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IMMIGRATION ALERT - Summary Of New 24-Month Stem Opt Regulation

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Practices: Immigration

SUMMARY OF NEW 24-MONTH STEM OPT REGULATION

Below is a summary of the new 24-month STEM OPT regulation that was released last Friday which replaces the 17-month STEM OPT program. The new regulation will be effective as of May 10, 2016.

GENERAL PROVISIONS

- Increases the period of OPT extension from 17 months to 24 months.
- Creation of a formalized Training Plan for STEM OPT Students, Form I-983, (an overview is available here: https://studyinthestates.dhs.gov/students-and-the-form-i-983), that the student and employer must complete.
- The Department of Homeland Security is clarifying that students must have a bona fide employment relationship with the provider of the training. **Therefore, currently acceptable employment arrangements where the student is hired by a staffing company, temp agency, sole proprietorship, multiple employer arrangements, etc. may no longer be acceptable.** The new rule requires that the employer signing the Training Program be the employer actually providing the training.
- STEM OPT extension cannot be based on a degree from an unaccredited school.
- Implementation of site visits (most likely to be conducted by Immigration Customs Enforcement) to employer worksites. Employers will be provided advance notice of 48 hours, unless the site visit is based on a complaint or there is evidence of noncompliance, whereby there will be no advance warning.
- Creation of four significant reporting requirements: 1) validation requirement every six months where student must verify their legal name, address and employer information; 2) annual self-evaluation, where the student provides an update on the training program, which must be signed by the employer; 3) requirement that the student and the employer report any changes in the employment to the Designated School Official (DSO), such as termination; and 4) requirement that the student and employer report any material changes or deviations to the training program to the DSO.
- Definition of which STEM fields qualify for the extension and creation of a public notification process by which the list can be updated. The list will be known as the STEM Designated Degree Program List.
- Changes the unemployment limitations during the practical training period from 90 days during initial OPT period and up to 30 additional days (for a total of 120) for students approved for the 17-month STEM OPT extension, to 90 days during initial OPT period and up to 60 additional days (for a total of 150) for students

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approved for the 24-month STEM OPT extension. Consistent with the current law, the student will receive a new 150 days for each OPT period.

PROVISIONS PRESERVED FROM OLD REGULATION

- Employers must enroll and be in good standing with E-Verify and must report changes in the employment and training to the DSO within 5 business days.
- Students must report to their DSO any changes in name, address, employer's name and address and must periodically review the accuracy of their information.
- Maintenance of Cap-Gap extension whereby a student's employment authorization is extended to September 30th if he/she is the beneficiary of a timely filed H-1B petition requesting a change of status, which remains pending or has been approved.
- If an employment authorization application is properly filed and remains unadjudicated, student's employment authorization is extended for 180 days.

TRAINING PROGRAM FOR STEM OPT STUDENTS, FORM I-983

- Training Program must be submitted to DSO before DSO can recommend the STEM OPT extension.
- Employers are permitted to utilize currently existing training programs to meet some of the regulatory requirements.
- Employers are required to report material changes, including change in employer FEIN, reduction in compensation (not resulting from working less hours) and major decrease in hours worked per week (including less than 20 hours per week, which would violate the STEM OPT eligibility requirements), to the DSO.
- Students changing employers must submit a new Training Program to their DSO within 10 days of the start of the new employment and obtain the DSO's recommendation for the new employment.
- The student and employer must sign an annual evaluation, with one evaluation after the first 12 months and a final evaluation before the end of the STEM OPT period.

PRIOR DEGREES

- Allows students on a 12-month OPT period based on non-STEM degrees to apply for the 24-month STEM OPT extension based on a previously conferred STEM degree. The 24-month STEM OPT training must be related to the original STEM degree. The school from which the prior degree was earned must be accredited and SEVP-certified at the time of the STEM OPT extension application.
- Previously earned STEM degrees may serve as a basis for a 24-month STEM OPT extension, however, the degree must have been earned from an accredited institution. Additionally, the STEM degree must have been conferred within 10 years from the date the DSO recommends the 24-month STEM OPT extension.
- Degrees earned at overseas campuses of U.S. based schools do not qualify.
- Accredited institution is defined as an institution accredited by an accrediting organization recognized by the Department of Education.

