

Job-hopping in US gets tougher for H-1B holders

TOI timesofindia.indiatimes.com/world/us/job-hopping-in-us-gets-tougher-for-h-1b-holders/articleshow/69088330.cms

April 29, 2019

Lubna Kably | TNN | Updated: Apr 29, 2019, 8:56 IST

Highlights

- It is getting tougher for H-1B visa holders to switch jobs
- Even if the new job is similar, the United States Citizenship and Immigration Services (USCIS), in several cases, has denied the application by the new employer on various grounds
- The most common reason for denial is that the new position does not constitute a 'specialty occupation'

It is getting tougher for
H-1B visa holders

to switch jobs. Even if the new job is similar and calls for the same set of skills, the United States Citizenship and Immigration Services (USCIS), in several cases, has denied the application by the new employer on various grounds. The most common reason for denial is that the new position does not constitute a 'specialty occupation'.

The biggest challenge here is that the individual who is job-hopping could find himself or herself 'out of status', with a bar on entry in the US for three to ten years. Usha Sagarwala, an Indian citizen, had lived in the US since 2012 on an H-1B visa. When she sought to change jobs in 2018, the USCIS denied the new employer's petition for transfer as the new position did not constitute a 'specialty occupation'.

Recently, when she applied for preliminary injunction for retaining her H-1B status, till she pursued a law suit over her H-1B denial for the new job, the US Federal Court declined to intervene. The court noted that she had failed to substantiate the kind of economic harm that justifies the court's intervention.

NEW CHALLENGE

- USCIS has at times **denied requests from a new employer** when an H-1B visa holder wanted to switch jobs
- Common ground for denial is that new position is **not a speciality occupation**
- If H-1B holder starts working elsewhere and transfer is denied, he could be '**out of status**'



The Federal Court, in its order dated April 16, observed that the only piece of evidence that Sagarwala has submitted is a short declaration that focuses mostly on what will happen if she is forced to go back to India.

In her case before the Federal Court, Sagarwala stated that she relied on her salary to pay her \$3,711 monthly mortgage and other expenses but she did not specify how much she relied on it. No information was available of her household income, or her current financial situation, the Federal Court stated.

For Indians who have a long wait for a green card, the ability to switch jobs is vital. Cyrus D Mehta, New York-based immigration attorney and founder of a law firm, explained the process to TOI . The new employer must file an H-1B petition all over again for the foreign worker and also seek an extension of the H-1B status. "The law allows the H-1B visa holder to port to the new employer after the filing, but it is best to wait for the approval before jumping ship," he said.

"If the H-1B visa holder already starts working for the new employer and the transfer gets denied, then this could lead to an out-of-status scenario unless the old employer is willing to take back the worker under the previous H-1B approval, which may seldom happen," added Mehta.

"An out-of-status scenario, for the H-1B visa holder and his or her dependents (such as spouse and children) would mean a three-to-ten-year bar from re-entering the country. The mechanism to redress an H-1B denial (including that of a transfer) is also highly inefficient," said Rajiv S Khanna, managing attorney at Immigration.com.

"Typically, there is no grace period if the H-1B status has already expired by the time the denial intimation is received. If, however there is time remaining on the original H-1B approval with the old employer, the beneficiary will have a 60-day grace period or the time remaining on the original approval, whichever is shorter," Khanna said.

According to Khanna, in case of denial, three choices are available. These are — refiling the denied case and hope for a better outcome the second time, filing an appeal or a lawsuit. The last two options are time consuming and often inadvisable.

"The silver lining is that H-1B premium processing, which requires USCIS to make a decision within 15 days, has been reinstated. Therefore, an application can be made in advance of moving to a new employer to determine whether or not USCIS will approve the transfer request," Mehta stated.