Our Perspective: Options After Layoff or Termination of H-1B Employment

Layoff or termination is challenging for all employees. Add the complexity of work authorization as an H-1B employee, complexity and challenges are even greater. In this guide, we break down the information individuals must know in order to remain in compliance with all U.S. immigration laws.

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INTERNATIONAL LEGAL AND BUSINESS SERVICES GROUP

About Us

ILBSG is a law firm focusing on U.S. Immigration and Global Mobility Services.

Our business is to understand yours - and your challenges. We are trusted for our successful representations, primarily in immigration, international arbitration, and contracts. Our clients consistently rate us highly, noting our strategic insights, attention to detail, and personal attentiveness.

With proprietary technology central to our processes, we deliver an efficient and personalized legal solution, enabling clients to access our services anytime, anywhere. Clients also see the status of each case anytime, in real-time.

Our organization is MSDC-certified minority-owned, ISO-9001 Quality Management System certified, and our attorneys are licensed to practice in the states of NY, CA, and IL We are also licensed in the U.S. District Court for the Northern District of Illinois, U.S. District Court for the Southern District of California, U.S. Court of International Trade, U.S. Tax Court, and multiple foreign jurisdictions.

Our team speaks 12 languages and employs high levels of cultural sensitivity, always focused on the experience of the individual.

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Below is a brief explanation of the options for H-1B holders after termination from employment, and for H-1B holders who currently have an employment-based green card application being adjudicated.

H-1B Holders

Individuals who are terminated while on their H-1B employment visa have the following options:

1. Transfer H-1B employment to another employer within the 60-day grace period;
2. Change to another non-immigrant status within the 60-day grace period; or
3. Change to another non-immigrant status within the 60-day grace period.

1. Filing an H-1B Transfer Employment within the 60-day Grace Period

What is the 60-Day Grace Period Rule?

If you are an H-1B holder who has been laid off before your approval or I-94 expires, DHS Rule 8 CFR 214.1(1)(2) provides a period of up to 60 consecutive days, or until the end of your authorized validity period, whichever is shorter, for you to

1) find new employment; i.e., another employer who will sponsor your H-1B,
2) change to a different nonimmigrant classification, or
3) prepare to leave the United States.

During the 60-day period, you are technically not in valid H-1B status – your H-1B employment ends when your approved employment ends – but you have not violated your nonimmigrant status either. In other words, during your grace period, you are not out of status and therefore not at risk of immediate deportation for failure to maintain status. Before 8 CFR 214.1(1)(2) became the final rule in 2017, DHS gave laid-off H-1B employees just 10 days to regain valid status or leave the country. With the new rule, however, DHS's goal is to enhance H-1B portability by giving affected individuals more flexibility and, ideally, more time to find a solution that would allow them to remain in the U.S.

What Should I Do During My 60-Day Period?

Calculate how much time you have.

It is important to note that the 60-day grace period is discretionary – neither DHS nor USCIS guarantee you the full 60 days, and every agency decision is fact-specific. You will need to know

1) the date you were laid off and
2) if your current authorized validity period is shorter than the 60-day grace period.

Be sure to check your I-94 expiration date – if this date is earlier than your approval expiration date, the I-94 date is controlling.

Start actively looking for another job NOW.

The H-1B Portability Provisions in INA § 214(n) provide that, should a laid-off H-1B employee find new employer within the grace period, the new employer can file an H-1B transfer petition to ensure maintenance of status.

You should update your resume, polish up your LinkedIn profile, and start spreading the word that you are looking to start working for a new company as soon as possible. We recommend also notifying prospective employers up front that you will need H-1B sponsorship right away so that they may initiate your petition quickly.

Do NOT travel outside the US.

Leaving the US during your grace period effectively terminates your grace period. You will be required to seek reentry as a new nonimmigrant visa applicant, which is a lengthy process dependent on several deadline-dependent factors such as the H-1B cap or quota (see the next section).

