USCIS over-issued FY 2005 H-1Bs

The DHS Inspector General reported that the USCIS approved 71,740 H-1B cap cases rather than the annual cap of 65,000 in FY 2005 that ended on September 30, 2005. Normally, at the end of the fiscal year, the USCIS is required to add back to the normal cap numbers the unused visas from the set asides for the Free Trade Agreements with Chili and Singapore. Because of the oversubscription, these numbers will not be added back to the FY 2005 numbers.

AAO issues "Adopted Decisions"

The USCIS has begun to designate decisions from the AAO as "USCIS Adopted Decisions." Decisions so designated will be binding policy guidance on all USCIS personnel. One of the first “Adopted Decisions” issued by the AAO indicates that time spent outside the U.S. may be recaptured for purposes of the maximum period of admission in H-1B or L-1 status. Subsequently, on November 3, 2005, USCIS Acting Associate Director for Domestic Operations, Michael Aytes, issued a memorandum regarding procedures for determining the amount of time that can be recaptured for H-1B and L-1 non-immigrants who have been out of the country.

J&H has routinely filed “recapture” cases over the years making similar arguments as those set forth in the decision. USCIS policy has been erratic among the various service centers. With this new policy of USCIS Adopted Decisions, employers and employees should benefit from more consistent adjudications.

USCIS travel advisory

On November 2, 2005, USCIS issued a Press Release reminding applicants for adjustment of status to obtain Advance Parole travel documents before planning

Spread the word! Immigration Spotlight is written and distributed to HR professionals and also published to our website. To read a back issue on our website, click on the “Spotlight” icon. Please feel free to forward Spotlight to the rest of your management team and employees.
holiday travel. Please keep the following rules in mind when traveling:

- If you have a valid H-1B, H-4, L-1, or L-2 visa, you may travel on the nonimmigrant visa and you do not have to travel on Advance Parole. When you travel on nonimmigrant status, please make sure when you return that: (1) your passport is valid; (2) you have a valid H or L visa in the passport; and (3) you have your original I-485 receipt notice. If you do not meet all criteria, you will not be able to reenter the country. Note that Canadian citizens are visa exempt and can simply enter on the valid petition approval notice.

- If you have filed an adjustment of status (I-485) application, never reenter the country using any nonimmigrant visas other than a valid H or L visa. Reentering the U.S. in another nonimmigrant status (i.e. O, TN) will be considered abandonment of the pending I-485 application. In other words only L and H nonimmigrants can enter the U.S. on H or L visas and maintain both their nonimmigrant status and their status as adjustment applicants. All other visa classes require Advance Parole.

- When you travel on Advance Parole, don’t leave home without the hard copy of the “approved” Advance Parole document. The application is not enough. Also, Advance Parole is not a guaranty that one will be allowed to reenter the U.S.

- Please be reminded that Canada, Mexico, and adjacent islands are foreign countries. If you travel without valid H/L visa status or without Advance Parole, your pending I-485 application will be considered abandoned and denied.

**H-1B U.S. master’s degree update**

The following are the most recent calculations for the H-1B visa number usage for the special 20,000 visas reserved for individuals who hold Master’s degrees (or other advanced degrees) from a U.S. university or college. These numbers represent the USCIS count as of October 23, 2005, and are on the USCIS website at http://uscis.gov/graphics/services/tempbenefits/cap.htm.

As evidenced by the chart, the FY 2006 numbers continue to decrease. J&H reminds employers who have recently hired individuals on F-1 practical training that will not be valid beyond the first day of the next fiscal year (October 1, 2006), who are considering hiring an F-1 student, or anyone else who requires initial sponsorship as an H-1B (or who was not previously counted against the cap because they are an H-1B nonimmigrant working for a university or a not-for-profit research facility) should file petitions immediately to have the best possible chance of securing one of the few remaining visa numbers for FY06. Once the cap is reached, new petitions will not be accepted by the USCIS until April 1, 2006, and the earliest validity date that will be available on those petitions will be October 1, 2006.

If you believe that you have any employees or would-be employees who fall within this category, please contact our office immediately. J&H will continue to provide updates as new information arrives.

**DOS News**

**Movement in December Visa Bulletin**

The December Visa Bulletin, released by the DOS on November 11, 2005, shows significant forward movement for several categories. For example, the EB-3 category for both Indian and Chinese nationals has
moved forward one year. There was also significant movement in the EB-1 and EB-2 categories for Indian and Chinese nationals. Please refer to our website for a link to the December Visa Bulletin: [http://www.jackson-hertogs.com/quota/0quota.htm](http://www.jackson-hertogs.com/quota/0quota.htm).

Digital photo passports required

DOS released a reminder for the 27 visa waiver program countries regarding passports issued on or after October 26, 2005 and the fact that they must bear a digital photo of the holder. If a passport does not have a digital photo, the traveler will need a visa to travel to the U.S. Visitors with valid machine-readable passports issued prior to October 26, 2005 may continue to travel without a visa under the program.

**DOL News**

Blue labor certifications

The Department of Labor has advised AILA that, "starting Monday, November 7, 2005, PERM certifications issued by DOL will have a new look. The certification will be printed on blue-colored paper. In addition, the certification stamp will no longer be used. This change in paper does not change requirements for stakeholders or for the program."

DOL explains BEC FIFO procedures

DOL has said that the BECs and the ETA regional offices process labor certification applications on a FIFO basis, but a number of factors impact the order in which a case ultimately reaches disposition, relative to other cases in the permanent labor certification process. In developing the backlog reduction system, DOL determined the most efficient approach was to establish two centers, which means applications will be processed in two locations. However, the overall productivity rate for the two centers is approximately the same.

