



MID-MARCH 2016 IMMIGRATION UPDATE

Posted on March 16, 2016 by Cyrus Mehta

Headlines:

1. [**DHS Issues Final Rule Amending F-1 Regs, Breaks Record for Public Comments**](#) – DHS published a final rule amending regulations to expand optional practical training (OPT) for students with U.S. degrees in science, technology, engineering, or mathematics (STEM) and create new obligations for F-1 students and F-1 employers starting May 10, 2016.
2. [**Reminder: USCIS Will Accept H-1B Petitions for FY 2017 Beginning April 1, 2016**](#) – The Alliance of Business Immigration Lawyers recommends filing during the first five business days in April.
3. [**DHS Launches 'Known Employer' Pilot**](#) – DHS announced a "Known Employer" pilot to assess a new process for employers seeking to hire certain workers through employment-based visa categories.
4. **Firm In The News...**

Details:

1. **DHS Issues Final Rule Amending F-1 Regs, Breaks Record for Public Comments**

On March 11, 2016, the Department of Homeland Security (DHS) published a final rule amending regulations to expand optional practical training (OPT) for students with U.S. degrees in science, technology, engineering, or mathematics (STEM) and create new obligations for F-1 students and F-1 employers starting May 10, 2016.

OPT is a form of temporary employment available to F-1 students (except those in English language training programs) that directly relates to a student's major area of study in the United States. A student can apply to engage in OPT during or after completing his or her academic program. A student can apply for 12

months of OPT at each education level (e.g., one 12-month OPT period at the bachelor's level and another 12-month period at the master's level). While school is in session, the student may work up to 20 hours per week pursuant to OPT.

DHS first introduced an extension of OPT for STEM graduates in a 2008 interim final rule. Under the 2008 rule, an F-1 student with a STEM degree from a U.S. institution of higher education could apply for an additional 17 months of OPT (17-month STEM OPT extension), provided that the employer from which the student sought employment was enrolled in and remained in good standing in the E-Verify employment eligibility verification program. On August 12, 2015, the U.S. District Court for the District of Columbia ordered the vacatur of the 2008 rule on procedural grounds and remanded the issue to DHS. The court stayed the vacatur until February 12, 2016, to give DHS the opportunity to issue a new rule related to STEM OPT extensions through notice-and-comment rulemaking.

On October 19, 2015, DHS published a notice of proposed rulemaking (NPRM) to reinstate the STEM OPT extension, with changes intended to enhance the educational benefit afforded by the extension and to increase program oversight, including safeguards to protect U.S. workers. The rule received more than 50,500 comments—the most in DHS history. On January 23, 2016, the court gave DHS additional time to complete the rulemaking following review of public comments and to allow the Department to publish the rule with a 60-day delayed effective date to provide sufficient time for efficient transition to the new rule's requirements.

DHS has now completed the final rule. Highlights include:

Extension period to increase from 17 to 24 months. Under the amended regulations, F-1 STEM students will be able to extend OPT for an additional 24 months beyond the initial 12 months, replacing the 2008 regulation that allowed F-1 STEM students to receive a 17-month extension of OPT, providing work authorization for employment related to their field of study.

New reporting requirements for F-1 students and university officials. New reporting requirements include: (1) a six-month validation requirement, confirming the F-1 student applicant's application for work authorization through the OPT program; (2) an annual self-evaluation required of F-1 students, for designated school officials to review; and (3) an affirmative

requirement for F-1 students to report any change in employment status or material departure from the adopted Training Plan. This is in addition to the requirement for F-1 employers to report similar changes to designated school officials within five business days, which remains in effect.

F-1 employer requirement to complete formal Training Plan with F-1 student.

The new regulations will increase DHS oversight over the OPT program. F-1 employers must complete a formal Training Plan, Form I-983, and comply with new wage requirements. The formal Training Plan must include concrete learning objectives with proper oversight. F-1 employers must set out the terms and conditions of employment, including the specific duties, hours, and compensation.

