

Charting the Course for H-1Bs and Other Visas Through COVID-19

Labor & Employment Law Update

By Jacqueline Lentini McCullough on May 27, 2020

U.S. Immigration laws and regulations have always required immigration attorneys to have a certain level of creativity to problem solve. Keeping current on regulation changes, combined with creativity, helped me navigate the paths to my clients' goals even when they took unexpected turns.

The COVID-19 pandemic has taken creative problem solving and preparedness to a whole new level.

Here are six situations I am helping clients navigate.

Work-from-Home Effect on H-1Bs

U.S. Citizenship and Immigration Services (USCIS) is a traditional organization that has not caught up with some of the modern work world's innovations. They prefer brick-and-mortar offices as evidence H-1B employees are working.

On a temporary basis, given our reality in many states, H-1Bs working from home is okay within certain parameters. However, if work from home were to become a permanent change, it could jeopardize their status.

Compliance for H-1B Employees Working from Home

H-1B employees working from home need to post the company's Labor Condition Application (LCA) notice in their home for 10 consecutive days and complete the posting sheet. The posting sheet must then be sent to the employer and placed in the employer's Public Access File.

Though this procedure sounds silly, it is important to comply with USCIS regulations.

Work and Pay Reduction Effects on H-1Bs

Clients have asked if they can reduce all of their employees' hours by 20 percent to avoid work force reductions and have their H-1Bs remain in good standing.

The answer is it depends.

If a wage range was listed on the LCA, it will work.

Otherwise, pay reductions would still need to maintain the prevailing wage or risk violating Department of Labor (DOL) regulations and incurring fines. Pay reductions will require filing a new LCA.

Depending on the person's salary, a ten percent reduction may not negatively impact the H-1B visa holder's status.

Work Force Reduction Effect on H-1Bs

H-1B status is based on continuous employment during the visa's duration. Loss of a job jeopardizes the visa. If terminated from the job, the H-1B employee has 60 days to find another one and to amend the H-1B before losing status.

Employers who decide to terminate an H-1B employee must notify the employee and USCIS and offer the employee the reasonable cost of return transportation.

Application Filing During COVID-19

We are in the midst of H-1B filing season and are continuing to file L-1s, Employment Authorization Documents (EADs) and green card applications on behalf of clients.

All applications require a "wet signature," meaning the applicant signs with ink and there is evidence the application is original, like having an indentation on the reverse side where the pen was pressed into the paper.

For the moment USCIS is accepting copies of wet signatures, but I am having clients send the originals as well just to be ready for any inquiries. E-signatures are not the same and are not accepted.

USCIS's preference for brick-and-mortar offices to show green card applicants are gainfully employed makes applying for a green card dicey right now. I'm advising clients who can wait to do so.

For others who may be nearing the end of their 6-year H-1B stay, I am helping them assemble the best application possible given the circumstances.

Travel During COVID-19

Many embassies and consulates have reduced or suspended visa processing services. Some posts are starting to accept appointments for late July/early August, such as the U.S. Embassy in London and the U.S. Consulate in Frankfurt.

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Acquiring passport photos has become difficult. Walmart is now offering a service where you can upload photos taken following U.S. federal guidelines and they will print them for you to pick up.

Visa holder clients who had been planning to travel because their status was expiring have had to file with immigration because they can't leave. Clients and their family members who have passports expiring soon have had to get extensions.

Visitors in the U.S. who came via the Visa Waiver Program (VWP), which allows citizens of participating countries to travel to the U.S. for up to 90 days without a visa, have had trouble securing travel for when their 90 days has expired.

The U.S. Custom and Borders Protection (CBP) issued guidance to ports of entry to grant these visitors a 30-day extension via a request for Satisfactory Departure. To avoid jeopardizing their ability to visit the U.S. in the future, VWP visitors need to request Satisfactory Departure before their 90 days expire.

As you can see, the intricacies of immigration regulations coupled with COVID-19 complications require diligence and creative problem solving to keep visa holders in status and applications in process.

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