JACKSON & HERTOGS
IMMIGRATION AND NATIONALITY LAW SERVICES

EMPLOYMENT TERMINATIONS, NIV AND IV CONSIDERATIONS | FREQUENTLY ASKED QUESTIONS

The information contained in this FAQ memo is general in nature. It cannot be used in lieu of advice from an attorney familiar with immigration law. We encourage you to seek counsel from an attorney who can address your individual case. Please note that unless your employer authorizes our firm to continue to represent you, you will need to seek independent counsel. Even if your employer waives its conflict of interest and allows us to represent you, you may be required to independently retain our firm for continued representation. Please refer to our website at www.jackson-hertogs.com for additional information on the various visa categories referenced below.

Note that this FAQ addresses employment terminations of any kind including resignations and layoffs. The general principals regarding filing applications and/or remaining in the United States apply to any employment separation. For brevity we use the term "termination" generally.

Nonimmigrant Issues – H-1B, H-1B1, L-1, E, O-1, TN, J-1, & F-1 workers

A1. How long can I stay in the U.S. if my employment is terminated?

For E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN nonimmigrants, in the event of termination, there is a grace period of up to 60 consecutive days or until the end of the authorized validity period (typically your Form I-94), whichever is shorter, once during each authorized validity period. During this grace period, they and their dependents will not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of the employment. They could use this grace period to prepare to depart the U.S., to find another employment in the same nonimmigrant visa classification, or to change to another nonimmigrant status. Any new petition or application to change status must be received by USCIS within the prescribed time frame (60 days or I-94 expiration date, whichever is earlier). If it is not filed, then the individual must depart but is not precluded from returning to the US based on a valid visa and any related approved visa petition.

Additionally, the law also allows E-1, E-2, E-3, H-1B, L-1, and TN nonimmigrants to be admitted for an additional 10 days after their validity periods of the petitions end. However, this 10-day grace period is not a period of work authorization. It is worth to note that H-1B1 nonimmigrants are not given the additional 10-day grace period after their validity pored ends.

However, J-1 nonimmigrants are directed by the Department of State (issuing authority) to leave the U.S. immediately if they are unable to maintain/change their status. The 30 day grace period granted to J-1 at the end of their status is not applicable in the event they are termed/laid off and cannot or will not maintain/change their status.

F-1 students in Optional Practical Training (OPT) employed based on an Employment Authorization Document (EAD) must report any material changes, especially the end of their employment, to their Designated School Officials (DSO). Per current guidance, F-1 status holders who cannot or will not maintain/change their status are entitled to either 90 or 150 days of unemployment (depending on if they are in the initial 12 month OPT period or an additional 24 month STEM OPT period).

Note that this FAQ covers layoffs and/or terminations of employees of an E enterprise, but not of the owner(s) or investor(s) of an E enterprise. If you qualified for E status based on your role as owner or investor of the enterprise, please contact your attorney.

A2. What if I get another job offer?

If you are in H-1B, H-1B1, L-1, E-1, E-2, E-3, O-1, or TN status, your employment is specific to your current employer. Therefore, to maintain lawful non-immigrant visa status, your new employer will need to submit a new non-immigrant visa petition on your behalf. As stated in the above section, in the event of termination, you will have a grace period of up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, once during each authorized validity period. , The USCIS generally approves visa petitions to allow extensions of status, as long as the new visa petition is filed within the grace period.

However, if the new visa petition is filed after the grace period lapses, the USCIS has discretionary authority of whether to grant the extension of status; each petition filed after the grace period requesting an extension of status will be considered on a case-by-case basis. The longer the period of time between end of the grace period and the filing of a new petition, the less likely the USCIS will grant an extension of status request. As a result, the visa petition can still be approved, but you may be required to depart the U.S. and obtain a new visa at a U.S. Consulate (or readmission to the U.S. if you hold a valid visa or are a visa-exempt Canadian). F-1* and J-1** status holders also require notification and/or permission to change employers with their authorizing body (international office or program sponsor).

