CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

CONSIDERATIONS WHEN TERMINATING A FOREIGN WORKER

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By Cyrus D. Mehta

Terminating an employee is always a very difficult decision, and requires the employer to comply with various state and federal laws. Terminating a noncitizen employee requires additional considerations under US immigration law. The American Immigration Lawyers Association has issued a flyer to its members that provides a useful guide to employers. In this blog, I will reiterate the guidance and also provide further commentary and insights that would benefit the employer and the employee.

Terminating H-1B, H-1B1 and E-3 Employees

The terminating of H-1B, H-1B1 and E-3 employees is the most burdensome because of the additional DOL rules that govern the underlying Labor Condition Application and which intersect with the USCIS rules. If the termination is not effectuated properly with the USCIS, an employer will be liable for back wages until there is a bona fide termination.

The termination of H-1B, H-1B1 and E-3 employees requires:

> *•written notice to the employee,*
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> *•written notice to USCIS (if the petition was filed with USCIS), and*
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> *•withdrawal of the labor condition application (when possible).*

AILA also correctly notes that the cost of reasonable transportation to the employee's country of last residence must be offered to H-1B and E-3 workers if

the employer terminates the employee. The employer is not required to pay transportation for dependents. This offer is not required if the employee resigns or chooses not to leave the United States. We direct readers to our prior blog for more detailed analysis on when the employer may choose not to pay the return transportation expenses especially where the worker has chosen to stay in the US through other options such as filing an extension of H-1B status through another employer or through filing an application of adjustment of status to permanent residence after marriage to a US citizen.

The AILA flyer also discusses the regulation that gives a grace period of up to 60 days to workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 and TN status following termination to remain in the US and not be considered to be in violation of status. The worker can use this time to prepare to depart, find another employer that will file a petition within the grace period or change to another status.

When Does Termination Occur?

What is less clear is when termination occurs with respect to an H-1B worker. An employer can terminate on June 1, 2022 and still pay the employee the full wage but keep this person in a nonproductive status for several weeks or months. Let's assume in this example that the worker is terminated on June 1, 2022, but continues to be paid from June 1, 2022 till August 1, 2022 while in nonproductive status. This nonproductive period is known as "garden leave" where the terminated worker is still considered an employee but not required to engage in productive work for the employer. The employer utilizes "garden leave" to disincentivize the employee from immediately working for a competitor. Does the termination in this scenario occur on June 1, 2022 or on August 1, 2022, which is when the garden leave period ends and the worker ceases to receive a salary in accordance with the terms of the H-1B petition?

According to a USCIS Policy Memo dated June 17, 2020, the USCIS has indicated that "he failure to work according to the terms and conditions of the petition approval may support, among other enforcement actions, revocation of the petition approval, a finding that the beneficiary failed to maintain status, or both." Based on this policy, it would be safer to consider the termination occurring on June 1, 2022 rather than August 1, 2022. Yet, the USCIS acknowledges that there may be situations when H-1B status is not violated if

the worker is on leave under statutes such as the Family and Medical Leave Act or the Americans with Disabilities Act even if the worker is not paid.

The USCIS also gives the officer discretion to determine whether nonproductive status constitutes a violation of the beneficiary's nonimmigrant classification. The following extract from the USCIS Policy Memo is worth noting:

> *In assessing whether a beneficiary's non-productive status constitutes a violation of the beneficiary's H-1B nonimmigrant classification, the officer must assess the circumstances and time spent in non-productive status. While neither statutes nor regulations state the maximum allowable time of non-productive status, the officer may exercise his or her discretion to issue a NOID or a NOIR to give the petitioner an opportunity to respond, if the time period of nonproductive status is more than that required for a reasonable transition between assignments. As always, if the officer encounters a novel issue, the officer should elevate that issue to local service center management or Service Center Operations, as appropriate.*

A terminated H-1B worker may need more time to find another job and thus extend the commencement of the grace period to a later date, especially when the worker continues to be paid and treated as an employee during the nonproductive status. There might be a basis for the termination date to be August 1, 2022 rather than June 1, 2022 given that the USCIS allows the officer to assess the circumstances and time spent in nonproductive status, although it would be far safer and more prudent to consider June 1, 2022 as the termination date.

Terminating Employees in Other Nonimmigrant Statuses

The AILA Flyer provides the following recommendations when terminating O-1, TN, L-1 and E-1/E-2 employees:

Termination of O-1 employees requires:

> *• written notice to USCIS and*
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> *• offer to pay the cost of reasonable transportation to the country of last residence.*

Termination of TN and L-1 employees:

> *•There is no specific immigration notification requirement or return transportation requirement.*

Termination of E-1/E-2 employee:

> *•While not mandatory, it is recommended that the U.S. consulate that issued the E visa be notified that employment was terminated.*

I-140 Petition Withdrawal

The AILA flyer **wisely** notes that there is no requirement that an employer withdraw an approved I-140 petition after a foreign worker's employment is terminated. If withdrawal is desired, consider the timing of that request carefully, as it may have adverse consequences for the foreign worker. A withdrawal request made before 180 days have passed from approval will automatically revoke the petition. The worker will retain the priority date for future I-140 petitions but will be unable to rely on the I-140 approval to qualify for H-1B extensions beyond the standard six-year limit. Submission of a withdrawal request after 180 days have passed from approval will not result in automatic revocation of the I-140, and the terminated worker will be entitled to I-140 approval benefits, including continued eligibility for H-1B extensions beyond the six-year limit. The I-140 that is withdrawn after 180 days can still provide the legal basis for the H-4 spouse to receive employment authorization.

