

Immigration Law \approx Foodservice

Layoffs and the Green Card Process

by Becki Young

In the past few months, our office has fielded an increasing number of questions from employers about layoffs and how they affect employees' immigration status. This is a very broad topic, and this brief article will address the issue of layoffs and immigration only in the context of the employment based green card process (PERM labor certification).



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How do layoffs at my company, or throughout the economy, affect my ability to sponsor a worker for a green card?

Despite the difficult economic climate, some employers are still sponsoring certain key employees for employment based green cards.

To successfully complete this process, the employer must show that the sponsored worker is not taking a job from a US worker who is "able, willing, qualified and available" to fill the sponsored worker's job. If the employer has had any layoffs in the geographic area of intended employment within six months of filing the PERM labor certification application (step one of the employment based green card process), the employer must notify and consider any potentially qualified US workers involved in the layoff, and must document the results of this notification.

In addition to this specific layoff notification requirement, it is likely that the general economic climate – including layoffs by other employers in the industry – could affect the labor certification process. Most PERM recruitment is conducted on the "honor system" – sort of like the filing of federal income tax returns - meaning that sponsoring employers are required to recruit for qualified US workers and to document their efforts to do so, but are only required to provide the results of their recruitment to the Department of Labor if asked to do so in the context of an audit. If the audit results are unsatisfactory then employer will be required to conduct a second recruitment supervised by the Department of Labor. In the current economy, it is likely that the number of audits, as well as cases where supervised recruitment is required, will increase significantly.

What if I have to layoff an employee whom I am in the process of sponsoring for a green card?

Another common layoff question that arises in the context of PERM labor certification is: what if the employer needs to layoff the sponsored foreign worker? The good news is, labor certification is a prospective process, meaning that by filing a PERM labor certification application the employer is agreeing to employ the sponsored worker at the end of the process, which can take many years. As long as the employer still intends to re-hire the employee once s/he becomes a permanent resident, and the employee still intends to take up that employment, the sponsorship may continue.

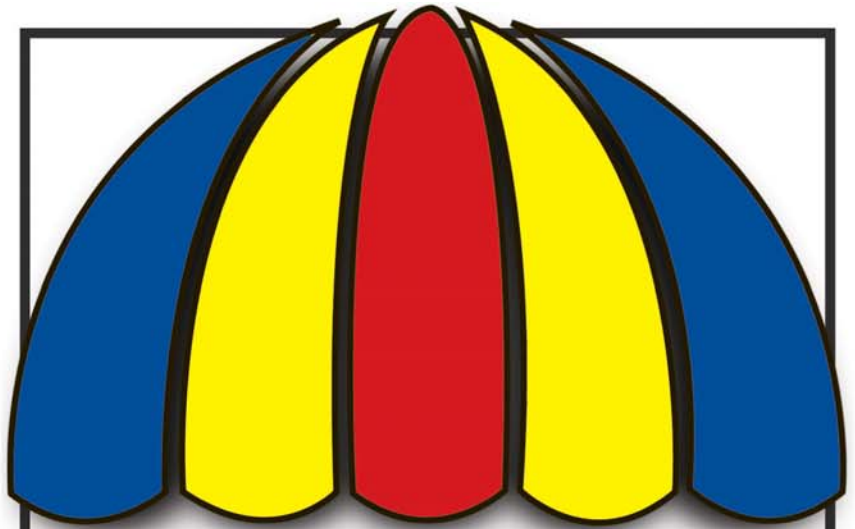
Note, however, the issue of "ability to pay" which can arise in step two of the employment based green card process, the I-140 immigrant visa petition. In this step of the process the employer must show that it can pay the sponsored worker's wages, beginning at the time the PERM labor certification was filed and continuing until the time the worker becomes a permanent resident. When filing the I140 the employer must submit one of three documents: annual report, audited financial statements, or federal income tax returns. The vast majority of employers will have to provide tax returns, since most small and medium sized companies do not have annual reports or audited financial statements. If the employer's tax returns do not show net income sufficient to pay the sponsored worker, the employer can submit alternative documentation including evidence that it is currently paying the worker at the offered salary (and has done so throughout the process), or evidence that its net current assets are sufficient to pay the offered salary.

Conclusion

Issues relating to layoffs, whether they involve a worker being sponsored for labor certification, other workers employed by the sponsoring employer or employers in the same industry, can further complicate the already complex and confusing labor certification process. Employers who encounter such issues are advised to consult a qualified immigration attorney to ensure that all possible steps are taken to protect their workers' status.



Becki L. Young has been working in the field of immigration law since 1995. Ms. Young's practice focuses on employment-based immigration law. She has represented employers in a variety of industries, including investment banking and securities, information technology, health care, and hospitality, providing advice on work permits and related immigration issues. Contact her to learn more or to schedule a personal consultation by calling 202-232-0983 or e-mailing becki.young@blylaw.com.



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