

What Do F-1 Students Need to Know as They Await the Fate of Their H-1B Cap Petition?

Written by Kevin J. Fitzgerald

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As reported on April 6, 2018, U.S. Citizenship and Immigration Services (USCIS) received more H-1B cap petitions than the statutory available visas for both the general cap of 65,000 available H-1B visas and the additional 20,000 for U.S. advanced degree exemption, also known as the “master’s cap.” We understand how stressful it is for both the H-1B employers and the foreign national candidate as they await the results of the H-1B lottery (“work by lottery” program). Given the limited number of H-1B visas available each fiscal year USCIS runs a statutory random lottery to select petitions. The lottery process determines the fate of a talented employee’s work permission in the U.S. On April 11, 2018, the agency had received 190,098 H-1B petitions during the regulatory filing period. Here is the breakdown of the numbers from USCIS:

Cap Type	Cap Amount	Cap Eligible Petitions	Date of Last Count
H-1B Regular Cap	65,000	94,213	April 6, 2018
H-1B Master’s Exemption	20,000	95,885	April 6, 2018

USCIS also reported that it conducted and completed the computer-generated random selection process (lottery) process. That means all the petitions to fill the congressionally-mandated cap of 65,000 and the U.S. advanced degree exemption of 20,000 for fiscal year 2019 have been selected. The receipts for accepted H-1B petitions have been generated and USCIS is in the process of mailing those out. Our office began receiving those last week.

As in years past, the process can often take a month or so before all employers are notified whether their particular employee’s H-1B petition is accepted or not. The impact of this on the F-1 student’s work authorization or travel while they await adjudication can be confusing. Here are a few questions that our clients have been asking that we thought would be helpful to share.

What is a Cap-Gap filing?

The regulations allow certain F-1 students with pending or approved H-1B petitions to remain in F-1 status and be work authorized during a “Cap-Gap” period. This is a way of filling for the “gap” between the end of a foreign national’s F-1 status and the beginning of their H-1B status that might otherwise occur if the status is not extended for the qualifying student. Those H-1B petitions that are timely filed on behalf of an eligible F-1 student and if the petition requests a change of status to H-1B on October 1, 2018, then the F-1 student qualifies for the Cap-Gap work authorization extension.

A timely filed petition means that the H-1B petition filing (indicating a change of status filing rather than consulate notification) is filed during the H-1B acceptance period (April 2 to 6, 2018) while the student’s authorized F-1 duration of status (D/S) admission is still in effect. This includes any period of time during the academic course of study or any work authorized periods of post-completion Optional Practical Training (OPT), or within the 60-day departure preparation period, commonly known as the “grace period.” Once a timely filed request for a change of status has been made, the automatic Cap-Gap extension will begin and will continue until the H-1B petition adjudication process is completed. If the student’s H-1B petition is selected and approved, the student’s extension of status will continue through September 30. If the student’s H-1B petition is not selected, denied, withdrawn, or revoked at any time, the student will have the standard 60-day grace period from that date or their program end date, whichever is later, to prepare for and depart the U.S.

It is important to note, F-1 students who have entered the 60-day grace period and then filed the H-1B petition 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 extension of stay in F-1 status, but will not be employment-authorized since the student was not employment-authorized at the time H-1B petition was filed.

Finally, if the H-1B petition is selected for adjudication, the student should provide the Designated School Officer (DSO) a copy of the H-1B receipt notice, Form I-797C, 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 that the H-1B employer can use to update their I-9 records.

Can I travel during Cap-Gap?

Generally speaking, no. Travel abroad is not advised during the Cap-Gap period. However, if emergency travel is required, we suggest calling our office first to determine the impact of the travel to their employment status in the U.S. as well as the impact to their H-1B petition process.

During emergent circumstances, an F-1 student generally can only travel if all 3 of these conditions are met:

1. The student's H-1B petition and request for change of status has been accepted and approved
2. The F-1 student seeks readmission before his or her H-1B employment begins (normally at the beginning of the fiscal year, i.e., October 1)
3. The student has a valid unexpired F-1 visa in their passport and is otherwise admissible.

If the student's travel is closer to October 1, 2018, they may 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, 2018, start date, travel should be planned accordingly.

As with all international travel to the U.S., the final decision on whether an F-1 student will be granted admission is with U.S. Customs and Border Protection (CBP) officers. Please see [Getting to the United States](#) page and CBP's website for more information regarding the appropriate travel documents and supporting evidence required for entry.

If granted an F-1 OPT work authorization, do I have to work?

The OPT rules allow for some limited period of unemployment. For example, if you are granted an initial 12 month OPT, you may only be unemployed for a total of 90 days. Also, as of May 10, 2016, if a F-1 student is granted a total of 24-month STEM OPT extension, then the F-1 student may be unemployed for a total of 150-days during the OPT period.

What if I do not qualify for a Cap-Gap extension but I was selected in the H-1B lottery?

F-1 students who do not qualify for a Cap-Gap extension but have been selected for the H-1B lottery do not have extended work authorization in F-1 status, but may remain in the U.S. This typically occurs when an F-1 student files for an H-1B petition during their 60-day grace period. In addition, if the H-1B petition is filed under consulate notification, then to begin working in H-1B status once it is approved, the F-1 student is required to leave the U.S., apply for the H-1B visa abroad, and then seek readmission to the U.S. in H-1B status. The earliest an H-1B holder may enter the U.S. is 10 days before October 1, 2018.

What if the H-1B is rejected or denied?

If USCIS denies, rejects, or eventually revokes an H-1B petition filed on behalf of an F-1 student covered by Cap-Gap, 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 from the U.S.

Am I eligible for more OPT work authorization?

F-1 students who have earned a science, technology, engineering, and mathematics (STEM) degrees included on the STEM Designated Degree Program List, AND are employed by employers enrolled in E-Verify, AND who have received an initial grant of post-completion OPT employment authorization, may apply for an additional 24 month STEM extension of work authorization. (See [here](#).)

Please note that F-1 students who are eligible for a Cap-Gap extension of post-completion OPT employment may apply for a STEM OPT extension during the Cap-Gap extension period while waiting to be selected or the case to be adjudicated. However, such application may

not be made once the Cap-Gap extension period is terminated (if the H-1B petition is rejected, denied, or even revoked), and the student has entered the 60-day grace period.

If I obtain STEM OPT work authorization, can I work at an off-site location for an employer client?

It appears under the STEM 2016 Rules this was not impermissible. However, on April 19, 2018, USCIS amended its website to state the following:

Moreover, the training experience must take place on-site at the employer's place of business or worksite(s) to which U.S. Immigration and Customs Enforcement (ICE) has authority to conduct employer site visits to ensure that the employer is meeting program requirements. This means that ICE must always have access to a student's worksite; if the student is sent to different worksite locations as part of the training opportunity, ICE must be able to access such worksite locations. For instance, the training experience may not take place at the place of business or worksite of the employer's clients or customers because ICE would lack authority to visit such sites.

Therefore, until we receive further clarification, we recommend that F-1 STEM students work and undergo their training obligations at the employer's place of business.

What if I am not selected for this year H-1B Cap?

The F-1 student may remain in the U.S. and work until their EAD expires. Then, they have the standard 60-day grace period to depart the U.S. or change status to another eligible category.

Please contact our team to discuss or identify possible alternative visa options.

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