

Business Immigration Weekly for October 23, 2015

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Practices: Immigration

The Department of Homeland Security (DHS) has released the text of its proposed law for a new STEM post-graduation Optional Practical Training (OPT) program. The DHS will allow the public to provide comments until November 18, 2015. Afterward, it is expected that the DHS will issue the final text of the law before the current rule is vacated on February 12, 2016. This article will provide the background and a summary of the new law.

HISTORY

In August 2015, the U.S. District Court for the DC District vacated the rule that allowed STEM students in F-1 status to extend their OPT employment authorization for 17 months. To avoid hardship to thousands of foreign students currently present and working pursuant to this rule, the District Court postponed the invalidation of the rule for six months, until February 12, 2016. According to the District Court, when issuing the rule in 2008 the US Department of Homeland Security (DHS) did not comply with the normal rulemaking process requiring the agency to issue a notice and allow for public comment.

The DHS issued the original 2008 rule pursuant to emergency rulemaking provisions that allow an agency to put into effect rules for good cause without public notice and comment. Unless the rule was issued, the DHS argued, thousands of foreign students who were unable to secure an H-1B work visa would have to leave the United States. The majority of foreign students will only qualify for the H-1B work visa, which is subject to an annual quota that is generally met the first week it opens. Due to this oversubscription, many foreign students were not able to secure an H-1B visa before their one-year period of OPT work authorization expired. The DHS argued that the rule was necessary to allow these foreign students multiple opportunities to secure an H-1B work visa.

SUMMARY OF PROPOSED REGULATION

The proposed regulation offers a combination of benefits and burdens to school Designated School Officials (DSO), students and employers. The most significant aspect of the new program is the increase of the total period of employment authorization from 17 months to 24 months. In addition to providing a new STEM OPT program, the DHS also included a formal rule on Cap Gap relief which had not been previously subjected to the normal rulemaking process. There are no changes in the Cap Gap provisions from the rule that is currently in effect. Below is a summary of the regulation's major provisions as they relate to the STEM OPT extension:

REQUIREMENTS CARRIED OVER FROM PRIOR RULE

- Employers must enroll and utilize E-Verify

- If employment authorization application is properly filed and remains unadjudicated, student's employment authorization is extended for 180 days
- Employer and student reporting obligations continue to apply

MENTORING & TRAINING PROGRAM

- Student and Employer will have to prepare a formalized Mentoring & Training Plan (MTP)
- MTP must be submitted to DSO before DSO can recommend the OPT extension
- MTP will outline the goals of the training program and how the student and employer hope to achieve those goals
- At some point in the future, DSOs will be able to submit MTPs to SEVIS, but for now the DHS may require the student to submit the MTP to Immigration Customs Enforcement (ICE) or US Citizenship and Immigration Services (USCIS)
- This MTP requirement may jeopardize the ability of temporary employment agencies to hire STEM OPT students if, at the time of hire, the agency hasn't identified a specific employment opportunity for the student
- When the student changes employers after the initial grant of the 24-month STEM OPT extension, within 10 days of the start of the new employment, the student must submit a new MTP to the DSO and obtain the DSO recommendation for the new employment

EVALUATION

- The student must prepare an evaluation every six months as well as a final evaluation before the end of the OPT period
- Employer must develop evaluation procedures to document the student's progress toward meeting the goals outlined in the MTP

PRIOR STEM DEGREES

- Previously earned STEM degrees may serve as a basis for 24-month STEM OPT extension
- STEM degree must have been earned at an institution accredited by an agency recognized by the Department of Education
- The STEM OPT employment must be directly related to the STEM degree
- If current OPT period is not based on a STEM degree, the STEM degree that will serve as the basis for the 24-month STEM OPT must have been conferred within 10 years before the date indicated on the employment authorization application
- A second 24-month STEM OPT extension must be based on a degree that is at a higher level than the degree that formed the basis for the first 24-month STEM OPT extension
- Student cannot complete two consecutive STEM OPT extensions, i.e., students cannot apply for a 24-month STEM OPT extension based on a previously earned degree immediately after a 24-month STEM OPT extension

EMPLOYER ATTESTATIONS & OBLIGATIONS

- Employer must attest in the MTP that the employment terms and conditions it offers the student, including duties, hours and compensation, are commensurate to those it offers similarly situated US workers (when employer has less than two similarly situated US workers, it will have to compare the terms and conditions to those of similarly situated US workers in the area of employment)
- Employer has enough resources and trained personnel to provide the student with mentoring and training
- Hiring of the student will not cause the employer to fire, lay off or furlough US workers (including full/part-time, temporary/permanent)
- The work the student will be performing will assist him/her in achieving the MTP objectives and goals
- DHS has the discretion to conduct site visits
- Employers must have a Federal Employer Identification Number (FEIN)

ADDITIONAL CHANGES

- Degree which serves as the basis for the STEM OPT extension must be accredited by an agency recognized by the Department of Education
- Students must file employment authorization application within 60 days of DSO entering STEP OPT recommendation in SEVIS (up from 30 days)
- Students are permitted an aggregate period of unemployment of 150 days (90 days during initial OPT and additional 60 days for 24-month STEM OPT extension)
- Students are limited to two lifetime 24-month STEM OPT extensions