

Immigration Spotlight

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Abbreviations used in this issue

- AILA** - American Immigration Lawyers Association
- AP** - Advance Parole
- BLS** - Bureau of Labor Statistics
- CSC** - California Service Center (of USCIS)
- DOL** - Department of Labor
- DOS** - Department of State
- EAD** - Employment authorization Documents
- TSC** - Texas Service Center (of USCIS)
- USCIS** - U.S. Citizenship and Immigration Services
- VSC** - Vermont Service Center (of USCIS)

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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.

USCIS News

4,000 H-1Bs left for U.S. Masters degree holders

On July 13, 2006, USCIS announced that as of July 11, 2006, they had received 15,208 H-1B petitions eligible for the 20,000 H-1B petitions for Fiscal Year 2007 that are reserved for individuals who hold Masters degrees (or other advanced degrees) from a U.S. university or college. USCIS further reports that in addition to these H-1B petitions that have been issued receipts, as of July 11, 2006, USCIS had approximately 800 H-1B petitions requesting the advanced degree exception awaiting data entry, bringing the true cap count to approximately 16,008. This means that less than 4,000 H-1Bs remain available under the advanced degree exception. You can view the cap count on-line at <http://uscis.gov/graphics/services/tempbenefits/cap.htm>.



Based on the reported usage of H-1B numbers, it is likely that the advanced degree H-1B cap will be reached within the next 1-2 weeks. There will likely be no advance notice when the advanced degree H-1B cap is reached, so employers should act quickly to secure these H-1Bs while they remain available.

Jackson & Hertogs advises employers to immediately file H-1B petitions for any foreign workers with U.S. advanced degrees who do not have employment authorization beyond October 1, 2007. The only exception would be for those foreign hires who already hold H-1B status and have already been counted against the H-1B cap. Note that those in H-1B status working for universities or non-profit research facilities have likely not had their H-1B visas counted against the cap, and thus likely remain subject to the H-1B cap if they wish to change to an employer who is subject to the cap (i.e., if an individual moves from a cap exempt employer to a cap subject employer, the individual would be cap subject even if s/he is already “in” H-1B status). Once this fiscal year’s H-1B cap is reached, new H-1B petitions will not be accepted by the USCIS until April 1, 2007, and the earliest start date that will be available on those petitions will be October 1, 2007.

If you believe that you have any employees or would-be employees who qualify for the H-1B advanced degree exemption for FY2007, please contact our office immediately.

Erroneous rejections by the Vermont Service Center

On July 17, 2006, USCIS confirmed that the mail room at the Vermont Service Center had erroneously rejected some H-1B filings submitted under the 20,000 exemption and confirmed that the usage numbers listed above are still correct. They confirmed that the cap has not been reached but that numbers are going quickly. Other AILA attorneys have reported rejections from VSC stating that the cap has been reached. USCIS is aware of this and if any case was erroneously rejected, it can be resubmitted with evidence of proper submission.



Difficulties for TN holders with approved H-1Bs

We have recently been made aware of two TN visa holders who have been denied entry to the United States at Vancouver International Airport, after they had an H-1B petition filed this year. The Foreign Nationals currently hold valid TN status, but also hold an H-1B approved to take effect on or soon after October 1, 2006.

TN status allows a Foreign National to lawfully work and reside in the United States until the time the H-1B takes effect. However, CBP officers told these TN visa holders that their necessary intent to return to Canada at the end of their authorized TN stay was compromised by their approved H-1B petitions. These individuals were told that they could return to the United States after October 1, 2006 in H-1B status, but that they could not return before then in TN status.

We cannot be sure if these are isolated incidents or part of a coordinated CBP policy. Therefore, we are warning all TN visa holders to avoid international travel between now and October 1, 2006, when their H-1B petitions will become eligible for activation. Should any international trips be planned prior to October 1, 2006, please consider postponing or canceling those trips. Should this prove problematic, please contact your J&H attorney immediately.

Bi-specialization to expand

USCIS released the 2nd phase Bi-specialization Filing and Processing Procedure on June 30, 2006. According to the 2nd phase filing procedure, all employment-based I-485 applications based on "pending" or "approved" I-140 petitions must be filed with the Nebraska Service Center effective July 24, 2006. Such I-485 filings are referred to as "stand-alone" I-485 applications. Any stand-alone I-485s filed prior to July 24, 2006 were filed with the Service Center where the underlying I-140 petition is pending or approved.

Under the 1st phase of the bi-specialization program, which started on April 1, 2006, all concurrently filed I-140/I-485 applications were required to be filed with the Nebraska Service Center.

