At the AILA Conference, Mr. Yates also announced that for FY2006, CIS received approximately 27,300 petitions toward the annual numerical limit of 65,000 traditional H-1B visa numbers (those open to all qualified H-1B nonimmigrants), and an additional 5,500 H-1B petitions for the annual limit of 20,000 H-1Bs reserved for holders of U.S. advanced degrees. Mr. Yates offered no prediction as to when the H-1B cap would be reached for either FY2005 or FY2006 H-1B numbers. It appears that CIS now maintains two H-1B visa counts: one for the general 65,000 H-1B numbers, and another for the 20,000 H-1B numbers reserved for holders of U.S. advanced degrees. Based on petitions received by CIS to date, the general H-1B numbers for FY2006 will likely be exhausted before the advanced degree H-1B numbers.

Once the FY2006 cap is reached, no new cap-subject petitions may be approved with a start date prior to the first day of the next government fiscal year, FY2007, which is October 1, 2006. Further, as new H-1B visa petitions may not be filed earlier than six months prior to the requested start date, H-1B petitions for FY2007 cannot be filed prior to April 1, 2006. However, the annual numerical limit of 65,000 mainly applies to “new” petitions (i.e., those filed on behalf of prospective specialty occupation professionals requesting H-1B nonimmigrant classification for the first time) for “non-exempt” employers.

Many H-1B petitions will be unaffected by the annual numerical limit. For example, extensions of H-1B stay with the same employer, “change of employer” H-1B petitions filed by a new employer for an individual already in H-1B status (unless the individual was never issued an H-1B “number”), amended H-1B petitions filed because of changes in job duties/job site, and petitions for concurrent H-1B employment are all exempt

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1 The 65,000 annual limit is actually reduced by 6,800 visas due to the Free Trade Agreements (FTAs) in effect with Chile and Singapore. During the first 45 days of each fiscal year, any unused visas from the FTAs are added back to the pool of available numbers. The 20,000 visas reserved for individuals with advanced degrees from U.S. universities are additional to the 65,000. Also new this year and going forward are an additional 10,500 E-3 visas for Australian citizens—we are waiting for information from the CIS and Department of State regarding how to process E-3 visas.
from the annual H-1B cap. Also “exempt” are certain H-1B employers, including nonprofit and governmental research organizations, academic institutions, and their affiliated nonprofit organizations.

Jackson & Hertogs will continue to provide updates on the availability of H-1B numbers as this information becomes available.

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**DOS News**

**EB-1, EB-2 current for ALL countries through August 2005**

On July 15, the American Immigration Lawyers Association (AILA) reported that the U.S. Department of State (DOS) had advised that both the employment-based first and second (EB-1 and EB-2) preference categories will remain current through August 2005. DOS issued the statement in response to rumors circulated on the Internet and some Listerves that these categories would become unavailable for the remainder of the fiscal year on August 1, 2005. While the Visa Bulletin for August 2005 has not yet been published, DOS provided AILA with advance confirmation that both EB-1 and EB-2 will remain current for August 2005.

While EB-2 numbers are current for all countries for the month of August, DOS also advised on the possibility that the EB-2 category will become unavailable in September 2005, either for India or China, or for all countries in the second half of the month of September. DOS has not yet determined whether this will be necessary.

Should there be a retrogression in the EB-2 category, only those individuals in the final stages of the permanent resident process will be immediately impacted, for example:

- those seeking to file an adjustment of status (AOS) application,
- those waiting for an AOS application to be adjudicated,
- those seeking to apply for an immigrant visa at a U.S. Consulate or Embassy based on an approved immigrant visa petition.

Retrogression has no impact on the processing of labor certifications about to be filed or currently pending with the Department of Labor. Furthermore, retrogression on the Visa Bulletin does not prohibit the filing of the immigrant visa petition (I-140) based on an approved labor certification, even if that immigrant visa petition will be filed under employment-based categories which are unavailable at the time of filing. The EB-2 category includes beneficiaries of labor certifications requiring at least a Master’s degree or its equivalent, or a Bachelor’s degree and five years of progressively responsible experience, or persons who have filed an I-140 petition under the National Interest Waiver (“NIW”) classification.

