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**USCIS News**

**H-1B cap has been reached**

At 6:36 PM EST, the USCIS announced that it has received enough H-1B petitions to meet this year's congressionally mandated cap of 65,000 new workers. After today, USCIS will no longer accept any new H-1B visa petitions for first-time employment subject to the 2004 Fiscal Year annual cap.

Jackson & Hertogs has been prioritizing H-1B cap cases since the beginning of the fiscal year and cap impacted cases have been treated as urgent. We do expect that some of the pending cases will still be adjudicated; however some will not be adjudicated with a start date for this fiscal year. We will contact clients to discuss affected cases as needed. *If you are concerned about a possible H-1B cap situation, please contact your attorney as soon as possible.*

The USCIS has indicated that the following procedures will be implemented for the remainder of FY2004:

USCIS will process all petitions filed for first-time employment received by the end of business today (February 17, 2004). All petitions for first-time employment subject to the cap which are received after the end of business on February 17, 2004, will be returned to the petitioner/attorney along with the filing fees. The petition may be resubmitted when H-1B visa petitions become available for FY2005 (October 1, 2004). The earliest date that a petitioner may file a petition requesting FY2005 H-1B employment with a start date of October 1, 2004 or later, would be April 1, 2004.

Petitions for individuals who are already in H-1B status do not count against the cap and will continue to be accepted and processed by the USCIS. The annual numerical limit of 65,000 only applies to “new” petitions (i.e. those filed in behalf of prospective specialty occupation professionals who are being accorded H-1B nonimmigrant classification for the first time). Common examples are those filed in behalf of individuals who are presently residing abroad and who will be entering the U.S. to commence H-1B employment, or petitions filed for those who are in the U.S. in a different nonimmigrant status (i.e. B-1/B-2 visitor, F-1 student, J-1 exchange visitor). Petitions for extensions of stay with the same employer, H-1B petitions filed by a new employer for an individual who is already in H-1B status, amended H-1B petitions filed because of changes in job duties/job site, and petitions for concurrent H-1B employment are not counted against the cap. Also not counted against the cap are new employment H-1B petitions where the alien will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or government research organization.

The USCIS will also continue to process H-1B visa petitions for workers from Singapore and Chile consistent with the Free Trade Agreements entered into with these countries reserving 5,800 visas for nationals of Chile and Singapore from the 65,000 annual limit.

For a more detailed discussion of the H-1B cap and its background, please refer to our September 2003 issue of *Immigration Spotlight.*
Application fees increase proposed

USCIS recently proposed an increase to the fees charged for filing petitions and applications. The average increase is $55.

The proposed rule includes a 30-day comment period and, after the USCIS reviews the comments, it will issue a final rule and implement a new fee structure. Comments must be submitted to USCIS no later than March 4, 2004.

For a list of the new proposed fees and information on how to submit comments access http://uscis.gov/graphics/lawsregs/04-2290.pdf.

Changes in RIR processing times

The January 2004 update of the U.S. Department of Labor (DOL) processing times on the DOL website shows significant regression in the Reduction in Recruitment (RIR) processing date in certain regions, particularly in the San Francisco region. The San Francisco DOL office now states that it is currently processing RIR applications received in May 2002. In December 2003, DOL indicated that the San Francisco office was processing RIR cases received in November 2002.

The change in processing dates is a result of the implementation of DOL’s November 2003 memo providing procedural guidance to DOL’s regional offices on the processing of alien employment certifications. In response to the memo, DOL’s regional offices have recalled thousands of RIR cases that were previously remanded to the states. As the regions integrate returned remands back into their RIR processing queues, we expect that processing dates will continue to change. On February 10, 2004, in a conversation with a DOL specialist, we were advised that the San Francisco DOL office has approximately 200 boxes of RIR files that were recently returned to the DOL office. These boxes represent approximately 4000 cases which are waiting to be logged into their system and assigned a case number.

For a more detailed discussion of DOL’s November 2003 memo, please refer to our December 2003 issue of Immigration Spotlight.

Special Focus

NAFTA and Mexican TNs — new procedures

Effective January 1, 2004, Mexican nationals must apply directly with a U.S. consulate for TN nonimmigrant status. It is no longer required that they first obtain an approved Nonimmigrant Petition from USCIS or an approved Labor Condition Application from DOL. The new procedures are set forth by the State Department in a January 22, 2004 cable to U.S. consular posts.

The TN visa category "Professionals Under the North American Free Trade Agreement" is available only to citizens of Mexico and Canada. Under the North American Free Trade Agreement (NAFTA) a citizen of a NAFTA country may work in a professional occupation in another NAFTA country provided that 1) the profession is on the NAFTA list, 2) the foreign national possesses the specific criteria for that profession, 3) the prospective position requires someone in that professional capacity and 4) the foreign national is going to work for a U.S. employer. The spouse and unmarried, minor children of the principal alien are entitled to the derivative TD status, but they are unable to accept employment in the United States.

The individuals must be coming to engage in a business activity in one of the professions listed by NAFTA. Examples of these professions include: accountants, lawyers, medical professionals, engineers, computer systems analysts, scientists, scientific technicians, or management consultants. For a complete list of the professions listed under NAFTA please see our website, http://www.jackson-hertogs.com//?page_id=9096. Typically, individuals must have at least a baccalaureate degree or appropriate qualifications to perform the services of the professions, including state licensure if required.