Also effective July 24, 2006, the EAD (I-765) applications and/or Advance Parole (I-131) applications that are filed concurrently with the I-485 applications will be filed with the Nebraska Service Center. However, stand-alone new or renewal EAD or Advance Parole applications will continue to be filed with the Service Center where the I-485 application is pending.

H-1Bs transferred to TSC

USCIS has advised AILA that about 5,000 H-1B cap cases were transferred from VSC to TSC and about 22,000 I-130s from VSC to CSC to assist VSC move the heavy volume of H-1Bs that came in during the first two months of the filing season.

H-1B "regular" cap update

AILA received news on July 10, 2006 from USCIS that those cap-subject H-1B cases received on May 26 but not selected in the "random selection" lottery would soon be notified via letter. The letter should accompany refunded fees, however petitions and exhibits will be retained by USCIS for consideration at the end of the fiscal year in the event it is determined that there has been underutilization.

AILA also received news that three cap-subject H-1Bs were approved in error. USCIS has advised that those three cases would be reopened and the approvals revoked.

DOS News

EB-2 India unavailable, other changes

On July 17, 2006, DOS released the August 2006 Visa Bulletin. While there were no changes in most categories, there was significant retrogression for persons born in India. More ominously, DOS also indicated that there is likely to be additional retrogression in other categories in September.

For individuals born in India, EB-2 will move from January 1, 2003 to "unavailable" on August 1, 2006, due to high demand in the category. This means that no EB-2 adjustment of status applications will be accepted by USCIS after July 31, 2006, regardless of priority date. This also means that all Indian nationals who presently have an EB-2 adjustment of status application pending at USCIS will see their cases go on hold while they wait for their priority date to become current and available. EB-3 for Indian nationals also retrogressed, moving from April 15, 2001 to April 1, 2001.

It is important to note that "nationality" is not the same as citizenship. Generally, DOS looks at the country of birth in determining whether a person is a national of a given country. As a result, persons who become citizens of other countries (i.e., Indians who become Canadian citizens) are still considered nationals of their birth country for immigrant visa purposes.

A retrogression in the EB-2 category immediately impacts

only those individuals in the final stages of the permanent resident process, i.e., those seeking to file an application for adjustment of status (AOS), who are waiting for an AOS application to be adjudicated, or who are seeking to apply for an immigrant visa at a U.S. Consulate or Embassy based on an approved immigrant visa petition. Retrogression has no impact on the processing of a labor certification that is about to be filed or is pending with the Department of Labor. Furthermore, the retrogression does not prohibit the filing of the immigrant visa petition (I-140) based on an approved labor certification, even if that immigrant visa petition will be filed under the EB-2 category.

The EB-2 category includes individuals who have labor certifications filed on their behalf where the requirements were at least a Master's degree or a Bachelor's degree and five years of progressive post-baccalaureate experience. National Interest Waiver cases also fall in the EB-2 category.

Again, beginning August 1, 2006, the USCIS will not accept any new EB-2 category I-485 adjustment of status applications for nationals of India, regardless of the priority date. Jackson & Hertogs encourages all individuals in the EB-2 category who are eligible to file an I-485 application to do so before July 31, 2006. Such an application must be received by the USCIS no later than July 31, 2006, which means that applications must be filed by July 28, 2006. If the I-485 application is received by USCIS on or before July 31, 2006, the applicant is eligible to apply for both the Employment Authorization Document (EAD) and Advance Parole (AP) while the I-485 remains pending. USCIS will also not be able to adjudicate any pending I-485 in the EB-2 category for Indian nationals until the underlying priority date becomes current. Similarly, DOS consular officers will be unable to approve immigrant applications for permanent residency until the priority date becomes current.

There were no changes in any other employment-based category on the August Visa Bulletin. However, DOS advises that "for September there is increased possibility of additional retrogressions of cut-off dates," and that China EB-2 and EB-3 and India EB-1 "could experience retrogressions" in that month. While this does not mean that these categories will retrogress or become unavailable in September 2006, the DOS prediction of this possibility suggests it is highly likely.

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 (<http://www.jackson-hertogs.com/quota/0quota.htm>) which includes detailed charts of quota movement for the past decade.

New requirements for travelers

Under the Intelligence Reform and Terrorism Prevention Act of 2004, by January 1, 2008, travelers to and from the Caribbean, Bermuda, Panama, Mexico and Canada must have a passport or other secure, accepted document to enter or re-enter the United States. Implementation of this requirement will be completed following a proposed timeline, which will be published in the Federal Register in the near future.

