IMPACT OF FEDERAL SHUTDOWN

As you are well aware, due to political brinkmanship in Congress, the federal government shut down “nonessential” services from October 1 to October 17. We address some of the specific agency impacts below. What we will discuss here is the overall impact and continuing ramifications of the government shutdown.

First of all, since many of the immigration benefits are “fee based” the USCIS continued to operate most sections, including the adjudication of immigration petitions and applications. However, many employers were stymied in the filing of H-1B visa petitions in particular given that the DOL is not fee based. This meant that employers were unable to file the Form ETA9035 Labor Condition Application, which is the first step in being able to file an H-1B change of employer petition. Further, newer companies were unable to obtain FEIN confirmations, or verification of ability to file LCAs, from DOL. Even after the DOL online filing system came back up on October 17, its functionality is sporadic. USCIS has issued a statement advising that they will forgive untimely petition filings that were held up due to the government shutdown and an employer’s inability to obtain an LCA.

The DOL shutdown also dramatically impacted PERM filings and prevailing wage determinations. Employers simply were unable to file these applications. During the shutdown, not only was the DOL on-line system down, but it also did not have a process for accepting paper PERM filings by mail. Employers with response deadlines for audits and appeals were stymied. It is possible that DOL will issue notices of failure to timely respond on PERM audits and appeals that will have to be appealed. We are fully expecting that the repercussions of the shutdown will continue to be felt as an already beleaguered agency digs out from the additional backlog. The upshot is that we need to be braced for an increase in processing times and added complexity.

Turning back to the USCIS, notably, E-Verify (employment verification system for new hires) is not fee based and was taken off-line. Given the general congressional intent to implement E-Verify for all employers and the perceived importance of the program, it is striking that this system was deemed non-essential and went off-line. The unavailability of E-Verify did not remove the obligation of employers to complete the I-9 employment verification for new hires. What it meant was the E-Verify enrolled employers had to keep track of new hires so that the E-
Verify step could be completed after the system was back up live—see article below for particulars.

Other agency impacts occurred within the consular function—some consulates were working with less staff and therefore had less available appointments and longer turnaround times for visa issuance. Some consulates indicated that there would be increased processing times for administrative processing (e.g., security checks) referred to the DOS, as some DOS employees were furloughed.

The long and short of it was that the government shut down impacted employers and foreign nationals. The current federal funding is again set to expire early in 2014 and there is every indication that there will be yet another shutdown. Employers and their employees will need to brace for another bumpy period if it happens again.

**COMPREHENSIVE IMMIGRATION REFORM OFF THE TABLE?**

Just as the latest spending bill was agreed to, President Obama called upon both houses of Congress to get to work on Comprehensive Immigration Reform (CIR).

A year ago, following the national election that sent President Obama back to the White House for another term and the Republicans trying to figure out how they alienated so many, in particular the immigrant population, it certainly looked as if CIR would be passed this year. After a rather good start with the Senate passing its own version of CIR, the legislation stalled in the spring.

The general thought is if it is going to be passed, this is the best year for it to happen since it is not an election year. Next year, with congress turning over and 1/3 of the Senate up for grabs, immigration reform will again be a political hot potato. The Congressional representatives in conservative blocks risk their seats with congress turning over and 1/3 of the Senate up for grabs, immigration reform will again be a political hot potato. The Congressional representatives in conservative blocks risk their seats if they are “easy” on immigration. In 2015, President Obama will be a lame duck president and all eyes will be on candidates looking to take up residence at the White House. So, this remains the best year to see immigration reform come through with a diminishing chance in subsequent years.

Earlier this year, the Senate’s “Gang of 8” passed their version of CIR. The House of Representatives chose to try to tackle immigration reform in a more piecemeal fashion, one issue at a time, and House leadership refused to bring the Senate version up for a vote. In the past few weeks, there has been more traction and a group of Congressional Democrats issued their own version of CIR. Over the past couple of weeks they have been joined by some Republicans.

Will there be CIR this year? It’s too early to know, but there is a chance, if they can stop bickering over who is to blame for the failings of [HealthCare.gov](http://www.healthcare.gov).

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**E-VERIFY RESUMED OPERATIONS ON OCTOBER 17**

After being shut down since October 1, 2013, the government reopened on October 17, 2013 and E-Verify resumed operation after being inaccessible during the shutdown. USCIS provided the following information for employers on issues that may have occurred during the shutdown:

**Receipt of Tentative Nonconfirmation (TNC):** Employers should add 12 federal business days to the date printed on the “Referral Letter” or “Referral Data Confirmation” for unresolved TNC due to the shutdown. Employees have until the new date to contact Social Security Administration or the Department of Homeland Security to resolve their case. Employers may not take any adverse action against an employee because of a TNC.

**Creating Cases under the 3-day Rule:** Employers have until November 5, 2013 to create an E-Verify case for each employee hired during the shutdown. To provide a reason why the case is late, select “other” from the drop down list and enter “Federal government shutdown”.

Although E-Verify was inaccessible, employers continued to have a responsibility to complete and retain a Form I-9 for every person hired to work during the shutdown.

**NEW ONLINE CHANGE OF ADDRESS**

On October 25, 2013, USCIS unveiled a new “Change of Address” online tool. The new tool is a single form with questions to guide the applicant through the process. Individuals filling out the form will need their receipt number for pending cases, data and location of entry into the US, and old and new address. Past difficulties with web browser compatibility should be resolved.