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If I've Found a New Employer to Sponsor my H-1B, When Can I Go Back to Work?

If you look for answers to this question online, you will see that this is a bit of a grey area under DHS's rule, and different immigration firms and blogs offer varying and sometimes contradictory answers. To clear up some confusion, here is ILBSG's approach to this question: when your new employer files your H-1B transfer petition and you are still in your 60-day grace period, can you start working for your new employer when the petition is filed, or do you need to wait for USCIS to issue an approval?

What DHS says – in 8 CFR 214.1(1)(2), DHS expressly declined to provide continuing work authorizations for individuals in the 60-day grace period, stating that this is "consistent with longstanding policy." On the basis of the rule alone, then, the safe option is to wait for USCIS to adjudicate and approve your petition before starting work. However, the new rule cites the American Competitiveness in the 21st Century Act (AC21), which allows H-1B candidates in most other circumstances to begin working for their new employer once the petition is filed with USCIS – hence the confusion.

What ILBSG sees in practice – ILBSG has not seen the issue of employment authorization during grace periods raised or enforced when applicable. The reality is that some people may not be able to afford to be out of work for up to 2 months. Moreover, prohibiting affected individuals from earn a living after suddenly losing their jobs seems contrary to DHS's intent to provide flexibility and protection under the new rule.

Again, this issue is always fact-specific – it is important to speak with one of our experienced ILBSG immigration attorneys who can advise you based on your particular circumstances.

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2. Change to Another Non-Immigrant Status

If you are an H-1B holder and you suspect your employer will terminate your H-1B employment soon, or your employment has already been terminated, but have not been able to secure another H-1B employer within the 60-day grace period, then you have other options. One of these is to apply for a change of status.

One of the statuses an H-1B holder can change to is an H4. To qualify for a change of status to H4, the candidate must have a spouse that is currently on valid H-1B status. An I-539, change of status form, can be filed with USCIS requesting a change of status from H-1B to H4 based on the H-1B spouse's status. If the H-1B spouse has a valid and approved I-140, then the candidate can also apply for an H4 EAD to get work authorization. However, the candidate cannot work on the H4 EAD until it is approved by USCIS.

As an alternative to applying for a change of status to H4, you can instead step out of the country with the H-1B spouse's approval and apply for an H4 stamp at the U.S consulate overseas. Once you have obtained the H4 stamp, you can then re-enter the U.S. on H4 status. Once in the U.S. on H4, you can then apply for H4 EAD to receive work authorization. The candidate can work on the EAD once it is approved by USCIS.

3. Leaving the U.S. and Filing an H-1B Cap Exempt Petition

If you are an H-1B holder and cannot secure another H-1B employer within the 60-day grace period, and you do not have the option to file a change of status, then you will have to leave the U.S. After leaving the U.S., you can wait to re-enter until after your H-1B is refiled as a new cap-exempt petition. It is important to know if the transfer will be subject to H-1B cap restrictions. Below you will find the difference between Cap-Subject and Cap-Exempt petitions.

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What Do Cap-Subject and Cap-Exempt Mean?

Every year, USCIS dedicates a specific number of H-1B petitions during a period known as the H-1B cap or quota (also referred to as the H-1B lottery). The H-1B cap carries very specific requirements and restrictions for registering and filing petitions and can only be utilized during the designated time of year ("cap season"). If successful, an H-1B cap candidate whose petition is approved is deemed as having been counted against the H-1B cap.

The terms "cap-subject" and "cap-exempt" apply to both candidates and to their sponsoring prospective employers.

Cap-exempt employers are those who, due to the nature of their business as defined by federal regulations, are not restricted to H-1B cap season and requirements – USCIS defines common cap-exempt employers as "institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization." You can find more information on how USCIS defines cap-exempt employers here.

Cap-exempt employees are those who have already been counted against the H-1B cap in the last six years and are also not restricted to the H-1B cap, as they will not be counted a second time.

