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Wrapping up H-1B cap season!

H-1B cap season is wrapping up and we are currently preparing new H-1B petitions to file at the end of the month. As a reminder, the government’s next fiscal year runs from October 1, 2008 to September 30, 2009. H-1B visa petitions may be filed no earlier than six months before the proposed employment would commence. Therefore, for FY 2009 cap subject H-1B nonimmigrant visa petitions, the earliest start date on the petition would be October 1, 2008 and the earliest date on which USCIS would accept such filings is April 1, 2008.

Remember that during last year’s FY 2008 filing season (i.e., April 2007), an unprecedented number of cases – approximately 120,000 – were received on the first two days of the filing season for regular cap H-1B visa petitions, essentially meaning that the cap was reached in one day.

This year, USCIS has extended the time period for when it will analyze whether it has a sufficient number of cap-subject H-1B petitions to the fifth business day of the filing period beginning on April 1, 2008. We anticipate that the upcoming H-1B cap filing season will be just as frantic as 2007, if not more so, and that a record number of cases will be filed under the regular cap once more. J&H also believes that the cap for those with U.S. Master’s degrees or higher will likely be reached even earlier this year, and we are processing those cases with the same sense of urgency as the regular cap cases.

Employers should notify J&H of any potential offers being made to new H-1B hires in order to ensure that a petition will be prepared in time for filing. Due to the extended 5 day time period USCIS will accept petitions before the cap lottery will be conducted, it may be feasible to file an H-1B cap petition after April 1, 2008. However, we highly suggest that you discuss any such strategy with your J&H attorney in advance.
USCIS to change H-1B cap processing and prohibit “double filings”

On March 19, 2008, USCIS announce a major change in how it will handle the processing of cap-subject H-1B petitions, which will be accepted for filing beginning on April 1, 2008.

Under the new rule, an employer may not file more than one cap-subject petition for an H-1B visa for a single employee in a fiscal year, even for different positions. There is an exception for related employers (such as a parent and subsidiary) to file petitions on behalf of the same employee for different positions within the related companies. USCIS will deny H-1B petitions, or it will revoke approved H-1B petitions, if it finds that an employer filed multiple petitions for the same employee, and will not refund the filing fees.

In addition, USCIS will extend the time period for analyzing whether it has a sufficient number of cap-subject H-1B petitions. Previously, USCIS included all petitions received on the first two business days of the filing period; USCIS will now consider and include petitions received until the fifth business day of the filing period beginning on Tuesday, April 1, 2008. This means that USCIS will continue to accept H-1B cap-subject filings until Monday, April 7, 2008. If, as we expect, USCIS will receive a sufficient number of H-1B cap-subject filings by April 7, 2008, USCIS will first conduct a random selection process (or lottery) of H-1B petitions filed under the 20,000 U.S. advanced degree exception (Masters H-1B cap). USCIS will then take those H-1B petitions submitted under the U.S. Masters cap, but not selected in that lottery, and it will add them to the pool of general H-1B cap-subject petitions. USCIS will then conduct another lottery of all petitions submitted under the general H-1B cap, which will include all Masters cap petitions that were not selected in the Masters cap lottery. This means that any applicant eligible for an H-1B under the Masters cap is guaranteed two chances for an H-1B number in FY2009.

USCIS has posted several updates discussing these changes, including a Fact Sheet, Q&A, and the News Release. Please see our Recent News for links to these documents.

Update: FBI name check policy for AOS cases

Last month we reported that on February 4, 2008, Michael Aytes, Associate Director for Domestic Operations, USCIS issued a memorandum to all USCIS offices, advising them of a major change in the adjudication policy for I-485 Adjustment of Status (AOS) applications. Effective immediately, AOS cases that are otherwise approvable, but are held up solely due to the FBI name check, can be approved if the FBI name check has been pending for more than 180 days and the case has been pending beyond normal processing times. Any AOS case approved without receipt of the FBI name check will be reviewed again by USCIS when the FBI name check results are received. If USCIS receives derogatory or adverse information from the FBI name check after the AOS approval, USCIS will determine whether rescission or removal proceedings are warranted.

When adjudicating AOS applications, USCIS is required to complete security and background checks before approving any AOS application. These include requesting FBI fingerprint checks (i.e., criminal records or rap sheets) and Interagency Border Inspection Services (IBIS) checks. In addition to these two checks, USCIS further requires that a third FBI “name check”, which involves a search and review of various government databases for any other information that might be a basis for denying the AOS application. Some AOS applicants have waited months or even years for their FBI name check to be completed, leaving their AOS cases on hold during that time. This delay has meant huge costs to applicants, as they must annually renew their EAD and AP documents, among other inconveniences.

