

## **OPT Changes Help H-1B Visa Applicants & F-1 Students**

Recently, the U.S. Department of Homeland Security published in the Federal Register a new regulation significantly changing current procedures and eligibility criteria for Optional Practical Training (OPT). This new regulation is extremely important to a great number of students in F-1 visa status, foreigners seeking H-1B visa status; and many U.S. employers. In this article we summarize the main changes brought about by this regulation.

This new regulation, currently being referred to as the “cap-gap” regulation, provides for the automatic extension of status and work authorization for F-1 students, if three criteria are met:

1. the employer must have timely filed an H-1B visa petition that includes a request for a change of status from F-1 status to H-1B status, while the intended employee held valid F-1 student visa status pursuant to the grant of OPT;
2. the H-1B visa petition seeks an October 1st start date for employment; and
3. the student otherwise has not violated her F-1/OPT status.

If all three of the above criteria are met, F-1 status and OPT work authorization shall automatically continue to be valid until:

- a. the October 1st H-1B visa validity date begins (based upon an approved H-1B visa petition);
- b. the H-1B visa petition is denied/revoked; or
- c. the H-1B visa petition is not selected in the annual “cap-subject” lottery.

This “cap-gap” regulation also automatically extends the F-2 visa status of F-1 visa holders’ eligible family members.

However, it is important to understand that the “cap-gap” regulation does not provide for any “cap- gap” benefit to those individuals whose employers filed H-1B visa petitions requesting consular processing, as opposed to change of status. Also, since the regulation was published after the deadline to receive H-1B petitions for the upcoming 2009 fiscal year, it penalizes those individuals who departed the U.S., instead of filing an H-1B visa change of status petition.

While the true impact of this new regulation cannot be determined immediately – in fact, the entire regulation remains subject to public comment – many significant changes that help U.S. employers and foreign nationals are apparent now. Hopefully, within the coming weeks and months, the U.S. Citizenship and Immigration Service (USCIS) will provide further guidance and clarification concerning this regulation. (Excerpts from the April 4, 2008 USCIS Q&A publication concerning this new regulation are contained within this article above.)

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