On December 8, 2004, President Bush signed the Omnibus Appropriations Act of 2005. This Act included several important changes to the H-1B and L-1 visa categories, including significant new mandatory filing fees, new rules for prevailing wage determinations, limitations on off-site placement of L-1B workers, and most importantly, another 20,000 H-1Bs that will be available to certain beneficiaries starting this fiscal year. The law added a new exception to the annual 65,000 cap for 20,000 individuals with a Master’s or higher degree from a U.S. institution of higher education. These new H-1B numbers will become available 90 days after the legislation’s enactment, i.e., on March 8, 2005.

It is unknown at this time how quickly these visas will be exhausted. Even though 20,000 visas sounds like a large number, due to pent-up demand and the overall improvement in the economy, these numbers may be quickly absorbed by applications. More importantly, these 20,000 visas can have effective dates prior to October 1, 2005, so any qualifying applicants who missed the filing deadline for an H-1B visa for Fiscal Year 2005 may quickly use these numbers.

Clients of Jackson & Hertogs are urged to identify candidates who may qualify for these new H-1Bs visas as soon as possible, so that we may prepare the H-1B petitions for these individuals at the earliest opportunity. This will give our clients the best chance of getting these visas in time. Please contact your attorney at Jackson & Hertogs if you have any questions or would like to start the H-1B process for a candidate.

The Omnibus Appropriations Act of 2005 also changed the rules regarding prevailing wages and removed the 5% rule. This means that as of March 8, 2005, when employers are comparing company actual wages with the prevailing wages for positions, they must use 100% of the prevailing wage. This will impact H-1B and labor certification filings submitted on or after March 8, 2005.

Also effective on March 8, will be the new anti-fraud fee of $500 which will attach to all new H-1B and L-1 visa petitions filed on behalf of new employees. This fee does not apply to petition extensions for existing employees.

The GAO study: Little benefit to annual nonimmigrant reporting requirement

As required by the Enhanced Border Security and Visa Entry Reform Act of 2002, the U.S. Government Accountability Office (GAO) recently completed a study on the viability of imposing an annual self-reporting requirement upon foreign nationals holding nonimmigrant visa status. Under self-reporting, the nonimmigrant visa holder would be expected to advise the appropriate Federal agency of his/her place of residence in the U.S. The study concluded that imposing an annual self-reporting requirement would do little to enhance security, because those nonimmigrant aliens wishing to avoid detection in this country would have little incentive to self-report, thus rendering the self-reporting process ineffective.
entry and exit. Please see our US-VISIT webpage or
phase of US-VISIT involves expansion to all ports of
entry. The future, third US-VISIT expanded implemen-
tation of US-VISIT to airport and seaport of exit. The second phase of
involved implementation of biometric collection (photo
and fingerprints) at air and sea ports of entry, and one
involved implementation of biometric data collection pro-
tiated the US-VISIT (U.S. Visitor and Immigrant Sta-
The U.S. Department of Homeland Security (DHS) ini-
tiated the US-VISIT (U.S. Visitor and Immigrant Sta-
tatus Indicator Technology) biometric data collection pro-
gram in January 2004. The first phase of US-VISIT
involved implementation of biometric collection (photo
and fingerprints) at air and sea ports of entry, and one
airport and seaport of exit. The second phase of
US-VISIT expanded implementation of US-VISIT to
the 50 busiest land ports of entry. The future, third
phase of US-VISIT involves expansion to all ports of
entry and exit. Please see our US-VISIT webpage or
the October 2004 edition of Spotlight for more back-
ground information.

