IF THE GOVERNMENT SHUTS DOWN…

The government’s fiscal year runs from October 1 to September 30. This year, Congress is facing a budget fight. Much of the focus is on whether the Affordable Care Act also called “Obamacare” will be funded. Despite the ACA having been passed and signed into law, there are some congressional representatives who are attempting to thwart the law by removing its funding—doing so would essentially make it so that components of the law cannot be implemented. A consequence of this budget fight is that there is a real possibility that the federal government may shut down. Even if a compromise is reached, it may be a short term deal that only takes us into December.

Please note that there has been no official announcements from any agency—but they have communicated with AILA the following expected impacts if there is a government shutdown (note we are only focusing on the impacts to individuals who are seeking immigration benefits):

- USCIS continues to function since they are primarily funded through user fees. However, you should anticipate some delays in case adjudication.
- Department of Labor would not process applications. This will impact Labor Condition Applications which are required to be submitted with H-1B, H-1B1 and E-3 petitions and applications. LCAs not being issued could therefore lead to delays in the filing of change of employer petitions and extensions of stay. This will also impact PERM submissions—presumably Employers would be able to submit applications, but the DOL will not move forward with adjudications. This could lead to issues with DOL’s sending out confirmations of receipt and verifications for Employers. Potential issues here include processing delays, submission delays, verification delays, etc. The impacts from a DOL closure will present significant issues for employers and employees.
- Department of State would only process visas in true emergencies. This means that individuals applying for employment visas (H-1B, L-1, E-2, etc.) will not be able to process these applications. This will impact individuals with personal
and business travel plans. Visas for tourists (B-1 business travelers as well as B-2 pleasure travelers) will be impacted. Immigrant visa processing at the Consulates as well as K-1 fiancee visa applications will be delayed.

- Customs and Border Protection at the borders would continue to function but may have less staff than usual which could impact border application processing. This includes airport staffing. Expect longer lines and more of a potential for missed flight connections.

More information will be posted to our website [www.jackson-hertogs.com](http://www.jackson-hertogs.com) as it is released. The best sources for tracking this situation are the popular news media. If there is a shut down and the above impacts happen, petitioners and applicants should not only anticipate the immediate effects but also the longer term effects as backlogs then will have to be worked through most likely resulting in processing delays far beyond the resolution of the political game.

**VALIDITY OF MEDICAL EXAM EXTENDED**

A USCIS policy memorandum issued on September 4, 2013 temporarily extends the validity of the civil surgeon endorsement on submitted medical exams. Generally, a medical exam submitted with an I-485 adjustment of status application is valid for only one year. However, under the policy memo, the medical exam will be extended and considered still valid where the medical exam shows that the applicant has no Class A or Class B medical condition and USCIS adjudicates the I-485 before May 31, 2014.

**Class A medical conditions** make the applicant inadmissible and include:

- communicable disease of public health significance
- failure to show proof of required vaccinations
- mental or physical disorder with associated harmful behavior
- drug abuse or addiction

**Class B medical conditions** do not constitute a ground of medical inadmissibility and are defined as physical or mental abnormalities, diseases, or disabilities serious in degree or permanent in nature amounting to a substantial departure from normal well-being.

This upshot of this policy is that medical exams that were filed with the USCIS will remain valid and the USCIS will not have to issue requests for updated medical examinations on long-pending I-485 cases that are now eligible for adjudication due to priority date advancement. This type of extension on medical examination results is periodically announced in order to help the USCIS avoid processing delays on adjudications when there have been periods of retrogression.
EMPLOYMENT-BASED QUOTA REACHED FOR FY2013

The State Department has confirmed to the American Immigration Lawyers Association (AILA) that they have reached the annual limit for employment-based immigrant visas for the current fiscal year. As mentioned above, the government’s fiscal year runs from October 1 to September 30. It is not unusual for visa numbers to be exhausted before the fiscal year ends. Once the visa numbers are exhausted no agency can issue immigrant visas (this includes approving applications for adjustment of status) until the new fiscal year begins and the fresh allotment of visas is then available.

USCIS has stated to AILA that it will continue to process applications for adjustment of status cases that are already pending but will hold them in abeyance until the new fiscal year starts. This means that the State Department will place USCIS requests for visa numbers for specific cases in a “Pending Demand” file to assign visa numbers when they come available. Starting on October 1, 2013, the State Department will be able to actually assign visa numbers to these pending cases so long as they are eligible under the cut-off dates listed on the October Visa Bulletin. The bottom line is that some cases that are listed as “current” in September, will be held up until October when the new numbers are issued. This short delay maybe also hampered by any government shutdown we experience—see the first article as it is all interrelated!

