



COVID-19'S EFFECTS ON EMPLOYMENT AND IMMIGRATION STATUS

Aja Pardini, Partner
Daniel Aharoni & Partners LLP
575 Madison Avenue, Suite 1006, New York, NY 10022
www.danielaharoni.com

VOLUNTEER LAWYERS FOR THE ARTS

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Maintenance of Status vs. Eligibility for Relief

- **Whether you are able to maintain your visa status** is a separate question from **whether you are able to accept various forms of relief** that may now be available to you as a result of the economic impact of COVID-19.
 - **Maintenance of Status** dictates whether you remain in valid legal visa status in the United States. This will affect both your current status and future immigration status. You want to be sure you safeguard yourself from any lapses in status if you can possibly avoid them.
 - **Eligibility for Relief** dictates whether you qualify for specific forms of relief that are becoming available in direct response to this global crisis. Eligibility may vary by state and visa holders' eligibility for many forms of relief is being discussed / argued about by immigration attorneys on a daily basis all of whom seem to have the best intentions for their clients.

Presentation Outline

I. Maintenance of Status – How does this affect my Visa?

A. Termination of Employment and Consequences

- i. Termination of most petition-based visas
- ii. Exceptions:
 - O-1B Multi-Employer / Agent-based Petitions
 - Employment Authorization Document
- iii. What can I do in my 30-day or 60-day Grace Period?

B. Partial Reduction in Hours / Wages

C. Voluntary Unpaid Leave

Presentation Outline cont.

II. Eligibility for Relief – can / should I accept assistance?

A. Government-funded Relief

- i. Stimulus Checks
- ii. Unemployment Insurance
- iii. Paycheck Protection Program (PPP)
- iv. Emergency Injury Disaster Loan (EIDL)

B. Privately-funded Relief

C. Public Charge Regulations

A. TERMINATION OF EMPLOYMENT

- **Termination / Lay Off / Furlough** – ALL these terms indicate cessation of employment (either permanently or temporarily) and may have an immediate consequence related to maintenance of nonimmigrant visa status

i. Termination of Visa Status

- IF your visa is petition-based and your sole employer is your petitioner, then in most cases, if your job ends, your visa ends.
 - E1, E2, E3, H1B, H1B1, L1, O1, and TN visa holders have a 60-day grace period during which time they are NOT eligible to work but ARE eligible to change their status and / or depart the United States.
 - J-1 visa holders have a 30-day grace period – same limitations as above

ii. Exceptions

- **O-1B** (multi-employer / agent-based), likely maintain status even following termination of employment.
- **E-2D, F-1 / OPT – with Employment Authorization Document** likely maintain status even following termination of employment.
- **Permanent Residents** of the United States - NO effect to status

O-1B Multi-Employer / Agent-Based Petition

- IF your petition allows you to work for multiple employers, provided you continue to 'work' in your area of extraordinary ability, you should be able to maintain status without issue. Create a daily log of activities / projects.
 - Example: Visual Artist has regular work as an instructor and that position is terminated. You can maintain visa status by continuing to produce work in your studio / at home etc.
 - Example: Musician has regular work as a performer and all currently planned future performances are cancelled. You can maintain visa status by continuing to write, rehearse music.
 - Example: Actor / Producer / Director (theatre or film/TV) has regular employment such as a long-term production which is terminated. You can maintain status by working on self-generated productions and/or rehearsing / continuing training.

Employment Authorization Document (“EAD”)

- IF you have employment authorization your status is likely not immediately affected / terminated as a result of the termination of your current employment WITH LIMITATIONS!
 - F-1 / OPT provided you do not exceed 90 days of unemployment – remember this is cumulative NOT consecutive
 - E-2D, L-2D, H-4 (with work authorization) and other dependent status provided the status of the principal is secure
 - DACA – your status is NOT affected by a termination of employment*

* The issue with DACA and several nonimmigrant visas (O-1B multi-employer and F-1 / OPT) is that although status may be maintained, beneficiaries are extremely limited in the relief that they can seek during this crisis if they want to maintain status. More to come on that topic.

iii. What can I do in my 60-day or 30-day grace period?

- During this time you can seek future employment and / or file a change of status to another visa type OR to another visa structure
 - Example: Visual Artist's petitioner gallery closes **permanently**. They have 60 days in which to find a new petitioner and to file a new visa petition or to change status to tourist* or to leave the U.S.
 - Example: J-1 Trainee's musical theatre organization terminates all employees and the trainee. Trainee has 30 days in which to find a new J-1 training program, or to file a new visa petition such as an O-1B (nearly impossible on that timeline) change status to tourist* or to leave the U.S.
- **Change of Status to Tourist for Pleasure**: You can file an I-539 change of status to tourist requesting a period of time – up to 6 months – to tie up loose ends, organize your things etc. while you plan your departure from the U.S. You would need to show sufficient funds to cover a plane ticket home among other documents. These are usually not reviewed / adjudicated for at least three months and usually much longer. We often see a final decision after the end of the requested period. USCIS does not look favorably on a change of status to tourist followed by a change of status to another nonimmigrant status.

