

## LAYOFFS / TERMINATION OF EMPLOYMENT | FREQUENTLY ASKED QUESTIONS

The information contained in this FAQ memo is general in nature and cannot be used in lieu of advice from an attorney who is familiar with immigration law. The intent of this memo is to provide you with some understanding of the rules that may apply to you. We encourage you to seek counsel from an attorney who can address your individual case. Please note that unless your employer authorizes our firm to continue to represent you, you will need to seek independent counsel. Even if your employer waives its conflict of interest and allows us to represent you, it is unlikely to continue to pay for our services, and you would need to enter into a separate financial arrangement with our firm for any continued representation. Please refer to our website at [www.jackson-hertogs.com](http://www.jackson-hertogs.com) for additional information on the various visa categories referenced below.

### Nonimmigrant Issues – H-1B, L-1, E, O-1 & TN workers

#### A1. How long can I stay in the U.S. if I am laid off?

The **U.S. Citizenship and Immigration Service (USCIS)** has issued several memoranda that indicate that H-1B status ends when H-1B employment terminates, and that there is no grace period in cases of layoff. While USCIS has not explicitly stated that the same rule applies for L-1, E-1\*, E-2\*, E-3, H-1B1, O 1, and TN nonimmigrants, the same analysis applies. There has been confusion concerning a “10-day” rule. The 10-day rule only applies in two situations: **Customs and Border Protection (USCBP)** may have allowed you to enter the U.S. initially up to ten days before your visa validity period begins, or USCBP may have issued you a Form I-94 that is valid for 10 days after the visa validity period ends. Both of these 10 day periods are simply time in which to initially settle into the U.S. and then to depart the U.S. You do not have work authorization during either 10 day period. If you are in L-1, E-1, E-2, E-3, H-1B1, O-1 or TN status and you are no longer working for the U.S. employer, there is no “10 day rule,” as you are no longer maintaining status in the U.S. Even if you are laid off just before or at expiration of your H-1B validity period, the 10 day rule would apply only if the USCBP officer who marked your I-94 card when you last entered the U.S. added 10 days to your validity period.

**\*Note that this FAQ is intended for employees of an E enterprise and not for the owner(s) or investor(s) of the E enterprise.** If you qualified for E status based on your role as owner or investor of the enterprise, please contact your attorney

#### A2. What if I get another job offer?

If you are in H-1B, H-1B1, L-1, E-1, E-2, E-3, O-1 or TN status, your employment is specific to your current employer. Therefore, to maintain lawful nonimmigrant status, your new employer will need to submit a new non-immigrant petition on your behalf. While there is no grace period, the USCIS has generally allowed individuals to remain in the U.S. and has approved applications for extensions of stay, as long as the new petition is filed soon after the lay-off occurs. However, the USCIS has indicated that the approval of such an extension application is discretionary, and that each case will be handled on a case-by-case basis. If a longer period of time has elapsed from the date of termination to the date that the new petition is filed, USCIS may not grant your application for extension of stay. As a result, you may be required to depart the U.S. and obtain a new visa at a U.S. Consulate after the new petition has been approved.

**H-1Bs:** If at the time that you were laid off you were in H-1B status, or if you had previously been in H-1B status within the last 6 years, then you may not be subject to the annual H-1B cap. If you are not subject, this means that if the annual cap for H-1B issuance has been reached, you will not be impacted and a new employer may immediately file a H-1B petition on your behalf. In addition, under the American Competitiveness in the 21st Century Act (AC21), if you have been maintaining valid H-1B status, you may work for the new employer once USCIS issues a filing receipt for the H-1B transfer petition.

**TNs:** If you are a Canadian or Mexican citizen and are offered new employment classifiable under the NAFTA, your new employer must file a new petition for you, either through the pre-flight/port of entry process (Canadian), through a Consulate (Mexican), or through filing a petition with the USCIS (Canadian/Mexican). Please note that there is no “receipt rule” for employment, as a TN and you would not be authorized to work for the new employer until the new TN was approved and/or you are admitted to the U.S. with the new TN. For that reason, you may wish to consider premium processing for any applications filed at the Nebraska Service Center. TNs are allowed indefinite renewals, as long as the TN worker can demonstrate an intent to return to their home country at the end of their one-year period of TN employment.

**Other Free Trade Agreements:** If you are a citizen of Singapore/Chile, you may also be eligible to have a new employer sponsor you for an H-1B1 visa. The requirements of this category are similar to the normal H-1B category, though procedures differ. If you are a citizen of Australia, you may also be eligible to have a new employer sponsor you for an E-3 visa. The requirements of this category are similar to the H 1B category, but the procedures are different.

