
JACKSON & HERTOGS Immigration Newsletter

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JACKSON & HERTOGS is engaged in the practice of Immigration and Nationality Law, concentrating in business-related immigration matters. This newsletter is designed to provide accurate and authoritative information on the subject matter covered but is not intended to be legal advice. Please contact either the San Francisco or San Jose office of Jackson & Hertogs if you have questions or would like additional information.

November 1996

The past few months have been ones of turmoil and change in the practice of immigration law and for companies involved in the sponsoring of foreign nationals for employment. California Proposition 187 helped propel immigration (illegal and legal) into an election year issue and we have seen politicians stumbling over each other trying to take the "hard line" on anything related to immigration. Then, in September 1996, we all experienced the great H-1B CAP CAPER. First (according to INS), the 65,000 annual cap was reached, then it wasn't; then there was a recount, followed by another recount. The end result--INS established that they can't count. The Cap was never close to being reached--but we all paid the price for three weeks when INS processing of H-1 petitions stopped cold. October brings us the new Immigration Law designed to curb illegal immigration, but affecting legal immigration as well. October also saw the U.S. Department of Labor completely change the ground rules for the processing of permanent labor certification applications. Please -- no more changes! Enough already!

The purpose of this newsletter is to highlight some of these new developments and to assist our clients in understanding how they impact business-related immigration.

PERMANENT LABOR CLEARANCE PROCEDURES REVAMPED

The Department of Labor (DOL) recently issued a General Administrative Letter regarding the implementation of changes to the labor certification procedures. Initially, we were advised that these new procedures will be in effect for any cases which commence processing on or after October 1, 1996. The DOL has recently advised that old style waiver (pre-recruitment cases) filed before October 1, 1996, would continue to be processed following the previous procedures. For all other cases, it appears that by the term "commence processing" the DOL means the day on which the EDD starts actually working on the case rather than the date of filing with the EDD. The DOL believes that the changes will enable the streamlining of cases and effect a reduction in the backlog of cases that are pending around the U.S. New rules for "waiver" cases are being implemented and a new category of "limited review" cases is being added to the "nonwaiver" category. In addition, new requirements regarding "business necessity" are being implemented.

The changes to how applications are processed are substantial and will effect our strategies for preparing and submitting each application. The following is a general summary of the changes:

Unduly Restrictive Job Requirements

If the State Employment Development (EDD) office determines that an application contains a restrictive requirement or one that did not exist prior to the date that the nonimmigrant applicant was hired, the employer will be asked to remove the requirement. The Employer could choose to remove the requirement and proceed with the recruitment or provide a business necessity justification which would be reviewed by the DOL prior to the recruitment.

The business necessity justification would need to address the position as it existed prior to the hiring of the alien

employee or show that there was a major change in the employer's business operation which caused the creation of the position. However, jobs that did not exist prior to the alien employee having been hired would be considered positions which are not truly open to U.S. workers unless the employer can clearly demonstrate a major change in business which caused the position to be created after the alien was hired.

The DOL has provided the EDD with new Operating Procedures or guidelines to assist them in reviewing cases to determine if there are "unduly restrictive job requirements":

If, after its initial review of the application, the EDD determines that there are unduly restrictive job requirements, the EDD will notify the Employer of its finding. At this point, the requirement(s) can be removed or the Employer can submit documentation to substantiate the business necessity of the requirement which must include information showing either that:

- a. The job existed and was previously filled at the same requirement level prior to the alien employee being hired. Such documentation could include position descriptions, organizational charts and payroll records.

-or-

- b. That there was a major change in the business operation which caused the job to be created after hiring the alien (assuming the alien is currently working for the employer).

If the Employer chooses to substantiate the business necessity of the requirement, that justification and all supporting documents will be forwarded to the DOL for review. The DOL will either remand the application to the EDD for recruitment if it accepts the business necessity argument OR will issue a Notice of Findings (NOF) stating that the justification is not acceptable. The Employer would then have the option of rebutting the NOF and risk a Final Denial of the application OR accept the NOF, delete the indicated restrictive requirements and conduct the recruitment. Please note that all of this action could potentially take place *prior* to any recruitment for the position.

Waiver or Reduction in Recruitment Requests

Waiver cases will be encouraged for applications that meet the following conditions:

1. Occupations for which there is little or no availability;
2. No restrictive requirements;
3. Meet prevailing wage requirement; and
4. Employer can show adequate recruitment through sources normal to the occupation & industry within the previous 6 months.

