INSIDE SPOTLIGHT

U.S. CITIZENSHIP AND IMMIGRATION SERVICES

H-1B cap update: 46,800 petitions as of 11/19/2010 .......................... 103.1
USCIS filing fees to increase November 23, 2010 .............................. 103.1
Naturalization certificate redesign .................................................. 103.1
Changes to Form I-129: Export control questions .............................. 103.2

DEPARTMENT OF STATE

December Visa Bulletin: Little change in dates ................................. 103.3
Administrative holds considered type of visa denial .......................... 103.3
Validity of certain visas for Slovakia decreased ............................... 103.3

DEPARTMENT OF LABOR

Trend in PERM denials and audits ................................................. 103.4

GLOBAL VISAS

Netherlands: Changes to immigration laws .................................... 103.5
United Kingdom: Tier 1 limit met for November ............................. 103.5

OTHER NEWS

Upcoming J&H webinars & Immigration Trivia ................................. 103.5
J&H holiday schedule .................................................................. 103.5

USCIS NEWS

H-1B CAP UPDATE: 46,800 PETITIONS AS OF NOVEMBER 19, 2010

As of the last count on November 19, 2010, approximately 48,977 H-1B cap-subject petitions were receipted. Additionally, USCIS has receipted 17,836 H-1B petitions for aliens with advanced degrees. 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. We also offer a link on our homepage to the latest H-1B cap count: www.jackson-hertogs.com. 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.

USCIS FILING FEES INCREASE NOVEMBER 23, 2010

As we reported last month, the USCIS published a rule raising filing fees on almost all application and petition form types other than the N-400 for Naturalization. The new fees will be effective 60 days from the date of publication. Applications or petitions mailed, postmarked, or otherwise filed on or after November 23, 2010 must include the new fee. For more details, please read: http://www.jackson-hertogs.com/?p=4114.

NATURALIZATION CERTIFICATE REDESIGN

On October 25, 2010, USCIS announced the redesign of the N-550 Certificate of Naturalization with implementation by the end of the year. The new certificate will include enhanced security features including digital photo and signature embedded in the certificate.

Also announced was that USCIS will transition to an automated process for certificate production by the end of the year. For a...

CHANGES TO FORM I-129:
EXPORT CONTROL QUESTIONS COME TO THE FORE

USCIS will soon release a new version of Form I-129 that contains long-awaited changes, including a query regarding whether the beneficiary requires an Export Control or International Traffic in Arms Regulations (ITAR) license or clearance. The revised form will roll out on November 23, 2010, and 30 days thereafter become mandatory for all nonimmigrant visa petitions filed with USCIS. (Blanket L applications use a different form, Form I-129S, and therefore should not be impacted for the immediate future.) Form I-129 is used for most nonimmigrant visa employment petitions (H-1B, H-1B1, L-1, O-1, E-2, E-3, and TN extensions) for foreign workers to come to the U.S. Among other minor changes, the new form requires the sponsoring employer to attest that it understands and complies with the federal export control regulations and ITAR.

Please note that the new Form I-129 adds no new burden to petitioners. Nonimmigrant visa petitioners have always been required to comply with the Export Control/ITAR regime. Specifically, U.S. employers have always been required to make sure that foreign workers are not exposed to any sensitive technologies under the export administration regulations (EAR) or ITAR, due to the so-called “deemed export” rules. The “Visa Mantis” screening applied by U.S. consulates during the security clearance process has always included an assessment as to whether export control licensure might be necessary. For more information on the “deemed export” rules, please see the following Bureau of Industry and Security website: http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html.

The only new change, then, is that employers must now attest that the necessary review for export control compliance was completed with each and every Form I-129 they file. Therefore, the added burden is one of “communication” only. Going forward, Petitioners must check a box certifying whether or not the foreign national employee is subject to an export/ITAR license requirement. If the individual is subject to the license, then the Petitioner will confirm that it will prevent access to the controlled technology and technical data until the required license or authorization to release it is granted to the sponsored foreign national.

