**INSIDE SPOTLIGHT**

**U.S. CITIZENSHIP AND IMMIGRATION SERVICES**

H-1B cap: It’s not too early to start planning .................. 127.1
Temporary immigration relief measures .......................... 127.2

**DEPARTMENT OF STATE**

December Visa Bulletin .................................................... 127.3
DV 2014 program has closed .......................... 127.3

**DEPARTMENT OF LABOR**

Hurricane Sandy extension request .......................... 127.3

**OTHER NEWS**

Holiday travel advisory .................................................... 127.4
Jackson & Hertogs is moving ......................................... 127.5
November “Immigrant Visa” webinar ............................ 127.5
Immigration Trivia ............................................................ 127.5

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**USCIS NEWS**

**END OF YEAR CONSIDERATIONS—IT’S NOT TOO EARLY TO THINK ABOUT THE H-1B CAP!**

While most folks start thinking about the end of year holidays, our firm starts worrying about the H-1B cap and how to make sure that employers are queuing up to file petitions so that they have the best chance of securing one of the visa numbers. As background, there is an annual limit of 65,000 visas that can be given out to new H-1B nonimmigrants. The 65,000 visas also include visas that are typically held in reserve for citizens of Singapore and Chile due to free trade agreements with these countries. The unused portion of the 5,800 visas reserved for citizens of Singapore and Chile each year may be added back towards the 65,000 based on usage each year. In addition to this base 65,000, another 20,000 H-1B visas are considered "exempt" from the cap each year to be awarded to individuals who have graduated from Master’s (or higher) degree programs from accredited U.S. universities. Therefore, there are roughly 85,000 new H-1B visas available each year.

The H-1B cap typically impacts employers desiring to employ individuals who are in the U.S. in other nonimmigrant categories (F-1, J-1, L-1, etc.) or who are H-1B nonimmigrants with universities or related not for profit research institutes (Stanford, Harvard, etc.) or who are outside the United States and have not previously held H-1B status. Individuals who were already counted against the cap in a prior fiscal year and who have not "reset" their six year limitation of stay clock, are exempt from the cap. Therefore, any current employees or possible new hires that a company has who are already in H-1B status and for whom an extension is required do not have cap issues. Given that the U.S. government’s fiscal year runs from October 1 through September 30 each year, and H-1B visa petitions cannot be filed more than six months prior to the requested start date, what has typically happened each year is that employers submit the bulk of the H-1B cap petitions to arrive at the USCIS service centers by April 1 of each filing year. Prior to 2009, more than sufficient numbers of petitions have been received during the first week of April to exhaust the number of available H-1B cap visas. In fact, during those high demand years typically the filed petitions are subjected to a lottery system for adjudication and a large
USICS NEWS (CONT’D)

The number of filed petitions are rejected based on the cap having been reached.

For the past three years, the cap has not been reached during the first 5 days of April and employers have continued to file petitions until the H-1B cap was exhausted. For the past several years, we have seen the cap reached earlier and earlier. Several years ago, the cap was reached on January 26, 2011. The next year it was reached more than two months earlier. This past year it was reached on June 11, 2012.

The general thought is that given the uptick in the economy and increased hiring in the tech sectors will result in the cap being exhausted during the first 5 business days of April. Employers should anticipate that the cap will be reached and that they will not be able to sponsor cap subject petitions for an entire year unless there is a significant change in the immigration laws.

We strongly urge employers to treat this as urgent and identify cap subject individuals they wish to sponsor for H-1B status as early in 2013 as possible. Prior to being able to file any H-1B visa petition, the underlying Labor Condition Application must be approved and the entire petition prepared for filing. The sooner cases are prepared and made ready for filing the better.

In order to reach the cap, a petition is received at USCIS before the cap is reached, the petition is assigned one of the available numbers. When USCIS announces that the cap has been reached, the Service will usually state that all petitions received on or by a certain date have been accepted under the cap, or all petitions received on that date will be run through a lottery, to determine which petitions get one of the remaining H-1B visa numbers. Petitions that are in the mail to USCIS on the day the cap is reached are not accepted, and will be returned unprocessed.

