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THE H-1B VISA PROGRAM IN AN ECONOMIC DOWNTURN

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by
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Looking forward to FY2010, last week's article (THE H-1B VISA PROGRAM - http://cyrusmehta.com/perseus/news.aspx?SubIdx=ocyrus20081219943) provided an update on the H-1B visa program for those who anticipate filing petitions for new H-1B employment in April. But what about those H-1B beneficiaries who were chosen in last year's H-1B lottery and began their employment in October 2008 only to be laid off in November? Or more succinctly, what must an H-1B employer do to properly wrap up the immigration end of this business relationship and what can the employee do to preserve his or her status?

HAS A TERMINATION OF EMPLOYMENT BEEN AFFECTED?

First, it is important to note that U.S. Citizenship & Immigration Services ("USCIS" or "the Service") has made a crucial distinction between the terms layoff and termination.[1] Specifically, the former involves a period of nonproductive status for which the employer is responsible – as opposed to medical leave or vacation time – during which the H-1B beneficiary is not actually performing his or her work duties. The latter refers to a clean break in the employer-employee relationship. Termination results in the beneficiary's loss of H-1B status unless s/he finds sponsorship for other temporary, professional employment, whereas a beneficiary who is laid off may be considered to be maintaining status with the same employer during the work slowdown.

Under the guidance of the Hernandez Memo, a beneficiary may continue to

reside in the United States and maintain lawful nonimmigrant status even despite a layoff, or "benching" as it is called by USCIS and the U.S. Department of Labor ("DOL"), provided that the employer continues to pay him or her the required wage during all such inactive periods, 20 C.F.R. §655.731(c)(7). *See also* INA § 212(n)(2)(C)(vii). However, readers are cautioned not to completely rely on the Hernandez Memo. As a policy memo or advisory letter does not have the same effect as a statute or regulation, USCIS could still decide that even an employee who is fully compensated while in non-productive status has failed to maintain lawful nonimmigrant status.

In fact, in a 1999 advisory opinion concerning reductions in force, USCIS indicated that a severance package that offered terminated H-1B and L-1 employees their normal compensation and benefits for a 60-day period did not preserve the beneficiaries' nonimmigrant status.[2] Specifically, Branch Chief Simmons wrote, "An H-1B nonimmigrant alien is admitted to the United States for the sole purpose of providing services to his or her United States employer. Once H-1B nonimmigrant alien's services for the petitioning United States employer are **terminated**, the alien is no longer in a valid nonimmigrant status" (emphasis added).

A sponsoring employer and sponsored employee must maintain a bona fide employer-employee relationship throughout the full period of sponsorship. Both the DOL and USCIS define employer-employee relationship by the common law definition which includes the ability of the employer to control the beneficiary. Such control may be demonstrated by documenting the capacity of an employer to hire and fire, to pay, to supervise and to impose other oversight and direction. 20 C.F.R. §655.715; 8 C.F.R. §214.2(h)(4)(ii).

Nevertheless, there have clearly been contrary interpretations from the Service. Therefore, an H-1B beneficiary who has been caught up in the recent layoffs, but who is receiving his or her full salary for the next several months, may very well be considered to have failed to maintain his or her H-1B status and asked to depart and re-enter the U.S. prior to beginning new H-1B employment.

OBLIGATIONS OF AN H-1B EMPLOYER IN THE CASE OF TERMINATION

U.S. employers who employ temporary H-1B nonimmigrants are required by law to notify the Service without delay of any material change(s) to the terms and conditions of an approved H-1B petition. 8 C.F.R. § 214.2(h)(11)(i)(A).[3] In

circumstances where the petitioning employer continues to employ an H-1B beneficiary under new terms and/or conditions, such as a change from full-time to part-time, it should file an amended Form I-129 petition that indicates such change(s). A more comprehensive discussion of specifically when the need arises to file an amended petition is beyond the scope of this article.