Calendar Reminders

**March 8, 2005**
- 20,000 new H-1Bs for U.S. advanced degree holders become available
- $500 fraud fee goes into effect for new H-1B and L-1 applications
- 100% of prevailing wage required for H-1Bs, H-1B1 (Singapore/Chile Free Trade visas), and labor certifications
- H-1B dependency rules and attestations go into effect

**March 24, 2005**
Last date to file labor certifications under the current regulations

**March 28, 2005**
PERM regulations go into effect

**April 1, 2005**
First date to file H-1B visa petitions for Fiscal Year 2006

**June 6, 2005**
L-1 visa rules change
- Applicants under blanket L-1 required to have one year experience
- New restrictions on off-site placement of L-1B specialized knowledge visa holders


At the land ports of entry, DHS implemented “US-ARRIVAL” on December 9, 2004. At land ports of entry, all nonimmigrant visa holders are referred by Customs & Border Protection (CBP) to “secondary inspection.” Such nonimmigrants no longer have to complete the I-94 arrival/departure card by hand. Rather, a computer-generated I-94 card is issued by the CBP officer. In addition to the date of admission and status validity end date, the new US-ARRIVAL I-94 card indicates the date the nonimmigrant was processed through US-VISIT; and the nonimmigrant does not need to be processed through US-VISIT again for 6-8 months.

Although Canadian citizens are still generally exempt from US-VISIT (unless they require a visa for admission), they must also be issued computer generated I-94 cards. In addition, the CBP officer must identify and select a TN occupation for Canadians seeking admission under the North American Free Trade Agreement (NAFTA). DHS states that by December 31, 2005, US-VISIT entry procedures will be implemented in the secondary inspection areas of all remaining land ports of entry.

At the airport of exit, nonimmigrants are required to follow check out procedures before departing on their flight. The ports of exit are using one of three pilot programs:

1. **ATM style kiosk:** “Exit stations” are located at various locations within the secure area of the airport. Nonimmigrants must submit their fingerprints and photo; their travel documents are read; they then receive a printed receipt verifying that they have checked out. A workstation attendant (who is a contractor and not a CBP officer) is available to assist with visitors’ check out.

For up-to-date information, visit us on the web: www.jackson-hertogs.com
2. **ATM style kiosk plus gate verification:** Nonimmigrants must present the receipt at their departure gate to confirm that they checked out at the exit station. The workstation attendant will scan the receipt and scan an index finger again to verify identity. The workstation attendant will hand the person his or her receipt back, and the person will board the airplane.

3. **Hand-held device:** The workstation attendant at the boarding gate will collect the biometric information. The workstation attendant will hand the person a receipt and the person will board the airplane.

On January 25, 2005, DHS initiated US-VISIT exit control at **San Francisco International Airport**. Pilot programs 1 and 2 are being tested at SFO.

Note that with option 1, a nonimmigrant may inadvertently depart the U.S. without having complied with US-VISIT requirements. Penalties for noncompliance can be potentially severe but according to DHS, are not currently being enforced as not all ports have US-VISIT exit control. Specifically, “willful” failure to comply with US-VISIT exit procedure can result in determination of inadmissibility at a U.S. consulate or Port of Arrival, or denial of any “other immigration benefit.”

### DOS News

**Forward movement in employment-based priority dates**

The Department of State’s (DOS) March Visa Bulletin announced that the priority date for employment-based third preference (EB3) category for persons born in China, India and the Philippines will move from January 1, 2002 to March 1, 2002. **Only persons born in these three countries are affected by priority date retrogression at this time.** The EB3 category refers to immigrant visa petitions that require at least two years of experience or a Bachelor’s degree as the minimum requirement for qualification. The priority date is the date either the labor certification was originally filed with Department of Labor, or the date the I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) for applications that do not require a labor certification. For a detailed discussion of priority date retrogression, please see our December 2004 issue of Spotlight.

**Visa Mantis security clearances extended**

On February 11, 2005, the Department of State (DOS) announced changes to the Visas Mantis security clearance program. Visa applications for persons to study or work in certain sensitive scientific and technical fields are subject to an interagency clearance in Washington, DC, called Visas Mantis. The Visas Mantis clearance process has been used to screen against the illegal transfer of technology. Once the clearance process is complete and a visa is issued by the U.S. consular post, the individual may apply for admission at a U.S. port of entry. Visas Mantis clearance and visa validity are different than the period of admission determined by a Department of Homeland Security officer at the port of entry.

