New 24-month F-1 STEM OPT Rule Effective May 10, 2016

Insights
3.10.16

On March 9, 2016, the U.S. Department of Homeland Security (DHS) posted to the Federal Register an advance copy of its final rule regarding certain F-1 Optional Practical Training (OPT) extensions. The new rule replaces the 2008 interim rule and lengthens the available extension period for holders of Science, Technology, Engineering and Math (STEM) degrees issued by U.S. institutions of higher education from 17 months to 24 months.

The rule also increases government oversight over STEM OPT extensions by requiring the implementation of formal training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students with degrees from accredited schools. The new rule will be formally published in the Federal Register on March 11, 2016, and goes into effect on May 10, 2016.

As background, a foreign student who is attending a U.S. institution of higher education in valid F-1 nonimmigrant visa status may seek up to 12 months of practical training related to their degree major called OPT. OPT is allowed either during his or her academic program (pre-completion OPT) or immediately after graduation (post-completion OPT). The F-1 student is issued an Employment Authorization Document (EAD) by the U.S. Citizenship and Immigration Services (USCIS) to document his or her authorization to accept employment in the United States.

In addition to the regular 12-month OPT period, F-1 students who graduate with a STEM degree from a U.S. institution of higher education are granted an additional training period. Under the 2008 interim rule an F-1 STEM degree holder could apply for a 17-month extension of their work authorization, for a total of 29 months of OPT. To qualify for the additional 17 months, the employer who employed the F-1 student must have been registered under E-Verify.

On August 12, 2015, the U.S. District Court for the District of Columbia invalidated the 2008 interim rule. The Court held that DHS violated the "notice and comment" period in enacting the 2008 interim rule. The Court granted DHS additional time to correct the procedural deficiencies occurring during the enactment of the 2008 rule. The Court gave DHS until May 10, 2016, to issue a final rule that meets the applicable regulatory requirements.

The DHS final rule lengthens the STEM OPT extension period from 17 months to 24 months, and the rule continues to require employment by an E-Verify compliant employer. Additionally, the final rule

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

includes the following clarifications and requirements:

- **Accreditation Requirement.** The STEM degree must be issued from a school accredited by a U.S. Department of Education-recognized accrediting agency and certified under the Student and Exchange Visitor Program administered by DHS' Immigration & Customs Enforcement (ICE).
- **STEM Definition.** The rule clarifies that the term "science, technology, engineering or mathematics field" means a field included in the Department of Education's Classification of Instructional Programs taxonomy within the two-digit series or successor series containing engineering, biological sciences, mathematics, and physical sciences, or a related field. ICE will continued to maintain the STEM Designated Degree Program List, which will be a complete list of qualifying degree program categories, published on the Student and Exchange Visitor Program Web site at http://www.ice.gov/sevis.
- **Multiple STEM Degrees.** The new rule clarifies that F-1 students who receive an additional STEM degree from an accredited college or university can apply for a subsequent STEM OPT extension.
- **Previously Issued STEM Degrees.** The F-1 student can utilize a prior eligible STEM degree conferred by a U.S. institution of higher education within the prior 10 years to apply for a 24-month STEM OPT extension even if the most recent degree is not a STEM degree. The prior degree must not have already formed the basis of a STEM OPT extension, must be from a school that is both accredited by a U.S. Department of Education-recognized accrediting agency and certified by SEVP at the time of the student's STEM OPT application. The student's most recent degree must also be from an accredited and SEVP-certified institution.
- **Formal Training Program.** Employers participating in STEM OPT must incorporate a formal training plan that includes concrete learning objectives with proper oversight. A new Form I-983 must be completed by the student and submitted to the Designated School Official (DSO) documenting the plan before the DSO can approve of the STEM extension.
- **Obligation to Report Material Changes.** Employers and students must report material changes in their training program.
- **No Adverse Effects on U.S. Workers.** To guard against "adverse effects on U.S. workers" the new rule requires that the terms and conditions of an F-1 student's training opportunity (such as duties, hours, and compensation) must be "on par" with U.S. workers in similar positions in the same geographic area of employment. Additionally, the F-1 student must not replace a full-time, part-time, temporary or permanent U.S. worker.
- **20 Hours/Week Requirement.** Students must work a minimum of 20 hours per week per employer to qualify.
- **Period of Unemployment.** Students are still permitted a limited period of unemployment during the initial period of post-completion OPT and the STEM OPT extension.
- **Transition from 17-Month to 24-Month STEM EAD.** The final rule states that students who currently possess a 17-month STEM EAD card can apply for the additional 7 months in certain circumstances. The I-765 application must be filed between May 10, 2016, and August 8, 2016,

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

and the F-1 student's current 17-month STEM EAD card must have at least 150 calendar days of validity remaining as of the date their I-765 is filed.

As stated, the final rule will become effective May 10, 2016. Fisher Phillips, will be offering on-going trainings to employers on suggested best practices to meet the new obligations regarding hiring F-1 students. If you have any questions, please be sure to contact your Fisher Phillips legal representative with whom you regularly work.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.