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Spring Immigration Workshop, Central CT State University

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Cap-Gap Advising:
The Regs and the Issues
What Is the Cap-Gap?

The cap-gap rule provides an automatic extension of duration of status (D/S), and any post-completion OPT work authorization for an F-1 student who:

1. is the beneficiary of a timely-filed H-1B petition requesting change of status and
2. has an H-1B employment start date of October 1

This applies to all qualified students on post-completion OPT, including STEM students.
Each year H-1B visas can start to be filed from April 1st onwards. In past years, the cap has been reached quickly, sometimes in the first few days that the numbers become available. This trend is picking up again, as seen below:

<table>
<thead>
<tr>
<th>Year: H1B 2006 (FY 2007 cap)</th>
<th>H-1B Cap Numbers</th>
<th>Date H-1B Cap Reached</th>
</tr>
</thead>
<tbody>
<tr>
<td>85,000</td>
<td>May 26, 2006</td>
<td></td>
</tr>
<tr>
<td>H1B 2007 (FY 2008 cap)</td>
<td>85,000</td>
<td>April 3, 2007</td>
</tr>
<tr>
<td>H1B 2008 (FY 2009 cap)</td>
<td>85,000</td>
<td>April 7, 2008</td>
</tr>
<tr>
<td>H1B 2009 (FY 2010 cap)</td>
<td>85,000</td>
<td>December 21, 2009</td>
</tr>
<tr>
<td>H1B 2010 (FY 2011 cap)</td>
<td>85,000</td>
<td>January 26, 2011</td>
</tr>
<tr>
<td>H1B 2011 (FY 2012 cap)</td>
<td>85,000</td>
<td>November 22, 2011</td>
</tr>
<tr>
<td>H1B 2012 (FY 2013 cap)</td>
<td>85,000</td>
<td>June 11, 2012</td>
</tr>
<tr>
<td>H1B 2013 (FY 2014 cap)</td>
<td>85,000</td>
<td>Filing opens April 1st 2013</td>
</tr>
</tbody>
</table>

Recruitment has started
Cap-Gap: The Regulations

(A) The duration of status, and any post-completion OPT employment authorization of an F-1 student who is the beneficiary of an H-1B petition and request for change of status shall be automatically extended until October 1 of the fiscal year for which such H-1B visa is being requested where such petition:

- Has been timely filed; and
- The H-1B employment start date for the F-1 student is October 1 of the following fiscal year.

(B) The automatic extension of an F-1 student's duration of status and employment authorization shall immediately terminate upon the rejection, denial, or revocation of the H-1B petition filed on such F-1 student's behalf. (Grace period applies)

(C) In order to obtain the automatic extension of stay and employment authorization, the F-1 student according to 8 CFR part 248, must not have violated the terms or conditions of his or her nonimmigrant status.

(D) An automatic extension of an F-1 student's duration of status also applies to the duration of status of any F-2 dependents.
Advising a Student

What the Student needs to know:

- If OPT expires before April 1 and the student is in their grace period when the H-1B is filed, the student qualifies ONLY for an extension of status and NOT work authorization!

- Student should request an updated I-20 from the DSO as evidence of continued employment authorization through September 30.

- No travel during the cap-gap period.
Advising a Student

When the student has had prior H-1B:

- Advise student to meet with lawyer filing H petition.

- If student had prior cap-subject H-1B, student may not be subject to the cap now and therefore not eligible for H-1B cap-gap extension!
Advising a Student

When H-1B petition is denied or withdrawn:

- OPT authorization ends 10 days after the date of the withdrawal or denial.

- 60 day grace period extended 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.

Source: SEVP OPT Policy Guidance 1004-03, April 23, 2010
Advising a Student

Common Reasons For H-1B Denial:

- Position is not “specialty occupation” requiring at least a bachelor’s degree.
- Petition does not prove the nexus between degree required to perform the position and the beneficiary’s field of study.
- Employer does not demonstrate it is a legitimate employer w/ need for a professional in this occupation. - Common for very small employers.
- Error in start dates on the H-1B and accompanying LCA. It’s a simple error, but if the H-1B requests a start date before 10/01/2013 it will be denied.
**When CLAIMS doesn’t push data into SEVIS**

**June 1**: Why it matters

- When Status or OPT ends before June 2, the DSO should select Cap Gap Extension “filed” to extend status or OPT through June 2. (For F-1 students with H-1B petitions either filed & accepted or filed & waitlisted)

- If a student’s OPT ends after June 2, do not use the “filed” function or the employment will be shortened to June 2. (data fix would then be needed)

Source: US-ICE Fact Sheet: 7/2009 supplemental guidance on Cap Gap
Duties of an Eligible Student

A student must be able to provide proof that the petition has been filed or waitlisted when requesting the I-20 with cap-gap notation. Proof can include:

- For a properly filed H-1B petition: A statement from the employer that the student is the beneficiary listed on a properly filed H-1B petition and proof of delivery to USCIS showing the date of receipt.

