



RESPONSE TO THE SPREAD OF COVID-19: THE IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS

March 31, 2020 – Clara Mager, Linda Armstrong, Reginald Pacis

Linda Armstrong

**RESPONSE TO THE SPREAD OF COVID-19:
THE IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS**

IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS

- Challenging times for employers and employees
- Employers want to retain talent
- Foreign National employees want to maintain status, remain in the U.S. legally and, in many cases, obtain permanent resident status
- U.S. Consulates around the world have suspended processing visa applications
- Travel bans are in place
- USCIS field offices are currently closed
- USCIS Regional Service Centers are still operating
- Premium processing has been suspended
- To date, the USCIS and DOL have provided no guidance regarding the impact of covid-19 on foreign nationals and their status in the U.S.

IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS

- We will discuss the following:
 - Impact of furlough and layoffs on foreign national employees in the most utilized nonimmigrant classifications
 - Options available to maintain status and retain talent
 - Changes in Form I-9 and e-verify
 - Most recent updates from Government

Clara Mager

**RESPONSE TO THE SPREAD OF COVID-19:
THE IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS**

IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS

Many foreign national employees are working in the U.S. in one of the following nonimmigrant classifications:

- H-1B – Employees in specialty occupation
- L-1A/L-1B – Intracompany transferees in executive/manager/specialized knowledge position
- E-2 – Treaty investors or employees of treaty investor
- O-1 – Employees with extraordinary ability
- TN/TN2 – NAFTA Professionals (Canada and Mexico)
- F-1/Opt – Students with Optional Practical Training

H-1B Specialty Occupation

Labor Condition Application (LCA)

- With limited exceptions, the employer must pay the H1B worker the required wage, even during nonproductive status.
- The employer must provide H1B workers with the same working conditions and benefits offered to similarly-employed U.S. workers.
- The employer must attest that the employment of H1B workers will not adversely affect the working conditions (such as hours, vacations, and benefits) of similarly-employed U.S. workers.
- The employer must also attest that there is no strike, lockout, or work stoppage on the date the LCA is filed.
- Finally, the employer must provide notice of the filing of the LCA. The employer must provide the H1B worker with a copy of the LCA.

H-1B Specialty Occupation

- Cannot bench employee –need to pay employee based on the terms of LCA
- Can file an amended Petition with USCIS to reflect reduction in hours
- If working remotely, need to confirm if location is within same MSA as the location listed in the LCA
- Evaluate if new LCA required, if posting required at remote location and if amended petition needs to be filed

H-1B Specialty Occupation

H-1B possible scenario #1

- No furlough and employee works remotely at full pay
- Employee does not trigger 60 day grace period
- Determine if remote work location is in the same MSA as initial LCA
- If remote work location is not in the same MSA determine if new LCA and posting are required

H-1B Specialty Occupation

H-1B possible scenario #2

- Furlough employee for two weeks with pay
- H-1B employee does not trigger 60 day grace period
- H-1B employee resumes work after two week furlough

H-1B Specialty Occupation

H-1B possible scenario #3

- Furlough for two weeks without pay
- Employee triggers 60 day grace period
- If the H-1B Petition is not revoked and the LCA not withdrawn, employer can rehire employee during the 60 day grace period
- 60 day grace period can be used once during an authorized period of stay

H-1B Specialty Occupation

H-1B possible scenario #3 continued

- Employer risks claim for back pay
- Employer can file new LCA for reduced hours
- Posting of LCA required
- Amended Petition required to be filed with USCIS
- Not subject to the H-1B lottery/quota

H-1B Specialty Occupation

H-1B possible scenario #4

- Employer decides to terminate employee
- To protect against claim for back wages
 - Employer request revocation of H-1B Petition by USCIS
 - Employer withdraws the LCA as a matter of prudence
- Some employer will risk back wages if employer plans to rehire the person

IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS

H-1B possible scenario 4

- If the H-1B Petition is not revoked and the LCA not withdrawn, employer can rehire employee during the 60 day grace period
- 60 day grace period can be used once during an authorized period of stay
- If H-1B Petition is revoked and LCA withdrawn, employer can file a new H-1B Petition within the 60 day grace period and rehire the employee

Reginald Pacis

**RESPONSE TO THE SPREAD OF COVID-19:
THE IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS**

Considerations for Other Classifications

- L-1, E, TN, O, P
- Nonimmigrant intent
- Sponsorship system
- Maintaining status means Maintaining Employer/Employee relationship
- “Lifeline”