Keeping to the present theme, when the employer terminates its employment relationship with one of its H-1B beneficiaries, the regulations require that it send the Service a letter to inform it of such action.[4] *Id.* Moreover, the employer is statutorily obligated to provide that employee with "reasonable costs of return transportation" if the termination occurred prior to the end of the beneficiary's period of authorized stay in H-1B status, as per the date indicated on his or her Form I-94 Arrival/Departure Record. INA § 214(c)(5)(A).[5]

Under the regulations, upon the Service's receipt of an employer's request to withdraw an H-1B petition, the revocation of the approval of such petition is automatic. 8 C.F.R. § 214.2(h)(11)(ii). Similarly, and unfortunately just as relevant in today's economic climate, the Service's approval of an H-1B petition is automatically revoked when the petitioning employer goes out of business. *Id.* Recently, the Vermont Service Center ("VSC") informed the American Immigration Lawyers Association ("AILA") that should it receive information independent of the record of proceedings that the petitioning employer of a pending H-1B petition is going out of business, such as from news accounts and reports from the Bureau of Labor Statistics (a fact-finding arm of DOL), it will issue Notice of Intent to Deny to allow the employer an opportunity to rebut the evidence by demonstrating the existence of a successor-in-interest.[6] Similarly, where the H-1B petition has already been approved, VSC indicated it will first issue a Notice of Intent to Revoke that requests evidence of a successor-in-interest, despite the fact that revocation is automatic where a sponsoring employer goes out of business.

EFFECT OF A TERMINATION ON THE H-1B EMPLOYEE'S STATUS

Citing *Matter of Lee*, 11 I. & N. Dec. 601 (BIA 1966) in its recent guidance, the VSC also reiterated the Service's position that a "eneficiary's H-1B status terminates as of the date the employment ceased . . . or the date the petition was revoked, **whichever is later**" (original emphasis). Moreover, VSC notes, "he Beneficiary is in violation of status the day after the employment was terminated." Thus, as

Mr. Hernandez explained, there is no grace period, and the beneficiary is "immediately deportable 237(a)(C)(i) as an alien who 'failed to maintain the nonimmigrant status in which the alien was admitted.'"

According to USCIS policy memoranda, however, a terminated H-1B beneficiary may still be able to accept new H-1B employment, or "port to" another H-1B employer, without having to depart and re-enter the U.S. prior to beginning such employment, provided that the H-1B petition requesting the change of employers is filed while the beneficiary remains within a "period of stay authorized by the Attorney General," as required by INA § 214(n)(2).[7] However, this too is extremely unclear and readers are cautioned not to place reliance on USCIS letters or memos, which do not have the same effect as a statue or regulation. The Service has been careful to explain that a period of authorized stay and the period of authorized admission, or authorized status, are legally distinct concepts in U.S. immigration law.[8] Thus, a terminated H-1B beneficiary's period of authorized stay does not necessarily "expire" with his or her status upon his or her termination from H-1B employment.

The Cook Memo does not clearly address the circumstances surrounding H-1B portability, as the memo works off the example of a change of nonimmigrant status from B-1 to H-1B. However, the memo states, "the Service will deem the alien to be within a period of stay authorized by the Attorney General (and not unlawfully present), if the alien has a filed a non-frivolous application with the Service Center and that application is still pending, provided that such application was timely filed, i.e., prior to the expiration of the Form I-94." This guidance keeps with early policy memoranda of the Service, as well as INA § 212(a)(9)(B)(iv), which tolls unlawful presence for a period of 120 days where a nonfrivolous application to change or extend nonimmigrant status has been filed.

The statute only requires that the beneficiary be lawfully admitted, the petition be nonfrivolous and that the beneficiary has not been employed without authorization. INA §§ 212(a)(9)(B)(iv) and 212(n)(2). Thus, where a laid off or terminated H-1B beneficiary seeks to port to another U.S. employer prior to the expiration of his or her I-94, but after his or her employment has been terminated, the beneficiary's loss of status due to a prolonged lay off, or even an outright termination, should not be determinative on whether the extension of the beneficiary's H-1B status is possible.[9] While the individual may still be

considered out of status and deportable, he or she can also take advantage of USCIS regulations, which allow for an extension of stay for an applicant who has been unable to maintain his or her previously accorded status where it is demonstrated at the time of filing that:

1. The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
2. The alien has not otherwise violated his or her nonimmigrant status;
3. The alien remains a bona fide nonimmigrant; and
4. The alien is not the subject of . . . removal proceedings under section 240 of the Act.

