Federal Immigration Officials Make More International Students Eligible for STEM Training Program to Delight of Employers

Insights
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The Department of Homeland Security recently added 22 new qualifying fields of study to its STEM Designated Degree Program List, which will greatly expand opportunities for international students to remain in the U.S. – and aid employers' efforts to expand their own talent pools. The January 2022 additions mark the first major substantive update to the list since the STEP OPT regulation took effect in 2016. This is a very welcome change for employers, as international students holding a U.S. university degree with a major on the STEM Designated Degree Program List are entitled to additional time in work-authorized status on their student visas, and also have multiple chances to enter the annual H-1B lottery registration system. What do employers need to know about this welcome change?

Background

Foreign students in F-1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by U.S. Immigration and Custom Enforcement's (ICE's) Student and Exchange Visitor Program (SEVP) are eligible for Optional Practical Training (OPT) following the completion of their studies. Currently, this creates a 12-month time period where the student is permitted to work for a U.S. employer in a job directly related to the student's major area of study, as well as an additional 24 months for students possessing a bachelor or higher degree in science, technology, engineering, or mathematics (STEM) who are employed by U.S. businesses enrolled in the E-Verify program (a computerized program for employers to determine employment eligibility of new hires and the validity of their Social Security Numbers). In order to be eligible for the STEM extension, the student must also currently be in an approved OPT period based on a designated degree. Thus, for example, a student with a qualifying undergraduate degree but enrolled in OPT based upon an MBA degree would not qualify.

Under the governing regulations, a STEM field of study is a field of study "included in the Department of Education's Classification of Instructional Programs taxonomy containing engineering, biological sciences, mathematics, and physical sciences, or a related field. In general, related fields will include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical, biological, and agricultural sciences."

In recent years, the U.S. Citizenship and Immigration Services (USCIS) has also implemented a set of integrity measures in order to increase oversight of the STEM OPT program, including:

- requiring individualized training programs developed by the employer and the student;
- requiring the student to regularly report to the university's designated school official (DSO);
- requiring the employer to attest that the student will not replace a full- or part-time temporary or permanent U.S. worker; and
- authorizing site visits by ICE (Immigration and Customs Enforcement) to very training plans, compensation, and non-displacement attestations that employers will be required to sign.

What's New

The STEM Designated Degree Program list contains all of the fields of study that one would expect, such as engineering, mathematics, chemistry, biology, and physics. In addition, the new announcement adds Bioenergy (Department of Education Classification of Instructional Programs (CIP) code: 03.0210), Forestry, General (03.0501), Forest Resources Production and Management (03.0510), Human-Centered Technology Design (11.0105), Cloud Computing (11.0902), Anthrozoology (30.3401), Climate Science (30.3501), Earth Systems Science (30.3801), Economics and Computer Science (30.3901), Environmental Geosciences (30.4101), Geobiology (30.4301), Geography and Environmental Studies (30.4401), Mathematical Economics (30.4901), Mathematics and Atmospheric/Oceanic Science (30.5001), Data Science, General (30.7001), Data Analytics, General (30.7101), Business Analytics (30.7102), Data Visualization (30.7103), Financial Analytics (30.7104), Data Analytics, Other (30.7199), Industrial and Organizational Psychology (42.2804), and Social Sciences, Research Methodology and Quantitative Methods (45.0102).

Why This Matters

Along with the additional 24 months of work authorization, the two-year STEM extension of OPT also has the benefit of allowing eligible foreign students to apply multiple times for H-1B status. The number of H-1B visas available per year is subject to a fairly low quota (65,000, with an additional 20,000 for holders of U.S. Master's Degrees). The USCIS conducts a lottery for these slots since it usually receives many more petitions than can be accommodated under the quota cap. Since cap-subject petitions are usually limited to one registration for the H-1B lottery per year, unsuccessful applicants are able to try again the following year.

Furthermore, following the end of a person's authorized F-1 OPT period (including all eligible STEM extensions), the student has 60 days (with no employment authorization) to either change to another nonimmigrant classification, begin a new course of study, or depart the U.S. F-1 students with pending USCIS petitions requesting a change of status to H-1B also remain eligible for automatic extensions of the period of stay, as well as employment authorization, until the pending H-1B petition is adjudicated. If the USCIS approves the H-1B petition, the student will be granted an F-1/OPT

extension that enables them to remain in the U.S. with work authorization until the requested start date of H-1B status (even if this is longer than 60 days). Individuals initially assuming H-1B status are not permitted to actually begin work in H-1B status until October 1 of the year in which they filed their H-1B petition (as this corresponds to the start of the federal government's next fiscal year). This automatic extension provision, known as "cap gap," eases the situation where a student has an approved H-1B petition, but either must stop work or depart the U.S. before the H-1B status is scheduled to take effect on October 1.

What Should You Do?

The ability of a foreign worker holding a STEM degree to be entered into the H-1B lottery for several years is an advantage for U.S. employers seeking to hire employees in H-1B status. This issue spotlights the concern that many U.S. high-tech companies have about the H-1B cap. The critical shortage of domestic science and engineering talent and the degree to which high-tech employers are as a consequence necessarily far more dependent on foreign workers than other industries.

Adding more degree programs to the STEM designation means that there are now more highly qualified potential employees available to be hired for a longer period of time. Holders of student visas with the STEM designation can work on their student visas for up to three years and have multiple chances of being selected in the annual H-1B lottery. Once an individual is selected in the H-1B lottery, you can then sponsor this employee for H-1B status. If approved by the USCIS, the employee would then be eligible for an additional six years of H-1B work authorization status, as well as potentially more should you ultimately decide to sponsor the employee for U.S. Lawful Permanent Resident status (i.e., Green Card status).

Conclusion

We'll monitor this situation and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Immigration Practice Group or Technology Industry Group.

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