THE LAW OFFICE OF SHEELA MURTHY, P. C.

U.S. IMMIGRATION LAW

10451 Mill Run Circle, Suite 100
Owings Mills, Maryland, 21117-5594, USA

Tel: 410-356-5440 | Fax: 410-356-5669
Email: law@murthy.com | Website: www.murthy.com

February 12, 2002

Mr. Efren Hernandez,
Director, Business and Trade Services Branch
Immigration and Naturalization Service
Office of Adjudications
425 I Street, NW
Washington, D.C. 20536

Re: Utilization of "Dormant" H-1B Approvals

Dear Mr. Hernandez:

We are writing to obtain clarification regarding the Service's position with respect to the following issue affecting H-1B workers. Some H-1B workers have multiple petition approvals. We have received a number of inquiries regarding the ability to maintain status by returning to work for a prior employer with a valid petition approval and I-94 or initiating employment based upon a petition and I-94 that were approved quite some time previous to the employment.

Specifically, the first scenario is as follows. H-1B worker works for company A for a year and a half, pursuant to a valid H-1 petition and valid status. The petition is valid for three years, as is the I-94. Thereafter, the worker changes employment to company B, pursuant to a new H-1 petition, which is approved. He works for company B for six months. After the six months, he wants to go back to company A. One year remains on the company A petition and I-94.

With respect to this, we would like to know the following, of course always based upon employment during a time period when the petitions in question and I-94s are valid:

1. Does the return to company A place the individual in lawful immigration status?
2. Does the answer change if there is a period of unemployment between the work for company B and the return to company A?

The second, related scenario is as follows. H-1 worker has petitions and I-94s approved through company A and company B; they each run concurrently for three years. The H-1B worker works for company A for 2 years and wants to take up employment with company B. The questions for this scenario remain the same:

1. Does the move to company B maintain the individual's status?
2. Does the answer change if there is a period of unemployment between the work for A and starting work for B?

We are aware that the Service addressed this matter in 1993, and indicated that an H-1 worker could take up employment and continue status on old, "dormant"

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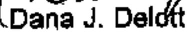
petitions. Since that time, the Department of Labor issued regulations and interpretations indicating that the employer in such a case will be liable for back pay throughout the validity of the petition. Since it is highly unlikely that employers will be willing to pay back pay in these scenarios, unless specifically fined by the DOL, we are wondering whether the INS interpretation of this matter is in any way impacted by the DOL regulations, or has changed in any way over time.

We appreciate your guidance on this matter.

Very truly yours,

Sheela Murthy



Dana J. Delott

U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/6.2.8

Office of Adjudications

425 I Street NW
Washington, DC 20536

APR 24 2002

Ms. Sheela Murthy
10451 Mill Run Circle, Suite 100
Owings Mills, MD 21117

Dear Ms. Murthy:

This refers to your letter of February 12, in which you pose a number of questions relating to the H-1B nonimmigrant classification. I apologize for the delay in responding to your letter.

In the first scenario described in your letter, an H-1B alien works for Company A and subsequently transfers to Company B. After 6 months, the alien transfers back to Company A.

In the second scenario, an alien is the beneficiary of two H-1B petitions filed by two separate companies. The alien works for Company A for two years and then decides to transfer to Company B. Based on these scenarios you ask whether the alien has maintained status.

Approved H-1B petitions remain valid until they either expire or are revoked by the Immigration and Naturalization Service. In the scenarios described above, the alien can transfer between the two employers as long as both supporting H-1B petitions remain valid. The alien is also considered to be maintaining nonimmigrant status during these transfers.

You also asked whether the alien continues to maintain status if he or she was unemployed before he or she transferred between the two employers.

An alien is considered to be maintaining lawful status if he or she continues to comply with the terms of his or her H-1B admission. An alien is not considered to be maintaining status if he or she is terminated from his or her H-1B employment regardless of the validity of the supporting petition.

Ms. Sheela Murthy
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As you note, the Department of Labor has issued regulations that address the liability of H-1B employers for back wages in these types of situations. These new regulations have no impact on the policy described in this letter.

Finally, you are reminded of the provisions of Section 105 of the American Competitiveness in the Twenty-First Century Act that allows for certain H-1B aliens to begin employment with a new H-1B employer if the employer merely files an H-1B petition in the beneficiary's behalf. As a result, even if the petitions filed by the first employer described in your letter where deemed invalid, the alien could return to the initial employer upon the filing of an I-129 petition by that employer.

I trust this response satisfactorily addresses your concerns.

Sincerely,

Efren Hernandez III
Director, Business and Trade Services