

Summary of CIS H-1B Cap Gap Notice

By Stephen Yale-Loehr and the AILA Business Visa Committee

The U.S. Citizenship and Immigration Services (CIS) published a notice in the Federal Register today (Friday, July 23) that extends the duration of status of F students and J exchange visitor students who have applied for change of status to H-1B but whose status expires before October 1. The notice extends their status if the CIS receives a timely-filed request for change of status to H-1B by next Friday, July 30, with a start date of no later than October 1. For the student to qualify under the terms of the notice, the H-1B petition must have been filed before the nonimmigrant's authorized stay expired.

The notice also applies to F-2 and J-2 dependents. It does not, however, apply to J-1 exchange visitors other than students, as defined in 22 C.F.R. § 62.4(a). Nor does it apply to J-1 students who are subject to the two-year home residence requirement.

The extension allows Fs and Js to legally stay in the United States until October 1, but they cannot work for their H-1B employer before that date unless they have some other sort of work authorization that allows them to do so. If the H-1B petition is still pending as of October 1, they will no longer be in valid nonimmigrant status, but they will not be accumulating unlawful presence. If the CIS denies the H-1B petition after October 1, two things may happen. If the student still has time remaining on his or her 60-day (F-1) or 30-day (J-1) grace period, they can complete that grace period. If, however, their grace period has already expired when the CIS denies the H-1B petition, the F or J student's status will terminate as of the date of the denial and they will be expected to leave the country immediately.

The notice does not address what the CIS will do about change of status requests that have already been denied. AILA is seeking further guidance from the CIS on that point.

The notice is fairly limited. For example, the H-1B petition must be received by the CIS (not filed) by July 30. Since it can take a CIS service center several days to receipt in a case, this means that there is only a short window of time to file an H-1B petition if one has not been filed already. For that reason the notice really only benefits H-1B petitions that have already been filed and are currently pending.

Practice tip: If your client plans to file an H-1B petition to take advantage of this notice, file it immediately, and by premium processing or e-filing, to increase the chances that the case will be received by July 30.

Note also the notice only benefits J students, not other categories of Js such as professors and research scholars. It is unclear why the notice excludes Js other than students.

Note also the cut-off date of July 30, 60 days before October 1. F-1 students already have a grace period of 60 days after their practical training expires before they have to leave the United States. 8 C.F.R. § 214.2(f)(5)(iv). Therefore, if an F-1 student's practical training is due to expire August 1 or later, there is no need for them to use the new notice; they will continue to maintain status

until October 1 anyway (unless they work during the grace period or do something else that makes them deportable). The July 30 cut-off date in the notice does benefit J-1 students, since they normally only have a 30-day grace period after their status expires in which to leave the United States. 8 C.F.R. § 214.2(j)(1)(ii).

The notice does not define what constitutes a "timely filed" change of status request. Must the change of status request be filed before a student's optional practical training or academic training expires? Or will the change of status request still be timely if it is filed during the student's 30- or 60-day grace period? Practical experience suggests that most CIS service centers will accept and approve change of status requests filed during a student's grace period. But there is no definitive CIS answer on this issue.

Practice tip: If an H-1B petition is pending for an F or J student that requests consular notification, consider sending a letter to the CIS service center or refiling the petition requesting a change of status instead. This can only be done if the F or J student is still in the United States and still in status.

The notice also states that F and J students and their family members may not travel pursuant to the notice. If they do, they will have to consular process to return to the United States. That will affect students who had planned to travel home after their status expired, receive an H-1B visa, and return to the United States just before October 1 to start work for their H-1B employer.

Overall, the extension benefits F and J students whose status would normally expire before October 1, who have an employer willing to sponsor them for H-1B, and who can get that petition filed (and received!) before July 30. The extension does not help Fs and Js who are still looking for an H-1B job.

(revised July 23, 2004)