Jackson & Hertogs
Immigration and Nationality Law Services

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©2010 Jackson & Hertogs LLP is one of the oldest and most respected immigration and nationality firms in the country dedicated solely to the practice of immigration law. Today, Jackson & Hertogs has eight attorneys and a staff of 25 legal assistants and office management personnel to assist you with immigration matters.

USCIS NEWS

H-1B CAP UPDATE: 25,300 PETITIONS AS OF JULY 16, 2010

As of the last count on July 16, 2010, USCIS had received 25,300 regular cap petitions towards the 65,000 cap amount and 11,000 master's exemption petitions towards the 20,000 cap amount. Petitioners may continue to submit petitions under either the regular or master's cap.

J&H will continue to monitor the FY2011 H-1B cap count, and advise clients as information becomes available. While the rate of H-1B cap filings is markedly slower than in previous years, 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. It is our recommendation that you review all new hires who hold F-1 status and consider filing H-1B visa petitions ASAP this year and not "chance it" that we will have a similar filing window in the next fiscal year. If you wish to start an H-1B case, please contact your J&H attorney.

The cap not being reached this year has a direct correlation to the economy. If the economic situation improves next spring, it is highly likely that H-1B cap numbers will again be used up shortly after the filing window opens up. Therefore, employers who identify H-1B cap subject hires this year should consider immediately filing an H-1B visa petition now rather than waiting for the next fiscal year when we may experience a lottery situation. We also urge employers to review all employees who are not already in H-1B status and determine if it would be beneficial to file H-1B cap petitions in order to secure a visa.

Background

There is an annual limit of 65,000 visas that can be given out to new H-1B nonimmigrants. The 65,000 limit also includes 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

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USCIS NEWS (CONT'D)

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.

Other than 2009, 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 nor in April 2010 due to various factors, including the U.S. economic recession and the "job less" recovery. The available H-1B cap numbers will continue to dwindle and at some point the cap will be reached. Employers will have little advance warning if and when the cap is reached. 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.

E-VERIFY: WHAT'S THE HIRE DATE?

On June 30, 2010, USCIS published a page on their website that addresses the 3-day rule as it applies to E-Verify. Specifically, the page provides examples for determining the "hire date" for E-Verify, since the date can vary depending on when the employee started work for pay and the date the case is created in E-Verify.

For examples and more information, please read:

http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c00b59cca6149210VgnVCM100000082ca60aRCRD&vgnextchannel=d4abfb41c8596210VgnVCM100000b92ca60aRCRD

DOS NEWS

AUGUST VISA BULLETIN: EB-2 INDIA & CHINA MOVE, PROGRESS IN EB-3

The Department of State (DOS) Visa Bulletin for August 2010 showed significant progress in the employment-based second preference (EB2) category for both India-born and China-born individuals. For India, the EB2 priority date moved forward five months, from October 1, 2005 to March 1, 2006. For China-born individuals, EB2 advanced from November 22, 2005 to March 1, 2006. All countries other than India and China remain "current" in the EB2 category. Employment-based first preference (EB1) also remains current for all countries.

In addition, the employment-based third preference (EB3) numbers for all countries other than India, China and Mexico have moved forward almost ten months, from August 15, 2003 to June 1, 2004. EB3 India moved forward from November 22, 2001 to January 1, 2002. EB3 China moved forward from August 15, 2003 to September 22, 2003. EB3 Mexico remains “unavailable.”

The marked advance in the India and China categories is due to reallocation of “unused” visa numbers from undersubscribed countries. A provision of the American Competitiveness in the 21st Century Act (AC-21) 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 otherwise unused numbers may be made available without regard to the annual per-country limits.” As we are now in the last quarter of FY2010, DOS appears to have implemented this provision to ensure that all of the employment visa numbers are used by the end of the fiscal year.

This forward progress is largely consistent with the projections for FY2010 employment-based visa cutoff dates that DOS made in the July Visa Bulletin. While we may see further advancement in some of these dates in September, this will depend on global demand and usage of the available visa numbers.

