

## **Breaking Up Is Hard to Do—the Plight of H-1B Employees and the Challenges for Those who Represent Them<sup>1</sup>**

*By Wendi S. Lazar<sup>2</sup>*

When an H-1B nonimmigrant employee<sup>3</sup> is fired and given a severance package, often the package cannot begin to compensate the employee for the loss of his job. Unless the nonimmigrant employee is returning home or has secured a new job that starts immediately, he is “out of status” and may be ineligible for any future employment in the U.S. After years of new proposals, legislation and regulations, being out of work poses enormous problems and confusion for H-1B nonimmigrants. While going abroad temporarily to receive a new visa may appear to be a solution, with H-1B visa numbers running out faster and earlier each year, the likelihood is that the nonimmigrant will not be returning to the U.S. any time soon. While this dilemma presents agonizing issues for these nonimmigrants and their families, counseling these individuals presents enormous challenges for employment and immigration attorneys alike.

Deciphering the status of these employees is one aspect of the problem, but advising them on the practical, legal and ethical responsibilities concerning termination is difficult, and makes it impossible to give legal advice that is unequivocal. The lack of clarity in government regulations in regard to portability and H-1B status upon termination, as well as recent regulations requiring petitions to be withdrawn upon termination, puts the attorney and his client in a precarious situation. Further, inconsistent government policy and practice with little or no guidance for the practitioner has further complicated this dilemma. Finally, counseling these employees on intersecting employment issues, such as discrimination or other wrongful discharge claims and negotiating a meaningful severance agreement, while trying to maintain the employee’s immigration status can be daunting.

### **Recent Law with Little Guidance**

While the most recent H-1B legislation, passed by Congress on October 17, 2000 (the American Competitiveness Act in the 21<sup>st</sup> Century Act,<sup>4</sup> hereinafter referred to as AC21 and H.R. 5362<sup>5</sup> relating to fee provisions) gave us portability, it left open the question of

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<sup>1</sup> An earlier article by Wendi S. Lazar on this topic appeared in *Immigration Law Today*/AILA Monthly entitled H-1Bs: Out of Work and Out of Status? Still, Unresolved Issues Remain, April 2001.

<sup>2</sup> Lin Walker, an immigration attorney practicing in New York City contributed to the research and drafting of this article.

<sup>3</sup> The H-1B is a nonimmigrant classification used by a non-citizen who will be employed temporarily in a specialty occupation or as a model of distinguished merit and ability. In this article, the term “H-1B employee” will have the same meaning as “beneficiary” and “nonimmigrant.”

<sup>4</sup> American Competitiveness in the 21<sup>st</sup> Century Act, (S. 2045) Pub. L. No. 106-313.

<sup>5</sup> The Immigration Services and Infrastructure Improvement Act of 2000.

how much time between jobs will cause an adverse status decision by USCIS<sup>6</sup> and result in deportation and a bar against reentry. While AC21 generously provides H-1B nonimmigrants with safe harbors for transferring from job to job through portability, it does not address the gap in time between termination and the filing of a new petition. While AC21's portability provision permits a nonimmigrant previously issued H-1B status to begin working for a new employer as soon as a new petition is filed by that employer (rather than on approval), it does not define maintenance of status in the H-1B context or include it as a condition to porting.<sup>7</sup> This vagueness leaves the H-1B employee with no definitive time frame on porting after termination. Even though specific INS memoranda in 2001 and 2002 provided interim guidance to immigration officers at the ports of entry in regard to admission post employment, and even confirmed that the terminated H-1B nonimmigrant "is not maintaining status,"<sup>8</sup> they did not make maintenance of status a condition to porting.

Moreover, with all of the recent legislation, comments and memoranda, there remains a schism between policy and practice in defining what maintenance of status is in the H-1B context and when being out of status will result in an adverse finding by the government. Prior to AC21, the formal INS policy on the H-1B beneficiary who was terminated from employment was that he or she was not maintaining status and subject to removal if they remained in the United States. They were also out of status if they went to work for a new employer prior to the approval of a new petition.

