

Immigration Spotlight

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New H-1B visas: FY2007 filings start on April 1, 2006!

Employers are reminded that petitions for cap-subject H-1B visas may be filed on April 1, 2006, with a requested start date no earlier than October 1, 2006. Last year, all regular H-1B visas were exhausted by August 10, 2005, and the additional 20,000 H-1B visas that were created for holders of advanced degrees from U.S. universities were exhausted on January 17, 2006. For FY2007, there are 65,000 regular H-1B visas available, and another 20,000 reserved for holders of U.S. advanced degrees. It is anticipated that FY2007 H-1B visa numbers will be used up well before the start of the fiscal year.

Employers should keep in mind that the annual numerical limits of 65,000 and 20,000 mainly applies to “new” petitions (i.e., those filed on behalf of prospective specialty occupation professionals who are being accorded H-1B nonimmigrant classification for the first time) for “non-exempt” employers. Further, while 65,000 “regular” H-1B visas are available each fiscal year, 6,800 of these visas are set aside for use by citizens of Chile and Singapore, pursuant to US Free Trade Agreements with those countries, reducing the effective H-1B cap to 58,200.

Common examples of new H-1B petitions are those filed on behalf of individuals who are presently residing abroad and who will be entering the U.S. to commence H-1B employment, or H-1B petitions filed for those individuals who are in the U.S. in a different nonimmigrant status (i.e., F-1 student, J-1 exchange visitor). Many H-1B petitions will be unaffected by the annual numerical limit. For example, extensions of H-1B stay with the same employer, H-1B petitions filed by a new employer for an individual already in H-1B status (unless the individual was never issued an H-1B “number”), amended H-1B petitions filed because of changes in job duties/job site, and petitions for concurrent H-1B employment are all exempt from the annual H-1B cap. Also “exempt” from the cap are certain H-1B employers, including nonprofit and governmental research organizations, academic institutions, and their affiliated nonprofit organizations.

Abbreviations used in this issue

AILA - American Immigration Lawyers Association

EOS - extension of status

DOL - Department of Labor

DOS - Department of State

IRCA - Immigration Reform and Control Act

LPR - Lawful permanent resident

PERM - Program Electronic Review Management (DOL)

USCIS - U.S. Citizenship and Immigration Services

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© 2006 Jackson & Hertogs LLP is one of the oldest and most respected immigration and nationality law firms in the United States. Established in 1950, we were one of the first legal firms in the country dedicated solely to the practice of immigration law. Today, Jackson & Hertogs has eight attorneys and a staff of more than 25 legal assistants and office management personnel to assist you with immigration matters.

J&H urges employers to identify candidates who need H-1B sponsorship as soon as possible, so that petitions may be filed while there are available visas. Please contact your attorney at J&H if you have questions about eligibility for H-1B status or the H-1B cap.

Preserving residence for naturalization (N-470)

In our global economy, employers often transfer staff from the United States to overseas offices. For U.S. citizens, such transfers have no impact on their status as citizens; however, long-term foreign assignments can have a major impact on lawful permanent residents (LPRs) of the U.S. Even if the LPR can maintain their permanent resident status during the assignment, a prolonged absence from the U.S. may cause significant delays in when the individual is eligible to file for U.S. citizenship, also known as naturalization.

In order to qualify for naturalization, an individual must have at least five years (three years if married to a U.S. citizen) of status as a permanent resident, have been physically present in the U.S. for at least 50% of the time prior to filing the naturalization application, and must have maintained continuity of residence during five years prior to filing the application. While short trips outside the U.S. do not break the “continuity” of residence, a stay outside the U.S. for more than one year does break the continuity of residence. If continuity of residence is broken, when the LPR returns to the U.S., he or she must be in the U.S. for another four years before being eligible to file for naturalization, regardless of how long the person was an LPR prior to going abroad.