Under this new policy, USCIS must still obtain clearance on the FBI fingerprint checks and IBIS checks for each AOS application before approval. However, if the FBI name check remains pending for more than 180 days, USCIS may approve the AOS application without receipt of the name check. Should the FBI name check ultimately return information on the AOS applicant that would have rendered the individual ineligible for permanent resident status, USCIS retains the right to reopen the AOS case and revoke the approval.

On February 28, 2008 USCIS issued a background check policy update, confirming that this policy shift impacts those applicants with pending I-485 AOS applications, I-601 applications for waivers of inadmissibility, I-687 temporary resident applications, and I-698 applications to adjust from temporary to permanent residents. The vast majority of our impacted clients are those with I-485 applications on file. The new policy does not include applicants for naturalization.

In considering this policy change, it is important to note that all AOS applicants must still meet all other requirements for adjustment of status, such as submission of completed medical exams as well as birth
and marriage documentation. Any underlying basis of eligibility for AOS, such as a pending I-140 or I-130 petition must be approved before the AOS can be approved. Further, the priority date must be current in order for the AOS application to be approved. This change does not mean that AOS applications will be approved 180 days after filing with USCIS.

Employers should remember that a critical implication of this policy could be significant backlogs and retrogression in many employment-based (EB) immigrant visa categories as more AOS cases are approved, and more green cards are issued. When USCIS begins clearing and approving many of the AOS cases that have languished while waiting for an FBI name check, annual immigrant visa number quotas may rapidly become exhausted. Once all immigrant visa numbers for the fiscal year have been claimed, no other AOS applications may be approved until the new fiscal year begins, and a new allotment of employment-based immigrant visas become available.

The key question for all of our clients is what impact this will have on their AOS applications. Here is what USCIS has indicated as of this writing:

- The agency is conducting sweeps of its AOS applications to determine which cases will benefit from the new policy. A case will be adjudicated if it is “otherwise approvable,” has been pending beyond normal processing times, and the FBI name check has been pending more than 180 days.

- Inquiries to USCIS by attorneys can be made after March 10, 2008.

- If an AOS applicant’s priority date is not current, the AOS cannot be approved.

- The results of fingerprint checks are only valid for 15 months. If the fingerprint checks have expired, an AOS applicant will be called in for a new biometrics appointment.

- The FBI fingerprint check (i.e., criminal records or rap sheets) and Interagency Border Inspection Services (IBIS) check must both have been completed before this policy can apply.

- The AOS application must be pending beyond the normal processing times for the USCIS Service Center working on the case. Thus, even if the FBI name check has been pending more than 180 days, USCIS will not adjudicate the case if the case is still within what the Service Center has stated is its normal processing time for AOS applications.

After March 10, USCIS recommends that applicants whose cases are pending beyond normal processing times and have been told the delay is due to the FBI name check call the USCIS customer service line at 1-800-375-5283 to inquire about their case.

J&H will continue to provide updates to clients as we learn more about this new policy change and its implementation.

Reentry Permits to require submission of biometrics

On March 5, 2008, USCIS published revised instructions for the Form I-131 Application for Travel Document that are effective immediately. This form is used for applications for reentry permits, refugee travel documents, and advance paroles. The instructions now require applicants for reentry permits and refugee travel documents to provide biometrics (e.g., signature, fingerprints and photographs) at a USCIS Application Support Center (ASC). The instructions indicate that where biometric collection is required and the applicant departs the U.S. before biometrics are collected, the application may be denied.

The new instructions require that applicants between ages 14 and 79 submit the biometrics filing fee in addition to the regular I-131 filing fee, and that they provide biometrics before departing from the United States. After an application is filed, USCIS will mail the applicant a Receipt Notice and an ASC scheduling notice.

In cases where an applicant requires expedited processing for one of the reasons outlined on the USCIS website. The instructions provide specific information for submitting pre-paid express mailers with the application, for USCIS to send the applicant his or her receipt and ASC appointment notice, as well as the completed Reentry Permit or Refugee Travel Document, if approved. A request for expedited processing should contain the applicant’s reasons for such processing.

Please note that this change only impacts applicants for reentry permits and refugee travel documents; applicants for advance parole are not impacted by this change.

Jackson & Hertogs is notifying affected clients immediately and will provide updates to our website as they become available.
Extension of Medical Certification
(Form I-693)

On January 7, 2008, USCIS announced that it would allow the medical exam certification submitted on concurrently filed Adjustment of Status (I-485) applications to be extended until the time of approval of the I-485. This change is in light of the longer processing time for the Adjustment of Status. In general, the medical certification is valid for only one year. Please note that this policy only applies where there is no Class A or B medical condition and will only be in effect until January 1, 2009. For more information, please see the USCIS memorandum under “Recent News”.

