

Practice Advisory on FY 2021 F-1 Cap-Gap

June 10, 2020

Topics: [International Students and Scholars, Regulatory Information](#)

Sub Topics: [Fees, Forms, Filing Procedures, International Students and Schools](#)

Summary. For the Fiscal Year 2021 H-1B cap season, employers wanting to file a cap-subject H-1B petition had to first submit registrations during a March 1 to March 20, 2020 registration period, naming and paying a \$10 registration fee for each individual they hope to file for. USCIS then conducted a lottery of all registrations received, and notified petitioners of which of their prospective beneficiaries were selected. Petitioners with selected registrations must file a complete H-1B petition on behalf of their selected beneficiaries within the filing period on the registration selection notice. A petitioner may not file a cap-subject H-1B petition for any beneficiary whose registration was not selected in the registration lottery.

Caution! Even though a petitioner with selected registrations will have 90 days to file a full H-1B petition on behalf of selected beneficiaries, for F-1 cap-gap purposes the Form I-129 requesting change of status and an employment start date of October 1, 2020 must still be received by USCIS before the student's OPT expires (for cap-gap extension of employment benefits) or before the expiration of the student's grace period (for cap-gap extension of duration of status with no extension of employment authorization).

This NAFSA practice advisory explores how the new H-1B cap registration and filing rule changes interact with F-1 cap-gap rules. Begin by comparing the new system to the prior.

Update. (June 10, 2020). SEVP informed stakeholders in [Broadcast Message 2006-02](#) (June 8, 2020), that on May 22, 2020 SEVIS was revised "to accommodate changes in the H-1B process. SEVIS has been modified to automatically add cap-gap extensions to records of eligible F-1 students whose H-1B petition was received by USCIS. The "waitlisted" and "rejected" cap-gap options are no longer available in SEVIS. If the link is missing or if other changes are needed, the designated school official (DSO) must call the SEVP Response Center and request a data fix."

Update. (April 13, 2020) USCIS Announces **Data Entry Delay** for Cap-Subject H-1B Petitions Until at Least May 1, 2020. On April 13, 2020, [USCIS announced](#) a delay in data entry and receipt notice generation for fiscal year (FY) 2021 H-1B cap-subject petitions until at least May 1, 2020, due to the impacts of COVID-19. Once USCIS begins data entry, petitions will be stamped received on the date they arrive at the service center and, if otherwise properly filed, will retain the receipt date that corresponds with the date the petition is received at the service center. USCIS stated that it is "mindful of petitions with sensitive expiration and start dates, such as cap-gap petitions, and will strive to process these petitions as efficiently as possible." Nevertheless, the automatic cap-gap functionality update in SEVIS will be impacted, since that process depends on a data transmission from USCIS's CLAIMS system. DSOs with students whose employer has filed a cap-subject H-1B petition on their behalf and who request a cap-gap notation on their Form I-20 before USCIS enters the data in CLAIMS could use the SEVIS [Cap Gap Extension](#) link to notate the cap-gap benefit until June 1, but would likely have to contact SEVP for notations beyond that if SEVIS has not been updated with CLAIMS data by then.

