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US IMMIGRATION & NATIONALITY LAW

LAYOFFS WILL HURT NONIMMIGRANT WORKERS THE MOST, ESPECIALLY INDIAN BORN, BUT THE BIDEN ADMINISTRATION CAN PROVIDE RELIEF

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In recent weeks, news of layoffs at the likes of Twitter, Meta, and Amazon have contributed to broader fears that the United States is entering a recession. In last week's blog, we provided suggestions for how terminated workers can maintain their nonimmigrant status and potentially even pursue permanent residency. The layoffs at Twitter have also shown that it was mainly workers whose H-1B visas were tied to Twitter that have stayed on and abided by the unreasonable ultimatums of Elon Musk. This has given credence to the notion that H-1B workers are akin to indentured laborers especially those who are caught in the never ending green card backlogs. We follow up on the previous blog by providing some suggestions that the Biden administration can follow to allow nonimmigrant workers who have been laid off to remain in the U.S, and even if they are not terminated, they should not be required to cling on to their job at all costs.

First, the Biden administration could extend the 60-day grace period to allow nonimmigrant workers additional time to find alternate employment after being impacted by a layoff. As discussed in prior blogs, 8 CFR § 214.1(l)(2) allows E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN nonimmigrant workers a grace period of 60 days after a cessation of their employment. Workers who are able to find new employment within 60 days will be able to remain in the U.S. and maintain their nonimmigrant status, but this period may not allow sufficient time for job hunting, especially if layoffs and hiring freezes become more widespread. By extending the 60-day grace period, the Biden administration would allow terminated workers more time to find new employment in the U.S. The 60-day

grace period is a relatively new concept, having been introduced in a final rule that went into effect on January 17, 2017. Before this rule was enacted, nonimmigrant workers did not benefit from any grace period, and had to immediately leave the U.S. if their employment was terminated to avoid being considered in violation of their nonimmigrant status. Because the 60-day grace period was itself created by a rule, the Biden administration could easily promulgate a new rule extending the grace period to 180 days, for example, or even longer. To avoid Administrative Procedure Act (APA) challenges, though, the administration would likely have to follow the strictures of the notice and comment rulemaking process rather than bypassing them under the good cause exception. Notice and comment rulemaking takes time, however, and the relief of an extended grace period might not arrive quickly enough for workers who have already lost their jobs or are laid off in the near future.

The next suggestion is to make clear when the 60 day grace period starts. Many workers are placed on severance or garden leave. The 60 day grace period should start at the end of the severance period. However, a June 2020 USCIS Policy Memo has muddied the waters somewhat. In this memo, 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 seem that the grace period starts when the H-1B worker is no longer in productive status even though they may be paid their full salary during the severance or nonproductive period. The USCIS should clarify that an H-1B worker continues to maintain status so long as the employer-employee relationship has not terminated.

The USCIS also gives officers 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.

One should also note a 1999 advisory opinion concerning reductions in force. USCIS indicated that a severance package that offered terminated H-1B and L-1 employees their normal compensation and benefits for a 60-day period did not preserve the beneficiaries' nonimmigrant status. Specifically, Branch Chief Simmons wrote, "An H-1B nonimmigrant alien is admitted to the United States for the sole purpose of providing services to his or her United States employer. Once H-1B nonimmigrant alien's services for the petitioning United States employer are **terminated**, the alien is no longer in a valid nonimmigrant status. However, an H-1B worker who has not been terminated, but is on leave, can distinguish his or her situation from one who has indeed been terminated."

Instead of all this muddled guidance and mixed messaging, the USCIS should provide straightforward clarification regarding when H-1B status ends, and clearly indicate that H-1B workers who are still maintaining an employer-employee relationship after being given notice ought to be considered in status until the relationship ends.