The U.S. Department of State, in consultation with the U.S. Department of Homeland Security, has extended the validity of Visas Mantis clearances for the F (student), J (exchange visitors), H (temporary workers), L (intracompany transferees) and B (tourist and business) categories of visas. This means that if the original visa has expired and a new visa application is filed to return to the previous study or work program in the United States, another Visas Mantis clearance may not be required. Please note that Consular officers have the discretion, if warranted, to request a Visas Mantis clearance during any visa adjudication.

International students (F visas) who have received a Visas Mantis clearance and been issued a visa will benefit from having that clearance be valid for up to the length of the approved academic program, to a maximum of four years. If a student changes academic programs, the clearance will no longer be valid and a Visas Mantis review would be required should the applicant reapply for a new visa.

Temporary workers (H visas), exchange visitors (J visas) and intracompany transferees (L visas) can receive a Visas Mantis clearance valid for the duration of their approved activity to a maximum of two years. If the nature of the visa holder's activity in the United States changes, the clearance will cease to be valid and a new Visas Mantis review would be required should the applicant reapply for a new visa. Because these visa classifications may be granted for up to three years on initial applications, if an individual must apply for a new visa stamp for the same activity, the original Visas Mantis clearance may have expired.

Business visitors (B-1 visas) and visitors for pleasure (B-2 visas) can receive a Visas Mantis clearance valid for one year, provided that the original purpose for travel, as stated in the visa application, has not changed on subsequent trips.

DOS also announced that it has made several other improvements in the Visas Mantis process in the past year, in particular, decreasing the average time to obtain Visas Mantis clearance to less than 14 days.
DOL News

PERM: Coming soon!

Reminder: The U.S. Department of Labor’s (DOL) new labor certification regulations go into effect on March 28, 2005. At that time, DOL will begin accepting online filings under the new Program Electronic Review Management (PERM) system. For a detailed summary of the PERM regulations, please see the January 2005 issue of Spotlight.

Since the PERM regulations were published, many questions have been raised about actual processing times, how the process will work, and what requirements may be included on the application. These questions are still largely unanswered, but Jackson & Hertogs continues to monitor all developments in the PERM system and will provide updates to clients as information becomes available.

Finally, any employers who wish to file under the current labor certification regulations must file the applications no later than March 24, 2005, to ensure that DOL receives the application before March 28, 2005. Filing under the current regulations may be advisable for certain individuals, such as persons who need proof of filing a labor certification for eligibility for a 7th year of H-1B status.

Special Focus

DOL backlog reduction process

As we have reported in past issues of Spotlight and in other communications with J&H clients, the DOL scheduled a series of public meetings in which to highlight the new PERM regulations. On behalf of our clients, one of our attorneys attended the DOL “road show” that was held in Costa Mesa, California on January 25, 2005. The meeting was hosted by the U.S. Department of Labor and covered three basic agenda items: (1) how the DOL is dealing with the current backlogs at all regions; (2) filing cases under PERM; and (3) the mechanics of the PERM electronic and paper forms.

This meeting was most informative on the first issue—the backlog reduction process that the DOL is adopting on cases filed before PERM goes into effect under the old reduction in recruitment (RIR) or supervised (non-RIR) filings. The focus of this section will be on the backlog reduction program that the DOL has implemented.