Please note that these are only estimates, and it is possible that annual limits could be reached or visa numbers could retrogress before the end of the fiscal year. The August visa bulletin is available on our DOS Visa Bulletin and Quota Movement page and on the DOS website at: http://www.travel.state.gov/visa/bulletin/bulletin_5092.html

U.S. EMBASSY AND CONSULATES IN CHINA LIBERALIZE INTERVIEW APPOINTMENT POLICY

Effective immediately, non-immigrant visa applicants may book interview appointments at any U.S. Consular Section in China, regardless of the province or city where the applicant lives. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang.

CBP NEWS

REMINDER ABOUT SUMMER TRAVEL TO CANADA

CBP reminds travelers that the Western Hemisphere Travel Initiative (WHTI) requires U.S. and Canadian citizens, age 16 and older to present a valid, acceptable travel document that denotes both identity and citizenship when entering the U.S. by land or sea. U.S. and Canadian citizens under age 16 may present a birth certificate or alternative proof of citizenship when entering by land or sea.

WHTI-compliant documents for entry into the U.S. at land and sea ports include:

- U.S. or Canadian passports;
- Trusted Traveler Card (NEXUS, SENTRI, or FAST/EXPRES);
- U.S. Passport Card;
- State or province-issued Enhanced Driver’s Licenses (when and where available). For more information please visit the WHTI Web site at www.getyouhome.gov

Jackson & Hertogs reminds all clients to provide our office with advance notice of their travel dates and to always provide updated I-94 and/or visa stamp copies to our office when applicable.

DOL NEWS

DOL UPDATES PERM PROCESSING TIMES

The U.S. Department of Labor (DOL) recently posted updated PERM processing dates. DOL reports that as of June 30, 2010, it was processing the following PERM cases:

Analyst Review: October 2009
Audit Review: June 2008
Standard Appeals: January 2008
Government Error Appeals: Current

The Analyst Review queue moved forward two months; both Audit Review and Standard Appeals moved forward one month from the dates reported at the end of May 2010.

Cases in "Analyst Review" are undergoing initial review – these are the cases for which DOL is currently issuing certifications and audit notices. While DOL reports that it is processing cases filed in October 2009, we are aware that cases filed as late as May 2010 have recently been processed at DOL.

Cases in "Audit Review" were issued audit notices by DOL, and the employer submitted an audit response to DOL for review. It is important to note that DOL uses the date of original filing (i.e., the priority date) to determine processing times for all PERM cases. For example, DOL is reviewing audit responses for PERM cases that were filed in June 2008 and earlier; however, the employer's audit response may have been submitted several months after that date.

Cases in "Standard Appeals" are denied cases where either a request for reconsideration by DOL or a request for appellate review (i.e., an appeal) was submitted. DOL now forwards appeals directly to the Board of Alien Labor Certification Appeals (BALCA) for review; however, until late 2009, DOL was processing both reconsideration requests and appeals in the same queue, so the "Standard Appeals" queue includes both requests for reconsideration and appeals.

"Government Error Appeals" are appeals based solely on an error by DOL, e.g., cases denied for failure to respond to an audit when the employer did in fact submit a timely audit response. While an employer may ask for its appeal to be considered under the government error queue, DOL is the sole arbiter in determining whether the decision was government error. If DOL does not find that the decision was erroneous, the case will move to the Standard Appeal queue for further processing.

DOL is currently working to reduce its pending backlog of PERM cases. DOL's goal for FY 2010 is to reduce the backlog by 50%. DOL states that if a pending application was filed more than three months prior to the reported processing month, an inquiry may be made on the status of the pending application. Whether a case is behind the processing times will depend on what processing queue the case is in at DOL. For example, under the DOL's standards, a case filed in April 2009 would be overdue for initial Analyst Review (August 2009), but not overdue under the Audit Review (June 2008) processing date.

Jackson & Hertogs is monitoring the status of our pending PERM cases, and following up with DOL when cases are behind the reported processing times.

GLOBAL VISAS

UNITED KINGDOM: TIER I WORK PERMIT CHANGES

The United Kingdom announced further changes to its Tier 1 work permits. Effective July 19, 2010, two changes will affect Tier 1 (General) applicants applying from outside of the UK.