**L-1s:** This visa category is based on intracompany transfer between a foreign and U.S. employer with a qualifying corporate relationship. If you have been laid off and are not offered another position within your same corporate family, you will not be eligible to continue in L-1 status. In order to qualify for L-1 classification, you must (1) have been employed for one year in the three years preceding your admission to the U.S. in a specialized knowledge, managerial or executive position (2) with an affiliate of your employer abroad, and (3) hold a similar specialized knowledge, managerial or executive position with the U.S. affiliate employer. L-1 status is limited to a total of five or seven years validity.

**O-1s:** If you already hold O-1 status, and therefore have been found to be a nonimmigrant of extraordinary ability, your new employer must file its own O-1 petition on your behalf with USCIS. Note that your new employer must be able to demonstrate that it requires an individual of extraordinary ability for the offered position. You may not work for the new employer until that O-1 petition has been approved. For this reason, you may want to consider premium processing for any new petition filed with the USCIS Service Center. If you hold another nonimmigrant status and seek to apply for O-1 status, you must demonstrate that you have extraordinary ability; that is, you are one of the few at the top of your field and have achieved sustained acclaim for your achievements. O-1s are not subject to a maximum time limit.

**E-1 or E-2:** If you already hold E status, you are authorized to work for the specific E employer which filed your petition or application. This visa category requires that you are a national of a country that has a bilateral trade or investment treaty with the United States, that your employer shares your nationality, and that you are employed in either an executive or managerial position, or in a position that requires essential skills. In addition to qualifying for other nonimmigrant categories, you may be eligible to move to another E employer that also shares your same nationality or you may be able to open your own qualifying E business in the United States. Note that you would not be authorized to work for the new employer, even if it is yourself, until the new status is approved (either through an application submitted at the U.S. Consulate in your home country, or through the USCIS). Es are not subject to a maximum time limit.

### A3. Can I change my status to another nonimmigrant category if I am laid off?

Yes, you may submit an application for change of status to visitor, student, etc., but the USCIS will need to determine if you were maintaining a lawful status when the application for change of status was filed. In the alternative, you may need to leave the United States, apply for a visa stamp in the new status, and then return before you can work for the new employer, depending on the classification and your circumstances.

If your application for a change of status is denied, you may begin to accrue unlawful presence in the United States from the date of the denial. Remaining in the United States for more than 180 days following such a denial could have very serious consequences, including becoming subject to a bar on reentry to the United States for three to 10 years.

Among the common work-authorized categories for which you may qualify, depending on your own circumstances, include E, H-1B, H-1B1, J, L, TN, and O. Please refer to our website at [www.jackson-hertogs.com](http://www.jackson-hertogs.com) for more information on the basic qualifications for each of these categories.

**B-1/B-2s:** The B visitor category is typically not work authorized. Nonimmigrants who have been working in the U.S. for several years may have difficulties in obtaining USCIS approval of an application for a change of status to B-1/B-2 visitor status, as this status requires that you prove that you do not have a long-term intention of immigrating to the U.S. Among other things, applicants need to show substantial ongoing ties to their home country, financial support, and a definite plan to return to their home country on a particular date in the near future. Rules for B-1/B-2 nonimmigrants have become more restrictive since September 11, 2001. Regulations proposed in April 2002 would limit the length of time that one may remain in the U.S. as a B-1/B-2 nonimmigrant. In addition, the proposed regulations include changes limiting the situations in which you can change your status to F-1 after entering the U.S. as a B 1/B 2.

**H-1Bs:** Note that if you are seeking to change status to H-1B and have not held H-1B status in the past six years, you may not be able to immediately change status to H-1B if the annual "cap" for new H-1B petitions has already been reached for a particular fiscal year. The "cap" limits the number of new H-1B petitions to 65,000. However some employers, such as universities and non-profit research institutions, are not subject to the cap. If there are no H-1B numbers available at the time the H-1B petition is filed and your intended employer is not exempt from the cap, then you will not be able to change your status to H-1B. In this circumstance, unless you apply to change status to another status that is immediately available, you cannot stay in the U.S. and would not be maintaining status in the U.S.

### A4. I held F-1, J-1, or M-1 status and I filed a change or status, I now want to change back to this status. What do I do?