Due to the importance of getting all known cases prepared and filed, J&H will be inundating our clients over the next couple of months. We will be sending emails to all corporate HRs identifying individuals we have in our system for whom they may wish to file H-1B visa petitions. In addition, we will again stress the underlying Labor Condition Application must be approved and the entire petition prepared for filing. The sooner cases are prepared and made ready for filing the better.

In terms of how the H-1B cap is reached, if a petition is received at USCIS before the cap is reached, the petition is assigned one of the available numbers. When USCIS announces that the cap has been reached, the Service will usually state that all petitions received on or by a certain date have been accepted under the cap, or all petitions received on that date will be run through a lottery, to determine which petitions get one of the remaining H-1B visa numbers. Petitions that are in the mail to USCIS on the day the cap is reached are not accepted, and will be returned unprocessed.

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TEMPORARY IMMIGRATION RELIEF MEASURES

USCIS will provide certain immigration benefits or relief to eligible individuals impacted by Hurricane Sandy. USCIS will entertain requests that include:

- A change or extension of nonimmigrant status for an individual currently in the United States, even when the request is filed after the authorized period of admission has expired;
- Extension or re-parole of individuals previously granted parole by USCIS;
- Expedited adjudication of off-campus employment authorization applications for F-1 students experiencing severe economic hardship;
- Expedited adjudication of employment authorization applications;
- Assistance to those who have not appeared for an interview or submitted required forms of evidence. You may show how the disrupting event affected your connection to USCIS and your ability to appear or submit documents as required; and
- Assistance to those who have not been able to respond to Requests For Evidence (RFEs) or Notices of Intent to Deny (NOIDs). USCIS will extend the deadline for individuals to respond to RFEs or NOIDs by 30 days. This will apply to all RFEs and NOIDs with a deadline of October 26 through November 26, 2012. During this time, USCIS will not issue denials based on abandonment of an application or petition.

Visitors traveling under the Visa Waiver Program may visit a local USCIS office for assistance. Specific questions of eligibility should be addressed to USCIS by calling the National Customer Service Center at 1-800-375-5283. Visa Reissuance Program (VRP)

Applicants for a visa stamp may be able to take advantage of the Visa Reissuance Program (VRP) to avoid a visa interview at certain U.S. Embassies abroad. While we note that this program is most common at U.S. Embassies in Europe, there are similar programs at some U.S. Embassies in Asia. Under the VRP, an applicant must meet certain criteria before the requirement of an interview at the Embassy is waived. Please keep in mind that each embassy sets its own criteria, but generally would require that the applicant previously completed fingerprints (all 10) and the applicant is applying to renew a visa in the same category as a visa that is either still valid or has expired within the last 12 months.

Please check the applicable U.S. Embassy’s website to verify qualification under the program and whether the embassy offers VRP. If an applicant qualifies under the VRP, then the process for visa stamp issuance is simplified in that the applicant need only mail his/her passport to the Embassy while physically present in that country and not have to appear for an interview. Please note however that a Consular Officer reserves the right to request that an applicant appear in person for an interview after reviewing any application.
DECEMBER VISA BULLETIN
The Department of State (DOS) Visa Bulletin for December 2012 indicates very little change from the November Visa Bulletin but for some slight forward movement for EB2 China and all EB3 categories. The employment-based first preference category (EB1) continues to remain current for all countries. The priority date for EB2 China has moved to October 22, 2007 while EB2 India remains at September 1, 2004. The EB2 category for all other countries, including Mexico and Philippines, is current. The employment-based third preference category (EB3) numbers for all countries made some slight forward movement. China advanced the most significantly from April 15, 2006 to July 1, 2006. EB3 India moved forward from October 22, 2002 to November 1, 2002, EB3 Philippines moved slightly from August 8, 2006 to August 15, 2006 and EB3 for all other countries, including Mexico, moved from November 22 to December 22, 2006. DOS looks at your country of birth in determining whether you are a national of a given country, not your country of citizenship. It is country of birth (yours or your spouse) that determines which country to which you are “charged” or “counted” for purposes of permanent residency. For example, if you were born in India but have since become a citizen of Canada, you are still charged against India and you have to look at advancements for India rather than worldwide numbers. As another example, if you (principal applicant on an employment based process) were born in India but you are married to a person who was born in Canada, both of you can be charged against Canada. This latter example is called “cross-chargeability”.