Table comparing the new and prior systems

New H-1B Cap Selection and Filing System	Prior System
During the initial registration period , petitioner preregisters itself and each beneficiary on whose behalf it would like to file an H-1B petition, paying a \$10 fee per H-1B beneficiary it registers. For the FY 2021 H-1B cap, the initial registration period was March 1 through March 20, 2020. A petitioner may submit only one registration per beneficiary. Multiple registrations by the same petitioner for the same individual will invalidate all registrations submitted by that petitioner for that particular beneficiary.	Petitioner files full H-1B petition with USCIS, so that it is received no sooner than 6 months before October 1, the first day of the government fiscal year, and no later than the "cut-off date" established by USCIS for that fiscal year's H-1B filings. This filing window typically lasts no more than a few days. A petitioner may file only one H-1B petition per beneficiary. Multiple petitions by the same petitioner for the same individual will invalidate all petitions submitted by that petitioner on behalf of that particular beneficiary.
After the close of the initial registration period, USCIS conducts a random lottery to select enough registrations to meet the H-1B caps. On March 27, 2020, USCIS completed the random lottery of registrations received during the FY 2021 March 1 - March 20 registration period.	Of the cap-subject H-1B petitions that were properly filed, USCIS conducts a random lottery to select for processing enough petitions to meet the H-1B caps.
USCIS notified petitioners of the beneficiaries who were selected and invited the petitioners to file a full H-1B petition on behalf of each selected beneficiary, during a designated filing period . The filing period for filing the H-1B cap-subject petition for a beneficiary whose registration was selected will be 90 days, starting April 1, 2020. Petitioners may not file a cap-subject H-1B petition for any beneficiary whose registration was not selected, or outside the designated filing period specified on the beneficiary selection notice.	USCIS returns unprocessed all petitions that were not selected in the lottery

F-1 Cap-Gap Regulatory Premises

Source: [8 CFR 214.2\(f\)\(5\)\(vi\)](#)

Cap-gap benefits are available to F-1 students only when an employer properly files a cap-subject H-1B petition with USCIS. To trigger cap-gap benefits, the H-1B petition must:

- Request an H-1B employment start date of October 1;
- Request a change of status from F-1 to H-1B; and
- Be timely filed with USCIS

There are two aspects of cap-gap benefits:

- An extension of OPT employment authorization, if USCIS receives the H-1B petition prior to the expiration of the student's approved post-completion OPT (standard or STEM)
- An extension of duration of status (D/S), if USCIS receives the H-1B petition before the expiration of the student's grace period (following completion of studies or practical training)

According to USCIS, "timely filed means that the H-1B petition (indicating change of status rather than consular processing) was filed during the H-1B acceptance period...while 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")."

If USCIS receives a qualifying H-1B petition before the student's OPT is approved or after it ends, but while the student is in his or her 60-day grace period, only a cap-gap extension of D/S will be triggered, but not a cap-gap extension of employment authorization.

These are the standard cap-gap rules, which continue unchanged.

H-1B Cap Regulatory and System Premises

Sources: [8 CFR 214.2\(h\)\(2\)\(i\)\(I\)](#) (earliest time of filing); [8 CFR 214.2\(h\)\(8\)\(iii\)\(A\)](#) (registration requirement); [8 CFR 214.2\(h\)\(8\)\(iii\)\(C\)-\(D\)](#) (notifications and petition filing)

Under the new H-1B cap regulations and system:

- A petitioner can only file a full H-1B petition for beneficiaries whose registrations were selected in the preregistration lottery. Because of this, F-1 students will know in advance, before an H-1B petition can even be filed, whether they will receive one of the prized H-1B cap numbers and be eligible for cap-gap benefits.
- USCIS says that the FY 2021 initial registration period will be March 1 – March 20, 2020.
- A petitioner must electronically register each prospective beneficiary by name and pay a \$10 fee for each prospective beneficiary for whom it submits a registration.
- A single petitioner may only submit one registration per beneficiary per fiscal year.
- 8 CFR 214.2(h)(8)(iii)(A)(4) allows a petitioner to "submit a registration during the initial registration period only if the requested start date for the beneficiary is the first day for the applicable fiscal year."
- Petitioners with selected registrations will be given a designated filing period of at least 90 days within which to file full H-1B petitions for those selected beneficiaries.

