
IMMIGRATION CONSEQUENCES OF LAYOFFS FOR H-1B WORKERS

1. How long can I stay in the US after my H-1B job ends?

A person in H-1B status is legally authorized to remain in the US only as long as they are employed with the H-1B petitioner (“sponsor”). If the employee is laid off, the H-1B worker and dependents in H-4 status immediately lose their status. In reality, most people need at least a few weeks to pack up and sell their residence, take children out of school, etc. While staying in the US to finalize arrangements for leaving is not strictly “legal”, it is very common for foreign nationals to do this.

Laid-off H-1B employees could file to change to visitor status to allow them remain in the US to make repatriation arrangement. As long as the application is filed while the worker remains in status, s/he will remain in status for up to 120 days while the change of status application is pending. The worker will also have to file a new non-immigrant application if s/he stays in the US and finds a new position.

2. Can I stay in the US to look for another job?

The US Citizenship and Immigration Service (CIS) will commonly approve a new H-1B petition as an automatic change of employer if the H-1B holder can provide a paystub less than 30 days (and sometimes even 60 days) old. This means that CIS may approve the change of employer even if the employee has not worked for the former employer for a month or more.

The gap between when a laid-off H-1B worker ends their job and when they file the new H-1B petition is not strictly a period when they are in status. However, as mentioned. CIS will usually overlook this gap in approving a change of employer.

If a new employer files a new H-1B petition and CIS does not approve an automatic change of employer, CIS might still approve the H-1B as a “notify.” This means the worker must leave the US, get a new H-1B visa at a consulate if the existing visa has expired, and return in the new H status to “effect” the new employer’s H-1B.

If the H-1B worker manages to find a new employer before leaving the old job, or very soon afterwards, s/he might be eligible for H-1B “portability.” This allows a H-1B worker to start working for a new employer as soon as the new H-1B petition is filed, rather than wait for it to be approved. Another piece of good news is that the H-1B worker should not be subject to the H-1B cap since s/he was already counted.

3. What are my employer’s obligations if I am laid off?

The H-1B regulations require an employer to pay “the reasonable costs of return transportation of the alien abroad” if the H-1B worker is dismissed before the H-1B period ends.

4. Can I collect unemployment or other benefits while unemployed?

When a nonimmigrant remains in the US in a visa category that prohibits employment (e.g. B-2), or while an employment-based visa is pending, the person is generally not eligible to collect unemployment compensation under most states laws. This is because unemployment statutes usually require that an individual must be available to work and authorized to accept work to be eligible for benefits. This means that these nonimmigrants cannot claim benefits even though they paid unemployment taxes while they were employed.

5. Can I change to another status to stay in the US?

As mentioned above, you can request a change to visitor (B-2) status. If you are able to find a new employer, you may be able to use one of the other work-authorized statuses if the H-1B is not appropriate. For example, if you Canadian or Mexican you might be eligible for a TN status if you are working on one of the TN occupations. If you enroll in school you could get F-1 status. The categories for which you are eligible are very case-specific, so it is critical to get formal legal advice about your exact situation.

6. What happens to my green card process if I am laid off?

If you have reached the final step of the permanent residence process, and have filed your Adjustment of Status (AOS), you may be able to remain in the US while the AOS is pending. Just having the AOS filed does not, however, allow you to work in the US or return from international travel once your H-1B ends. You must have specific work authorization (an EAD) to allow you to work and Advance Parole to allow you return from overseas.

A foreign national is permitted change employers and keep the AOS filing if the AOS has been on file for 180 days or more, and the new occupation is in the “same or similar occupational classification” as the one that formed the basis of the permanent residence filing. This means that e H-1B worker who was a Software Engineer for Employer A and then got a job as a Software Engineer for Company B would qualify. However a Software Engineer who went to work as a French teacher could not use this “portability” provision.

If you have not reached the final step of the permanent residence process, unfortunately you cannot complete the existing permanent residence process.