Again, the DOL has issued operating procedures to effectuate a process for waiver applications:

- a. An Employer may file a waiver for any occupation not included on Schedule B if the Employer can show that an adequate test of the labor market has occurred at the prevailing wages and working conditions through normal recruitment efforts for the occupation and industry within the past 6 months.
- b. The EDD's only responsibility on these cases will be to review the applications for completeness and to determine the prevailing wage. The application would be returned to the Employer for corrections and/or additional information where deficiencies are found such as an inadequate wage offer or a restrictive requirement. If any of the deficiencies would have affected recruitment, the Employer will be advised that the DOL would likely not approve the waiver request and suggest that the Employer follow the regular nonwaiver recruitment process. However, the EDD cannot discourage the filing of a waiver nor refuse to forward the application to the DOL but can include a recommendation for or against the granting of the waiver.
- c. Waivers will be given expedited processing. Except where the EDD has identified deficiencies, the waiver will be processed in the order in which it was received with all other applications.

d. The DOL, in reviewing a waiver application, will consider the following factors:

- Adequacy of recruitment conducted by the Employer through newspaper advertising, Internet, etc.;
- Documentation of normal recruitment practices in the industry and occupation furnished by the employer;
- Availability of U.S. workers for the occupation for which recruitment has been conducted through the EDD in the past as shown by EDD referrals and job orders;
- EDD recommendations and comments; and
- DOL's knowledge of the job market.

If a waiver is denied because recruitment was not acceptable, the application will be returned to the EDD for regular processing in the order in which it is received along with other applications. However, if the DOL determines that the waiver contains deficiencies, a NOF will be issued

Limited Review Processing on Nonwaiver cases

The EDD, through DOL guidance, will implement a system to identify and flag nonwaiver applications that are ready for transmittal to DOL that will require limited review. Cases which fit into this category would meet the following:

1. No special job requirements (i.e., Item 15 on Job Offer form is blank);
2. No unusual job duties;
3. No available applicants or a few applicants who clearly do not meet the job's requirements;
4. No prevailing wage issue;
5. Requirements do not exceed the Standard Vocational Preparation as set forth in the DOL's *Dictionary of Occupational Titles*;

The DOL operating procedures for limited review are as follows:

Each Regional Certifying Officer may establish his/her own process for making expedited determinations on applications based on EDD recommendations. The EDD may designate applications for limited review processing only after the completion of the recruitment. The DOL will then expedite these applications for approval when they are forwarded to the DOL except that some applications will be randomly selected for quality control and training purposes.

Resume Screening on Nonwaiver type cases

The EDD will be responsible for pre-screening all U.S. applicant resumes received prior to their being forwarded to the Employer or the DOL Regional Office. Resumes received after the recruitment period has ended can be forwarded to other Employers having similar job offers or returned to the applicants.

One good item is that follow up questionnaires will no longer be sent to applicants. This will save time at EDD for the transmittal of cases to the DOL Regional Office.

Standardized Recruitment through an NOF

Where the DOL requires the employer through a NOF to recruit again because of deficiencies in the first recruitment, a 1-day Sunday advertisement will be required unless it is determined that a trade or professional journal is more appropriate. This advertisement will be run in conjunction with a 10-day job order placed by the EDD.

We have had several discussions with the DOL and the EDD regarding the implementation of the new procedures outlined by the General Administrative Letter. We know that the DOL is currently training EDD specialists in the new procedures and we anticipate that we will start seeing new assessment notices on pending cases which will give us more insight as to how the labor certification process will be effected.

While we will continue to discuss these changes with the DOL and EDD, we believe that it is imperative for employers to start collecting evidence of their prior recruitment efforts in order to be able to file cases under the new waiver procedures.

Under the new waiver type process, the DOL will no longer require nor accept a three-day ad in a newspaper provided that the Employer can demonstrate "continuous recruitment" for the past six months covering the position sought to be certified (i.e., position described in the individual AEC application.) DOL has indicated that it will expedite applications in which such evidence of on-going recruitment is presented and in which the Employer is offering the job at prevailing wage and the application contains either no special requirements or only one or two requirements common to the industry (i.e.. not restrictive.)

