

# Immigration Spotlight

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*Happy Holidays from the J&H Team*

As 2007 draws to a close, everyone at J&H wishes you a healthy and happy New Year. We hope that 2008 is bright and full of pleasant surprises for us all. Happy New Year!

## Legislative Corner

### Contact Congress to oppose the SAVE Act!



#### Enforcement-focused immigration bill introduced in House and Senate

The "Secure America with Immigration and Enforcement" (SAVE Act) was introduced in November 2007 by Representatives Heath Shuler (D-NC) and Brian Bilbray (R-CA). A companion bill (S.2368) has been introduced in the Senate by Senators Mark Pryor (D-AR) and Mary Landrieu (D-LA). The SAVE Act is an immigration enforcement-only package that would, among other things, expand the E-Verify electronic employment verification system and codify the recently withdrawn DHS regulations related to the Social Security Administration (SSA) "no match" letters.

The SAVE Act would require that within four years, all employers use the E-Verify program to confirm work authorization for all employees, foreign workers, U.S. workers, and all current workers. At present, only 30,000 employers are enrolled in the E-Verify program for new hires and reverification of existing employees. Approximately 6 million employers in the U.S. would be required to use E-Verify if this bill becomes law. A recent independent study of the E-Verify program concluded that enrolled employers frequently use it incorrectly, and that the system requires significant improvements before expanding it to accommodate more users.

Additionally, the E-Verify program relies on the Social Security Administration (SSA) database that government studies have shown contains numerous errors, such as incorrect matches of names to Social Security Numbers, incorrect dates of birth or citizenship status. The SAVE Act contains no provisions requiring government databases to be accurate and updated, nor does it provide privacy protection for workers or recourse for those workers wrongfully denied employment if their employment eligibility cannot be confirmed via E-Verify. If it becomes law and the quality of the SSA database does not improve, more than 2

million workers each year risk being wrongly identified as unauthorized for employment or as no-matches. Further, while the SAVE Act would require employers to terminate employees that fail to clear E-Verify, the Act contains no liability protection for employers who rely on E-Verify program as a basis to terminate an employee who is in fact an authorized worker. This means that a US citizen or permanent resident who was terminated due to an E-Verify mismatch could then sue the employer for wrongful termination or employment discrimination; the employer could not present the E-Verify mistake as a defense.

The SAVE Act would also enact and expand the SSA “no-match” program that DHS rolled out earlier this year, but has not been implemented due to legal challenges. As we reported last month, a federal judge issued an injunction in October 2007, prohibiting the government from moving forward with this program because it placed a burden on employers and could result in harm to U.S. workers. The SAVE Act would require SSA to notify employers of all no-matches and to alert DHS to all unresolved no-matches. Workers who wrongfully receive a no-match letter would have only 10 days to resolve the discrepancy or be dismissed. The “no-match” regulation recently found to be overly burdensome by a federal judge would have allowed employees 90 days to correct an error – reducing the amount of time to only 10 days would make it almost impossible for most workers to correct a mismatch before their employer would be required to terminate their employment.

We believe the SAVE Act will not assist or benefit U.S. employers and their workers, but will only add burdensome new regulations that will hurt workers and disrupt business. We encourage all employers to contact their representatives in Congress to oppose this bill.

## USCIS News

### Employers must use new Form I-9 by December 26, 2007

On November 26, 2007, USCIS published the new I-9 Employment Eligibility Verification Form in the Federal Register. The I-9 Form is used to document employment eligibility verification. All U.S. employers are required to have new hires complete the Form I-9 within three days of hire, and must reverify certain employees upon expiration of employment authorization. At the time the form is completed, employees must provide appropriate documentation demonstrating that they have employment authorization. The Form I-9 includes a list of certain acceptable documents that employers may accept as evidence of em-

ployment eligibility. DHS’s revisions to the Form I-9 have reduced the number and types of acceptable documents.

Employers should begin using the new Form immediately although they are not legally required to do so until December 26, 2007. Employers who fail to use the new Form after that date may face fines and other penalties. The new Form I-9 should be used for all new hires and to perform any required re-verification of employment authorization for current employees or for rehired employees. Employers are not required to update or replace any Forms I-9 that have been completed using a previous version of the form until the required re-verification date, if applicable. Employers may download the new Form I-9 from the USCIS website, [www.uscis.gov](http://www.uscis.gov). The new version of the Form I-9 was released on November 9, 2007 and has the following edition date on the lower right hand corner: (Rev 06/05/07).

The new Form updates the list of acceptable documents by removing five documents from the previous list of acceptable proof of both identity and employment authorization: Certificate of U.S. Citizenship (Form N-560 or N-561), Certificate of Naturalization (Form N-550 or N-570), Alien Registration Receipt Card (I-151), Unexpired Reentry Permit (Form I-327), and Unexpired Refugee Travel Document (Form I-571). The new Form also clarifies that the employee is only required to provide his or her Social Security Number if the employer is participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify).

