

BUSINESS IMMIGRATION ALERT

A complimentary service of the McCandlish Holton Immigration Practice Group

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1. H-1B Cap for FY2009 Reached

U.S. Citizenship and Immigration Services (USCIS) received approximately 163,000 H-1B petitions toward the FY2009 cap during the initial filing period of April 1 to April 7, 2008. More than 31,200 of those petitions were for the 20,000 H-1B quota reserved for persons with an advanced degree from a U.S. institution of higher education. USCIS plans to conduct the computer-generated random selection process this week, starting with the selection of the 20,000 "advanced degree" H-1B petitions. Any "advanced degree" petitions not selected will be added to the random selection process for the standard 65,000 H-1B cap. USCIS will reject and return the filing fees for all cap-subject petitions that are not selected.

Although USCIS will no longer accept cap-subject H-1B petitions until April 1, 2009, persons who already hold H-1B status are not affected by this announcement: USCIS will continue to process petitions to extend H-1B status and change H-1B employers, and for concurrent H-1B employment with an additional employer. In addition, USCIS will continue to process H-1B petitions filed by cap-exempt employers such as institutions of higher education and affiliated nonprofit organizations, and nonprofit and governmental research organizations.

2. New Rule Extends Duration of OPT and Provides "Cap Gap" Relief for Some F-1 Students

OPT Duration Extended from 12 to 29 Months for STEM Degree Graduates

The Department of Homeland Security (DHS) published a rule extending the period of Optional Practical Training (OPT) from 12 to 29 months for qualified F-1 students. OPT is the employment authorization issued to F-1 students following graduation. The extension is only available to F-1 students who obtained specific U.S. degrees in science, technology, engineering, or mathematics (known as "STEM degrees", which are specifically defined in the rule) and who are employed by businesses enrolled in the E-Verify program. See our [November 5, 2007 Business Immigration Alert](#) for an overview of the E-Verify program. The F-1 student will continue to be work authorized for up to 180 days while the application for a new Employment Authorization Document is pending with USCIS.

"Cap Gap" Relief

Many foreign students apply to obtain H-1B status following the completion of their OPT in order to continue their U.S. employment. Thousands of students without STEM degrees will continue to have a gap in their immigration status between the date their OPT ends

(ordinarily in May or June) and the start date of their H-1B status (October 1). The new rule aims to help bridge this gap by automatically extending OPT beyond the normal 12 month limit for all F-1 students who filed an H-1B with an October 1 start date. OPT is automatically extended until October 1, or, alternatively, until the H-1B petition is rejected, denied or revoked. F-1 students are not required to obtain a new Employment Authorization Document during this "cap gap" period.

Extended Application Period for Initial OPT

Previously, students were required to apply for OPT up to 120 days before completing their degree. Under the new rule, students may apply for OPT from 90 days before the completion of their degree, and up to 60 days following.

Limitation on Unemployment

The regulation also limits the period of time a student may remain unemployed during OPT to an aggregate of no more than 90 days during the initial 12 month period. Those taking advantage of the new 17 month extension are permitted no more than 120 total days of unemployment. Periods of unemployment over these new limits will result in a determination that the F-1 student violated his or her status.

Employer Reporting Obligations

Employers who hire F-1 students during the 17 month extension period must also agree to notify the student's school within 48 hours of the termination of the student's employment before the expiration of the 17 month period.

3. USCIS Now Approving "Green Card" Applications Delayed by FBI Name Checks

USCIS recently instructed its adjudicators to approve I-485 Adjustment Applications when the only basis for withholding approval is an FBI Name Check that has been pending 180 or more days. Previously, USCIS would not approve any Adjustment Application without a completed FBI Name Check, resulting in some "green card" applications being delayed for years.

USCIS is currently reviewing its inventory of pending Adjustment Applications and approving the cases that are subject to this new policy.

In conjunction with this new guidance, USCIS and the FBI announced a joint plan to eliminate the current FBI Name Check backlog. By increasing staff and applying new processes, the stated goal is to complete 98 percent of all name checks within 30 days. The FBI also intends to resolve the remaining two percent of cases, which involve a "hit" or other issue, within 90 days.

The FBI Name Check is one of the three primary background checks USCIS conducts on all individuals applying for permanent residence, citizenship and asylum. The FBI Name Check involves comparing a person's name (as well as variations and fragments of the name) against the Central Records System to see if there is a matching record. Of the three background checks, the FBI Name Check is primarily responsible for the large number of "green card" applications that are stuck in the background check process for months or years.

4. Proposed Supplemental "No Match Letter" Regulation Published

DHS recently published a proposed rule to supplement its August 2007 "No Match Letter" regulation. A "No Match Letter" informs an employer that the name and Social Security Number (SSN) of an employee do not match SSA records, and therefore, the employee is not receiving credit for earnings. Although a "No Match Letter" can be issued due to an employee using a false SSN, there are several other possible explanations for the discrepancy, including a government database error, a typographical error by an employer when submitting its payroll reports, or an employee name change following marriage. In fact, the government admits that up to 10% of its database contains data entry errors, the majority of which pertain to U.S. citizens' records.

The initial August 2007 regulation provided guidelines for employers to follow when receiving a "No Match Letter" from the Social Security Administration (SSA) or DHS. Specifically, the regulation gives employers a "safe-harbor" procedure to follow when it receives a no match letter to avoid the government later finding that the employer "knew" that the employee was not authorized to work. The only substantive change between the August 2007 regulation and the proposed supplemental rule is that the supplemental rule requires employers to notify an employee of the "No Match Letter" within five days of determining that its own records were not the source of the "no match".

5. PERM Labor Certification Processing to be Centralized at the Atlanta National Processing Center

Effective June 1, 2008, the Department of Labor will centralize the processing of PERM labor certification applications at the Atlanta National Processing Center (NPC). Previously, PERM applications were handled by both the Atlanta and Chicago NPCs. Starting June 1, the Chicago NPC will only handle applications relating to temporary visa categories such as the H-1C, H-2A and H-2B.

By centralizing the filing of PERM applications and specializing each NPC, the DOL hopes to reduce processing times and promote greater consistency in the adjudication of its applications.