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Approaching the U.S. Department of Homeland Security's New STEM OPT Extension Regulations with Caution

On Tuesday, May 10, 2016, the U.S. Department of Homeland Security ("DHS") will implement major modifications to Optional Practical Training ("OPT") extensions for students on F-1 visas enrolled in science, technology, engineering, and mathematics ("STEM") degree programs. The new regulations, published on March 11, 2016 at 8 CFR Parts 214.2(f) and 274a, authorize a 24-month STEM OPT extension period, replacing the previous 17-month STEM OPT extension period. While at first glance, the new STEM OPT extension regulations may seem a cause for celebration, there are a number of added requirements and oversight provisions and, for some U.S. employers, the benefits may not outweigh the burdens.

OPT is a form of temporary employment available to students holding F-1 visas that directly relates to a student's program of study. The employment is often paid, and may take place during and/or after completion of the degree program. The overarching idea is that OPT will afford eligible international students and new graduates the opportunity to gain hands-on practical experience to supplement what they learned during their degree program. Students may be authorized for a total of 12 months of full-time OPT at each educational level (e.g., undergraduate, graduate and post-graduate). The application process is relatively straight forward. The student must first request approval from his or her designated school official ("DSO"), who will then make a recommendation to the electronic Student and Exchange Visitor and Information System ("SEVIS") by endorsing a Form I-20. Thereafter, the student must file the Form I-765, Application for Employment Authorization, supporting documentation, and a filing fee of \$380.00 with the U.S. Citizenship and Immigration Services ("USCIS").

Since 2008, eligible students who graduate with a qualified STEM degree and are presently engaged in a period of approved post-completion OPT may have the option to extend their OPT for a period of 17 months. This is the existing STEM OPT extension, and this is what the new regulations modify. These changes will affect all parties involved in the STEM OPT extension process. This includes the students and the U.S. employers with whom the students will train during the course of the approved period of STEM OPT. Not to be forgotten, however, are the DSO's who perform pivotal work with students behind-the-scenes to recommend them for OPT and extensions and maintain student records in SEVIS.

So, what's new? The better question, really, is what isn't new. The new regulations provide a comprehensive overhaul to the STEM OPT program. A few provisions that will remain the same are: the school where the student is enrolled must be certified by the U.S. DHS's Student and Exchange Visitor Program (SEVP) in order for the school to be capable of authorizing OPT (a school search tool is available on the U.S. DHS's Study in the States website <https://studyinthestates.dhs.gov/school-search>); the U.S. employer the student will train with during their period of approved STEM OPT must be registered in USCIS's E-Verify electronic employment eligibility verification program; upon filing a timely extension application, the student's OPT automatically extends for 180 days; there are no changes to the H-1B Cap Gap relief timetable; and the U.S. employer must comply with all state and federal laws, including wage and hour laws, applicable to the student's employment.

Now, on to the positive changes. Several provisions expand the STEM OPT program, beneficial to all of the parties involved. Most notably, these include:

- The STEM OPT extension may now be granted for a longer period of 24 months in the place of the prior 17-month period.
- Eligible students may now qualify for two lifetime STEM OPT extensions. While students may not apply for these extensions back-to-back, they may obtain STEM OPT separately at two different educational levels. For example, a student may complete his or her undergraduate degree, engage in OPT and subsequently obtain a STEM OPT extension; return to school and complete a graduate degree, engage in a second OPT and subsequently obtain a second STEM OPT extension.
- The list of STEM degree categories is expanded, allowing students in a broader range of programs of study to qualify for the STEM OPT extension. The updated list may be viewed on U.S. Immigration and Customs Enforcement's ("ICE") website: <https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>.
- Eligible students may, under certain circumstances, apply for a STEM OPT extension based on a previously completed degree. For example, if a student completes his or her undergraduate degree in a STEM category, and goes on to complete a graduate degree in a non-STEM category, and obtains an initial grant of post-completion OPT based on the non-STEM graduate degree, he or she may, under certain circumstances, be able to apply for a STEM OPT extension based on the previously completed STEM undergraduate degree.
- The limit on the number of days a student may be unemployed during STEM OPT has been increased, now totaling 150 days over the course of the combined 36 months of regular plus STEM OPT.

Unfortunately, the new regulations also include several changes that may create an additional burden on the parties involved in the STEM OPT extension process. These provisions are meant to ensure the integrity and security of the STEM OPT program, as well as to provide safeguards for U.S. workers in STEM fields:

- Students and their employers seeking STEM OPT extensions must work together to draft the newly implemented Form I-983 (<https://www.ice.gov/sites/default/files/documents/Document/2016/I-983.pdf>), Training Plan for STEM OPT Students. Completion of the Form I-983 requires the development of a formal training plan for the student on STEM OPT that specifies:
 - o the student's job duties;
 - o specific goals and objectives for the student's training program with a timeline;
 - o the employer oversight provided to the student during the training program; and
 - o the measures and assessments that will be utilized by the employer to assess the student's progress and performance.