H-1Bs: If you were in H-1B status at the time that your employment terminated, or if you have held H-1B status within the last 6 years and were counted against the H-1B cap, you may not be subject to the annual H-1B cap. If you are not subject to the annual H-1B cap, then your new H-1B petition can be

adjudicated whether or not H-1B visa numbers have been exhausted for that year. In addition, if you have maintained valid H-1B status, you may work for your new employer once the new H-1B visa petition is filed with USCIS (you need not wait for the new H-1B visa petition to be approved before starting your new job). If a prior employer obtained an I-140 immigrant visa petition on your behalf and has not withdrawn the petition within less than 180 days after the approval of I-140, you can anchor H-1B extensions beyond the normal 6 year limitation of stay relying on the approved I-140 petition.

TNs: If you hold TN visa status, you must apply for a new TN status/visa, either through the pre-flight/port of entry process (Canadian), through a Consulate (Mexican), or through a petition filed by your employer with the USCIS. The filing of a TN visa petition with USCIS does not allow you to begin new employment; you must have the extension of status request approved by the USCIS Service Center, or secure new entry to the United States with a new TN admission.

Other Free Trade Agreements: If you are a citizen of ***Singapore/Chile***, you may also be eligible to have a new employer sponsor you for an H-1B1 visa. If you are a citizen of ***Australia***, you may also be eligible to have a new employer sponsor you for an E-3 visa. Some requirements of these categories are similar to the H-1B visa category, but certain procedures are different. Premium processing is now available but applications can also be made directly at the Consulate without filing first with USCIS. These visas are not subject to a maximum time limit and can be renewed indefinitely. NOTE: Unlike regular H-1B status, merely filing a request for a new H-1B1 or E-3 is not sufficient to begin employment with a new sponsor. An approval through the Service Center or Embassy outside the U.S. is required before new employment authorization can begin.

L-1s: If your employment has been terminated while in L-1 visa status and are not offered another position within the corporate family that sponsored you, you will almost certainly be ineligible to continue in L-1 status. In order to qualify for L-1 classification, you must have been employed with an overseas office of your multinational employer for at least one full year within the three years preceding your admission to the U.S. Unless you were employed for a full year with another multinational company within the past three years prior to entering the United States, then no other U.S. employer could sponsor you for L-1 status. Therefore, you will almost certainly have to change to another visa category if eligible to do so.

O-1s: If you already hold O-1 visa status, you may be able to retain that status if your new employer files a new O-1 visa petition on your behalf. You must demonstrate your continuing qualification for this visa category; specifically that you continue to have "extraordinary ability", sustained acclaim, and are among the few at the top of your field. You may not work for the new employer until the new O-1 petition has been approved. For this reason, you may want to consider premium processing for any new petition filed with the USCIS Service Center. If you hold another nonimmigrant status (e.g., L-1), and seek to apply for O-1 status, you must demonstrate that you have "extraordinary ability."

E-1 or E-2: If you already hold E-1 or E-2 visa status, you are authorized to work only for the specific employer which sponsored your visa. Assuming you otherwise qualify, you may be eligible to move to another employer in E-1 or E-2 status, but only if that new employer also shares your nationality. Alternatively, if you have sufficient funds for investment, you may be able to open a new business in the United States that can support your own E visa. You would not be authorized to work for the new employer, even if it is your own company, until the new E visa status is approved (either through an application submitted at the U.S. Consulate in your home country, or through the USCIS). E visas are not subject to a maximum time limit, and can be renewed indefinitely.

All: Note that your employer may notify the USCIS of termination of your employment, and if your visa classification involves an underlying Labor Condition Application (LCA), your employer may withdraw the LCA upon your termination.

***F-1s:** If you are in initial OPT period, you will need to notify and obtain new I-20 endorsement from your school DSO to reflect the change of employment. If you are in 24-month STEM OPT period, in addition to notifying and obtaining new I-20 endorsement from your school DSO, you will also need to submit a new Form I-983 to your school DSO and submit an amended Form I-765 to USCIS to update and amend your already approved STEM OPT application. .

****J-1: You will** require authorization from either the current program sponsor, or may be required to apply for either a transfer or new J-1 program sponsorship, to maintain status. Note that if the J-1 program terminated, certain J-1 categories carry a temporary bar against repeat participation.

A3. What if a new employer does not file a petition for me and/or I do not file an application for change of status after my grace period lapses?