If you are a cap-exempt employee or your sponsor is a cap-exempt employer, then you can apply for the cap-exempt petition at any time. Otherwise, you are subject to the cap and are required to comply with cap requirements and timelines are cap-subject.

For more information about the H-1B cap in general, you can find our articles on the subject on our website or reach out to us for specific questions.

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How Does This Affect a Laid-off H-1B Worker?

If you are an employee: you will need to determine whether you are a cap-subject or cap-exempt employee.

Most likely you are cap-exempt because you have already been granted H-1B status, which means you were already counted against the cap and will not be counted a second time. However, there may be circumstances specific to your situation that would make you cap-subject. Our experienced immigration attorneys will work with you based on your eligibility.

If you are an employer: you will need to

1) verify whether you are a cap-subject or cap-exempt employer due to the nature of your business, and
2) verify whether your prospective employee is cap-subject or cap-exempt.

If you are familiar with the H-1B cap process already, it is probably because you have dealt with it before as a cap-subject employer. But you are not barred from sponsoring an H-1B transfer petition outside of cap season simply because you are a cap-subject employer – if the prospective employee is cap-exempt, you may still file to transfer their employment to your company.

Be sure to consult an ILBSG attorney to verify your eligibility to sponsor such a transfer petition, and to have our experienced professionals quickly and efficiently guide you through the filing process itself.

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Can an H-1B holder, whose position was terminated, use the previous H-1B visa stamp to re-enter the U.S. based on new H-1B approval?

If an H-1B candidate cannot transfer their H-1B status to another employer within 60 days or before the end of the I-94 expiration (whichever comes first), then they should leave the U.S. to avoid accruing any unlawful stay in the U.S. As stated above, an H-1B cap-exempt petition can be filed for the beneficiary to re-enter the U.S. after securing a new employer and filing the new H-1B cap-exempt petition. The candidate can travel with their new H-1B approval, without needing to obtain new visa stamping.

A visa is a stamp that is given to an individual in their passport and used only to seek entry into the United States. The United States requires a valid visa to enter the U.S., whether it be for travel or work purposes. If an H-1B holder has a change of employer since their first time entering the U.S. on H-1B status, and they currently have valid and unexpired H-1B visa stamping in their passport, then they may use that visa to re-enter the U.S. The H-1B holder is not required to reapply for a new visa stamp with their new employer's H-1B, but rather can reenter the U.S. with the previous H-1B visa stamping, as long as it is valid and unexpired at the time of re-entry. If they want to avoid any issues traveling with a visa with a previous H-1B receipt number, then by all means they can get a new visa stamping with the new H-1B approval, but new stamping is not required.

Though the H-1B holder will not need a new visa stamping, they will, however, need to carry the new H-1B approval copy, along with the new client documentation at the new employer's location. This documentation will be required to be shown at the port of entry.

If there are any questions or further information is required regarding the H-1B holder's options when terminated from the H-1B employer, please make an appointment with our office to explore the options available for the H-1B candidate during employment termination.

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GREEN CARD RELATED QUESTIONS AFTER LOSING JOB WHILE I-485 IS FILED TO ADJUST STATUS IN THE UNITED STATES

A big portion of the individuals who are losing jobs are “immigrant applicants” whose employment-based green cards are currently underway. This portion of the article will tackle those first few questions that pop up in the minds of these individuals who lost their jobs, with respect to their pending green card status.

Frequently Asked Questions:

What is my current status, and how can I remain in lawful immigration status after the job loss?

If you have already filed for the I-485 application then you are in an “authorized status.” Losing your job does not automatically jeopardize your status. You will remain in status until USCIS reviews your case and subsequently denies the I-485 application.

Usually, when you filed your form I-485, you also filed for employment authorization through EAD (Form I-765) and travel documents through Advance parole (Form I-131). Please ensure to file these forms immediately if you haven’t already filed them along with your I-485. The EAD will allow you to work for any employer without requiring the employer to petition on your behalf for any work permit. The Advance Parole will allow you to travel, but it is definitely not a great idea to travel until your I-485 is sorted out.

