

# Immigration Spotlight

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## Abbreviations used in this issue

<b>AC21</b> - American Competitiveness in the 21st Century Act (2000)
<b>BCS</b> - Background Check Services (USCIS)
<b>CBP</b> - Customs and Border Protection
<b>DHS</b> - Department of Homeland Security
<b>DOL</b> - Department of Labor
<b>DOS</b> - Department of State
<b>ICE</b> - U.S. Immigration and Customs Enforcement
<b>TECS/IBIS</b> - Treasury Enforcement Communication System / Interagency Border Inspection System
<b>USCIS</b> - U.S. Citizenship and Immigration Services
<b>WHTI</b> - Western Hemisphere Travel Initiative (DHS & DOL).

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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.

## January webinar: Global visas



Jackson & Hertogs will offer a webinar on January 17, 2007 addressing business travel to the United States and other countries. The webinar also will discuss general considerations for work authorizations when transferring employees to countries other than the United States. Please join Jackson & Hertogs attorneys Daniel Horne and Kirsten Anderson for a web-based power point presentation on considerations when applying for visas for business travel for your employees as well as for transferring employees to countries other than the United States. To register, please e-mail [webinar@jackson-hertogs.com](mailto:webinar@jackson-hertogs.com).

## USCIS News

### USCIS to revise naturalization exam

On November 30, 2006, USCIS announced that it has redesigned the naturalization examination questions and answers and released 144 questions and answers, which will be administered as part of a pilot examination program beginning from January 2007 to about 5,000 volunteer citizenship applicants in 10 cities. Please refer to the following link for a list of questions and answers: [www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dc5e1df53b2f010VgnVCM1000000ecd190aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dc5e1df53b2f010VgnVCM1000000ecd190aRCRD).

### Security check changes proposed



On December 4, 2006, USCIS issued a notice of a proposal to add a new system of records entitled Background Check Service (BCS). The established system of records will be effective January 3, 2007, unless comments are received that result in a contrary determination. In order to process and adjudicate certain immigration applications and petitions, USCIS currently conducts three separate background checks:

1. an FBI fingerprint check,
2. an FBI name check, and
3. a CBP Treasury Enforcement Communication System/Interagency Border Inspection System (TECS/IBIS) name check.

BCS will consolidate all background check requests and it will allow authorized USCIS representatives to request background checks and access data stored in the BCS system during the adjudication process. As a centralized repository containing all background check activity, BCS will provide the status and results of background checks required to adjudicate certain petitions and applications. This system furthers USCIS' initiatives to reduce its backlogs. Prior to BCS, information relating to the FBI Fingerprint Checks and the FBI Name Checks were stored in the FD-258 system and FBI Query system respectively. Information relating to the TECS/IBIS Name Checks was not stored in any system.

For the full text of the USCIS notice, visit this link: <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-20289.htm>.

## Time in H-4 / L-2 status does not count against H-1B / L-1 limits of stay

On December 5, 2006, U.S. Citizenship and Immigration Services published a memorandum from Michael Aytes, Associate Director, Domestic Operations (hereinafter "Aytes Memorandum"). The Aytes Memorandum advises USCIS adjudicators that any time spent in H-4 status does not count against the six year maximum period of admission applicable to H-1B aliens. Similarly, time spent as an L-2 dependent does not count against the maximum period of admission applicable to L-1 aliens. The Aytes Memorandum also provides guidance to USCIS adjudicators on how to calculate H-1B admission periods, and provides specific guidance relating to H-1B extensions of stay under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

