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Business Immigration

An Update

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"Benching," Doesn't Sit Well! – Handling Non Productive Time in the H-1B Context – *By Vaman Kidambi, Esq.*

No, you are not the first, I said and added, "there have been several others with the same, or similar questions." My client was calling about *benching*. He was enquiring about non-productive time for his H-1B employees. How does one handle the current spate of layoffs? As mentioned in my previous newsletter, these layoffs have adversely affected smaller companies in no small measure. Non-productive time is an issue that needs careful handling and employer's need to be aware of the regulations.

For additional information on benching , contact Attorney Vaman B. Kidambi at info@kidambi.com

As part of the American Competitiveness and Workforce Improvement Act [ACWIA], if the H-1B nonimmigrant is not performing work and is in a non-productive status due to a decision by the employer (*e.g.*, because of lack of assigned work), lack of a permit or license, or any other reason except where the non productive status is due to non-work related factors [Such as the worker's own, fully voluntary request or convenience (e.g. touring the U.S., caring for ill relative), or rendering the nonimmigrant unable to work (e.g. maternity leave, automobile accident which temporarily incapacitates the nonimmigrant, the employer is required to pay the salaried employee the full pro-rata amount due, or to pay the hourly-wage employee for a full-time week. [20 Code of Federal Regulations § 656.731(c)(7)].

Special Points of Interest

- The Vermont Service Center Director has indicated that I-140 processing will commence in the second week of May
- Did you know that the Vermont Service Center only has 12 phone lines for customer service?
- The State Department spokesman, Charles Oppenheim, has indicated that visa numbers for all nationalities in the EB3 category may become current by October.

The final regulations to ACWIA further state that this obligation is effective, "after the H-1B worker has entered into employment with the employer," but in any event, not later than 30 days after the worker's date of admission to the United States (if entering the country pursuant to the petition) or 60 days after the date the worker "becomes eligible to work for the employer" (if already in the country when the petition is approved). The 60-day rule is in conformity with Congressional mandate that H-1B processing be completed within a period of 60 days. However, it does not take into account the new "portability" provision under §105 of the American Competitiveness in the Twenty-First Century Act [AC21], which allows a beneficiary of an H-1B petition to change employers and to begin the new employment upon filing of the petition.

Congressman Smith and Senator Abraham, in their remarks after enactment of the ACWIA, noted that the most extreme examples of "benching" occur when workers are brought to the United States on the promise of a certain wage, because the employer does not have enough work for the H-1B worker. [144 Cong. Rec. E2326 (Nov. 12, 1998);] They also agreed that employers must pay full wages and benefits during an H-1B

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worker's non-productive status when the status is due to the employer's decision – on factors such as lack of work for the worker – or due to the worker's lack of a license or permit. However, Senator Abraham went on to add that this provision does not prohibit an employer from terminating an H-1B worker's employment on account of lack of work or for any other reason. Simplistically, Senator Abraham's assurance could be construed as the straight answer to the non-productive time issue! The employer could terminate the employee without '*benching*' him, avoiding Department of Labor scrutiny and issues of back wages and penalty.

The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and others, who commented on the non-productive time regulations in ACWIA, observed that the provision's prohibition against '*benching*' may lead employers to treat H-1B workers better than U.S. workers, and may create a situation where an employer retains an H-1B worker over an American worker during a lay-off to avoid paying full wages to the H-1B worker! The Semiconductor Industry Association [SIA] and the American College of International Physicians [ACIP], in fact, encouraged the Department of Labor to exercise flexibility to avoid the potential effect of companies laying off U.S. workers to avoid the benching of H-1B workers by allowing for periods attributable to regular objective business occurrences such as cyclical business downturns, holiday plan shutdowns, and plant retooling.

In response to these logical arguments, the Department of Labor stated that it could not interpret the Act to allow employers to be relieved from payment of salaries for periods where the employer's business is shutdown, regardless of whether it affects U.S. workers as well, whether for economic downturn, annual retooling, or holiday shutdown; nor can the employer be relieved from liability for mandatory vacation, pre-employment training, or disciplinary action. The Department further added, "if an employer finds need to discipline an H-1B nonimmigrant, it must find a method other than loss of pay, or it may terminate the employment relationship."

Again, the answer seems to lie in terminating H-1B employees as opposed to '*benching*' them. In this context, the Vermont Service Center Director, Mr. Paul Novak, recently assured practitioners that the Service would consider petitions filed on behalf of laid off H-1B workers on a case by case basis. This could be taken as willingness on the part of the INS to adjudicate H-1B petitions filed on behalf of terminated H-1B workers after the regulatory 10-day period meant for departure.

In commenting on the exception for nonpayment based on "the voluntary request of the nonimmigrant for an absence," the Department reiterated that it would look closely at any situation where there is any question about whether the period of non-productive time is truly voluntary, adding, "the Department will not under any circumstances consider the employer to be relieved of wage liability where there is a plant shutdown. Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract."

It is also important to point out that under ACWIA based regulations, the employment relationship is not terminated, unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR § 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home.

Clearly, there is no one easy way of dealing with non-productive time. However, this article is intended to provide Employers with a clear understanding of the issues involved in dealing with non-productive time. I strongly recommend contacting my office for advice when you are confronted with issues similar to the ones discussed in this article.

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