However, the USCIS Service Centers have not followed the formal policy but have chosen a more practical approach. While not adhering to any formal grace period, adjudicators often allow terminated H-1B beneficiaries a period of up to thirty (30) days of being out of status before the filing of a new petition. This informal policy has been followed at all the Service Centers and for the most part, H-1B nonimmigrants, so long as

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<sup>6</sup> As of March 1, 2003, the former Immigration and Naturalization Service (INS) was absorbed by the newly formed Department of Homeland Security, which divided the organization into three new agencies: U.S. Citizenship and Immigration Services (USCIS), which is responsible for adjudicating applications and petitions for immigration benefits; U.S. Customs and Border Patrol (USCBP), which is responsible for protecting the Nation's ports of entry and borders and for controlling entry, admission, and departure requirements; and U.S. Immigration and Customs Enforcement (USICE), which is responsible for investigating immigration violations and enforcing detention and removal orders.

<sup>7</sup> Section 105 lists the following prerequisites to qualifying for portability: the new H-1B petition must be filed prior to the expiration of the H-1B employee's period of authorized stay; the new H-1B petition must not be frivolous; the H-1B employee must have been lawfully admitted to the United States; and, the H-1B employee must not have worked without authorization after being admitted to the United States in H-1B status and before the filing of the new H-1B petition.

<sup>8</sup> On January 29, 2001 an INS memorandum provided interim guidance to immigration officers at the ports of entry. The memorandum clarified the requirements for admission when an H-1B employee returned to the United States following a trip abroad and was no longer working for the original employer listed on his or her H-1B visa. Unfortunately, this memorandum failed to define "maintaining lawful status" in the context of H-1B employment. Then, in an April 24, 2002 memorandum issued in response to questions regarding employment and utilization of multiple approved H-1B petitions, INS took the position that an H-1B employee who is terminated from his or her employment was not maintaining his or her status regardless of the validity of the previously approved H-1B petition. However, it did not define "maintenance of status" as a prerequisite to H-1B portability under AC21.

they quickly secure new employment, are permitted to remain in the US. The question remains, how long is too long?

Also, the fact that a petition's approval date could be valid for up to two years beyond the actual date of the beneficiary's termination creates other confusion and ambiguities for attorneys and clients alike. While some of these issues were addressed by the new legislation—most were not.

### **Prior History**

Historically the government has been non-committal at best, in enforcing any consistent policy and practice in regard to these employees. In March 1999, in a letter responding to an AILA member query, the INS Branch Chief of Business and Trade stated that once an "H-1B nonimmigrant's services for the petitioning U.S. employer are terminated, the alien is no longer in a valid nonimmigrant status."<sup>9</sup> It further stated that severance does not represent a valid continuation of employment. Unfortunately this memorandum went no further in addressing the practical issue of maintaining status after termination for those H-1B beneficiaries who apply for new employment. However, following these statements, the Service Centers across the country continued to approve these petitions if nonimmigrant's period of unemployment was not "too long" or if they were being paid severance during this period of unemployment.

On August 11, 1999, during a Teleconference between the AILA Liaison Committee for the Vermont Service Center and INS, an unconfirmed comment was made by the Service that there was no fixed period or "grace period" within which an applicant could file a new H-1B petition for a second employer after being terminated by a first employer, adding that the "rule of reason" would govern.<sup>10</sup> This comment, in addition to heightening scrutiny by INS and later USCIS in reviewing H-1B petitions, caused practitioners to question the existence of any informal grace period for these adjudications. Increased requests by the Service for W-2s and pay stubs in establishing on going employment quickly became the new policy, but it was never applied consistently. However, when it was applied, and a nonimmigrant failed to produce the evidence of continued employment, his petition was inevitably denied.

There was also an additional problem that the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), on "unlawful presence," brought to the forefront for the immigration officials. The fact that a petition's approval date could be valid for more than two (2) years beyond the actual date of termination could potentially cause other problems for the terminated H-1B nonimmigrant that remained in the United States. INS took the position that this "unlawful presence" included "any time spent in the U.S. by aliens after they violated the terms and conditions

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<sup>9</sup> Letter from Thomas W. Simmons, INS Branch Chief of Business and Trade responding to a letter by Harry J. Joe, Esq.

