

New Optional Practical Training (OPT) Rules for F-1 Students and a Cap-Gap Provision for the H-1b

On April 3, 2008, The Department of Homeland Security announced the publication of an Interim Final Rule that makes significant changes to Post-Completion Optional Practical Training for F-1 students. The rule took effect on April 8, 2008 with publication in the U.S. Federal Register.

Highlights of the New Rule:

- The current 12-month limit on OPT will be extended by 17 months, for a total of 29 months for certain **STEM** degree holders ONLY.
- The H-1B “Cap Gap” is eliminated by extending OPT employment and status for those who are beneficiaries of an H-1B petition with an October 1 start date (available to ALL OPT participants).
- The filing deadline for initial OPT applications is changed to allow a student to file the I-765 up to 90 days prior to the end of the program and up to 60 days after the program end date (applies to all OPT participants).
- There are new reporting requirements for students and employers (applies to all OPT participants) .
- Post-Completion OPT will now be dependent on employment. Only limited periods of unemployment will be permitted (applies to all OPT participants).

STEM = Science, Technology, Engineering, Mathematics

STEM Fields include:

- Actuarial Science
- Computer Science Applications
- Engineering
- Engineering Technologies
- Biological and Biomedical Sciences
- Mathematics and Statistics
- Military Technologies
- Physical Sciences
- Science Technologies
- Medical Scientist (MS, PhD)

Certain fields that many would regard as being part of science or engineering are not included in the STEM list, but the Department of Homeland Security is inviting individuals to submit the titles of additional fields of study. However, Department Homeland Security must also continue to ensure that the extension remains limited to students with degrees in major areas of study falling within the technical field where there is a shortage of qualified, highly skilled U.S. workers.

Additional Requirements for 17-Month Extension of OPT

Besides having to be enrolled in a “STEM” field of study, there are many additional requirements for the 17-Month Extension of OPT:

- The student must be currently authorized for a 12-month period of OPT and working for a US employer in a job directly related to the student’s field of study.
- The student must provide an email address, job title or position, and the supervisor’s name and contact information for entry into SEVIS.
- The student must have successfully *completed* a bachelor’s, master’s or doctoral degree in a field on the DHS STEM Designated Degree Program list, from a SEVIS-certified US college or university.
- At the time of application for the 17-month extension, the student must have a job-offer or be employed by an employer registered with the “E-Verify” federal employment verification system. For more information on “E-Verify,” see the next section.
- The student must not have previously received a 17-month OPT extension after earning a STEM degree.
- The student must apply for the 17-month extension with the OSU International Students and Scholars office. The school’s Designated School official must recommend the extension and issue a new I-20 with the recommendation noted.
- The student applies for the extension using form I-765 with fee (currently \$340.00) to the US Citizenship and Immigration Services Processing Center having jurisdiction over the student’s current place of residence.
- The student must file the extension application in a timely manner, generally 90 days before the current period of OPT expires.
- A student who files the application timely may continue employment while the extension application is pending, until a final decision is made, or for 180 days, whichever comes first
- The employer must agree to report the termination or departure of the student OSU International Students and Scholars Office or through any other process chosen by the Department of Homeland Security.
- The student must agree to report the following information to the OSU International Students and Scholars Office:
 - Change of name
 - Change of residential or mailing address
 - Name and address of employer
 - Change in the name or address of employer
 - When employment changes or terminates
- The student must also agree to provide a report every six months to the OSU International Students and Scholars Office to verify the above information.

What Is E-Verify?

E-Verify was formerly known as the Basic Pilot/Employment Eligibility Verification Program. E-Verify is an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration.

E-Verify allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify is free and voluntary. However, there are concerns whether employers will want to join E-Verify. If an employer joins, the employer will have to verify ALL new employees, including US citizens, in E-Verify.

There have been reports of significant discrepancies in the databases currently being used that result in verification errors, indicating that a worker is ineligible for employment when that is not accurate. Participating employers must permit visits by Homeland Security and the Social Security Administration to review their employment records and interview employees.

Remember that a F-1 student seeking to extend his or her OPT by 17 months can only do so if at the time of filing, the student is employed by, or has a job offer with, an E-Verify participating employer.

The new I-765 requires information on the employer's E-Verify company and/or Client Identification Number. There is not enough information at this time to determine if the E-Verify requirement will have a negative impact on employer participation, and thus prevent many students on OPT in STEM fields from seeking the 17-month extension.

