JACKSON & HERTOGS
IMMIGRATION AND NATIONALITY LAW SERVICES

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USCIS NEWS

H-1B CAP UPDATE: EXHAUSTION IMMINENT

As of December 15, 2009, approximately 64,200 H-1B cap-subject petitions had been filed. USCIS has approved sufficient H1-B petitions for aliens with advanced degrees to meet the exemption of 20,000 from the fiscal year 2010 cap. Any H1-B petitions filed on behalf of an alien with an advanced degree will now count toward the general H1-B 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to reach the statutory limits, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn.

What is the impact for employers?

What this means is that the H-1B visa petition cap is likely to be reached in the next few days to weeks, but most certainly by the end of January and possibly sooner if the current demand keeps up. We believe that the general uptick in filings reflects the recent crop of winter graduates who are securing employment offers and a general change from the hiring freeze that we have been experiencing for the past year. While any improvement in the economy is welcomed, the impact on employers and many potential employees who require H-1B sponsorship to take employment in the U.S. is that the visa category will not be available until the next fiscal year commences on October 1, 2010.

When the H-1B cap is reached, employers will once again have to queue up to file H-1B visa petitions for cap subject individuals on April 1, 2010 for a start date of October 1, 2010. This also means that employers should be reviewing their employment roles now to determine if any individuals have been hired as F-1s, J-1s or other nonimmigrant classifications who may require H-1B sponsorship or if candidates from abroad are being considered for opportunities that require H-1B sponsorship. If there are any such identified individuals, now is the time to file an H-1B cap petition. Once the cap is reached, cap subject petitions will not be accepted until April 1 with an October 1 validity start date.

USCIS NEWS (cont'd)

Looking forward to 2010 and beyond

Assuming that the economy improves and U.S. hiring increases, there will likely be a return to the "run on numbers" that we have experienced in prior years. Employers and foreign nationals should be braced for a return to the lottery system for H-1B visa numbers and, while this may not happen in April 2010, it will likely happen in subsequent fiscal years.

J&H continues to monitor the FY2010 H-1B cap count, and is notifying clients as information becomes available. It is impossible to predict when the H-1B cap will be reached. In prior years, USCIS has given little or no notice before the cap was reached, leaving some clients who wanted H-1B visas out of luck.

If you wish to start an H-1B cap case, or have questions about the H-1B visa cap, please contact your J&H attorney immediately.

Background

There is an annual limit of 65,000 visas that can be given out to new H-1B nonimmigrants. The 65,000 visas also include visas that are typically held in reserve for citizens of Singapore and Chile due to free trade agreements with these countries. The unused portion of the 5,800 visas reserved for citizens of Singapore and Chile each year may be added back towards the 65,000 based on usage each year. In addition to this base 65,000, 20,000 visas are considered "exempt" from the cap each year to be awarded to individuals who have graduated from Master's (or higher) degree programs from accredited US universities. Therefore, there are roughly 85,000 new H-1B visas available each year.

The H-1B cap typically impacts employers desiring to employ individuals who are in the U.S. in other nonimmigrant categories (F-1, J-1, L-1, etc.) or who are H-1B nonimmigrants with universities or related not for profit research institutes (Stanford, Harvard, etc.) or who are outside the United States. Individuals who were already counted against the cap in a prior fiscal year and who have not "reset" their six year limitation of stay clock, are exempt from the cap. Therefore, any current employees that a company has who are already in H-1B status and for whom an extension is required do not have cap issues.

Given that the U.S. government's fiscal year runs from October 1 through September 30 each year, and H-1B visa petitions cannot be filed more than six months prior to the requested start date, what has typically happened each year is that employers submit the bulk of the H-1B cap petitions to arrive at the USCIS service centers by April 1 of each filing year. In past years, more than sufficient numbers of petitions have been received during the first week of April to exhaust number of available H-1B cap visas. In fact, the filed petitions are typically subjected to a lottery system for adjudication and a large number of filed petitions are rejected based on the cap having been reached.

This did not happen in April 2009 due to various factors, including the U.S. economic recession. To give an idea of the accelerating rate of cap filings, as of June 12, 2009, approximately 44,400 H-1B cap-subject petitions and approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. As of September 25, 2009, the number of regular cap cases had crept up to 46,700 and by the end of October, the number hit 53,800. Filing continued to increase throughout November, and by November 27, more than 58,900 petitions had been received at USCIS. As of December 15, the total received had climbed to 64,200.

