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USCIS Publishes FAQ on F-1 OPT And H-1B Cap-Gap Regulations

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Submitted by Editor on Apr 5th 2012

Introduction

These Questions & Answers address the automatic extension of F-1 student status in the United States for certain students with pending or approved H-1B petitions (indicating a request for change of status from F-1 to H-1B) for an employment start date of October 1, 2012 under the Fiscal Year (FY) 2013 H-1B cap.

Questions & Answers

Q1. What is ?Cap-Gap??

A1. Current regulations allow certain students with pending or approved H-1B petitions to remain in F-1 status during the period of time when an F-1 student?s status and work authorization would otherwise expire through the start date of their approved H-1B employment period. This is referred to as filling the ?cap-gap,? meaning the regulations provide a way of filling the ?gap? between the end of F-1 status and the beginning of H-1B status that might otherwise occur if F-1 status is not extended for qualifying students.

Q2. How does ?Cap-Gap? Occur?

A2. An employer may not file, and USCIS may not accept, an H-1B petition submitted more than six months in advance of the date of actual need for the beneficiary?s services or training. As a result, the earliest date that an employer can file an FY 2013 H-1B cap-subject petition is April 2, 2012 for employment starting not before October 1, 2012. If USCIS approves the H-1B petition and the accompanying change of status request, the earliest date that the student may start the approved H-1B employment is October 1, 2012. Consequently, F-1 students whose periods of authorized stay expire before October 1, 2012, and who do not

qualify for a cap-gap extension, are required to leave the United States, apply for an H-1B visa at a consular post abroad, and then seek readmission to the United States in H-1B status, for the dates reflected on the approved H-1B petition.

Q3. Which petitions and beneficiaries qualify for a cap-gap extension?

A3. H-1B petitions that are timely filed on behalf of an eligible F-1 student and request a change of status to H-1B on October 1, 2012 qualify for a cap-gap extension.

Timely filed means that the H-1B petition (indicating change of status rather than consular processing) was filed during the H-1B acceptance period, which begins Monday April 2, 2012, while the student's authorized F-1 duration of status (D/S) admission was still in effect (including any period of time during the academic course of study, any authorized periods of post-completion Optional Practical Training (OPT), and the 60-day departure preparation period, commonly known as the "grace period").

Once a timely filed request to change status to H-1B on October 1, 2012 has been made, the automatic cap-gap extension will begin and will continue until the H-1B petition adjudication process has been completed. If the student's H-1B petition is selected and approved, the student's extension will continue through September 30, 2012 unless the petition is denied, withdrawn, or revoked. If the student's H-1B petition is not selected, the student will have the standard 60-day grace period from the date of the rejection notice or their program end date, whichever is later, to prepare for and depart the United States.

Students are strongly encouraged to stay in close communication with their petitioning employer during the cap-gap extension period for status updates on the H-1B petition processing.

Q4. How does a student covered under the cap-gap extension obtain proof of continuing status?

A4. The student should go to their Designated School Official (DSO) with evidence of a timely filed H-1B petition (indicating a request for change of status rather than for consular processing), such as a copy of the petition and a FedEx, UPS, or USPS Express/certified mail receipt. The student's DSO will issue a preliminary cap-gap I-20 showing an extension until June 1, 2012.

If the H-1B petition is selected for adjudication, the student should return to his or her DSO with a copy of the petitioning employer's Form I-797, Notice of Action, with a valid receipt number, indicating that the petition was filed and accepted. The student's DSO will issue a

new cap-gap I-20 indicating the continued extension of F-1 status.

Q5. Is a student who becomes eligible for an automatic cap-gap extension of status and employment authorization, but whose H-1B petition is subsequently rejected, denied or revoked, still allowed the 60-day grace period?

A5. If USCIS denies, rejects, or revokes an H-1B petition filed on behalf of an F-1 student covered by the automatic cap-gap extension of status, the student will have the standard 60-day grace period (from the date of the notification of the denial, rejection, or revocation of the petition) before he or she is required to depart the United States.

For denied cases, it should be noted that the 60-day grace period does not apply to an F-1 student whose accompanying change of status request is denied due to the discovery of a status violation. The student in this situation is not eligible for the automatic cap-gap extension of status or the 60-day grace period. Similarly, the 60-day grace period and automatic cap-gap extension of status would not apply to the case of a student whose petition was revoked based on a finding of fraud or misrepresentation discovered following approval. In both of these instances, the student would be required to leave the United States immediately.

Q6. May students travel outside the United States during a cap-gap extension period and return in F-1 status?

A6. No. A student granted a cap-gap extension who elects to travel outside the United States during the cap-gap extension period will not be able to return in F-1 status. The student will need to apply for an H-1B visa at a consular post abroad prior to returning. As the H-1B petition is for an October 1, 2012 start date, the student should be prepared to adjust his or her travel plans, accordingly.