Avoid Cutting the Lifeline



- No Change: Keep the employee employed
- Reduction in pay
- Furlough
- Change of hours
- Filing for unemployment
 - “Can” versus “Should”

F-1 Foreign Students

- OPT (Optional Practical Training)
 - 90 days unemployment allowed
- OPT STEM (Science Technology, Engineering and Mathematics field)
 - Notify University sponsor of significant change of training plans
 - Additional 60 days unemployment allowed



Last Resort Options

- Return home: can't fall out of status if not in the U.S.
 - L-1A/L-1B reassign them to company abroad
 - TN or TN-2 returns to Canada or Mexico
 - Quarantine considerations
- Grace Period
 - Terminate employee.
 - Employee and dependent family members have a 60 day grace period to legally remain in the U.S.
 - Employee cannot work.
 - Any Company can rehire during the 60 days period **as long as eligible**
 - May need to file a new Petition depending on the classification.



More on Last Resort Options

- Find another employer another employer during the Grace Period
- In certain classifications the new employer will need to file a new Petition during the Grace Period to re-establish a possible future 60 day Grace Period.
- If employee is not rehired, cannot find a new employer or cannot leave the U.S. due to the covid-19 virus, it is possible to change to visitor status which will provide time to deal with circumstances related to the covid-19 virus.
 - Lose protection of “Grace Periods”
 - May have to explain later change of status to a work authorized status from Visitor to H-1B, L-1, etc. because intent not really to “visit.”
- Exercise of Discretion to future change or extension of status requests
- Seeking to protect against a future challenge by Department of Labor or Immigration Service to the employer or employee on the immigration status

IMPORTANT THINGS TO KNOW

- Important to know which status
- Expiration date of status
- Whether employee is in the green card process
- What stage of the green card process
- Spouse and children in dependent status

Linda Armstrong

**RESPONSE TO THE SPREAD OF COVID-19:
THE IMPACT ON EMPLOYMENT OF FOREIGN NATIONALS**

Temporary Flexibility of Form I-9 Requirements

- Applies to employers and workplaces that are operating remotely
- Defers the physical presence requirement associated with completing the Form I-9
- Employer must still inspect Form I-9, Section 2 documents within 3 business days from date of hire, but they may do so remotely
- Once normal operations resume, employees must provide Section 2 documents in person

Everify Extends Timeframes

- Everify is extending timeframes to resolve Social Security Administration Tentative Non-confirmations (TNC's) due to office closures
- Everify is also extending timeframes to take action to resolve Department of Homeland Security TNC's, in limited circumstances, when the employee cannot resolve a TNC due to public or private office closure

Recent Government Updates

- USCIS temporarily suspends in person services at all Field Offices and Application Support Centers through at least April 7, 2020.
- Naturalization Oath ceremonies are temporarily suspended.
- US permanent resident interviews are temporarily suspended
- Appointments for Field Office, Application Support Centers, Oath ceremonies and permanent resident interviews will automatically be rescheduled

Recent Government Updates

- Employers granted extension to May 19, 2020, to respond to Department of Homeland Security Form I-9 Notices of Inspection (NOI's) for those received during March 2020.
- Employers who receive USCIS Requests for Evidence (RFE) or Notices of Intent to Deny (NOID) dated March 1, 2020 through May 1, 2020, may submit responses within 60 calendar days after the response deadline set forth in the RFE or NOID before USCIS will take any action

Recent Government Updates

- USCIS premium processing is suspended for all I-129 and I-140 petitions
- USCIS will accept forms and documents without original “wet” signature” for submissions on or after March 21, 2020 for the duration of the COVID 19 National Emergency
- Visa Waiver/ ESTA: Satisfactory Departure



Linda Armstrong | 313.983.7476 | armstrong@butzel.com

Clara Mager | 313.225.7077 | mager@butzel.com

Reggie Pacis | 313.983.6929 | pacis@butzel.com

QUESTIONS?

DISCLAIMER

These materials and presentations are intended and designed for informational purposes only and reflect the state of the law as of March 30, 2020 – they do not provide legal advice and no attorney-client relationship is created. No liability is assumed in connection with the use of these materials. Legal counsel should be consulted regarding how applicable law impacts your situations.