Factors to be Cautious About and Incorporate in Your Advising

Timing and attention to detail matter more than ever! Students, employers, advisers, and attorneys must closely monitor the following dates, and how they interface with the F-1 cap-gap regulations:

- The student's OPT start and end dates
- The end date of the student's 60-day grace period following OPT
- The H-1B initial registration period (March 1 – March 20, 2020)
- The petitioner's designated filing period
- The significance of April 1, 2020
- The requested October 1, 2020 start date
- The date the employer files the H-1B petition requesting change of status

The student's OPT start and end dates

Always remember that cap-gap employment benefits are triggered only if USCIS receives a qualifying H-1B before the expiration of approved standard or STEM post-completion optional practical training. There are no cap-gap employment benefits if the H-1B petition is filed either before practical training is approved, or after the practical training validity period ends.

If USCIS receives a qualifying H-1B petition before the student's OPT is approved or after it ends but while the student is in his or her 60-day grace period, only a cap-gap extension of D/S will be triggered, but not a cap-gap extension of employment authorization.

The initial registration period

Noon (Eastern Time) March 1, 2020 – Noon (Eastern Time) March 20, 2020 was the initial registration period for FY 2021 cap numbers. See [USCIS notice of initial March 1 - March 20, 2020 registration period - 85 FR 1176 \(January 9, 2020\)](#). An employer had to set up a registration account in MyUSCIS to electronically submit a separate registration request naming each individual it seeks to petition for a cap-subject H-1B. Petitioners were able to register and pay for multiple individuals in a single online session. The electronic system allows for a filer to prepare, edit and store the record in their account prior to final payment and submission. H-1B account registration set-up began on February 24, 2020, but registered employers could not submit an H-1B cap registration on behalf of prospective beneficiaries until the initial registration period opens at noon Eastern Time on March 1, 2020.

USCIS closed the initial registration period at noon Eastern Time on March 20, 2020. USCIS then conducted a random lottery among all registrations received. The lottery was completed on March 27, 2020.

USCIS notified all employer registrants with selected registrations that they are eligible to file an H-1B cap-subject petition on behalf of the individual(s) named in the notice within the filing period indicated on the notice. An employer can't file a cap-subject H-1B petition for a beneficiary for whom they did not submit a registration during the registration period, or whose registration was not selected.

Students, advisers, petitioners, and attorneys must be aware of the preregistration requirement and the initial registration period, and plan accordingly.

The petitioner's designated filing period

Under both the prior and the new H-1B cap counting and filing systems, it is the timely **filing of a qualifying H-1B petition** that triggers F-1 cap-gap benefits. A student whose OPT expires before the H-1B petition is filed will not be eligible for a cap-gap extension of work authorization, and a student whose 60-day grace period expires before USCIS receives the H-1B petition is not be eligible for an extension of D/S.

Whereas under the prior system all petitioners wanting an H-1B number filed full petitions in a filing window lasting from April 1 until a few days later, under the new H-1B cap counting and filing system employers with beneficiaries selected in the registration lottery will have to file a complete H-1B petition within a 90-day **designated filing period** beginning April 1, 2020. 8 CFR 214.2(h)(8)(iii)(D)(ii) provides that the designated filing period must be at least 90 days. **However**, to receive cap-gap extension of OPT employment authorization the H-1B petition must still be filed before the F-1 student's OPT expires, and to receive cap-gap extension of D/S, the H-1B petition must be filed before the F-1 student's 60-day grace period expires. Those are F-1 regulations, which have not changed.

Petitioners and students must not be lulled into thinking that filing the petition any time during the designated filing period is fine. Even though that may be true for the employer's petition, if the petition is filed after the end date of the student's OPT, the student will not receive a cap-gap extension of employment authorization. If the petition is filed after the end of the student's 60-day grace period, the student will not receive an extension of D/S and USCIS will deny the change of status portion of the H-1B petition if the student's grace period ends before the requested start date of the H-1B petition.

Students, advisers, petitioners, and attorneys must be aware of the OPT and D/S end dates and the petitioner's designated filing period, and plan accordingly.

The significance of April 1

Under the prior H-1B cap counting and filing system, where filed full petitions constituted "entries" to secure an H-1B cap number in USCIS's random selection process (lottery), employers rushed to file full H-1B petitions with USCIS so that they were received on or as early as possible after April 1, before USCIS declared the final receipt date several days later, and conducted lotteries on all petitions received during that limited window of time.