Jackson & Hertogs will continue to monitor the changes in priority dates and the Visa Bulletin, and will provide updates to clients as information becomes available.

**Visa appointment delays at consular posts**

The peak travel season is upon us, and the wait times to obtain a visa appointment at U.S. Embassies and Consulates abroad have increased substantially. For example, the U.S. Consulate in Chennai, India, is currently listing a typical wait time for a nonimmigrant visa interview appointment of 146 days. The U.S. Embassy in London lists its typical current wait time at 40 days. See the Department of State’s Visa Wait Times webpage (http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php) for current wait times at all U.S. Embassies and Consulates around the world. Recent client reports reflect that some of the more remote U.S. Consulates, such as the U.S. Embassy in Nassau, Bahamas, (http://nassau.usembassy.gov/visa_ni.php) are accepting third country nationals for visa processing, without requiring an advance appointment. Those facing immediate travel needs may want to consider scheduling a flight through the U.S. Consulate in Nassau for just this purpose. However, visa applicants should bear in mind that no foreign national is guaranteed visa processing at a U.S. Consulate other than the one located in their home country.

Further, please note that after a visa appointment is granted, applicants may still experience visa issuance delays based on security clearances. As a result of the risk of delays, foreign nationals requiring a visa to enter the U.S. should plan well in advance of their intended travel dates.

**E-3 visas for Australians: Regulations forthcoming**

The State Department’s Visa Office (VO) recently announced that it is actively working to finalize implementation of the new E-3 visa for Australian nationals...
performing services in a specialty occupation. The E-3 visa was authorized as part of the “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005,” which also included REAL ID and other significant immigration legislation.

The VO advised that draft regulations implementing the E-3 visa application process are currently undergoing internal review by other interested agencies. Simultaneously, the State Department is seeking assurances from the Australian government that U.S. citizens will receive reciprocal visa treatment. According to VO, implementing regulations should be published in about two months. If this timeline is met, the first E-3 visa applications should be accepted during the third quarter of 2005.

**Worldwide Business Visa Center**

The U.S. State Department recently announced the development of a Worldwide Business Visa Center this month, meant to “better facilitate the issuance of visas for legitimate business travelers worldwide.” The new program will be open to all U.S. businesses planning to invite either employees or prospective or current business clients and partners to the United States. The Business Visa Center will provide information to U.S. companies about the visa application process with respect to business-related travel. The Business Visa Center also plans to act as a liaison between U.S. companies and State Department consular officers.

The State Department’s Bureau of Consular Affairs will continue to maintain a list of major conferences in the United States where a large number of foreign visitors are expected, so as to notify Consular officers reviewing business visitor visa applications. The Business Visa Center and the conference list can be reached via e-mail at: BusinessVisa@state.gov. The phone number is (202) 663-3198.

**DOL News**

**PERM: The first 100 days**

The U.S. Department of Labor’s (DOL) new PERM labor certification system has been in effect for just over 100 days. As previously reported, DOL’s online filing system for PERM has presented challenges both for employers to register to use the system, as well as to file actual applications. Employers should be on notice that the DOL will continue to contact employers directly, rather than their attorneys, in order to confirm their existence during the PERM registration process, and immediately after the filing of every PERM labor certification application.

In response to numerous complaints from U.S. employers and AILA regarding problems with PERM’s web-based software program, the DOL is taking steps to correct reported problems. The DOL is giving a new full review to all denied labor certification applications. The Department has advised employers and attorneys to ignore any denial notices dated earlier than June 24, 2005, whether they had been filed online or on paper, as these cases are undergoing a new round of full review. Many cases that were originally denied have now been certified, thanks to a software correction.

