

Bridging The H-1B 'Cap-Gap'

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The 2015 H-1B visa filing season has passed, and employers and their future employees with approved H-1B visas now face a common dilemma: how to maintain lawful status in the United States after filing and approval of the H-1B, but before the standard 2015 H-1B start date of Oct. 1, 2015?

Many F-1 student visa holders in the United States whose status will expire after April 1, 2015, and whose H-1B cap petition was timely filed (between April 1 and 7, 2015) requesting an Oct. 1, 2015 start date, will have a “gap” between their authorized status and Oct. 1 (H-1B petitions can be filed up to six months in advance of the Oct. 1 start date). To fill this gap, U.S. Citizenship and Immigration Services has issued “cap-gap” rules that automatically extend the status and work authorization of certain F-1 students under the conditions discussed below.

Under the cap-gap rules, students whose H-1B status will become effective on Oct. 1 are eligible for an automatic extension of their F-1 status until Sept. 30. These students must be the beneficiaries of H-1B “change-of-status” petitions, which request that USCIS automatically change their status from F-1 to H-1B on Oct. 1 without requiring their departure and re-entry to the United States.

How to Ensure Your Employees are Maintaining Valid F-1 Status and Employment Authorization During the “Cap-Gap”

A student is eligible for a cap-gap extension when an employer files an H-1B petition (i) any time during an F-1 student’s academic study, (ii) during an authorized period of post-completion optional practical training (OPT) or (iii) during the 60-day grace period authorized for students to depart the United States following the completion of their academic or OPT period. All students whose H-1B petitions are timely filed will automatically receive a cap-gap extension.

The H-1B category has a limit of 65,000 visas, plus 20,000 for U.S. master’s degree graduates. Because more than 233,000 petitions were filed for the FY 2016 allotment, all cap petitions were placed in a lottery for selection. The determination of the length of the cap-gap extension and whether it includes



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employment authorization depends on whether the H-1B petition is selected in the lottery and whether the student was working pursuant to OPT at the time of filing or had already entered the grace period.

- If the H-1B cap petition is selected in the lottery for adjudication:
 - If a student was validly authorized to work pursuant to OPT at the time the H-1B petition was timely filed, the student qualifies for both an extension of F-1 status and work authorization through continuation of OPT. Upon approval of the H-1B petition, the cap-gap rule will automatically extend the student's status through Sept. 30, 2015.
 - If a student's OPT had expired and the student had entered the 60-day grace period following that expiration when the H-1B petition was timely filed, the student qualifies for an extension of the F-1 status but not an extension of work authorization. Upon approval of the H-1B petition, the cap-gap extension will be valid through Sept. 30, 2015.
 - If, in either of the above situations, the H-1B petition is selected in the lottery for adjudication, but the petition is ultimately denied, the student will have the 60-day grace period within which to depart the country. The grace period is effective from the date of the notification of denial or the end of the academic program or OPT (not including any prior cap-gap extension), whichever is later.

- If the H-1B cap petition is rejected in the lottery:
 - Any student whose H-1B petition is not selected in the lottery will remain in F-1 status until the latter of the expiration date of the OPT or the date on which the employer receives notification that the H-1B petition is not selected. The student would then have the normal 60-day grace period within which to depart the United States.

All F-1 students whose student status expired before the date the petition was filed must, if the petition is approved, depart the United States, apply for an H-1B visa stamp at a U.S. consulate abroad, and then seek readmission to the United States in H-1B status, for the dates reflected on the approved H-1B petition.

How to Avoid Disruption if the Student Plans to Travel Internationally During the Cap-Gap Period

If beneficiaries of cap-gap extensions plan to travel abroad following approval of their H-1B petition *but before their change of status occurs on Oct. 1, 2015*, they must comply with key aspects of the governing regulations for F-1 students. First, they must ask their DSO to endorse — formally — their certificate of eligibility for student status, the Form I-20. In addition, they must be prepared to demonstrate at re-entry to the United States that they intend to comply with all F-1 regulations, including having nonimmigrant intent, i.e., that they genuinely intend to return to their home country. Having a foreign residence that they do not intend to abandon is a requirement for F-1 status.

In addition, the traveler must return to the U.S. in F-1 status with the following required documents:

- Current, valid passport;
- Valid (unexpired) F-1 visa stamp in a current, valid passport;
- Form I-20 that is endorsed for travel by the DSO; and,

Those who plan to resume OPT upon reentry require:

- Valid (unexpired) EAD;
- Information about the OPT, in the form of a letter from their employers stating job title, job description, beginning/end dates, and salary;
- Most recent pay statement from the employer.

Please note that time spent outside of the United States is normally counted as an unemployment period during OPT, which can last no more than 90 days in the aggregate for many OPT beneficiaries.

H-1B beneficiaries traveling late in the summer through September should consider applying for an H-1B entry visa to allow them to re-enter the United States in H-1B status. According to State Department rules, travelers can generally apply for a visa up to 90 days before the H-1B petition start date. For example, if the start date is Oct. 1, 2015, travelers would be able to apply for an H-1B entry visa no earlier than July 3, 2015. Because procedures differ among U.S. consulates, travelers should check with the consulate where they will apply for specific instructions on when they can submit a visa application. Contact information for U.S. embassies and consulates is available at <http://usembassy.gov/>.

Once a traveler has received the H-1B entry visa, they may enter the United States up to 10 days before the H-1B petition start date. For example, if the start date is Oct. 1, 2015, they can enter as early as Sept. 21, 2015. The extra 10 days allows H-1B beneficiaries to get settled in the United States, but they cannot do H-1B work until the actual petition start date.

What Employers Need To Do to Ensure I-9 Compliance During the Cap-Gap Period

Employers of foreign students who have expiring employment authorization documents (EAD) are required to reverify the students' employment authorizations pursuant to I-9 regulations. For a student who has continuing employment authorization based on the cap-gap rules, employers may accept an expired EAD if accompanied by the student's Form I-20 endorsed by the designated school official (DSO) with the cap-gap extension. The EAD's title, number and expiration date must be recorded in Form I-9 with a notation of "cap-gap" in the margin of Section 2. These employment reverification documents are acceptable through Sept. 30, 2015. The employer must reverify the student's I-9 Form on Oct. 1 when the H-1B status becomes effective.

How Students Prove Continuing Status and Employment Authorization

Because of these I-9 reverification requirements, students must take action if their EADs will expire prior to the Oct. 1 effective date of their H-1B petitions. A student should take a copy of the H-1B petition and a FedEx, UPS or USPS Express receipt (proving the H-1B petition was mailed to USCIS) to their DSO. Per 2013 USCIS guidance, this documentation should be sufficient for the DSO to issue a preliminary cap-gap I-20 extension until June 1, 2015.

If the H-1B petition is selected in the lottery, the student must then provide to the DSO a copy of the H-1B Receipt Notice (Form I-797 Notice of Action) bearing the receipt number. The DSO will then issue a new cap-gap I-20 extension indicating the continued extension of F-1 status until Sept. 30, 2015. As noted above, these updated Form I-20s are required for I-9 employment verification purposes.

In closing, USCIS's cap-gap rules ameliorate a decades-old problem facing recent graduates. While employers and employees alike benefit from this patch, most experts agree that holistic, bigger-picture reforms to the U.S. immigration system are needed to more completely address the needs of employers and employees. The strain that an artificial 25-year old limit on such an important visa category on members of the business community and their lawfully admitted, highly skilled foreign workers is dramatic. It is time for a more rational system than a random lottery for attracting top talent to the United States.

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