

“Cap Gap” Notice Issued for Certain F/J Nonimmigrants

July 23, 2004

The Department of Homeland Security published what has become to be known as the “Cap Gap” notice in the July 23, 2004 edition of the Federal Register.

SUMMARY

The essence of this Notice is that F-1 and J-1 nonimmigrant students, together with their dependent family members, will be granted an extension of stay of their F-1/J-1 nonimmigrant status, provided that an H-1B petition requesting a Change of Status for October 1, 2004 or earlier is filed prior to their current F-1/J-1 expiration of stay, but in no event can that filing date be later than July 30, 2004.

DETAIL

According to the Notice entitled “Supplemental Information Regarding the H-1B Numerical Limitation for Fiscal Year 2004 Affecting F and J Nonimmigrants”, and published in the Federal Register, Vol. 69, No. 141, Pg. 44044, The Department of Homeland Security has authorized an extension of status for F-1 and J-1 students who meet certain conditions.

This Notice and authorization for an extension of status for certain F-1/J-1 nonimmigrants is made in response to the reaching of the annual H-1B numerical limitation of 65,000 visas earlier this year. This numerical limitation is commonly referred to as the “H-1B Cap”. Because the H-1B Cap was reached so early this year, it effectively prevented F-1 and J-1 students from graduating in spring of 2004 and then being sponsored for an H-1B nonimmigrant employment visa. As a result, the Secretary of Homeland Security has authorized an extension of stay to these F-1 and J-1 students under certain very specific conditions.

Perhaps the most important condition listed in this Notice is that it affects only students. All F-1 nonimmigrants are students, but not all J-1 nonimmigrants are students. The J-1 nonimmigrant classification includes many different subcategories, such as teachers, au pairs, camp counselors, professors, etc. This Notice, however, limits the benefit of an automatic extension of F-1/J-1 status to students only.

The second significant condition is that an F-1/J-1 nonimmigrant must be the beneficiary of an H-1B Change of Status petition filed on their behalf in a “timely” manner. The word “timely” means that the H-1B Change of Status petition must have been filed prior to the expiration of the F-1/J-1 student’s normal expiration of status.

The final conditions relating to this Notice are that, in addition to the requirement that the H-1B Change of Status petition be “timely” filed, the H-1B Change of Status petition must be filed no later than July 30, 2004 and specify an H-1B start date that is no later than October 1, 2004.

If all of the above-listed conditions are met, then the F-1 student and his/her F-2 dependent family members, and the J-1 student and his/her J-2 dependent family members, will continue to maintain respective F/J nonimmigrant status until October 1, 2004. If the H-1B Change of Status petition is not adjudicated by October 1, 2004, then F/J nonimmigrants benefiting from this Notice will be considered to be in a period of stay authorized by the Attorney General until the H-1B Change of Status petition is either approved or denied.

Click [HERE](#) to view the actual Notice that was published in the Federal Register.