To preserve the continuity of residence during a long absence from the U.S., individuals and employers may want to file Form N-470, Application to Preserve Residence for Naturalization. An approved N-470 application entitles an applicant for U.S. citizenship to rebut the legal presumption that continuity of residence is broken when the applicant has been continuously abroad for a period of over a year. The N-470 does not maintain permanent resident status during a prolonged absence, and individuals filing these cases should not presume that the N-470 filing permits them an extended absence from the U.S. Further, the approved N-470 does not eliminate the requirement that a naturalization applicant be physically present in the U.S. for at least 50% of the five calendar years prior to filing the application; however, the N-470 does save applicants from possibly years of delays in eligibility for naturalization.

In order to be eligible to file the N-470, three tests must be met:

1. The applicant must be a U.S. Lawful Permanent Resident (LPR)
2. The applicant must be going abroad to work on behalf of either a qualifying U.S. multinational company or a U.S. government agency
3. The applicant must have had one full year (365) of uninterrupted physical presence in the U.S. after becoming an LPR

Eligible employers transferring LPRs outside the U.S. should consider filing N-470s for these staff, as added insurance that the filing of these applications can provide by saving the LPR years of waiting for their chance to apply for citizenship. While many persons can meet the first two required elements, many individuals cannot meet the legal requirement of at least one full year of uninterrupted presence in the U.S. since becoming an LPR. Employers and individuals interested in N-470 filings should contact their attorney at J&H.

DOL News

DOL issues new PERM FAQs

On February 21, 2006, DOL released two new FAQs on the PERM program. These FAQs dealt mainly with technical issues, such as where employers must post the mandatory notice of filing an application for labor certification, and how to enter information on the ETA 9089 application.

One FAQ also confirmed that no correction or changes may be made to a PERM filing after it has been submitted to DOL. DOL further noted that if an employer believes that changes or corrections are necessary, the employer should withdraw and refile the application with the appropriate changes. DOL advises that PERM does not permit alteration of applications after filing because PERM was designed to achieve fast processing of applications, most significantly through automated processing. DOL states that “Automated processing yields a large reduction in the average time needed to process labor certification applications, but requires establishment of and adherence to defined business rules. Allowing manual corrections or other mechanisms to change filed applications would decrease the system’s efficiency and create the possibility of new backlogs.” DOL has further applied this rule to deny PERM cases where a typographical error (such as transposing a number) led to the automated system to find the application was not in compliance with the regulations. This strict rule makes it essential that PERM cases be prepared with care, to avoid denials due to a simple typographical error.

The complexity of the PERM case is highlighted by DOL's continued release of new "FAQs" to address areas of ambiguity in the regulations. Since PERM went into effect on March 28, 2005, DOL has published seven FAQs, and it is expected that DOL will publish more FAQs this year. J&H will continue to update clients on PERM developments as more information becomes available.

DOS News

Movement in all EB visa categories

The April 2006 Visa Bulletin (http://travel.state.gov/vis/a/frvi/bulletin/bulletin_2805.html) was released by the Department of State (DOS) on March 10, 2006. The Bulletin continues to show significant forward movement for several employment-based (EB) categories.

For Chinese-born individuals, the EB-1 category moved forward six months to January 1, 2004, while EB-2 moved forward three months to January 1, 2003.

Similarly, for individuals born in India, both the EB-1 and EB-2 categories moved forward; EB-1 to January 1, 2005 and EB-2 to July 1, 2002 respectively. India EB-3 advanced one month to February 1, 2001. Worldwide cut offs (for individuals born in all countries other than India and Mexico) for EB-3 were unchanged, and remain at May 1, 2001. EB-1 and EB-2 remain current for all individuals born in countries other than India and China.

For more information on the Visa Bulletin and country quota movements, including information movement in the Family-Based Quotas, please see our DOS Visa Bulletin and Quota Movement (<http://www.jackson-hertogs.com/quota/0quota.htm>) page, which includes detailed charts of quota movement for the past decade.

Issuance begins on electronic passports

On February 17, 2006, DOS announced that Electronic Passports (e-passports) would begin to be phased in. The e-passports have been developed to better facilitate international travel for U.S. citizens and enhance border security.



The first e-passports were produced on December 30, 2005 as part of a pilot program and integrate the latest concepts in electronic document protection and readability.

