



F-1 CAP GAP STUDENTS IN LIMBO FROM OCTOBER 1, 2018 ONWARD IF THEIR H-1B CASES HAVE NOT BEEN APPROVED

Posted on October 2, 2018 by Cora-Ann Pestaina

It is October 1, 2018 and this morning, in what is an extremely unfortunate yet totally preventable situation, businesses across the U.S. were forced to [temporarily terminate the employment of F-1 students](#) who were previously employed pursuant to their [cap-gap](#) extension period.

Briefly, the [cap-gap extension](#) regulation temporarily extends the OPT (Optional Practical Training) period for F-1 students with pending H-1B petitions and requests for change of status. The cap-gap period starts when an F-1 student's status and work authorization expire, and they are extended through

September 30th, the end of fiscal year. The ongoing suspension of USCIS' premium processing service, previously discussed in one of our earlier [blogs](#), has critically impacted H-1B cap subject petitions for F-1 students in the cap-gap extension period. USCIS has found a way to basically suffocate the H-1B visa program.

USCIS [extended the suspension of premium processing](#) for fiscal year 2019 cap-subject H-1B petitions which was originally slated to last until September 10, 2018, through to an estimated date of February, 19, 2019. USCIS' premium processing service has always been a heavily utilized option for U.S. businesses providing them with a significantly faster adjudication timeline of a few weeks instead of the regular processing time of 6-9 months! The premium processing option also allowed businesses to ensure that their professional staff would be available to meet critical project timelines and thus allowed them to plan accordingly. Employers had to offer the jobs prior to April 1, and then file H-1B petitions on behalf of the foreign national within the first five days of April 2018

to be considered in the H-1B visa lottery. Under the H-1B regulations, an H-1B petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services or training. Therefore, U.S. employers are unable to file an H-1B petition on behalf of a prospective employee more than six months from the intended start date but the processing of that H-1B petition may take well beyond six months. Without premium processing, many employers are left unable to hire the H-1B worker on October 1, 2018 even though the job offer was made more than six months ago and the petition is potentially approvable. In addition, premium processing was also a great tool for the F-1 student. Imagine having a petition filed on your behalf in the first week of April and for the next 6-9 months, or likely longer, being unable to make any concrete plans for your future, including not knowing whether you would be allowed to remain in the US or have to immediately pack your bags and leave.

USCIS stated that the suspension of premium processing is necessary in order to allow the agency to "be responsive to petitions with time-sensitive start dates" but it is not clear why F-1 students who are in a cap-gap extension period failed to qualify as having time-sensitive start dates. U.S. employers forced to suspend the employment of these F-1 students have no recourse. USCIS has indicated that these petitioners may submit a request for expedited processing but the expedite process is grossly unreliable and it is not clear how these requests are being processed. It is by no means a viable alternative to premium processing.

As of October 1, F-1 students previously employed pursuant to a cap-gap extension are no longer authorized to work and will start accruing unlawful presence in the U.S. if they continue to work under the [new unlawful presence policy](#) applicable to students. However, the F-1 student generally may remain in the United States while the change of status petition is pending without accruing unlawful presence, provided they do not work without authorization. This student also cannot travel during the limbo period, unless he or she is prepared to return to the US after the H-1B petition is approved on a new H-1B visa. But one should not assume that the H-1B petition will get approved in a climate where the Trump administration is routinely challenging H-1B petitions for occupations that were previously easily approved. Although the USCIS has at this time delayed its removal policy with respect to employment-based petitions that ultimately get denied, the delay will not be indefinite and these

F-1 cap students will find themselves not just accruing unlawful presence, [but will also find themselves facing removal proceedings](#) if the H-1B petition and the request for change of status is denied.

Of course, if an F-1 student with a pending change of status H-1B petition has work authorization (such as a valid Employment Authorization Document (EAD)) that extends past September 30th they may continue to work as authorized.

The American Immigration Lawyers Association (AILA) has called on USCIS to immediately lift the premium processing suspension on FY 2019 H-1B cap-subject petitions for beneficiaries who are in a cap-gap extension period, or alternatively, to publish a notice in the Federal Register extending the cap-gap work authorization period to at least 90 days beyond September 30, 2018, or until all FY 2019 H-1B cap cases can be adjudicated. To date USCIS has issued no response to this request.

In choosing to [so suffocate the H-1B visa program](#), USCIS is restricting legal immigration and fulfilling the Trump administration's objective under its ["Buy American and Hire American"](#) Executive Order No. 13788. But a negative chain reaction easily ensues with an immigration policy influenced by BAHA: U.S. businesses cannot remain competitive if they are unable to hire the best students graduating from US universities, including foreign students in F-1 status. U.S. universities will get hurt if they cannot attract the best students in the world who also pay full tuition fees. The U.S. loses out as a nation if it cannot compete with other countries for the best and brightest. The only way out of this downward spiral is for this administration to come to its senses and provide much needed oxygen to the H-1B program it has cruelly strangled by restoring premium processing and adjudicating bona fide H-1B petitions more sensibly so that they get approved rather than denied.