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.

DV 2014 PROGRAM HAS CLOSED
Registration for the Diversity Visa Program, DV-2014, has closed and no additional entries will be accepted. Online registration for the DV-2014 program began on Tuesday, October 2, 2012 and concluded on Saturday, November 3, 2012. DV-2014 entrants will be able to check the status of their entries as of May 1, 2013 through Entrant Status Check (ESC) using the electronic DV entry form at www.dvlottery.state.gov.

Successful entrants will receive instructions for how to apply for immigrant visas for themselves and their eligible family members. Confirmation of visa interview appointments will also be made through Entrant Status Check.

HURRICANE SANDY EXTENSION REQUESTS
The Office of Foreign Labor Certifications will allow for extensions from employers that were impacted by Hurricane Sandy. The OFLC will consider requests from employers and authorized representatives which require additional time to provide documentation for issuance of a prevailing wage determination, PERM audit, and supervised recruitment. See the DOL’s notice for specific instructions: http://www.foreignlaborcert.doleta.gov/pdf/Sandy_Extension_FAQ11-8-2012.pdf.
HOLIDAY TRAVEL ADVISORY

With the holidays approaching, your employees may be traveling outside the United States to see friends or family, in addition to perhaps making business trips. Before travel plans are finalized, travel documents need to be reviewed to ensure safe return to the United States.

We have prepared the following checklist of issues you may share with your employees before holiday travel plans are made:

► Check documents for continued validity/expiration.

First, check the expiration date of your passport, nonimmigrant visa stamp in your passport (e.g., H-1B, L-1, O-1, J-1, etc.), and your I-94 Entry/Exit card. Please check not only your own documents, but those of your spouse and children as applicable.

When you travel abroad, you will be required in most cases to surrender your I-94 card to the authorities. (Canadians citizens holding TN status are exempt from this requirement.) You will, however, want to hold on to your USCIS Form I-797 Approval Notice. When you return, be sure to present your Form I-797 Approval Notice and valid nonimmigrant visa stamp. This will demonstrate your authorized period of authorized employment status. You should always carry the original Form I-797 Approval Notice on all international trips, assuming USCIS issued one to you. (Please note that nonimmigrants in certain categories, such as Blanket L-1, E-2, E-3, or TN, will not necessarily have an I-797 Approval Notice, unless their employers had previously filed extensions of their nonimmigrant status with USCIS.)

With respect to your nonimmigrant visa stamp itself, please make sure it is valid not only at the time you depart the US, but also for a meaningful period of time after you return from your international trip. Trips to Canada or Mexico lasting less than 30 days require no visa stamp for return to the United States. In this type of situation, you may return to the US using an expired Form I-94. However, if you apply for a visa stamp in Canada or Mexico, and your visa stamp application is subsequently denied or delayed, you may not necessarily be able to return to the United States with just your I-797 Approval Notice.

Finally, with respect to passports: please ensure your (and any family member’s) passport is valid for at least six months beyond your approved period of stay in the United States. If you do not have a passport valid for the full period of authorized nonimmigrant stay, please consider getting a new passport prior to your trip if possible. Otherwise, it is likely that US CBP will "short change" your period of authorized stay upon return to the United States. That means they will not give you the full period of stay for which you were previously authorized. This is NOT an admission error. One cannot be admitted for a period that exceeds the validity of the passport expiration date. You will want to contact your country’s nearest embassy to determine how to obtain a new passport as soon as possible. The passport validity date is the controlling date.