A laid-off foreign national or one who has terminated employment who remains in the U.S. after the grace period lapses, who is not the beneficiary of a timely filed petition for extension/transfer/change of status, and/or who does not timely file for an application for change of status (for example, to visitor or student), is considered to be violating the terms of their nonimmigrant stay. A foreign national who remains in the U.S. after the expiration date on their Form I-94 arrival record (if the Form I-94 states a specific date) plus a 10-day grace period (if available), or after a finding of unlawful presence (if the Form I-94 states D/S or "duration of status") is considered unlawfully present, and is subject to additional penalties, including:

- **Cancellation of any valid U.S. nonimmigrant visas**, and restriction to applying for future visas at their home country consulate,
- **3 year bar** on admission to the U.S., if the foreign national remained unlawfully present in the U.S. for 180 days, and/or
- **10 year bar** on admission to the U.S., if the foreign national remained unlawfully present in the U.S. for 1 year.

Exceptions and waivers may apply in certain circumstances.

For H-1B and O-1 nonimmigrants, your most recent employer sponsor is responsible for providing your "reasonable" return trip expenses to your home country (not including dependents). Since regulations do not provide specific guidance on reasonable costs, the terms of the expenses are subject to usual contract and bargaining conditions within your jurisdiction (i.e. state) if they were not agreed before the termination date.

A4. Can I change my status to another nonimmigrant category if my employment is terminated?

Yes, you may submit an application for change of status to visitor, student, etc. However, the USCIS must determine if you were maintaining a lawful status as of the date your application to change visa status was filed and that you are eligible for the new classification sought. If you are unable to demonstrate maintenance of status as of the date of filing (for example, because of a gap in employment), you may need to leave the United States, apply for a new visa stamp at a U.S. embassy (or readmission to the U.S. if you hold a valid visa or are a visa-exempt Canadian)., and then return before you can work for the new U.S. employer, depending on the classification and your circumstances.

If your application to change visa status is denied, you may begin to accrue unlawful presence in the United States from the date of the denial. Remaining in the United States for more than 180 days following such a denial could have very serious consequences, including becoming subject to a bar on reentry to the United States for three to 10 years. Therefore, be prepared to leave the United States soon after a denial is issued.

B-1/B-2s: The B visitor category is typically not work-authorized. Nonimmigrants who have been working in the U.S. for several years may have difficulties obtaining USCIS approval of an application to change their visa status to B-1/B-2 visitor status. That is because this visa category requires you prove you have no long-term intention of immigrating to the United States. Among other things, applicants need to show substantial ongoing ties to their home country, financial support, and a definite plan to return to their home country on a particular date in the near future.

H-1Bs: Note that if you are seeking to change visa status to H-1B and have not held H-1B status in the past six years, you may not be able to immediately change status to H-1B if the annual "cap" for new H-1B petitions has already been reached for a particular fiscal year. The "cap" limits the total number of new H-1B petitions to 65,000 (plus an additional 20,000 cap numbers reserved for individuals who obtained Master's or higher degrees from US universities). Some employers, such as universities and non-profit research institutions, are not subject to the H-1B annual numerical cap. You will not be able to change to H-1B visa status if no H-1B visas are available at the time the new H-1B petition is filed, or if your intended employer is not exempt from the cap. In this circumstance, unless you apply to change status to another visa status, you cannot remain in the United States.

H-4, L-2, TD and other dependent categories: If your spouse holds an employment category in the U.S. in his/her own right, you should consider filing a change of status to the corresponding dependent visa category. Most of the dependent categories (H-4, TD, O-3) do not allow for the spouse to be employed in the U.S., but you will have status in the U.S. Some do allow for employment authorization (filing of an EAD) such as L-2 and E-2. Some H-4 spouses are also eligible for work authorization if the H-1B spouse is the beneficiary of an approved I-140 immigrant visa petition or is in a period of H-1B extension of stay beyond the six year limit. If your spouse is in J-1 or F-1 status, you can change to J-2 or F-2, respectively in order to maintain status in the U.S.

F-1 considerations: You may be able to return to school. To do this, you must be admitted to a U.S. university/college/institute that is able to issue Forms I-20. You would need to not only be admitted to a program of study and issued the Form I-20 but would have to change status or depart the U.S., apply for the new visa and return in that classification. F-1 students are required to carry a full academic load and have limited options in terms of working off campus during their academic studies.

