



NEW F-1 STUDENT OPTIONAL PRACTICAL TRAINING EXTENSION RULE

On April 4, 2008, the Department of Homeland Security (DHS) released an interim final rule, effective immediately, which extends the period of work authorization or, optional practical training (OPT), for F-1 students who have completed a science, technology, engineering, or mathematics degree from 12 months up to 29 months. Additionally, this new regulation extends the authorized period of stay for F-1 students with an H-1B petition pending with the USCIS. Lastly, it implements a programmatic change to allow students to apply for OPT within 60 days of concluding their studies.

Background

Congress has prohibited the US Citizenship and Immigration Services (USCIS) from granting H-1B visas to more than 65,000 non-immigrant aliens during any fiscal year (known as the “cap.”) There is a significant competition among employers of highly skilled workers for the limited number of H-1B visas available each fiscal year.¹ Currently, students in F-1 status may apply for up to 12 months of optional practical training (OPT) to work for a US employer in a job directly related to the student’s major area of study. Many employers who hire F-1 students under the OPT program eventually file a petition on behalf of the F-1 student as an H-1B worker in a specialty occupation. However, many students on OPT are unable to maintain F-1 status through October 1 (the H-1B effective date) and have a gap in status (“cap gap”). Therefore, they are forced to leave the country.

Extension of F-1 OPT Status to 29 Months

The new rule allows an F-1 student already in a period of approved OPT to extend that period by up to 17 months (for a maximum total period of 29 months of OPT) if the student received a degree in science, technology, engineering, or mathematics (STEM). However, this extension is only available to F-1 students with STEM degrees who have accepted employment with an employer registered and in good standing with USCIS’ E-Verify employment verification program. In addition, employers of F-1 students who qualify for this 17-month extension of OPT must report to the student’s school within 48 hours if the student’s employment ends prior to the end of the student’s authorized OPT employment period.

Cap-Gap and Need to Expand Relief to All F-1 Students with Pending H-1B Petitions

This rule also bridges the cap-gap and allows F-1 students to remain in the U.S. and continue to work on their OPT if a timely-filed H-1B petition remains pending or has been granted by the USCIS. Unlike the extension of the OPT period, which is limited to F-1 students who have obtained

¹ Last year, on April 2, 2007 (the first day it accepted petitions for the 2008 fiscal year), the USCIS received twice the number of petitions needed to reach the cap for that fiscal year.

STEM degrees, the extension of status for F-1 students in a cap-gap applies to all F-1 students who are successful under the H-1B lottery and have a pending or approved H-1B petitions.

This rule also makes programmatic changes to the OPT requirements, including allowing students to apply for OPT 60 days **after** completing their degree. F-1 students are also allowed a maximum of 90 days (aggregate) of unemployment while on a 12-month OPT and 120 days for students who have an approved 17-month OPT period.

Open Questions and Next Steps

Unfortunately, the text of the regulation limits this “cap gap” protection to those employees who have a “change of status” and H-1B application filed on their behalf. Before this regulation was released, the F-1 students whose status expired (including a 60-day grace period) before October 1 were not eligible for a change of status so these applications were not filed as change of status petitions. The USCIS is aware of this problem, and we are working to find a solution to the problem posed by this new regulation.

Please contact Cornerstone Law Group for guidance on how to implement eVerify to take advantage of this new law at your workplace or apply for OPT extensions on behalf of your employees.