If the GAL is taken literally, the new processing will result in a much faster adjudication of AEC applications and without the time consuming and expensive recruitment with which we have all been accustomed for so long (i.e., newspaper classified ads, interviewing applicants, and so forth.) Our objective, then, is to assist you in developing a package of evidence to be submitted to EDD/DOL in connection with each AEC application which describes your company's continuous recruitment program. Please note that this information will need to be kept updated as we must show adequate recruitment efforts for the immediate six months prior to the filing of each AEC. To accomplish this objective, we suggest that you take some time to respond to the following questions in narrative form and provide us with samples. The following information should be forwarded to our firm as soon as possible:

1. What are the company's recruiting philosophy, objectives and goals? What department(s) are largely responsible for recruiting? How much of a budget is devoted to recruiting (in dollars or in percentage of overall budget, as appropriate). Please provide an overview of how the company locates and hires qualified workers for your professional level positions.
2. In general, what type of documentation can you provide to show that there has been on-going recruitment for the past six months or longer? Such documentation may include, but is not limited to, the following:
 - a) Web site: Cop(ies) of job opening announcements posted on your web-site. Such postings should include: job title, location of job site, brief description of duties, minimum requirements and salary. We have been informed by DOL that the actual salary need not be posted provided each individual AEC contains the salary and that the salary meets the prevailing wage requirement. Also, to the extent possible, provide information on the number of job openings in each category (i.e., professional level only) in each job location for the past six months and the number of hires by category and location.
 - b) College recruiting: Describe the company's college recruiting plan, if any. This should include name(s) of college(s) visited in past six months (or on a yearly basis, as appropriate), cop(ies) of job announcements for professional level positions, how many applicants interviewed and/or hired.
 - c) Job fairs: If you routinely participate in job fairs, please furnish the following information and documentation: location(s) & date(s) of fairs in the past 6-12 months; fair sponsor's name (i.e., American Electronics Association or others); cop(ies) of job announcements for professional positions only and number of interviews and/or hires.
 - d) Newspapers/professional journals or other publications used for recruiting: Please provide the same information and documentation as described above and as appropriate.
 - e) Recruiters for a fee (i.e., "head hunters"): If your company uses or has used in the past 6-12 months, a recruiter for a fee, please provide essentially the same information and supporting documentation as above.
 - f) Employee incentive program: If your company has a written employee incentive program for referring qualified applicants, please provide a copy. Please provide information on the impact of such a program. including the number of persons referred and hired.

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3. Do you have a copy of the requisition order for the position used when each nonimmigrant employee was initially hired? If so, please furnish a copy.
 4. By job classification, please list number of current job openings, number in the past 6-12 months, number of hires in same time period and, if possible, the source of the hire(s).

We realize that this is a significant amount of work to request of you. However, as we mentioned above, we hope the new AEC processing will result in more predictability as to outcome, a reduction in time, money and effort on your part, and a far less time consuming effort all around. Please feel free to call our office to discuss these issues.

H-1B CAP BROUHAHA: CENTRAL OFFICE ADMITS THEY CAN'T COUNT: REMEDIAL MATH CLASS SUGGESTED

On August 21, 1996, INS shocked the business community and immigration practitioners by announcing that the 65,000 H-1B numerical limit imposed by the Immigration Act of 1990 (INA) had been reached for fiscal year 1996 (FY'96). Since the enactment of INA in 1991, this event marked the first time that all 65,000 numbers had apparently been used. INS provided no forewarning that the cap was nearing its peak, nor did they provide information on how they were going to handle cases that were currently in the pipeline. Instead, instructions were given to the four service centers to hold all H-1B cases in abeyance so that the count could be verified.

A subsequent statistical report, generated on September 6, 1996, set criteria to ensure that the system was only counting what was clearly appropriate under existing policy. The findings revealed that, in fact, only 60,667 numbers had been used. INS plans to publish a proposed rule explaining its procedures in order to solicit public comment on methods to track petition approval numbers for FY'97. We will keep you posted!

NEW IMMIGRATION LAW IMPACTS H-1 VISA APPLICATIONS AT U.S. CONSULATES IN CANADA AND MEXICO

The new Immigration bill which was signed into law on September 30, 1996, contains a provision which bars individuals from obtaining visas in third countries if they have overstayed their status. This applies to anyone who has overstayed by even one day. In the event the American Consulate determines that an individual has overstayed, or if the individual is unable to prove that s/he has not overstayed, s/he will not be readmitted to the U.S. without first traveling to his/her home country to obtain the appropriate visa stamp. This means that s/he not be able to "travel on the Form I-94." For example, if you/your employee were issued an H-1B visa with Company A and your employee had violated his/her status at any time, that visa is now deemed void. The employee will not be able to continue to use that visa to return to the U.S. from a trip abroad without applying for another H-1B visa in the country of nationality to continue to work for his/her current employer and/or may not be able to return to the U.S. using the I-94.