- For a wait-listed H-1B petition: A copy of the wait list letter from USCIS to the employer.

- For a receipted or approved H-1B petition: A copy of the Form I-797 and/or the I-797 receipt number.
If student’s work authorization ended before April 1, 3rd page should read:

"F-1 status for this student has been automatically extended to September 30, [current year]. The student is authorized to remain in the United States. This is pursuant to 8 CFR 214.2(f)(5)(iv) and 8 CFR 274a.12(b)(6)(iv), as updated April 8, 2008 in a rule published in the Federal Register (73 FR 18944).

If the student’s work authorization ends after April 1, and s/he is eligible to continue working in F-1 status through September 30, the 3rd page should read (next slide):

"F-1 status and employment authorization for this student have been automatically extended to September 30, [current year]. The student is authorized to remain in the United States and continue employment with an expired employment authorization document. This is pursuant to 8 CFR 214.2(f)(5)(iv) and 8 CFR 274a.12(b)(6)(iv), as updated April 8, 2008 in a rule published in the Federal Register (73 FR 18944). Additional information about the automatic extension can be found on the Student and Exchange Visitor Program Web site at www.ice.gov/sevis." (see next slide)
3rd Page Work Authorization

FAMILYNAME: Sevis
FIRST NAME: Carly
Primary Major: 27.0502 Mathematical Statistics and Probability
Student Employment Authorization:
Employment Status: FULL TIME
Duration of Employment - From (Date): 08/01/2007
To (Date): 09/30/2008
Employer Name:
Employer Location:

The Student has met the 1 full academic year requirement.
Comments: Student will be working in Statistical Analysis.

Change of Status
Requested Visa Type: H1-B
Request Status: Approved
Receipt Number: ABC001112222
Benefit Start Date: 10/01/2008

Comments: F-1 status and employment authorization for this student have been automatically extended to September 30, 2008. The student is authorized to remain in the United States and continue employment with an expired employment authorization document. This is pursuant to 8 CFR 214.2(9)(5)(iv) and 8 CFR 274a.12(b)(6)(iv), as updated April 8, 2008 in a rule published in the Federal Register (73 FR 18044). Additional information about the automatic extension can be found on the Student and Exchange Visitor Program Web site at www.ice.gov/sevis.
Duties of a DSO

DSOs should respond to a student's request to provide an I-20 that contains cap-gap notations.

- If CLAIMS has automatically updated SEVIS with H-1B receipt information, the DSO need only print a new Form I-20, which will print out with cap-gap notations.

- If a student's H-1B case has been filed, but USCIS has not yet finished the H-1B selection or receipting process, the DSO should respond to a student's request for an updated Form I-20 by using the Cap-Gap Extension function in SEVIS, and then printing out an I-20 that contains the cap-gap notation. For students on post-completion OPT, use this function ONLY if the student's OPT does not extend until June 1.

- In cases where the H-1B petition has been selected and receipted by USCIS with an I-797 receipt notice, or approved by USCIS, but CLAIMS has not properly updated the SEVIS record with the case information, or for other anomalies not addressed by SEVIS functionality, the DSO must ask for a data fix to respond to a student's request for an updated Form I-20.
Issues the DSO can face:

- Determining if the student qualifies for cap-gap extension.
- The CLAIMS-SEVIS interface is not perfect, and sometimes an eligible student may not have the cap-gap extension applied to their SEVIS record.
- The SEVIS record will be automatically completed for Approved Change of Status, sometimes before the DSO can print a new I-20.
- Consular processing H-1B have had cap-gap applied and OPT was effectively shortened.
Role of the Employer

Remember

- SEVIS access is important, but not the only factor in resolving a Cap Gap problem.

- The H-1B petition is filed by the employer. Remember the employer or attorney needs to play an active role in resolving the matter.