Thus, an employer may want to allow an I-140 to reach the 180-day mark before withdrawal as this would be a benefit for the departing employee. When the attorney is representing the employer and employee, advising the employer to withdraw the I-140 at the 180 day mark or not withdraw at all will minimize the conflict of interest between the employer and employee at the time of termination.

Attorneys often do not wish to provide a copy of the I-140 petition to the employee who has been terminated even when it has been concurrently filed with an I-485 adjustment of status application. They view it as the employer's I-140 petition. However, providing a copy of the I-140 petition and the

underlying PERM labor certification would enable the terminated employee to file an I-485J that is required when the employee is porting to a new job in a same or similar occupation. Attorneys who do not wish to part with the I-140 should realize that there is a growing legal recognition of a foreign national's interest in an I-140 petition where there is also a pending I-485. See, e.g., *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017) (clarifying that beneficiaries are "affected parties" under DHS regulations for purposes of revocation proceedings of their visa petitions and must be afforded an opportunity to participate in those proceedings"); see also *Lexmark Intern. v. Static Control*, 134 S. Ct. 1377 (2014) (holding that a plaintiff has the ability to sue when his or her claim is within the zone of interests a statute or regulation protects); USCIS, Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After *Matter of V-S-G- Inc.*, PM-602-0152, Nov. 11, 2017 ("The traditional distinction of petitioner, beneficiary, and affected party breaks down, however, when the law allows the beneficiary to leave the employ of the original petitioner and take a job elsewhere without disrupting the validity of the underlying immigrant visa petition on which the pending adjustment application depends."); *Kurapati v. USCIS*, 775 F.3d 1255 (11th Cir. 2014) ("We agree that a beneficiary of an I-140 visa petition who has applied for adjustment of status and has attempted to port under falls within the class of plaintiffs' Congress has authorized to challenge the denial of that I-140 visa petition. It is clear from the statutory framework that such immigrant beneficiaries fall within the zone of interests it regulates or protects."); *Khedkar v. USCIS et al*, No. 1:2020cv01510 - Document 23 (D.D.C. 2021) (USCIS acted unlawfully be issuing an RFE on the pending I-140 to the petitioning employer rather than the beneficiary who had ported who was also a party in the I-140 adjudication proceeding).

It would thus behoove the employer to share a redacted version of the I-140 and labor certification with the terminated employee especially when it is associated with an I-485 application. Information pertaining to the employer such as sensitive financial information and documents can obviously be redacted, although the employee must be given sufficient information to know the exact nature of the position and duties for which he or she was sponsored in order to file an I-485J and make a cogent case for portability under INA 204(j).

Dual Representation

Finally, the AILA flyer advises that the attorney is generally representing both the employer and the employee. While sole representation may be possible when filing the nonimmigrant visa petition and the foreign national employee is still overseas and thus not in contact with the attorney, at the time when the employee has come to the US and especially after the I-140 and I-485 have been filed, it would be difficult for the attorney to justify that he or she is only representing the employer when the employee has been advised about legal issues pertaining to maintenance of nonimmigrant status and adjustment of status.

AILA thus cautions:

> *There is a dual representation situation in immigration cases where a firm represents both the petitioner (employer) and worker (employee). When this occurs, the attorney is required to keep each party (petitioner and beneficiary) adequately informed of any*
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> *information related to that representation. Any information revealed by either party during this representation cannot be kept confidential from the other party. If looking for guidance related to the termination of a foreign worker, keep in mind that you should not mention specific names of individuals unless you intend to share this information with all parties.*

Of course, at the point of termination it becomes difficult and tricky to represent both employer and employee because of potential conflicts of interest and especially when the employee seeks to port to another employer in a same or similar occupation. Under these circumstances, it would either require the attorney to withdraw from the representation of one or both clients or to continue to represent one or both clients if the clients have agreed to the conflict in advance or at the time of its occurrence. My article, “Finding the Golden Mean in Dual Representation”, available on AILA InfoNet at AILA Doc. No. 07081769, realizes that withdrawing from the matter entirely is impractical and provides guidance and strategies on how attorneys can set forth the parameters of the representation between the employer and employee client at the outset of the representation, and be able get agreement from both clients on how the attorney will handle the representation if there is termination down the road.