8 C.F.R. § 214.1(c)(4). *See also* 8 C.F.R. § 248.1(b). The Cook Memo acknowledges that the regulations do not define "maintaining status," however, it notes that the Service will give consideration to whether "the authorized period of admission has been overstayed," as well as "any other conduct relating to the maintenance of current status, including unauthorized employment."

In practice, VSC has repeatedly acknowledged that it possesses the discretion to adjudicate H-1B petitions for new employment that are "late-filed" due to the beneficiary's abrupt termination, and excuse their untimeliness where the beneficiary meets all four criteria of 8 C.F.R. § 214.1(c)(4). In 2002, VSC noted that it "demands that the adjudicator apply these guidelines regardless of whether the extension of stay request is one day late or four months late."[10]

VSC reiterated this position in 2003, and again in June 2008.[11] In its June 2008 guidance, VSC requested that the beneficiary of a late-filed H-1B petition demonstrate that s/he has "made a good faith effort to secure new employment upon termination from the previous employment." This VSC guidance falls in line with the ameliorative policy the Service had proposed soon after the enactment of the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), as it purportedly drafted proposed regulations to address the H-1B portability provisions of section 105.[12]

In a June 2001 policy memorandum, Executive Associate Commissioners Cronin and Pearson of INS' Offices of Programs and Field Operations indicated that the Service was contemplating the inclusion of a 60-day grace period for porting to other H-1B employment in its proposed regulations.[13] Specifically noting that

Congress did not seem to limit AC21 portability benefits to only those individuals working in lawful H-1B status on the date that a new employer has filed a petition for new H-1B employment on their behalf, Executive Associate Commissioner Cronin proposed a rule that offered "a reasonable period of time . . . after leaving the initial H-1B employer to begin working for new H-1B employer. . ." Today, nearly 7 years later, USCIS still has not promulgated a regulation that addresses H-1B portability. Therefore, H-1B beneficiaries should stay mindful of Executive Associate Commissioner Cronin's caveat in his 2001 memorandum that "his prospective statement of policy is provided solely for informational purposes to Service personnel and shall not be utilized as a standard of adjudication in cases involving portability issues, unless and until promulgation of a final rule implementing AC21 105 with such an interpretation."

VSC echoed Executive Associate Commissioner Cronin's qualification in its liaison answers to AILA on August 27, 2002, stating, "Until such time . . . the Service does not prescribe a systematic approach for handling H-1B extension with change of employer petitions, where the previous employer has laid-off the beneficiary." Most recently however, in its June 2008 liaison with AILA, VSC noted that it "seeks to be reasonable in its approach to late filed petitions which are the result of the alien's abrupt departure from the previous H-1B employment." Whether *reasonable* means 60 days or 4 months, we regularly disclose the facts surrounding our clients' termination from their prior H-1B employment, and cite the guidance above in our cover letters. Also, as recommended by VSC in its June 2008 liaison answers, we include copies of termination letters and emails or other correspondence between our clients and their prospective employers. We continue to receive approvals of these H-1B petitions as extensions of status rather than as consular processing cases.

As a final note, VSC also noted in its December 2008 guidance that even if an H-1B petition has been revoked, the beneficiary will continue to be counted under the prior H-1B cap should s/he find another employer to file an H-1B petition on his or her behalf. Under INA § 214(g)(7), a petition to amend or extend the H-1B status of a beneficiary who has already been counted toward the H-1B cap within the past 6 years is not subject to the H-1B cap (lottery) unless it seeks to make the beneficiary eligible for a new 6-year period of lawful admission. However, if the initial approval of H-1B status is revoked for fraud or willful misrepresentation, the beneficiary will not be considered to have been

counted under a prior H-1B cap, and his or her nonimmigrant visa number will be restored under INA § 214(g)(3). Of course, in such a situation the beneficiary may not simply change employers and extend his or her status, but must wait for the next allocation of H-1B visa numbers in a subsequent fiscal year and provided the fraud or misrepresentation does not deem the beneficiary inadmissible.