In the proposed implementation plan, which is subject to a period of initial public comment, the Initiative will be rolled out in phases, providing as much advance notice as possible to the new guidelines. The proposed timeline is as follows:

- December 31, 2006 - Requirement applied to all air and sea travel to or from Canada, Mexico, Central and South America, the Caribbean, and Bermuda.
- December 31, 2007 - Requirement extended to all land border crossings as well as air and sea travel.

This is a change from prior travel requirements and will affect all United States citizens entering the United States from countries within the Western Hemisphere who do not currently possess valid passports. This new requirement will also affect certain foreign nationals who currently are not required to present a passport to travel to the United States. Most Canadian citizens, citizens of the British Overseas Territory of Bermuda, and to a lesser degree, Mexican citizens will be affected by the implementation of this requirement.



DOL News

DOL establishes BEC reopen procedure

On July 10, 2006, DOL provided instructions on how to reopen erroneously closed AECs pending at the Backlog Elimination Center in Philadelphia or Dallas. Reopen requests may only be submitted by the employer or representative in three situations: 1) where there was no BEC 45-day letter received by the employer or attorney and a case closure notice was subsequently received; 2) where the case status screenshot indicated the case was closed; and 3) where a timely response was submitted to the 45-day letter, but a closure notice was subsequently received. The window for reopen requests is 30 days from July 10, 2006.

Upon each Center's receipt of the employer or representative's e-mail request, the BEC will issue a standardized, automated electronic notification that the request has been received.

Response time will vary, depending on volume of requests received. A second e-mail will inform of the BEC's determination to either reopen the case or keep the case closed. If the request is approved and the case is reopened, this second e-mail will include a screenshot of the employer's case reflecting the case is active. If an application is incomplete, the second e-mail will also include the 45-day letter originally sent to the employer and a corrections list. Employers and their representatives will not be receiving a separate 45-day letter or corrections letter by mail, and should treat these documents as requests for action.

J&H is actively submitting the necessary information to the appropriate BEC on all cases effected by erroneous case closures. If you receive any communication directly from the BEC, it is important to notify your J&H attorney immediately.

45-day letter update

DOL has announced that all Center Receipt Notification Letters ("45-day letters") will have been issued by the BECs as of Friday, July 21, 2006. For any outstanding cases being managed by J&H that have not received a 45-day letter by that date, J&H will contact the BEC immediately. Note that DOL has not yet published its policy regarding such cases.

Prevailing wage revisions

DOL revised the Bureau of Labor Statistics (BLS) prevailing wage data on July 6, 2006. The Foreign Labor Certification Data Center is the location of the Online Wage Library for prevailing wage determinations. BLS wage and area data have been updated to the new Metropolitan Area and Balance of State area definitions. A file with all of the new area codes can be found at <http://www.flcdatadcenter.com/download.aspx>.

J&H News

J&H welcomes Robert Chlala!

J&H is pleased to welcome Robert Chlala as our newest paralegal. Robert grew up in Lebanon and Los Angeles, so he's still getting used to the Bay Area weather after many years. He graduated from UC Berkeley in 2003. He has spent the last five years working on immigration policy advocacy and with asylum and family-based cases, with organizations such as Survivors International, National Lawyers Guild, and the American-Arab Anti-Discrimination Committee. He is also currently working with a rights group in Lebanon on penal code and health reform. He is very excited to be working in this side of the immigration field, particularly with J&H!

J&H welcomes Sheila Mahadevan!

J&H is also happy to welcome Sheila Mahadevan, who has recently joined our team of legal assistants and will be working primarily with attorney Daniel C. Horne. Sheila is originally from Hampton, Virginia and received her Bachelor's degree in International Affairs and Modern Languages from Georgia Tech in Atlanta, Georgia. Prior to moving to San Francisco, Sheila served as a Paralegal and Advocate for the Georgia Law Center for the Homeless. She has also completed work on nonimmigrant visa petitions as a Legal Assistant at large business immigration firm in San Francisco.

J&H seminars & webinars



August 16, 2006 – Travel Issues

September 20, 2006 - I-9 Compliance Issues

October 18, 2006 - Scientists

November 15, 2006 - H-1B Alternatives

Immigration Trivia

When the EB category visa priority date becomes "unavailable," it means that an I-140 immigrant visa petition cannot be filed for the effected foreign national.

True or False?

Answer: False. Retrogression has no impact on the processing of a labor certification that is about to be filed or is pending with the Department of Labor. Furthermore, the retrogression does not prohibit the filing of the immigrant visa petition (I-140) based on an approved labor certification, even if that immigrant visa petition will be filed under an "unavailable" category.

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