Background: Two-tier labor certifications

As background, under current procedures, an employer seeking to file a labor certification can choose to file under the RIR or non-RIR process. For the RIR process, the employer conducts recruitment prior to submission of its application; for the non-RIR process, the employer submits its application and waits for instructions to recruit. Under both processes, there are two levels in the adjudication of the actual application for alien employment certification, one at the State Workforce Agency (SWA), and the other at the DOL. For both RIR and non-RIR filings, the applications are submitted to the SWA that has jurisdiction over the place of the employment or the employer’s headquarters, depending upon certain circumstances. The SWA reviews each application filed and if any deficiencies are found, the SWA notifies the employer and provides the employer with a chance to respond. Under the RIR process, assuming that there were either no deficiencies or that the employer responded to the request and asked that the application be forwarded to the DOL, the case is sent up to the regional DOL office to await adjudication. In the non-RIR pipeline, after the assessment process is completed, the SWA provides the employer with recruitment instructions, the employer provides details as to the qualifications of each applicant and assuming that no qualified U.S. workers were identified, the case is then sent to the DOL regional office to adjudicate the application.

This bifurcated adjudication process has been one of the reasons for inordinate delays in the processing of applications and is one of the reasons that the PERM regulations were issued. However, the PERM regulations do not totally address the backlog on the previously filed cases. Furthermore, the DOL does not have sufficient funding to handle the backlog under the current processes. Therefore, the DOL has taken a bold step in creating a program that is designed to eliminate the backlog on non-PERM cases within approximately 30 months.

Creation of Backlog Processing Centers

The DOL’s approach to handling the backlog of cases is to eliminate the bifurcated adjudication process for most of the cases that are still waiting review and/or adjudication. DOL has also set a firm deadline by which PERM becomes effective and after which cases can no longer be filed as RIR or non-RIR. As part of the backlog reduction, the DOL has established two Backlog Processing Centers (“BPC”), also referred to as Backlog Reduction Centers, one in Philadelphia.

1 If the SWA or the DOL is currently processing a case (assessing, recruitment phase or adjudication phase), the regional office or satellite office will keep the file until adjudication.
and one in Dallas. The DOL is in the process of dismantling the existing regional offices in favor of the two BPCs and three regional office that will function as satellite offices to the BPCs. The stated rules for the backlog reduction are pretty simple: transfer the cases to a centralized location, then process each case following a FIFO system.

Handling of cases at the BPCs

Now that you have the background, we can provide you with the current update. DOL began the process by shipping cases from the regional offices of DOL to the BPCs. As we have previously reported, in October 2004, 20,000 cases that were pending with the DOL regional office in San Francisco were shipped to the two BPCs, half to each office. Cases were also transferred from the regional offices in Philadelphia and Dallas to the BPCs. Following the transfers from the regional DOL offices, DOL began directing the SWAs to ship cases to the BPCs. The DOL divided the SWA shipping process into two “sweeps.” First, as of December 31, 2004, the goal was to have shipped all cases pending at the SWAs that were originally filed in 2003 or earlier to the BPCs. We were advised that California was unable to meet the December 31 deadline and that it took them a few additional weeks to transfer files under the “first sweep”.

A new memo to the SWAs and Regional Offices is due to be issued shortly that provides details on the transfer of the rest of the pending files (other than those that are currently being worked as mentioned above). The goal is that as of March 31, 2005, all cases will be transferred to the two BPCs. Again, the idea will be to evenly split the entire country’s case load 50/50 between the two BPCs. Headquarters will track processing times to ensure that as a whole, the DOL is adhering to FIFO and will shift cases and resources as needed to keep on schedule. The DOL assured the audience that it is using one system to track all cases and that they have a cross check system to account for all files to assure that no files will be lost in transit. As of January 25, 2005, 75,000 of the 2003 or earlier cases had been transferred to the BPCs from 22 different SWAs. The estimated backlog is approximately 300,000 cases nationwide.

Your case at the BPC

Once a case is received at the BPC, contract staff is responsible for data entry which will in turn generate a notice to the employer and attorney representative. This notice is the only notification that the case has been transferred. The notice will ask the employer to confirm that it wants to continue processing the application for alien employment certification. If any other information for data entry is required, it will be asked for in the same letter. If the employer/attorney fails to respond to the notice within the 45 day deadline, the case will automatically be canceled. The DOL is banking on many cases to either be withdrawn or abandoned as one means of backlog reduction. As cases are canceled, DOL will review the case load at the two BPCs and will move cases as necessary to ensure that FIFO principles are maintained across the backlog of pending cases. DOL plans to use one database to track to track cases at both BPCs and the satellite offices. DOL estimates that many cases will either be canceled because employers don’t want to continue them or will be withdrawn and re-filed under PERM.