Technical instructions for vaccinations

On our website, we have available the U.S. Centers for Disease Control (“CDC”) manual on immigration requirements. This manual advises of the latest vaccination requirements. All immigrant visa applicants are required to verify that they have met the vaccination requirements, or that it is medically inappropriate to receive one or more of the listed vaccinations.

You can access this manual through our news items and on our website’s vaccination requirements page, http://www.jackson-hertogs.com/?page_id=5498.

DHS News

Visa Waiver Program agreements with Slovakia, Hungary and Lithuania

On March 18, U.S. Department of Homeland Security (DHS) Secretary Michael Chertoff signed a Visa Waiver Program (VWP) Memorandum of Understanding (MOU) with Slovakia, Hungary and Lithuania. The agreements put all three countries on track for visa-free travel to the U.S., and potential designation as VWP members later this year.

The U.S. Congress authorized DHS in August 2007 to reform the VWP and strengthen the security arrangements required of existing participant countries, as well as to expand the conditions for countries to join the program. Among the security enhancements required, DHS will establish an electronic system of travel authorization for air passengers. VWP travelers will be asked to provide some basic information online, which will generate an authorization number for travel. DHS will announce complete details on how the authorization systems will work, and when they will begin, later this year. VWP partners also must ensure reporting of lost and stolen passports to avoid fraudulent use and enhance security measures for airports that originate flights to the U.S., to include permitting air marshals on certain flights.

The VWP has been authorized by U.S. law for over 20 years, with 27 current members from Asia and Europe. Citizens from those countries generally may travel to the US as visitors for business or pleasure without first obtaining a visa, greatly facilitating business travel, and encouraging tourism and travel between the Visa Waiver countries and the U.S.

In addition to the agreements with Slovakia, Hungary and Lithuania, DHS recently has signed enhanced VWP agreements with the Czech Republic, Estonia and Latvia.

It is important to note that signing the MOU does not immediately authorize Visa Waiver travel from these countries – until DHS and the State Department announce that citizens of these countries may travel to the US visa-free, citizens of those countries are still required to obtain a visa stamp prior to entry to the U.S.

Jackson & Hertogs will provide updates as additional countries sign VWP memoranda, and when their citizens become eligible for visa-free travel to the U.S.

April Visa Bulletin: EB2 returns, EB3 progression

The Visa Bulletin for April 2008 indicates that visa numbers will move forward significantly in several categories, most notably for employment-based second preference (EB-2) for India-born individuals. EB-2 India was “unavailable” for the past two months, and was retrogressed to January 1, 2000 on the January Visa Bulletin. Effective April 1, 2008, the priority date for the EB-2 India category will be December 1, 2003. All other EB-2 categories are unchanged, with the EB-2 China cutoff at December 1, 2003; and EB-2 is current for all countries other than India and China.

The rest of the Visa Bulletin includes favorable news for other employment-based green card applicants. EB-1 remains current for all countries, including India and China; DOS does not foresee any regression in the EB-1 category for countries other than India and China. EB-2 remains current for all coun-
tries other than India and China.

EB-3 continues to move forward for all categories. EB-3 for all countries other than China, India and Mexico will advance six months to July 1, 2005. EB-3 China progressed just over two months to February 8, 2003. EB-3 India and Mexico will also move forward to October 1, 2001, reflecting two months progress for India and five months progress for Mexico.

In discussing the return of available visa numbers for India EB-2, DOS states in the Visa Bulletin:

Section 202(a)(5) of the Immigration and Nationality Act provides that if total demand will be insufficient to use all available numbers in a particular Employment preference category in a calendar quarter, then the unused numbers may be made available without regard to the annual “per-country” limit. It has been determined that based on the current level of demand being received, primarily by Citizenship and Immigration Services Offices, there would be otherwise unused numbers in the Employment Second preference category. As a result, numbers have once again become available to the India Employment Second preference category. The rate of number use in the Employment Second preference category will continue to be monitored, and it may be necessary to make adjustments should the level of demand increase substantially.

In light of this guidance from DOS, individuals in the EB-2 category should be aware that the priority dates may change in the coming months, and EB-2 India may become unavailable again later in the year, depending on overall usage of visa numbers in this category.

It is important to note that “nationality” is not the same as citizenship. Generally, DOS looks at the country of birth in determining whether a person is a national of a given country. As a result, persons who become citizens of other countries (i.e., Indians who become Canadian citizens) are still considered nationals of their birth country for immigrant visa purposes.