First, there will be an interim limit for Tier 1 (General) applications for through March 31, 2011. This will be applied on a monthly basis. If an application meets all the rules and the limit has not been reached for the month in which it is filed, the visa will be issued in the usual way. If an application is successful but the limit for that month would be exceeded by issuing a visa, the application will be deferred to the next month when the limit allocation reopens. Applications that are not successful will be refused whether or not the monthly limit has been reached. Applications can be submitted even after the monthly limit has been reached and they will be processed in the order received as far as possible within operational limits. The interim limits will not apply to applicants from within the UK, dependants of Tier 1 applicants or other Tier 1 sub-categories.

The United Kingdom also announced a that the number of points required to qualify for a Tier 1 (General) visa application will be raised from 95 to 100 points. People with previous earnings of GBP 150,000 will receive an increase from 75 to 80 points. The points awarded to those who have an eligible MBA are increasing from 75 to 80. Please contact Jackson & Hertogs for specific information and assistance.

CANADA: PERMANENT RESIDENCY CHANGES FOR SKILLED WORKERS

The Canadian Department of Citizenship and Immigration announced several changes to the permanent residence applications. Effective as of June 26, 2010, the Federal Skilled Worker category will cap at 20,000 the number of applications considered for processing each year if there is no accompanying offer of arranged Canadian employment. Within that 20,000 yearly cap, a maximum of 1,000 applications per eligible National Occupation Classification code will be considered for processing. Applications will be considered in order in which they are received, and applications received on the same date will be processed according to regular office procedures. The first cap period will run from June 26, 2010 to June 30, 2011; subsequent cap years will run from July 1 to June 30. The list of eligible occupations for the Federal Skilled Worker program also has been amended. Moreover, applicants must show one year of continuous full-time experience or equivalent paid work experience in the last ten years in one of the eligible occupations. Federal Skilled Worker applicants also will be required to provide the results of an English or French proficiency test.

Applicants for permanent residence under the Canadian Experience Class category also will be required to submit the results of an English or French proficiency test. The results must be less than one year old at the time of submission. Applications submitted after June 26, 2010, without the language proficiency test results will be returned as incomplete. Please contact Jackson & Hertogs for specific information and assistance.

LEGISLATIVE NEWS

DOJ CHALLENGES ARIZONA IMMIGRATION LAW

On July 6, 2010, the Department of Justice filed a challenge to the immigration law recently passed by the state of Arizona. In the DOJ's brief, they wrote:

> S.B. 1070 unconstitutionally interferes with the federal government's authority to set and enforce immigration policy, explaining that "the Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country." A patchwork of state and local policies would seriously disrupt federal immigration enforcement. Having enacted its own immigration policy that conflicts with federal immigration law, Arizona "crossed a constitutional line."

To read more, see:
http://www.justice.gov/opa/pr/2010/July/10-opa-776.html

J&H NEWS

J&H WEBINARS

To sign up for a J&H complimentary webinar, send an e-mail to webinar@jackson-hertogs.com.
You can always find an up-to-date list of webinar offerings on our website at www.jackson-hertogs.com/jh/seminars.shtml.

7/28/10 Webinar: Midyear "Hot Topics" in Immigration Law.

This webinar will focus on current hot topics and provide an update on current immigration law and procedures and follows on the heels of our participation in the annual American Immigration Lawyers Association (AILA) conference, where many U.S. government representatives present on panels, and announce or clarify changes in law, regulations, or policy. We will review recent developments with DOS, DOL, CBP, and USCIS, as well as other areas that may be relevant to our corporate clients.

Please join us for this overview of the latest developments in immigration. (No PHR/SPHR certification for this webinar)

IMMIGRATION TRIVIA

When did CBP implement the Western Hemisphere Travel Initiative at all land and sea ports?

Answer: June 1, 2009. WHTI was designed to enhance border security and facilitate lawful cross-border travel between the U.S. and Canada and Mexico. WHTI requires U.S. and Canadian citizens, age 16 and older, to present a valid, acceptable travel document that denotes both identity and citizenship when entering the U.S. by land or sea.