In addition to removing five previously acceptable documents, the new Form I-9 adds the Unexpired Employment Authorization Document (I-766) to List A of the List of Acceptable Documents.

The new Form now conforms with earlier regulations published in 1997 amending acceptable employment verification documents and does not incorporate changes in the law which have occurred since that date, such as the American Competitiveness in the 21st Century Act (AC-21).

Please contact your J&H attorney if you have questions about the new Form I-9. We will also have a Webinar on the new Form I-9 and I-9 Compliance in February 2008 – see “J&H Webinars” below for more details and how to register.

The image shows a portion of the USCIS Form I-9. The header includes the title 'Form I-9, Employment Eligibility Verification' and the USCIS logo. Below the header, there is a section titled 'List A - Documents that Establish Both Identity and Employment Authorization'. The list includes items such as 'U.S. Citizenship Certificate (Form N-560 or N-561)', 'U.S. Naturalization Certificate (Form N-550 or N-570)', 'Alien Registration Receipt Card (I-151)', 'Unexpired Reentry Permit (Form I-327)', and 'Unexpired Refugee Travel Document (Form I-571)'. The form is partially filled out with handwritten information.

## Prepare now for H-1B cap season – Don't wait!

The H-1B cap season is just around the corner and it appears that Congress will not be increasing H-1B numbers any time soon. This means that employers need to start thinking **NOW** about individuals that they want to sponsor for H-1B status in FY2009. As a reminder, the government's fiscal year runs from October 1<sup>st</sup> to September 30<sup>th</sup>. H-1B visa petitions may be filed no earlier than six months before the proposed employment would commence. Therefore, for FY2009 cap subject H-1B nonimmigrant visa petitions, the earliest start date on the petition would be October 1, 2008 and the earliest date on which USCIS would accept such filings is April 1, 2008.

Remember that during last year's FY 2008 filing season (i.e., April 2007), an unprecedented number of cases – approximately 120,000 – were received on the first two days of the filing season for regular cap H-1B visa petitions, essentially meaning that the cap was reached on April 2, 2007 (This was the first date cap cases were accepted, because April 1, 2007 fell on a Sunday). By regulation, if the cap is reached on the first day of the filing year, then all cap cases received during the first two days of filing are subjected to a random lottery. This year, cases that “won” the lottery were then adjudicated; cases that “lost” were rejected unprocessed. For the 20,000 advanced degree H-1B cap cases, the cap was reached on April 30, 2007. It is generally anticipated that the upcoming H-1B cap filing season will be just as frantic as 2007, if not more so, and that a record number of cases will be filed under the regular cap once more. J&H also believes that the master's cap will likely be reached even earlier this year, as many individuals in master's programs who did not graduate in time to apply under the FY2008 numbers will have since obtained their degrees, and will be eligible to apply on April 1, 2008.



The USCIS has suggested that it may change procedures on how cap cases will be entered into the lottery, so that the Service is not faced with the daunting task of opening all of the packages and then returning rejected cases to petitioners. However, recent feedback from USCIS suggests that any change in the cap filing rules would require a regulation to be published, and there does not appear to be sufficient time for this to be completed before April 1. We hope that USCIS will provide details early in 2008 so that petitioners can be better prepared for the upcoming H-1B filing season.

What employers can do **now** to prepare is to review their employment lists. Have any new F-1 or J-1 students been hired who would need to have H-1B visa

petitions filed on their behalf? Are there any TN employees or L-1B employees who may benefit from a change of status to H-1B? While J&H will be compiling lists for our employer clients, those lists will not necessarily include your F-1 or J-1 employees if they were hired directly by departments with current F-1 or J-1 work authorization, unless our firm was looped in at the time of hire.

Hiring managers and recruiters should be reminded of the H-1B cap issues so that as they are interviewing candidates, they are identifying individuals who not only may require immigration sponsorship, but specifically looking for individuals who would be H-1B cap subject. Issues that managers should be aware of include the pitfall of hiring an individual with work authorization that would expire before October 1, 2008. In those situations, even if the individual is one of the lucky ones to secure an H-1B visa number, s/he would likely have a gap in employment authorization between the end date of the current or anticipated work authorization and October 1, 2008. In some situations where work authorization expires more than 60 days before October 1, 2008 for an F-1 nonimmigrant, or 30 days before October 1, 2008 for a J-1 nonimmigrant, the individual would have to depart the United States and remain outside until s/he can apply for and be issued an H-1B visa to return to the United States.

