustment of status, the individual *may* be able to exercise portability. This means that he or she may change employers *if* the new job is in the same or a similar occupational classification as the job for which the initial I-140 petition was filed. However, if that I-140 is withdrawn before 180 days from the date the adjustment application is filed or if USCIS denies it or revokes an approval at any time, the portability provision does not apply. For that reason, it is better that the I-140 be approved prior to porting.

The B-2 visa may also be an option. The H-1B worker who has suddenly been

laid off can switch to B-2 status to wind down affairs. But, a request for a B-2 in order to look for a job will run into a problem. It will be difficult to demonstrate the required intention to depart at the expiration of the requested stay and to show employment, family and social ties to residence abroad. In addition, the doctrine of dual intent is not applicable to persons in B-2 status. Also, the existence of an I-140 petition filed on behalf of the foreign national may lead to a denial of the request for B-2 status.

Alternatively, upon termination of employment, the H-1B holder can also consider changing to H-4 status as a dependent on his or her spouse's H-1B, F-1 status as a student, or F-2 status as a dependent on his or her spouse's F-1. If the foreign national is so fortunate as to have a spouse in L-1 status, he or she can obtain dependent L-2 status and file for employment authorization. By changing to another status, the H-1B holder does not lose the allotted number under the annual H-1B cap. If and when he or she secures new H-1B employment, the new employer can file the H-1B petition as a change of status recapturing the old H-1B number or the beneficiary can apply for a new H-1B visa abroad. He or she will not have to scramble with other potential H-1B beneficiaries in the April 1 filing period, which has become a lottery due to demand outstripping the fixed number of annual visas.

US business immigration policy, unfortunately, is employer driven, which puts the foreign national in an extremely disadvantageous provision. It is clear that although Congress did give foreign employees some degree of portability, these provisions do not go far enough in protecting them in today's economic climate or against sudden job termination.

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