<sup>10</sup> Draft Minutes from VSC/AILA Liaison Teleconference, August 11, 1999. The editor of the minutes stated that VSC had not confirmed these printed comments.

of any form of nonimmigrant status because time spent in violation of status is not authorized." <sup>11</sup>

INS subsequently reversed this position on September 19, 1997, in a memorandum stating "under the modified interpretation, unlawful presence with respect to a nonimmigrant includes only periods of stay in the U.S. beyond the date noted on the I-94." <sup>12</sup> The question of what status, if any, a terminated H-1B nonimmigrant retains prior to the expiration date on the I-94, remains unanswered for the purpose of any subsequent approval or denial of a second petition.

### **Another Agency Gets Involved**

Complicating an already vague and inconsistent policy, in December 2000, the U.S. Department of Labor<sup>1</sup> (DOL) came out with regulations that augmented some of the AC-21 legislation and foreshadowed, for the practitioner and the employer alike, areas of conflict between the two agencies that share responsibility for enforcing H-1B legislation. These regulations have principally been responsible for interpreting some of the provisions of AC-21. With regard to termination of H-1B employees, DOL regulations require the employer of a terminated employee to withdraw the H-1B petition for that employee or suffer the risk of financial responsibility if an employee files a claim for lost wages for the remaining period of the original approved petition.

As employers face this risk, such a mandate has encouraged employers to act quickly in withdrawing an approved H-1B petition once the employee has been terminated, whereas in the past, this was not common practice. In fact, this employer tactic is now commonplace in fending off employee threats of discrimination or charges of wrongful termination and is an effective tool for employers in pushing back in severance negotiations.

Moreover, the withdrawal of the petition makes the terminated employee's continuing presence in the United States unlawful as of the date of the withdrawal. With the withdrawn petitions on file, USCIS will have to decide whether it is possible to grant a new petition to an H-1B whose termination, as well as lack of status, is confirmed. Clearly, the H-1B nonimmigrant is at the mercy of his former employer if he does not have a job offer that would allow him to remain in the U.S., port and maintain status.

### **Benching Versus Performing Services**

In addition, under the new DOL regulations,<sup>13</sup> an employer is required to continue paying its H-1B employee the wage specified in the Labor Condition Application even if he has been laid off or benched temporarily. This includes periods of time when an employer does not have enough work for the H-1B employee, or he is waiting for a license or

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<sup>11</sup> INS Memo dated March 31, 1997, *reprinted in 74 Interpreter Releases 562* (Apr. 7, 1997).

<sup>12</sup> INS Memo dated September 19, 1997, *reprinted in 74 Interpreter Releases 1498* (Sept. 29, 1997). *See also* State Dept. Cable No. 97-State 23545.

<sup>13</sup> 8 U.S.C. §1182 (n)(2)(C)(vii)(I-III)

permit to continue operating. If not, the employer must withdraw the petition to avoid liability. If, however, the employee does not perform services because of a reason unrelated to his or her employment, for example, maternity or family leaves, temporary disability or vacation, the employer is not required to pay the employee.<sup>14</sup>

### **Counseling H-1B Non immigrants--the Immigration and Employment Context**

For the immigration or employment attorney counseling these employees, the lack of clarity and the high risk of disclosure has led to serious ethical questions for attorney and client. However, there are specific guidelines that can assist an attorney and his or her client in avoiding serious consequences. Depending on the situation, this can be as simple as making a call to the Company's attorney and stating your concerns or even making sure at the onset of counseling that the non immigrant has all the information he needs to make informed decisions about employment.