Also important to keep in mind, particularly for employers who hire researchers and scientists, is that not all individuals who are in H-1B status have been counted against the cap. For example, if an individual's current H-1B employer is a university or a not-for-profit research institute, that employer is exempt from the cap and therefore the H-1B employee has not yet been counted. This means that the individual is H-1B cap subject and you may or may not be successful in the lottery. Therefore, even if someone is in H-1B status, you have to look at who the petitioner on that H-1B visa petition is and whether the individual was counted or not. Please contact your Jackson & Hertogs attorney if you have questions about a potential H-1B applicant, or about the upcoming H-1B cap filing season.

## DHS News

### New travel document requirements

On December 3, 2007, DHS issued a press release reminding travelers that effective January 31, 2008, all adult travelers will be required to present proof of citizenship such as a passport, or a birth certificate and proof of identity such as a driver's license, when entering the U.S. through land and sea ports of entry. Please note that all persons entering the U.S. via air

must have a valid passport. This is the next implementation phase of the Western Hemisphere Travel Initiative (WHTI).

Presently, immigration officers may accept oral declarations of citizenship from U.S. and Canadian citizens seeking entry into the U.S. through a land or sea border. However, beginning January 31, 2008 officers will apply these new rules: oral declarations of citizenship will no longer be accepted; U.S. and Canadian citizens ages 19 and older will be required to present a government-issued photo ID along with proof of citizenship; children ages 18 and under will be required to provide proof of citizenship, with no photo ID required. However, passports and secure traveler program cards (i.e., NEXUS, SENTRI and FAST) will continue to be accepted for cross-border travel.

Documentary requirements for travelers who are citizens of countries other than the U.S. and Canada will not change.

## DOS News

### New procedure may delay, complicate NIV applications at U.S. Consulates

In November 2007, DOS made public a cable instruction to all consular posts announcing a new internal procedure by which U.S. Consulates would check the validity of petition-based nonimmigrant visas. This procedure stands to create potentially significant delays in the NIV visa issuance process. The instruction impacts nonimmigrant visa applications filed at U.S. Consulates in the H, L, O, P, and Q categories. Upon approving nonimmigrant visa petitions in these categories, the USCIS Service Centers will no longer forward the approval directly to a U.S. Consulate.

In issuing a visa stamp, U.S. Consulates will not be allowed to rely solely upon a visual inspection of an original I-797 approval notice. Instead, the Consular officer must check the visa applicant's name against an electronic record, called the Petition Information Management Service, or PIMS, created by a centralized DOS office located in Kentucky. This PIMS record will serve as the primary evidence of petition approval for the above-mentioned categories. Notwithstanding possession of an original I-797 approval notice, a visa applicant whose petition approval is not recorded in the PIMS may have to wait for a number of days while the Consular officer investigates further.

Details on implementation of PIMS are still limited, but our office has already received reports of delayed visa processing at some U.S. Consulates in Canada,

due to implementation of this instruction. We will report on any further implementation instructions, and how Consulates are expected to cope with the inevitable "missing records" that are sure to plague the new PIMS system. In the meantime, foreign nationals applying for nonimmigrant visas in the H, L, O, P, or Q categories are advised to budget extra time in their country of application, to ensure they receive their visas in time for return to the United States.

### NIV application fees to increase on January 1, 2008

DOS announced that effective January 1, 2008; the application fee for a U.S. nonimmigrant visa will increase from \$100 to \$131. According to DOS, this increase will allow it to recover costs associated with security and other enhancements to the nonimmigrant visa application process. This increase applies to nonimmigrant visas issued on machine-readable foils in passports and to border crossing cards issued to some applicants in Mexico.

According to DOS, security-related technologies required for processing visas has driven the cost of production higher than the \$100 fee charged to applicants. DOS states it has been absorbing the cost of production since at least 2004 when it conducted a cost of service survey and determined the cost of producing a visa was higher than the fee being charged.



Applicants who pay the \$100 before January 1, 2008 will have their visas processed as long as they appear for the visa interview before January 31, 2008. Applicants who paid the \$100 fee, but are scheduled for interviews after January 31, 2008 will be required to pay the \$31 difference before their scheduled interview.

Please bear in mind that the "machine readable" fee is only one possible fee that a visa applicant would be required to pay. Based upon reciprocity agreements between the United States and other countries, there are also visa fees that may be charged to the visa applicant. Individuals seeking visas should review the reciprocity schedule for their country of citizenship and the type of visa classification being sought in order to determine the additional fees charged, if any. Furthermore, various consulates may also include a small processing fee for using on-line systems or mail delivery. Nonimmigrant visa applicants would be prudent to review the specific Consular Website where the visa application will be made in advance to determine fees and acceptable payment methods.



## January Visa Bulletin: More EB-2 retrogression for India

The DOS Visa Bulletin for January 2008 indicates that visa numbers will again significantly retrogress for India-born EB-2 employment-based individuals. Effective January 1, 2008, the priority date for the EB-2 India category will move back two years to January 1, 2000. In December 2007, the priority date for this category retrogressed more than two years to its current date of January 1, 2002. Under the January 2008 Bulletin, the priority date for EB-2 India is now more backlogged than the EB-3 India category, which remains unchanged at May 1, 2001.