The above is only a brief summary of the most common but not necessarily exhaustive list of available nonimmigrant visas. The list does not include relief available from applying for a qualified family based immigration petition such as an immediate relative (U.S. citizen parent, spouse, or adult child). We recommend that you arrange for a consultation with an immigration attorney with an expertise in employment-based immigration in order to discuss your particular situation.

A5. Can I continue to travel with my H-1B visa after I am laid off?

No. Once your employment is terminated, you cannot use your H-1B visa (or if Canadian, the H-1B approval notice) to enter the United States unless another employer has filed a new H-1B visa petition on your behalf and you present the USCIS Form I-797 receipt or approval notice for the new employer upon entry. If you are also an I-485 Adjustment of Status (AOS) applicant, you may obtain an Advance Parole document before you travel, and use the Advance Parole document to return to the United States. Please see the below section regarding permanent resident processing issues.

A6. Can I continue to travel with my L visa after my employment is terminated?

No. Once you are separated from your employer, you cannot use your L-1 visa to enter the United States unless you are returning to work for an employer with a qualifying corporate affiliation with the U.S. Company that sponsored your L-1 visa. If you no longer qualify for L-1 status, and if you have a pending AOS application, you will need a valid Advance Parole document.

A7. Can I continue to travel with my TN visa after my employment is terminated?

No. Once you are separated from your employer, you cannot use your TN status to enter the U.S. unless another employer has filed a new TN on your behalf. Furthermore, once you are terminated, you cannot use a TN travel document for the former employer to work for a new employer. You will need to process a new TN (change of employer) either through preflight/border inspections or with a filing with the USCIS. In addition, if you have a pending I-485, your prior TN status was already voided, due to the "nonimmigrant intent" requirements of the TN visa. Once you file an I-485 AOS application, you cannot enter the United States as a TN nonimmigrant without abandoning the pending AOS. You must instead obtain an Advance Parole document.

A8. Can I continue to travel with my H-1B1, O-1, E-1, E-2, E-3, J-1, or F-1 visa after my employment is terminated?

No. Once you are laid off, you cannot use these other types of nonimmigrant classifications to enter the United States unless you are offered a qualifying position by another U.S. employer. For the H-1B1 and E-3, a new application will generally be made at a U.S. Consulate abroad but premium processing is now available for these visa types. For O-1, a new employer will need to file a new petition with USCIS on your behalf prior to travel. E-1 and E-2 status holders may file a new petition prior to travel or may apply for a new visa from a U.S. consulate abroad. J-1 and F-1 nonimmigrants will need their authorizing body (DSO or Program Sponsor) to amend/extend their underlying status document (e.g. Form I-20 or IAP-66) and validate it to authorize travel before they travel

Please note that these nonimmigrant classifications are incompatible with having a pending I-485 AOS application, regardless of whether you continue to be employed or are laid off by the petitioning employer. As such, if you have a pending AOS, you must have an Advance Parole document in your possession prior to any international travel.

Immigrant Issues

B1. What happens to my approved labor certification (PERM) application when I am laid off or terminated or resign?

A pending or approved PERM application will not, in and of itself, provide you any benefit if your employment ends. You can only benefit if your PERM application is not only approved, but also "locked in" by the subsequent filing and approval of an I-140 immigrant petition by your employer. See below. If the PERM is pending when you terminated employment, you cannot keep your priority date (the only time-limited benefit is that if a H-1B extension beyond the 6 year limit is needed, the prior employer's PERM application, if still pending can be used to qualify for a 7th year extension). If the PERM is approved, it is only valid for 6 months. If the employer is unable or unwilling to file an I-140 immigrant visa petition before the PERM approval expires because they can no longer offer you the position, then the PERM simply expires. If the I-140 is pending, then it will depend on whether the employer withdraws the petition or if the USCIS issues a request for evidence to which the employer is unable to respond. In short, if you are terminated with only a PERM approval, the immigrant sponsorship process must start anew. Any new employer will need to proceed with its own PERM application and if/when that is approved, file its own I-140 immigrant visa petition.

B2. What if my employer filed and obtained approval of my I-140 immigrant visa petition when my employment ended, and I have not applied for permanent residency (e.g., I-485 application for Adjustment of Status has not been submitted for any reason including priority date retrogression)?

