

Immigration Alert: USCIS Releases Interim Rule Addressing H-1B "Cap Gap" and Extending Some OPT-based EADs

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On April 8, 2008 the U.S. Department of Homeland Security (DHS) published an interim final rule addressing three very important issues regarding Optional Practical Training (OPT) for F-1 students, outlined below. Though the DHS will accept comments on this rule for the next 60 days—and could make changes based on those comments—the rule went into effect as of Tuesday, April 8, 2008. Given that this significant announcement came *after* most of this year's cap-subject H-1B petitions were filed, this rule is certain to generate a great deal of feedback from the immigration community.

The most important and broadly applicable change is the "cap-gap" relief that this new rule provides. As many employers are aware, many of their F-1 students' OPT will expire before H-1B status can even begin on October 1st. The new rule allows for an extension of status and work authorization through October 1st for any F-1 student who is the beneficiary of a cap-subject H-1B petition and for whom a request for change of status was made. U.S. Citizenship and Immigration Services (USCIS) has not made this relief available for H-1B petitions that requested consular notification and not a change of status. We expect USCIS will further clarify what steps employers should take to obtain an extension of employment authorization for F-1 students whose petitions were selected, but for whom consular processing was selected. In summary, the individuals who benefit from this new rule will now be able to continue to work until October 1st, but must stop working if notified that either the H-1B petition is denied or that the H-1B petition was not chosen in the lottery and the petition is returned.

The second major change described in this rule is an extension of the maximum validity period of OPT from 12 to 29 months for students with degrees in science, technology, engineering, or mathematics (STEM) vocations **whose employer has enrolled in the USCIS E-Verify program**. These STEM degrees include programs under the headings of: Actuarial Science, Computer Science (except Data Entry/Microcomputer Applications), Engineering, Engineering Technologies, Biological and Biomedical Sciences, Mathematics and Statistics, Military Technologies, Physical Sciences, Science Technologies, and Medical Scientist (MS, PhD). In order for an F-1 student to qualify for this OPT extension, the following requirements would need to be fulfilled by the foreign national student and his or her employer:

- foreign national must currently be participating in a 12-month period of approved post-completion OPT;
- foreign national has successfully completed a STEM-related degree;
- foreign national is working for a U.S. employer in a position directly related to the student's major area of study;
- foreign national is working for, or has accepted employment with an employer enrolled in the USCIS E-Verify program;
- foreign national is otherwise continuing to properly maintain valid F-1 status.

The interim rule also introduced a third major change. It imposes a new requirement for the maintenance of valid post-completion F-1 status for those working pursuant to OPT, in that an individual can be unemployed for an aggregate of no more than 90 days for the duration of a 12-month authorized OPT work authorization in order to be considered "lawfully maintaining status." This maximum period increases by 30 days to a total of 120 days for an OPT period extended for the 17 months described above. On the positive side, the rule increases the window of opportunity for an F-1 student to apply for OPT. Now F-1 students may apply for OPT up to 90 days prior and 60 days beyond their program end date.

We will be updating our clients on these new rules as USCIS provides us with additional information. We will also be providing more details on enrollment in the E-Verify program and considerations in that regard.

If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or go to www.mintz.com.

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