Immigration Spotlight

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Abbreviations used in this issue

AOS - Adjustment of Status
BEC - Backlog Elimination Centers
CBP - Customs and Border Patrol
CSC - California Service Center
DHS - Department of Homeland Security
DOL - Department of Labor
DOS - Department of State
EDD - California Employment Development Department
INA - Immigration and Nationality Act
LCA - Labor Condition Application
OMB - Office of Management of Budget
RFE - Request for Evidence
USCIS - U.S. Citizenship and Immigration Services

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USCIS News

H-1B mini-cap update

On August 10, 2005, the USCIS announced that the fiscal year 2006 H-1B cap had been reached. Applications under the 20,000 cap, or “mini-cap,” for H-1B petitions filed under the Advance Degree Exemption for fiscal year 2005 and 2006 are still being accepted at this time. According to the last bulletin from USCIS, published on August 3, 2005, there remained 10,379 mini-cap H-1B visas available for fiscal year 2005, and 8,212 H-1B visas available for fiscal year 2006. As these numbers are more than a month and a half old at this point, however, Jackson & Hertogs reminds employers contemplating filings under the mini-cap to do so as soon as possible.

For a review of the history of the H-1B cap, please see our August Spotlight article entitled “FY2006 H-1B cap reached 8/10/05”.

DOS News

DOS announces severe employment-based visa retrogression

The DOS Visa Bulletin for October 2005 indicates that employment-based visa numbers will retrogress for both Indian- and Chinese-born individuals in all three employment-based (EB) categories (i.e., EB-1, EB-2, and EB-3) as of October 1, 2005. The Bulletin also indicates that EB-3 numbers will remain unavailable and retrogress significantly for all nationalities. For more information on visa retrogression in general, please refer to our FAQs on the subject.

This retrogression immediately impacts those individuals in the final stages of the permanent resident process (i.e., those seeking to file an I-485 adjustment of status (AOS) application, those who are waiting for an AOS application to be adjudicated, or those who are seeking to apply for an immigrant visa at a U.S. Consulate or Embassy based on an approved I-140 immigrant visa petition). Retrogression has no impact on the processing of a labor certification application about
be received by the USCIS no later than September 30, 2005, which means that applications must be filed by September 29, 2005. If the I-485 application is received by USCIS on or before September 29, 2005, the applicant is eligible to apply for both the Employment Authorization Document (EAD) and Advance Parole (AP) document while the I-485 remains pending. USCIS will also not be able to adjudicate pending EB-3 I-485 applications for any nationalities or any employment based I-485 application for Indian and Chinese nationals until the underlying priority dates becomes current. Please note that the adjudication process for these cases will continue, but the case cannot be approved unless the priority date is current. Similarly, DOS consular officers will be unable to approve immigrant applications for permanent residency at immigrant visa interviews until and unless the priority date is current on the date of the immigrant visa interview.

For labor certification-based petitions, the controlling factor is what requirements were listed on the labor certification supporting the employer's immigrant visa petition for EB-2 and EB-3 cases. The sponsored individual's education or experience may be greater than that listed on the labor certification application, but does not determine whether a petition is eligible for the EB-2 or EB-3 categories. The requirements on the labor certification represent the employer's minimum requirements for the position, and these requirements determine whether the case will be approved under either the EB-2 or EB-3 preference category. If the labor certification has already been filed and/or approved with EB-3 requirements, the case must be processed under the EB-3 quota. A labor certification is not required for the EB-1 category or for the national interest waiver or Schedule A Group II EB-2 categories.

Again, as of October 1, 2005, the USCIS will accept no new employment-based I-485 AOS applications, or adjudicate pending applications for Indian and Chinese nationals with priority dates later than those listed in the October 2005 Bulletin. Further, USCIS will accept no new EB-3 based I-485 AOS applications, or adjudicate pending applications, regardless of nationality, unless the priority date (for both the EB category and country of birth) is current. The priority date is determined based on the date of filing the labor certification application, if one is required, or filing the immigrant visa petition, if a labor certification is not required.

Jackson & Hertogs encourages all Indian and Chinese nationals in the EB-1 and EB-2 categories who are eligible to file an I-485 application at this time to do so before September 30, 2005. Such an application must be received by the USCIS no later than September 30, 2005, which means that applications must be filed by September 29, 2005. If the I-485 application is received by USCIS on or before September 29, 2005, the applicant is eligible to apply for both the Employment Authorization Document (EAD) and Advance Parole (AP) document while the I-485 remains pending. USCIS will also not be able to adjudicate pending EB-3 I-485 applications for any nationalities or any employment based I-485 application for Indian and Chinese nationals until the underlying priority dates becomes current. Please note that the adjudication process for these cases will continue, but the case cannot be approved unless the priority date is current. Similarly, DOS consular officers will be unable to approve immigrant applications for permanent residency at immigrant visa interviews until and unless the priority date is current on the date of the immigrant visa interview.

Australian E-3 visa update

Federal regulations implementing the new E-3 visa for Australian citizens were published on September 2, 2005. With the publication of these regulations, Australians citizens may now file E-3 applications directly at U.S. Consulates in Australia, or anywhere else around the world. The U.S. Consulate in Sydney has recently made available to Jackson & Hertogs its FAQ on the subject, which may be accessed from our website. The E-3 visa has some similarities with the H-1B1 Free Trade Agreement visa category, established in 2004 for citizens of Chile and Singapore. The E-3 category makes available 10,500 new employment visas for Australian nationals working in a professional occupation, and who possess at least a U.S. Bachelor's degree or its foreign equivalent. However, unlike the H-1B1 Free Trade visa for citizens of Singapore and Chile, the 10,500 E-3 visas are not deducted from the annual H-1B visa cap of 65,000. Like the H-1B1 Free Trade Visas, the E-3 visa is not a “dual intent” visa like the more traditional H-1B or L-1 visa categories. Thus, immigrant intent is not allowed. However, unlike the H-1B1 Free Trade Visas, the very filing of a labor certification or immigrant petition can not by itself be used as a ground to deny an E-3 visa application.

