

CLIENT UPDATE

DHS MAKES IMPORTANT CHANGES TO POST-GRADUATION WORK AUTHORIZATION FOR INTERNATIONAL STUDENTS

April 7, 2008

On April 6, 2008, Immigration and Customs Enforcement published an interim final rule extending the period of Optional Practical Training (OPT) from 12 to 29 months for certain F-1 non-immigrant students, and providing “cap gap” relief for other F-1 non-immigrants. The regulation contains important changes to practical training for all F-1 students who have H-1B petitions filed on their behalf, as well as a new, 29-month period of practical training available to F-1 students with a degree in designated science, technology, engineering, or mathematics fields who are employed by businesses enrolled in the E-Verify program. The rule also imposes new reporting and employment requirements for maintenance of status by F-1 students during the period of Optional Practical Training.

How Does This Rule Help All Students Selected in the “H-1B Lottery”?

The first change made by the rule is protection for all F-1 students granted optional training last year, if they are the beneficiary of an H-1B petition selected in this year’s H-1B “lottery.” This new regulation is meant to prevent what is known as the “cap gap”: the lapse in work authorization and, eventually, lawful status caused when a student’s grant of Optional Practical Training ends prior to October 1 of the following fiscal year. The “cap gap” means that even F-1s whose petitions are selected for the following year’s H-1Bs may have to stop working, and their employers may have to do without them, for a number of months until the effective date of the H-1B petition (October 1) is reached.

The new rule addresses the “cap gap” by providing that the period of a student’s F-1 status, and the duration of the work authorization granted by OPT, are extended by operation of law. The extension of employment authorization is granted to F-1 students where the following conditions are met:

- The student is the beneficiary of an H-1B petition filed before the end of the student’s lawful F-1 status;
- The H-1B petition requests a change of status with an effective date of October 1 of the following fiscal year;
- The F-1 student has not violated the terms and conditions of that status; and
- The H-1B petition is not rejected, denied or revoked.

Employers should note that this extension is automatic (by operation of regulation) when the conditions are met, so that no new Employment Authorization Document is required for I-9 purposes. Similarly, this extension applies to all F-1s selected to receive an H-1B for the following fiscal year, whether the F-1 works in a science, technology, engineering or mathematics field or not. The extension of status also covers the student’s spouse and children in F-2 status.

For this year's H-1B filings, the new rule was promulgated after the petitions were filed, and no duplicate petitions will be accepted. Therefore, if the H-1B petition only requested consular processing because the employer assumed that the student would not be able to maintain a nonimmigrant status until October 1, the new rule would not appear to apply to that student. Our lawyers will be seeking clarification as to whether other options may be available to gain the benefit of this new rule, including the possibility of filing an amended H-1B petition, prior to October 1, to seek a change of status for those H-1B petitions selected to be processed under the H-1B caps. Further Alerts will be issued when more information becomes available to us.

How Does This Rule Change OPT Requirements For All Students?

The second significant change made by the rule is to establish, for the first time, a requirement that foreign students maintain employment as a condition of maintaining F-1 status during the period of Optional Practical Training. Previously, the regulations had not explicitly required students to maintain employment during the period of OPT as a condition of maintaining F-1 status. The new rule provides a limited period of unemployment that will not violate the student's status, but also provides that failure to maintain employment for longer than provided in the rule is considered a violation of status. The rule also imposes a new reporting requirement on students and their schools, requiring students to report their employer and employment status to their schools during the OPT period, and requiring schools to maintain their students' SEVIS records and update ICE regarding their students through the SEVIS system.

The new rule provides that a student may not aggregate more than 90 days of unemployment during the initial 12-month period of OPT. If the student is eligible for the new OPT extension, the student may not aggregate more than 120 days of unemployment during the whole 29-month period of OPT. Because the new rule looks at unemployment in the aggregate, a student with any period of unemployment will need to be careful to avoid a future period of unemployment that would cause his or her total unemployment to exceed 90 (or 120) days.

The new rule also provides enhanced reporting requirements for all F-1 students in OPT status. All students must report any change of address to their DSO, and any interruption in their employment. A student granted a 17-month extension, described below, must also report any change in employer or in the employer's address, and must make a "validation report" every six months to his or her DSO regarding his or her current employment status.

Finally, the new rule changes the period within which a student may apply for OPT, returning to the pre-SEVIS rule that a student may apply for OPT within 90 days before completion of their course of study, or within 60 days after completion of studies.

How Does This Rule Help Students With Degrees in Science, Technology, Engineering and Mathematics And Their Employers?

One of the major policy issues presented by the H-1B cap is the unavailability of visas for individuals who graduate from US schools with degrees in Science, Technology, Engineering and Mathematics ("STEM") fields. These individuals are forced by the cap to seek employment in other countries rather than benefiting US companies. The new rule provides for a new extension of OPT for an additional 17 months for F-1 students in these fields, so long as their employer signs up for an electronic employment eligibility verification system known as "e-Verify." The new rule is meant to help close the gap for those students, and give them at least two chances to be selected in the H-1B cap "lottery" during their OPT period.

In order to be eligible for a 17-month extension of OPT, the following conditions must be met:

- The student must be participating in a 12-month period of approved post-completion OPT at the time the extension is requested;
- The student must have successfully completed a degree in science, technology, engineering, or mathematics (STEM) included in the DHS STEM Designated Degree Program List from a college or university certified by the U.S. Immigration and Customs Enforcement's Student and Exchange Visitor Program (note that as of the time of this Update, that list had not yet been published, but will be available at <http://www.ice.gov/sevis>);
- The student must be working for a U.S. employer in a job directly related to the student's major area of study;
- The student's employer must agree to report the termination or departure of the F-1 student to the student's DSO;
- The student must be working for, or have accepted an offer of employment with, an employer enrolled in U.S. Citizenship and Immigration Services' E-Verify program; and
- The student must maintain F-1 status.

Procedurally, the students eligible for this extension will need to contact their schools for an updated I-20, report their employment status, and then send an updated I-20 to USCIS with an I-765 Application for Employment Authorization and the applicable fee. Unlike most applicants for an extension of employment authorization, the new rule provides that the student's employment authorization is extended by regulation during the time that the request for a STEM extension of OPT is pending.

Students otherwise eligible for this extension should be aware that the deciding whether or not to participate in e-Verify is a significant decision for employers, who may opt not to assume the obligations of e-Verify (since they cover the whole workforce, not just the students in OPT status).

What Must Employers Do To Take Advantage of the STEM Extension of OPT?

Because so few employers participate in the USCIS's voluntary "e-Verify" program, the new rule conditions the availability of OPT extension on the employer's willingness to participate in the E-Verify program for all of its employees. E-Verify is a voluntary program under which employers commit to use an electronic database to check whether the name and social security number presented by new hires match the records in the Social Security database, and whether any immigration documents presented by the employee match information contained in the Department of Homeland Security's database.

Deciding whether or not to participate in e-Verify, particularly for an employer who hires any significant number of employees, is complicated. The system provides certain advantages, but requires a significant investment in training of human resources staff and may expose the company to increased risk of discrimination charges or government audits if not implemented correctly. Further information on participation in e-Verify is available for employers from the Firm's attorneys.