In terms of how the H-1B cap is reached, if a petition is received at USCIS before the cap is reached, the petition is assigned one of the available numbers. When USCIS announces that the cap has been reached, the Service will usually state that all petitions received on or by a certain date have been accepted under the cap, or all petitions received on that date will be run through a lottery, to determine which petitions get one of the remaining H-1B visa numbers. Generally, petitions that are in the mail to USCIS on the day the cap is reached are not accepted, and will be returned unprocessed. For this reason, it is imperative to file H-1B cap petitions as soon as possible.

USCIS HOLDS AOS CASES FOR CHANGE IN VACCINATION REQUIREMENT

On November 25, 2009, USCIS announced that they are holding some Adjustment of Status (AOS) applications until the new CDC vaccination requirement becomes effective on December 14, 2009. The temporary hold began on November 13, 2009 when an announcement from CDC was published amending the vaccinations required for immigration purposes. Amongst the changes, the controversial vaccines for herpes zoster (zoster) and human papillomavirus (HPV) will no longer be required for immigration purposes.

USCIS is holding any application that would have been denied solely based on the applicant's failure to show proof of having received the HPV or zoster vaccine. USCIS will resume adjudicating these applications on December 14, 2009, using the new vaccination criteria. More information on the new criteria and changes to the vaccination requirements is available on CDC's website at CDC Information on Vaccination Requirements.

USCIS NEWS (CONT'D)

LAW EXTENDS E-VERIFY THROUGH SEPTEMBER 2012

The DHS Appropriations Act of 2010, signed by the President on October 28, 2009, extended E-Verify and a few additional USCIS programs until September 30, 2012. E-Verify is an Internet-based system operated by DHS in partnership with the Social Security Administration (SSA). It allows participating employers to electronically verify the employment eligibility of their newly-hired employees. More than 168,000 participating employers at nearly 640,000 worksites nationwide currently use the program. Since October 1, 2009, more than 1.3 million employment verification queries have been run through the system.

FORM I-693 ACCEPTABLE WITHOUT SEASONAL INFLUENZA VACCINE

As of November 25, 2009, CDC informed USCIS that the availability of the seasonal influenza (flu) vaccine varies both geographically and temporally. The seasonal flu vaccine is one of the vaccines required for applicants for adjustment of status, 6 months through 18 years of age, and individuals aged 50 years or older. The receipt of the required vaccines is recorded on Form I-693.

Based on CDC's information, Form I-693 may be accepted without the seasonal flu vaccine if the following conditions are met:

- The civil surgeon does not have the seasonal flu vaccine available; AND
- The civil surgeon either has referred the applicant to the health department to obtain the seasonal flu vaccine, or has contacted the health department for the availability of the seasonal flu vaccine, but the health department does not have the seasonal flu vaccine available; AND
- The civil surgeon notates on the form, in the row for the seasonal flu vaccine of the vaccination chart, the following: "vaccine unavailable at health department".

If the above is notated on the Form I-693, USCIS will grant a blanket waiver for the seasonal flu vaccine. The USCIS' notice extends through March 31, 2010. Until further notice is given by CDC, the H1N1 influenza vaccine is not part of the vaccination requirements for purposes of Form I-693. Further information can be found at http://www.uscis.gov/i-693

DOS NEWS

JANUARY 2010 VISA BULLETIN: FY 2010 PROJECTIONS

The DOS Visa Bulletin for January 2010 shows a small date change for the employment-based third preference (EB3) category for India-born individuals to June 22, 2001. The EB3 date for China, Philippines, and all other countries moves forward two months to August 1, 2002. EB3 Mexico advances only one month to July 1, 2002. All countries other than India and China remain "current" in the EB2 category. For China, the EB2 priority date moves forward one month to May 1, 2005. For India-born individuals, the EB2 priority date remains January 22, 2005. Employment-based first preference (EB1) remains current for all countries.

The January 2010 visa bulletin contains the following information from DOS regarding cut-offs and projections for the remainder of FY-2010:

Will there be any additional cut-off dates for foreign states in the Employment First or Second preference categories?

At this time it is unlikely that there will be any cut-off dates in the Employment First preferences. It also appears unlikely that it will be necessary to establish a cut-off date other than those already in effect for the Second preference category. Cut-off dates apply to the China and India Second preference categories due to heavy demand, and each has the potential to become "unavailable" should demand cause the annual limit for that category to be reached.

