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USCIS NEWS

H-1B CAP UPDATE: 55,600 PETITIONS RECEIVED AS OF 11/13/2009

As of November 13, 2009, approximately 55,600 H-1B cap-subject petitions had been filed. USCIS has approved sufficient H-1B petitions for aliens with advanced degrees to meet the exemption of 20,000 from the fiscal year 2010 cap. Any H-1B petitions filed on behalf of an alien with an advanced degree will now count toward the general H-1B cap of 65,000. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the statutory limits, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn.

At this point, it is impossible to determine when the cap will be reached. Once it is reached, H-1B visa petitions for cap subject beneficiaries will not be accepted by the USCIS until April 1, 2010, and the earliest available validity start date would be October 1, 2010. We will have little advance notice when the cap is reached and employers are urged to file H-1B visa petitions during the current fiscal year and avoid a possible lottery situation next year. Assuming that the economy improves and companies start hiring we will likely return to a situation where there is high demand for H-1B numbers and for the lottery allocation system.

CDC TO END HPV VACCINATION REQUIREMENT

On November 13, 2009 a Final Notice was published amending the vaccinations required for immigration purposes. The criteria will now include vaccinations explicitly listed in INA § 212(a)(1)(A)(ii) and only those where public health need exists. Specifically, the vaccine must protect against a disease that has the potential to cause an outbreak or the vaccine must protect against a disease that has been eliminated in the United States, or is in the process for elimination in the United States. Under these criteria, the controversial HPV vaccine will no longer be required:

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USCIS NEWS (CONT'D)

While HPV is a common infection, the occurrence of more cases than expected (as defined by an outbreak, discussed above) is not met. Further, HPV has not been eliminated, nor is in the process of elimination, in the United States.

Therefore, because HPV does not meet the adopted criteria, it will not be a required vaccine for immigrant and adjustment of status to permanent residence applicants.

The newly adopted CDC criteria will be effective on December 14, 2009. The Federal Register may be reviewed at <http://edocket.access.gpo.gov/2009/pdf/E9-27317.pdf>

USCIS TO CONDUCT 25,000 ON-SITE INSPECTIONS

On November 17, 2009, Computerworld published an [article](#) stating that USCIS will increase H-1B enforcement by conducting 25,000 on-site inspections of H-1B petitioners this fiscal year. This is a tremendous increase over the approximately 5,000 site visits that were conducted in the prior fiscal year. The government's fiscal year runs from October 1 to September 30.

The FDNS (Fraud Detection and National Security) site visits to date appear to be a random sampling of H-1B visa petitions. The FDNS officers typically arrive at a work site unannounced and ask to speak with an H-1B beneficiary by name and the HR or manager on site who can respond to some basic questions. Typically, the FDNS officer is interested in confirming that the H-1B worker is employed by the petitioning employer and is being paid the offered salary. The FDNS officer usually is satisfied when they see a "brick and mortar" establishment. All H-1B employers should be prepared for such site visits and should advise personnel at satellite offices of the possibility of such a visit.

Tougher enforcement measures appear to be in response to a study conducted by USCIS last year that found fraud and other violations in H-1B petitions. Some of this activity also appears to be spurred by allegations made by U.S. Senator Charles Grassley (R-Iowa) as to the legitimacy of the H-1B program. In a letter to Senator Grassley, Alejandro Mayorkas, director of the Citizenship and Immigration Services, stated that the agency began a site visit and verification program in July to check on the validity of H-1B applications. This letter was released on November 15 by Senator Grassley's office.

"[The inspection program determines] whether the location of employment actually exists and if a beneficiary is employed at the location specified, performing the duties as described, and

paid the salary as identified in the petition," said Mayorkas in his letter to Grassley.

Senator Grassley who has been very critical of the H-1B program is a co-sponsor of legislation [that will increase H-1B program enforcement](#).

H-1B employers will likely again need to contact their congressional representatives to encourage them to support legitimate business use of the H-1B and other nonimmigrant visa classifications.

The Computerworld article can be found at: http://www.computerworld.com/s/article/9141047/Feds_plan_25_000_on_site_H_1B_inspections?taxonomyId=19

CBP NEWS

CBP UPGRADES ELECTRONIC READING ROOM

On October 23, 2009, CBP launched improvements to the CBP Freedom of Information Act Electronic Reading Room to increase public access to agency records and documents. The upgrade features records and documents formerly only available via FOIA request. It includes policies and procedures, awarded contracts and grants, manuals and instructions, final opinions, common FOIA requests, and logs of FOIA requests received by the agency. The Reading Room can be accessed at <http://foia.cbp.gov/>

CBP PROPOSES TO ESTABLISH GLOBAL ENTRY PROGRAM

On November 19, 2009, CBP issued a proposed regulation in the Federal Register to establish an international trusted traveler program, called Global Entry. Per the preamble to the proposed regulation "This voluntary program would allow CBP to expedite clearance of pre-approved, low-risk air travelers into the United States. CBP has been operating the Global Entry program as a pilot at several airports since June 6, 2008. Based on the successful operation of the pilot, CBP now proposes to establish Global Entry as a permanent voluntary regulatory program."

