

Effect of Lay-off on Immigration Status

Typically, an alien worker's non-immigrant status such as H-1 or L-1 ceases on the day he or she is laid off by the petitioning employer for the non-immigrant status. Severance package does not affect this date. There is not any grace period if the employee is terminated or laid off. If the alien has already filed I-485 and his or her I-485 has been pending for over six month, then he or she can continue to stay in US legally and is able to port to a new position using his or her current EAD. But at the time of adjudication of your I-485, the alien must have a "same or similar" job offer available to him or her. Otherwise his or her I-485 will be denied. Once the alien's I-485 is denied, his or her unlawful presence starts to accrue. The time period during which your I-485 is pending is not considered as unlawful presence.

If the alien worker has not filed I-485, or the alien's I-485 has been pending for less than 180 day period, and his or her employer seeks to withdraw the alien's I-140 before the 180th day during which I-485 has been pending, then the alien could lose his or her entire I-140 process. Theoretically, an alien would need to leave the country as soon as USCIS denies your I-485 and/or revoked your I-140. If the alien overstays his or her visa by not leaving the country after his or her I-485 is denied, the alien starts to accrue unlawful presence. If the alien finds another job after having overstayed for less than 180 day, the alien would have to obtain a new H-1 or L-1 visa from U.S. consulate overseas (following approved petition in the U.S.) to reenter the US. But if the alien overstays his or her visa for 180 days or more, then the alien will be subject to 3 year bar once he or she leaves US. Alien workers should never want to overstay your status by 180 days or more.

For those who have found a new position after having overstayed their visa for less than 180 days and have their I-485 denied, they would have to start the I-140 process all over again. However, if their I-140 was not revoked, then they still retain the priority date of the original I-140 when they adjust their status in the future. When these applicants apply for adjustment of status, they would have to claim 245(k) exemption of their unlawful presence, as long as their total number of days of unlawful presence and unauthorized employment are not over 180 days. Make sure you don't engage in any unauthorized employment during these 180 days, because unlawful presence and unauthorized employment are counted separately when calculating the 180 days. The 180 day limit starts all over again every time you gain a lawful entry into the US.

The issue revolving around termination of a non-immigrant worker is a complex one. Please call or email us for specific consultation.

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