U.S. Department of Justice
Immigration and Naturalization Service

Office of Adjudications

425 I Street NW
Washington, DC 20536

MAR 27 2001

Wendi S. Lazar, Esq.
Law Offices of Wendi S. Lazar
100 Church Street, Suite 1605
New York, New York, 10007

Dear Mrs. Lazar:

This letter is in response to your March 21 inquiry regarding the status issues that arise when H-1B workers are fired by their employers.

As you know, there has been a great deal of confusion regarding this issue. There have been rumors of a "grace period." One internet article went so far as to state that the INS was going to "let it slide" when these workers lost their jobs. Other articles have mentioned the possibility of applying for a grace period or waiver when one loses one's job. I thank you for the opportunity to clarify this confusing situation.

I first wish to clarify the terminology used in this situation. Many news reports refer to "laid off" H-1B workers. However, the term "laid off" has a specific meaning in the immigration context. A "laid off" nonimmigrant worker is one who is simply in inactive status for the employer. Most commonly this term is associated with the practice of "benching," in which an H-1B employer places the alien worker in inactive status due to work slowdowns, time in between contracts, etc. When this is the case, or when the alien is not performing work for the employer because of his own needs, such as sick leave, vacation, etc., the alien is not considered to be out of status simply due to the inactivity so long as the employment relationship continues. In this context, it is worth noting the recent Department of Labor Rule published in the Federal Register at 65 FR 80110. That rule provides that in the "benching" context, an employer must either continue to pay the alien the required wage or if not, then terminate the alien. While Service regulations do not currently require that an employer notify the Service and revoke the petition upon termination of the alien, many employers do, and this is the ideal practice in this situation.

The situation in which an alien is "laid off" should be contrasted with the situation in which an employee is "fired" or terminated and no employment relationship continues. When the employment relationship does not continue then the alien is no longer in H-1B status upon the moment of termination. As you know, an H-1B alien is one coming to the United States to perform services in a specialty occupation for a specific employer. Put more simply, such a

nonimmigrant is admitted to the United States to perform specific services for a specific employer, just as every nonimmigrant is admitted to the United States for a specific, unique purpose. Once this purpose is no longer being served, then the alien is no longer maintaining status because he is no longer performing services in a specialty occupation. This is no different than the situation of the nonimmigrant student who drops out of school or that of any nonimmigrant who either fails to continue to undertake the activities for which he was admitted or performs additional activities for which he was not admitted. Upon the failure to maintain nonimmigrant status, such an alien is immediately deportable under section 237(a)(C)(i) as an alien who "failed to maintain the nonimmigrant status in which the alien was admitted." In this context, it is worth noting what is known as the "return transportation requirement." As you know, Section 214(a)(c)(5) of the Act imposes a return transportation requirement upon the employer upon the dismissal of the H-1B nonimmigrant when dismissal occurs before the end of the period of authorized admission. This provision is meant to protect the nonimmigrant worker by ensuring that he has a means to depart the U.S. upon termination of employment and works in tandem with the concept that status ends immediately upon termination.

There is no "grace period" which can be applied for in this situation, and no waiver applicable to the status violation. Besides the possibility of removal in this situation, the status violation would affect the possibility of an extension of or change to H-1B nonimmigrant status. 8 CFR 214.1(c)(4) states that an extension of stay may not be approved if the alien failed to maintain the previous status or where the status expired before the extension application was filed. Failure to file an extension of status before the expiration of the period of authorized status may be excused by the Service if such failure is due to extraordinary circumstances. 8 CFR 248.1(b) applies the same test to an application for change of nonimmigrant status.

Notwithstanding this fact, I am aware that there have been rumors of a ten-day grace period in these situations. These rumors are a misunderstanding of two other provisions of immigration law and practice. First, as you know, 8 C.F.R. § 214.2(h)(13)(i)(A) provides that an H-1B nonimmigrant should be admitted to the United States for the validity period of the H-1B petition, plus a period of ten days after the validity period ends. This ten-day time period applies only to aliens who complete their time period of admission, not to aliens who fail to maintain status during the period of admission. Also, INS Operations Instruction 214.1 states that when an extension application is denied and fewer than ten days remain of the alien's period of admission or the period of admission has already passed, then the alien should be given ten days from the date of the denial to depart the United States. I can only surmise that the terms of both these provisions have been either misunderstood or miscommunicated and have together led to the concept that a ten-day grace period attaches after a failure to maintain status.

I am aware that these provisions may work a hardship in some cases. In that regard, it is worth referring to the purpose of the H-1B program and employment-based immigration generally. Employment-based immigration is meant to supplement the U.S. job force. It is meant to satisfy specific needs of specific employers when employers cannot fill positions by looking to the U.S. workforce. When an employer is forced to terminate alien (and U.S)

workers, it would seem that this need may no longer exist. The employment-based immigration program was never intended to provide a source of competition for U.S. workers, and the current structure of law and policy in this area of immigration reflects this fact. Whether this fundamental concept of immigration law can or should be reexamined is obviously beyond the authority of the Service.

I regret that I could not be more hopeful regarding this situation, however I hope you find the information in this letter useful.

Sincerely,

Efren Hernandez III
Director, Business and Trade Services Branch
Office of Adjudications