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Extension of Post-Completion Optional Practical Training (OPT) and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations

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 Oct. 1, 2010 under the Fiscal Year (FY) 2011 H-1B cap.

Questions & Answers

Q: What is the H-1B cap?

A: The cap is the congressionally-mandated limit on the number of individuals who may be granted initial H-1B status or visas during each fiscal year. For FY 2011, the cap is 65,000.

Not all H-1B beneficiaries are subject to the cap. Congress has provided that the first 20,000 H-1B petitions filed on behalf of aliens who have earned a U.S. master's degree or higher are exempt from the fiscal year cap. H-1B petitions filed on behalf of beneficiaries who will work at institutions of higher education or related or affiliated nonprofit entities, or at nonprofit research organizations or governmental research organizations are exempt from the fiscal year cap. Additionally, petitions filed on behalf of beneficiaries who will be performing work or services solely in Guam and/or the Commonwealth of the Northern Mariana Islands (CNMI) are exempt from the cap until Dec. 31, 2014. Generally, H-1B beneficiaries seeking to extend status and/or add employers are not subject to the cap.

Q: What do Current F-1/H-1B Extension Regulations Allow?

A: 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, and up to the start 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 F-1 and H-1B status that might otherwise occur if F-1 status was not extended for qualifying students.

Q: How does "Cap-Gap" Occur?

A: An employer may not file and USCIS may not accept, an H-1B petition submitted earlier 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 H-1B petition is April 1, for the following fiscal year, starting October 1. 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 Oct. 1. Consequently, F-1 students who do not qualify for a cap-gap extension, and whose periods of authorized stay expire before October 1, 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.

Q: Which petitions and beneficiaries qualify for a cap-gap extension?

A: H-1B petitions must be timely filed on behalf of an eligible F-1 student. Timely filed means that the H-1B petition (indicating change of status rather than consular processing) was filed during the H-1B acceptance period, while the student's authorized 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 OPT, and the 60-day departure preparation period, commonly known as the "grace period").

Once a timely filing 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 30th unless the petition is denied, withdrawn, or revoked. If the student's H-1B petition is not selected and approved, the student will have the standard 60-day grace period from the date of the rejection notice or their program or OPT 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.

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

A: A student will need to obtain an updated Form I-20 from his or her designated school official (DSO). The Form I-20 is the only document a student will have to show proof of continuing status and OPT, if applicable. The student should go to their 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 an interim cap-gap I-20 showing an extension until June 1st. Students whose approved period of OPT already extends beyond June 1st do not need an interim extension.

In some cases, a student's SEVIS record will not be automatically updated with the cap-gap extension, in error. In this situation, the student's DSO may need to add an interim cap-gap extension to the student's SEVIS record or contact the SEVIS Help Desk to have the full cap-gap extension applied to the record. For additional information on the interim cap-gap extension, refer to SEVP's Supplementary Cap-Gap Guidance.

Q: If a student was not in an authorized period of OPT on the eligibility date for the cap-gap extension; can the student work during the cap-gap extension?

A: No. For a student to have employment authorization during the cap-gap extension, he or she must be in an approved period of post-completion OPT on the eligibility date.

Q: If, after being granted the automatic cap-gap extension, a student's H-1B petition is subsequently rejected, denied, or revoked is the student allowed the 60-day grace period?

A: Yes. The student will have the standard 60-day grace period before he or she is required to depart the United States. In such cases, the 60-day grace period will commence on the date that

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the rejection, denial, or revocation letter is post marked.

Please note that in cases where the H-1B petition is denied or revoked based on fraud, misrepresentation, or a status violation, the student is ineligible for the 60-day grace period and is required to leave the United States immediately.

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

A: No. The regulations at 8 CFR 214.2(f)(13) state that a student who has an unexpired Employment Authorization Document (EAD) issued for post-completion OPT and who is otherwise admissible may return to the United States to resume employment after a temporary absence. However, by definition, the EAD of an F-1 student covered under a cap-gap extension is necessarily expired. Consequently, if a student granted a cap-gap extension elects to travel outside the United States during the cap-gap extension period, he or she 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 presumably for an October 1 or later start date, the student should be prepared to adjust his or her travel plans, accordingly.

Q: Do the limits on unemployment time apply to students who have been granted an automatic cap-gap extension for F-1 status and post-completion OPT?

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

Q: What is a STEM OPT extension?

A: 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 such 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.

Q: If the student is granted the automatic cap-gap extension of F-1 status and post-completion OPT, and his or her H-1B petition is denied or withdrawn, may the student apply for a STEM OPT extension?

A: Yes. However, such an application must be made within 10 days of the denial or withdrawal. See section 9 of SEVP's OPT Policy Guidance.

Q: For Fiscal Year 2010, due to the availability of H-1Bs, not all employers 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?

A: The student should contact their DSO. The DSO may request a data fix in SEVIS by contacting the SEVIS helpdesk. A student may continue to work past October 1st on their OPT (their EAD card will still show the original end date) if the request to change the end date back is pending with the SEVIS Desk.

Q: An F-1 student whose period of post-completion OPT will extend beyond the effective date of his or her change of status to H-1B does not need the automatic cap-gap extension of his or her period of F-1 status and OPT. If the H-1B employer of such a student withdraws the H-1B petition before the change of status to H-1B becomes effective, can the student continue to use any remaining period of post-completion OPT?

A: Yes, but only if USCIS receives the withdrawal request from the H-1B petitioner before the change of status to H-1B becomes effective. Once the petition has been withdrawn, the student must provide his or her DSO with a copy of the USCIS acknowledgement of withdrawal (or notice of revocation). The DSO may then make a request to the SEVIS Help Desk for a data fix to the student's record in SEVIS. Such students may continue to work pursuant to their unused period of OPT while the data fix remains pending because the student will still be in valid F-1 status.

If, however, USCIS does not receive the withdrawal request before the change of status to H-1B becomes effective, the student must file a Form I-539 to request reinstatement and may not work or attend classes until the reinstatement is approved.

Q: Are students considered to be in valid F-1 status after revocation of the H1B petition has occurred, but while the request to change the OPT end date remains pending?

A: Possibly. If the H-1B employer revokes the H-1B petition prior to October 1 and the student's original OPT end date extends beyond the date of revocation, the student remains in valid F-1 status and may continue to work pursuant to the EAD received for OPT.

If the student's original OPT end date expires before revocation of the H-1B petition has occurred, the student retains work authorization for a 10-day period following the date of revocation and enters the 60-day grace period on the date of revocation.

A student who was granted an automatic cap-gap extension that does not include an extension of OPT remains in valid F-1 status and enters into the 60-day grace period on the date of revocation.

Each of the scenarios above are based on the assumption that the student has maintained F-1 status up until the date of revocation.

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.

For more information on USCIS and its programs, visit www.uscis.gov or call 1-800-375-5283.

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