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[1] Letter of Efren Hernandez II, Director, then Business and Trade Services Branch of the Office of Adjudications, to Wendi S. Lazar, Esq. (March 27, 2001), reprinted, 78 INTERREL 616, Appx. II (Apr. 2, 2001) ("Hernandez Memo").

[2] *See* Letter of Thomas W. Simmons, Brach Chief, Business and Trade Branch to Harry J. Joe, HQ 70/6.2.8, HQ 70/6.2.12, *reprinted in* 76 NO. 9 Interpreter Releases 378 (March 8, 1999).

[3] *See also* 20 C.F.R. § 655.731(c)(7)(ii) (regarding circumstances where wages need not be paid to H-1B employees despite an employer's LCA wage obligations). Citing 8 C.F.R. § 214.2(h)(11), the regulation explicitly includes "a *bona fide* termination of the employment relationship" as a justifiable reason for not paying the required wage, *Id.* (original emphasis). The DOL's Administrative Review Board has found that a "*bona fide* termination" requires that notice of the termination be provided to USCIS. Otherwise, the employer may remain liable for back wages. *See DOL v. Help Foundation of Omaha Inc.*, ARB Case No. 07-008 (Dec. 31, 2008) (*available at* http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/LCA/07_008.L

CAP.PDF).

[4] Although an overly broad reading of the regulation could potentially require that an H-1B employer submit a letter to USCIS in situations where its beneficiaries voluntarily "port" to other U.S. employers, one could make the good faith argument that the Service is put on notice of the termination of an employer-employee relationship by the filing of a subsequent Form I-129 that presumably indicates in Part. 2, Question 2, "change of employer" rather than "new concurrent employment."

[5] *See also* 8 C.F.R. § 214.2(h)(4)(iii)(E); 20 C.F.R. § 655.731(c)(7)(ii).

[6] *VSC Practice Pointer: Preparing for the Worst, VSC Provides Guidance on Layoffs and H-1Bs*, AILA InfoNet Doc. No. 08120972 (December 9, 2008).

[7] *See* Memo, William R. Yates, USCIS Associate Director for Operations, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQOPRD 70/6.2.8-P, p.11 (May 12, 2005), *published on* AILA Infonet at Doc. No. 05051810 (posted May 18, 2005).

[8] Janice Podolny, Chief, Inspections Law Division, Office of General Counsel, MEMORANDUM FOR THOMAS E. COOK, ACTING ASSISTANT COMMISSIONER, OFFICE OF ADJUDICATIONS, *Interpretation of "Period of Stay Authorized by the Attorney General" in determining "unlawful presence" under INA section 212(a)(9)(B)(ii)*, HQCOU 90/15 (March 27, 2003), *published on* AILA Infonet at Doc. No. 03042140 (posted April 12, 2003) ("Cook Memo").

[9] The regulation requires that the Service make separate determinations as to the petition for H-1B status and the beneficiary's extension of stay, despite the fact that they are combined in a single petition. 8 C.F.R. §§ 214.2(h)(2)(i)(D) & (15).

[10] **AILA-VSC liaison agenda items submitted August 19, 2002** and answered on August 27, 2002, AILA InfoNet Doc. No. 02091271 (posted Sep. 12, 2002).

[11] **AILA-VSC liaison agenda items submitted** December 13, 2002 and answered on January 21, 2003, AILA InfoNet Doc. No. 03012441 (posted Jan. 24,

2003). **AILA-VSC liaison agenda items submitted** June 2, 2008 and answered on June 4, 2008, AILA Doc. No. 08080763.

[12] 106 Pub. L 313, 114 Stat 1251 (Oct. 17, 2000).

[13] See Michael D. Cronin, Executive Associate Commissioner, Office of Programs and Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, *Initial Guidance for Processing H-1B Petitions as Affected by the "American Competitiveness in the Twenty-First Century Act" (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)*, HQ 70/6.2.8 (June 19, 2001).