

## Miller Law Offices Bulletin: New Optional Practical Training Rules

The Optional Practical Training (OPT) program allows F-1 international students who are degree candidates to apply for up to 12 months of employment authorization. Students who have received one year or more of full-time curricular practical training or two years of part-time curricular training are ineligible for post-completion OPT.<sup>1</sup> The student must apply for the Designated School Official recommendation, apply for, and receive a CIS Employment Authorization Document (EAD), Form I-766, before beginning employment. The student may not begin OPT until the date indicated on his or her EAD. The EAD processing by the CIS is usually taking at least 90 days, so advance planning and timely execution are necessary to allow the student to meet employment opportunities without delay.

On April 8, 2008, the Department of Homeland Security published an interim final rule which changed OPT rules to provide for a cap gap extension for students sponsored for H-1B employment, extended OPT for STEM program students and changed the timing for the application process for OPT for all students. The interim final rule provides new reporting requirements for students, foreign student officers and employers who participate in the applicable programs.<sup>2</sup>

F-1 Students may now apply for post-completion OPT no more than 90 days before their program end date and up to 60 days after their program end date. The I-765 application for an Employment Authorization Document must be properly filed with the appropriate CIS service center within 30 days of the date the student's DSO recommends OPT in SEVIS. The student should request the DSO to recommend post-completion OPT within 30 days of the date the student expects the application to arrive at the USCIS Service Center. If the OPT recommendation in SEVIS is dated more than 30 days prior to the receipt date, the CIS has advised that the application may be denied.<sup>3</sup>

The requested end date for post-completion OPT cannot be more than 12 months after the requested start date. The end date may be sooner if the student has less than 12 months of OPT left at the current degree level or the student wishes to retain a period of OPT for pre-or post-completion OPT for another degree at the same academic level.<sup>4</sup>

The interim final rule also established a limit on the number of days students in a period of post-completion OPT can be unemployed and still maintain F-1 status.<sup>5</sup> For students on regular post-completion OPT or an automatic extension due to the cap gap provisions, the limit is 90 days, including those students with a cap gap extension. Students with an approved STEM OPT extension will receive another 30 days of unemployment time for a total of 120 days over the entire period of post-completion OPT.

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<sup>1</sup> 8 C.F.R. §214.2(f)(11).

<sup>2</sup> 73 *Fed. Reg.* 18944-18956 (April 8, 2008)(interim final rule).

<sup>3</sup> 2008 *OPT Guidance* §5.3.

<sup>4</sup> 2008 *OPT Guidance* §6.2.

<sup>5</sup> 2008 *OPT Guidance* §4.9.

## Cap gap extension

Under the April 8, 2008 interim final rule<sup>6</sup>, a “cap gap extension” has been created. It represents the period in which an eligible F-1 student’s status is automatically extended to bridge the gap between the end of F-1 status and start of H-1B status. If the student is in a period of authorized post-completion OPT on or after the date the student becomes eligible for the extension, the student’s post-completion OPT is also automatically extended.

## OPT STEM Extensions

DHS now allows a 17 month extension of optional practical training from 12 to 29 months for F-1 students who major in specified science, technology, engineering and mathematics (STEM) SEVIS authorized programs.<sup>7</sup> This regulatory change affected in-status F-1 students enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary who are eligible for 12 months of optional practical training (OPT) to work for an U.S. employer in a job directly related to the student’s major area of study, provided the accepted employment is accepted with employers enrolled and considered by the CIS to be in good standing in the E-Verify program.

A student with an expired EAD may continue to be employed while a STEM OPT extension is pending based on the automatic extension of the student’s work authorization for up to 180 days.<sup>8</sup>

The interim final rule requires F-1 students with an approved OPT extension to report and periodically verify changes in the student’s name or address and changes in the employer’s name or address. Under the terms of the rule, employers of the F-1 students with these OPT extensions must report to the student’s designated school official (DSO) within 48 hours after the OPT student has been terminated or leaves the employment prior to the end of the OPT period. The CIS issued a SEVP Policy Guidance 0801-01 “Updates to Post-Completion Practical Training” (April 25, 2008), which explained the new procedures to students and their academic advisors.<sup>9</sup>

F-1 students who have received a bachelor's, master's, or doctoral degree on the DHS STEM Designated Degree Program List<sup>10</sup>, working for a U.S. employer in a job directly related to the student’s major area of study are allowed to obtain an extension of their existing post-completion OPT period for up to 17 months, for a maximum period of post-completion OPT of 29 months. The extension, however, is only available to students who are employed, or will be

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<sup>6</sup> 73 *Fed. Reg.* 18944-18956 (April 8, 2008)(interim final rule).

<sup>7</sup> *Id.*

<sup>8</sup> 2008 *OPT Guidance* §8.4.2.

<sup>9</sup> 2008 *OPT Guidance*.

<sup>10</sup> The STEM Designated Degree Program List is based on the “Classification of Instructional Programs” (CIP) developed by the U.S. Department of Education's National Center for Education Statistics (NCES). See *Classification of Instructional Programs--2000*: (NCES 2002-165) U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office. This publication may be found at <http://nces.ed.gov/pubs2002/2002165--2.pdf>. The approved list is available on SEVP's Web site at <http://www.ice.gov/sevis>. DHS will announce any future changes to the list on this Web site.

employed, by an employer enrolled (and determined by USCIS to be in good standing) in the CIS' E-Verify employment verification program at the time the student applies for the 17-month extension.

The student who applies for the extension must agree to report to a DSO at his or her school the following: Changes to the student's name, the student's residential and mailing address, the student's employer, and the address of the student's employer. The student must also report to a DSO every six months from the date the OPT extension starts to verify this information. In addition, the employer of a student under extended OPT must report to the student's school DSO within 48 hours after the student leaves employment

The employee is considered to have worker departed when the employer knows the student has left the employment or if the student has not reported for work for a period of 5 consecutive business days without the consent of the employer, whichever occurs earlier.<sup>11</sup>

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<sup>11</sup> Interim Rule at 18955-18956.