Visa retrogression immediately impacts only those individuals in the final stages of the permanent resident process (i.e., those seeking to file an application for adjustment of status (AOS), who are waiting for an AOS application to be adjudicated, or who are seeking to apply for an immigrant visa at a U.S. Consulate or Embassy based on an approved immigrant visa petition). Visa retrogression has no impact on the processing of a labor certification that is about to be filed or is pending with the Department of Labor. Furthermore, visa retrogression does not prohibit the filing of an I-140 immigrant visa petition.

For general information on visa retrogression, please see our FAQ on this subject. For more information on the Visa Bulletin and country quota movements, including information about movement in the Family-Based Quotas, please see our DOS Visa Bulletin and Quota Movement page which includes detailed nationality-specific charts of quota movement for the past decade.

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**DOL to centralize PERM processing**

On March 5, 2007, the DOL published a notice in the Federal Register informing the public that effective June 1, 2008, all permanent labor certification applications (PERM) will be processed through the Atlanta National Processing Center (NPC). DOL also announced that effective June 1, 2008, all temporary labor programs (including D-1 crewmembers performing longshore work, H-1C nurses, H-2A agricultural workers, and H-2B temporary/seasonal workers) will be processed through the Chicago NPC. Effective June 1, 2008, all applications filed by mail must be submitted to the appropriate office. Until June 15, 2008, any application filed by mail with the incorrect DOL office address will be forwarded to the appropriate NPC. After June 15, 2008, however, any application filed by mail with the incorrect office will be returned to the employer unprocessed.

Currently, both the Atlanta and Chicago NPCs handle all PERM and most temporary applications, with cases divided between the two centers on a geographical basis. DOL’s National Office of Foreign Labor Certification (OFLC) in Washington, DC also processes a limited number of temporary foreign labor applications for certain other classes of temporary nonimmigrant programs, such as those for D-1 crewmembers performing longshore work, emergency boilermakers, professional athletes, and H-1C nurses in health professional shortage areas. After June 1, 2008, OFLC will no longer process these applications.

DOL’s stated reason for this change in processing is that “[c]entralizing the filing of labor certification applications and specializing each NPC will increase operational efficiencies in each program, improve customer service that reduces confusion with respect to where permanent and temporary labor certification applications should be filed, enhance efforts to combat...
fraud and abuse within and across each program, and promote greater consistency and uniformity in the adjudication of labor certification applications.”

It is unclear at this time how the change in location may impact processing of PERM and temporary applications. PERM processing times have increased substantially in the past six months, as DOL has begun to issue more audits and appears to be reviewing applications more closely prior to issuing certification. In addition, the change in location for processing may require changes in the mandatory internal notice of PERM filings. Currently, employers are required to include the address of the appropriate NPC on the posting, which is either the Atlanta NPC or the Chicago NPC. It is also unclear whether the NPCs will process applications pending on June 1, 2008, to completion in the original office that accepted the application, or if DOL will transfer files between offices to shift the workload. Jackson & Hertogs is continuing to monitor these changes, and will provide updates as more information becomes available.

Higher fines for immigration violations

On February 22, 2008, Attorney General Michael Mukasey announced higher civil fines against employers who violate federal immigration laws. The announcement was made in a joint briefing with DHS Secretary Michael Chertoff about newly enacted border security reforms put in place by DOJ and DHS. Under the new rule, civil fines will increase by as much as $5,000. The new rule will take effect on March 27, 2008.

Under the Immigration and Nationality Act, employers who violate employment eligibility requirements are subject to civil monetary penalties.

Employers may be fined under the Act for knowingly employing unauthorized aliens or for other violations, including failure to comply with the requirements relating to employment eligibility verification forms, wrongful discrimination against job applicants or employees on the basis of nationality or citizenship, and immigration-related document fraud. According to DOJ, the new penalties have been adjusted for inflation. “Because these penalties were last adjusted in 1999, the average adjustment is approximately 25 percent. Under the specific rounding mechanism of the law, the minimum penalty for knowing employment of an unauthorized alien increases by $100, from $275 to $375. Some of the higher civil penalties are increased by $1,000; for example, the maximum penalty for a first violation increases from $2,200 to $3,200. The biggest increase under the rounding mechanism raises the maximum civil penalty for multiple violations from the current $11,000 to $16,000. Because the penalties are assessed on a per-alien basis, if an employer knowingly employed, or continued to employ, five unauthorized aliens, the resulting penalty could be five fines.