In some cases, applications with an earlier priority date may be processed or reach disposition later than newer applications. Assuming two applications with the same priority date, there are several factors that account for different processing times for some applications. These include the type of application (i.e. RIR vs. supervised recruitment), the stage of processing at which the application was received by the BEC (applications received from the regions have recruitment completed, and so are further along than those received from the states), the dates of other applications pending at each center (which determines each application's place within the FIFO queue), the quality of the application (applications that raise questions take longer), and the response time of the employer to center requests for confirmation to continue processing the application.

Legislative Corner

Senate approves immigration relief

AILA announced on November 3, 2005, that we had achieved a partial victory in trying to gain H-1B cap and immigrant visa backlog relief.

On October 20, the Senate Judiciary Committee, as part of the budget reconciliation process, held a markup of proposed legislation which, if passed by Congress, would provide temporary relief from the H-1B visa cap and the employment-based immigrant visa backlogs in exchange for increased filing fees on some petitions. This marked up bill was passed out of the Committee by a very strong 14-2 vote. In a nutshell, the final package would:

- Impose a new $500 fee on immigrant visa petitions for the EB-1, EB-2, and EB-3 categories.
- Recapture unused employment-based visas from prior years for immediate allocation of up to 90,000/year.
- Exempt spouses and minor children from counting against the annual cap on employment-based immigrant visas.
- Allow individuals to apply for adjustment of status before an immigrant visa is deemed currently available. (Of course, approval could not occur until the visa number is available.)
- Recapture approximately 300,000 unused H-1B numbers dating back to FY 1991. As a result of an amendment by Senator Feinstein, 30,000 rather than 60,000 would be available annually. (In other words, effectively raising the cap from 65,000 to 95,000 for at least 10 years.)
- Impose a new fee on the recaptured H-1B visas so that the fees on the original 65,000 H-1B allotment remain unchanged but the additional 30,000 available annually carry an additional $500 fee.
- Impose a new $750 fee on L-1 visas. (This was part of Senator Feinstein's amendment and was necessary to offset the reduction in revenue resulting from the limitation on recaptured H-1B numbers from 60,000 to 30,000.)
During floor debate on the Senate’s overall reconciliation package (S. 1932), Senator Byrd offered an amendment to remove from the final package the H-1B and immigrant visa retrogression relief provisions passed by the Senate Judiciary Committee and replace them with a provision that mirrored the House’s version, which simply imposes a $1,500 fee increase on L visas. That amendment was ultimately rejected by an overwhelming vote of 85-14. This is a tremendous victory for foreign nationals, their employers, and the U.S. economy and the Senate ultimately approved the Budget Reconciliation Package by a vote of 52-47.

Unfortunately, the Senate’s package still must be reconciled in conference with the House’s alternative budget reconciliation bill which, as noted above, imposes a $1,500 fee increase on L visas. It is imperative that our representatives in Congress continue to be contacted. We must maintain the pressure on Congress.

Compete America

Compete America is a coalition of over 200 corporations, universities, research institutions and trade associations committed to assuring that U.S. employers have the ability to hire and retain the world’s best talent. America’s race to innovate and produce the next generation of products and services for the world market requires highly educated, inventive and motivated professionals. While many of the world’s top engineers, educators, scientists, and researchers are citizens of the United States, a significant number are not. America’s scientific, economic and technological leadership has been aided by the many outstanding contributions of foreign nationals. Compete America believes it is in the United States’ economic interest to provide world-class education and job training, while maintaining a secure and efficient immigration system that welcomes talented foreign professionals.

If you would like your company’s name added to the coalition distribution list, send an email directly to Sandra Boyd at SBOYD@nam.org. Include your name, title, address, phone, and e-mail. Also, if a member of your staff would like to become steering committee members, he/she should also contact Ms. Boyd for additional information!

Welcome, attorney Kirsten Anderson!

J&H is happy to welcome Kirsten Anderson as our newest attorney. Kirsten obtained her Bachelor of Arts degree in Women’s Studies from the University of Minnesota, Minneapolis in 1985 and her J.D. degree from University of California Berkeley’s Boalt Hall School of Law. She was admitted to the California Bar in 1990. While at Boalt Hall, Kirsten worked as an Article Editor for the Berkeley Women’s Law Journal. After law school, Kirsten worked as a Legal Research Attorney for the Superior Court of the City and County of San Francisco from 1990 to 1993. From 1993 to 1999, Kirsten worked as a Staff Attorney for the U.S. Court of Appeals for the Ninth Circuit, including several years in the motions department. In 2000, Kirsten moved to the Netherlands and into private practice as an associate in the International Advice Practice of Holland Van Gijzen, a Netherlands law firm. Working in the corporate and business law area, Kirsten became a senior associate at Holland Van Gijzen in January 2003. During her tenure at Holland Van Gijzen, Kirsten managed legal implementation of multi-country corporate and organizational restructuring projects for U.S. and European multinational companies to improve clients’ efficiency from a business, financial and tax perspective as well as advising clients on general aspects of U.S. corporate and business law. Kirsten is a member of the American Bar Association, and speaks Dutch.

Welcome, Karl Sunnen!

Please join us in welcoming a new employee to the J&H team: Karl Sunnen. Karl has joined our team of legal assistants and will be primarily working with attorney Atessa Chehrazi. Karl is a San Francisco native who attended S.F. State, has 7 years of experience in insurance defense, 3 years of prior immigration work and most recently 1.5 years doing plaintiff-side personal injury, product liability and medical malpractice type cases while living in Georgia.

J&H holiday schedule

J&H announces our schedule of office closure this month and next:

J&H will be closed on the following dates:

November 24-25;
December 26; and
January 2, 2006

Our office will also close at 1:00 p.m. on December 23 and 30.

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