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# H-1B Laid Off Issues

## H-1B Laid Off Issues <sup>[1]</sup>

Submitted by Chief Editor on Nov 12th 2015

### **ANSWER:**

See clip from Attorney Rajiv S. Khanna's conference call video that addresses this question.

<https://youtu.be/F0YZD8zWm88?t=1068> <sup>[2]</sup>

### **FAQ Transcript:**

If you get laid off on H-1B there is no grace period. You get laid off today tomorrow you are out of status.

Answer 1. Not even one day. However when you are getting paid can you not make the argument that since you are getting paid you are still maintaining status. That's a slightly unpredictable argument. It can cut both ways. An example: I did a consultation on garden leave. Garden leave is very common in the financial industry. The employer lets you resign or if they lay you off they will pay you for the couple of months but they don't want you to join another employer. The idea is you should not be able to take their information which is current and apply to a competitor. So in that case those pay checks are strongly set to keep you in status because it is full salary and they are maintaining control over you and they are not letting you do what you please. And that's the assumption.

However severance pay? government has at one point said that they don't consider severance pay to maintenance of status because severance pay seems to be a part of an arrangement were this is not salary you are basically just getting paid sought of a bonus to part company and I have doubts about that. I do not believe that to be a very good legal opinion from the government. I feel as long as my salary amount is getting paid, my deductions are being made, it is does not matter if I have a job or not. So you can certainly argue that. Severance pay doubtful, something like garden leave or regular leave coming out your way is probably ok to maintain status.

Answer 2. Not really. Understand the difference between out of status and unlawful presence. These are two different concepts. If you are on H-1 and you get laid off you are out of status the next day. But you are not unlawfully present until your H-1 is revoked or until your 1-94 expires. For sure unlawful presence begins when 1-94 expires. So unlawful presence and out of status are two different things. You are out of status the following day but you may not be

unlawfully present until you're I-94 expires or revocation of the H-1 occurs. Consequences of being out of status and unlawful presence are quite different. You are out of status that is no bar from getting another H-1B visa, another H-4, L-1, L-2 maybe a problem for F-1 or B-1 visas that have rather weak basis but for H-4, H-1, L-1, L-2 or even O-1 or E-3 this is not a problem. On the other hand if you are unlawfully present for 180 days you are barred from green card or work visa for three years to ten years if you are unlawfully present for one year. So you can't come back without a waiver and waivers are limited.

Answer 3. No because you don't have a job. If you use the same visa to come back in, that could be fraud.

Answer 4. The answer is yes and why not. Government has never made a formal announcement that they will not accept severance as indicative of violation of status. So definitely use them.

Answer 5. That's between you and your new employer. Immigration law does not require you to inform your new employer about termination by the old employer.

Answer 6. It can be many months but revocation should be retroactive so if your employer sent a revocation request which reaches USCIS today even if they act on it three months down the line they will back date it to today. Revocation is effective on the date revocation request is received.

Answer 7. It is up to USCIS, they might allow you status if the facts of your case is such that they require some sympathetic consideration but normally if you are out of status even one day government is well within its right to refuse to issue you status within the country. In these cases I always advice people to file premium processing soon so you know rather quickly where you stand.

Answer 8. B-2 application to maintain status is acceptable sometimes and also objectionable by the government. You can try, you can tell them that you were laid off unexpectedly and you have enough money to support yourself and you will not work without authorization, and that as soon as you find another employer you will immediately apply for an H-1. When all these things are said and done I think you can make a case for a B-2.

Sometimes government has come back and said we cannot give you a B-2 but as long as you get it filed before your current H-1 expires at least you have the right to stay in the US. You can argue in what is called authorized period of stay. But the problem is this. Something you need to be aware of. Let's say your status is expired you have filed for B-2 and it is pending now you found a job remember an H-1 transfer within US will be approved only (most cases) if the pending B-2 has been approved in your favor by the time USCIS decides the H-1 transfer. If the case is still pending they will not give you status within USA, they will ask you to go for visa stamping. That is not a problem. You can do that but be mindful of that. If the B-2 is still pending or the B-2 is denied you will have to leave USA. The only time you get H-1B within USA is if by the time they decide your second H-1 and your B-2 is already approved in your favor.

You will be cap exempt. That is not a problem because cap just says if you have been approved anytime in the last six years you are not subject to the quota.

Answer 9. Why not. On the one hand we are arguing that's keeping you in status. On the

other government could take the position that means you are violating status and I would say ?no? because that is payment for work already done. They are giving me severance not because I am working for them; it?s because I already worked for them and this is either a payment for work already done or part of the arrangement while I was working. In order for employment to be unauthorized there must be a payment or remuneration as well as work. If there is payment without work or work without payment I think that is a good argument that?s not an unauthorized employment.

Answer 11. There is no consistency. I have seen them ignore not even one day they will come back and say no you were out of status for one day, in some situations they have done for two or three months. Most of the times they are not tolerant of this issue at all.

Answer 12. I think B-2is a good idea as long as you understand the implications of a B-2.

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[H-1 Visa](#) [4]

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**Unless the context shows otherwise, all answers here were provided by [Rajiv](#) [9] and were compiled and reported by our editorial team from comments and blog on [immigration.com](#) [10]**

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