You may request reinstatement by the USCIS or submit an application for change of status, but the processing of such applications is very time consuming, and there is a good possibility that you have already been removed from the Student & Exchange Visitor Information System (SEVIS) that tracks valid F-1 and J-1 student and exchange visitor status. You may need to apply for F-1, J-1, or M-1 status at a U.S. consulate

based on a new I-20 or DS-2019. You need to address these issues with your Designated Student Officer (DSO) or your J-1 Responsible Officer (RO).

**F-1s:** Assuming you have a valid F-1 visa stamped in your passport and have a current I-20 endorsed for travel, you may consider departing the U.S. and reentering while the period of optional practical training work authorization is still valid. However it is imperative that you coordinate with your DSO and ensure that you are properly entered into the SEVIS system to show that you are maintaining status. Do not assume that you will be reinstated. You must work with your school and/or be admitted to another school who will enroll you as a student with a valid I-20, and then carefully follow the instructions of the DSO from your school.

Special note regarding F-1s with curricular training authorization—this type of employment authorization is employer specific. You must immediately contact your school and ask them to update your Form I-20 with a new employer if applicable and to ensure that you are considered as a full-time student if the practical training is cut short.

### Immigrant Issues

#### **B1. What if my employer has filed and obtained an approved labor certification on my behalf when I am laid off or terminated?**

Unfortunately, if you are laid off while the labor certification is still pending or after it has been approved but you have not moved into the final processing stages (see below), the certification does not benefit you. The labor certification belongs to the employer. You would be able to use the priority date of your case for a future employment-based filing only if your employer files an I-140 Petition on the approved labor certification and that I-140 is approved. If you change employers, the new employer will have to obtain a new labor certification on your behalf. You do not have nonimmigrant status in the U.S. based on the labor certification.

#### **B2. What if my employer has filed and obtained approval of the I-140 Petition when I am laid off, and I have not applied for permanent residency?**

In most cases, if the I-140 has been approved, you would be able to use the priority date of your case for a future employment-based petition. Since there is no longer a job offer based on the original immigrant visa petition, you cannot proceed with filing an application for permanent residency (I-485) based on that approved immigrant visa petition. The only exceptions are if the immigrant visa petition was approved under either the “extraordinary ability alien” or “national interest waiver” categories. If the petition was filed under either of these two categories, you may be able to continue processing your permanent residency application because both of these categories allow for “self-sponsorship. However, your intent must be to pursue the same type of work as outlined in the petition. We strongly urge you to seek advice from an immigration attorney who specializes in these types of cases. Please note that the approval of an I-140 immigrant visa petition in and of itself does not affect your nonimmigrant status in the U.S.

#### **B3. What if I have filed the I-485 Adjustment of Status (AOS) application when I am laid off but it has not been approved?**

Pursuant to USCIS guidance issued relating to the American Competitiveness in the 21st Century Act (“AC21”), if 180 days have passed since the I-140 petition and I-485 AOS application were filed, you may switch employers as long as you continue to work in the same or similar occupation with the new employer. If the I-140 petition is still pending, USCIS will review the I-140 to determine whether it was approvable at the time of filing; i.e., without regard to your new job. If the I-140 is approved, USCIS will then adjudicate your AOS application and at that time will determine whether your new job is substantially similar to the job described in the original I-140. If USCIS denies the I-140 Petition, the I-485 Petition would also be denied. Please note also that your former employer may withdraw the I-140 Petition if your I-485 Application has been pending for less than 180 days. If your former employer withdraws the I-140 Petition before your I-485 Petition has been pending for 180 days, the I-485 Application will be denied. After your I-485 Application has been pending for more than 180 days, a request from your former employer to withdraw the I-140 Petition will not impact your I-485 Application.

Please note that in all cases you must have work authorization to join the new employer. This means that you either must have an employment authorization document (EAD) or a new H-1B or L-1 visa petition filed on your behalf and work authorization provided by this filing or approval. Again, you should seek advice from an attorney regarding your specific situation. In addition, per USCIS memoranda, the USCIS requires that you affirmatively notify them if you change your employer pursuant to this provision.

### **B4. If my AOS application has been pending for more than 180 days and I am laid off, can I become self-employed?**

As long as you meet the “porting” requirements, you may become self-employed. You must be able to demonstrate that your new job is the same or similar to that for which the I-140 was filed. You must also be prepared to demonstrate that your new job is legitimate and full-time. Finally, USCIS will inquire as to whether the I-140 petition represented your former employer’s true intentions to employ you once you became a permanent resident and if you also intended to work for that employer at the time your I-140 and I-485 application was filed. Self-employment is probably the riskiest option since it would be potentially difficult to prove that that the self-employed position is the “same or similar” position as that described in a labor certification. This option is also only outlined in one non-binding memorandum from the USCIS. All other memoranda on the subject specifically indicated that self-employment was not appropriate for porting.