As reported in previous *Spotlight* issues, CBP began conducting "Global Entry" as a pilot program at three airports on June 6, 2008 and expanded the program on August 13, 2008 to four additional airports. As of August 10, 2010, the program expanded to thirteen additional airports (for a total of twenty airports). According to the Federal Register, "[t]he Global Entry pilot utilizes fingerprint biometrics technology to verify registered program participants and automated kiosks to provide participants expedited entry into the United States at any of the pilot's airport locations. Applicants apply online through the Global On-line Enrollment System (GOES) at <http://www.globalentry.gov>. Applicants pay a non-refundable fee of \$100 when applying to the program. All applicants undergo a background check, including an interview by a CBP officer, before being enrolled in the pilot program."

While the initial pilot program was limited to U.S. citizens, U.S. nationals, and U.S. lawful permanent residents, in April 2009, CBP expanded eligibility for participation in the Global Entry pilot to include citizens of the Netherlands who participate in Privium, an expedited travel program in the Netherlands, provided they

otherwise satisfy the requirements for participation in the Global Entry pilot program.

The program is restricted to individuals who are 14 years of age or older. Individuals may not qualify if they:

- Are inadmissible to the United States under applicable immigration laws;
- Provide false or incomplete information on their application;
- Have been convicted of a criminal offense in any country;
- Have been found in violation of customs or immigration laws; or
- Fail to meet other Global Entry requirements.

CBP has determined that the Global Entry pilot is operating successfully and that the automated kiosks are operating with no current major technical issues or problems. "From June 2008 through March 2009, over 8,000 applications were filed and 7,923 participants were enrolled. CBP is approving applications for participation more quickly than was expected. The average approval time for each application has been less than one week—better than the initial estimates of ten to fourteen days. Public reaction has been positive, and CBP has received comments during the pilot lauding the program."

Given the success of the program, CBP is now proposing to make the program permanent and expand it to additional airports. The comment period for the proposed regulation will close January 19, 2010. We will provide additional information as it becomes available.

ICE NEWS

ICE ANNOUNCES 1,000 NEW WORKPLACE AUDITS

On November 19, 2009, ICE Assistant Secretary John Morton announced that 1,000 Notices of Inspection (NOI) went out to employers. The NOI informs employers that ICE will audit their hiring records for compliance with employment eligibility verification laws. This will involve a comprehensive review of Form I-9s. Employers are required to complete and retain a Form I-9 for each individual hired in the US, ensuring employers review and record each individual's identity and work eligibility documents.

The 1,000 businesses served with audit notices this week were selected for inspection as a result of investigative leads and intelligence and because of the business' connection to public safety and national security. The names and locations of the businesses have not yet been released due to the sensitive nature of these audits.

More details about ICE's new workforce enforcement strategy can be found on the website at <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>.

DOS NEWS

DECEMBER VISA BULLETIN: ONLY EB3 INDIA CHANGE

The DOS [Visa Bulletin for December 2009](#) shows a small date change for the employment-based third preference (EB3) category for India-born individuals to May 1, 2001. All other categories carry over from the November visa bulletin. The EB3 date for all countries other than India remains June 1, 2002. All countries other than India and China remain "current" in the EB2 category. For China, the EB2 priority date remains April 1, 2005. For India-born individuals, the EB2 priority date remains January 22, 2005. Employment-based first preference (EB1) remains current for all countries.

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.

For general information on visa retrogression, please see our [FAQs](#) 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 since 1996.

DOL NEWS

DOL RELEASES JUNE 2009 PERFORMANCE DATA

DOL recently released the [performance results](#) for the quarter ending June 30, 2009. DOL's performance in the PERM program showed a small improvement from the preceding quarter; 17% of PERM cases were "completed" within six months of filing, as opposed to 11% in the previous quarter. A completed case means that either a certification, denial, or a withdrawal was issued – cases under review are not considered completed by DOL.

DOL's performance in the PERM program is drastically slower than a year earlier, when 94% of PERM cases were completed within six months of filing. DOL states that the decrease in processing is "due to the impact of increasing integrity activities in light of the declining economy and continued filings for positions where there are U.S. workers."

DOL also provided an update on the planned implementation of the new PERM form for the iCERT filing portal. DOL had originally planned to launch this form on September 1, 2009. The report now states that the new PERM system should be launched on July 1, 2010. DOL rolled out the iCERT portal in April 2009 for Labor Condition Application (LCA) filings.