Although the "not be filed earlier than 6 months" rule remains unchanged, under the new H-1B cap counting and filing system employers will be notified of a **designated filing period** for filing full H-1B cap-subject petitions on behalf of beneficiaries whose registrations were selected in USCIS's pre-registration lottery. USCIS will reject cap-subject petitions received outside that designated filing period (i.e., either before or after the designated filing period). In it's February 6, 2020 stakeholder webinar *Overview of the H-1B Electronic Registration Process: A Webinar for Registrants*, USCIS stated that the designated filing period for employers with selected beneficiaries will be 90 days, starting April 1, 2020.

Here are some things that we know and do not know about the designated filing period.

What we know:

- Under 8 CFR 214.2(h)(8)(iii)(D)(ii), a designated filing period must be at least 90 days.
- Under 8 CFR 214.2(h)(2)(i)(I), no designated filing period will begin sooner than April 1, 2020, for petitioners that request an October 1, 2020 start date.
- For FY 2021 filings, the designated filing period for employers with selected beneficiaries will be 90 days, starting April 1, 2020.
- USCIS intends to notify registrants with selected registrations from the initial registration period no later than March 31, 2020."

The October 1 employment start date and change of status requirement for cap-gap benefits.

Students, advisers, petitioners, and attorneys must continue to be aware of the cap-gap benefit triggers of the unchanged F-1 regulations at 8 CFR 214.2(f)(5)(vi), and make sure the H-1B petitions that are filed conform to those regulations.

Form I-129 petition must request on October 1 employment start date. Under the unchanged F-1 cap-gap regulations at 8 CFR 214.2(f)(5)(vi)(A)(2), a cap-subject H-1B petition must request an October 1 employment start date. Requesting any other start date on the Form I-129 petition will mean that the F-1 student will be ineligible for cap-gap benefits. The H-1B regulations at 8 CFR 214.2(h)(8)(iii)(A)(4) require cap-subject petitioners to "submit a **registration** during the initial registration period only if the requested start date for the beneficiary is the first day for the applicable fiscal year." The F-1 cap-gap regulations, however, explicitly require the **I-129 petition** to have an October 1 start date. If the employer puts a date other than October 1 as the employment start date on the I-129, the beneficiary's eligibility for cap-gap benefits based on that petition will be put in jeopardy.

Form I-129 petition must request a change of status for the beneficiary. Under the unchanged F-1 cap-gap regulations at 8 CFR 214.2(f)(5)(vi)(A), the F-1 student must be the beneficiary of an H-1B petition "and request for change of status." This requirement has not changed. For example, if the employer requests consular notification rather than a change of status on Form I-129, the beneficiary will not be eligible for cap-gap benefits.

Other Ramifications of the Preregistration Requirement

SEVIS Ramifications

Under the prior H-1B cap counting and filing system, all petitions had to be filed in a condensed time period of a few days starting April 1, and an F-1 beneficiary of a cap-subject H-1B petition did not know whether USCIS would accept the petition for processing until USCIS conducted a lottery of all cap-subject petitions received before the cap filing cut-off date and then notified the employer by issuing a Form I-797C receipt notice.

F-1 cap-gap regulations at 8 CFR 214.2(f)(5)(vi)(A) provide that cap-gap benefits are automatically granted when a qualifying cap-subject H-1B petition is timely filed.

Although 8 CFR 214.2(f)(5)(vi)(A) states that duration of status and employment authorization "shall be automatically extended until October 1," 8 CFR 214.2(f)(5)(vi)(B) provides that those extensions "shall automatically terminate upon the rejection, denial, revocation, or withdrawal of the H-1B petition filed on such F-1 student's behalf or upon the denial or withdrawal of the request for change of nonimmigrant status, even if the H-1B petition filed on the F-1 student's behalf is approved for consular processing."