B. PARTIAL REDUCTION IN HOURS / WAGES

- In most cases, this does not end your visa status but may require notifications of the changes be provided to the U.S. Citizenship and Immigration Service (“USCIS”) and/or the U.S. Department of State (“DOS”) and/or the U.S. Department of Labor (“DOL”)
 - H-1B / H-1B1 - be sure your employer seeks legal advice before any changes to your hours / wages go into effect
 - If your wages and/or hours are reduced, you may need to file a new Labor Condition Application (“LCA”) with the DOL and re-post
 - Be sure your wage reduction does not take you under the prevailing wage
 - If you are working from home you may need to file a new LCA indicating a new job site
 - O-1B (straight employment) and O-1A, O-2, L-1A and L-1B – may require an amended petition to be filed with USCIS (if a temporary change, likely not necessary)
 - E1, E-2, J-1 – may require notification be sent to DOS such as a simple letter notifying the consulate of the changes (if a temporary change, likely not necessary)
 - F-1 / OPT - should not require amendments as a result of a change in hours / wages, especially if temporary. You can even work in an unpaid capacity and maintain status.

C. UNPAID VOLUNTARY LEAVE

- The golden ticket to maintenance of status? If an employee voluntarily takes an unpaid leave of absence, they can maintain visa status
 - Available to ALL visa types
 - MUST be suggested by the employee, NOT the employer (though the employer CAN make employee aware of this option)
 - There must be a reason identified for the requested leave such as, “I am scared to work right now and need to take a break for my mental health.”
 - There is no maximum amount of time your unpaid leave can last
 - When you return to work, there is no new filing required
 - Employer must keep you on ‘the books’ with full benefits

This can be a great way to proactively maintain status if you fear a termination is in the future.

II. ELIGIBILITY FOR RELIEF

- Now that I lost my job, I need income. Am I eligible to accept any of the forms of relief that most Americans are applying for?

A. Government-funded Relief

- Thus far, the following types of relief have been offered by the U.S. Government*:
 - Stimulus Checks
 - Unemployment Insurance
 - Small Business Loans
 - Paycheck Protection Program (PPP)
 - Economic Injury Disaster Loan (EIDL)

* There may be additional relief offered by State and City government agencies and we are not discussing that in this presentation.

i. Stimulus Checks

- For ANY U.S. tax resident (that includes nonimmigrant visa holders who pass the substantial presence test and are considered a U.S. tax resident), **you MAY accept this relief!**
- \$1,200 per individual, \$2,400 for joint filings, \$500 per dependent child (with some caveats based on earnings).
- Please **see the IRS website** for further details on the amount which could be less than stated above depending on annual earnings: <https://www.irs.gov/coronavirus/economic-impact-payment-information-center>

ii. Unemployment Insurance

- You only qualify for unemployment if you have been **terminated**. If you voluntarily took an **unpaid leave**, or if you are still working at a reduced rate (in most cases) you are NOT eligible for unemployment.
- MOST nonimmigrant visa holders are NOT eligible for unemployment and even if you are eligible, we are advising clients NOT to accept unemployment. **Why??**
 - If you file for unemployment, you unequivocally confirm that your employment has ended. That immediately raises a maintenance of status issue even if you qualify under the new expanded unemployment provisions that allow independent contractors and gig workers to file.
 - Further, as part of the application, you are required to attest that you are authorized to take on any 'suitable' work. That is not true if your employment has ended as, even if you are in a grace period, you are not authorized to work during that time.

Unemployment Insurance cont.

- If you are an **O-1B visa holder with a multi-employer / agent-based petition**, we would still recommend that you NOT file for unemployment even if you are arguably 'authorized to take on suitable work' – **Why??**
 - Again, the application filing indicates to USCIS that your employment has ended. This would **likely raise flags upon renewal or during a consular interview** even if you subsequently resumed work in your field.
 - Even if you remain eligible to work in your field of extraordinary ability, **you must take on employment that requires the services of an alien of extraordinary ability**. Thus, if it went to court, it would likely be determined that you were did not in fact have work authorization during the time you accepted unemployment.
 - We are advising clients NOT to file unless their health and safety is at risk; unless without that funding they are unable to provide safe housing and food etc. for themselves. Again, there are arguments to be made in support of O-1B multi-employer beneficiaries to qualify but we believe the **risk of future issues is too great**.

Unemployment Insurance cont.

