

PUBLICATION

New Optional Practical Training Rules for Students Announced

Authors: Robert C. Divine

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F-1 Foreign students with a U.S. degree in science, technology, engineering or math (STEM) may now extend optional practical training (OPT) for 17 months of STEM work if the employer participates in E-Verify. New rules protect all F-1 students from the "cap gap" while they wait on an H-1B petition adjudication and its October 1 effective date.

17 month OPT extension for STEM work

The Department of Homeland Security (DHS) announced today that it will publish an interim final rule which permits, upon application and approval, a 17-month extension to the period of F-1 optional practical training (OPT) for qualifying students from the current 12-month authorization to a total of 29 months under certain conditions:

- The student applicant must be currently participating in a 12 month period of post-completion OPT as indicated on his/her I-20 documentation.
- The student applicant must have successfully completed at a U.S. institution a bachelor's, masters or Ph.D degree in one of the following fields, which are detailed at ICE's web site at www.ice.gov/sevis/stemlist.htm:
 - Actuarial Science
 - Computer Science (except Data Entry Microcomputer Applications)
 - Engineering
 - Engineering Technologies
 - Biological and Biomedical Sciences
 - Mathematics and Statistics
 - Military Technologies
 - Physical Sciences
 - Science Technologies
 - Medical Scientist (MS, PhD)
- The student applicant must be working for a U.S. employer in a position directly related to his/her STEM major area of study. Further clarification is needed concerning whether the student can work in a different STEM field than his latest field of study. Many employers will be disappointed in not being able to use STEM students in less directly related work that seems equally important.
- The designated employer must be currently enrolled in DHS's E-Verify electronic employment verification program, and the student must provide the employer E-verify registration number in the application for the extension. The rule does not specify what part of the employer must be participating in E-Verify. One might presume that the component where the student will work must be participating, even if other parts of the institution are not participating, but apparently USCIS will only request and confirm that the employing company has a SEVIS registration number at all for any location. This requirement is part of the Administration's and many states' continuing effort to pressure employers into this "voluntary" program.
- The student applicant must be properly maintaining F-1 student status and must report to the school any changes of his or her name, residence or mailing address, and employer's name or address

during the extended OPT, so that the school can enter this information into SEVIS. This requirement appears to apply to any OPT situation, by the way.

- The employer must agree to report to the school within 48 hours if the student leaves the employer during the extended OPT status. DHS may announce in the future a way to report the termination directly to DHS. This requirement does not clearly apply to an employer subsequent to the one whose SEVIS number is reflected in the I-765 application, and we might expect further guidance from DHS.
- The school designated student officer (DSO) must make a recommendation in the SEVIS system confirming the student's STEM field degree and that the student understands the requirements. The SEVIS system has been updated to collect this information. Interestingly, SEVIS does not collect the employer's E-Verify number, which is provided only on the Form I-765 relating to the OPT student's initial employer under the 17 month extension. Schools and employers are establishing various ad hoc policies to ensure that the I-765, officially filed by the employer, contains accurate representations about their respective assertions to USCIS. Some employers are concerned about their E-Verify registration number(s) becoming publicly disseminated and misused.

The Form I-765 has been amended to allow certification of the student's STEM field of study, employer for STEM work, and employer's E-Verify number. While an application to USCIS for extended OPT status is pending for up to 180 days the student may work.

OPT Timing and Cap Gap Protection for ALL F-1 Students

In addition, the rule provides that *all* F-1 students (not just in STEM fields):

- May apply for OPT as late as 60 days after graduation (for work to start no later than 60 days after graduation).
- Will enjoy automatic extension of OPT that otherwise expires while an H-1B petition requesting change of status is pending (i.e., be protected from the "cap gap"). The interim authorization ends upon rejection (including rejection for lack of a visa number) or denial of an H-1B petition.
- Fall out of F-1 OPT if they are unemployed 90 days during a 12 month OPT period or 120 days during 17 a month OPT extension. It is unclear whether time waiting for initial OPT approval (following 60 days after graduation, since now students may file OPT applications later than they could before) counts against this 90 day limitation.

The "cap gap" previously prevented continuous status for students with OPT ending earlier than August 2 who were the beneficiaries of cap-subject petitions to take effect on October 1. Now the prospective H-1B employer of a student who has OPT ending as early as February 1 can request the procedural benefit of change of status, rather than "consular notification" involving departure from the U.S. and return in late September. Moreover, the student can continue to work while waiting on the H-1B petition processing.

The limitation on unemployment of OPT students corresponds to a new SEVIS requirement, effective May 15, 2008, that school officials track OPT students' address and employment changes in the SEVIS system. For the moment, for students outside of the STEM extension context (in which the employer now has a reporting obligation to the school, mentioned above), the school and student have an obligation to remain in contact about employment. We can expect future regulation imposing new obligations on all OPT employers. It is also unclear whether and how such new reporting obligations will lead to closer monitoring of a reasonable connection between a non-STEM student's field of study and type of OPT work, which heretofore has been unregulated as a practical matter.

At the time petitions were filed on April 1, before the regulation was announced, there was no reason to expect that the students would have any "bridge" to October 1, the earliest date a cap-subject H-1B petition could take effect. Thus, petitions for students facing cap gap requested consular notification as the procedural benefit—

the only one available. USCIS had expected the rule to be published before the April 1 date for filing this year's petitions, so the rule did not address the issue. USCIS has now clarified that petitioners with a receipt notice for an H-1B petition may send USCIS an email updating the procedural request to change of status, implicating the cap gap protection.

DHS has indicated that the Administration is attempting to help increase our country's competitive edge by extending the OPT time for students who have those degrees in highest demand by employers. A longer, more flexible period of practical training will provide these students with "two bites at the H-1B apple" and will facilitate "cap gap" coverage through October 1st, the beginning of the new H-1B allotment period each year.

How We Can Help

We assist institutions and employers to seek USCIS or State Department designations of students or exchange programs, to establish systems for compliance with complex government rules for such programs, to help students of exchange visitors know and comply with their rules and obtain work authorization and other benefits that may be available, and to work through the complex individualized problems that inevitably arise. We assist business, institutions, family and friends in clarifying arrangements for visitors' activities and financial support in order to obtain visas and entry.

We help individuals document and clarify their nonimmigrant intent, financial support, and planned activities in making visa applications, seeking entry, and applying for change of status. We help students and exchange visitors and/or their family members to obtain and maintain work authorization where available. We provide advice about allowable activities and periods of stay, and we evaluate and pursue changes to other classifications, such as H-1B, and to permanent residence for those who wish to expand their range of activities and duration of stay.