

Work and Travel Guidance for F-1 Students with Pending H-1B “Change of Status” Applications and “Cap-Gap” Employment Authorization for FY16

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This advisory summarizes key travel and employment issues if you are an F-1 student with Optional Practical Training (OPT) employment eligibility *and* an H-1B filing on your behalf has been accepted by US Citizenship and Immigration Services (USCIS). USCIS has completed its data entry of all H-1B cap subject petitions selected out of the lottery and will begin returning all petitions that were not selected. While it is unlikely that any petition which has not been issued a Receipt Notice by this date has been selected for the FY16 H-1B allotment, one may hold out hope until the petition and filing fee have been returned.

Based on prior experience, we expect that USCIS will adjudicate the annual H-1B cap visa petitions through the end of the summer. Approved petitions will have an October 1, 2015 start date. The good news is that if your OPT employment card expires before October 1, it is automatically extended, by operation of law, with validity to September 30, 2015 under the “cap-gap” OPT extension rule. This means you can continue working legally even after the expiration of your OPT employment card. We recommend that you alert your school’s international student office by providing that office with a copy of the H-1B receipt notice. The international student office will use this receipt information to update your I-20 to show the extension of your OPT.

International travel between now and October 1 is complicated, and whether you can travel and return to work before October 1 depends on your specific situation. **As a general rule, it is safest not to travel during the cap-gap period.** In all cases, travel as an F-1 student with OPT requires a valid F-1 visa stamp, Form I-20 with updated authorization for travel from your school’s international student office, the OPT Employment Authorization Document (EAD), and proof of current employment in the US (employer letter and/or recent pay slips).

Please note that any international travel carries risks. If your F-1 visa has expired and you need to apply for a new one, you may face delays for extra security clearances (221(g) administrative processing), or you may not be able to prove you have nonimmigrant intent, which is required for F-1 visa applications. During July and August 2014, delays were experienced by all visa applicants after a Department of State software crash. These types of expected and unexpected issues can significantly delay your ability to obtain a new visa and travel back to the US. Furthermore, even with a valid F-1 visa, admission to the US is up to the discretion of the US Customs and Border Protection (CBP) officer at the port of entry. We therefore caution you to carefully consider the need to travel as an F-1 student with OPT and list below some of the common scenarios and our recommendations.

1. My OPT employment card has not expired and my H-1B petition has been accepted, but not yet approved.

If you travel outside the US in this situation, the change of status part of your H-1B petition will be abandoned. This means that even when the H-1B is approved, your status will not change to H-1B because you departed the US while the H-1B “change of status” petition was pending. Your employment eligibility will end on September 30 with expiration of the cap-gap extension. You will need to depart the US, apply for an H-1B visa stamp based on the petition approval, and reenter no more than 10 days before October 1 to activate your status as an H-1B worker.



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2. My OPT employment card has not expired and my H-1B has been approved.

In this situation, according to guidance from USCIS, it is possible to travel and not abandon the change of status because it has already been approved and is for a date in the future. Since there is no abandonment, once you return to the US on your F-1 visa, your change of status will be effective on October 1. However, there is a very real risk in traveling in this scenario. Upon approval by USCIS of your H-1B petition, the Student and Exchange Visitor Information System (SEVIS) may no longer reflect that you are an F-1 student and you may have difficulties entering the US in F-1 status. We recommend contacting your school both prior to travel and before returning to the US to ensure that you are still in the SEVIS system as an F-1 student.

3. My OPT employment card has expired.

In this situation, you are eligible to remain in the US and continue working after the expiration of your OPT employment card under the cap-gap extension rule discussed above. However, there is no provision or guidance from USCIS that allows for reentry during this cap-gap period once your EAD has expired. Therefore, if you must depart the US during this period, you will not be able to return to the US until you obtain an H-1B visa stamp based on approval of the H-1B petition. Initial entry into the US on an H-1B visa is allowed up to 10 days in advance of the start date of the petition approval. So, for an October 1 start date, this entry date can be as early as September 21. However, you will not be able to resume employment until October 1. Unless there is an emergent need to travel and arrangements can be made for remote work outside the US, you should make no plans to travel after expiration of your OPT employment card.

4. I need to depart the US and will not return until October 1 or later and will apply for the H-1B visa.

You can apply for the H-1B visa stamp any time after approval of the H-1B petition as soon as you can schedule an appointment at the US Embassy or Consulate. The visa will not be effective until October 1, but you can, and are encouraged to, apply for it as soon as possible to avoid the rush in September. Please note that H-1B nonimmigrants are allowed to enter the US up to 10 days in advance of the petition validity. However, you cannot start employment in H-1B status until October 1. This 10-day time period is intended to allow you to get settled in the US before starting employment.

5. My H-1B petition was denied by USCIS.

If your H-1B petition is denied and your OPT EAD is still valid, you are authorized for ongoing employment in the US until your EAD expires. However, cap-gap employment eligibility after expiration of the EAD is only valid while the H-1B petition is pending with USCIS. Therefore, you are no longer eligible to continue working in the US if your H-1B petition is denied and your OPT EAD has expired.

The examples above all deal with the situation where the H-1B filing has been accepted by USCIS out of the quota. If the H-1B petition filed on your behalf was rejected, you may choose to travel if you have a valid F-1 visa stamp, Form I-20 with updated authorization for travel from your school's international student office, the OPT EAD, and proof of current employment in the US in the form of an employer letter and/or recent pay slips. You may also stay in the US for 60 days after the expiration of your F-1 OPT status, but only for purposes of settling your personal affairs and domestic travel within the US. You are not allowed to work during this 60-day grace period. If you travel outside the US during the 60-day grace period, even if you do not plan to work upon your return, you will not likely be readmitted because you will be deemed to have departed the US at the conclusion of your F-1 program, thus fulfilling the need for the 60-day grace period. The 60-day grace period is not meant to facilitate international travel and reentry — it is designed to allow F-1 students to remain in the US at the end of the F-1 program to settle their affairs until they are ready to depart the US.