

Roll Call



H-1B workers lose jobs, legal status amid pandemic

Tanvi Misra

April 15, 2020

Like millions of people in the United States, Sudip Upadhyay was laid off in March, as the economic fallout of the coronavirus pandemic became apparent. Now, if he doesn't find an employer who hires him and petitions for his work visa within the next 50 days, he may also lose his legal status.

"If everything ends like this, then that American Dream was not for me," he said.

Upadhyay came to the United States from Mumbai, India, in 2013 to attend graduate school at Southern Methodist University in Dallas. After obtaining his master's degree in telecommunication and networking, he worked with tech companies in Texas, Illinois and, most recently, New York.

His most recent work authorization came from the H-1B specialty visa, granted to foreign guest workers who have at least a four-year college degree. This visa program is commonly associated with the information technology sector, but it is also used to employ workers in health care, education, academia and marketing, among other fields. Each year, 65,000 H-1B visas are given out, a cap set by Congress. When the number of applications exceeds that cap, as it has done every year since 2004, the ones ultimately processed are selected through a lottery.

Upadhyay's petition for a work visa was selected on his third attempt, in 2018. But the same employer that sponsored his work visa, a company that produces key duplication kiosks, laid him off on March 30. By that time, the coronavirus pandemic had swung into full gear, and many of the stores with which his company partnered had shuttered.

H-1B visa holders have to abide by strict rules and timelines to maintain their legal status, said Sarah Pierce, a policy analyst at the nonpartisan Migration Policy Institute.

"In order to stay in status for the H1-B visa, you need to be working for the employer that you said you were working for. You need to be working the hours that you said you would be working, at the location that you said you would be working," she said.

"Any major changes to your employment require filing a new application, which, of course, is logistically difficult in our current environment."

If a person in Upadhyay's position does not file a fresh H-1B application with a new employer within 60 days, they could risk what in legal parlance is called "accruing unlawful presence." The longer this person stays in the United States beyond their authorized period, the more severe

the long-term immigration and travel penalties may become. For staying 12 months or more, a person can be barred from entering the United States for 10 years.

To avoid those penalties, the government typically recommends voluntarily departing the United States, but even that option isn't readily available to Upadhyay. India, his home country, has instituted strict restrictions during its nationwide lockdown, leaving many of its citizens stranded abroad.

“That's not in my hand,” Upadhyay said about the notion of leaving the United States. “What is in my hand is applying to the maximum number of jobs so I can find someone, they give me a job, and transfer the visa as quickly as possible.”

Tax-paying noncitizens

Upadhyay portions his days between applying for jobs and studying up on skills he may need for any openings he sees — including ones that may not entirely be in his wheelhouse.

While he searches for work, Upadhyay is not eligible for unemployment. Nor is his layoff, or that of the many other H-1B workers he knows, reflected in national unemployment numbers.

He noted an irony in the federal benefits he typically cannot receive: “I see my tax returns, and I see that I'm paying the Social Security tax and Medicare tax.”

But on Wednesday, Upadhyay discovered a check deposited in his bank account as part of the coronavirus aid dispatched by Congress, which he called a “relief.” Some non-immigrant workers appear to be eligible for the same assistance, but it's not clear how many.

Some critics of the H-1B visa program have pointed out its susceptibility to fraud, while others see it as a way for U.S. companies to displace American employees with cheaper labor. But many employers say it is a useful way to recruit specialized labor in short supply. And for foreign workers without immediate U.S. citizen relatives, the H-1B may be the only viable path to citizenship.

International students at U.S. colleges often apply for this visa when they are near the end of their student visa-related work authorization, like Upadhyay did. If they get the three-year H-1B visa, they can extend for another three years, after which they must ask their employers to sponsor an employment-based green card if they want to remain in the country.

