AMERICAN IMMIGRATION LAWYERS ASSOCIATION

August 23, 2024

Mr. Nathan Stiefel
Acting USCIS Ombudsman
Office of the Citizenship and Immigration Services Ombudsman
Department of Homeland Security
Mail Stop 0180
Washington, D.C. 20528

Dear Ombudsman Stiefel:

We write on behalf of the American Immigration Lawyers Association (AILA) to seek your assistance with a request to U.S. Citizenship and Immigration Services (USCIS) to provide a process for employers to effect *bona fide* terminations of E-3 Specialty Occupation Workers from Australia and H-1B1 Free Trade Agreement workers in a specialty occupation from Chile and Singapore nonimmigrants for whom the employer has not filed a "petition" with USCIS, but who applied for E-3 or H-1B1 status directly at a U.S. consulate.

According to the Department of Labor (DOL), a bona fide termination requires a three-step process[1]: (i) notify the employee that the employment relationship is terminated; (ii) notify the Department of Homeland Security (DHS) that the employment relationship has been terminated; and (iii) provide the employee with payment for transportation home under certain circumstances. The employer bears the burden of proof that it completed all three steps. Failure to document all three steps can result in significant financial and civil penalties levied against the employer.

At present, no formal process has been confirmed by USCIS or the DOL's Wage and Hour Division to perfect the second step — notification to the Department of Homeland Security of the termination of E-3 or H-1B1 employment obtained through consular application - despite our efforts to obtain clarification on this matter since at least 2017.

An employer facing an investigation by the DOL or a complaint by a terminated E-3 or H-1B1 worker will need proof that the employer has complied with all three steps for a bona fide termination. Typically, when a request to withdraw an H-1B petition which was previously filed with and approved by the USCIS is submitted to USCIS, USCIS will issue a revocation notice, acknowledging the termination of the employment relationship, ending the petition, and providing documentation to the employer of perfection of the second step for a bona fide termination. However, no such agreed upon process exists for employers of E-3 and H-1B1 workers where a petition with USCIS was not required or filed.

[1] *See Gupta v. Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 (ARB Mar. 30, 2007). *See also* AILA DOL Liaison Committee and DOL Wage and Hour (WHD) Meeting minutes of March 15, 2023 – Questions 23 - 26, (AILA Doc. No. 23040407, Posted 04/04/2023).

This quandary arises from 20 C.F.R. §655.731 (c)(7)(ii), which provides that "[p]ayment [of wages] need not be made if there has been a bona fide termination of the employment relationship." DOL regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E))."[2] 8 CFR 214.2(h)(11) provides: "If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition."

However, as discussed, a "petition" is not required to be filed with USCIS for the majority of E-3[3] or H-1B1[4] cases. A beneficiary may apply directly at a U.S. consulate for an E-3 or H-1B1 visa and may then be admitted by CBP in E-3 or H-1B1 status. USCIS is at no point involved in the process and there is no "petition" to have been approved by "the director."

It is our position, therefore, that the requirement to "send a letter" to the "director who approved the petition" cannot apply to employers of E-3 or H-1B1 status holders who sent the employee to a U.S. consulate with an application for an E-3 or H-1B1 visa—and did not file an E-3 or H-1B1 petition with USCIS—as compliance would be impossible.

The DOL's Wage and Hour Division has found otherwise and has awarded back pay to individual E-3 and H-1B1 status holders where the employer had not sent a letter to "the director." See e.g. *Administrator, Wage and Hour Div, USDOL v. S V Technologies, LLC* (consular E-3, backpay of over $30,000 awarded), *James Wayne Linnie v. Murphy Pipelines, Inc*. (consular E-3, backpay of over $330,000 awarded) and *Edmuno Vicuna v. Westfourth Architecture, PC, and Vladimir Arsene* (consular H-1B1, backpay of over $49,000 awarded).

This places employers of E-3 and H-1B1 employees who applied directly at consulates in an impossible position when completing a bona fide termination. AILA's DOL liaison committee has asked the DOL's Wage and Hour Division to clarify how an employer may effectuate a bona fide termination for an E-3 or H-1B1 worker for whom no petition to USCIS has been filed, and the DOL responded that employers should employ the same procedures, including notice to USCIS, for making a bona fide termination in the H-1B context.[5]

Similarly, USCIS was asked to provide a procedure for compliance with 8 CFR 214.2(h)(11) in these situations and USCIS indicated that such letters should not be sent to USCIS. USCIS instead indicated that the employer should contact DOL and the Department of State (DOS).[6] Seemingly, DOL and USCIS instructions for employers of E-3 and H-1B1 workers are in open conflict—despite our sustained efforts to obtain clarification on this matter since at least 2017.

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[2] It is clear that the wage obligations of 20 C.F.R. §655.731 apply to E-3 and H-1B1 nonimmigrants.
[3] See 9 FAM 402.9-8(C)(h).
[4] See 9 FAM 402.10-5(D).
[5] See attached AILA DOL Liaison Committee and DOL Wage and Hour Division Meeting, March 15, 2023, Question 25, which is the most recent discussion of the issue between the Committee and DOL.
[6] See attached e-mail summarizing the USCIS response to AILA's inquiry.

We therefore seek your assistance, as there appears to be no resolution to this quandary. We request that USCIS either:

1. Provide an address, either electronic or physical, for employers to use to notify USCIS of terminations of employees who were in E-3[7] or H-1B1[8] status pursuant to applications filed at consulates;

2. Confirm that any written notification of termination to either the Service Center with jurisdiction over E-3 or H-1B1 petitions or any general USCIS email such as USCISFeedback@uscis.dhs.gov would satisfy the notification requirement under 8 CFR 214.2(h)(11); or

3. Confirm in public guidance that no notification to USCIS is required to effectuate a *bona fide* termination of an E-3 or H-1B1 employee where there was no petition filed with USCIS, so that employers may have official documentation to provide to the DOL's Wage and Hour Division in the event of an investigation.[9]

Clarity is critical as an employer faced with an investigation by the DOL or a complaint by a terminated E-3 or H-1B1 worker is currently required to evidence compliance with all three steps for a bona fide termination.

Thank you in advance for your assistance and we would welcome the opportunity to further engage on this matter with your office. If you have any questions or concerns, please contact Shev Dalal-Dheini at sdalal-dheini@aila.org.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

[7] The USCIS filing location for an E-3 petition could be an option to use, but guidance on the USCIS website is recommended.
[8] The USCIS filing location for an H-1B1 (HSC) petition could be an option to use, but guidance on the USCIS website is recommended.
[9] As evidence of the importance of such clarity, please see U.S. Department of Labor, Wage and Hour Division, FIELD OPERATIONS HANDBOOK 7D107 (Sept. 27, 2016), providing instructions to Wage and Hour Investigators evaluate terminations of H-1B, E-3, and H-1B1 employment. ("The best evidence is a copy of a letter and/or notice sent by the employer to the USCIS, notifying the USCIS that the H-1B worker's employment has been terminated as of a particular date.")