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GT ALERT

Separating myth from fact in the context of H1-B layoffs

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"Employers of H-1B specialty workers must take additional measures to avoid potential liabilities resulting from recent changes in the Department of Labor's regulations."

In reaction to the sluggish economy, employers are announcing lay-offs in all sectors. While lay-offs in and of themselves are unpleasant, employers of H-1B specialty workers must take additional measures to avoid potential liabilities resulting from recent changes in the Department of Labor's regulations. This alert discusses the steps that companies must take when the employer lays off an employee in H-1B status, the immigration status of the H-1B worker upon termination, and their eligibility for employment with other companies.

EMPLOYER'S OBLIGATIONS WHEN LAYING OFF H-1B WORKERS

Specifically, if any H-1B employee is terminated, the employer must notify the INS immediately of the layoff, and offer to pay the reasonable costs to return home. If an employer does not notify the INS, it could be liable for any back-wages for the period between the termination date and the date that it notifies the INS, or the date the H-1B petition expires. Significantly, the requirement to

notify the Service does not apply when the employee decides to leave the employer. Upon notification of termination from the employer, the INS revokes the H-1B petition.
Needless to say, many H-1B workers have deep ties to the United States, their children are enrolled in schools, and they own homes. Many H-1B workers have concerns about the consequences of being laid off as regards to their immigration status. In this environment of uncertainty, it is important for these workers to understand how lay-offs affect their H-1B status.

LAYOFFS AND THEIR EFFECT ON H-1B NONIMMIGRANTS' STATUS

"Grace Periods" for Laid-Off H-1B Employees
There are many rumors that there is a "grace period" for an employee after a lay-off during which time the employee would still be "in status." There is no grace period. An individual in H-1B status is technically "out-of-status" the day their employment ends with the H-1B petitioner unless another employer has already filed an amended petition on their behalf. Individuals who are "out-of-status" are generally ineligible for changes or extensions of status.

INS Has Discretionary Authorityto Grant Changes, Extensions, and Amendments of Status if an Individual is "Out-of-Status"
The INS has authority to exercise discretion as to whether an individual is out of status after being laid off when a change or amendment of status request is made. The key factor that INS considers when adjudicating these requests is the length of time since the H-1B beneficiary stopped working for the H-1B petitioner. At this time, the decision is made on an individual basis. However, in his June 19, 2001 policy memorandum to all Regional Service Centers, the INS Executive Associate Commissioner Michael A. Pearson instructed all adjudicators to consult with Tracy Renaud at INS Headquarters before denying benefits on the grounds that a nonimmigrant was not maintaining lawful status. Moreover, Mr. Pearson shed light in this memo as to INS's current view regarding the length of time that an individual in H-1B status could be unemployed and still be eligible for an extension of status. Mr. Pearson announced that the INS plans to publish regulations

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that would authorize extensions of status for individuals in H-1B status who have worked for the H-1B employer for up to 60 days.

In some cases, an H-1B petition could be approved, but the request to extend H-1B status could be denied on the grounds that the individual was out of status at the time the petition was filed. Petitioners may also simply file the H-B petition without requesting a change or extension of status if the H-1B worker has been unemployed. In either case, the employee could still work for the employer after being admitted to the United States based on the new H-1B Notice of Approval (Form I-797).

It is important to note that the H-1B visa in a passport is a valid travel document as long as an employer does not revoke the underlying H-1B petition. Consequently, H-1B employees, as a standard practice, apply for admission to the U.S. by presenting the original INS Notice of Approval from his or her current employer and an H-1B visa identifying his or her former employer. As a precautionary measure, prospective H-1B employees should check with their previous employers to find out if the company withdrew the H-1B petition. If the employer withdrew the petition, the employee should apply for a new H-1B visa identifying his or her current employer before seeking admission in H-1B status. Given the increased scrutiny at INS ports-of-entry after the September 11th attacks, failure to obtain a new visa could result in the employee being denied admission for lack of a valid travel document if the former employer has withdrawn the H-1B petition.

EMPLOYMENT AUTHORIZATION UPON THE FILING OF A NON-FRIVOLOUS H-1B PETITION

Significantly, the "American Competitiveness In the 21st century Act of 2001" (AC21), amended the Immigration & Nationality Act to permit an individual who has been lawfully admitted to the U.S., held H-1B status, and has not worked without authorization to work for another employer while the petition is pending. To qualify for temporary employment authorization, the employer must properly file a "non-frivolous" H-1B petition on behalf of the individual prior to the expiration of the foreign national's date of authorized stay on his/her I-94 card.

As stated above, according to a June 19, 2001 INS policy memorandum to all field operations, the Service intends to propose a rule that would permit H-1B beneficiaries "some reasonable period of time such as 60 days after leaving the initial H-1B employer" to begin working for a new H-1B employer under the portability provisions. This proposed rule is not in effect yet; however, it provides guidance to the field as to how H-1B petitions requesting extensions of status should be treated.

Greenberg Traurig will continue to monitor developments closely. In addition, we will represent the views of businesses and their employees to the Service at liaison meetings.

If you should have specific questions, please contact Greenberg Traurig's Business Immigration Group. Names of these members appear on the following page.

ALERT breaking news

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