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# Cap-Gap Rule for F-1 OPT and H-1B Cap Filer

## Cap-Gap Rule for F-1 OPT and H-1B Cap Filer [1]

Submitted by Chief Editor on Apr 26th 2013

The period of time when an F-1 student's status and work authorization expire through the start date of their approved H-1B employment period is known as the "Cap-Gap".

Cap-Gap occurs because 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 H-1B cap-subject 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 October 1.

### Cap-Gap Extensions

Current regulations allow certain students with pending or approved H-1B petitions to remain in F-1 status during the cap-gap 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.

### Eligibility for an Extension

H-1B petitions that are timely filed, on behalf of an eligible F-1 student, that request a change of status to H-1B on October 1 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 April 1, 2013 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 filing has been made, requesting a change of status to H-1B on October 1, 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. If the student's H-1B petition is denied, withdrawn, revoked, or is not selected, the student will have the standard 60-day grace period from the date of the rejection notice or their program end date, whichever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.

**Please note:** F-1 students who have entered the 60-day grace period are not employment-authorized. 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-1 petition was filed, there is no employment authorization to be extended).

### **Those Not Qualified for an Extension**

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.

### **Proof of Continuing Status**

To obtain proof of continuing status, a 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.

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.

### **Denied H-1B Petitions**

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 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, misrepresentation, or fraud. 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 a status violation, fraud or misrepresentation discovered following approval. In both of these instances, the student would be required to leave the United States immediately.

### **Travel during Cap-Gap Extension Period**

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 start date, the student should be prepared to adjust his or her travel plans, accordingly.

### **Unemployment Limits**

The 90-day, or 120-day for STEM OPT, limitation on unemployment during the post-completion OPT authorization continues during the cap-gap extension.

### **STEM OPT Extensions**

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](http://www.ice.gov/sevis) [2].

Students who are eligible for a cap-gap extension of post-completion OPT employment and F1-status may apply for a STEM OPT extension during the cap-gap extension period.

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

### **Start Date Issues**

If the students' OPT end dates are shortened to September 30, even though their H-1B employment would not begin until a later date, the student should contact their DSO. The DSO may request a data fix in SEVIS by contacting the SEVIS helpdesk.

### **Changes in Employment**

**Laid Off/Termination from H-1B employer:** 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, the student can retrieve any unused OPT. 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.

**Student finds a new H-1B job:** The student can continue working with his or her approved EAD while the data fix in SEVIS is pending 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.

### **Pending Request to Change OPT End Date**

**Working during request:** If the H-1B revocation occurs before October 1, the student may continue working past October 1 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 October 1, the student will need to stop working before October 1, apply for reinstatement, and wait until the reinstatement request is approved before resuming employment.

**Maintaining Valid F-1 Status:** If the H-1B revocation occurs before the H-1B change of status effective date, the student is still 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](#) <sup>[3]</sup>

[H-1 Visa](#) <sup>[4]</sup>

[STEM](#) <sup>[5]</sup>

[OPT](#) <sup>[6]</sup>

[General Nonimmigrant Visa](#) <sup>[7]</sup>

[F Visa](#) <sup>[8]</sup>

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### **Links:**

[1] <https://immigration.com/news/f-1-visa/cap-gap-rule-f-1-opt-and-h-1b-cap-filer>

[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/visa/nonimmigrant-visas/f-visa/stem>

[6] <https://immigration.com/visa/nonimmigrant-visas/opt>

[7] <https://immigration.com/visa/nonimmigrant-visas/general-nonimmigrant-visa>

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