INA Section 202(a)(5) provides that if total demand will be insufficient to use all available numbers in a particular employment preference category in a calendar quarter, then the unused numbers may be made available without regard to the annual per-country limits. For example, if it is determined that based on the level of demand being received at that time there would be otherwise unused numbers in the Employment Second preference category, then numbers could be provided to oversubscribed countries without regard to per-country limitations. Should that occur, the same cut-off date would be applied to each country, since numbers must be provided strictly in priority date order regardless of chargeability. In this instance, greater number use by one country would indicate a higher rate of demand by applicants from that country with earlier priority dates.

Should Section 202(a)(5) be applied, the rate of number use in

DOS NEWS (CONT'D)

the Employment preference category would continue to be monitored to determine whether subsequent adjustments are needed in visa availability for oversubscribed countries. This action provides the best possible assurance that all available Employment preference numbers will be used, while still ensuring that numbers remain available for applicants from all other countries that have not yet reached their per-country limit.

What are the projections for cut-off date movement in the Employment preferences for the remainder of FY 2010?

Based on current indications of demand, the best case scenarios for cut-off dates which will be reached by the end of FY-2010 are as follows:

Employment Second:

China: July through October 2005

India: February through early March 2005

If Section 202(a)(5)were to apply:

China and India: October through December 2005

Employment Third:

Worldwide: April through August 2005

China: June through September 2003

India: January through February 2002

Mexico: January through June 2004

Philippines: April through August 2005

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.

WORLDWIDE DEPLOYMENT OF THE DS-160 BY APRIL 30, 2010

Currently the DS-160 form is used at just 24 posts in a pilot implementation. Where in use, the DS-160 replaces both the DS-156 and DS-157 and is an integrated online application form. DOS has announced that the DS-160 will be expanded in phases with the goal of complete global usage for all nonimmigrant visa statuses except K's by April 30, 2010. DOS will complete the expansion in two phases. Those U.S. Consulates and Embassies identified as Priority Posts must implement the DS-160 prior to March 1, 2010. All remaining posts will implement the DS-160 between March 1 and April 30, 2010.

Jackson & Hertogs recommends that all applicants for visa at a U.S. Consulate or Embassy verify which form is currently being accepted prior to appearing for a visa appointment. To verify which posts are currently accepting the DS-160, please check the DOS website at: http://www.travel.state.gov/visa/frvi/forms/forms_1342.html

INCREASE IN NONIMMIGRANT VISA FEE PROPOSED

On December 14, 2009, the Department of State published a proposed rule to increase the nonimmigrant visa application processing fees. These are also called the Machine-Readable Visa (MRV) fee, and Border Crossing Card (BCC) fees. The proposed rule would set a tiered fee schedule with different fees for the different visa categories. The current fee is $131 and was set on January 1, 2008. Under the proposed rule, applicants for all visas that are not petition-based, including B1/B2 tourist and business visitor visas and all student and exchange-visitor visas, would pay a fee of $140. Applicants for petition-based visas would pay an application fee of $150. These categories include: H, L, O, P, Q, and R. The application fee for K visas for fiancé(e)s of U.S. citizens would be $350. The fee for E visas for treaty-traders and treaty-investors would be $390.

The Department will not begin collecting the new proposed fees until it considers public comments and publishes a final rule. In order to view the proposed rule and to submit comments, please go to www.regulations.gov.

DOL NEWS

PREVAILING WAGE SYSTEM CHANGES – PERM AND H-1B IMPACT

Beginning January 1, 2010, all prevailing wage determinations for both temporary and permanent foreign labor programs (including H-1B, H-2B, H-2A and PERM) will be issued by the U.S Department of Labor. For decades, most wage determinations were issued by the State Workforce Agency (SWA) for the State where the employment of the foreign worker would occur. Having each State issue its own wage determinations has led to a variation in processing time for wage requests, as well as different interpretations on what type of wage surveys or other documentation can be considered prior to issuing a prevailing wage determination. As part of the DOL's efforts to develop consistency in the foreign labor programs, as well as to move the program management and administration to the federal level, DOL published regulations in 2008 that moved responsibility for prevailing wage determinations from the SWAs to DOL. DOL has been issuing prevailing wages for H-2B cases for several months, and pursuant to regulations published in 2008, DOL will be responsible for issuing all prevailing wages effective January 1, 2010.

DOL will require the prevailing wage requests to be submitted by mail until their online prevailing wage system goes "live" on January 20, 2010. Prevailing wage determinations will be returned to requesters via mail or email, if a contact email address is included in the wage request. DOL will continue to accept mailed in wage requests after the online system has been implemented, but mailed in requests are discouraged. DOL has advised stakeholders that mailed in wage requests will be processed more slowly than electronically filed wage requests.