Note that USCIS has not yet issued regulations on AC21 and has only issued memoranda detailing how it will handle these situations. If/when regulations are issued, these rules may change. It may be advisable to maintain nonimmigrant status, even if you have work authorization through a pending I-485 petition.

### **B5. If I have obtained an EAD pursuant to an I-485 Adjustment of Status application and I am laid off, can I use it to work for another employer?**

The EAD offers unrestricted employment authorization. Therefore, you can use the EAD to work for a new employer. Also note that if you are in H-1B status and you work for a new employer on an EAD, you would no longer be permitted to work for another employer under the H-1B “receipt rule”.

### **B6. Will my AOS be denied if I am laid off less than 180 days after it was filed?**

Not necessarily. In its guidelines to AC21, USCIS has stated that an AOS application will not necessarily be denied if the applicant leaves the I-140 petitioner less than 180 days after the AOS application is filed. This is because both the I-140 and AOS application focus on the prospective employment of the applicant. At the time of filing, the I-140 employer and AOS applicant must have both intended for the applicant to undertake the employment at the time the AOS is approved. USCIS has indicated it will investigate such cases as it deems appropriate.

### **B7. Can I rely on AC-21 for additional H extensions (6yrs+) for another employer based on my currently pending immigrant visa process?**

USCIS guidance confirms that AC21 allows the employer of an H-1B nonimmigrant to seek an extension of stay beyond the sixth year as long as the foreign national is the beneficiary of any labor certification application or immigrant worker petition that was filed more than 365 days prior to the end of their authorized six-year stay. The AC21 guidelines specify that USCIS will not deny a request for an H-1B extension beyond the 6-year limit solely on the basis that the labor certification has been approved, but the I-140 petition has not yet been filed. In addition, AC-21 does not require that the labor certification or immigrant petition be from the same employer requesting the H-1B extension.

Please note, however, that labor certifications now expire 180 days after approval unless an I-140 Petition is filed while the labor certification is valid. There is no guidance yet from USCIS on whether an approved but expired labor certification may be used to request an AC-21 H-1B extension. We believe that such reliance is ultimately risky.

### **B8. Can I extend my EAD after I am laid off if my I-485 petition is pending?**

Yes, as long as your I-485 is pending, you may continue to request extensions of your EAD.

### **B9. Can I continue to travel with my H-1B visa after I am laid off?**

No. Once you are laid off, you cannot use your H-1B visa (or if visa exempt, the H-1B approval notice) to enter the U.S. unless another employer has filed an H-1B petition on your behalf and you present the USCIS Form I-797 receipt notice or approval for the new employer upon entry to the U.S. As an adjustment applicant, you may also apply for and obtain an Advance Parole before you travel and use the Advance Parole document to enter the U.S.

### **B10. Can I continue to travel with my L visa after I am laid off?**

No. Once you are laid off, you cannot use your L-1 visa to enter the U.S. unless you are entering the U.S. to work for an employer that is part of the same corporate family. If you no longer qualify for L-1 status and you have a pending AOS application, you will either need another valid visa stamp for a category for which you qualify and have an approved petition (such as an H-1B), or you will need a valid Advance Parole document.

### **B11. Can I continue to travel with my TN, approval notice after I am laid off?**

No. TN status is incompatible with a pending AOS, in that it requires that you have an intention of returning to your home country of Canada or Mexico once the temporary work assignment in the U.S. is complete. Once you file an adjustment of status application, you cannot use the TN approval to continue to travel. You must obtain an Advance Parole. Furthermore, once you are laid off, you cannot use a TN travel document for the former employer to work for a new employer. The best solution, if you have not already obtained one, is to apply for and receive an Advance Parole from the USCIS prior to any travel.

### **B12. Can I continue to travel with my H-1B1, O-1, E-1, E-2 or E-3 approval notice after I am laid off?**

Please note that similar to the TN classification, these other types of nonimmigrant classifications are also incompatible with a pending AOS, regardless of whether you continue to be employed or are laid off by the petitioning employer. As such, you must have an advance parole document in your possession prior to any international travel.

**As with all of these questions, please consult with an immigration attorney regarding the specific facts of your own situation.**