We urge clients to discuss this new requirement internally with their Export/ITAR compliance department, and develop a procedure for notifying the mobility or HR department regarding any foreign employees for whom an export license is required. Petitioners may want to consider modifying the hiring process so that such information can be captured at the initiation stage. Suggested language for all future hiring worksheets might run as follows:

With respect to the technology or technical data Company will release or otherwise provide access to the beneficiary, Company must certify that it has reviewed the Export Administration (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

(1) a license is not required from either U.S. Department of Commerce or U.S. Department of State to release such technology or technical data to the foreign person; or

(2) A license is required for such release to the beneficiary and that until such license is issued, Company will prevent access to the controlled technology or technical data by the beneficiary. Company’s Export Control Department has determined that a license is required:

Please respond YES or NO.

However companies decide how to handle this issue, their export control compliance group should be advised of the fact that some communication must be made to those responsible for processing immigration paperwork. If you have any questions regarding the impact of this form change, please contact Jackson & Hertogs.
DECEMBER VISA BULLETIN: LITTLE CHANGE IN DATES

The Department of State (DOS) Visa Bulletin for December 2010 shows little progress in any of the employment-based (EB) categories. Only the Employment-based first preference (EB1) remains current for all countries. In the employment-based second preference (EB2) category for India-born and China-born individuals, there was little to no movement. For China-born individuals, the EB2 priority date moved forward only 7 days, from June 1, 2006 to June 8, 2006. India EB-2 remains unchanged at May 8, 2006. All countries other than India and China remain “current” in the EB2 category.

The employment-based third preference (EB3) numbers for all countries other than India, China, and Mexico moved forward one month from January 22, 2005 to February 22, 2005. EB3 India did not change, remaining at January 22, 2002. EB3 China moved forward from November 22, 2003 to December 8, 2003. EB3 Mexico has moved more than one year from May 1, 2001 to July 1, 2002.

At the AILA California Chapters Conference on November 12, Charles Oppenheim, Chief, Immigrant Control and Reporting Division, Visa Services Office, DOS advised that he does not anticipate much progress in the EB categories for the coming year. EB1 should remain current; however, due to country quota limits, it is possible that a cutoff date may be imposed in the EB1 China and India categories. In the EB-2 category, the worldwide numbers will remain current. India and China EB2 will progress slowly, with no progress expected in India EB2 until summer. Mr. Oppenheim expects that EB3 worldwide will progress about 3-6 weeks per month. India EB3 may move as little as 0-2 weeks per month, and China EB3 about 1-3 weeks per month. Mr. Oppenheim advised that he tries to give advance notice of 1-2 months when there may be a significant change in the visa numbers, and he also tries to avoid retrogressing the cutoff dates, as he is aware that this is very disruptive for visa applicants.

It is important to note that “nationality” for immigrant visa allotment 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.

ADMINISTRATIVE HOLDS CONSIDERED A TYPE OF VISA DENIAL ON SUBSEQUENT VISA APPLICATIONS

Another issue addressed at the AILA California Chapters meeting provided rather disturbing news regarding how DOS views INA § 221(g) notices given out by Consular Officers as part of the visa application process. This section of the Immigration and Nationality Act is a catch all to enable the Consular Officer to request additional information. This section is relied on in various circumstances when the Consular Officer refers the application to Washington, D.C. for a security check or other wise holds the case up for what is usually referred to as “administrative processing.” This is also used when the Consular Officer wants additional evidence regarding a tourist’s ties to the home country, documentation regarding the relationship between two entities for an L-1 visa, original documents for an H-1B nonimmigrant, etc. Generally, once the additional documents are presented, most visa applicants are issued the visa.

According to DOS officials such a visa issuance delay is considered a “denial” that has been overcome. Therefore, DOS officials have stated that any person subjected to a visa issuance delay even if the visa was ultimately issued, must indicate on subsequent visa applications (Form DS-160) and ESTA (Electronic System for Travel Authorization) applications for Visa Waiver entrances that s/he had been denied a visa. Therefore, at this question on the form, the individual would mark “yes” and as the explanation something to the effect of “overcome; visa issued”.

Failure to mark this question “yes” could result in a finding of misrepresentation. AILA is attempting to work with DOS on this issue but for now, clients applying for visas or ESTA entrances are being advised to take note of this issue.

VALIDITY OF CERTAIN VISAS FOR SLOVAKIA DECREASED

On October 18, 2010, the Department of State reduced the available validity for H, L, O, P, and R visas for Slovakian citizens to 24 months. The visa fee was also increased to $60, see http://travel.state.gov/visa/fees/fees_3732.html. These changes reflect the reciprocity agreement between the two countries.
DOL NEWS

TREND IN PERM DENIALS AND AUDITS

DOL has been working through its backlog of pending PERM audits, and some new trends have emerged in how DOL views PERM recruitment documentation. It appears that a new, tougher DOL attitude to recruitment is related to the current state of the U.S. economy – when unemployment is running at or close to 10%, DOL is more reluctant to grant an employer’s request to hire a foreign worker.