Another step that the Biden administration can employ to aid laid off nonimmigrant workers is the expeditious issuance of employment authorization documents (EADs) that would allow nonimmigrants to continue working in the United States for a new employer. Under 8 CFR § 204.5(p), an EAD may be issued to individuals in E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status if they can demonstrate compelling circumstances and are the beneficiaries of approved I-140 petitions, but their priority dates are not current. "Compelling circumstances" have never been precisely defined, but DHS suggested some examples of compelling circumstances in the preamble to the high skilled worker rule, which include serious illness and disabilities, employer dispute or retaliation, other substantial harm to the worker, and significant disruptions to the employer. DHS has suggested loss of funding for grants that may invalidate a cap-exempt H-1B status or a corporate restructure that render an L-1 visa status invalid are examples of scenarios that might constitute significant disruption to the employer. Historically, USCIS has rarely issued EADs under compelling circumstances. Given the precarious situation that nonimmigrant workers who are impacted by layoffs will find themselves in, the Biden administration could instruct USCIS to employ this authority to generously grant EADs to individuals who have lost their jobs. Nonimmigrant

workers who are laid off will be forced to uproot their lives on very short notice if they cannot find new employment within 60 days. Many nonimmigrant workers have lived and been employed in the United States for many years. Some have U.S. citizen children and spouses who have also built careers in the United States. Such individuals will face serious hardship if they are forced to abandon their lives in the United States and return to the countries of which they are citizens, a devastating situation that should be interpreted to readily constitute compelling circumstances.

The Biden administration can also utilize a provision at 8 CFR § 214.1(c)(4), which affords USCIS the discretion to accept an untimely filing if "the delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances; he alien has not otherwise violated his or her nonimmigrant status; he alien remains a bona fide nonimmigrant; and he alien is not the subject of deportation proceedings". A nonimmigrant worker whose employer was unable to timely file a petition on his behalf due to a layoff could credibly assert that his uncertain employment situation constituted extraordinary circumstances. If the layoff was the result of a recession or general economic difficulties, it should be demonstrable that the resultant delay of filing the H-1B petition beyond the grace period was not the fault of either the petitioner or the beneficiary. By generously applying this discretionary authority, the USCIS can assist nonimmigrants whose ability to seek a timely extension of status is impacted by a termination.

Ideally, a legislative solution would relieve the immense immigrant visa backlog, which would prevent beneficiaries of I-140 petitions from remaining in a nonimmigrant visa status for years until they can file adjustment of status applications. Proposals for legislative solutions include the recapture of wasted visa numbers from previous years and the allocation of additional visas to backlogged categories. Although *Wang v. Blinken*, No. 20-5076 (D.C. Cir. 2021), a case we have discussed in a previous blog, previously struck the idea down, Congress could assert that INA § 203(d) requires the unitary counting of family members. Even the Administration could contradict *Wang v. Blinken* if it had chutzpah through a rule or policy memo under the *Brand X* doctrine (thus overruling the case everywhere except in the DC Circuit), but this is hard to imagine as it recently successfully contested the plaintiff's contention of unitary counting in that case. Another legislative proposal is to eliminate the per

country limits, but even if that passes, there will still be backlogs although not as terrible right now which could be over a 100 years for Indian born beneficiaries. Of course, finding a legislative solution is easier said than done in a polarized Congress, which will get even more polarized in 2023 when the Republicans take control of the House and the Democrats take control of the Senate. The GOP is too obsessed about border security before making any deal on immigration reform. There is also an urgency to prioritize on a legislative solution for DACA recipients as it is expected that the Supreme Court will uphold the lower courts that have found that DACA is not authorized by the INA. Unless by some stroke of luck the lame duck Congress can cobble together a deal to bring relief to backlogged beneficiaries based on the many proposals on the table, the Biden administration should focus on administrative solutions to bring relief to terminated nonimmigrant workers, who stand to suffer the most in the face of layoffs and economic woes.

Existing Indian born H-1B workers in the employment based green card backlogs who get terminated are far worse off than others. But for the backlogs they may have already had their green cards or become US citizens. Indian born beneficiaries whose labor certifications were filed after April 1, 2012 are still caught in the backlogs and have remained in H-1B status while their contemporaries born in other countries have become US citizens. Making tweaks in existing policies such as extending the 60-day grace period, issuing EADs based on a more generous interpretation of compelling circumstances, and giving more discretionary authority to accept untimely filings under 8 CFR § 214.1(c)(4) can provide some small amelioration to terminated nonimmigrant workers, especially those who are caught in the never ending green card backlogs.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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