

Q. What is the H-1B cap?

A. The cap is the congressionally-mandated limit on the number of individuals who may be granted H-1B status during each fiscal year. For FY08, the cap is 65,000, with certain statutory cap exemptions.

Q. What is the F-1/H-1B “cap-gap”?

A. Cap-gap occurs when an F-1 student’s status and work authorization expire in the current fiscal year before they can start their approved H-1B employment in the next fiscal year beginning on October 1. An F-1 student in a cap-gap situation would, in most cases, have to leave the United States and return at the time his or her H-1B status becomes effective at the beginning of the next fiscal year. Depending on when the student’s status expires, such circumstances could require the student to remain outside the United States for several months.

Q. How does cap-gap occur?

A. Under the prior regulation, which remains unchanged, 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 for consideration under the next fiscal year cap is April 1, for an October 1 employment start date. If that H-1B petition and the accompanying change-of-status request are approved, the earliest date that the student may start the approved H-1B employment is October 1.
- Consequently, F-1 students who are the beneficiaries of approved H-1B petitions with October 1 employment start dates, but whose periods of authorized stay (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expire before October 1, are in many cases 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.

Q. What were the prior cap-gap regulations for F-1 students?

A. The prior regulations addressed the cap-gap problem by authorizing an extension of an F-1 student’s authorized stay, but they did not extend the student’s employment authorization. This extension was not automatic; a notice had to be published in the Federal Register announcing the extension.

- Under the prior regulations, when this Federal Register notice was published, the student’s authorized stay was extended, but not the employment authorization. This meant the student could remain in the United States until October 1, when the approved H-1B employment began, but could not work until then.
- If a Federal Register notice authorizing an extension was not published, affected students would in many cases be required to leave the United States, apply for an H-1B visa, and seek readmission to the United States in H-1B status.

Q. How is the cap-gap situation changed under the interim final rule?

A. F-1 students on post-completion OPT maintain valid F-1 status until the expiration of their OPT. Once that OPT has ended, they are authorized to remain in the United States for up to 60 days to prepare for departure. Under this rule, the F-1 status of students is automatically extended when the student is the beneficiary of an H-1B petition for the next fiscal year (with an October 1 employment start date) filed on his or her behalf during the period in which H-1B petitions are accepted for that fiscal year.

- The automatic extension terminates when USCIS rejects, denies, or revokes the H-1B petition.
- If the H-1B petition filed on behalf of the student is selected, the student may remain in the United States and, if on post-completion OPT, continue working until the October 1 start date indicated on the approved H-1B petition.
- The student may benefit from this provision only if he or she has not violated his or her status.

Summary

Effective April 8, 2008, as part of the **interim final OPT rule**, duration of status *and* any post-completion OPT work authorization will be automatically extended for an F-1 student who is the beneficiary of a timely-filed H-1B petition requesting change of status and an employment start date of October 1 of the following fiscal year. This applies to all qualified students on OPT, not just STEM students. Since the regulation states that cap-gap extensions are terminated if the H-1B petition is rejected, denied, or revoked, DHS has created a **graduated extension scheme**, which will grant extensions of OPT and of F-1 status depending on the situation of the underlying H-1B petition. Your International Student Advisor is not responsible for *initiating* any actions in connection with the cap gap extensions, but if a student asks for an updated I-20 showing the extension dates, the International Student Advisor is responsible for printing the I-20.

Other Guidance

- The cap-gap extension of status and work authorization officially commences on the date the I-129 petition and fee are received by the Service Center, not the date that the receipt notice was issued.
- If a student was not in authorized OPT on the eligibility date, he or she is not eligible for an extension of employment authorization. If the student was still in his or her 60-day grace period, the student is eligible for an extension of status, but not of work authorization.
- For a student who is the beneficiary of an H-1B petition filed by a cap exempt (higher education, etc.) employer, USCIS will likely *not* recognize that s/he is eligible for the extension of status and work authorization under the cap gap provision of this rule. The rationale is that a cap exempt employer can choose a start date that matches the end of authorized F-1 status or work authorization. USCIS and SEVP are consulting with counsel.
- The automatic extension terminates when USCIS rejects, denies, or revokes the H-1B petition. However, the student would have a grace period after the termination during which s/he is authorized to remain in the United States for up to 60 days to prepare for departure from the U.S., change degree level, transfer, change status, etc. as long as the student has not otherwise violated status.
- The limits on unemployment continue to apply to students with employment authorization while on a cap-gap extension.

Additional Resources

SEVP Policy Guidance:

http://www.nafsa.org/_/Document/_/sevp_policy_guidance.pdf

USCIS Q&A #2:

http://www.nafsa.org/_/Document/_/uscis_faq_2_on_opt_interim.pdf