In most cases, if the I-140 immigrant visa petition has been approved, you can use and "recapture" the secured immigrant visa priority date for a future employment-based immigrant visa petition, unless your employer withdraws the I-140 less than 180 days after its approval

Since there is no longer a job offer based on the original immigrant visa petition, you cannot proceed to file an application for permanent residency (I-485) based on that approved immigrant visa petition. The only exceptions are if secured approval of a "self-filed" immigrant visa petition under either the "extraordinary ability alien" or "national interest waiver" categories. If the immigrant visa petition was filed under either of these two categories, you may be able to continue your immigration process, because both of these categories allow for "self-sponsorship." However, you must continue to pursue the same type of work as outlined in the petition. We strongly urge you to seek advice from an immigration attorney who specializes in these types of cases.

Please note that the approval of an I-140 immigrant visa petition, in and of itself, does not affect your non-immigrant status in the U.S. For most individuals, self-sponsorship is not an option. This means that the new employer must restart the green card process from the beginning. For positions that require a PERM application, then the employer must go through a new test of the labor market; and if no qualified U.S. workers are identified, it can submit its PERM application. If/when the PERM is approved, the employer can then file its own I-140 immigrant visa petition and request that the original

priority date on the prior employers I-140 immigrant visa petition be retained. To do this, you must have a copy of the I-140 approval notice from the first employer or other evidence of the filing and approval.

In limited circumstances, an approved I-140 that has not been withdrawn before 180 days after approval may be utilized to apply for EAD work authorization. See more info below.

B3. What if my pending I-485 Adjustment of Status (AOS) application is not approved at the time my employment ends?

If 180 days have passed since the I-485 AOS application was filed, you may change employers as long as you continue to work in the "same or similar occupation." If the I-140 immigrant visa petition remains pending, USCIS will review the I-140 immigrant visa petition to determine whether it was approvable at the time of filing; i.e., was it a *bona fide* filing by an employer who had the financial ability and the intent to employ you and without regard to your new job. If the I-140 immigrant visa petition is approved, USCIS will then adjudicate your AOS application, and at that time will determine whether your new job is substantially similar to the job described in the original I-140 immigrant visa petition. If USCIS denies the I-140 immigrant visa petition, the I-485 AOS application will also be denied.

Please note also that your former employer may withdraw the I-140 immigrant visa. If your former employer withdraws the I-140 immigrant visa petition before your I-485 AOS application has been pending for 180 days, or if your employer withdraws the I-140 immigrant visa petition less than 180 days after the I-140 approval, the I-485 AOS application may be denied. After your I-485 AOS application has been pending for more than 180 days, a request from your former employer to withdraw the I-140 immigrant visa petition should not impact your I-485 AOS application.

Please note that in all cases you must have work authorization to join the new employer. This means that you either must have an employment authorization document (EAD) or a new H-1B or L-1 visa petition filed on your behalf and work authorization provided by the filing or approval. Again, you should seek advice from an attorney regarding your specific situation. In addition, per USCIS memoranda, the USCIS requires that you affirmatively notify them if you change your employer pursuant to this provision.

B4. If my AOS application has been pending for more than 180 days and my employment terminates, can I become self-employed?

The immigration laws do allow self-employment for certain AOS applicants who are far along enough in the process. You must be able to demonstrate that your new job is in the "same or similar occupation" to that occupation for which the I-140 visa petition was filed. You must also demonstrate that your new job is *bona fide* and full-time. Finally, USCIS will inquire as to whether the I-140 immigrant visa petition represented your former employer's true intention to employ you once you became a permanent resident. USCIS may also inquire as to whether you intended to work for your employer at the time your I-140 and I-485 application was filed. Self-employment is a riskier option, since it may be more difficult to prove that the self-employed position is in the "same or similar" occupation as that described in your approved PERM labor certification. You must also have some form of employment authorization, typically an EAD, to work in the United States while the application remains pending.

B5. If I have obtained an EAD pursuant to an I-485 Adjustment of Status (AOS) application and my employment terminates, can I use it to work for another employer?