That time spent as an H-4 or L-2 dependent will not count against the maximum allowable period of stay in H-1B and L-1 status constitutes a significant policy change by the USCIS. The Service has long taken the position that all periods of stay in the U.S. in H or L status must be counted against the six year limit of stay for H-1B status, the five year limit for L-1B status, or the seven year limit for L-1A status. The Aytes Memorandum states: "an alien who was previously an H-4 dependent and subsequently becomes an H-1B principal will be entitled to the maximum period of stay applicable to the classification." USCIS determined that this policy was most consistent with the statutory framework, and "promotes family unity by affording each qualified spouse the opportunity to

spend six years in H-1B status while allowing the other spouse to remain as an H-4 dependent." Adjudicators are now instructed that the primary purpose of dependent status is to accompany the principal worker, and "a spouse or child may be required to show that the requested H-4 stay is not intended to evade the normal requirements for nonimmigrant classification that otherwise would apply when the principal alien is absent from the United States. This policy is meant to prevent an H-1B or L-1 alien from using only occasional work visits to the United States to 'park' dependent family members in the United States for extended periods of time while the principal is normally absent."

The Aytes Memorandum also clarifies that H-1B workers who qualify for AC-21 extensions beyond the six year maximum need **not** be in H-1B status when requesting the additional period of stay beyond the six year maximum. Aliens who are eligible for an AC-21 extension may be granted such extensions regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status. In determining eligibility for a seventh year of H-1B status, USCIS will focus on whether the alien is eligible for an additional period of admission in H-1B status, rather than whether the alien is currently in H-1B status that is about to expire and is seeking an extension of that status in the United States.

Finally, the Aytes Memorandum confirms USCIS policy that only time spent physically in the United States counts toward the H-1B six-year maximum period of stay, and clarifying USCIS practice for H-1B "remainder" applications. The H-1B remainder is the difference between the six year maximum period of admission and the time the H-1B worker was in the United States in valid H-1B status. If an alien who was previously admitted to the United States in H-1B status was outside the United States for at least one year, but did not use the full six years of H-1B eligibility, the alien may either request admission in H-1B status for the remainder of his/her original six year eligibility, or may request a new six year period. However, if a new six year period is requested, the alien will be subject to the annual H-1B numerical cap. A petition for the remainder of the original six year H-1B period of admission will not be subject to the H-1B cap. In order to request the remainder H-1B period, the alien must document that s/he has been outside the United States, such as with visa stamps, I-94 copies, and I-797 approval notices.



## ICE News

### ICE raids focus attention on proper I-9 procedures

Recent news reports of ICE raids on employers such as Swift & Co have vividly illustrated the need for employers to exercise due diligence in completing and maintaining I-9 forms for all employees. With an increase in workplace enforcement and criminal penalties, it is more important than ever for employers to complete and maintain I-9 forms properly.

Following are some important tips to keep in mind:

**Section 1:** Section 1 must be completed by the employee on or before the first day of employment. Although the employee must fill out, sign and date this portion of the form, the employer is responsible for making sure that this section is filled out completely.

**Section 2:** Section 2 must be completed, signed and dated by a company representative on or before the end of an individual's third day of employment. The employee must either present a List A document, which provides proof of identity and employment, or both a List B, identity document, and List C, employment authorization document. A company representative should not request or suggest a specific document to verify employment eligibility or identity. Rather, the employee should choose from the list of documents noted on the back of the I-9 form. A company representative must review original documents provided by the employee for purposes of completing this section, except as noted in the I-9 form directions.

Whether or not to keep copies of the required documents is the subject of debate among attorneys. Some argue that since copies of the required documents are not required, they should not be retained. The rationale here is that the copies could be used against the employer if maintained with the I-9 forms. Others believe that copies should be retained to defend an employer in a sanctions investigation to show that the documents looked valid on their face. Whichever route an employer takes, it should be sure to have a consistent policy for all employees. Each relevant line in Section 2 must be fully completed and include the document title, issuing authority, number, and expiration date, if applicable.

**Section 3:** To re-verify an employee's work authorization, the company representative may complete Section 3 on the bottom of the original Form I-9. If Section 3 has already been used, the company representative may write the individual's name in Section 1 of a new Form I-9, complete Section 3 on the new form, and then keep the original I-9 form and the new Form I-9

together.

