

# H-1B OPT Cap-Gap Extension

## **What is a 'Cap-Gap'?**

The period of time when an F-1 student's status and work authorization (OPT) expire through the start date of their approved H-1B employment period is known as the "cap-gap". For example, an F-1 student with an OPT end date of June 30 will have a 60 day grace period which ends August 30. The gap of time between August 30 and October 1 (the start of the H-1B) is a "cap-gap."

Because employers who are subject to the cap gap rule may only apply for H-1B on April 1 of every year, the earliest start date that a student approved for an H-1B may start on the H-1B is October 1.

Students should be sure to confirm with their employer that the employer is subject to the cap. If an employer is not subject to the cap (this means the employer has the ability to file for H1-B at any time throughout the year), its employees are not eligible for the cap gap extension because they will not need this provision. The University of Utah as an employer is exempt from the cap.

## **What is a 'Cap-Gap' Extension?**

Current regulations allow 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. Students who qualify for this cap-gap extension are automatically awarded this extension.

## **You are eligible for a cap-gap extension IF:**

1. Your H-1B petition was timely filed by your employer. 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 and 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").
2. Your employer requested a change of status to H-1B on October 1

## **What happens after my employer files my H-1B request?**

Once a timely filing requesting a change of status to H-1B on October 1 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 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 filed during 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. They can 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 (I-20 request for Cap-Gap)**

To obtain proof of continuing status, a student may request a printed copy of their I-20 from ISSS. Students must show 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. ISSS 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 submit to ISSS 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. ISSS will issue a new cap-gap I-20 indicating the continued extension of F-1 status until September 30.

### **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.

The 60-day grace period does not apply to an F-1 student whose 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 150-day for STEM OPT) limitation on unemployment during the post-completion OPT authorization continues during the cap-gap extension. Once all 90 (or 150) unemployment days are used, the student **MUST** be employed or risk termination of their OPT.

### **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 24-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).

Students who are eligible for a STEM OPT extension must submit their application to USCIS prior to the end date of their approved OPT period listed on their EAD card. They may not apply for STEM OPT during the cap gap period if their OPT authorization has ended.

### **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 on OPT using the unexpired EAD until the EAD

card expires. 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.

### **Can my ISSS advisor check my SEVIS record for H-1B application update?**

No. Only your employer can provide accurate, official updates regarding your H-1B application.

**Can the cap-gap extension be extended beyond September 30 if my H-1B petition is still pending?**

No, the cap-gap extension is only until September 30. If the H-1B petition is still pending beyond October 1, you may remain in the US based on pending change of status petition; however, you must cease all employment until the H-1B is approved.

**Can I apply for the 24-month OPT STEM extension while I am within a period of cap-gap extension?**

Yes, you may apply for the OPT STEM extension as long as you are in a valid period of OPT (your OPT end date on your EAD card cannot have already passed). Should you choose to continue on your 24-month extension rather than H-1B, you must ensure your employer requests the withdrawal of your H-1B petition prior to October 1, otherwise, your H-1B will begin October 1, which will cancel your eligibility for the 24-month extension.

***Disclaimer:** International Student & Scholar Services (ISSS) provides support and information related to U.S. immigration laws and regulations related to F and J status at the University of Utah. ISSS staff are not attorneys and any information provided by ISSS should not be construed as legal advice. Individuals are welcome to consult a qualified immigration attorney for specific legal advice, particularly in complicated cases. For a list of local Utah attorneys please visit our website [here](#).*

***Employment:** ISSS reviews work related requests based upon the information provided to us by the student. If USCIS later determines that the student misused the work authorization, or otherwise did not follow the required rules and regulations, additional immigration benefits could be denied by USCIS.*