DOS advises in the Visa Bulletin that retrogression of India EB-2 numbers was necessary because of “heavy applicant demand for numbers by USCIS for adjustment of status cases despite the retrogression that occurred for December.” DOS also notes that it anticipates that the annual limit for India EB-2 applicants will be reached within the next few months, at which point the category will become “unavailable” for the remainder of fiscal year 2008.

The other categories in the Visa Bulletin remained mostly unchanged from December 2007. In the EB-3 category, for all countries other than China, India, and Mexico, the priority date moved forward approximately 6 weeks to October 15, 2002. EB-3 China moved forward one month to November 1, 2001. All other categories remain unchanged.

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.

Visa retrogression 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). Visa 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, visa retrogression does not prohibit the filing of an 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.

For general information on visa retrogression, please

see our FAQ on this subject. 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 which includes detailed nationality-specific charts of quota movement for the past decade.

## Global Visas

### U.K: Biometric data for all visa applicants now required



On December 3, 2007, the U.K. began requiring the collection of biometric data in the form of ten-finger scans and a digital photograph, from all visa applicants, regardless of nationality. For U.K. visa applicants residing in the U.S., the U.K. government has arranged that any one of the USCIS 129 designated Application Support Centers (ASC) may collect the biometric data for the visa application. Visa applicants are required to schedule appointments with the ASC for the collection of the biometric data. If you have specific questions about U.K. visas or U.K. work permits, please contact J&H for information specific to your case.



## J&H News

### J&H complimentary webinars for HR professionals



January 16, 2008 –  
H-1B Basics & Preparing for H Cap Season

This webinar will focus on the basics of petitions for H-1B non-immigrant temporary workers from the point of view of the sponsoring employer. We will explain such terms of art as “specialty occupation” and “prevailing wage” as they relate to H-1B eligibility. We will examine the Labor Condition Application process, including requirements for the DOL Access File and Personal Immigration File. We will also discuss the implications of the H-1B quota cap and strategies for extensions beyond the maximum 6 year limit under the American Competitiveness in the 21<sup>st</sup> Century Act.

February 20, 2008 (Webinar) – Corporate Best Practices: I-9 Compliance Issues

One of the fundamental duties of most HR departments is to complete and maintain I-9 Forms for all hires. Completing the I-9 Form has often been viewed

as a simple HR function, but there are significant liability issues that attach to this form. Robust I-9 practices are the foundation of an effective corporate compliance strategy for immigration issues. This webinar will focus upon the procedures and requirements employers must follow when completing and maintaining their CIS Forms I-9. Covered subjects will include how to best prepare the Form I-9, when and whether to ask for documents to verify the I-9, when I-9 "reverification" is required, and when reverification is inappropriate. We will also discuss record retention requirements for Forms I-9, including electronic storage options. We will also review recent changes to the Form I-9, and trends in I-9 Enforcement, including compliance issues with contractors and creating best practices.

### March 19, 2008 – PERM: Coping with Audits and a Tougher DOL.

This Webinar will provide a general overview of the PERM labor certification program, and discuss recent changes in DOL adjudication of PERM cases. We will focus primarily on the growing trend of audits from DOL, issues that lead to audits and strategies to over-

come an audit. We will also discuss the DOL's anti-fraud rules for PERM, including limits on employee payments for PERM, and expiration of approved PERM labor certifications. We will also discuss the new PERM form, assuming that DOL releases the new form as scheduled prior to March 2008.

### April 16, 2008 – Alternatives to the H-1B category

Many employers will find themselves facing tough decisions once the H-1B cap is reached. This seminar will address alternatives to the H-1B cap once the annual numerical limit is exhausted. While there may not be options for all foreign national employees who were shut out of the cap, there are some alternatives that should be considered. Citizens of certain countries (e.g., Canada, Mexico, Chile, Singapore, & Australia) can often find work visas independent of the H-1B category. Further, certain international transferees and citizens of countries sharing nationality with foreign-owned corporations can also be eligible for visas independent of the H-1B.

## Immigration Trivia

### Who needs a cap-subject H-1B?

- A new hire who is not a lawful permanent resident, U.S. citizen or asylee in the U.S. and who just graduated from college.
- Employees who are working on F-1 Optional Practical Training (OPT) or Curricular Practical Training (CPT).
- A candidate who has H-1B status through a university or a research organization.
- All of the above

**Answer:** d. Individuals in all of the situations described above are cap-subject and will need one of the H-1Bs that can be filed on April 1, 2008 with an effective date of October 1, 2008.

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

**December 24-25;**

**December 31; and**

**January 1, 2008**



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



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