The most significant trend is a surge in denials because the newspaper advertisements did not include the job description, or were deemed not to have sufficient information regarding the job description. This is a marked change, as DOL has previously advised that the newspaper advertisements for PERM do not need to include the job description, only sufficient information to “apprise” potential U.S. applicants of the nature of the job opportunity. This has usually meant including only the job title for the position, or the title plus a minimal description if the job title is vague along with the name of the company and job location.

Several attorneys have reported that they successfully challenged these denials, and DOL ultimately certified cases; however, the applications were delayed as the cases went through the post-denial reconsideration process. For this reason, and to avoid the risk of a denial and delays, employers may want to consider adding more details to their PERM advertisements. This of course would come at a dollar cost as the price of the newspaper advertisements would increase. This issue only arises when DOL issues an audit notice. Therefore, employers with large numbers of PERM cases could end up increasing their PERM budgets on all cases but only reap the benefit on the handful of PERM cases designated for audit. Also keep in mind is the fact that it is unclear what level of detail is sufficient. For example, would it be sufficient to refer the applicant back to the company’s web site or to the mandatory SWA job order? Does the entire description need to be in the ad or just part of it? Given the success of appeals in this area, larger employers with larger numbers of advertisements may choose to risk the chance of denial and appeal in order to not increase expenses. Furthermore, given that up until the last six months, advertisement content was not a reason for denial, this may in fact simply be a trend that will end as quickly as it started.

Another new trend involves a closer inspection of the use of an Employee Referral Program (ERP) as part of the PERM recruitment. In recent months, DOL has demanded proof of a nexus between the ERP and the PERM position, and evidence that current employees were notified that referrals to the PERM position would be eligible for the ERP program. Previously, a copy of the ERP and its incentives was sufficient documentation for this step. Employers who use an ERP as part of their PERM recruitment should make sure that they can show proof that the ERP was in effect during the recruitment period, that employees were aware of the ERP, and that the employees were aware that the PERM position was eligible for the ERP program. We typically ask the employer to print out and sign with a current date a copy of the ERP to include in the PERM recruitment package as a way to show that the ERP is currently in effect. Print outs from the company web site outlining the ERP or emails or other documents provided to employees regarding the ERP are also helpful. The idea here is to show that the ERP not only exists but that the employees are aware of it and it is currently in effect. The harder step is demonstrating that the PERM job advertised was also included under the ERP.

DOL has been issuing audits asking for more documentation regarding the recruitment of U.S. workers for the job opportunity. Several attorneys have reported receipt of audit letters which ask for resumes of all applicants, as well as documentation of when and how applicants were contacted and considered for the position. DOL has also asked employers to document how the applicants were not rejected for lack of any skills which could be learned during a reasonable period of on-the-job (OTJ) training. The regulations specify that if a skill or requirement can be gained OTJ, this is not a lawful reason to reject an otherwise qualified U.S. worker. Employers must be sure to maintain records of all applicant contacts, how they were deemed to be qualified or unqualified, and provide detailed explanations why all of the listed job requirements cannot be gained during a reasonable period of OTJ training.

At a recent meeting with program stakeholders, including AILA, DOL suggested that it may be publishing more guidance for employers regarding advertisements and ERP documentation. As this information becomes available, Jackson & Hertogs will update our PERM procedures to ensure that we are incorporating the best practices in this challenging area of immigration law.

Jackson & Hertogs is hosting a webinar on December 1, 2010 to go over these recent PERM trends. See below regarding our webinar series.

Clients with questions about PERM recruitment, or about the PERM program, should contact their Jackson & Hertogs attorney.
**J&H NEWS**

**NETHERLANDS: CHANGES TO IMMIGRATION LAWS**

It is anticipated that on January 1, 2011, Dutch law will amend the procedures for obtaining work permits for foreign nationals and impose certain duties on employers sponsoring such work permits. One change will require employers to register as sponsors. There will be two classes of sponsors: “regular” and “authorized” but only “authorized” sponsors will be able to sponsor highly skilled migrants after January 1, 2011.