The e-passports will combine face recognition and a contact-less chip embedded in the cover of the passport that will hold the same information that is printed in

the passport: name, date of birth, gender, place of birth, dates of passport issuance and expiration, passport number, and photo image of the bearer. Passports previously issued without electronic chips will remain valid until their expiration dates.

DOS plans to issue the first full validity U.S. e-passports to the American public later this year and plans to issue e-passports at all domestic passport agencies by the end of 2006.

Global Visas



J&H opens branch office in the Netherlands

A few months ago, Jackson & Hertogs began its Global Visa Program to assist employers who are sending employees to other countries for business or to work. The response has been significant and Jackson & Hertogs is pleased to announce that it has opened a branch office in the Netherlands staffed by attorney Kirsten Anderson, who manages the Jackson & Hertogs Global Visa Program. The Netherlands is the gateway to Europe and serves as a central location between the United States and Asia, particularly from a time zone perspective. You can reach Kirsten by email (kanderson@jackson-hertogs.com) or by telephone during Netherlands' business hours or by appointment at +1 415 986 4559, +1 415 992 7635, or +31 63 390 3347.

Like the United States, many countries have adopted stricter policies regarding the issuance of business visitor visas. Some consulates may require several weeks to process a business visa and some consulates may even require business visa applicants to personally appear at the consulate when making the application. Accordingly, please remember that it is important to plan ahead if your organization wishes to send an employee abroad for business purposes. Please contact Jackson & Hertogs for questions or assistance in obtaining global business visas.

To update last month's *Spotlight* article regarding Italian work permits, the Italian government has published the quotas for non-EU nationals to work in Italy and applications for such work permits may be filed beginning on March 14, 2006. It is expected that the quotas will be rapidly exhausted, but note that there may be other types of work permits available that are exempt from the quota. Please contact Jackson & Hertogs for further information if you have questions about a work permit for a non-EU national to work in Italy or other countries.

Legislative Corner

Contact your senator!



A major immigration bill is being debated in the U.S. Senate as you read this month's Spotlight. The House of Representatives passed a bill in December 2005, HR 4437 (the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, <http://www.nilc.org/immlawpolicy/CIR/index.htm#r4437>) which focuses on enforcement. The bill proposed by Senators John McCain (R-AZ) and Ted Kennedy (D-MA), the Secure America and Orderly Immigration Act (S. 1033), <http://www.nilc.org/immlawpolicy/CIR/index.htm#aويا>, which would provide significant immigration benefits, such as increased H-1B numbers and relief from immigrant visa retrogression, was not passed. In late February 2006, Senator Specter (R-PA), Chairman of the Judiciary Committee, introduced his bill, the "Chairman's Mark" (the Comprehensive Immigration Reform Act of 2006, <http://www.nilc.org/immlawpolicy/CIR/index.htm#ira>), which incorporates many provisions of the House's enforcement-only bill, and a few benefits provisions including creation of a new guest-worker program.

Notably for our office, Senator Diane Feinstein (D-CA) is a member of the Judiciary Committee. If passed by the Judiciary Committee, the bill will then go to the Senate floor, where Senate Majority Leader Bill Frist (R-TN) has scheduled debate to start on March 27. This is a most important time to express support for laws providing immigration benefits. For this reason, one of our attorneys, Atessa Chehrazi, will be traveling to Washington D.C. as part of the American Immigration Lawyers Association's (AILA) Annual Lobby Day to visit Capitol Hill and meet with Senator Feinstein's office.

The following are among the provisions which are relevant to employers of foreign nationals:

- The bill would amend immigration law to add a new crime of "unlawful presence," and defines unlawful presence as being present "in violation of the immigration laws of regulations" – this would make any violation of immigration law, such as failure of a permanent resident to submit a change of address within 10 days, or a gap between H-1B employers, a federal crime. By making unlawful presence in the U.S. a continuing criminal offense, this provision enlists state and local law enforcement officers in immigration enforcement.

