

## **FOREIGN STUDENTS GRANTED EXTENDED WORK BENEFITS TO LIMIT IMPACT OF CONGRESSIONAL INACTION ON HIGH-SKILL VISAS**

On April 6, 2008, Immigration and Customs Enforcement (“ICE”), a component of the Department of Homeland Security, published an interim final rule extending benefiting foreign students educated in the sciences, engineering and mathematics at American colleges and universities. The rule also benefits US employers seeking to employ these students in the United States, rather than hiring them in their operations abroad, or losing them to competitors overseas.

International education is the country’s fifth-largest export of services, adding approximately \$14.5 billion to the US economy last year, according to a study by the Institute for International Education. IIE also reports that foreign students make up about 50 percent the graduate school admissions in many science and technology fields. To retain the benefit of these highly talented individuals for the US economy, current visa regulations allow a foreign student in F-1 status to obtain up to 12 months of work authorization, called Optional Practical Training (OPT), after completion of their degree to work in the US. If a US employer chooses to sponsor them for an H-1B visa or permanent residence, they can remain after the end of OPT, provided their employer can show that their skills are in short supply and their wages are competitive with US workers.

For several years, the number of new H-1B nonimmigrant petitions that can be issued under quotas Congress set in 1990 has been exceeded the first day such petitions can be filed (April 1 of each year). Both last year and this year, more than twice as many petitions were filed as the approximately 80,000 petitions available. That limit is even exceeded for the “supplemental cap” of 20,000 H-1Bs limited to new employees who have earned a Master’s or higher degree from a U.S. college or university. Because of this limit and the random selection process used to determine which petitions filed at the beginning of the fiscal year will be processed further, employers refer to the “H-1B lottery,” which limits their ability to plan for hiring in the United States.

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 automatically if the student is the beneficiary of an H-1B petition filed for a student in lawful while in lawful F-1 status and the H-1B petition is selected in lottery and eventually approved.

Employers and their counsel 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, if they hold F-2 (dependent of F-1) status.

The second major change included in this rule addresses one of the major policy issues presented by the H-1B cap. The cap results in 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, and some US companies (with Microsoft noisily leading the way) have expanded their facilities overseas rather than increasing employment in the US because of visa restrictions. The new rule seeks to ameliorate the H-1B cap as applied to employers of STEM graduates, providing for a new extension of OPT for an additional 17 months for F-1 students in these fields. The carrot comes with a large stick, however: interested employers must sign 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;
- 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.

Students and employers 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).

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. The pros and cons of registering for e-Verify will be addressed in a future column.

The new rule also makes other significant changes with respect to maintenance of status by foreign students during their time on OPT. The rule establishes, 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, so that students could be unemployed between jobs or be in unpaid internships without violating their student status. The new rule provides that 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.

The ultimate solution to the problem of so many highly-educated workers being sent overseas by visa restrictions lies with Congress, which tried to address these limits in the context of Comprehensive Immigration Reform last year. With the failure of the CIR formula (seeking to address skilled immigration, family reunification, border security and registration of the undocumented in a single package), it remains to be seen if Congress will address the problem piecemeal or will let the problem languish longer, while employers continue to build facilities abroad at which their skilled workforces can innovate.