► Booking visa appointments to get a new visa stamp.

You may need to apply for a new nonimmigrant visa stamp at a US consulate, if either

1. you have either never before obtained a nonimmigrant visa stamp for your current employment category, or

2. if your previously-issued nonimmigrant visa stamp expires before your intended return date to the United States.

This must be done before you return from your international trip. Please make sure to book your visa appointment as early as possible, even if you do not plan to leave the United States for several weeks from now. Consular appointments typically require personal interviews that can sometimes take weeks to obtain, due to high demand during holiday travel months. With limited exceptions, under the Department of State’s Nonimmigrant Visa Interview Waiver Pilot Program, certain individuals interviewed in conjunction with a prior visa application will be allowed to renew their visas without undergoing another interview. We recommend you check with the specific US consulate where you will apply for your visa to verify availability and eligibility under this program.

Please note that consular appointments need not necessarily be made in your home country. They may be made in Canada or Mexico, or other countries, depending upon your circumstances. However, before making a visa appointment with a US consulate in a country besides your own, please ensure to the extent possible that the post will accept your application. Visa application processes at different US consulates can differ from country to country. Therefore, please check with that consulate on necessary documents and procedures at the time of making your visa appointment. You can locate different US consulates around the world by checking the US State Department website.

► Beware of security clearance checks.

Anyone applying for a nonimmigrant visa takes some small risk of delay resulting from so-called "administrative processing" or
“security clearance” delays. This is particularly, but not exclusively, true for nationals of India, Pakistan, China, and Russia. Sometimes these delays can last days, weeks, or even months. Sadly, the only way to ensure you never get delayed by security clearance checks is to never apply for a nonimmigrant visa at a US consulate. This is not a viable option for most nonimmigrants, as it would require a halt to any international travel. There is no US consulate (e.g., in Canada or Mexico) where you are more or less likely to receive a security clearance check. Security clearance checks can be, and have been, ordered at all US consulates, depending upon the circumstances. Please plan your travel accordingly, so that a delay in your return due to security clearance checks does not come as a total surprise to those expecting your timely return to the United States.

► Applicants for adjustment of status (I-485) should renew advance parole early.

Those who have applied for adjustment of status (Form I-485) can travel internationally only with an advance parole (AP) document, issued prior to departure, that is valid beyond the intended return to the United States from their trip abroad. (The only exception is for those adjustment of status applicants who also hold valid, unexpired H-1B/H-4 or L-1/L-2 visa stamps.) The USCIS can often take as long as 3 to 4 months to process an advance parole renewal application. For that reason, it is wise to apply for renewal of any advance parole document within four months of its expiration date, to ensure that a new advance parole document will arrive before the existing advance parole document expires. Otherwise, you may not receive your new advance parole document in time to make your international trip.

► Send J&H a copy.

Provide a copy of your I-94 card (front and back) immediately upon your return. As you know, as a nonimmigrant visa holder working for a US employer, the white I-94 card issued to you from US Customs & Border Protection (CBP) controls your ability to lawfully work and remain in this country. I-94 cards are typically issued by USCBP officers each and every time you take an international flight. Sometimes, the new I-94 card lists an expiration date later than your prior I-94 card (CBP officers are not consistent in providing for a 10 day “grace period”). Sometimes, you are “short changed,” and your new I-94 card expiration date is shorter than that of your prior I-94 card. Sometimes, the I-94 expiration dates of your family members are not in alignment with your own I-94 card. Sometimes, the I-94 is marked with the wrong classification.

For these reasons, it is very important that you provide Jackson & Hertogs the most current I-94 card issued by US CBP to you and your family. Please be sure to scan and e-mail (or fax with a cover sheet) a copy of the new I-94 card you and/or your family receive after each entry into the United States.

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