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DHS NEWS

FORM I-9 ELECTRONIC SIGNATURE AND STORAGE UPDATE
DHS has issued a final rule that allows for employers and recruiters or referrers for a fee who are required to complete and retain the Form I-9, Employment Eligibility Verification, to sign this form electronically and retain this form in an electronic format. This rule is effective as of August 23, 2010. For more information about I-9 compliance, please see: http://www.jackson-hertogs.com/?page_id=16.

Other recent changes to the I-9 rules include new regulations that eased some of the prior requirements of electronic I-9 creation and reporting. One of the best items of import to employers is that they are no longer required to provide a printed confirmation of the I-9 transaction at the time of completion.

The original electronic I-9 rules – previously required employers to provide the I-9’d employee a “printed confirmation” of the I-9 transaction. But the 2006 electronic I-9 rules failed to define what form such “printed confirmations” could take. Employers were left to wonder if a duplicate copy of the Form I-9 for the employee was the best way to comply, or whether some other kind of “printed confirmation” (which did not contain sensitive information) could suffice instead.

The problem for employers was twofold – providing a hard copy “on the spot” at the time of completion, can be difficult. The HR completing the I-9 with the individual may not have access to a printer OR, given the volume at a new hire orientation, may be simply unable to process all the I-9s and print out the confirmations. Second, even when the printer is available, an HR may be uncomfortable providing a hardcopy of the Form I-9 form itself, due to the sensitive data contained therein.

The original DHS rule refers in the preamble to “terms of art” borrowed from IRS and SEC. These references seem to use the term “printed confirmation of transaction” which is an e-commerce term referring to the creation of a kind of receipt. Thus, the I-9 rules, while ambiguous, seem to best refer to a
kind of printed “receipt” of the transaction, (as you would have with, say, an SEC trade). But of course, the I-9 form itself would certainly suffice. The problem with issuing the I-9 form itself is that it contains sensitive data that could if misplaced be used for identity theft.

Under the final regulation, DHS has modified this area. DHS now allows employers to provide or transmit confirmation of a Form I-9 transaction within a reasonable period of time and upon a request of the employee. Therefore, this is only an obligation when the employee requests the confirmation.

Furthermore, DHS clarifies what is sufficient to meet the obligation of providing a confirmation of transaction and the timeframe by which the confirmation should be provided. In the comments to the final rule, DHS explains:

DHS removed the language requiring the employer to provide the confirmation at the time of the transaction. DHS understands that in certain situations it may be impracticable for employers to transmit or print a confirmation of the transaction because the employee may not have access to a computer or the employer may not have the capability to print a paper copy of the electronic record at the time the document is completed electronically. If, however, the employee requests confirmation, it is reasonable for the employer to be required to give the employee a copy of the information provided within a reasonable period of time. Providing the option of electronic preparation and storage does not in any way alter the requirement that the employer physically examine any documentation provided by the employee in the presence of the employee prior to completing the Form I-9. Though not required when preparing a paper Form I-9, DHS believes requiring an employer to provide a receipt upon employee request when completing an electronic record allows employers and employees to confirm the accuracy of the information provided.

By removing the requirement that the transaction confirmation be provided immediately upon completion and by clarifying what is acceptable to meet the obligation if the employee so requests are both welcome news to employers.

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**USCIS NEWS**

**H-1B CAP UPDATE: 29,700 PETITIONS AS OF AUGUST 13, 2010**

As of the last count on August 13, 2010, USCIS had received 29,700 regular cap petitions towards the 65,000 cap amount and 12,300 master’s exemption petitions towards the 20,000 cap amount. Petitioners may continue to submit petitions under either the regular or master’s cap.

J&H will continue to monitor the FY2011 H-1B cap count, and advise clients as information becomes available. While the rate of H-1B cap filings is markedly slower than in previous years, it is impossible to predict when the H-1B cap will be reached. In prior years, USCIS has given little or no notice before the cap was reached, leaving some clients who wanted H-1B visas out of luck. It is our recommendation that you review all new hires who hold F-1 status and consider filing H-1B visa petitions ASAP this year and not “chance it” that we will have a similar filing window in the next fiscal year. If you wish to start an H-1B case, please contact your J&H attorney.

**UPDATES TO USCIS WEBSITE**

U.S. Citizenship and Immigration Services (USCIS) announced the launch of new web features designed to expand users’ access to their case information. These enhancements include a new online inquiry tool and tailored case status information, as well as new features for Spanish-speaking customers available at [www.USCIS.gov/espanol](http://www.USCIS.gov/espanol). E-mail updates about case status can also now be received in Spanish.

In addition, USCIS states that customers will now be able to submit an electronic inquiry directly to a USCIS Field Office or Service Center to request case status information if their Application to Replace Permanent Resident Card (Form I-90) or Application for Naturalization (Form N-400) is outside the posted processing times. This electronic inquiry system will reduce the need for InfoPass appointments to speak with USCIS representatives in person.

