THE IMMIGRATION GROUP, P.C.

Kenner Avenue, Suite 202

Nashville, TN 37205

Tel 615-340-5000 Fax 615-216-104 2118

How Does the New OPT STEM Extension Rule Affect Our Company's Talent Acquisition Program?

The new USCIS rule on Optional Practical Training ("OPT") takes effect on May 10. It provides a longer extension of employment authorization for STEM graduates and enables more F-1 students to qualify as STEM graduates. However, employers face increased obligations under the new rule, including preparation of a detailed training plan, compliance with more extensive reporting requirements, and potential worksite inspections.

What is OPT and How Does It Work?

Under existing law, any foreign national student in the United States on an F-1 student visa may obtain permission to work for 12 months before or after graduation in a position that directly relates to their field of study. This permission, known as Optional Practical Training ("OPT"), must be granted by the student's Designated School Official ("DSO"). The student must then apply to the USCIS for an Employment Authorization Document ("EAD").

This OPT cannot be extended unless it is a STEM extension, meaning that (1) the student's degree is on the USCIS list of STEM degrees (Science, Technology, Engineering, or Mathematics); (2) the employer is an E-Verify employer; and (3) the employment is directly related to the student's most recently obtained STEM degree. The extension is valid for 17 months, giving the student a total of 29 months of employment authorization. Those who have completed their OPT and are in the 60-day grace period applicable to F-1 students are not eligible for a STEM extension.

The New Rule

The new rule provides for a 24-month STEM extension (rather than 17 months). This in effect provides F-1 STEM students with a total of 36 months of work authorization. The new rule also broadens the fields that qualify as STEM. In addition, F-1 students with a previously obtained STEM degree, followed by a non-STEM degree, can qualify under the new rule for the STEM extension so long as the prior degree is directly related to the employment. For example, an individual who obtains a bachelor's degree in engineering, followed by an MBA degree, can obtain a STEM extension if the OPT job directly relates to the engineering degree.

"Cap gap" protection is preserved under the new rule for an F-1 student beneficiary of an H-1B cap petition that (1) requests a change of status to H-1B and (2) was filed while the OPT was valid. This cap gap protection provides an automatic extension of F-1 status and work authorization from the expiration date of the EAD through October 1, when the change of status to H-1B takes effect. (Of course, a student in valid F-1 status without OPT, or with an expired OPT when the H-1B cap petition was filed, receives only an F-1 extension of stay and not an extension of work authorization.) The new rule also confirms that an F-1 student protected by the cap gap may change employers.

An application for a STEM extension can be filed only after the employer and the F-1 student have submitted a signed, formal training plan to the DSO on new Form I-983. The plan must (1) state the specific goals for the STEM OPT period and explain how they will be achieved; (2) detail the specific knowledge, skills, or techniques that the employer will impart to the student; (3) explain how the training is directly related to the STEM degree; and (4) describe how the student will be supervised and evaluated. In the training plan, an employer must certify that: (1) the terms and conditions of the employment, including compensation, are commensurate with those applicable to similarly situated U.S. workers; (2) the student will not "replace" a full-time or part-time temporary or permanent U.S. worker; (3) the employer has sufficient resources and personnel to train the student; and (4) the training is directly related to the STEM degree and will achieve plan objectives. Compensation information must be shown in the plan. These additional employer burdens apply only to STEM extensions and not to the initial 12-month OPT program.

The employer and the F-1 student must complete a written performance evaluation after the first 12 months of OPT and again at the conclusion of the STEM extension program. The student must submit the evaluation to the DSO within ten days after the conclusion of the review period. The employer must notify the DSO within five business days if the F-1 student is terminated or departs the STEM OPT job.

All F-1 students on STEM OPT must report to the DSO (1) within 10 days after starting a new job; (2) within 10 days of a change in their legal name, residence address or mailing address, employer's name or address, or loss of employment; (3) any material changes to the training plan "at the earliest available opportunity"; and (4) every six months to confirm the accuracy of the information in item 2 above. If there is a job change, the student must submit a new training plan to the DSO, who will make a new recommendation for STEM OPT.

Transition to the New Rule

USCIS will begin accepting applications for STEM extensions under the new rule on May 10, 2016. Before an application can be filed, the employer and student must submit the training plan to the DSO, who will recommend the extension by endorsing Form I-20. The student must then file Form I-765 with the USCIS to request the extension. The Form I-765 must be filed during the validity of the initial OPT and within 60 days after the DSO's recommendation. If the initial OPT expires while the I-765 extension is pending, then the student is automatically authorized to continue working for up to 180 days while the application is adjudicated, as under the existing rule.

Until May 10, USCIS will continue to accept STEM extension applications under the existing rule. A STEM extension that is granted before May 10 will be valid for 17 months and is subject to existing program requirements. In contrast, an application that is filed before May 10 but pending on or after that date will be adjudicated under the new rule, with the USCIS issuing a request for a training plan. If approved, the EAD will be issued for 24 months.

