

The ABCs of Immigration: The New OPT Rule

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On April 4, 2008, USCIS released a new interim regulation that makes two major changes:

- a. students with degrees in certain STEM fields (science, technology, engineering and mathematics) may apply for extensions of their optional practical training time by an additional 17 months if their employers participate in E-Verify, the electronic employment verification system; and
- b. any student on OPT seeking a change of status to H-1B status may receive an automatic extension of their status and employment authorization until H-1B time starts on October 1st or when the H-1B application is denied.

The two rules are expected to dramatically improve the prospects of students with STEM backgrounds graduating from US universities since they will be able to continue employment long enough to have two additional opportunities to be selected in the H-1B annual lottery and potentially receive employment authorization tied to a permanent residency petition. For other students seeking to change to H-1B status, the ability to continue working without a "cap-gap" will reduce disruptions significantly.

What is F-1 Optional Practical Training?

F-1 students enrolled on a full-time basis at a college, university, conservatory, or seminary who have maintained their status are eligible to apply for up to a year of optional practical training to work for a US employer in a job in their area of study. That training can take place either during their studies (pre-completion OPT) or after the completion of studies (post-completion OPT).

Why is USCIS releasing this rule?

According to the rule's preamble, "The inability of US employers, in particular in the fields of science, technology, engineering and mathematics (STEM professions), to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of US employers to recruit and retain

skilled workers and creates a competitive disadvantage for US companies." USCIS also states it is concerned that "the inability of US companies to obtain H-1B visas for qualified F-1 students in a timely manner continues to result in the loss of skilled technical workers to countries with more lenient employment visa regimes, such as Canada and Australia." USCIS also notes the European Union's proposed "Blue Card" program would have no cap and would give European employers a significant advantage over their US counterparts.

What does the rule actually do with respect to STEM professionals?

F-1 students who have degrees in science, technology, engineering or mathematics who are already in a period of approved post-completion OPT can apply to extend that period by up to 17 months (for a total of 29 months of OPT) if the student has accepted employment with an employer registered and in good standing with USCIS' E-Verify electronic employment verification system.

What is the role of the F-1 student's school's Designated School Official?

Students must seek out the recommendation of the DSO in order to qualify for the extension and the DSO annotates SEVIS when such an extension is approved (see question below).

Employers must report to the student's DSO within 48 hours if the student leaves the employer prior to the end of the authorized OPT employment period. The employer can find the DSO's contact information on the I-20.

Also, students seeking a STEM extension must agree to report within ten days to the school the following:

- changes to the student's name
- the student's residential and mailing address
- the student's employer
- the address of the student's employer

The student must also check in with the school every six months from the date the STEM extension starts.

All of the information reported to the school must be reported in SEVIS by the school officer.

Which are the STEM professions?

STEM stands for science, technology, engineering and math. USCIS will refer to a "STEM Designated Degree Program List" that is based on the US Department of Education's "Classification of Instructional Programs" (CIP) 2000 report which can be found online at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2002165> .

According to USCIS, the list of degrees includes those degrees in the following fields:

Actuarial Science: NCES CIP Code 52.1304
Computer Science: NCES CIP Codes 11 .xxxx (except Data Entry/Microcomputer Applications, NCES CIP Codes 11.06xx)
Engineering: NCES CIP Codes 14.xxxx
Engineering Technologies: NCES CIP Codes 15.xxxx
Biological and Biomedical Sciences: NCES CIP Codes 26.xxxx
Mathematics and Statistics: NCES CIP Codes 27.xxxx
Military Technologies: NCES CIP Codes 29.xxxx
Physical Sciences: NCES CIP Codes 40.xxxx
Science Technologies: NCES CIP Codes 41.xxxx
Medical Scientist (MS, PhD): NCES CIP Code 51.1401

Will any other professions be added?

According to DHS, the agency will continue to work with interested parties to evaluate the degrees that may be added to the list in the future. However, DHS states that it will ensure that the extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled US workers and that is essential to this country's technological innovative competitiveness.

What is the employer's responsibility when a student has left its employ?

As noted above, the employer must notify a DSO within 48 hours of the student's departure or termination. An employer shall consider a worker to have departed when the employer knows the student has left the employment or if the student has not reported for the work for a period of 5 consecutive business days without the consent of the employer, whichever occurs earlier.

How does a student request the extra 17 months of OPT?

Students make the requests with their DSO. The DSO verifies the student's eligibility, certifies that the student's degree is in a designated STEM field and then explains to the student of his or her responsibilities for maintaining status while on OPT. The DSO then makes the recommendation to extend OPT in the Student and Exchange Visitor Information System (SEVIS). Note: SEVIS will be temporarily updated to allow for this rule to be implemented immediately. The change will be minimal for now and a more extensive change will happen in early fiscal year 2009.