The new laws also will change the procedure for submitting applications for both highly skilled migrants who require entry clearance and highly skilled migrants who do not require entry clearance. Authorized sponsors may be able to submit only a certificate of sponsorship confirming that the highly skilled migrant meets the conditions with the application and will only need to retain evidence of the qualifications in case requested during an immigration inspection. Applications from authorized sponsors should be adjudicated in two weeks from the time the application is submitted. The new laws also will impose reporting and record retention duties on employers. Employers also will have a duty to keep foreign employees informed of their rights and responsibilities as well as to ensure that foreign employees leave the Netherlands at the necessary time. Please contact Jackson & Hertogs if you have specific questions.

**UK: TIER 1 LIMIT MET FOR NOVEMBER**

As of November 10, 2010, the limit for UK Tier 1 (General) visa applications has been reached for November 2010 and no further visas for Tier 1 (General) applications will be issued in November. Applicants can submit a Tier 1 (General) application but, if the application meets the rules, the applicant will not receive the visa until the UK Border Agency begins issuing visas again on December 1, 2010. Please contact Jackson & Hertogs if you have specific questions.

**J&H NEWS**

**J&H ON THE GO**

Senior Associates Grace Hoppin and Atessa Chehrazi both spoke at AILA’s California Chapters Conference in Monterey, California in November 2010. Grace served on a panel that discussed recent trends in PERM cases, and best practices to avoid denials. Atessa served as Discussion Leader on a panel covering issues relating to I-140 Petitions and the interplay with educational evaluations.

**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.

**December 1, 2010**

**PERM: Recent Trends and Coping with DOL**

In the past year, DOL has made substantial improvements in their PERM processing times. However, in addition to faster processing, some alarming new trends have emerged in how DOL views documentation submitted in response to an audit. We will discuss recent DOL policy changes in advertisement preferences, documentation changes for employee referral programs, and other new interpretations from DOL that impact preparation of cases. We will also discuss the possibility of an increase in supervised recruitment cases, and whether DOL is moving to an active application of its debarment authority under the regulations.

Please join us for this complimentary webinar by sending your name and company to webinar@jackson-hertogs.com.

**J&H HOLIDAY SCHEDULE**

Jackson & Hertogs will be closed November 25 and 26 for the Thanksgiving holiday. We will also be closed December 23, 24, 30, and 31 for the Winter holidays.

---

**IMMIGRATION TRIVIA**

The USCIS filing fee increase effective on November 23, 2010 will raise filing fees on almost all application and petition form types other than which of the following?

(a) Form I-90 Application to replace Permanent Residence card
(b) N-400 Application for Naturalization
(c) Form I-539 Application to Extend/Change Nonimmigrant Status
(d) Form I-129F Petition for Alien Fiancé(e)
(e) None of the above. All fees will increase.

**Answer:** (b) and (c) and (d). The new fees will raise filing fees on almost all application and petition forms other than the N-400 for Naturalization, which remains the same. Some fees on almost all application and petition forms other than the N-400 for Naturalization will rise.

---

**December 1, 2010**

**PERM: Recent Trends and Coping with DOL**

In the past year, DOL has made substantial improvements in their PERM processing times. However, in addition to faster processing, some alarming new trends have emerged in how DOL views documentation submitted in response to an audit. We will discuss recent DOL policy changes in advertisement preferences, documentation changes for employee referral programs, and other new interpretations from DOL that impact preparation of cases. We will also discuss the possibility of an increase in supervised recruitment cases, and whether DOL is moving to an active application of its debarment authority under the regulations.

Please join us for this complimentary webinar by sending your name and company to webinar@jackson-hertogs.com.

**J&H HOLIDAY SCHEDULE**

Jackson & Hertogs will be closed November 25 and 26 for the Thanksgiving holiday. We will also be closed December 23, 24, 30, and 31 for the Winter holidays.
SERVING THE COMMUNITY

Since 1950, Jackson & Hertogs has had a long tradition of providing pro bono legal services to needy individuals and families seeking immigration assistance. Our attorneys regularly provide free counsel to less wealthy members of the public on a range of different immigration issues, working either individually or in concert with nonprofit organizations.

The firm partnership actively encourages all attorneys to find some way to contribute to the local community, not only through pro bono legal representation, but also by participating in local outreach services. Just one example of the many community outreach programs is our annual participation in San Francisco’s Citizenship Workshop.