

# Business Immigration

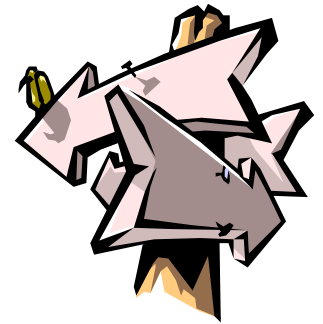
## An Update

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### Tough Choices: Hiring Decisions Concerning Laid Off H-1B Professionals

- By Vaman Kidambi, Esq.

“...Is it 10 days or 60 days? Do they have a ‘grace-period’? Can I hire him when he can’t show pay stubs?” Clients have been intrigued by the situation created by the recent spate of lay offs affecting H-1B workers. How does an employer determine whether the individual he is trying to hire is in status or not? The H-1B worker has been terminated, but his authorized stay as documented on his H-1B Approval Notice and I-94 has not expired. The situation arises both when a company lays-off an H-1B worker and when a company seeks to hire a new employee who appears to be out-of status.



For more information on INS policy issues, contact Attorney Vaman B. Kidambi at [info@kidambi.com](mailto:info@kidambi.com)

The INS has not provided us with a clear directive in the matter. There is no policy statement on the issue either. Far from being clear, INS spokespersons have been ambiguous and uncertain about their own regulations. The often cited, “10 day departure rule” is clearly misleading. In an AILA, Connecticut meeting, I asked the Vermont Service Center Director, Mr. Paul Novak for a clear statement on the policy of the INS in lay-off situations. He responded with a written note [reproduced in full on my website], explaining the INS’ decision to adjudicate such petitions on a “case-by-case” basis.

#### Special points of interest:

- H-1B Premium Processing starts from July 30th. The Premium Processing fee is \$1000.00 and the Form is I-907, available on the INS website at [www.ins.usdoj.gov](http://www.ins.usdoj.gov)
- The email address of the Premium Processing Centers are:
  - Vermont Service Center
  - [VSC.Premium.Processing@usdoj.gov](mailto:VSC.Premium.Processing@usdoj.gov)
  - Texas Service Center
  - [TSC.Premium.Processing@usdoj.gov](mailto:TSC.Premium.Processing@usdoj.gov)
  - Nebraska Service Center
  - [NSC.Premium.Processing@usdoj.gov](mailto:NSC.Premium.Processing@usdoj.gov)
  - California Service Center
  - [CSC.Premium.Processing@usdoj.gov](mailto:CSC.Premium.Processing@usdoj.gov)
- The emails should only be used to check the status of Premium Processing Cases.

In the past, the INS held that H-1B workers are required to depart immediately upon termination. This has always been an unrealistic expectation. The end of an employment relation, however sudden, does not end the ability of the individual to find alternative employment. In fact, increasingly, I am being called upon to decide when a laid off employee is truly out-of-status. A difficult task, considering the effect it is likely to have on the career of the unfortunate H-1B professional. In such circumstances, I tend to rely on the relative ambiguity of the guidelines, to test the system and push the limits of INS discretion.

Section 105 of the American Competitiveness in the Twenty First Century Act allows an H-1B professional to commence working for a new employer upon the filing of a new petition, provided the H-1B worker was lawfully admitted, has not engaged in unauthorized employment and the petition itself is non-frivolous. In fact, the Act does not require that the individual to be maintaining status at the time the new petition is filed. However, the INS has insisted that the maintenance

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## Tough Choices...

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of status is a pre requisite for portability. An interpretation, which in my opinion is, clearly contrary to the language in the statute and arguably in variance to congressional intent. Several immigration experts share my concern.

**“All good legislation starts out with good logical suggestions.”**

Recently in a liaison meeting, INS HQ stated that in instances where an individual has been laid off and a subsequent H-1B petition has been filed, INS Adjudicating Officers should consult with an officer at HQ, before making a decision denying extension of status, while approving the underlying petition.

Under the circumstances, I recommend that Employers continue to file petitions on behalf of laid off employees, showing the lay off was due to a downturn in the economy and not due to the redundancy of the skills possessed by the H-1B professional. Clearly, the case-by-case adjudication of such petitions affords us an opportunity to challenge the system and in the absence of clear directions, creative lawyering always triumphs!

In the meantime, lobbying efforts should focus on seeking Congressional support to initiate legislation to allow laid off employees to be portable for a certain period of time. Perhaps, 60 days, to allow a laid off H-1B professional to search for alternative employment. After all, the INS takes longer than that to adjudicate an H-1B petition! All good legislation starts out with good logical suggestions. A regulatory change will provide adjudication officers the much-needed guidance they require in this area. It will also promote easy hiring of laid off H-1B workers, avoiding the need to seek employees from abroad. I see it as a win-win situation for both employers and the INS.

## INS AUDITS H-1B EMPLOYERS

The INS is conducting audits to check the viability of H-1B employers. I have learned that these audits are part of a random, nationwide audit conducted by the INS on behalf of the General Accounting Office [GAO]. The GAO is the investigative arm of Congress. At the present time, these visits involve site visits to employers to verify that H-1B beneficiaries work for the petitioning employers and, if relevant, the circumstances of the individual's departure, if he or she left prior to the end of an approved validity period.

Typically, the corporate representative who signed the H-1B petition is the person whom the INS representative has contacted. Though there have been no reports of INS personnel requesting payroll records, such records should be in order and available as required by DOL rules on document retention for H-1B/LCA purposes.

In the event that an H-1B beneficiary is no longer working for the company, and departs or departed prior to the end of his or her permitted validity period, the employer should maintain documentation, e.g., a memorandum to the file, that notes the employee's separation from service. If applicable, evidence of the company's payment of a terminated H-1B worker's return transportation should also be made available.

Please contact my office immediately if you have been contacted by the INS. It is in your best interest to have all documentation available and in compliance prior to any audit. Please do not hesitate to contact me to schedule a mock audit of your INS books and records.

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