From the immigration perspective, if your client has been out of work for over a month and the prospect for new employment is waning, it is better to advise him to leave the country than to lose the possibility of him re-entering down the road. While the lack of visa numbers makes this option unattractive, being responsible for your client's unlawful presence may be grounds for a malpractice suit. Moreover, when you are filing an initial H-1B petition, even if your primary representation is of the employer, advise the H-1B nonimmigrant of issues that could present problems for him in the future. This way, if he knows a layoff is on the horizon, and he may be vulnerable, at least he will have a chance to port to a new employer before it is too late. Also, explore with him what alternative nonimmigrant or immigrant status may be available to him if he were to lose his job. It is an immigration attorney's responsibility to advise the nonimmigrant (even if you primarily represent, or are paid by the employer) of timing and other status issues if he has no other counsel.

For the employment attorney representing terminated H-1B employees, being totally aware of your client's work and living situation, as well as knowing his ability to attain new employment before you start evaluating the case or creating a strategy, is critical. Also, knowing how to handle a discrimination or severance case involving an H-1B nonimmigrant is a unique skill with many minefields to avoid. By approaching the former employer in the wrong way or taking the wrong approach, you may create animosity when what you ultimately need is cooperation.

Also, knowing the government's position on severance in the context of H-1B employment is critical. As the government has stated, severance pay is not considered salary and therefore will not give your client the comfort he needs in looking for a new job while collecting it. Further, the DOL regulations have set up numerous definitions of what is illegal "benching" as opposed to actually performing H-1B services, and there are risks the H-1B employer takes if he ignores those rules. Accordingly, approaching an employer with the knowledge of what his own counsel is advising is critical in being able to assist your employee client and negotiate for him.

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<sup>14</sup> 8 U.S.C. §1182 (n)(2)(C)(vii)(IV)

Make sure you know the length of the employee's period of H-1B employment in the U.S. and what other nonimmigrant or immigrant options are available before reacting to your client's legal claim or employment situation. If his H-1B employment period is coming to an end, and he cannot apply for different status, he may have to leave the U.S. immediately and will want to get the largest severance the employer is willing to give. On the other hand, if he is looking to remain in the U.S. and find a new position to port to, a period of reinstatement may be what this employee needs immediately.

Understand the company's position if there has been a reduction in force (RIF) as well. Often times, these RIFs occur in stages, and perhaps the employer would be willing to delay your client's termination until he has had an opportunity to find other employment. At the very least, often an employer will keep a nonimmigrant employee on salary, rather than give them the equivalent in severance if they understand the importance of such a gesture. For example, there might be a project your client can finish up for the employer or other interim work that will provide H-1B services to the employer during this period. While there may be little legal leverage in your client's case because of the issues surrounding his status, do not underestimate an employer's desire for good public relations in terms of being known as a fair and equitable employer of H-1B non immigrants—particularly in a dependent industry.

Also, fully evaluate your case and determine the merits of any alleged discrimination if you are representing the nonimmigrant. If the case is meritorious and there may be significant damages, you must decide if your client is willing to bring such a case, even if they are forced to leave the U.S. before any action in the case is taken. Obviously, if there is no reasonable negotiating position, you will need to help your client understand the process as well as the statute of limitations. There are several remedies available to nonimmigrants in bringing discrimination claims of which your client needs to be made aware.<sup>15</sup>

If you discern that there is a meritorious claim, your client may opt for negotiating a better severance that includes a period of salary continuation in exchange for his availability at work, or perhaps a chance to work from home. As in many discrimination