OCTOBER VISA BULLETIN

The Department of State (DOS) Visa Bulletin for October 2013 indicates very limited forward movement in the employment-based second preference category (EB2) after a few months of rapid priority date progression. The EB2 China category moved forward from August 8, 2008 to September 15, 2008. There was no movement in the EB2 India category which remains at June 15, 2008. In addition, the EB2 category for all other countries, including Mexico and the Philippines, remain current.

There was also limited forward movement for the employment-based third preference categories (EB3). The EB3 category for the Philippines moved forward from December 1, 2006 to December 15, 2006. There was no movement in any other EB3 categories. EB3 India remains at September 22, 2003 while all other EB3 categories, including Mexico and China, remain at July 1, 2010.

The employment-based first preference category (EB1) continues to remain current for all countries. The DOS has indicated that it is unlikely that there will be additional forward movement for most employment-based categories during the next few months. In addition, a sudden surge in demand could require the retrogression of a cut-off date at any time.

The priority date is effectively one’s place in line to immigrate. The priority date is established when a PERM application is filed with the Department of Labor, or for those cases not requiring a PERM application (typically EB1 cases and EB2 applications in the national interest), when the I-140 is filed with the USCIS. Individuals with priority dates earlier than the listed cut-off date on the bulletin are eligible to submit applications for adjustment of status (or consular visa applications) or if their applications are already pending may have their cases adjudicated. If ones priority date is not “current” neither agency may accept the case for processing nor adjudicate a pending case because the “visa is not available” if the priority date is not “current.”

Note that 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” against 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. Please also note that while Congress is contemplating new immigration legislation it is far too early to look at the potential changes and their impact on the immigration system. Until new legislation is actually passed and becomes law, we can only look to the current laws for how cases will be processed.
**DIVERSITY VISA 2015 INSTRUCTIONS RELEASED**

The U.S. Department of State has posted instructions for entering the 2015 diversity immigration visa lottery (DV-2015). The Diversity Immigrant Visa Program is administered annually by the Department of State and provides for a class of immigrants known as “diversity immigrants,” from countries with historically low rates of immigration to the United States. For DV-2015, 50,000 diversity visas will be available. Please note that Nigeria is no longer on the eligible countries list. Entries to the DV-2015 program must be submitted electronically between October 1, 2013 and November 2, 2013. There is no fee to enter the lottery and no fee should be paid to download or complete the entry form. Starting May 1, 2014, entrants may enter their DV-2015 entry confirmation number into the Entrant Status Check, available at www.dvlottery.state.gov, to find out whether their entry was selected or not. For full instructions see [http://travel.state.gov/visa/immigrants/types/types_1318.html](http://travel.state.gov/visa/immigrants/types/types_1318.html)

Diversity Visa program (DV) applicants should be aware that the Department of State has advised the public of a notable increase in fraudulent emails and letters sent to DV applicants. The scammers behind these fraudulent emails and letters are posing as the U.S. government in an attempt to extract payment from DV applicants. Applicants are encouraged to review the rules and procedures for the DV program so that you know what to expect, when to expect it, and from whom. DV entry forms are free to download and complete and applicants should never pay a fee to a website to “complete” their DV forms. The Department of State does not notify successful DV applicants by letter or mail. Applicants can only find out if they were selected to continue with DV processing by checking their status online at [http://www.dvlottery.state.gov](http://www.dvlottery.state.gov).

All eligible individuals who are interested in immigrating should consider entering the lottery—the fact that you may have an employer who is sponsoring you for permanent residency does not preclude you from entering the lottery.

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**J&H NEWS**

**J&H WEBINAR SERIES**

To register for any of our webinars please send an e-mail to webinar@jackson-hertogs.com with the date of the seminar you would like to attend.

**October 23, 2013: PERM 102**

This webinar will focus on the requirements to test the local labor market to determine whether qualified U.S. workers are available to fill jobs currently held by foreign staff. Reviewing recruitment results can be a challenging process in today’s job market. In some cases, PERM applications are met with DOL audits requesting resumes and records of applicant contact. This webinar will assist human resources and staffing professionals in analyzing these issues and developing best practices both in managing the applicant review process, and in maintaining records in compliance with DOL requirements.

**November 20, 2013: Portability Considerations**

The American Competitiveness in the 21st Century Act came into effect 13 years ago. Since then employers and foreign nationals have been struggling to understand the various rules that allow for portability when there are changes in employment either due to changes in the employee’s position, or due to changes in the corporate structure. Given lengthy processing times for permanent residency which is compounded by visa retrogression, changes in employment are becoming more and more common. Join us for a discussion that focuses on H-1B and green card portability issues as well as priority date retention when there are changes.

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**IMMIGRATION TRIVIA**

True or False. To enter the Diversity Visa Lottery, an applicant must mail in form and fee to the Department of State before November 2, 2013.

Answer: False! Entries to the DV-2015 program must be submitted electronically.