After March 23, 2005, the letters will be re-engineered to provide the employer with the added option of advising the DOL that it wants to re-file the application under PERM. Employers are cautioned to be very careful in choosing this option as the originally filed application will be canceled and the employer will only have 210 days to file a new case under PERM and request recapture of the original case’s priority date. If that new case under PERM is not absolutely identical to the originally filed application, then the old priority date will not be captured and the new PERM case will be treated as a new case. This could have major negative impacts on the employer’s ability to file H-1B extensions beyond the 6th year of stay. Guidance from legal counsel should be taken before this option is selected.

BPC fraud protection check

The DOL also advised that they are in the process of implementing a new Fraud Protection System within the BPC system. As part of the BPC notice process, the contract staff will be checking into the “bona fides” of the sponsoring employer using a commercial web site. If the employer does not appear to exist, if its address has changed, or other identifying information on the application does not match up with the web site, the employer will be asked to provide documentation to confirm that it exists and is a U.S. employer. Attendees at the DOL session were advised that there have been instances where very well known employers failed the validation check, and DOL cautioned attendees to make sure that even if the request seems to be issued in error that we should respond. The BPCs do not expect to finish data entry until this summer. Once the BPCs complete their data entry, the same system will be shifted to the three satellite offices.

Labor certifications in the future

As stated previously, the BPCs were established to...
eliminate the backlog on old cases. The BPCs are scheduled to be dismantled by the summer of 2007. As a final note and perhaps of most interest to you and your employees are estimated processing times and how to find out the status of specific files. Simply put, this is the one part of the equation where the DOL did not provide good solid answers. The processing times were not provided and in fact we were advised at the meeting that the processing times currently published to the DOL web site and on the various regional phone systems are no longer accurate and should not be relied upon. On February 15, DOL removed the processing times from their website, and is now posting general information about the backlog reduction process; however, no processing times are included. Until we receive a BPC letter we will not know for sure that a file was transferred and entered into the system. J&H started receiving and responding to BPC letters in mid January 2005. To date, we have not received any response or decision on any case transferred to the BPCs. We are hopeful that the BPCs will implement a faster adjudication system after data entry is complete.

As more information is provided as to the progress that the BPCs are making, we will provide updates. We do believe that there is a light at the end of the long processing tunnel. Hopefully, it isn’t just the headlamp of an oncoming train.

April 20 – “Immigration 101: We want to sponsor an employee for a green card”

This seminar will provide a general overview of the immigrant visa process. We will touch on labor certifications and immigrant visa petitions, retrogression of visas, adjustment of status, consular processing, employment authorization and travel issues and portability under the American Competitiveness Act of the 21st Century. While designed for the human resource professional who is new to immigration, this seminar will provide the seasoned participant with an update on immigration issues and a general update on immigration law.

May 18 – “Immigration 102: Nonimmigrant Visas”

This seminar will be a general overview of the nonimmigrant visa classes and processes with particular emphasis on employment based classifications. Although designed for the human resource professional who is new to immigration, this seminar will provide more experienced participants with updates on changes to the H-1B, L-1 and TN categories and a general update on immigration law.

Immigration Trivia

Which of the following are true about DOL’s Backlog Processing plans?

a. All pending RIR and non-RIR cases will be processed in either Philadelphia or Dallas.
b. BPCs will process cases filed under the new PERM regulations.
c. DOL will operate the BPCs until all cases filed under the existing regulations are completed.
d. If no response is made to the 45 day letter from the BPC, DOL will send a follow up letter to the employer.

Answer: None are true.