

Management Alert



Government Shutdown: Immigration Consequences for Employers and their Foreign Employees

Congress' inability to pass a funding bill by midnight on Monday, September 30, 2013, resulting in a federal government shutdown, will trigger numerous immigration-related ripple effects on employers, both large and small. The federal government, through its various agencies, plays a key role in authorizing and regulating the employment of foreign citizens in the United States. Employers should be aware of how the federal government shutdown could affect their ability to hire, verify and maintain the status of foreign national employees.

Background

A federal government shutdown began on Tuesday, October 1, 2013. This means that, but for a few hours on October 1 during which federal workers wind-down operations, only "essential" government workers will report to work until Congress passes a spending bill. The longest government shutdown in recent history started on December 16, 1995 and lasted 21 days until January 5, 1996.

U.S. Citizenship and Immigration Services (USCIS)

USCIS will be minimally impacted because it is largely a user-fee funded service. Out of the 12,558 USCIS employees, all but about 300 will continue to report to work during the shutdown. This means USCIS will continue to process applications and petitions for immigration benefits, with some processing delays possible. As explained below, however, petitions for which a Department of Labor (DOL) certification is required -- such as the H-1B that requires a Labor Condition Application (LCA) -- may be adversely affected. USCIS has not yet announced whether it will temporarily accept extensions without DOL-certified LCAs.

E-Verify, USCIS' free, internet-based system that allows businesses to determine the eligibility of their employees to work in the United States, will be inaccessible during the shutdown. Employers must continue to complete I-9 forms in compliance with the law and when E-Verify becomes available, create cases in the E-Verify system.

Other components of the Department of Homeland Security (DHS), such as Customs and Border Protection (CBP) and Immigration Customs Enforcement (ICE) are expected to retain most of their essential staff. CBP has not yet indicated whether it will process immigration applications at the border, such as initial TN and Blanket L applications for Canadian nationals, but it is expected that these adjudications will continue.

Department of Labor

Office of Foreign Labor Certification (OFLC) employees, who fall under the umbrella of DOL, are considered non-essential and will be placed in furlough status during the government shutdown. **OFLC will neither accept nor process any applications or related materials**, including LCAs, applications for a prevailing wage determination, applications for temporary employment certification, PERM audit responses or applications for permanent employment certification (e.g PERM applications). **OFLC's web site, including the iCERT Visa Portal System, will become static and unable to process any requests or allow authorized users to access their online accounts.** Employers with concerns about these deadline-specific functions should consult an immigration attorney with questions about proper maintenance of status during these uncertain times.

Department of State (DOS)

DOS officials have confirmed that visa issuance will continue, at least temporarily. According to DOS, domestic and overseas Consular operations will remain fully operational as long as sufficient fees exist to support operations. However, if a passport agency is located in a government building affected by a lapse in appropriations, that facility may become unsupported. The continuance of consular operations in such instances will be treated on a case-by-case basis by the Under Secretary for Management.

Department of Justice (DOJ)

The DOJ has indicated that its trial attorneys and immigration judges will conduct removal (deportation proceedings) only for individuals in federal custody. All other cases are suspended during the shutdown. Similarly, furloughed are attorneys and staff within the Office of Special Counsel for Unfair Immigration-Related Employment Practices, the agency charged with accepting and investigating charges of workplace discrimination arising under the immigration laws.

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Seyfarth Shaw's *Business Immigration Group* is closely monitoring this developing situation. If you should have any questions about how the government shutdown might affect your workforce, please reach out to your contact person at Seyfarth Shaw LLP. We will be happy to address your questions.

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