United Kingdom: Change in breach of condition ramifications

From the beginning of April 2008, there will be changes in the United Kingdom’s (“UK”) laws with ramifications for individuals who are either refused entry into the UK or found to be in breach of their conditions (including overstaying, working illegally and deception). Under these new UK Immigration rules, individuals may potentially be subject to one, five and ten year bars from returning to the UK. An area where this might be of particular concern is for business visitors to the UK whose activities are in the gray area and might be considered to be work. Please be aware that business visitor activities generally are limited to attending business meetings and negotiations.

The UK also has announced that it is strengthening its border by having the UK Border Agency work more closely with the police and other law enforcement agencies to improve border control and security. If you have questions about a specific matter, please contact Jackson & Hertogs.

Singapore: “In Principle Approval letter” change in procedure

The Singapore Ministry of Manpower (the “Ministry”) has changed its procedures such that the In Principle Approval letters for employment/dependant passes are now valid for three months instead of six months. This means that the beneficiary of an approved employment pass or dependant pass must enter Singapore and collect his/her pass within three months from the date that the Ministry issues the In Principle Approval letter. Extension applications must be submitted in writing. If you have questions about a specific matter, please contact Jackson & Hertogs.

Global visas—is a visa required for travel?

You can now find the answer on-line as part of Jackson & Hertogs’ “eStatus” case management. See page 7 for the complete story.
Jackson & Hertogs Global Travel System

We are pleased to report that the Jackson & Hertogs eStatus Case System now includes the Global Travel System. This feature allows Human Resource personnel to enter an employee’s nationality, country of residence and country or countries to which he or she will be traveling to determine whether a visa is required.

To use the Global Travel System, click on the Global Visa hyperlink found in the middle of the far left column of the screen after you log in. You may either select one of the Foreign National employees that is linked to you, or just enter the person’s nationality, the country of residence, the type of passport and the destination country and, if applicable, transit country. After you click “Submit”, a new screen will open with the information about the visa requirements for the transit country and the destination country.

If a visa is required, Jackson & Hertogs would be pleased to assist with preparing the visa application and filing the application if permissible (many countries may require that a traveler appear in person). If you have any questions about using the Global Travel System, please contact eStatus@jackson-hertogs.com.

Holiday emergency telephone access for our clients!

Did you know that J&H offers clients emergency telephone access to an attorney on all holidays? Whenever our office is closed for a holiday, we activate an emergency line for our clients to contact our office. The emergency line is answered by one of our attorneys, so you and your employees have immediate access to legal counsel in the event of an immigration emergency. The emergency number is 415-848-5555.

Please note that this emergency line is only active during holidays – during our regular office hours please call our main telephone line. The number is posted both on our website and in eStatus, and we also send out an e-mail to our HR contacts right before the holiday closure.

J&H News

J&H sponsors ALRP Human Rights Award

J&H was one of the proud sponsors of the AIDS Legal Referral Panel’s first annual Benito Juárez Human Rights Award for Outstanding Service to the HIV Immigrant Community. The night was in recognition of immigration attorneys and social service agencies who work on behalf of low-income HIV-positive refugees/asylees.

J&H webinars

April 16, 2008 (Webinar) – Alternatives to the H-1B category

Many employers will find themselves facing tough decisions once the H-1B cap is reached. This seminar will address alternatives to the H-1B cap once the annual numerical limit is exhausted. While there may not be options for all foreign national employees who were shut out of the cap, there are some alternatives that should be considered. Citizens of certain countries (e.g., Canada, Mexico, Chile, Singapore, & Australia) can often find work visas independent of the H-1B category. Further, certain international transferees and citizens of countries sharing nationality with foreign-owned corporations can also be eligible for visas independent of the H-1B category.

May 21, 2008 (Webinar) – Multinational Employers: Nonimmigrant and Immigrant Issues

The L-1 visa category allows U.S. employers to transfer foreign based employees from a related business entity (i.e. parent, subsidiary, affiliate, or branch) abroad to any related U.S. office. This webinar will provide a general overview on how to determine if an L-1A Executive or Manager petition or L-1B Specialized Knowledge petition best applies to your employee and what the differences between the categories mean to the employee and employer. We will also discuss “blanket L-1s” and the green card process for your L-1 employees with particular emphasis on how the L-1A category can transition into an EB-1C multinational manager or executive immigrant visa petition for attaining a green card.

Immigration Trivia

May an employee with a pending employment-based AOS application switch jobs or leave his/her employer?

Answers: Yes. The employee’s AOS must be pending for at least 180 days and the new job must be similar to the position for which the employee was initially sponsored.