

Fiscal Year 2009 H-1B Cap Reached

On Monday, April 1, US Citizenship and Immigration Services began accepting H-1B visa petitions for Fiscal Year 2009. 65,000 H-1B visas are made available each fiscal year for individuals working in a “specialty occupation.” On Tuesday, April 8, U.S. Citizenship and Immigration Services (USCIS) announced that it had received enough H-1B petitions to meet the congressionally mandated cap for fiscal year 2009. USCIS also announced that the “advanced degree” exemption—which allows an additional 20,000 H-1B petitions for individuals with an advanced degree from a U.S. school—had also been exhausted.

USCIS must now subject all cap-subject H-1B petitions received during period of April 1st through April 7th to a computer-generated random selection process. USCIS will process only those petitions that are randomly selected, and will reject and return those petitions not selected (filing fees will also be returned). USCIS has not yet announced the precise day on which it will conduct the random selection process. If history is any guide (USCIS also conducted a random selection of H-1B petitions in 2007), this process will take several weeks.

Regulations Amended to Allow Some Foreign Students to Extend Work Authorization

In an effort to ameliorate the effect of the H-1B cap on U.S. employers, the Department of Homeland Security has issued interim regulations extending the Optional Practical Training (OPT) for some F-1 student visa holders. OPT allows an F-1 student to work for a U.S. employer in a job directly related to the student’s area of study. Upon completion of the period of OPT, the F-1 student must either change status, extend their stay (such as by returning to school) or depart the U.S.

Previously, the regulations imposed a limit of 12 months on the period of OPT. The interim regulations, which went into effect on April 8, 2008, allow certain F-1 students to extend their OPT for an additional 17 months, thus allowing a total of 29 months of OPT. In order to qualify for the extension, certain conditions must be met:

- The student’s degree must be a bachelor’s, master’s or doctorate degree with a degree code that is on the current STEM (Science, Technology, Engineering, Mathematics) Designated Degree Program List. (The complete list of STEM degrees, along with additional information on the interim regulations, is available online on the USCIS website [here](#)).
- The student must be employed by an employer who has enrolled in the USCIS E-Verify Program. E-Verify is an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

In order to obtain the 17 month extension, the student must get a recommendation from the Designated School Official and, once a favorable recommendation is made, submit an application for employment authorization (Form I-765) with USCIS.

In addition to the 17 month extension of OPT, USCIS has expanded the “cap-gap” relief for F-1 students with pending H-1B petitions. The earliest start date for an FY 2009 H-1B petition is October 1, 2008. However, the period of admission for many F-1 students for whom H-1B petitions have been

filed will expire before October 1. This results in a “gap” in their status between the end of their F-1 status and the start of their H-1B status (commonly referred to as the “cap-gap”). The USCIS interim regulation eliminates this gap by allowing an automatic extension of status and employment authorization for F-1 students with pending H-1B petitions.

The full text of the interim regulations is available online: [Interim Regulations](#). Please contact MSEC Immigration Services for additional information regarding the H-1B visa and the interim regulations.