To review the new features, please visit [www.uscis.gov](http://www.uscis.gov).
ESTA FEE TO BE IMPLEMENTED SEPTEMBER 8, 2010

CBP has announced that an interim final rule has been published that will require travelers entering under the Visa Waiver Program (VWP) countries to pay fees when applying for an Electronic System for Travel Authorization (ESTA) beginning September 8, 2010. The total fee for a new or renewed ESTA will be $14. Collection of the fees will begin for ESTA applications filed on or after September 8.

ESTA is an electronic travel authorization that all nationals of VWP countries must obtain prior to boarding a carrier to travel by air or sea to the United States under the VWP. This travel authorization has been mandatory since Jan. 12, 2009. ESTA applications may be submitted at any time prior to travel. Once approved, authorizations are generally valid for multiple entries into the U.S. for up to two years or until the applicant’s passport expires or other specific circumstances give rise to a need to reapply, whichever comes first. Under the new interim final rule, travelers with an approved ESTA will not need to pay the ESTA fees when updating an ESTA application. However, travelers with new passports and reapplying for an ESTA will need to pay the ESTA fees.

For more information about the Visa Waiver Program, please see our FAQ at http://www.jackson-hertogs.com/?page_id=5517.

SEPTEMBER VISA BULLETIN: LIMITED ADVANCE FOR EB-2 INDIA & CHINA

The Department of State (DOS) Visa Bulletin for September 2010 showed limited progress in the employment-based second preference (EB2) category for both India-born and China-born individuals. For both India-born and China-born individuals, the EB2 priority date moved forward just over two months, from March 1, 2006 to May 8, 2006. All countries other than India and China remain “current” in the EB2 category. Employment-based first preference (EB1) also remains current for all countries.

The employment-based third preference (EB3) numbers for all countries other than India, China and Mexico moved forward just over six months, from June 1, 2004 to December 15, 2004. EB3 India remains unchanged at January 1, 2002. EB3 China moved forward one month from September 22, 2003 to October 22, 2003. EB3 Mexico remains “unavailable”.

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.

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 since 1996.
DOL NEWS

DOL UPDATES PERM PROCESSING TIMES

The U.S. Department of Labor recently posted updated PERM processing dates. DOL reports that as of July 31, 2010, it was processing the following PERM cases:

- Analyst Review: December 2009
- Audit Review: July 2008
- Standard Appeals: February 2008
- Government Error Appeals: Current

Cases continue to move forward at the same pace as last month. The Analyst Review queue moved forward two months, and both Audit Review and Standard Appeals moved forward one month from the dates reported at the end of June 2010.

Cases in “Analyst Review” are undergoing initial review – these are the cases for which DOL is currently issuing certifications and audit notices. While DOL reports that it is processing cases filed in October 2009, we are aware that cases filed as late as May 2010 have recently been processed at DOL.

Cases in “Audit Review” were issued audit notices by DOL, and the employer submitted an audit response to DOL for review. It is important to note that DOL uses the date of original filing (i.e., the priority date) to determine processing times for all PERM cases. For example, DOL is reviewing audit responses for PERM cases that were filed in June 2008 and earlier; however, the employer's audit response may have been submitted several months after that date.

Cases in “Standard Appeals” are denied cases where either a request for reconsideration by DOL or a request for appellate review (i.e., an appeal) was submitted. DOL now forwards appeals directly to the Board of Alien Labor Certification Appeals (BALCA) for review; however, until late 2009, DOL was processing both reconsideration requests and appeals in the same queue, so the “Standard Appeals” queue includes both requests for reconsideration and appeals.

“Government Error Appeals” are appeals based solely on an error by DOL, i.e., cases denied for failure to respond to an audit, but the employer did in fact submit a timely audit response. While an employer may ask for its appeal to be considered under the government error queue, DOL is the sole arbiter in determining whether the decision was government error. If DOL does not find that the decision was erroneous, the case will move to the Standard Appeal queue for further processing.

DOL is currently working to reduce its pending backlog of PERM cases. DOL’s goal for FY 2010 is to reduce the backlog by 50% this fiscal year. DOL states that if a pending application was filed more than three months prior to the reported processing month, an inquiry may be made on the status of the pending application. Whether a case is behind the processing times will depend on what processing queue the case is in at DOL. For example, under the DOL’s standards, a case filed in April 2009 would be overdue for initial Analyst Review (August 2009), but not overdue under the Audit Review (June 2008) processing date.