The EAD based on a pending AOS application offers unrestricted employment authorization. Therefore, you can use the EAD to work for a new employer. However, if you are in H-1B visa status with an AOS application pending, and you start work for a new employer on an EAD before that employer files an H-1B petition on your behalf, you are no longer maintaining underlying H-1B status. This means that even if you obtain an H-1B approval notice, you would **not** be in H-1B status until you later apply for admission to the US as an H-1B nonimmigrant.

B6. Will my I-485 AOS application be denied if my employment terminates less than 180 days after it was filed?

Not necessarily. USCIS has stated that an I-485 AOS application will not necessarily be denied if the applicant leaves the I-140 immigrant visa petitioner less than 180 days after the AOS application is filed. This is because both the I-140 immigrant visa petition and I-485 AOS application focus on the *prospective* (future) employment of the applicant. That said, both the I-140 immigrant visa petition-filing employer must have intended to offer, and the I-485 AOS applicant must have intended to accept the employment at the time of AOS filing. USCIS has indicated it will investigate such cases as it deems appropriate.

B7. Can I receive additional H extensions beyond the 6th year for another employer based on my currently pending immigrant visa process?

USCIS guidance confirms that H-1B nonimmigrants may seek an extension of stay beyond the sixth year as long as the foreign national is the beneficiary of any PERM labor certification application or I-140 immigrant visa petition filed more than 365 days *prior* to the end of their authorized six-year period of H-1B stay, and pending when the H-1B petition is filed. Furthermore, extensions beyond the normal six year limitation of stay are available if you are the beneficiary of an approved I-140 immigrant visa petition. Neither the approved PERM labor certification nor the approved I-140 immigrant visa petition need be from the same employer requesting the H-1B extension, provided the PERM labor certification is not yet expired and/or the I-140 has not been revoked due to misrepresentation or fraud.

If your prior employer withdraws your approved I-140 immigrant visa petition 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, the I-140 petition will remain approved unless its approval is revoked on other grounds such as fraud or misrepresentation.

You should contact an attorney who specializes in employment-based immigration to confirm H-1B eligibility in a specific case.

B8. Can I extend my EAD after my employment terminates if my I-485 petition remains pending?

Yes, as long as your I-485 AOS application is pending, you may continue to request extensions of your EAD. If the EAD renewal application is timely filed prior to the expiration of the current EAD, the validity period of the EAD will be automatically extended for an additional period not to exceed 180 days from the expiration date of the current EAD.

As with all of these questions, please consult with an immigration attorney regarding the specific facts of your own situation.

B9. Can my Lawful Permanent Resident or U.S. Citizen family member sponsor me?

This will depend on the relationship and the family member's status. If you are married (or will shortly be marrying) a U.S. citizen, in most cases you can be immediately sponsored for permanent resident status or a fiancé/fiancée visa, depending on your situation. If you are married to a Lawful Permanent Resident (green card holder), you should consult an immigration attorney, since immigrant visa numbers are not generally immediately available. Only U.S. citizen children over the age of 21 can sponsor a parent for permanent resident status. If you believe you may qualify for immigration sponsorship through a family relationship, you should arrange for a consultation with an immigration attorney.

B10. Can I apply for an EAD with only just a valid approved I-140?

There is a rule that permits persons in E-3, H-1B, H-1B1, O-1, or L-1 nonimmigrant status to apply for an EAD in possession of an approved I-140, ***provided*** they meet certain conditions:

1. The applicant is the beneficiary of an approved employment-based (EB-1, EB-2, or EB-3) immigrant visa petition,
2. The applicant is unable to apply for adjustment of status or an immigrant visa stamp because her priority date is not current under the Visa Bulletin,
3. The applicant shows "compelling" circumstances justifying the grant of an EAD.

This last requirement of "compelling" circumstances are described as including:

1. serious illness or disability faced by the worker or dependents
2. employer retaliation against the nonimmigrant worker
3. other substantial harm to the applicant
4. significant disruption to the employer

Such highly-discretionary factors to demonstrate "compelling" circumstances make it unlikely many nonimmigrant workers will benefit from this new rule. However, dependent family members (dependent spouses and children) of qualifying applicants may also apply for an EAD. Dependent family members may also apply at the same time as qualifying principal applicants. Qualifying principal EAD applicants and any dependent family members may renew their EADs provided they continue to meet the requirements.