After the DSO recommends the extension in SEVIS, the DSO issues a new I-20 indicating the STEM extension has been recommended and the student files a Form I-765 and filing fee (currently \$380) to the USCIS service center with jurisdiction for OPT-based I-765 cases.

Is there still a grace period when the STEM extension time is over?

Yes. A 60 day grace period applies after the OPT employment authorization expires.

What if the student has OPT to work in a field for a degree that is not a STEM profession, but the student has a previously issued degree in a STEM occupation?

The degree that is the basis for the student's current period of OPT must be a bachelor's, master's, or doctoral degree in one of the degree programs on the current STEM Designated Degree Program List.

What happens if an EAD card expires while awaiting the 17 month extension?

The new rule automatically extends EADs for 180 days for students with pending requests for extension of post-completion OPT while USCIS adjudicates the request for extension.

Can a student get a new 17 month extension for a new STEM degree if the student received an extension based on a prior-received STEM degree?

No. A student may not have previously received a STEM extension.

Are changes being made to the I-765?

Yes. A new question#17 is being added to the I-765 asking the student seeking an extension to identify the degree he or she has received. The form will also ask the student to provide the name of the employer as listed in E-Verify and the employer's E-Verify Company I.C.

Can a denial of a STEM extension be appealed?

No.

What is E-Verify?

See the supplemental FAQ on E-Verify at the end of this document.

Does the employer verify the OPT student in E-Verify after it signs up in order to continue employing the student?

No. E-Verify is only used to verify new employees. An existing employee – in this case the F-1 student working on OPT – is not to be verified in E-Verified. If an employer has E-Verify in place when a student begins employment, the student would be run through the system.

What if a company is only using E-Verify at some locations but not all (including the location where the student is working)?

The rule only states that an employer must be registered and using E-Verify. It does not state that E-Verify must be used company-wide and the E-Verify rules permit a company to use the system at some locations as opposed to all. So while USCIS has not addressed this specific questions in the regulation, a good faith argument can be made that companies that use E-Verify at only some of its locations qualifies.

What does the rule change with respect to students whose OPT is set to end before their H-1B employment starts?

The rule addresses the “cap-gap” problem where OPT ends before H-1B time begins on October 1st. The new rule extends the authorized period of stay as well as work authorization of any F-1 student who is the beneficiary of a timely-filed H-1B petition that has been granted by, or remains pending with USCIS. The extension of status and work authorization terminates on October 1st of the fiscal year for which the H-1B is requested. Unlike the prior cap-gap rule, USCIS need not first issue a notice that the cap has been hit. USCIS assumes the cap is always going to be hit before October 1st so the extension will now be automatic. The old rule only allowed for an extension of F-1 status, but the new rule extends both status and employment authorization.

Does the rule extend the F-1 status when a change of status to H-1B status is not requested and instead consular processing is requested?

No. The language of the rule states that it only applies in change of status cases. While this was probably an oversight on the part of USCIS, the rule requires a change of status application be pending to claim a “cap-gap” extension. It may be possible to amend an H-1B petition to convert it to a change of status petition and you should consult with your immigration attorney.

What happens if the student finds out that the application for H-1B status was not selected in the random selection of H-1B applications or is otherwise denied?

The automatic extension of F-1 status and employment authorization immediately terminates upon the rejection, denial, or revocation of the H-1B petition.

Does the “cap-gap” rule apply to STEM professionals only?

No. Only the 17 month extension provision of the new rule applies to STEM professionals. Any OPT holder can qualify for the cap-gap extension provision.

Are F-2 students extended as well under the “cap-gap” rule?

Yes. F-2s are automatically extended as long as the F-1’s status is.

What change does the new rule make with respect to the timing of filing an initial OPT application?

Prior to this rule being issued, students must have applied for post-completion OPT prior to completing their coursework. The new rule allows students to apply for post-completion OPT up to 90 days before program end date and for 60 days afterwards.

What does the rule change with respect to the unemployment of OPT students?

The rule imposes for the first time a limit on unemployment. Students on 12 month OPT may only have an aggregate maximum period of unemployment of 90 days. That period increases by 30 days for F-1 students in the 17 month extension period.

How many students will benefit from the new rule?

According to DHS, there are approximately 26,000 students on OPT that have earned a bachelor's, master's, or doctorate in a STEM field. DHS estimates that approximately 12,000 will take advantage of the STEM extension. DHS also estimates that another 10,000 students will benefit from the "cap gap" change.