Jackson & Hertogs is monitoring the status of our pending PERM cases, and following up with DOL when cases are behind the reported processing times.
LEGISLATIVE NEWS

BORDER SECURITY LAW ADDS NEW FEES FOR COMPANIES EMPLOYING LARGE NUMBERS OF H-1B OR L-1 WORKERS

On August 13, 2010, President Obama signed into law the Border Security Emergency Supplemental Appropriations Act of 2010. This law includes a substantial increase in fees for certain H-1B and L-1 visas. The following fee changes have been imposed for employers who have 50 or more employees in the U.S., and more than 50% of those employees working in H-1B and/or L-1 nonimmigrant visa status:

- Fees for an H-1B visa would be increased by $2,000 per initial application, raising the total filing fees for a new H-1B visa to $4,320, without premium processing

- Fees for an L-1 visa would be increased by $2,250, raising the total filing fees for a new L-1 visa to $3070, without premium processing.

The filing fee increases will expire on September 30, 2014. These new fees appear targeted towards so-called 'IT consulting' companies, the majority of whose U.S. employees are typically working on H-1B or L-1 visas. As drafted, these fees would also apply for extensions and renewals of H-1B and L-1 visas, not just for the initial application.

However, at a teleconference on August 19, USCIS advised that the additional fees would only apply to new H-1B and L-1 petitions, not for extensions/amendments with the same employer. USCIS also advised that because the law was effective upon signing on August 13th, they would be applying the law to any pending H-1B or L-1 petition with a postmark date of August 14, 2010 or later. Petitions that may be subject to the law are currently being held in abeyance at USCIS, and USCIS will be issuing requests for evidence (RFE) on these petitions to determine whether the additional fee applies. If the fee applies, the petitioner will be required to submit a check for the additional fee before the case can be adjudicated. If the fee does not apply, the petitioner will need to present documentation to prove that is not subject to the fee and why.

During the teleconference, USCIS also advised that they are presently revising the forms and filing instructions to address the new fee and documentation requirements. USCIS also stated that in calculating whether a U.S. workforce was made up of more than 50% employees in H-1 or L visa status, the employer would need to perform a “snapshot” test as of the date of filing the petition. USCIS also stated that it considered L-2 employees working under an Employment Authorization Document (EAD card) to count as L visa holders for purposes of calculating the number of employees in H or L visa status.

We would note the few employers will actually be subject to these new fees. The law does not raise H-1B and L-1 fees for all employers, only for those employers who have 50 or more employees in the U.S., and 50% or more of those employees are on H-1B or L-1 visas. Most U.S. employers do not have the majority of their employees on H-1B or L-1 visas, and will therefore be unaffected. However, all employers filing new H-1B and L-1 petitions may experience delays in processing their petitions at USCIS as the Service implements this law. Jackson & Hertogs will be contacting clients who may be impacted by the new law, and working to gather any necessary documentation to meet the USCIS evidentiary requirements.
**J&H NEWS**

**J&H ON THE GO**

Senior Associate Atessa Chehrazi will be presenting a seminar this month on the “Basics of H-1B Filings” for the American Immigration Lawyer’s Association Northern California New Members Division.

**J&H WEBINARS**

To sign up for a J&H complimentary webinar, send an e-mail to webinar@jackson-hertogs.com.

You can always find an up-to-date list of webinar offerings on our website at http://www.jackson-hertogs.com/?page_id=519.

**August 25, 2010: Travel Considerations: Issues Raised by International Travel.**

This webinar will focus on the 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 extension/change of status is pending? As many people will be applying for initial H-1B visas on or about October 1, 2010, 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 possible security checks.

(no PHR/SPHR certification for this webinar)

**September 29, 2010: Immigration 101.**

This webinar will present a broad overview of immigration issues, including a review of nonimmigrant visa categories and the immigrant visa categories and process. This is an excellent overview for HR staff who are new to immigration issues, or for experienced HRs who want to brush up on the basics. Please join Senior Associates Daniel Horne and Grace Hoppin for a whirlwind tour through the alphabet soup of visas, petitions and applications. (PHR/SPHR certification pending)

**October 27, 2010: Visas Created Through Free Trade Agreements: TNs, L-1s, E-3s, and H-1B1s.**

This webinar will provide an in depth look at the visa categories created solely for citizens of certain countries (e.g., Canada, Mexico, Chile, Singapore, and Australia) that have entered into free trade agreements with the United States. In addition to the requirement that a foreign national be a citizen of one of the countries, we will discuss what other requirements are necessary to qualify for each visa category. We will also discuss the benefits and the limitations of these visas. (PHR/SPHR certification pending)

**IMMIGRATION TRIVIA**

True or False? The Border Security Emergency Supplemental Appropriations Act of 2010 imposes increased H and L fees for employers with more than 50 employees if more than 50% of the employees are on L or H-1B visas.

**Fees for a new L-1 visa to $5307.0, without premium processing.**

**L-1 visa would be increased by $2250.**

**The total filing fees for a new H-1B visa would be increased by $2000 per application.**

**Answer: True.**