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US IMMIGRATION & NATIONALITY LAW

TERMINATION IN THE TWILIGHT ZONE WHEN THE I-485 APPLICATION HAS BEEN PENDING FOR LESS THAN 180 DAYS

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Just a couple of months ago we considered the options available to terminated H-1B workers who want to become entrepreneurs. Since then, layoffs have not abated and we've continued thinking about the options available to laid off nonimmigrant workers. This time, we consider the options available to H-1B workers whose employers have filed I-485 adjustment of status applications on their behalf before they were laid off and the I-485 has been pending for less than 180 days.

For starters, laid off workers can remain in the US while their adjustment applications are pending. They are authorized to remain in the US so long as their I-485 application has not been denied. They should also request that the employer not withdraw the prior approved I-140. Unlike 8 CFR § 214.2(h)(11) which obligates employers to notify the USCIS when an H-1B worker's employment has ended before the end of their authorized period of stay – as that could trigger back wage liability – employers are under no such obligation with respect to I-140 beneficiaries. Therefore, the laid off workers can make a case against the employer's withdrawal of the I-140. Under 8 CFR § 205.1(a)(3)(iii)(C), a petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, remains approved unless its approval is revoked on other grounds.

Thereafter, the laid off workers should seek new employment. Although they may be able to rely on employment authorization that will be issued based on

the I-485 filing, it is recommended that their new employer file an extension of H-1B status on their behalf. They must do that within the 60 day grace period that they have in H-1B status from the termination under 8 CFR § 214.1(l)(2). Remaining in H-1B status provides an added layer of security in case the I-485 is denied for any reason. However, once 180 days passes from the I-485 filing, and they can port, they would be more secure even if there is no underlying H-1B status.

If the laid off worker's adjustment application has been pending for 180 days or more, then they can port to a new employer, and even self-employment, in a same or similar occupation that was the basis of their I-140 petition under INA § 204(j). Once they can port under § 204(j), the labor certification and I-140 petition are preserved, and the foreign worker can be granted permanent residence. 8 CFR § 245.25(a)(2)(ii)(B) even allows a beneficiary to port to a new employer based on an unadjudicated I-140, filed concurrently with an I-485 application, so long as it is approvable at the time of filing. The ability to port under § 204(j) when the I-485 application has been pending for 180 days or more, however, is the best case scenario. If the laid off worker's adjustment application has not been pending for 180 days or more, then he or she cannot port to a same or similar occupation under § 204(j).

Although the laid off worker can remain in the US throughout the pendency of their adjustment application even if no longer employed by the sponsoring employer, the worker may face a bit of a predicament if the USCIS takes an action on the pending adjustment application, for instance, by issuing a Request for Evidence (RFE) or scheduling an interview. If the RFE requests an I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j), and the adjustment application has not been pending for 180 days or more, then the laid off worker is in trouble. As there is usually a 90 day deadline to respond to RFEs, the laid off worker may be able to submit a completed Supplement J, either signed by a new employer or by themselves if self-employed, if the 180th day of submitting their adjustment application comes around before their RFE response deadline. But of course, there may be individuals who are not as lucky. If they do not respond to the RFE, then the adjustment will likely be denied. On the other hand, under INA § 204(j), they cannot submit a Supplement J if 180 days have not elapsed since the filing of their adjustment application. If the adjustment application is subsequently denied, they can submit an I-290B Motion to Reopen or

Reconsider. There is at least an arguable basis that the motion might work

The laid off worker faces a similar problem if they are scheduled for an adjustment interview that will fall on a date that is before the 180th day of their I-485 application filing and will thus be unable to produce an executed Supplement J. While one can reschedule a USCIS interview due to a medical or family emergency, unforeseen events, or other personal circumstances such as a wedding, funeral, or important family event that conflicts with the interview, one may not be able to reschedule an adjustment interview on account of not being able to present a Supplement J, but it is always worth trying.

Suppose the laid off worker does not have to respond to any RFEs or attend any interviews and USCIS approves the adjustment application even though the laid off worker no longer works for the employer that sponsored the green card or intends to work for that employer – then what? From the foreign worker's perspective, they can argue that they were willing to work for the employer who sponsored them but the employer was not willing to give them the job in accordance with the I-140 petition and they should still be granted adjustment of status. There are decisions holding that as long as the noncitizen took up the job or reported for work, and then left later due to a change in intention (as a result of finding a more attractive job elsewhere), this individual could not be found excludable or deportable. In *Matter of Cardoso*, 13 I.&N. Dec. 228 (BIA 1969), the respondent, a Portuguese citizen, was sponsored to work for a Rhode Island employer as a braider tender. Upon reporting to the employer with his wife for work, the foreman indicated that there was a possibility that both would be laid off if they both worked for the employer. Based on the foreman's well intentioned advice, who also stated that he would keep the braider tender job offer open, the respondent worked elsewhere first as a shoelace tipper and then as a bobbin machine operator. The BIA held that it could not impugn the validity of such an admission where a person reported for work and did not take up the job under the circumstances described above or if the person worked for some time with the certified employer but quit because he did not like the work or found a better job elsewhere. *See also Matter of Marcoux*, 12 I.&N. Dec. 827 (BIA 1968) (respondent who left certified trainee weaver job after 5 days for a fiber glass repairer job because he did not like the former job was not found to be deportable because he still had a valid certification at time of entry).

Notwithstanding, the USICS during a naturalization interview may still

determine that lawful permanent residence status was not properly obtained, or even prior to naturalization, the USCIS could rescind that status. Even if the foreign worker can argue that they intended to accept employment there may have still not been a valid offer of employment after the foreign worker was terminated. See *Matter of Rajah*, 25 I.&N. Dec. 127 (although the foreign worker is not required to be employed at the time of adjustment, he must still show the continued existence of an offer of employment as set forth in the labor certification and I-140, and must also demonstrate an intent to accept employment). Therefore, it would be safest if there has been a termination during the twilight period – when the I-485 has not been pending for 180 days – to have another employer file an H-1B extension. Even if the USICS denies the I-485 application if there is an RFE before the 180 days, which cannot be complied with, the foreign worker will be in H-1B status through another employer and that new employer can recapture the old priority date under 8 CFR § 204.5(e) when starting all over with a new labor certification and I-140 petition. If the date is current at the time the I-140 will be filed, then a concurrent I-485 application can also be filed.

Given the glacial pace in adjudicating I-485 applications to completion, it is unlikely that the USCIS will currently issue an RFE within 180 days from its filing, although this blog provides guidance on steps that need to be taken just in case the USCIS becomes efficient!

(This blog is for informational purposes and cannot be relied upon as a substitute for legal advice).

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