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What are the possible situations regarding my I-458 Status post-job loss?

With respect to this section, there are two possible situations, both of which are addressed below:

SITUATION ONE/ MORE FAVORABLE SITUATION:

As per the American Competitiveness of the Twenty-First Century Act referred to as AC21 – Individuals whose I-485 application has been pending for more than **180 days** can switch employers while awaiting your adjustment of status decision if you satisfy the portability requirements. In particular, you must find a job that must be "same or similar" to the job that you had listed in your previous I-140. In that case, you can continue with the current I-485 application. This process of moving to the same or similar job while holding on to your I-485 application is called "porting."

If you have found a similar or same job, then the next step would be to notify USCIS of your new job by submitting Form I-485 Supplement J. There is no fee attached to this form. Supplement J will contain the details of the new job and the new employer. This Supplement J is submitted after the 180-day period, either in response to an RFE that has been issued or to a notice of intent to deny has been issued, or when you appear for your interview. USCIS will continue to process the I-485 application and there should not be any interruption in the process thereafter, and you should be able to adjust your status.

If the new position is not the same or similar, then the pending I-485 will be denied and you will have to start from ground zero. Sometimes your employer might offer you a different position within the same company. The same rules will apply, however, and the new position must be the same or similar to the job petitioned in your I-140.

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If USCIS denies your I-485 because you switched employers without either filing for proper work authorization or without complying with the above-described portability rules, then your green card application will likely be denied. One can only adjust status if you are already maintaining a valid status. If you remain in the U.S. after your I-94 expires, then you will be deemed to have "overstayed" your period of authorized stay.

SITUATION TWO/LESS FAVORABLE SITUATION:

If you are able to find a new job that is not the same or similar, then you will need to ensure that the new employer is willing to sponsor your green card. That new employer may have to start the whole process again, including the labor certification process with an advertisement, recruitment, and filing an I-140 petition. Only then can the employer file an I-485 application. The good news in this situation is that you will still be able to hold on to your old priority date for your I-140 petition.

My Adjustment of status is currently pending with USCIS, and I have an EAD which is about to expire. What should I do?

Due to lengthy adjudication, the temporary EADs that are issued are expiring even before the candidate is called for an interview or adjusted status. In this case, you will need to file a new form I-765 to renew your temporary EAD. You can file this application 180 days before the expiration of your current EAD. For green card related EAD, you qualify under the category (c)(9).

It is important to note that effective May 4, 2022, the Department of Homeland Security regulations provides for an automatic EAD extension for a total period of up to 540 days from the expiration date stated on the EAD. The initial extension period was 180 days but was recently increased by 360 days for a total of 540 days for eligible renewal applicants. The automatic extension time is calculated starting with the expiration date of the employment authorization and/or EAD. You can now use your filing receipt as proof of your work authorization.

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This temporary increase is available to eligible renewal applicants with pending applications if you filed your Form I-765 renewal application either:

- Before May 4, 2022, and your 180-day automatic extension has since expired;
- Before May 4, 2022, and your 180-day automatic extension has not yet expired or
- Between May 4, 2022, and Oct. 26, 2023, inclusive of these dates.

If you file your Form I-765 renewal application after Oct. 26, 2023, the normal 180-day automatic extension period will apply.

We know it can be discouraging when you receive notice of a job loss. However, there are many options available, which we encourage you to consider. Using an experienced immigration attorney is a great way to explore those alternative options, as an attorney can assess your individual situation and advise you on what may be possible.

At ILBSG, we are here to help. If you're interested in exploring different routes to live and work in the U.S. after being laid off, please reach out to an ILBSG attorney today. Our team of experienced attorneys works directly with our clients to ensure they get the right advice to maximize their odds of a successful outcome.

Have questions about the the H-1B Visa and eligibility?

Contact us anytime at Info@BizLegalServices.com

Access more guides on our website at www.BizLegalServices.com

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