If the employer rehires an individual who has previously completed an I-9 form, the company representative may complete a new I-9 form for that person or re-verify on the original document. Re-verification is available if the individual is re-hired within three years of the initial hire date and the individual's previous work authorization has expired but he or she is eligible to work on a different basis. In such a case, the company representative can use Section 3 to record the date of re-hire, document title, number and expiration date of any documents presented. If Section 3 has already been used, the company representative can either add the employee's name to a new I-9 form and complete Section 3, or complete a new I-9 form having the employee complete Section 1.



If the company rehires an individual within three years of the initial hire date and the individual is eligible for employment on the same basis as when the original I-9 was completed, the company representative may update the original form in Section 3. In this situation, the representative would record the date of re-hire and sign and date Section 3.

**Corrections:** Only an employee can correct an entry in Section 1, and only a company representative can correct an entry in Section 2 or 3. If a correction needs to be made, the person making the correction should, using a different color pen, write in the correct information and cross out the incorrect information, then initial and date the correction. The correction should not be back-dated. The company representative should not throw out the old I-9 form and complete a new form with the old date.

The I-9 form can be downloaded from the U.S. Citizenship and Immigration Services website.

General information about the I-9 process is at the USCIS website. J&H also provides I-9 training and performs I-9 audits for clients. Please contact your attorney at J&H if you are interested in these services.

## Interagency News

### Western Hemisphere Travel Initiative

On November 22, 2006, both DHS and DOS announced the official requirement for citizens of the United States, Canada, Mexico, and Bermuda to present a passport to enter the United States when arriving by air from any part of the Western Hemisphere beginning January 23, 2007.

The travel document requirements make up the departments of State and Homeland Security's Western Hemisphere Travel Initiative (WHTI). This change in travel document requirements is the result of recommendations made by the 9/11 Commission, which Congress subsequently passed into law in the Intelligence Reform and Terrorism Prevention Act of 2004. The Western Hemisphere Travel Initiative requires all citizens of the United States, Canada, Mexico, and Bermuda to have a passport or other accepted document that establishes the bearer's identity and nationality to enter or re-enter the United States from within the Western Hemisphere.

The only acceptable alternative documents to a passport for air travel will be the Merchant Mariner Document (MMD) and the NEXUS Air card. The MMD or "z-card" is issued by the U.S. Coast Guard to U.S. merchant mariners and the NEXUS Air card is issued to citizens of Canada and the United States, lawful permanent residents of the United States and permanent residents of Canada who meet certain eligibility requirements. The NEXUS Air card may only be accepted when used in conjunction with the NEXUS Air program. The MMD card may only be accepted when used on official business by U.S. Citizen Merchant Mariners. Members of the United States military, when traveling on official orders, may continue to present their military ID and orders for entry.



A separate proposed rule addressing land and sea travel will be published at a later date proposing specific requirements for travelers entering the United States through land and sea border crossings. As early as January 1, 2008, U.S. citizens traveling between the United States and Canada, Mexico, Central and South America, the Caribbean, and Bermuda by land or sea will be required to present a valid U.S. passport or other documents as determined by the Department of Homeland Security. While recent legislative changes permit a later deadline, the Departments of State and Homeland Security are working to meet all requirements as soon as possible. Ample advance notice will be provided to enable the public to obtain acceptable documents for land and sea entries.

## DOS News

### January Bulletin: Forward movement

The January Quota Bulletin which was released by the DOS on December 13, 2006, shows slight forward movement for several categories. The January Quota Bulletin is available on our website: <http://www.jackson-hertogs.com/quota/0quota.htm>.

For persons born in India, the EB-3 category moved forward to May 8, 2003. Similarly, for Mexico born persons, EB-3 moved forward to May 15, 2001. The EB-2 category for all countries as well as the worldwide cut-offs (for all countries other than Mexico and India) for EB-3 did not move. The Schedule A category moved from "unavailable" to June 15, 2004 for all nationalities.