- The bill would expand the definition of "alien smuggling" to include offenses where the offender acts with knowledge or reckless disregard of the fact that the alien lacks lawful permission to remain in the U.S. This provision could criminalize the work of law firms counseling foreign nationals who are unlawfully present. In addition, employers could be fined and imprisoned for "harboring" undocumented employees.
- The bill would prohibit the granting of not only adjustment of status, but also any other immigration benefit (e.g., EADs) until all relevant security and background checks have been completed.
- The bill would require that all aliens who have overstayed their authorized period of stay or whose visas have been revoked to be listed in the federal National Crime Information Center (NCIC) database.
- The bill would prohibit issuance of a nonimmigrant visa unless the applicant waives his or her right to any review or appeal of an immigration officer's decision at the port of entry as to the applicant's admissibility.
- The bill would eliminate the diversity visa (lottery) program.
- The bill would also make major revisions to the employment eligibility verification (I-9) process, and would create a telephonic or electronic verification system. The bill would significantly increase civil penalties for hiring violations, to a minimum penalty of \$5,000 for each unauthorized alien, and \$1,000 for each paperwork violation.

You don't have to travel to Washington D.C. to raise your concerns with your representatives. If your company is located in one of the states represented on the Judiciary Committee (such as California), please call your Senator from the list provided on the next page to express your concerns about these provisions. A section-by-section analysis of the entire bill is available on AILA's website at <http://www.aila.org/content/default.aspx?bc=1019|6712|8846|18648>.

Please contact our office if you have questions about the bill and contact your Senator today.

Senate Judiciary Committee



Please contact the Senator where your company is located with your concerns about the "Secure America and Orderly Immigration Act"

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Other News

Social Security Number requirement?

Perhaps contrary to popular belief, neither immigration law nor federal tax law requires an individual to possess an SSN to begin working. AILA's SSA liaison committee reminds employers that The Immigration Reform and Control Act (IRCA) does not require an employee to present an SSN card, but rather, lists the Card as a possible "List C" document for work authorization. Similarly, the Internal Revenue Code does not require an employee to possess an SSN to begin working. It requires only that an application for an SSN be made within seven days of commencing employment for taxable wages. Usually, the real obstacle to commencing employment is the software of a third-party payroll preparer, which cannot generate a paycheck without the number. Under these circumstances, if permitted by its system, the preparer can use a "dummy" SSN solely to generate a paycheck, provided the actual SSN or other required information is provided on the information returns at the time of filing. Further instructions are on the SSA website at www.ssa.gov/employer/.

J&H News

J&H seminars & webinars



April 19, 2006 (Webinar) – PERM, one year later

The first year of PERM has proven to be the best of times and the worst of times: some cases have been approved in a matter of days, others languish for months; two identical cases may receive different decisions on the same facts, with no explanation for the disparity; PERM cases are approved quickly, but due to visa retrogression, the beneficiary is not eligible to apply for the green card upon the approval. This webinar will focus on these and other evolving trends one year after the implementation of the PERM regulations. Issues to be discussed will include: Are there actual patterns? If so, what are the patterns for approvals and audits? What processing times should employers expect after a case is filed? How are employers justifying requirements that exceed what DOL considers "normal" for the occupation? Are these business justifications proving successful when cases are filed? If there is no immigrant visa available when PERM is approved, can anything be done? Can you

file a PERM application when a labor certification is already pending? If so, what are the risks and possible benefits? (PHR/SPHR cert pending)

May 17, 2006 (Webinar) – Visa retrogression

This webinar will address some of the questions regarding immigrant visa retrogression: What is immigrant visa retrogression and what does it mean for an employer? What is the difference between “EB-3,” “EB-2,” and “EB-1”? Does it matter where the employee was born, what country s/he is a citizen of, or whether s/he is married? Is it better to sponsor an employee for a PERM labor certification or an outstanding researcher immigrant visa petition? How does retrogression affect 7th year H-1B extension petitions? (PHR/SPHR cert pending)

Immigration Trivia

Which of the following statements is true when completing an I-9?

- a. A social security card is always required.
- b. A green card also requires proof of work authorization.
- c. The I-9 must be completed within 3 days of hire.
- d. You must make copies of the documents presented for I-9 purposes to attach to the I-9.

Answer: c. The only true statement is that the I-9 must be completed within 3 days of hire. If you have questions about I-9 verification, contact your J&H attorney.