Q7. What if a student's post-completion OPT has expired and the student is in a valid grace period when an H-1B cap-subject petition is filed on their behalf? It appears that F-1 status would be extended, but would OPT also be extended?

A7. F-1 students who have entered the 60-day grace period are not employment-authorized. Consequently, if an H-1B cap-subject petition is filed on the behalf of a student who has entered the 60-day grace period, the student will receive the automatic cap-gap extension of his or her F-1 status, but will not become employment-authorized (since the student was not employment-authorized at the time H-1B petition was filed, there is no employment authorization to be extended).

Q8. Do the limits on unemployment time apply to students with a cap-gap extension?

A8: Yes. The 90-day limitation on unemployment during the initial post-completion OPT authorization continues during the cap-gap extension.

Q9. What is a STEM OPT extension?

A9. F-1 students who receive science, technology, engineering, and mathematics (STEM) degrees included on the STEM Designated Degree Program List, are employed by employers enrolled in E-Verify, and who have received an initial grant of post-completion OPT employment authorization related to such a degree, may apply for a 17-month extension of this authorization. F-1 students may obtain additional information about STEM OPT extensions on the Student and Exchange Visitor Program website at www.ice.gov/sevis [2].

Q10. May a student eligible for a cap-gap extension of post-completion OPT employment authorization and F-1 status apply for a STEM OPT extension while he or she is in the cap-gap extension period?

A10. Yes. However, such application may not be made once the cap-gap extension period is terminated (e.g., if the H-1B petition is rejected, denied, or revoked), and the student has entered the 60-day departure preparation period.

Q11. In recent years, employers have been able to file H-1B cap-subject petitions after April 1, and have not always requested an October 1 start date. However, some students' OPT end dates were nevertheless shortened to September 30, even though their H-1B employment would not begin until a later date. What should the student do to correct this?

A11. The student should contact their DSO. The DSO may request a data fix in SEVIS by contacting the SEVIS helpdesk.

Q12. If the student finds a new H-1B job, can he or she continue working with his/her approved EAD while the data fix in SEVIS is pending?

A12. Yes, if the (former) H-1B employer timely withdrew the H-1B petition and the following conditions are true:

§ the student finds employment appropriate to his or her OPT;

§ the period of OPT is unexpired; and

§ the DSO has requested a data fix in SEVIS.

Note: If the student had to file Form I-539 to request reinstatement to F-1 student status, the student may not work or attend classes until the reinstatement is approved.

Q13. If the student has an approved H-1B petition and change of status, but is laid off/terminated by the H-1B employer before the effective date, and the student has an unexpired EAD issued for post-completion OPT, can the student retrieve any unused OPT?

A13. Yes. The student will remain in student status and can continue working OPT using the unexpired EAD until the H-1B change of status goes into effect. The student also needs to make sure that USCIS receives a withdrawal request from the petitioner before the H-1B change of status effective date. This will prevent the student from changing to H-1B status. Once the petition has been revoked, the student must provide their DSO with a copy of the USCIS acknowledgement of withdrawal (i.e., the notice of revocation). The DSO may then request a data fix in SEVIS, to prevent the student from being terminated in SEVIS on the H-1B effective date, by contacting the SEVIS helpdesk.

If USCIS does not receive the withdrawal request prior to the H-1B petition change of status effective date, then the student will need to stop working, file a Form I-539 to request reinstatement, and wait until the reinstatement request is approved before resuming employment.

Q14. In cases where a student is authorized to work OPT past the H-1B change of status effective date, can the student continue working on OPT if a request to revoke/withdraw the H-1B change of status is submitted to USCIS?

A14. If the H-1B revocation occurs before the H-1B change of status effective date, the student may continue working while the data fix remains pending, because the student will still be in valid F-1 status.

If the H-1B revocation occurs on or after the H-1B change of status effective date, the student will need to stop working before the H-1B change of status effective date, apply for reinstatement, and wait until the reinstatement request is approved before resuming employment.

NOTE: This is NOT a cap-gap situation since the student has an EAD authorizing OPT beyond the H-1B change of status effective date.

Q15. Do students remain in valid F-1 status while the request to change the OPT end date is pending?

A15. If the H-1B revocation occurs before the H-1B change of status effective date, the student is still deemed to be in F-1 status while the data fix is pending.

If the H-1B revocation occurs after the H-1B change of status effective date, the student will not be in valid F-1 status and will therefore either need to apply for reinstatement or depart the United States.

Nonimmigrant Visas:

F-1 Visa [3]

H-1 Visa [4]

Agency:

USCIS [5]

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[1] <https://immigration.com/news/f-1-visa/uscis-publishes-faq-f-1-opt-and-h-1b-cap-gap-regulations>

[2] <http://www.ice.gov/sevis>

[3] <https://immigration.com/visa/nonimmigrant-visas/f-visa/f-1-visa>

[4] <https://immigration.com/visa/nonimmigrant-visas/h-visa/h-1-visa>

[5] <https://immigration.com/agencies/agency/dhs/uscis>