

# BURR ALERT

## Immigration Update: Rule Changes for International Student Workers

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Many of our clients employ international students in a status known as "F-1/OPT," which is "Optional Practical Training," a program similar to an internship that allows international students to get practical work experience during or at the end of their university studies. Many of these students have degrees in the fields of Science, Technology, Engineering, or Mathematics, known as "STEM" degrees. As of May 10, 2016, the U.S. Government is implementing new rules that allow these students to work for longer periods of time, but with additional requirements on the companies that employ them as explained below.

### Summary of the New Rule

Previously, international students with a STEM degree were permitted to receive an extension of 17 months beyond the standard year of OPT work authorization. All an employer was required to do to assist students in receiving this extension was write a brief letter certifying that the type of work the student was doing relates to the student's STEM field, that the employer is enrolled in and using the E-Verify system, and that the employer will immediately notify the appropriate officials if the employment opportunity ends before the student's OPT authorization expires.

Now, the so-called STEM extension will be valid for 24 months total. However, to help students benefit from the STEM extension, employers will have to do additional paperwork to show the following:

- 1) The student is participating in a formal training program to augment the student's academic learning through practical experience, and the employer has enough resources (i.e. sufficiently trained personnel) to train the student toward reaching the goals of the program;
- 2) The employment opportunity offers the same duties, hours, and compensation as positions held by similarly situated employees;
- 3) The student will not replace a full-time or part-time temporary or permanent U.S. worker.

These attestations are in addition to the existing attestations made under the old rule. These new rules were implemented in response to a lawsuit filed to enjoin the OPT program on the grounds that it deprives U.S. workers of employment opportunities. While the court agreed with the plaintiffs who filed the lawsuit, the court's decision to enjoin the OPT program was stayed to allow the relevant government agencies to develop new rules showing that OPT is meant to provide legitimate practical experience to students rather than giving employers a "cheap" labor source.

The most time-consuming part of this obligation for employers will be developing a succinct explanation of the training program, which either already exists or has been developed specifically for the student. The training program must express the following elements:

- 1) A description of the student's role within the employer's organization and the goals of the training. In other words, the employer must specify what competencies and benchmarks it expects the student to achieve over the course of the training;
- 2) A description of the activities the student will engage in to enhance her studies and work toward achieving the goals of the training. A description of the student's daily job duties, augmented with an explanation of how those duties relate to her studies and to training goals will be relevant, as well as a description of how daily duties will be supplemented by additional mentoring and training;
- 3) A description of the supervisory and oversight structure available to monitor the student's work and provide mentoring. A statement of the employer's existing organizational reporting structure, as well as a statement of how the student receives assignments and how closely the student will be supervised in completing those assignments will be relevant;
- 4) A description of the employer's system for evaluating the student's progress. The employer must state how it measures the student's progress through the training program, such as self-evaluations, supervisor evaluations, and remediation for students who fall behind the schedule for progress, and it must explain how its chosen process for evaluation accurately measures the student's progress.

Ultimately, all of these elements will be reduced to a form called I-983, but it will help the employer to keep a more detailed description of the training program on hand for the student's use, and for government enforcement programs, as explained below.

### Scenarios in which Employers will Encounter New Rules

Employers will encounter these new rules in the following scenarios.

#### *Students applying for their first-time STEM extension:*

Any students who begin the application process for a STEM extension and who are filing the I-765 application for work authorization after May 10, 2016, will have to include these attestations from the employer in their paperwork.

#### *Students with a pending I-765 application for work authorization:*

If a student has filed an I-765 application with U.S. Citizenship and Immigration Services (USCIS), and the application is still processing as of May 10, 2016, USCIS will send a request for evidence asking for proof that the employer has met all of these requirements before it will continue processing the I-765 application. Keep in mind that USCIS will expect to see paperwork from the student's school showing that the school has reviewed the employer's training proposal and endorses the proposal for the student. If you are concerned about whether your student's work authorization application will be approved prior to the expiration of the current work

authorization period, contact Burr & Forman to discuss whether your student is eligible for an automatic extension.

*Students with an existing 17-month STEM extension:*

Students who are already working in an approved STEM extension status have the option of filing an I-765 application to claim the additional 7 months available to reach a full 24 months of STEM extension validity. These students may file the I-765 application between May 10 and August 8, 2016, so long as they still have 150 days of validity left on their existing OPT validity period at the time of filing. As with the request for evidence, the student must produce an endorsement from her school obtained after May 10 showing that the employer's training program has been reviewed. This option may be helpful to employers who are trying to sponsor students for H-1B visa status, but due to the statutory cap on the number of H-1B visas available each year, have been unable to get their students' applications through the dreaded H-1B lottery. Keep in mind that, if the student and employer opt not to seek the additional 7 months, the new rules for STEM extensions will not apply to the student's remaining period of employment.

### Government Enforcement of the New Rules

The new rules give ICE the authority to visit employers' sites to determine whether the student and the employer are complying with their new obligations and whether the employer is truly providing a training opportunity to the student. Employers are supposed to receive 48 hours' notice of a visit from ICE, though notice may not be provided if ICE is visiting in response to a complaint or other reasonable suspicion of violations. Given reports that ICE's resources are already strained, it remains unclear how soon it will be able to include these reviews within its existing priorities or on what areas it will focus. It also is unclear what documents ICE will expect employers to produce or whether it will require the employers and students to submit to interviews. For now, employers are advised to keep copies of the training program, evaluations of the students' progress, documentation of the students' duties, hours, and compensation, and documentation of the circumstances under which U.S. workers previously held the students' positions, on hand and easily accessible to be prepared for possible ICE visits.

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