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Immigration Update: Extensions for Form I-9 and H-2B Emergency Processing; STEM OPT Rules Pack In more than Just 7 More Months; Shedding Light on the "Same or Similar" Analysis

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April 14, 2016

Tracking newsworthy developments in the ever-changing world of business immigration and its impact on employers and employees.

This month: Extensions for Form I-9 and H-2B emergency processing; STEM OPT Rules pack in more than just 7 more months; Shedding light on the "Same or Similar" analysis.

I-9 Like Your Cereal: Valid Past Expiration, For Now

Clients might worry that they have missed something when they see that the OMB expiration date of March 31 has come and gone. But just like some items in your refrigerator or pantry, the Form I-9 for verification of identity and authorization of every new hire is actually OK to use past the printed expiration date, for now. USCIS had planned to replace it with a new form by now, but their new complicated form has gotten tied up in a prolonged notice and comment process and is not ready for consumption. So U.S. employers should keep using the facially "expired" I-9 form from www.uscis.gov/I-9 until further notice from USCIS and us.

Emergency H-2B Processing Available For Another Month

The Department of Labor (DOL) has announced that it will continue to accept emergency requests until midnight on April 29, 2016 for H-2B applications filed on or between April 2 and April 29, 2016. This extension is due to continued delays in processing H-2B applications. For full background on the H-2B delays, please see our March 2016 alert.

New STEM OPT Rules: More than Just an Extra Seven Months of Work Authorization

On March 11, 2016, the U.S. Department of Homeland Security (DHS) published its final rule on enhancements to the Optional Practical Training (OPT) program for F-1 international students in science, technology, engineering and mathematics (STEM) fields. This final rule takes effect on May 10, 2016, and extends the STEM OPT validity from 17 months to 24 months. The additional seven months of employment authorization (allowing at least two more chances for H-1B cap filing success) is a welcome change for foreign students and their employers, but this extension comes with increased reporting, training and monitoring obligations for the employer and student. Employers hiring STEM OPT workers should carefully review the links below, especially the Form I-983 instructions, to make sure any employment arrangements comply with the new requirements.

STEM OPT is an additional period of temporary training/work authorization that is available to eligible F-1 students following their initial period of regular, post-completion OPT (typically for 12 months). To qualify for this extended (now 24 month) period of OPT, a student must:

- Have a degree in an eligible STEM field from a school that, at the time of filing the STEM OPT extension application, is accredited by the U.S. Department of Education (DOE) and is certified for I-

20 issuance by the Student and Exchange Visitor Program of U.S. Customs and Immigration Enforcement (SEVP).

- Pursue his or her STEM OPT extension through an employer that:
  - offers training in a field matching the student's qualifying field of study;
  - pays wages similar to those of U.S. workers;
  - will not replace any U.S. workers, even part-time, with the STEM OPT trainee;
  - is enrolled in USCIS's E-Verify employment eligibility verification program; and
  - agrees to provide the student with formal training and learning objectives and periodic assessments using Form I-983 (similar to the DS-7002 for J-1 trainees and interns), which must be provided to the school official along with any changes or termination.
- Work a minimum of 20 hours per week per employer.

The rule takes effect on May 10, 2016 and includes transitional provisions. Students with 17-month STEM OPT applications pending with USCIS on May 10, 2016, will receive from USCIS a Request For Evidence (RFE) to allow them to upgrade the application under the new rules and receive 24 months instead of 17 months of STEM OPT. Students with approved EADs with at least 150 calendar days of expiration of an existing 17-month OPT period may request a seven-month extension by filing a new STEM OPT application following the new rules. If less than 150 days remain on the original EAD, no extension will be allowed.

In a change from the past, if the student's STEM degree was not the most recent degree, OPT may still be available, but the school of most recent graduation must monitor and coordinate the STEM OPT, and both the school that issued the STEM degree (within 10 years of STEM OPT application) and most recent school must be DOE-accredited and SEVP certified at the time of filing the STEM OPT extension application. A student who obtains a second U.S. STEM degree can receive a second period of STEM OPT authorization.

Students, employers and school officials will need to actively monitor and cooperate in the various requirements and deadlines that STEM OPT now imposes. USCIS may conduct site visits to confirm the training is as represented, and employers can expect other workers to be aware and watching (and maybe reporting).

The rule newly allows automatic 180-day extension of employment authorization for students who timely filed the STEM OPT application, but it eliminates a rule that technically required USCIS to issue an "interim EAD" for a first-time EAD application that USCIS does not adjudicate timely.

The longer period of STEM OPT will allow some former students another chance to be sponsored for "capped" H-1B employment under the lottery for limited slots that occurs every April.

For further details on the new STEM OPT rule and related resources, go here.

For the Form I-983 overview and instructions click here.

USCIS Guidance on "Same or Similar" Occupations

USCIS has issued a new policy memorandum (PM) outlining relevant considerations in assessing whether a position qualifies as a "same or similar" occupation to the foreign national's previously approved job for purposes of portability. Section 204(j) of the Immigration and Nationality Act (INA) was created as part of the American Competitiveness in the Twenty-First Century Act of 2000 and permits applicants for adjustment of status to that of lawful permanent resident who are beneficiaries of approved Form I-140 petitions to change jobs or employers without re-testing the labor market or obtaining new approved petitions under certain

circumstances. This PM has been made part of the Adjudicator's Field Manual and will be used by USCIS officers in making 204(j) determinations for petitions pending or filed on or after March 21, 2016.

Section 204(j) provides that an approved I-140 petition for certain classifications remains valid for adjustment of status purposes even when an applicant changes jobs or employers if (1) an applicant's application for adjustment of status (Form I-485) has been filed and remains unadjudicated for at least 180 days and (2) the new job is in the same or similar occupational classification as the job for which the petition was filed. The PM discusses the use of the Department of Labor's Standard Occupational Classification (SOC) codes (breaking down the significance of each digit/group of digits in the code), including matching detailed occupational codes and analyzing differences in occupational codes within the same broad occupation. For I-140 applications that were not based on a previously approved labor certification, the applicant must establish the SOC code for both the original position and the new position, with supporting evidence from the intending employer to support the selected code. The PM discusses flexible analytical approaches to career progression and wage differentials between the originally sponsored position and the new position.

Ultimately, it is the applicant's burden to establish by a preponderance of the evidence that the new position is the same or similar to the previously approved occupation. The reviewing officer will look at all relevant evidence, to include the job duties of the respective jobs, skills, experience, education, licenses or certifications required for both positions, the wages offered, and any other material and credible evidence provided. The PM is aimed at providing foreign workers and their employers increased flexibility and stability as they pursue permanent residence, but applicability of section 204(j) still requires careful analysis. Employers should proceed with caution and consult immigration counsel before shifting a previously approved employee into a new role.