Alert

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COZEN O'CONNOR

Possible Options for Nonimmigrant Workers Following Termination of Employment

On December 19, 2022, U.S. Citizenship and Immigration Services (USCIS) released information regarding nonimmigrant workers whose employment is terminated, either voluntarily or involuntarily. USCIS indicated that nonimmigrant workers may have several options for remaining in the United States in a period of authorized stay based on existing rules and regulations. This release gave a detailed summary of the possible options for nonimmigrant workers who were terminated from their employment. Below is a compilation of options that may be available to nonimmigrant workers seeking to remain in the United States in a period of authorized stay following termination. Please note that not all options below provide employment authorization.

60-Day Grace Period

Immigration regulations permit a discretionary grace period that allows workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, or TN classifications (and their dependents) to be considered as having maintained status following the cessation of employment for up to 6**0 consecutive calendar days or until the end of the authorized validity period**, whichever is shorter (See 8 CFR 214.1(l)(2)).

During this period, workers may be able to maintain their nonimmigrant status if a new employer timely files a petition on their behalf with an extension of stay request (e.g., an H-1B change of employer petition for a worker in H-1B status).

Alternatively, workers may be able to remain in the United States in a period of authorized stay if they timely file an application to change to a new nonimmigrant status (such as B-2 visitor nonimmigrant status) or an application for adjustment of status, if eligible.

However, workers who are unable to timely file a change of status application, or find a new employer who timely files a change of employer petition for the worker, may be required to depart the United States at the end of this grace period.

Portability to a New Employer

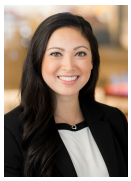
Portability rules permit workers currently in H-1B status to begin working for a new employer as soon as the employer properly files a new H-1B petition with USCIS, without waiting for the petition to be approved.

Also, a worker with an adjustment of status application (Form I-485) that has been pending for at least 180 days with an underlying valid immigrant visa petition (Form I-140) has the ability to transfer the underlying immigrant visa petition to a new offer of employment in the same or similar occupational classification with the same or a new employer. This is commonly referred to as "porting."

Change of Status

Workers may use the 60-day discretionary grace period to apply to change their nonimmigrant status, which may include changing status to become the dependent of a spouse (e.g., H-4, L-2). Some individuals in a dependent nonimmigrant status may be eligible for employment authorization incident to status, including spouses of E-1, E-2, E-3, or L-1 nonimmigrants. In addition, some spouses of H-1B workers may be eligible for work employment authorization if certain requirements are met.

Other possible nonimmigrant options include student status (F-1) or visitor status (B-1 or B-2).



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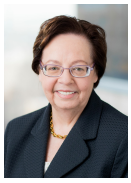

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- Immigration Policy & Strategy

Note that, by statute, B-1 and B-2 nonimmigrant visitors are specifically precluded from "performing skilled or unskilled labor" in the United States. Certain F-1 students, by regulation, may engage in limited employment. It is important to note that the timely filing of a non-frivolous application to change status will toll, or stop, the accrual of unlawful presence until the application is adjudicated.

Change of Status and Employer

Workers may use the 60-day discretionary grace period to seek a new employer-sponsored nonimmigrant status in the same or different status. For example, depending on the specific facts presented, an L-1 worker may be eligible for new employment under the TN, E-3, or H-1B classifications. The timely filing of a non-frivolous change of status application will prevent the accrual of unlawful presence until the application is adjudicated. Such a filing alone will not, however, confer employment authorization in the new position during the pendency of the application, and will not extend employment authorization if the original classification is no longer valid. Some petitions may be eligible for premium processing for an additional fee.

Adjustment of Status

Some workers may be eligible to file a self-petitioned immigrant visa petition concurrently with an adjustment of status application. Examples of immigrant classifications that are eligible for self-petitioning include EB-1 Extraordinary Ability, EB-2 National Interest Waiver, or EB-5 Immigrant Investors. Workers with a pending adjustment application are generally eligible to remain in the United States and obtain an Employment Authorization Document (EAD).

Period of Authorized Stay – Compelling Circumstances EAD

Workers who are the beneficiary of an approved employment-based immigrant visa petition (Form I-140) may be eligible for an EAD based on compelling circumstances for up to one year if they:

- do not have an immigrant visa available to them as set forth in the Department of State's Visa Bulletin, and
- face compelling circumstances.

It is important to note that a compelling circumstances EAD is a discretionary stopgap measure intended to assist certain individuals on the path to lawful permanent residence by preventing the need to abruptly leave the United States. Workers who begin working on a compelling circumstances EAD will no longer be maintaining nonimmigrant status but generally will be considered to be in a period of authorized stay and will not accrue unlawful presence in the United States while the EAD is valid.

Expedite Petition Criteria

Some circumstances may warrant expedited adjudication, including applications to change status to a dependent status that includes eligibility for employment authorization. For example, an application to change status from H-1B to L-2 may be eligible for expedited adjudication to prevent severe financial loss.

Departure from the United States

Workers may choose to depart the United States at any time. For H-1B and O workers who choose to depart the United States after involuntary cessation of employment, the reasonable costs of transportation to the worker's last place of foreign residence must be borne by the H-1B employer or by the O employer and O petitioner, as applicable (See 8 CFR 214.2(h)(4)(iii)(E) and 8 CFR 214.2(o)(16)).

Once abroad, H-1B holders may seek U.S. employment and readmission to the United States for any remaining period of their H-1B status. Those seeking another classification for which they may be eligible can complete the application or petition process abroad and seek readmission to the United States.

Conclusion

It is important that individuals seek guidance from an immigration attorney to decide which, if any, of these possibilities would apply.