DOL's performance numbers, as well as their reference to "integrity activities" suggest that PERM processing times will continue to be slow for the foreseeable future. Employers should be prepared for additional DOL scrutiny of PERM cases and be able to demonstrate a lack of available U.S. workers

PREVAILING WAGES – CHANGES IN 2010 FOR PERM AND LCA WAGES

Included in regulations that amended the H-2B visa program was a provision to transfer the responsibility for issuing prevailing wages from the State Workforce Agencies (SWA) to the U.S. Department of Labor (DOL). DOL has been issuing wages for the H-2B visa program for several months, and barring a last-minute postponement, DOL will assume responsibility for issuing all prevailing wages (for LCAs, PERM and the H-2A visa programs) on January 1, 2010.

As currently planned, the SWAs will issue prevailing wages for all prevailing wage requests submitted to them on or before December 31, 2009. After that date, all prevailing wages requests must be submitted to the DOL. DOL has not yet issued instructions on how wage requests should be submitted, which

form should be used, or how long prevailing wages may take to be issued. DOL is required to issue the H-2B prevailing wage determination within 30 days of the request; however, at a meeting with Stakeholders in September 2009, DOL advised that it would not apply the 30 day turnaround time to all types of wage requests, and wages could take more than 30 days to be issued for the H-1B and PERM programs.

With all wage determinations being issued by a central, federal office, there should be greater consistency in prevailing wage determinations across the U.S. Under the current system, every state has its own wage request form, processing time, and preferences for alternate wage sources, which leads to a wide range of processing times and interpretations on similar wage requests, simply because of the location of the job. However, it is uncertain at this time how much dialog (if any) attorneys and employers will have with DOL on wage requests, and if wage surveys which were accepted by SWAs will be rejected as valid wage sources by DOL.

In addition, the prevailing wage determination is an important milestone and a gating issue for the preparation of PERM applications, as the employer must have received a prevailing wage determination prior to filing the PERM application with DOL. While the regulations do allow an employer to begin the PERM recruitment before the prevailing wage determination was issued, many employers are reluctant to do so, because if the wage determination reflects a higher wage than was used in the recruitment, much of the recruitment would need to be done again. A delay in the issuance of prevailing wage determinations could lengthen the time to prepare and submit PERM applications.

Jackson & Hertogs is closely monitoring the prevailing wage system changes, and will update clients as more information about the new prevailing wage system and processing time becomes available.

J&H NEWS

J&H ATTORNEYS ON THE GO

Senior associate [Atessa Chehrazi](#) volunteered at a citizenship event in Hamilton City, near Chico, California. The event was coordinated by the American Immigration Lawyers Association, Immigrant Legal Resource Center, the Mexican Consulate, American Civil Liberties Union, and other community organizations.

Senior associate [Daniel Horne](#) and partner [Ilana Drummond](#) hosted a webinar on HR.Com focusing on I-9 compliance and the interplay with E-Verify. You may listen to a recording of this program by logging into HR.com at <http://www.hr.com/SITEFORUM?t=/contentManager/onStory&e=UTF-8&i=1116423256281&l=0&active=no&ParentID=1119974671478&StoryID=1252442156280>.

J&H HOLIDAY SCHEDULE

J&H will be closed November 26 and 27 for the Thanksgiving Holiday. J&H will also be closed December 24 and 25 for the winter holiday and December 31 and January 1, 2010 for New Year's Day.

J&H WEBINARS

To sign up for a J&H complimentary webinar, send an e-mail to webinar@jackson-hertogs.com

January 27, 2010 — FDNS and I-9 Audits

Description forthcoming; check our website at <http://www.jackson-hertogs.com/jh/seminars.shtml>.

February 24, 2010 — LCA recordkeeping and compliance

On-going news reports of ICE raids of employers on I-9 issues illustrate the need for employers to keep current, up-to-date paperwork for their foreign national employees. While not as dramatically publicized, employers of H-1Bs are required to maintain paperwork on file and available to the public or DOL for their H-1B employees. Do you know what an LCA is? Do you know where your LCAs are maintained? This webinar will present an overview on employer requirements for Labor Condition Application (LCA) recordkeeping, including public and DOL access file guidance, location of records, how to update LCAs, and when LCAs may be destroyed. We will also discuss some of the

immigration consequences for employers related to corporate mergers, acquisitions, and restructuring.

March 24, 2010 — H-1B Basics

Jackson & Hertogs will provide an in-depth webinar, focusing on the basics of visa petitions for H-1B non-immigrant temporary workers from the perspective of the sponsoring employer. We will explain such terms 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 H-1B's maximum six-year limit.

April 28, 2010 — Global travel and immigration

With business partners and affiliates located all over the world, global mobility is critical to a company's success. This webinar will address basic issues concerning employees' international business travel and work assignments. We will provide an overview of the B-1 visa and the Visa Waiver Program for foreign national visitors coming to visit U.S. companies. We will discuss general requirements for international business visits and visas to other countries. The webinar also will address preliminary considerations and document requirements for global work authorization.

IMMIGRATION TRIVIA

What is a "prevailing wage"?

Answer: The prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment. This wage rate is usually obtained by contacting the State Workforce Agency (SWA) having jurisdiction over the geographic area of intended employment or from other legitimate sources of information, such as the [Online Wage Library](#).