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<sup>15</sup> The Immigration Reform and Control Act of 1986 ("IRCA") prohibits national origin discrimination by employers. See 8 U.S.C. § 1324b(a)(1)(B), 28 C.F.R. § 44.200(a)(1)(i). Regulation 28 C.F.R. § 44.101(c)(1),(2) enumerates U.S. citizens, lawfully-admitted permanent and temporary aliens, refugees, and asylees as protected individuals. The protections under 8 U.S.C. § 1324b are applicable only when: (1) the employer has four or more employees; (2) Title VII, 42 U.S.C. § 2000e-2, *et. seq.* does not already cover such national origin discrimination claims; (3) and they are not exempted by law, regulation or executive order. 8 U.S.C. § 1324b(a)(2)(C); 28 C.F.R. § 44.200(b)(1). Regulation 28 C.F.R. § 44 vests enforcement authority to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("Special Counsel") in the Department of Justice ("DOJ"), Civil Rights Division. Generally, the Special Counsel will not review charges concurrently filed with the EEOC, unless such charges are dismissed based on jurisdictional grounds. Section 1324b also guards against intimidation, retaliation and document abuses relating to national origin discrimination. 8 U.S.C. § 1324b(a)(5),(6), 28 C.F.R. § 44.200(a)(2),(3). Filing requirements are outlined in 28 C.F.R. § 44.101(a)(1)-(12). Types of relief available to prevailing parties include injunctive relief (cease and desist and compliance orders), reinstatement, civil fines and penalties, and additional equitable relief. 8 U.S.C. § 1324b(g).

cases, you may be able to negotiate reinstatement until your client has found new employment and is able to port to a new employer without risking loss of status. Again, knowing how important that pay stub is to your client may drive the settlement. In fact, often an employment lawyer is hired only to insure that the wrongful termination does not result in the nonimmigrant's loss of status. In the universe of nonimmigrant employment law, negotiating for a pay stub has replaced negotiating for more severance, because the threat of being unemployed is the threat of unlawful presence or worse, the lack of eligibility for rehire.

When confronted with these situations it is also advisable for the employment lawyer representing nonimmigrants to look at any potential contract damages or reliance damages that may in fact give your nonimmigrant client more negotiating power. While the case law is extremely pro-employer in these cases,<sup>16</sup> if there has been detrimental reliance, the threat of a lawsuit may convince the employer to do the right thing for your client.

## Conclusion

H-1B nonimmigrants, while only temporary workers, have become and continue to be an essential part of our workforce. While they have been given increased rights and benefits under new laws and regulations, their fate upon termination of employment has worsened and is dependent on factors that are confusing and even arbitrary. With recent corporate mergers, consolidations and reductions in force, H-1B terminations are again on the rise but there remains little or no guidance from the government. For the H-1 B employer and employee, the issue of maintenance of status is vital, particularly as it effects the portability provisions as well as the employee's future eligibility for additional benefits. With increased scrutiny by USCIS and the Doll's requirement to withdraw approved H-1B petitions, the H-1B employee is at the mercy of his former employer and may not even be eligible for severance benefits offered to other similarly situation workers.

For the practitioners in this area, these are dangerous times and the penalty to you and your client can be severe if not irreparable. Therefore, it is vital to talk to your clients and provide them with all the choices that could be available to them now and in the future--be it changing status, or reinstatement in a job. Moreover, it is essential to take

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<sup>16</sup> For example, courts have generally held that statements on a visa petition promising to employ a non-citizen for a particular duration do not create an enforceable employment contract. The default rule is that employees without fixed duration contracts are at-will, and thus may be terminated for any reason, and statements to the government on visa petitions do not change the at-will nature of the employment contract. See *MacIntosh v. Building Owners and Managers Ass'n Intern.*, 355 F.Supp.2d 223, 229 (D.C. 2005) (former employer's petition to the INS stating its intention to employ former employee, a Canadian citizen, for fixed term was neither a contract nor a promise on which employee could reasonably rely, and thus, presumption in favor of at-will employment precluded employee's breach of contract claim against employer); *Geva v. Leo Burnett Co., Inc.* 931 F.2d 1220 (7<sup>th</sup> Cir. 1991) (statement regarding employment duration on visa petition did not constitute an enforceable promise); *Francis v. Gaylord Container Group*, 837 F.Supp. 858 (S.D. Ohio 1992) (employer promise to assist in process of obtaining a green card did not limit the default at-will grounds for which employer could terminate the employee).

each case individually and fully evaluate the totality of the circumstances from both the perspective of the employer and the nonimmigrant employee. Different circumstances will call for different tactics and considerations whether bringing a claim for discrimination, negotiating a severance agreement or making sure, at the end of the day you have that pay stub to send to USCIS if requested.