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- The STEM OPT employment must be directly related to the STEM degree and the degree must be a bachelor's, master's or doctoral degree.
- Dual degrees do qualify, as long as one of the degrees is in a qualified STEM field.
- 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. The student would have to complete a new course of study and a new 12-month OPT period before qualifying for a new 24-month STEM OPT extension.

Employer Attestations & Obligations

- Imposes significant obligations on employers, including attesting that it: 1) will provide assistance to the student with the creation and maintenance of the Training Program; 2) has adequate resources and personnel to provide training to the student; 3) that the student will not replace a US worker (including full/part-time, temporary/permanent); and 4) that the employment will assist the student further his/her training goals.
- Employer must attest in the Training Program 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).
- The Training Program can be signed by any authorized employee of the employer, a change from the proposed rule where the signatory had to be the student's supervisor.
- An employer will no longer have to provide their E-Verify Company Identification Number (E-Verify ID Number) to the employee, instead, the employer and the student will have to complete the Form I-983.

Additional Changes

- Creation of a new portal in SEVIS in 2017, which will allow students to submit changes to their information directly into SEVIS, as opposed to notifying their DSO to submit the change.
- Prohibition on students working as volunteers.
- Students may not sign their own Training Program, thereby precluding self-employment, which is currently permitted.
- Clarifies that students may qualify for the 24-month STEM OPT extension if they have not completed their thesis requirement, as long as that is the only degree requirement remaining at the time of the extension application. This is not applicable where the thesis was a requirement of a previously earned STEM degree if the student is applying for OPT based on that degree.
- Students must file the employment authorization application within 60 days of the DSO entering the STEM OPT recommendation into SEVIS (increased from 30 days under the current rule).
- Students are limited to two lifetime 24-month STEM OPT extensions.

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Clarification on Cap-Gap Provisions

- A student's cap-gap employment authorization is automatically terminated when an H-1B employer withdraws their petition before approval.
- Students may change employers during the cap-gap period, as long as it meets all other OPT requirements.
- Clarification that cap-gap provisions only apply to H-1B petitions that are subject to the H-1B statutory cap.
- Somewhat indicates that international travel is permitted as long as the H-1B petition has been approved, the student seeks admission before the H-1B employment starts and the student is otherwise admissible. However, the rule indicates that it is up to Customs and Border Protection to determine admissibility. Further, students are reminded that international travel during the processing of a change of status may result in the abandonment of the change of status request.

Transition Procedures

- Students who qualify for the 17-month STEM OPT extension should continue to submit their Form I-765 to the Department of Homeland Security until May 9, 2016. On or around May 10, 2016, the Department of Homeland Security will start issuing Requests for Evidence (RFEs) to students with pending applications. These RFEs will allow students to amend their application to qualify for the 24-month STEM OPT extension, with no additional fee or resubmission of a new Form I-765. These documents will include a Form I-20 Certificate of Eligibility issued by a DSO recommending the 24-month STEM OPT extension. Students are warned against withdrawing 17-month STEM OPT extensions and filing new applications when they are not in a valid OPT period, which may cause them to fall out of status.
- The Department of Homeland Security will start accepting applications for the 24-month STEM OPT program on May 10, 2016.
- Students who are already in a 17-month STEM OPT period, will be allowed to apply for an additional 7 months of OPT by filing a Form I-765 with fee and supporting documents. The application must be filed on or before August 8, 2016 and within 60 days of the date that the DSO recommending the OPT. Additionally, at least 150 calendar days of the 17-month OPT must be remaining at the time the application is submitted. The student must comply with all other 24-month STEM OPT requirements, except, that the 150 days of unemployment will only apply to the student after the 7-month extension has been approved.

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