Employers wishing to utilize the E-3 visa will be required to first obtain an approved Labor Condition Application (LCA) from the U.S. Department of Labor. However, they need not obtain an approved petition from USCIS. Instead, after obtaining an approved LCA, the E-3 candidate can apply for the E-3 visa directly at a U.S. Embassy or Consulate abroad. Individuals currently in the United States in some other lawful nonimmigrant status will also be able to
change status to E-3 while remaining in the United States. Please note that LCAs filed for E-3 visas currently must be mailed to the DOL, and cannot be sent through the Internet via electronic filing. J&H has experienced significant delays in receiving responses from DOL on LCAs for E-3s. The U.S. Embassy and Consulates in Australia as well as the U.S. Embassy in Toronto have already announced procedures to apply for the E-3 visas.

Similar to the existing E visas for Treaty Traders and Treaty Investors, the E-3 visa for Australian professionals is indefinitely renewable, and accompanying spouses will be eligible to apply for U.S. work authorization. Unlike the other E visa categories however, only the citizenship of the employee, not the employer, need be Australian.

**DOL News**

**Multiple filings reconsidered**

On August 11, 2005, the DOL issued its fifth set of PERM Frequently Asked Questions (FAQ). This latest FAQ memo addresses an issue of particular concern for many employers and employees, relating to multiple filings of labor certifications by the same employer for the same employee. Please see the earlier news story on our website for a complete summary of this FAQ. On August 24, 2005, the DOL removed this particular prohibition on multiple filings. The FAQ now states that the "Department is considering questions and information stakeholders have submitted in response to this FAQ posting, and will be developing and posting a clarified response in the near future." The stakeholders mentioned by the DOL include Jackson & Hertogs who voiced its concerns both through AILA and directly with the DOL.

**Update: Labor certification backlog elimination**

The U.S. DOL’s Backlog Elimination Centers (BECs) recently announced that they now have approximately 345,000 pending labor certifications (requesting processing under either supervised recruitment, reduction in recruitment (RIR), or special handling). A few cases remain at the New York and San Francisco regional offices, which should be closed by January 2006.

While the BECs have begun data input on approximately 90% of the pending labor certifications that they have received, the BECs announced that they have performed only partial data input, in order to quickly get a full accounting of the number of pending cases. As a result, there will be no “45 day letters” issued on any labor certifications until full data entry has been completed upon re-review. (For more information on the 45 day letters, please see our prior BEC update from February 25, 2005.) So far, at least 100,000 cases have only partial data entry, meaning that tens of thousands of 45 day letters have not yet issued. The BEC will endeavor to enter all relevant data regarding these cases into its systems, and will subsequently issue the remaining 45 day letters.

At the moment, the BECs have completed adjudication of only RIR labor certifications. However, they are ramping up to handle the backlog of supervised recruitment cases, including instructions regarding prevailing wage and job order instructions. The BECs state that they have adjudicated “tens of thousands of cases” to date, though no exact numbers have been published.

Jackson and Hertogs will continue to monitor developments at the BECs, and advise clients accordingly. Stay tuned for further updates.

**HR PERM registrants**

Undergoing a restructuring of your HR department? Hiring new staff? J&H reminds employers that changes to your HR department may necessitate an update to your employer registration information on DOL’s website in connection with PERM filings. As many of you already know, upon submission of an electronic PERM application, DOL sends the registered employer contact an email requiring a response within 7 days. If a response is not submitted to DOL, the PERM application can be denied. Therefore, it is imperative that HR departments obtain the employer registration information from any registered individual(s) that will be leaving the company. Please contact our office if you would like assistance with updating your registrants on the DOL website.

**J&H News**

**J&H seminars and webinars**

**September 21, 2005 - International Travel**

This seminar will address immigration issues raised by international travel, and address the following questions: Who needs a visa stamp? What are the visa requirements for travel to a contiguous territory? What issues arise from travel while an exten-
sion/change of status is pending? As many people will be applying for initial H-1B visas on or about October 1, 2005, what will be the potential impact for people applying for visas during this period? Finally, what current issues must be considered for visa processing at consulates, including interviews, appointment wait times, and potential delays due to security reviews.

**October 19, 2005 - PERM Nuts and Bolts**

This webinar will provide an overview of the PERM process and cover issues in drafting job descriptions, wage determinations, SWA Job Orders, and recruitment. We will discuss how to place SWA Job Orders and options for managing and monitoring the number of applicants received.

Please contact our office at Seminar@jackson-hertogs.com if you are interested in attending either or both seminars.

**No November or December 2005 seminars are currently scheduled.**

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**Immigration Trivia**

Individuals are now able to apply for the new E-3 visas. These visas are:

a. For any Australian-owned companies, and are similar to the E-1/E-2 visas.

b. Restricted to nationals of Australia, are most like the H-1B visas, and will allow spouses to work.

c. For spouses of E1/E2 visa holders and will allow them to obtain employment authorization.

d. Restricted to nationals of Canada in the professional category and allow spouse to work.

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