Under the prior system, since not all H-1B petitions that were filed were accepted for processing by USCIS, SEVP and USCIS developed a graduated extension policy programmed into SEVIS that granted extensions of OPT and of duration of status depending on the status of the underlying H-1B petition, as follows:

Source: [SEVIS Help Hub - F-1 Cap Gap Extension](#)

Effect of H-1B Petition on SEVIS Status during Cap Gap

A cap gap-eligible student's SEVIS status is affected by one of the following statuses in an H-1B petition:

Status of H1-B Petition	Program or OPT End Date
Approved (Entered only through USCIS interface or SEVP data fix)	SEVIS extends the F-1 status and any authorized OPT until September 30.
Canceled	SEVIS reverts F-1 status or any authorized OPT end date to the original end date and removes comments about the cap gap extension from the Student Information page and from the Form I-20.
Filed	SEVIS extends F-1 status and any authorized OPT until June 1.
Pending (Entered only through USCIS interface or SEVP data fix)	SEVIS extends the F-1 status and any authorized OPT until September 30.

Since H-1B petitions can be filed only for beneficiaries who have been selected to receive an H-1B number in the registration lottery, SEVP informed stakeholders in [Broadcast Message 2006-02](#) (June 8, 2020), that on May 22, 2020 SEVIS was revised "to accommodate changes in the H-1B process. SEVIS has been modified to automatically add cap-gap extensions to records of eligible F-1 students whose H-1B petition was received by USCIS. The "waitlisted" and "rejected" cap-gap options are no longer available in SEVIS. If the link is missing or if other changes are needed, the designated school official (DSO) must call the SEVP Response Center and request a data fix."

If USCIS delays H-1B petition data entry or the CLAIMS-SEVIS data exchange does not work properly in individual cases, DSOs with students who request a cap-gap notation on their Form I-20 before USCIS enters the data in CLAIMS must work with SEVP on a datafix.

Citations

- [8 CFR 214.2\(h\)\(2\)\(i\)\(I\)](#) (earliest time of filing)
- [8 CFR 214.2\(h\)\(8\)\(iii\)\(A\)](#) (registration requirement)
- [8 CFR 214.2\(h\)\(8\)\(iii\)\(C\)-\(D\)](#) (notifications and petition filing)
- [USCIS final rule establishing H-1B cap preregistration and filing system - 84 FR 888 \(January 31, 2019\)](#), effective April 1, 2019
- [USCIS final rule setting the H-1B preregistration fee at \\$10 - 84 FR 60307 \(November 8, 2019\)](#), effective December 9, 2019
- [USCIS notice of initial March 1 - March 20, 2020 registration period - 85 FR 1176 \(January 9, 2020\)](#)
- [SEVIS Help Hub - F-1 Cap Gap Extension](#)

Related Content

[Pre-Registration Requirement for Cap-Subject H-1B Petitioners](#) >>>

Regulatory Resources

[Law Links](#) >>>

[Adviser's Manual 360](#) >>>

[NAFSA Regulatory Engagement](#) >>>

Keep Up With All Things NAFSA

Whether you are looking for the latest news or job updates or simply want to keep a finger on the pulse of the international education community, NAFSA has a number of easy ways to stay updated—all in your preferred social media platform.

[Follow us on Twitter](#)

[Like us on Facebook](#)

[Connect with us on LinkedIn](#)

[SHOP NAFSA](#) · [MEDIA](#) · [CONTACT](#)

Privacy Notice

This website uses cookies to ensure you get the best experience. You can revoke your consent to the use of cookies by following the instructions on NAFSA's Privacy Policy page to adjust your browser settings. You can also set your communication preferences in your MyNAFSA account. Further information can be found in NAFSA's privacy policy. I agree to the use of cookies for the purposes of web analytics and digital advertising. If I continue to use this website, this is considered consent. Learn more about NAFSA's privacy policy

I Consent

SHARE