F-1 students who hold an unexpired 17-month STEM extension issued before May 10, 2016 can continue to work until their OPT expires. They can file for a 7-month extension between May 10, 2016 and August 8, 2016**,** if (1) they have at least 150 days remaining on their existing OPT when the application is filed and (2) all requirements under the new rule, including an approved training plan, are met. A student whose OPT expires while the extension application is pending receives an automatic extension of work authorization for up to 180 days while the application is adjudicated.

So, Why Would An Employer Accept This Additional Burden?

Answer: In order to position a STEM graduate for a 6-year H-1B work visa as part of its talent acquisition strategy. Most foreign graduates from U.S. universities hold a STEM degree. They are therefore eligible for 12 months of OPT and a 24-month STEM extension, providing work authorization for a cumulative 36 months under the new rule. United States employers use the H-1B visa to employ foreign nationals in engineering, information technology, finance, and other "specialty occupation" fields that require a bachelor's degree or its equivalent for entry-level work.

Due to the visa quota, however, the H-1B visa is unavailable most of the year. The H-1B visa filing window opens on April 1. If petitions exceed the quota during the first five business days of April, then a lottery is held, with a selected petition enabling an H-1B employee to begin work on October 1. Last year, the chance of selection in the H-1B lottery was 36% for a master's degree holder and 31% for a bachelor's degree holder. (An advanced degree holder gets two tries in the lottery as a result of a 2005 amendment addressing the "brain drain" issue. In essence, some effort is being made by the USCIS to retain foreign students who earn advanced degrees in the United States. The new STEM extension rule is consistent with this effort by allowing multiple bites at the apple in successive years. Curiously, advanced degree holders who are not selected in the advanced degree lottery fall in with the bachelor's degree holders for the second drawing, which seems contrary to the goal of retaining talent.)

An H-1B allows a cumulative 6 years of physical presence in the United States and is extendable in certain instances beyond the 6-year limit to permit completion of a green card. For this reason, employers are willing to incur the obligations associated with OPT and the STEM extension.

Here is an example of the strategy at work:

Vinod will obtain a mechanical engineering master's degree from Texas Tech in May of 2016. He applies before graduation and obtains OPT employment authorization to work for Texas Instruments from June 2016 to June 2017. In February 2017, he extends his OPT for 24 months to June 2019 under the new STEM extension rule. The company files an H-1B petition for him in April 2017. If his petition is not selected in the advanced degree lottery or the general lottery, he can continue working while the company files another H-1B petition in April 2018. If his petition is selected in either lottery, he becomes an H-1B on October 1, 2018. If his petition is not selected, the company can file again in April 2019. If his petition is selected in either lottery, then he is protected by the cap gap provision between the time that his OPT expires in June 2019 and his H-1B becomes effective on October 1, 2019. As an H-1B, he then has an aggregate 6 years of employment eligibility in the United States, during which Texas Instruments (or any other company) can sponsor him for a green card and position his case so that he may remain in the U.S. working until the green card is issued, however long that may take.

What Is The Cost of Pursuing This Talent Acquisition Strategy?

For an H-1B visa petition, the USCIS offers "premium processing," which for $1225 provides a decision several weeks earlier than a regular filing. In the lottery context, however, it does not provide any advantage whatsoever with regard to the chance of selection. Instead, it simply provides earlier notice as to whether the petition has been selected. The STEM beneficiary may insist on premium processing in order receive notification at the earliest time possible if the petition has indeed been selected.

Fortunately, if the petition is not selected, the USCIS refunds all of the filing fees, including the premium processing fee, so there is no financial "downside" to filing a lottery petition using premium processing unless the petition is in fact selected. If the petition is selected, then the employer has spent $2325 on regular USCIS filing fees plus $1225 on premium processing for a total of $3550. In addition, legal fees are incurred for preparing and filing the petition, whether it is selected or not. In the example given above involving Vinod, the company is spending $3550 in USCIS filing fees, plus legal fees for filing three H-1B petitions (in 2017, 2018, and 2019).

The beneficiary will also likely press the company to begin the green card process right away, in order to complete that process at the earliest possible time (and possibly to provide a safety net in case the H-1B petition is not selected in any of the lotteries). Often, in an effort to seek the fastest green card possible, the beneficiary will request that the company file for a green card in a category that is reserved for those few individuals at the top of their field. This is an expensive undertaking and, given the small likelihood of success in this category, the employer may decide to seek a green card simultaneously along the more conventional "market test" green card route. In all, a large sum can be spent by an employer seeking to obtain an H-1B in the lottery while accommodating the new hire with one or more green card filings.

Under the "portability" rules, however, the foreign national may change H-1B employers during the 6-year term. As well, they may also be able to use their place in line (established by the employer's filing of the market test green card application) to finish their green card for another employer. Lastly, an individual can be the beneficiary of H-1B petitions by multiple companies at the same time, with the company whose petition is selected being the winner. For these reasons, a company should consider utilizing a reimbursement agreement to recapture the legally recoverable expenses incurred on behalf of an OPT beneficiary who departs to another employer shortly after significant money is spent on an H-1B petition or a green card, or both.