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FAQ ON CHANGES IN SALARY AND OTHER WORKING CONDITIONS FOR NONIMMIGRANT WORKERS IN L-1, O, TN, E AND F-1 STATUS DUE TO COVID-19

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In continuation of my Frequently Asked Questions (FAQ) relating to the COVID-19 crisis on immigration issues, I focus on other nonimmigrant visa categories besides the H-1B visa category. Changes in employment at the workplace, especially salary reductions, continue to abound especially for other nonimmigrant visa workers in L, E, O and TN status. There are also questions relating to students in F-1 status who are under Optional Practical Training. Although a prior FAQ covered changes in salary and working conditions for H-1B workers, where the Department of Labor imposes rigid and inflexible rules, there may be more flexibility for other nonimmigrant visa categories that are not subject to DOL rules and the Labor Condition Application. Since there are plenty of grey areas with no definitive answers, my interpretations of these rules are based on my experience in advising employers and H-1B workers during past disasters and presently during the COVID-19 crisis.

1. Can the salary of an L-1 nonimmigrant worker be reduced as a result of the adverse economic impact caused by the COVID-19 crisis?

Since the L-1 visa is not governed by the same DOL rules as the H-1B visa category, it may be permissible to reduce the compensation of a nonimmigrant worker on an L-1A or L-1B visa. So long as the nonimmigrant is working in the appropriate L-1 capacity as either an executive or manager or in a specialized knowledge capacity, a reduction in salary ought not to be considered as a violation on the part of the employer or status violation for the nonimmigrant worker. There is a long line of administrative decisions holding that the employment of an L-1 worker is not necessarily determinative upon the amount or existence of a salary. A non-salaried chairman has been able to

qualify for an L-1, see *Matter of Tessel, Inc*., 17 I&N Dec. 631 (AAC 1981), and the salary may even emanate from the foreign entity, see *Matter of Pozzoli*, 14 I&N Dec. 569. While there is a legal basis for an L-1 worker's salary to be reduced, this does not mean that the government cannot later question whether the lower salary is commensurate to the executive, managerial or specialized position under the L-1 visa. One should also note a recent decision, see *Matter of I Corp*, Adopted Decision 2017-02 (AAO April 12, 2017), which held that USCIS cannot approve an L-1 petition where the proffered wage violated the minimum wage under the Fair Labor Standards Act.

Changing the terms of an L-1 worker's employment in the US from full time to part-time may also not require an amendment as it may not constitute a material change so long as the worker is still employed in the qualifying L-1 capacity.

2. Can one re-file under the L-1 "new office" rule if the business has been impacted due to COVID-19?

The USCIS rules governing the L-1 visa category detail special provisions where a new parent, subsidiary, branch or affiliate office is opened in the US within 1 year, and this new office petitions for an L-1 visa for a manager, executive or specialized knowledge worker. The petition may be approved even if there is no proof of extensive business activity. A new office is an organization which has been doing business in the US through a parent, subsidiary or branch for less than 1 year. If the business is shuttered due to a stay at home order, it may be possible to argue that it has not been doing business for 1 year, and should still be possible to obtain another extension as a new office. In the past, the USCIS has not been receptive to such arguments if the business has been in existence for 1 year, but could not function due to economic downturns. However, it would not hurt to apply as a "new office" for another year, in the alternative, when also applying for a regular 2 year extension given the most unusual economic impact COVID-19 has caused, and the fact that the business was forced to stay shut as a result of government orders and not due to the volition of the employer.

3. Is there similar salary flexibility for a nonimmigrant on an O-1, E-1, E-2 or TN visa?

I would say "Yes" since these nonimmigrant categories are also not subject to the LCA and other DOL rules. With respect to the O-1 visa, if one of the basis to

establish extraordinary was to demonstrate a high salary in relation to others, then a reduction in the O-1 worker's salary may undermine the worker's ability to maintain status. On the other hand, if there has been an across the board reduction for all persons in that category, then the salary reduction could still be potentially justified as being in comparison to others who have demonstrated extraordinary ability in the field.

With regards to an E-2 investor, it is important for the investor to demonstrate that the enterprise is not marginal. An enterprise is marginal if it does not have present or future capacity to generate more than a minimal living for the investor and the family. Therefore, it would be important to demonstrate that a drop in revenues from the business that would otherwise sustain the investor was temporary due to COVID-19.

4. Can nonimmigrant workers in L, O and TN status perform their duties without pay and not be in danger of violating their status?

One could argue that so long as the nonimmigrant worker is performing the duties for the employer under the terms of the nonimmigrant visa category, it would not be a violation of their status even if the employer cases to pay them. The government will likely disagree, but it may be possible to counter argue that ICE has indirectly allowed F-1 students who are engaged in Optional Practical Training to serve in a voluntary capacity in work that is related to their studies so long as it is 20 or more hours (although the 20 hour minimum requirement has been relaxed during COVID-19). For instance, an F-1 who graduated with a law degree could conceivably still be legitimately maintaining status under F-1 OPT by providing pro bono representation to indigent clients. Note that ICE does not permit voluntary employment under STEM OPT. Still, employers have to be careful that they do not violate federal and state laws regarding paying the minimum wage. This sort of voluntary situation would more readily apply to an O-1 who is traditionally self-employed or an E-2 investor in a startup that has yet to generate revenues.

5. Would nonimmigrant visa holders in E-3 and H-1B1 status have the same flexibility?

No. Since the E-3 (for Australians) and the H-1B1 (for Singaporeans and Chileans) visa categories are subject to the LCA like the H-1B visa category, please refer to my prior FAQ relating to changes in salary and working conditions for H-1B workers.

6. Can an F-1 engage in Curricular Practical Training while overseas?

Yes. According to the latest COVID-19 Guidance for SEVP Stakeholders dated April 30, 2020, students may engage in CPT during their time abroad, provided they are:

- Enrolled in a program of study in which CPT is integral to the program of study;
- Their DSO authorized CPT in advance of the CPT start date; and
- Either the employer has an office outside the United States or the employer can assess student engagement and attainment of learning objectives electronically. According to earlier March 13, 2020, COVID-19: Guidance for SEVP Stakeholders, this enrollment may be online. All other requirements at 8 CFR 214.2(f)(10)(i) still apply.

7. Can an F-1 engage in Optional Practical Training while overseas?

Although an F-1 can engage in OPT while working in the US for an employer remotely, it has not been determined by DHS whether a student can engage in OPT while overseas during the COVID-19 period. Since USCIS also adjudicates applications for employment authorization, this is not just an SEVP issue. Since an F-1 OPT cannot be unemployed for more than 90 days, and a STEM OPT cannot be unemployed for more than 150 days, an F-1 should be prepared to argue that working overseas for a US employer while overseas during the COVID-19 crisis did not constitute unemployment during OPT or STEM OPT.

Fortunately, in 2010, SEVP provided the following guidance, which is likely applicable even during COVID-19:

"Time spent outside the United States during an approved period of post completion OPT counts as unemployment against the 90/120-day limits, unless the student is either:

- Employed during a period of leave authorized by an employer; or
- Traveling as part of his or her employment."

While this 2010 does not directly relate to a student working remotely for an employer while overseas during the COVID-19 period, as the student is neither on authorized leave nor travelling as part of the employment, it is closely analogous and hopefully SEVP and USCIS should approve of remote OPT employment while overseas as not counting towards unemployment.