As part of the formal training, employers must also attest that:

- o they have sufficient resources and trained personnel available to provide appropriate training for the program; that the duties, hours and compensation that the student will receive are commensurate with similarly situated individuals;
- o the student will not replace a U.S. worker; and
- o the opportunity helps the student attain his or her goals.

It is not specified how employers should prove these elements, but employers should be ready to provide supporting evidence for their attestations upon request.

- New reporting requirements that will go into effect which require that students:
 - o touch base with their DSO's every six months to verify their SEVIS information;
 - o complete an annual self-evaluation, endorsed by the employer, that the DSO's will keep on file as part of the required Form I-983; and
 - o report any materials change to the training plan or the student's employment status.
- Certain types of alternate employment arrangements that were previously accepted, including volunteering, entrepreneurs and sole proprietorships, and consulting companies, may no longer be appropriate for STEM OPT.
- New enforcement provisions are contained in the regulations, including random STEM OPT site visits. U.S. ICE and Homeland Security Investigations ("HSI") will be responsible for the enforcement of the STEM OPT program. HSI will typically provide 48 hours'

notice of a site visit. However if the site visit is triggered by a complaint or evidence of noncompliance to the program, they may show up unannounced. During a site visit, HSI will confirm consistency between the employment and the I-983 training plan and verify that the student is in fact still employed.

There are additional administrative changes to the regulations, too burdensome to list out herein; however one important administrative mismatch should be highlighted. That is that a new SEVIS reporting portal will deploy an update on May 13, 2016 to align with the new STEM OPT changes. This is three days after the regulations go into effect, and in the meantime DSO's will not be able to recommend students for the 24-month STEM OPT extension. While this practical limitation will be short lived, certain students will be affected by this administrative gap, as described in detail below.

In order to facilitate a smooth transition from the current to the new regulations, U.S. DHS has set forth rules and guidelines for several distinct scenarios. Beginning May 10, 2016 USCIS will process all STEM OPT extensions based on the new 24-month regulations only. This means that for any pending STEM OPT 17-month extension applications filed before May 10, 2016, USCIS will issue a Request For Evidence ("RFE"), affording students the opportunity to "amend" their applications to request the 24-month extension without paying a new application fee. Students may not decline to amend their application, as after May 10, 2016 USCIS will no longer be adjudicating 17-month STEM OPT extensions. When students respond to these RFE's, they will need to include documentation demonstrating that they are eligible under the new regulations, including a new Form I-20 endorsed by the DSO. In order to obtain the new I-20, students must provide the DSO with a completed training plan on Form I-983. Students who do not reply to the RFE are at risk of having their applications denied.

USCIS will continue to adjudicate 17-month STEM OPT extensions through May 9, 2016. This means that any currently pending applications that are adjudicated prior to May 10, 2016 will be approved for 17 months only. Certain students, who have already received approved 17-month STEM OPT extensions, may be eligible to apply to obtain the additional seven months afforded under the new regulations. USCIS will accept applications from these students from May 10, 2016 to August 8, 2016 only. In order to be eligible to apply, students must have at least 150 days remaining on their current STEM OPT at the time USCIS receives their applications. This means that students whose current 17-month STEM OPT expires before October 7, 2016 (150 days after the first date applications are accepted) are not eligible to apply for this benefit. Students who are eligible and who opt to apply for the additional seven-month STEM OPT must submit a new Form I-765, supporting documentation and filing fee to USCIS, and abide by the new regulations and requirements. Students in this category may be affected by the problematic administrative gap mentioned above. DSO's will not have the ability to issue a new I-20 for the additional seven months before May 13, 2016, and this new I-20 is a required supporting document students must include in their application



to USCIS. Students who are eligible to apply, but whose eligibility will expire before May 13, 2016, have been instructed by the SEVP to apply to USCIS before their eligibility expires without the new I-20 and to include special language with their Form I-765 to explain why the new I-20 Form is not included, prompting USCIS to later issue a RFE requesting it.

According to the U.S. ICE's quarterly report SEVIS by the Numbers (<https://www.ice.gov/news/releases/ice-releases-quarterly-international-student-data>), as of March 2016, there are nearly 1.2 million students studying in the United States in either F or M status. Because over 40% of these students study in STEM coursework, the new STEM OPT extension regulations will potentially affect hundreds of thousands of students studying in the United States. In light of the new requirements imposed under the new regulations and the importance this training opportunity may play in a student's life by allowing them to gain valuable hands-on experience that may not be available in their home country, we urge students, employers and DSO's seek an experienced immigration attorney's advice when preparing an application for a STEM OPT extension to ensure all aspects of the new regulations are complied with.

Questions or Assistance:

If you have any questions about this alert, please feel free to contact Brenda Eckert at beckert@goodwin.com or (860) 251-5712 or Ashley Mendoza at amendoza@goodwin.com or (860) 251-5018.

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