According to a recent estimate by the libertarian Cato Institute, around a million people — mainly from India — currently are stuck in the backlog for this kind of green card, living on provisionally extended H-1Bs for years in the interim. During this time, their ability to stay in the country remains contingent on continued employment with their company sponsor.

During the pandemic, all of the people at various stages of the H-1B employment-based immigration pipeline are at risk of losing their jobs, and potentially, their legal status. Many furloughed workers also would not be able to comply with the legal requirements of the visa.

“There are people on temporary visas of many kinds who are incredibly vulnerable right now,” said Doug Rand, co-founder of Boundless Immigration, a technology company that helps immigrants obtain green cards and citizenship.

“We’re talking about millions of people here who’re on temporary work visas,” said Rand, an assistant director for entrepreneurship in the Obama administration's Office of Science and Technology Policy.

Pandemic postponements

While finding a new employer to sponsor an H-1B visa is tough enough within a 60-day timeline, the economic, logistical, and administrative conditions created by the pandemic have made it even more difficult, experts say.

For one, U.S. Citizenship and Immigration Services has closed its offices countrywide and suspended services that require in-person interaction due to COVID-19 fears. Under the Trump administration, the agency had already been requesting more paperwork, taking longer to process it and denying more applications, attorneys say. Now, it has suspended premium processing, a tool in which employers and visa holders can pay to expedite the processing of applications with sensitive deadlines or ones that need to be re-filed after a denial.

In addition, employers are in a bind due to the economic crisis, said Nell Barker, a Chicago-based immigration lawyer. Even if they are interested in hiring people like Upadhyay who are on the market, they may not be willing or able to sponsor his visa. Similarly, for H-1B workers nearing their six-year visa limit, getting their bosses to commit to sponsoring a green card during this time seems unlikely.

Then, there are the 1 million or so H-1B workers who already have a green card application pending. If they lose their jobs now, “then potentially all is lost — all their work, all their waiting,” Rand said.

“It’s just extraordinary, the level of fear and uncertainty during this pandemic emergency, and the crazy thing about this is that it’s totally avoidable,” he said.

On March 16, the American Immigration Lawyers Association sent a letter to Ken Cuccinelli, who serves as acting director of USCIS, demanding a number of relief measures for immigrants and workers whose status may be affected by the pandemic. Among them was waiving the requirement that H-1B workers file new petitions due to changes in employment. In a follow-up letter, the organization asked for the suspension of all deadlines and the automatic maintenance of all legal statuses for people on work visas for the duration of the national emergency.

On April 3, AILA filed a legal complaint against the agency on the matter.

“USCIS has every power to immediately and temporarily toll any and all immigration-related deadlines and expiration of status to the benefit of U.S. employers, lawfully admitted foreign nationals, and the public,” said Jesse Bless, AILA's director of federal litigation, in an accompanying statement. “Many of those fighting on the front lines — our nurses and healthcare workers — are foreign nationals on nonimmigrant visas.”

In recent weeks, USCIS has offered flexibility with certain deadlines and announced it would reuse old biometrics for certain types of work authorization requests. The agency declined to respond to H-1B-specific questions from CQ Roll Call, but provided a statement via email.

"U.S. Citizenship and Immigration Services has taken steps to help individuals, employers, and others address some of the immigration-related challenges they face as a direct result of the COVID-19 national emergency," the statement said.

"USCIS will continue to monitor the coronavirus pandemic; consider stakeholder recommendations; assess various options related to temporary worker programs in coordination with DHS as the situation evolves; and communicate any changes we make across multiple platforms to ensure the public is fully informed of the steps USCIS is taking to address the challenges resulting from this national emergency."

But the measures taken so far suggest that the agency is "cherry-picking easy solutions without getting at the root of the problem," said Barker. For others, like Rand, the administration's sluggish response to this pandemic points to its immigration agenda, which is to limit both illegal and legal immigration.

The pandemic brings "wrenching uncertainty," Rand said. "The terrible thing about this is that the administration sees it as a feature, not a bug."