As part of the Training Plan, F-1 employers must attest that the F-1 employee is paid a salary commensurate with similarly situated workers and that: "(1) it has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity will help the student attain his or her training objectives."

DHS to conduct on-site visits. The new regulations state that DHS has discretion to conduct employer site visits to ensure that F-1 employers meet the requirements of the OPT program. Generally, DHS must provide notice 48 hours before an on-site inspection, unless the visit is conducted in response to a complaint or evidence of noncompliance.

Cap-gap extension language clarified. DHS has revised the cap-gap extension regulation to clarify that the extension for F-1 students with pending H-1B petitions and requests for change of status temporarily extends the OPT period until October 1, the beginning of the new fiscal year.

Transition Procedures. One can still file for STEM OPT 17-month extension up to May 9, 2016. However, as a practical matter, if this extension is still pending as of May 10, 2016, the USCIS will issue a Request for Evidence ("RFE") so that the student may amend his or her application for the 24-month extension without incurring additional fees or having to refile the Form I-765, Application for Employment Authorization. Therefore, given that the USCIS is granting a 90 day processing time for STEM extension applications, an application filed today may likely not get approved by May 9, 2016 under the existing rule.

Students who have valid 17-month STEM OPT prior to May 10, 2016 will not automatically be extended to 24 months. On the other hand, they may apply for an additional 7-month extension. The qualifying student must meet the following requirements and must file between May 10, 2016 and August 8, 2016 for the additional 7 months:

1. The student must meet all the requirements for the 24-month STEM OPT extension under the new Final Rule as described in 8 CRR 214.2(f)(1)(ii)(C), and
2. must submit of the Training Plan (Form I-983), completed by the student and the employer, to the DSO, and
3. **must have 150 calendar days remaining on their current 17-month STEM OPT Extension at the time the Application for Employment Authorization is filed**, and
4. must apply within 60 days of the date the DSO enters the recommendation for 24-month STEM OPT.

Additionally, the final rule states:

- Only students who earned a degree from a school accredited by a U.S. Department of Education-recognized accrediting agency and certified by the Student and Exchange Visitor Program (SEVP) may apply for a STEM OPT extension.
- Participating students who receive an additional qualifying degree from an accredited college or university can apply for a second STEM OPT extension.
- Participating students can use a previously earned qualifying degree to apply for a STEM OPT extension. The prior degree must not have already formed the basis of a STEM OPT extension and must be from a school that is both accredited by a U.S. Department of Education-recognized accrediting agency and certified by SEVP at the time of the student's STEM OPT application. The student's most recent degree must also be from an accredited and SEVP-certified institution.
- Students must work at least 20 hours per week per employer to qualify.
- Students are permitted a limited period of unemployment during the initial period of post-completion OPT and the STEM OPT extension.
- All STEM OPT employers must participate in DHS's E-Verify program.

Also on March 11, 2016, SEVP launched a STEM OPT Hub at

<https://studyinthestates.dhs.gov/stem-opt-hub>. The Hub includes resources for students, designated school officials, and employers.

The final rule, which replaces the existing 2008 interim final rule and amends the current regulations at 8 CFR parts 214 and 274a, is at <https://www.federalregister.gov/articles/2016/03/11/2016-04828/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and>. A related ICE press release is at <https://www.ice.gov/news/releases/sevp-stem-opt>. Information on completing the Training Plan form is at <https://studyinthestates.dhs.gov/form-i-983-overview>. More information about SEVP is at <https://www.ice.gov/sevis>.

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2. Reminder: USCIS Will Accept H-1B Petitions for FY 2017 Beginning April 1, 2016

On April 1, 2016, U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions subject to the fiscal year (FY) 2017 cap. U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering, and computer programming.