It is unknown at this time how long it may take DOL to process requests and return a prevailing wage determination. DOL has declined to estimate how quickly they will process requests, other than to state that requests will be processed "as soon as possible". DOL is required to issue a prevailing wage determination within 30 days on H-2B wage requests; for all other categories, there is no regulatory timeline to issue the wage determination.

The prevailing wage determination is a mandatory step for all PERM, H-2A and H-2B cases, and delays in issuing the determination may lead to longer preparation times for these types of applications. While a wage determination is not mandatory for the H-1B program, many employers seek a prevailing wage determination because it can provide "safe harbor" in the event of a wage audit.

Another area of uncertainty is whether wage surveys that have been acceptable to various SWAs as an alternate prevailing wage source will be approved by DOL. While moving all wage determinations to DOL may lead to greater consistency in how requests are processed, it is expected that the DOL prevailing wage unit will be less accessible than the individual SWAs have been to employers and attorneys.

J&H will be closely monitoring the performance of the new prevailing wage processing system, and will provide updates to clients as more information becomes available.

IMMIGRATION TRIVIA

When does the FY 2011 H-1B cap period begin?

Answer: The H-1B cap for FY 2011 begins on October 1, 2010. H-1B petitions can be filed 6 months in advance allowing for the first day of filing under the H-1B cap on April 1, 2010, with an effective date of October 1st. If you know you have an employee who will need H-1B visa status next year, please contact our office to begin processing.

LEGISLATIVE NEWS

CONGRESSMAN LUIS GUTIERREZ INTRODUCES COMPREHENSIVE IMMIGRATION REFORM BILL

On December 15, 2009, Congressman Luis Gutierrez (D-IL) introduced the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 ("CIR ASAP"). More than 87 other Representatives joined Rep. Gutierrez in support of the bill, and the Congressional Progressive Caucus, the Congressional Asian Pacific American Caucus and members of the Congressional Black Caucus have endorsed CIR ASAP, suggesting that there is wide support for many of the provisions of this bill.

While it is too early to know what form (if any) comprehensive reform legislation might take, CIR ASAP includes several provisions, including a pathway to legalization for undocumented workers and students, family unity and labor provisions, enhanced border security measures, and implementation of employment verification systems. Of particular interest, CIR ASAP would allow for the recapture of thousands of unused immigrant visa numbers from prior years, and would raise the individual country caps; these steps alone would provide long-sought relief for the lengthy backlogs in priority dates for employment-based green cards. CIR ASAP would also allow certain individuals to submit I-485 applications even if their priority date is not current, allowing applicants to obtain work and travel authorization for themselves and their family members while they wait for their I-485 to be approved.

The dismal 2010 projections from the January Visa Bulletin, with delays of up to eight years for individuals from India and China, vividly demonstrate the urgent need for immigration reform – it is not realistic or reasonable to expect workers or employers to put their futures on hold for nearly a decade. Jackson & Hertogs encourages clients to contact their Congressional representatives and express their support for immigration reform. Almost 20 years have passed since the last major reform of U.S. immigration law in 1990 – it is time to bring our immigration laws out of the 20th Century and recognize the changes that must be made for the 21st Century. You may find your representative through our website at http://www.jackson-hertogs.com/issues/congress.shtml

J&H HOLIDAY SCHEDULE

J&H will be closed December 24 and 25 for the winter holiday, and December 31 and January 1, 2010 for New Year's.

J&H NEWS

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

2009 continued the trend of increased enforcement of immigration rules on U.S. employers by the Department of Homeland Security. Approximately 40,000 H-1B petitions were recently transferred to U.S. Citizenship and Immigration Services (USCIS) Office of Fraud Detection and National Security (FDNS) for investigation. As a result, FDNS has been conducting unannounced site visits of employers nationwide to verify the employment of the specified H-1B workers. At the same time, approximately 2,000 employers were subjected to Form I-9 audits that are being conducted by Immigration and Customs Enforcement (ICE) — leading to substantial monetary fines and other enforcement activities. These trends are a marked shift from the practices of the previous administration, which emphasized workplace raids and arresting unauthorized workers. While the raids have been drastically reduced, the Obama Administration is making clear that employer enforcement will be an important part of their immigration policy, with an emphasis on unannounced site visits and I-9 audits. Our webinar will address the latest techniques to ensure maximal I-9 and LCA compliance. We will review techniques and procedures that companies can adopt to ensure that any unannounced visits in the future cause a minimum of disruption and anxiety to employees and to employers. (PHR/SPHR certification pending)

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. (certification pending)