The State Department, on October 7, 1996, issued a cable to all Diplomatic and Consular posts which implements, effectively immediately, provisions of this new law. The State Department has interpreted the above provision to mean "any alien who, whether before or after enactment of [this law], having been lawfully admitted in nonimmigrant status, has overstayed by even one day the initial period of authorized stay, or any extension of such period granted by INS, may no longer use the visa with which the alien entered the U.S. to reenter the U.S. and is not eligible for further nonimmigrant visa issuance except in the country of the alien's "nationality." This means that the affected individual will be required to go home (to the country of his/her nationality) to apply for the visa.

Effective immediately, we are discouraging nonimmigrants from traveling to Canada or Mexico to obtain visas unless they have Canadian or Mexican nationality. Our view of the situation is that since the American Embassy offices in both Canada and Mexico do not have the resources to determine whether one has violated his/her status in the U.S., the Consulates will simply advise all applicants to fly to their home countries to apply for the visa. In the past, visa applicants whose visa applications were denied but who had a valid Form I-94, could return to the U.S. using the Form I-94. Under the changes in the Immigration law, if the Consulate denies the visa due to a violation of status, the person cannot return to the U.S. using the Form I-94. In other words, s/he may be detained in Canada until s/he can secure travel back to his/her country of nationality.

It appears that the odds of obtaining a visa via Canada or Mexico are 50/50. Many of our clients have obtained the H-1B visa even after our "alert message" was initially sent. Unfortunately, we cannot guarantee that the visa will be issued.

We highly recommend that your employees bring documentation that shows that they have continually maintained their status in the U.S. since entry. This includes copies of I-94s, tax returns, W-2s, pay stubs, and college transcripts.

If a Third Country National (TCN) wants to apply for a nonimmigrant visa (NIV) stamp, e.g. H-1B, at an American Consulate in Canada or Mexico, s/he must first set up an appointment with the Consulate. The individual must call 1-900-443-3131 between the hours of 7am and 10pm (Eastern Standard Time) and be prepared to pay \$3.20/minute.

In response to complaints from people in the West Coast who had to call at 4am in order to secure appointments, the Department of State changed its policy by staggering opening times for appointment calls. Hours for scheduling appointments for each post will open according to time zone. In other words, if you want to schedule an appointment in Vancouver or Tijuana, you can call at 7AM rather than 4AM.

In order to book an appointment, the individual must provide the following: name, passport number, and date of birth. It presently takes approximately 3 weeks to schedule an appointment. Although you can book an appointment at any of the Consulates in Canada or Mexico, we recommend that your employees avoid the Consulate in Vancouver. Based on feedback from clients, we believe that the likelihood of success is greater in Calgary than other Consulates.

FEDERAL COURT SLAPS LABOR'S HAND: LCA COMPLIANCE FURTHER CONFUSED

A U.S. District Court judge in Washington D.C. recently held certain portions of the Department of Labor's (DOL) 1994 interim regulations implementing the Labor Condition Application (LCA) requirements for H-1B workers to be invalid. The National Association of Manufacturers (NAM) sued the DOL seeking to enjoin DOL's 1994 regulations. While rejecting NAM's position that DOL acted arbitrarily and beyond the scope of the statute, the District Court held that the DOL failed to comply with the notice and comment requirements of administrative law in its rulemaking.

What was NOT changed by the NAM decision:

- Employers must continue to list the prevailing wage source on the LCA;
- Employers must continue to list the H-1B worker's wage rate on the internal posting;
- DOL may still initiate its own investigations of LCA compliance even without a complaint (*Note: to our knowledge, DOL has not yet initiated any investigations pursuant to its rules*);
- DOL may continue to define "aggrieved party" broadly & to include DOL itself;
- LCA may be filed no earlier than six months before the H-1B employee's start date;
- Employer must still file LCA within 90 days of receiving a SESA prevailing wage determination;
- Employer may not challenge a SESA (EDD or other state employment agency) prevailing wage determination if that wage was relied upon in filing the LCA

What WAS changed by the decision:

- LCA postings at each "worksite" NOT required as long as new worksite is in the same area of intended employment listed on the approved LCA;
- 90-day rule exempting employers from a new LCA for temporary placements outside of the listed area of intended employment on the LCA was declared invalid;
- Rule requiring employers to maintain & document an "objective system" by which all salary levels are set for the LCA occupation were declared invalid;
- Employers need NOT pay H-1B workers for "nonproductive" time provided overall compensation meets the required wage rate.