- If you sense collaboration is needed, the alumus/alumna should put you in touch with the employer/attorney filing the H-1B.
Stories from the trenches

- SEVIS Stories:
  - 2011 and 2012 SEVIS Tickets to apply cap-gap ext. not applied before expiration
  - Cap-Gap notation updated in SEVIS but record not extended to 9/30
  - OPT Shortened to 9/30, not extended (October 2012)
  - Records terminated due to Consular Processing error
Stories from the trenches

- Employer filed H-1B when student first started working despite valid 12-month OPT.

- Two students not requiring cap-gap extension because OPT was valid into future had OPT shortened to 9/30.
  - Student 1 — was “let go” on 09/28 before H-1B start
  - Student 2 — was unaware of H-1B petition and had plans to leave company
Stories from the trenches

Student Stories:
- Students not aware/don’t care about cap-gap extension until 10/2

- Cap-Gap Extension for Cap Subject Only
  - Student with prior H-1B may not be cap-subject

- Replacement EAD denied, because original approved OPT submitted > 30 days after endorsement. Help Desk will not apply cap-gap extension b/c of denial

- H-1B approved before OPT recommended. Cap-Gap extension eligible?
Stories from the trenches

- Student did 10 months of pre-completion OPT.
- Employer filed H-1B for student in April, while on Pre-OPT.
- Student then applies for 2 months post-OPT, after H-1B is approved. Cap-Gap eligible?

- Student applies 12-month OPT more than 30 days after DSO recommends OPT.
- OPT is approved, but EAD is lost. Replacement EAD denied b/c original application submitted more than 30 days after DSO recommends OPT.
- Help Desk will not apply cap-gap extension b/c of replacement EAD denial!

- Issues/Concerns?
- DSO Course of Action?

Omar earned a Bachelor’s degree and has been working for a consulting company since June 2012. His OPT expires on March 22, 2013 because he used some pre-completion OPT for a Junior Year Internship at the same company which got him the job there. The company is preparing to file the H-1B for Omar.

- Issues/Concerns?
- DSO Course of Action?
Case Studies

- **Hyunsoo** graduates with a Ph.D. in Chemical Engineering in May 2012. She has applied for 12 months of post-completion OPT to start on May 15, 2012. Prior to graduation she was offered a position with a chemical manufacturer who starts the H-1B petition as soon as she completes her degree. Her OPT will end May 14, 2013.
  - **Issues/Concerns?**
  - **DSO Course of Action?**

- **James** is completing his MBA has applied for his 12 months of OPT to start in June 2013 and end in June 2014. In talking to his DSO James tells her that he had H-1B prior to starting the MBA program so he “knows all about that Cap stuff” and is relieved to know that there is a Cap-Gap extension of OPT to get him to October 1 in 2014.
  - **Issues/Concerns?**
  - **DSO Course of Action?**
Strategies for Communicating

Pre-Completion Requests:
Yale begins the conversation when students request pre-completion OPT. Using 10-12 weeks (1 internship) is possible, more than that will not get a student to April 1 on Post-Completion.

Post-Completion OPT Workshops:
Yale, UCONN, Hult all advise the Cap-Gap Extension and who is eligible.

Website:
Yale and UCONN instruct students to send a copy of the H-1B Receipt Notice when requesting the Cap-Gap I-20.
http://www.yale.edu/oiss/immigration/employment/offcampus/opt/extending.html
http://global.uconn.edu/opt-h-1b-cap-gap-extension/
Strategies for Communicating

**Email Message:**
Yale and Hult send an email in early May reminding students to request the I-20.

**I-20 Attachments:**
Hult adds a half sheet on cap-gap stapled to the OPT I-20 with reminders.

**Post-Completion OPT Listserv:**
To send reminders to all Post-OPT students.

**Mini Audits:**
UConn uses PeopleSoft “Status Verify” alerts to perform mini-audit on records in July/August, pulling files for all records extended/shortened to 9/30
Government guidance that advisers should be familiar with includes:

- SEVP's Supplemental Cap Gap Fact Sheet (included in NAFSA's compilation of July 16, 2009 SEVP guidance posted on the NAFSA Web site)
- SEVP's OPT Policy Guidance Document
- USCIS's FY 2012 Cap-Gap Q&A
Options Other than Capped H-1B

From “Twenty-five (Or More) Strategies for the Capped-Out H-1B” at www.KlaskoLaw.com

- Proving Cap Exemption
- Prior H-1B
- Options based on alien’s history: asylum, dual nationality, portability
- Changing plans: student status, work overseas, subcontract employment
- Country-Specific options: E-1/E-2/E-3, TN-1, TPS
- Occupation-Specific options: J-1, R-1, P visa, L visa
- Other visa options: O-1, L-1, spouse visa
- Adjustment options: lottery, employment-based, marriage-based
Your New I-20 with OPT Recommendation

• Your **complete** OPT application package, including a **photocopy** of this I-20, must arrive at USCIS no later than: ______________________.