- If you currently hold an Employment Authorization Document, you may well be eligible to apply for and receive unemployment
 - **E-2D, H-4, L-2D** and other dependents of nonimmigrant visa holders may be **eligible** provided the principal maintains status
 - **F-1 / OPT** – while you hold an employment authorization document, **you should NOT file** as you could risk maintaining status if you formally acknowledge your employment has ceased. Remember you may only have 90 days of unemployment – **CUMULATIVELY** – during your OPT period.

iii. Paycheck Protection Program

- Small business owners AND/OR **Sole Proprietors / Independent Contractors** can apply for Paycheck Protection Program loans through the Small Business Administration to cover their own earnings for 8 weeks.*
 - You must be a tax resident (see above)
 - Apply directly through your bank OR other banks (PayPal is doing these applications as well)
 - Future funds will likely prioritize minority workers, economically disadvantaged areas, small banks
 - Can cover your earnings based on 2019 numbers for up to 8 weeks
 - You can apply and then decide whether to accept later
 - Most of the funds distributed can be converted into a grant if used for payroll expenses during the 8-week period
 - Whatever is not used becomes a 2-year loan at 1% interest
 - More info found here <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp> OR just go to your bank's website.

***PLEASE NOTE:** You have likely seen news that this funding has all been paid out. We are expecting a new round of funding to be passed by Congress in the near future.

iv. Economic Injury Disaster Loan (EIDL)

- You are very likely eligible to apply for an Economic Injury Disaster Loan (EIDL loan) which is available to any small business with less than 500 employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organization or 501(c)(19) veterans organizations affected by COVID-19.
 - You don't have to accept the loan even if approved but you should apply so you have the option, especially if running a small business
 - You apply directly through the SBA which decides how much you will get (based on basic operating numbers you give them)
 - Loans will be at 3.75% interest for small businesses and 2.75% for private non-profit organizations
 - Term can be for up to 30 years!
 - Apply now because we do not know how long this disaster will last.
 - Apply at www.sba.gov/disaster.

***PLEASE NOTE:** You have likely seen news that this funding has all been paid out. We are expecting a new round of funding to be passed by Congress in the near future.

B. Privately-funded Relief

You can ABSOLUTELY accept privately funded relief in the form of grants and even loans. Some of these programs limit their funding to legal permanent residents and U.S. Citizens but if it is open to all, you may apply and accept funding.*

These are sites that collect information about offers for grants and loans to artists. They are very comprehensive lists but I am sure there are other options out there not included here. So keep your eyes open for opportunities and share with colleagues!

- For all artists:
 - <https://covid19freelanceartistresource.wordpress.com/emergency-funding/>
 - <https://docs.google.com/spreadsheets/d/1fFyKzxtzSFGzzvpRySJNtsVbjJhwnK7-N9KJxSHrW6w/edit#gid=0>
- For Musicians:
 - <https://makemusicny.org/resources>

*Just be sure there is no relationship to the U.S. government...just read the fine print and ensure that this is truly private funding and does not pull from any government funding.

C. Public Charge Regulations

- Legal Permanent Residents are NOT subject to these regulations*
- Currently, these regulations trigger questions when you apply for permanent resident status and when you apply for a change or extension of status.
- **Currently, the public charge regulations do NOT require that you answer whether you have accepted unemployment insurance.** In fact, unemployment insurance is a 'paid-in-benefit' meaning employers and employees pay into this fund and it has been clearly and specifically excluded as a red flag for purposes of a public charge assessment.

* Unless you have been outside the United States for more than 180 days consecutively and are then seeking "readmission".

Other possible immigration-related ramifications of accepting unemployment

- Even though unemployment is CLEARLY excluded from the public charge regulations, we have anecdotal stories of visa applicants being denied visa issuance at U.S. Consulates on the basis of having previously accepted unemployment.
- MOST likely is that this represented clear proof of a period of unemployment to the reviewing officer who concluded the beneficiary **violated status**.
- If you indicated **high earnings** as one of the evidentiary criteria in support of your extraordinary ability, acceptance of unemployment could indicate to the DOS that you **did not maintain your status as an alien of extraordinary ability**.

Resources

- **American Immigration Lawyers Association (AILA)** Practice Pointer re “Considerations when Discussing Unemployment Insurance Benefits with Immigration Clients” posted April 15, 2020
- **New York State Department of Labor** Frequently Asked Questions
- **National Employment Law Project (NELP)** document titled, “Immigrant Workers’ Eligibility for Unemployment Insurance” published March 2020



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VOLUNTEER LAWYERS FOR THE ARTS

1 East 53rd Street, 6th Floor
New York, NY 10022
Art Law Line: (212) 319-2787 ext. 1

VLANY@VLANY.ORG

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