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ON THE EDGE OF THE PRECIPICE P BEING LAID OFF DURING THE 7TH YEAR H-1B

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by

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Among the group of employees in H-1B status who are vulnerable when they lose jobs, no group is more vulnerable than those that have maximized their 6th year limit in H-1B status and are in their 7th or 8th year H-1B extension based on a pending labor certification. Not only are they in danger of falling out of status, but they may also be unable to continue to remain in the 7th or 8th year in H-1B status. This advisory will briefly provide a strategy for such a vulnerable H-1B worker to still remain in H-1B status. Since this area is very complex, the advisory is basic and generalized, and individuals in this situation must consult with qualified counsel to advise them on their specific predicament.

A previous article on our website, THE H-1B VISA IN AN ECONOMIC DOWNTURN, discusses the risk when an H-1B employee losses his or her job. Upon the termination of employment, he or she is considered not to be maintaining status if a timely extension or change of status has not been filed prior to termination.

Under Section 106(a) of the American Competitiveness in the 21st Century Act, a person is able to extend the H-1B status beyond six years if, inter alia, a labor certification was filed 365 days prior to the end of the 6th year.

Take the example of an individual who has lost his or her job while in the 7th year of the H-1B extension, and this has become increasingly commonplace in this economic downturn. The 7th year H-1B was squeezed out of the sixth year

limit, pursuant to Section 106(a) of AC21, only because there is a pending labor certification application filed 365 days prior to the end of the sixth year, i.e. before the H-1B 5th year got completed. If this individual's employment has not been terminated, and he or she has only received notice of termination and is still considered an employee (even if on garden leave under New York's WARN Act), he or she should look for another job. If successful, the prospective employer must file an H-1B extension before the date of termination with the existing employer. It is also important that when the new employer files the H-1B extension, the existing employer has not withdrawn the labor certification. The 7th year H-1B extension can be obtained even if the labor certification has been filed through a different employer.[1]

Provided the labor certification continues to remain pending, the new employer will be able to file the H-1B extension for the remainder of the 7th year, and at the time of the filing the extension request, ask for an additional one-year, i.e. the 8th-year in H-1B status.

The authority for this strategy is based on a Memo by Michael Aytes, Acting Director of Domestic Operations, December 27, 2005, HQPRD 70/6.2.8-P.[2] The relevant extract from the Memo is worth noting:

II. Q&A ON PROCESSING OF H-1B PETITIONS UNDER THE EXTENSION PROVISION OF §106(a) ALLOWING EXTENSION PAST THE H-1B 6 YEAR LIMIT

Question 1. When an alien would otherwise be eligible for an H-1B extension, is it necessary to first file a Form I-129 requesting an extension of time to allow the beneficiary to complete or nearly complete the initial 6 years, and then file an additional Form I-129 requesting an extension of time beyond the 6 years?

> ***Answer:*** *No. Section 106(a) of AC21 allows an alien to obtain an extension of H-1B status beyond the 6-year maximum period, when:*
>
> > *A. 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or*
> >
> > *B. 365 days or more have passed since the filing of an EB immigrant petition.*
>
> *Once these requirements have been met, the alien may be granted an*

> *extension beyond the 6-year maximum on or prior to the date the alien reaches the 6-year maximum. Such extensions may only be granted in one-year increments, but may be requested on a single (combined) extension request for any remaining time left in the initial 6-year period requiring. Requiring the filing of two extension petitions merely increases petitioner and CIS workloads, and has no basis in statute. In no case, however, may the total period of time granted on an extension exceed a cumulative total of 3 years. 8 CFR 214.2(h)(15)(ii)(B)(1).*

Even though this guidance refers to someone in the H-1B 6th year being able to complete the 6th year and ask for a 7th, it is equally applicable to someone in the 7th year, as opposed to the 6th year, being able to request the remainder of the 7th year through a new employer, as well as an additional one year of H-1B extension time, which is the 8th year.

If this new H-1B extension is successfully obtained, the new employer would now have sufficient time to file a new labor certification application before the end of the 7th-year. It takes at least two months for an employer to conduct the recruitment under the PERM labor certification system. Of course, more than two months must be left in order to play safe as there are always delays. One source of delay is obtaining the prevailing wage determination from the local State Workforce Agency prior to the recruitment or during the recruitment. There may also be hitches in the employer registering under the PERM system and being able to post a job order. Thus, if there is sufficient time before the end of the 7th-year to conduct the mandatory recruitment steps, the new employer can file the labor certification before the 8th-year begins. Then, prior to the expiration of the 8th-year, the new employer can request a 9th-year in H-1B status based on the new labor certification that is filed before the end of the 7th-year or at least 365 days before the 8th year ends. By then, the prior employer may have withdrawn its labor certification and the H-1B worker starts relying on a timely filed new labor certification 365 days prior to the end of the 8th year.

While the H-1B worker in the 7th-year extension is truly on the edge of the precipice, and more so if he or she is losing a job, it may still be possible to be pulled back from the brink if a new employer can successfully file an H-1B extension for the remainder of the 7th-year plus the 8th-year based on the existing labor certification. Thereafter, the new employer can file a timely labor

certification before the 7th year, or one year before the end of the 8th-year, which would enable this individual to seek further extensions with the new employer into year 9, 10 and beyond.

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[1] Memo, Yates, Assoc. Dir. Operations, USCIS, HQOPRD 70/6.2.8-P (May 2, 2005), published on AILA InfoNet at Doc. No. 05051810 (May 18, 2005).

[2] This memo repeats the guidance in the Yates Memo, supra, note 1.