The congressionally mandated cap on H-1B visas for FY 2017 is 65,000. The first 20,000 H-1B petitions filed for individuals with a U.S. master's degree or higher are exempt from the 65,000 cap.

We strongly recommend filing during the first five business days in April in order to be considered under the H-1B lottery.

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3. DHS Launches 'Known Employer' Pilot

The Department of Homeland Security (DHS) announced on March 3, 2016, a "Known Employer" pilot to assess a new process for employers seeking to hire certain workers through employment-based visa categories.

By modifying the process U.S. Citizenship and Immigration Services (USCIS) uses to review an employer's eligibility to sponsor individuals under certain employment-based immigrant and nonimmigrant classifications, the Known

Employer pilot is expected to reduce paperwork, costs, and delays in the processing of these benefit requests. USCIS will oversee the pilot in collaboration with the DHS Office of Policy, U.S. Customs and Border Protection (CBP), and the Department of State (DOS).

"Today, we're partnering with a select group of representative organizations across a variety of industries to determine how we can improve efficiency and cut costs. If successful, we will continue to build on this trial program and promote robust trade, travel, and economic prosperity," said USCIS Director León Rodríguez.

The goals of the Known Employer pilot are to make the employment eligibility adjudication process more efficient and reduce delays for U.S. employers that wish to employ foreign workers under certain immigrant and nonimmigrant visa programs by:

- Reducing the amount of paperwork filed by employers and retained by USCIS;
- Promoting consistency in the adjudication of employment-based petitions and applications;
- Streamlining the adjudicative process to achieve greater efficiency within USCIS; and
- Providing greater support to CBP and DOS in support of greater efficiency and consistency at ports of entry and consular posts.

According to reports, five employers had confirmed their participation in the pilot as of the launch date: Citigroup, Inc.; Ernst & Young LLP; Kiewit Corporation; Schaeffler Group USA Inc.; and Siemens Corp.

Under the Known Employer pilot, up to nine preselected employers will file applications requesting that USCIS predetermine that they meet certain requirements relating to certain immigrant and nonimmigrant visa classifications. When making this request, employers will create a profile in the Web-based Known Employer Document Library (KEDL), and upload documents relating to the requirements. USCIS officers will review and predetermine whether a prospective employer has met certain requirements relating to the visa classifications. If USCIS approves the employer's predetermination request, the employer may then file petitions or applications for individual employees without needing to resubmit company information with each petition or

application.

Reportedly, immigrant classifications included in the Known Employer pilot are E-12 (outstanding professor or researcher) and E-13 (multinational executive or manager). Nonimmigrant classifications included in the pilot are H-1B (specialty occupation worker), L-1A (intracompany transferee in a managerial or executive capacity), L-1B (intracompany transferee in a position involving specialized knowledge), and TN (Trade NAFTA: Canadian and Mexican citizens engaged in business activities at a professional level under the North American Free Trade Agreement).

Employers will not be charged any additional fees to participate in the Known Employer pilot. The pilot is scheduled to last for up to one year. However, USCIS may terminate or extend the pilot at any time. DHS and DOS will solicit ongoing feedback from participants. If the pilot is successful, DHS is expected to seek permanency for the program and open it to all eligible employers.

DHS first announced in January 2015 that it would explore a Known Employer pilot under the U.S.-Canada Beyond the Border initiative. The pilot also was recommended in a report from federal agencies submitted to President Obama in July 2015, "Modernizing and Streamlining Our Legal Immigration System for the 21st Century."

DHS's announcement is at

<https://www.dhs.gov/news/2016/03/03/dhs-launches-known-employer-pilot-program>. See also the Known Employer Pilot page at <https://www.uscis.gov/working-united-states/known-employer-pilot>.

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4. **Firm In The News**

Cyrus Mehta was the Program Chair of the well-regarded *Basic Immigration Law 2016 conference*, held under the aegis of the Practising Law Institute in New York City and was also simultaneously webcast on March 10, 2016.

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