### Final rule published on consular interviews for NIV applicants

The Department of State published a final rule amending guidance to consular offices for nonimmigrant visa applicants. The final rule sets out detailed statutory requirements for personal interviews of nonimmigrant visa applicants for the first time. Some highlights:

**General rule:** A consular officer must now interview all persons between the ages of 14 and 79, with few exceptions;

**Waivers not permitted:** In addition to the existing list of situations in which an interview may not be waived, the rule adds several scenarios in which the interview may not be waived. (1) Personal interview requirement may not be waived for third country nationals, (2) for applicants who have been previously refused visas or found ineligible for visas, and (3) for any NIV applicant who is from a country designated by the Secretary of State as a state sponsor of terrorism, regardless of age.

For the full rule, see <http://257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-21492.htm>.

## DOL News

### DV Lottery registration announced

On December 15, 2006, DOS announced that more than 6.4 million entries have been received for the 2008 Diversity Visa Lottery. Once dependents are taken into account, the total number of participants in the 2008 lottery exceeds 10 million. This is marked increase in registration when compared to the DV-2007, which attracted around 5.5 million primary registrants. The exact details have yet to be released, but the announcement indicates that Africa accounts for 41 percent of the total applications received, Asia accounts for 38 percent, Europe for 19 percent, and South America, Central America, and the Caribbean combined account for 2 percent. Bangladesh was the country with the largest number of applicants, with

more than 1.7 million, followed by Nigeria with 684,000 and Ukraine with 619,000.

The State Department is scheduled to send out notifications to the winners between April and July 2007. For the announcement, see: <http://www.state.gov/r/pa/prs/ps/2006/77895.htm>.

## New PERM FAQs

On November 29, 2006, the Office of Foreign Labor Certification issued its ninth round of PERM FAQs. This FAQ answers some very important questions in relation to withdrawal procedures, training of foreign national staff as it relates to PERM, various timeframes for PERM recruitment, and acceptable publications for recruitment. For the full FAQ, follow this link: [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_11-29-06.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_11-29-06.pdf).

## RIR conversion window announcement

DOL is expected to announce a window of safety for employers who wish to convert traditional pending labor certification applications to Reduction in Recruitment ("RIR"). According to the American Immigration Lawyers Association, employers will be able to notify the DOL that they plan to submit a conversion request, and then will have a specified amount of time to actually submit the conversion request including recruitment information. During this time frame, the employer will be protected to proceed with its recruitment without concern about receiving the DOL-supervised recruitment instructions and thus having the RIR recruitment be wasted. If you would like to discuss converting a traditional labor certification application, please contact your J&H attorney. Please note that only employers may request conversion to RIR, employees may not file RIR conversion requests.

## J&H News

### J&H webinars

Please see page 1 for a description of our January 17th webinar on Global Visas. To register, send an e-mail to [webinar@jackson-hertogs.com](mailto:webinar@jackson-hertogs.com).



You can always find a list of scheduled webinars on our website at <http://www.jackson-hertogs.com/JH/spot/0spot.htm>.

## Immigration Trivia

Which of the following documents does an H-1B worker with a pending H-1B transfer nonimmigrant visa petition filed by your company need to present to CBP inspections when s/he reenters the U.S.?

- Valid unexpired H-1B visa
- USCIS Form I-797 Receipt Notice for your company
- USCIS form I-797 Approval Notice for former employer
- Two most recent paystubs
- Letter signed by your company evidencing the H-1B is employed by you.

**Answer:** a, b and c are needed; d and e are not mandatory, but it is a good idea that one or both be carried along with the other three documents to evidence that they are currently employed with your company. Please note that Canadian citizens are visa exempt. Other than not requiring a valid visa, Canadians should carry the other documents mentioned.

**Mark your calendars! J&H will be closed on the following dates:**

**December 25-26; and**

**January 1-2, 2007**



**Happy holidays from all of us at J&H !**