



Monday, April 8, 2008

U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) ANNOUNCES INTERIM FINAL RULE EXTENDING F-1 OPTIONAL PRACTICAL TRAINING (OPT) EMPLOYMENT AUTHORIZATION FOR CERTAIN STUDENTS

On Friday, April 4, 2008, the U.S. Department of Homeland Security (DHS) announced the upcoming publication of an interim final rule extending the status and employment authorization of certain F-1 students working pursuant to post-completion Optional Practical Training (OPT) employment authorization.

Bridging the Gap between EAD Expiration and October 1st H-1B Start Date

The interim final rule extends both F-1 status and employment authorization for any F-1 student who holds F-1 OPT employment authorization and who is the beneficiary of a timely-filed H-1B Nonimmigrant Visa Petition requesting a change of status and an H-1B employment start date of October 1st. In order to take advantage of this benefit, F-1 students must not have violated the terms and conditions of F-1 student status. Extensions of status and employment authorization pursuant to this regulation will automatically terminate upon the rejection, revocation, or denial of the underlying H-1B petition. This regulatory measure effectively “bridges the gap” in status and employment authorization for those students whose OPT Employment Authorization Document (EAD) card will expire before the beginning of H-1B employment authorization on October 1st of the next fiscal year.

F-1 Students May Now Apply for OPT Following Graduation

Under the new rule, F-1 students may now apply for post-completion Optional Practical Training up to 60 days following completion of a program of study. Previously students were required to apply for OPT employment authorization prior to completion of their degree programs.

Additional 17-Month Extension of F-1 OPT Employment Authorization for Certain Graduates Working for Qualifying Employers

The new interim final rule also provides for a 17-month extension of F-1 OPT employment authorization for certain graduates of science, technology, engineering, and mathematics (STEM) programs. In order to take advantage of the 17-month extension of status and employment authorization, STEM graduates must be employed by an employer enrolled in the Federal Government’s E-Verify program for verification of employment authorization. In addition to participating in E-Verify, the employer must agree to report the termination or departure of an OPT employee. The student must report to the Designated

School Official (DSO) every six months and must notify the DSO of changes in legal name, residential or mailing address, employer name, employer address, and employment status.

E-Verify, formerly known as “Basic Pilot,” is the Federal Government’s web-based program for accessing Social Security Administration (SSA) records to verify employment eligibility. The E-verify program electronically compares information contained on an Employment Eligibility Verification Form I-9 with records contained in the SSA database as a means to attempt to verify both identity and employment eligibility of newly hired employees. The program is voluntary for most employers, although some states require E-Verify participation for some employers.

Participation in E-Verify requires an employer to sign a Memorandum of Understanding (MOU; a contract). The MOU requires the employer to electronically “verify” employment eligibility of all new hires. The MOU also establishes a rebuttable presumption that continued employment following a final non-confirmation (data mismatch) constitutes a violation of section 274A(a)(1)(A), which prohibits the “knowing” hire or continued employment of unauthorized workers.

Employers considering participation in E-Verify should be aware that selective participation is not an option. It is not possible to participate for the sole purpose of verifying the employment eligibility of F-1 students employed pursuant to OPT employment authorization, or of any other group or classification of employees. An employer’s commitment to participation in E-Verify requires full participation and the entry of all Form I-9 information into the web-based program for all new hires.

Concerns Relating to Participation In E-Verify

Because E-Verify is dependent on SSA records, of which 4.1% are known to contain errors that could return a false non-confirmation of identity or employment eligibility, an employer participating in E-Verify runs the risk of receiving non-confirmation reports with respect to personnel who are actually authorized for employment. A decision not to hire such personnel based on a non-confirmation report could lead to allegations of employment discrimination.

Further, participation in E-Verify does not absolve an employer from penalties associated with the employment of unauthorized workers and does not provide a defense to “knowing hire” violations in the event of continued employment following a final non-confirmation.

Finally, in a worst-case-scenario that came true for at least one large employer participating in the predecessor E-Verify program, accessing the E-Verify portal may highlight patterns of fraudulent document presentation, overall non-compliance, whether intentional or inadvertent, or other forms of data mining which could significantly increase the risk of an investigation or enforcement action. Such data may form the foundation for probable cause warrants and subsequent ICE audits or raids.

For more information concerning an employer's obligations to verify employment eligibility for new hires or the potential advantages and disadvantages of the Federal Government's E-Verify program for electronic verification, please contact your Tindall & Foster immigration attorney. Your Tindall & Foster attorneys specializing in workforce compliance will be able to assist you in evaluating the E-Verify program as a tool for employment eligibility verification and can work with you to pursue measures mitigating your company's exposure to potential liability for historical I-9 violations while minimizing the risk of future violations.