What does this mean for the Employer?

- Need not undertake additional postings at travel locations within the area of employment listed on the LCA;
- Must file an LCA for assignments to worksites outside of listed area of employment;
- Need not document objective compensation system for all similarly employed H-1B workers provided an actual wage memo is prepared for each employee;
- Need not compensate H-1B workers who are parked "on the bench" as long as Employer meets the required wage for entire period of employment.

Practical Impact and Word of Caution:

Many of DOL's rules challenged in the NAM lawsuit were voided by the District Court because DOL failed to follow proper administrative notice and comment requirements. DOL can, and likely will, remedy this problem by publishing its rules for comment. Therefore, J&H does NOT recommend that employers change current LCA practices. Until new regulations are promulgated, however, the decision will likely insulate an employer from being penalized for not posting at each worksite or for failing to document and maintain an objective wage system for all employees.

***INDIA-BORN NATIONALS FACE ADDITIONAL DELAYS
IN OBTAINING PR STATUS DUE TO QUOTA BACKLOGS***

The Department of State issued the visa bulletin for June, 1996 which reflected the availability of visa numbers for all family and employment-based preference categories. The bulletin indicated that visas would be unavailable in employment-based category three (this is the "skilled worker" category for those in jobs requiring a minimum of two years of training or experience to perform) for natives of India.

The State Department made the following comments in the bulletin:

Demand for numbers in the India employment third preference by applicants at INS offices has been very heavy during fiscal year 1996. Allocations in the India employment third preference category are 'unavailable' for June, since the category limit for the year has been reached. India employment third preference allocations will resume in October, the first month of the new fiscal year.

Anticipated oversubscription of India employment second preference: A visa cut-off in the India employment second preference is possible as early as July due to heavy applicant demand for numbers.

The news for employment-based two (the category for those possessing advanced level degrees or those of exceptional ability) was even worse than the Department of State predicted. The visa bulletin issued for the month of July, 1996 indicated that visas were unavailable in the employment-based two category, and would remain unavailable for the balance of the fiscal year. However, we anticipated that with the start of the new fiscal year on October 1, 1996, visas would once again be available in both the employment-based two and three categories.

We received additional bad news when the State Department issued the bulletin for September, 1996. It noted: "The India employment first, fourth and fifth preference categories are expected to be current in October. The India employment second and third preference categories will be oversubscribed and subject to cut-off dates because of heavy demand." The bulletin for October, 1996 now reflects a cut-off date of August 1, 1994 in the employment-based two category, and a cut-off date of January 8, 1994 in the employment-based three category. These dates mean that immigrant visas are only available to those who have established a priority date on the waiting list before the date shown; the priority date is normally established when the request for alien employment certification is received and accepted for processing by a state employment service office.

As indicated above, we had been put on notice that cut-off dates would appear in the October, 1996 bulletin, but the severity of the quota backlog took all of us by surprise. We hope that this is a temporary phenomenon, perhaps due to the fact that the processing of labor certification applications through some regional Department of Labor offices on the East Coast are even slower than what we are experiencing with Region IX in San Francisco. We have received the visa bulletin for the month of November, 1996 which indicates that visas will be available to those Indian born EB-2 visa applicants with priority dates before November 22, 1994, and for EB-3 visa applicants with dates prior to February 1, 1994. While it is still too early to make any definitive estimates as to the future progress of these two categories, the data thus far suggests that the movement in the Employment-Based 2 category is likely to be considerably faster than the movement in the Employment-Based 3 skilled worker category.

JACKSON & HERTOGS cordially invites you to attend a seminar on "Immigration: 1997 and Beyond", concentrating on business immigration issues. Please join us.

*Wednesday, December 11, 1996
9:00 - 12:00, Continental Breakfast Buffet will be served
Hyatt Rikeys*

4219 El Camino Real, Palo Alto, CA

Please RSVP by December 4th: Tom, 415/986-4559; Sophia, 408/971-0282

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