On July 15, DOL also provided advice for persons who filed PERM applications between June 24 and July 14, 2005. Those who filed on-line, and whose on-line status presently shows that their case is currently being processed, can ignore any previously issued denial notice. Those whose cases have on-line status which continue to indicate “denied,” or whose cases were filed on paper between June 24 and July 14, are asked to refrain from filing a formal appeal for another two weeks, so that a corrected notice may be issued. Due to the confusion resulting from so many erroneously issued denial notices, the DOL will allow appeals to be filed 60 days, rather than the usual 30 days, after any denial letter dated between June 24 and July 15, 2005.

Despite so many erroneously denied cases issued from the initial stages of the PERM program, Jackson & Hertogs has received an approved PERM application, has a number of PERM cases at the “final review” stage, and still believes that the program holds the promise of expedited processing, once the initial bugs are worked out of the PERM software’s decision matrix.

**DOL backlog processing update**

While the new PERM program continues to encounter problems with its initial implementation, the DOL’s newly renamed “Backlog Elimination Centers” (“BECs”) also struggle to cope with the myriad labor certifications filed prior to PERM’s implementation. Adding to the burden of DOL’s efforts to eliminate its backlog of pre-PERM labor certifications, the Labor Department reported an unanticipated surge of an additional 40,000 applications filed immediately prior to PERM going into effect. To accommodate this volume, the BECs plan to perform abbreviated data entry so as to enter all cases into their database by the end of September, 2005. While this will speed up the en-
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try of cases into the database, issuance of the BEC’s 45-day Center Notification Receipt Letters may be delayed, as the BECs must complete full data entry before the letters can be mailed. Also, to facilitate the H-1B extension process, each BEC has created an e-mail address employers and their counsel can use to obtain evidence of the filing of pre-PERM labor certifications, so as to prepare H-1B extensions beyond the sixth year. Jackson & Hertogs is contacting the BEC offices as needed to obtain the necessary evidence that cases are pending on behalf of our clients. Please note that no on-line case status is available and DOL will respond to our inquiries simply by providing a “screenshot” from the BEC database that shows that the case is pending with the DOL. Case-specific inquiries sent to these accounts will not receive replies.

Additionally, many employers continue to report the problem of cases closed by the BEC in error for supposed failure to respond to a 45-day letter. As a result, DOL is implementing a software fix permitting those cases to be reopened (or “reset”). At some point in the near future, employers and their counsel who erroneously received “closing letters” should soon receive new letters from DOL indicating that the cases have been reset. Cases reset by DOL will be placed back in the processing queue based on their original filing date, so these erroneously closed cases will not be prejudiced in their processing times.

Jackson & Hertogs has received a small number of certified labor certifications from the Dallas BEC. All of the certified cases were originally filed under the RIR process between May and September 2002. No official processing times are yet available, but we anticipate that the BECs will continue to move forward on the 2002 cases for the next few months. We will provide updates on processing at the BECs as this information becomes available.

J&H Wednesday seminars and teleconferences

August 3, 2005 – “Hot Topics” from the Annual AILA Conference (Webinar)

Updates on PERM, DOL backlog processing, H-1Bs, and more, will be provided. Those interested in signing up for this web seminar should send an e-mail to seminar@jackson-hertogs.com.

Immigration Trivia

Which of the following H-1B petitions are not subject to the annual H-1B cap?

A. Change of employer H-1B petition filed by an academic institution
B. Amended H-1B petition
C. Change of employer H-1B petition filed by a private employer
D. H-1B petition filed for a holder of a Master’s degree from a U.S. university

Answer: A and B are not subject to the annual numerical cap. A. Academic institutions are exempt from the annual numerical cap. B. An amended H-1B petition is not subject to the cap if the individual has already been accorded H-1B status. C. A change of employer petition is not subject to the annual numerical cap if the new employer is an academic institution. D. A Master’s degree holder may be eligible for one of the additional 20,000 H-1B numbers provided each year, but once those numbers have been, the petition is subject to the annual numerical cap.

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