The TN visa can be preferable to other nonimmigrant visa categories for a number of reasons. TN visas are granted on a yearly basis with no limit of stay required, unlike the six-year limit of H-1B visas or the five-to-seven-year limit of the L visa. In addition, the prevailing wage and record keeping requirements of the H-1B visa do not apply to Canadian TN professionals. Also, a TN visa can be extended in increments of one year for as long as is required to conduct the business activity. Individuals nearing the end of their limits on H or L for up-to-date information, visit us on the web: www.jackson-hertogs.com
visas may qualify for TN status without having to fulfill a one-year-abroad requirement. However, TN professionals must show that they maintain a residence abroad to which they intend to return and that they are not intending immigrants.

Until now, NAFTA subjected Mexican TN professionals to procedures and requirements that differed dramatically from those imposed on their Canadian counterparts. Mexican professionals seeking TN status were required to obtain approval of a Form I-129 Petition for Nonimmigrant Worker from USCIS, as well as approval of a labor condition application (LCA) from the Department of Labor, much like H-1B professionals. Once the petition was approved, the Mexican citizen was required to obtain a TN visa from a U.S. consulate for admission to the United States. Canadian nationals, on the other hand, have been able to apply for TN status directly at a U.S. border through an expedited process without the need of an approved petition, LCA or visa.

Effective January 1, 2004, the process for Mexican nationals will look more like the one for Canadian nationals. Mexican nationals seeking initial TN classification will have to make a visa application at a U.S. consulate, providing proof of citizenship (passport), evidence of an offer of employment in one of the designated TN professions, and evidence that the applicant meets the minimum education and/or work experience requirements for the profession. The visa application will be adjudicated by a consular officer, who will issue the TN visa upon approval. Under this new process, the Mexican national's employer will not be required to file and obtain approval of the Form I-129 or the LCA. They will, however, have to file Form I-129 (without the LCA) to seek extensions of TN status or changes of status to TN for individuals who are currently in the United States and for whom travel is not required or desired.

Canadian nationals are exempt from the requirement to obtain a visa at a U.S. consulate, and are not required to obtain an approved visa petition or labor condition application. Rather, these foreign nationals may enter the United States by providing at the port of entry documentation verifying that they are engaged in one of the designated TN professions and that they possess the requisite educational qualifications for that profession. Canadian citizens who seek to extend their TN status or change status to TN must also file Form I-129 if they are in the U.S. but may also extend their TN status by directly applying at a U.S. port of entry.

House IRC holds L-1 visa hearings

On February 3, 2004, the House International Relations Committee held a hearing on the L1 nonimmigrant visa category. Unfortunately, most individuals that testified favored restricting the L visa category. The witnesses mischaracterized the L visa category as a source of job outsourcing, instead of recognizing the L-1 visa as a tool to increase foreign investment and create U.S. jobs. Among the issues discussed were numerical limits to the L visa program, prevailing wage requirements, as well as a cap on the length of stay. According to Rep. Henry Hyde (R-IL) this was the first in a series of hearings. For information about L-1 legislation recently introduced in Congress see our July and August 2003 issues of Spotlight.

We strongly encourage supporters of the L program to contact their Representatives and voice their support of the L visa category. AILA has drafted a sample letter employers can send to their Representative and Senator in support of the L visa (see link below). Additional information on the L visa category and its importance to our economy as well as AILA Business Committee Chair Stephen Yale-Loehr’s July 2003 testimony before the Senate Committee on the Judiciary is available on our website (see link below).

Sample letter: http://capwiz.com/aila2/mail/oneclick_compose/?alertid=3137656

L Visa Background: http://www.jackson-hertogs.com/AILA/IssuPapr/L1ecgrow.pdf


J&H News

Jeff Rummel, speaker at AILA conference

Jeff Rummel, managing partner at Jackson & Hertogs, was an invited speaker/panelist at an AILA conference which took place February 8-10 in Park City, Utah. The conference was attended by prominent immigration practitioners as well as various government
representatives from DHS and USCIS. Various topics related to “Travel for Work and Business”, including visa applications at U.S. embassies and U.S. admission issues with post 9-11 security clearances, were discussed.

**J&H First Wednesday Seminar**

**March 3, 2004 - Reaching the H-1B Cap and Employer Strategies**

This seminar will cover the impact of reaching the H-1B cap and employer strategies for dealing with affected employees. We will also discuss alternate nonimmigrant visa categories.

If you would like to attend, please e-mail us at seminar@jackson-hertogs.com. Make sure to include the name and date of the Seminar. We look forward to seeing you there!

**Immigration Trivia**

NAFTA TN classification is different from the H-1B classification because:

- a. TN visa is only for Canadians and Mexicans
- b. TN visa is granted in one year increments
- c. TN visa is only available for a limited number of professions listed in NAFTA
- d. TN visa does not allow the foreign worker to have immigrant intent
- e. All of the above

For up-to-date information, visit us on the web: www.jackson-hertogs.com