Under USCIS regulations, all “aliens” or foreign nationals (nonimmigrants and immigrants) are required to notify USCIS of a change of address using Form AR-11 within 10 days of moving. The change of address reporting requirement applies to all nonimmigrants, asylees, and lawful permanent residents. The new form can be accessed directly at [https://egov.uscis.gov/coa/displayCOAForm.do](https://egov.uscis.gov/coa/displayCOAForm.do).

**REDESIGNED USCIS.GOV**

On October 30, 2013, USCIS launched their redesigned website. The new website includes redesigned navigation menus, a tools section for electronic transactions, and a larger search bar. The redesigned website is part of the Department of Homeland Security’s strategy to use a common content management system and consolidate the Department’s public websites. The new website is available in English and Spanish and can be accessed at [www.uscis.gov](http://www.uscis.gov) and [www.uscis.gov/espanol](http://www.uscis.gov/espanol).
NOVEMBER VISA BULLETIN

The Department of State (DOS) Visa Bulletin for November 2013 continues to indicate 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 September 15, 2008 to October 8, 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 in some employment-based third preference categories (EB3). While the EB3 category for the Philippines remained at December 15, 2006 and EB3 India remained at September 22, 2003, all other EB3 categories, including Mexico and China, moved forward three months from July 1, 2010 to October 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 national interest/exceptional ability or Schedule A cases), 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 an individual’s priority date is not “current,” neither agency may accept the case for processing nor adjudicate a pending case because the “visa is not available.”

Note that DOS looks at the country of birth in determining visa chargeability, and not the country of citizenship. It is the country of birth (of the applicant or applicant’s spouse that determines which country to which the immigrant visa is “charged” or “counted” against for purposes of permanent residency. For example, if an applicant was born in India but has since become a citizen of Canada, the immigrant visa is still charged against India and that applicant must look at advancements for India rather than worldwide numbers. As another example, if the principal applicant on an employment based process was born in India but married a person born in Canada, both applicants can be charged against Canada. This latter example is called “cross-chargeability.”

DV LOTTERY ENTRY PERIOD IS OPEN

The 2015 Diversity Visa program entry submission period opened on October 1, 2013 and will close at 12PM EDT on November 2, 2013. The entry form is only available for submission during this period. Entries must be made online. The DOS reminds applicants to be wary of scammers who contact individuals with fake emails, letters, and requests for money. Entry to the DV lottery is free. You should never pay anyone a fee to download or complete the entry form.

To read more about the DV program, please see last month’s news item on our website.
DOL NEWS

DOL RESUMED OPERATIONS, SOMEWHAT
While the government reopened on October 17, 2013, DOL’s online filing system, iCERT, has been only sporadically available, and subject to significant delays in accepting data when available. iCERT’s system outages are possibly due to the confluence of high volumes of use and system “upgrades.” Among those upgrades is a new advisory notice that “all data” submitted via iCERT “may be… disclosed in any manner by authorized personnel.”

DOL was successful in resetting its timelines to allow employers additional time to respond to verification confirmations for PERM cases filed just before the shutdown. However it has not met its regulatory obligation to process LCAs within 7 working days in some cases. There is no required processing time for prevailing wage determinations and PERM applications, therefore processing times for these application types can be expected to lengthen further.

GLOBAL VISA NEWS

NEW RULES FOR THIRD COUNTRY NATIONALS VISITING SCHENGEN COUNTRIES
As of October 18, 2013, any foreign national making short-term visits to Schengen countries, whether with a visa or visa-exempt, will be allowed to remain in the country in the region for a maximum cumulative stay of 90 days within any 180-day period. If an individual is issued a multiple-entry Schengen visa, the individual may leave and return any number of times within the 180-day period but the combined stay within the region must not total more than 90 days.

In accordance with current Schengen rules, citizens of non-Schengen countries, regardless of their visa obligation status, may enter and remain within the Schengen Area without a residence permit for up to “90 days per 180-day period starting from the date of first entry.” As of October 18, 2013, these rules will be changed so that stays within the Schengen Area without a residence permit will be possible for up to “90 days over any 180-day period.”

This change means that the 180-day period (i.e. reference period) will no longer correspond to 180 days following the date of first entry, but rather to the 180 days prior to the control date (border control upon entry into or departure from the Schengen Area, or police check within the Schengen Area). In other words, the duration of stay must not exceed at any time 90 days per 180-day period.

Please note that this change will not impact most travelers; however frequent business travelers who hold Schengen C visas or are traveling on a short-stay visa waiver should take note of this change. The new rules do not apply to third-country nationals who hold residence permits in the Schengen Area member countries. They also do not apply to EU nationals traveling in EU countries that have implemented freedom-of-movement agreements.

Please note that third-country nationals entering a Schengen area must now possess a valid passport issued in the last 10 years with a remaining validity period of at least 3 months beyond the intended date of departure from the region.

J&H NEWS

THE J&H FAMILY EXPANDS!
We are pleased to announce that J&H attorney Angela Mapa recently gave birth to a healthy baby boy! Benito Nainoa Foland weighed 8 lbs., 1.6 oz. Angela and her family are doing well. We wish them all the best! Angela plans to return from family leave at the beginning of 2014.

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.

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.