• If USCIS receives your application after this date, your application will be **denied** with no option for appeal.

• See the reverse side of this sheet for a list of all required application materials.

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**REMEMBER**...

• It is your responsibility to know and comply with all immigration regulations which apply to you as an international student and F-1 visa holder, which includes your time on post-completion OPT. Hult Student Services will advise you on these regulations. Here are some important responsibilities that **you agree to be subject to** by applying for OPT:

  1. I verify that I have watched and understood the online OPT Tutorial videos uploaded on MyHult.

  2. I understand the responsibilities of maintaining status while on OPT, and I understand my responsibility to report certain information to the school while I am on OPT.

  3. During OPT, I agree to report changes to any or all of the following to the school, within 10 days of the change:

     a) Legal name changes

     b) Change in residential or mailing address

     c) Change in employment (either new employment or changes in employment)

     d) Change in immigration status – includes the filing of an H-1B petition on your behalf, an application for an adjustment of status, or any other change in immigration status

     e) Early departure from the U.S. – if you decide not to use your OPT, or to depart the U.S. before the end date of your OPT with no intention to return as an F-1 student

  4. I understand that during OPT, F-1 status is dependent upon employment, and I will be considered out of status if I accrue an aggregate of more than 90 days of unemployment.

  5. To update any of the above items, please complete the following web form: [https://hult.wufoo.com/forms/hult-alumni-registration-update-form/](https://hult.wufoo.com/forms/hult-alumni-registration-update-form/).

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**H-1B Applications and Cap-Gap Extensions**

• If your employer decides to sponsor you for an H-1B visa, you may be eligible for a **cap-gap extension**.

• A cap-gap extension extends OPT work authorization and F-1 status for any student who files an H-1B petition with a requested start date of October 1. The application must be filed before your OPT work authorization expires.

• In many cases, your employer will want an updated I-20 documenting the cap-gap benefit. To request a cap-gap I-20, please take the following steps:

  • Ensure that your employer information is up-to-date by using the Alumni Affairs Update Form (see above).

  • Request an updated I-20 using the following web form: [https://hultstudentservices.wufoo.com/forms/boston-i20-request-form/](https://hultstudentservices.wufoo.com/forms/boston-i20-request-form/).

  • Make sure you upload documentation of your H-1B petition, including your EAD card, I-797 receipt form, and approval notice if the application has already been approved.

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**Questions or concerns? Email** [visas.boston@email.hult.edu](mailto:visas.boston@email.hult.edu)
OPT Application Checklist

Please make sure your application is **complete** before mailing it to USCIS:

- Completed original Form I-765. Instructions on how to complete the I-765 can be found on MyHult.

- 2 U.S. passport size photos with SEVIS ID Number and full name printed in pencil on the back

- Application fee
  - Check or money order for $380
  - Made out to U.S. Citizenship and Immigration Services
  - Include your SEVIS ID Number in the memo line

- Photocopy of I-20 with OPT recommendation (remember to sign the I-20 on the first page)

- Photocopies of all previous I-20s

- Photocopy of passport ID page

- Photocopy of front and back of I-94 card

- Photocopy of F-1 visa

- OPTIONAL: Completed form G-1145 (this form allows you to receive email and/or text message notifications from USCIS regarding your application)

** We strongly recommend that you make a copy of your application packet for your records before submitting it to USCIS**

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**Filing Instructions**

These filing addresses are only applicable if you used a **Massachusetts mailing address** on your I-765. If you used a non-MA address, please speak with Student Services before filing your application:

**Regular U.S. Postal Delivery**
(certified mail/return receipt recommended)

U.S. Citizenship and Immigration Services
P.O. Box 660867
Dallas, TX 75266

**Express Mail and Courier Deliveries**

U.S. Citizenship and Immigration Services
Attn: AOS
2501 S. State Hwy. 121 Business
Suite 400
Lewisville, TX 75067