

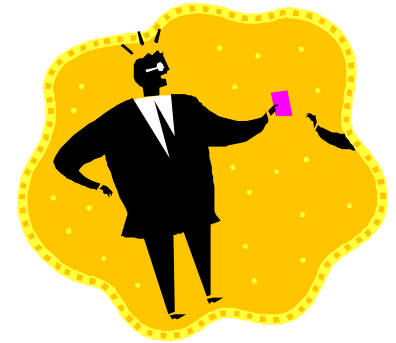
# Business Immigration

## An Update

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## Time to Say Goodbye! Terminating H-1B Workers Without Getting Sued — By Vaman Kidambi, Esq.

The INS announced last week that the number of H-1B filings in February had fallen to 16,000 petitions, nearly 50% lower than the number of petitions filed in January. Well, it is no surprise that the filing of H-1B petitions have fallen so dramatically. The month of March accounted for the largest number of jobs eliminated in a single month in over 9 years. 86,000 jobs were shed in March alone. Many large employers of H-1B visa holders, such as Intel Corp, CISCO Systems, Inc. and Motorola, Inc., recently announced plans to scale back hiring. This large scale shedding of jobs by the larger corporations has had a ripple effect on smaller corporations. Across the board, my clients have had to deal with these terminations in their own right.



However small, layoffs have the potential to turn into complex wrangles if not handled properly. The rule of thumb is to consult your attorney before the act. Plan the termination process carefully and stick to the script.

On additional information on a release agreement please contact Attorney Vaman B. Kidambi at [info@kidambi.com](mailto:info@kidambi.com)

At the outset, if you are terminating H-1B workers, the new American Competitiveness and Workforce Improvement Act (ACWIA), makes it mandatory for the Employer to notify the Immigration and Naturalization Service. What happens if you don't? Well, three things - the employee could join others in a class action suit against the employer for improper termination, the INS may take the position that the termination was not proper and seek to impose sanctions on the H-1B employer, and the Department of Labor may enjoin the employer for back wages!

### Special Points of Interest

• H-1B Processing Dates at the Service Centers as on 4/15/2001

• VSC - 1/26

• CSC - 1/24

• TSC - 1/17

• NSC - 3/19

• The H-1B Processing times are now available on our website [www.kidambi.com](http://www.kidambi.com)

• April 30th is the last day for filing petitions to preserve Section 245(i) eligibility for filing Adjustment of Status Applications in the United States.

H-1B workers who are terminated may also find themselves *out-of-status* and be forced to leave the country. Under current regulations, employees have ten days to find alternative employment or leave the country. In this context, the INS has repudiated a widely-distributed story in Wired News that quoted INS sources as having said that the Service is "going to let things slide" for laid off H-1B workers and allow them to change jobs "without leaving the country, even if they have been unemployed for a while." INS has indicated that it still follows its long-held view that H-1B non immigrants who remain in the U.S. without changing status, when they are no longer employed, are considered to be in violation of their status. The INS further indicates that it will continue its past policy of reviewing such situa-

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tions on a case-by-case basis.

Recent regulations under ACWIA have also given employees additional access to the Department of Labor if they are subject to unfair employment related practices. The Department of Labor can use information received from dissatisfied employees and ‘whistleblowers’ to launch an investigation against the company.

**“While it is hard for employers to ignore the fact that a terminated employee runs the risk of being out of status, it is equally hard to ignore the possibility of being hit with a million dollar lawsuit for wrongful termination that could jeopardize the business and affect other employees.”**

Employers should also recognize the role U.S. Consulates play in the overall picture. When nonimmigrant employees return home they carry tales of abuse and oppression [sometimes exaggerated accounts of normal U.S. hiring and firing practices] that are relayed to Consulates around the country. Consulates could then initiate investigations based on these accounts by employees. Case law holds that Consulates can rely on hearsay evidence to initiate investigations and decide on applications. This could prove disastrous for future recruitment.

While it is hard for employers to ignore the fact that a terminated employee runs the risk of being *out of status*, it is equally hard to ignore the possibility of being hit with a million dollar lawsuit for wrongful termination that could jeopardize the business and affect other employees. Here are a few tips for employers planning to lay off H-1B workers:

- a. Read your Employment Agreement carefully. Identify express and implied promises made to employees prior to termination. Certain language in your Employment Agreement may be construed as an implied promise. Something that you failed to keep in terminating the employee.
- b. Besides H-1B workers, be aware and identify protected classes of employees, Some major protected classes include, pregnant women with children, gays, the disabled and foreign born workers.
- c. Fire everyone, if possible. As an alternative, consider terminating the entire division, unit or level.
- d. Provide terminated employees with a simple, but clear reason for the termination.
- e. Make sure you have at the minimum a ‘legitimate business reason’ for the termination. Most courts will look for this in a termination involving several employees.
- f. Go over each contract clause to determine if there are any ‘time bombs’ that could go off later. Look for assurances and promises of continued employment. Look for penalty like ‘liquidated damages’ clauses that could be used by employees to sue for fraud and misrepresentation.
- g. Offer terminated employees ‘severance pay’ in exchange for a release giving up their right to

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sue.

- h. If your contract contains a severance pay clause already, provide employees with additional money to secure a release.
- i. Do not threaten employees who are being terminated.
- j. Be kind and civil to employees who are being terminated. Yes, you are also in deep trouble and have a right to be upset but you will secure a lot by being patient and tactful in a situation that involves a layoff.

Clearly, there is no one way of avoiding a lawsuit. However, the steps outlined in this newsletter should enable you to avoid being plagued with frivolous claims.



## Kidambi & Associates, P.C.

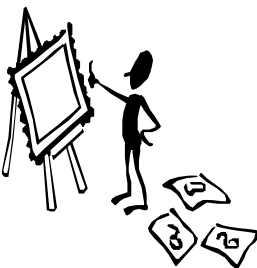
*is pleased to announce that the firm will now be known as*

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This newsletter could not have been made possible, if it were not for your valuable suggestions. If you want to read about a special topic that would interest you, please do not hesitate to write to us at::

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