

USCIS INTERIM FINAL RULE EXTENDS OPTIONAL PRACTICAL TRAINING

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Immigration

On April 8, 2008, the United States Citizenship and Immigration Services (USCIS) published an interim final rule that extends the period of optional practical training for certain F-1 students. The interim final rule was effective April 8, and interested persons may submit written comments on or before June 9, 2008.

A student holding F-1 status is eligible to apply for optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's major area of study. Prior to the interim final rule, F-1 students could qualify for up to twelve (12) months of OPT, either during their educational program (pre-completion OPT) or after graduation (post-completion OPT). Time spent in pre-completion OPT counts against the time the student has for post-completion OPT. Further, F-1 students remain in status and are permitted to stay in the U.S. during their educational program, assuming they comply with all terms, such as maintaining a full course load, during post-completion OPT, and for a period of sixty (60) days after the completion of their studies and post-completion OPT. Thus, an F-1 student who graduated in May 2007 could obtain OPT until May 2008 and remain in the U.S. for 60 days after the end of his or her OPT, until approximately July 2008. During the last several years, with the shortage of available H-1B visas, many F-1 students experienced what is known as a "cap-gap." The earliest an H-1B visa was available was October 1, but the F-1 student's OPT and work authorization would expire in May or June and the student would have to leave the U.S. in July or August. The cap-gap resulted in productivity interruptions for the employer and loss of wages for the student/employee. The interim final rule is intended to address this problem in two ways.

A. 17-Month OPT Extension for STEM Degree Holders

Recognizing the competitive disadvantage U.S. employers have against foreign competitors because of the recurring H-1B fiasco, the USCIS interim final rule permits a 17-month extension of OPT for students in high-tech fields. The interim final rule permits qualified F-1 students who currently have approved post-completion OPT to apply for a 17-month extension of the OPT. The F-1 student's employer must also satisfy requirements under the final interim rule.

1. STEM Degree

To qualify for the 17-month extension, the student must hold a bachelor's, master's, or doctoral degree in science, technology, engineering, or mathematics (STEM). The student's degree, as reflected in SEVIS (the Student and Exchange Visitor Program

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Information System that the government uses to track F-1 students, among others), must correspond with a degree code that is on the current STEM Designated Degree Program List. The list, available at www.ice.gov/sevis, includes:

- Actuarial Sciences
- Computer Science
- Engineering
- Engineering Technologies
- Biological and Biomedical Sciences
- Mathematics and Statistics
- Military Technologies
- Physical Sciences
- Science Technologies
- Medical Scientist

2. Is the Employer an E-Verify Participant?

The second requirement, which may prove to be a stumbling block to the availability of the extension, is the requirement that the student's employer must be registered in the government's E-Verify program and must be a participant in good standing in the E-Verify program. E-Verify is the government's Internet-based system that permits participants to compare information electronically on a new employee's Form I-9 with records maintained in databases of the Social Security Administration (SSA) and the Department of Homeland Security (DHS). To participate in E-Verify, the employer must sign a multi-page memorandum of understanding with the DHS and SSA. Participants in E-Verify must verify all new hires using the system. The E-Verify program has been criticized for the inaccuracy of information in the databases, at times, which has prohibited U.S. citizens and other authorized individuals from working. Employers should weigh the advantages and disadvantages of E-Verify before signing the memorandum of understanding and should not base their decision solely on the 17-month OPT extension.

3. Employer Reporting

The employer must also agree to notify the Designated School Official (DSO) at the OPT worker's former school if the OPT employee terminates from employment, whether voluntarily or involuntarily. The employer must make notification within 48 hours of the termination. This requirement allows the DSO to make an entry in SEVIS and the DHS to track the F-1 alien.

B. Cap-Gap Relief

As discussed above, the authorized status of an F-1 alien on post-completion OPT is the period of OPT 60 days after the expiration of work authorization under the OPT to allow the F-1 alien time to depart the United States. Under the interim final rule, both the F-1 alien's employment authorization and the period of authorized stay are automatically extended until October 1 of the fiscal year for which an H-1B petition has been filed if:

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1. the F-1 alien is the beneficiary of an H-1B petition;
2. the H-1B petition seeks a change of the F-1 alien's status from F-1 to H-1B;
3. the H-1B petition was timely filed; and
4. the H-1B petition requests a start date of October 1 of the following fiscal year.

The alien's spouse and children in F-2 status also receive an automatic extension of their status. The automatic extension of the alien's duration of status and employment authorization immediately terminate if the H-1B petition filed on the F-1 alien's behalf is rejected, denied, or revoked. As currently drafted, the automatic extension of duration of status and employment authorization will benefit only those H-1B candidates fortunate enough to have their H-1B petitions selected for processing. Further, the interim final rule, as currently written, applies only to F-1 aliens who are the beneficiary of an H-1B petition requesting a change of status. Precisely because of the cap-gap, many of the H-1B petitions recently filed for F-1 aliens did not request a change of status because the F-1 alien's status would have expired prior to October 1, resulting in there being no status to change. The USCIS recognized this dilemma and has since implemented a short-term measure that will permit F-1 aliens who are the beneficiaries of H-1B petitions selected for processing to request the USCIS to amend the H-1B petition to request a change of status in lieu of consular notification. USCIS has established e-mail addresses at the applicable Service Centers to accommodate the requests, which must be received within 30 days of the issuance of the receipt notice. It is likely that this measure will apply only to those H-1B petitions filed during the first week of April 2008 and that in future years petitioners must request a change of status to obtain the automatic extension of stay and work authorization. Despite its flaws, the interim final rule is a step toward resolving the dilemma facing employers who wish to hire F-1 students.