For more information on E-Verify, visit:

http://www.dhs.gov/ximgtn/programs/gc_1185221678150.shtm

New Filing Deadlines for Initial OPT Applications

Currently, an applicant for post-completion OPT must file their application before their degree completion date. Under the new rule, a student will be able to file the OPT application up to 90 days **prior** the end date of the degree program, and up to 60 days **after** the end date of the degree program. However, the application for OPT must be submitted to the USCIS Processing Center within 30 days of the date the DSO enters the recommendation for OPT into the SEVIS record.

Students who have issues with a certain G.P.A in order to graduate may choose to apply for OPT after the grades have been reported. The new regulations will allow you to make this choice.

Duration of OPT

The starting date for the OPT Employment Authorization Document (EAD) will be the date requested by the student or the date OPT is approved at the USCIS Service Center, whichever is later. But, there is an exception: the authorization period for the 17-month OPT extension begins the day after the expiration of the initial post-completion OPT employment authorization, and ends 17 months later, regardless of the date the extension is approved.

Form I-765 Changes

A new Form I-765 is now required, and is available in the OPT Packet from the International Students and Scholars office. The prior version of the form will not be accepted after May 8, 2008. The form and instructions have been changed to implement the new OPT regulations. The changes included the following:

The eligibility code for an F-1 seeking OPT has been changed to these three codes. (c)(3)(A) for pre-completion OPT, (c)(3)(B) for post-completion OPT, and (c)(3)(C) for a 17-month STEM OPT extension.

On item 17 – asks for information needed to process applications for the 17-month STEM OPT extension, including space for the degree conferred, and the employer's E-Verify Company or Client Identification Number. Also, required is a copy of the conferred degree as well as the student's major field of study.

Reporting Requirements for Students While on OPT

All students on OPT must report to the OSU International Students and Scholars office the following information:

- Any change in name or address
- The name and address of their employer
- Any change to the name and address of the employer
- Any interruption of such employment

In addition, students with an approved 17 month extension must report to the OSU International Students and Scholars office within **ten days** the following information:

- Any change in name or residential/ mailing address
- The name and address of their employer
- Any change to the name and address of the employer
- Any interruption of such employment

Students with an approved 17 month extension must also make a validation report to the OSU International Students and Scholars office every **six months** starting on the date the extension begins and ending when the OPT ends. The validation is a confirmation that the student's name and address, employer name and address, and /or loss of employment is current and accurate.

Reporting Requirements for Employers While on OPT

The employer of a student with an approved 17-month OPT extension must agree to report the termination or departure of the student to the OSU International Students and Scholars office within **48 hours** of the event. Also, the employer shall consider the student to have departed when the employer knows the student has left or if the student has not reported for work for a period of 5 consecutive business days without the employer's consent. Eventually, DHS may identify other means or processes to report this event, but at this time the event will be reported to the OSU International Students and Scholars office.

Post-Completion OPT is Now Dependent on Employment

Students on post-completion OPT may not accrue an aggregate of more than **90 days** of unemployment under the initial 12-month period of OPT. Students granted a 17-month OPT extension may not accrue an aggregate of more than **120 days** of unemployment during the total 29-month OPT period. This new rule implies that the student will be in violation of status. At this time, it is unclear as to what the student will be required to do in this scenario.

Elimination of the H-1B “Cap-Gap”

The H-1B “cap-gap” occurs when a F-1 student’s status and OPT work authorization expires during the current fiscal year before the student can start approved H-1B employment during the next fiscal year that begins on October 1. For example, a student whose OPT ending date is July 16, 2008, and whose employer successfully files an H-1B petition for a job that is subject to the H-1B “cap” and starts October 1 currently needs to stop employment as of July 16, and depart the United States on September 15 (the last day of the 60-day grace period following OPT). While outside the United States, the student must then obtain an H-1B visa, and cannot re-enter the United States any sooner than 10 days prior to the H-1B start date.

Under the new rule, a student currently on OPT who is the beneficiary of a timely-filed and approved H-1B petition that requests an employment start date of October 1 of the following fiscal year will have his or her duration of status and OPT employment authorization extended to that date.

Should the pending H-1B petition ultimately be denied, the student will have a sixty day grace period from the notification date of the denial to depart the United States, obtain admission to a new F-1 SEVIS-approved school, or file an application for a change of status.

At this time, it is unclear if additional documentation will be required during the gap period.

What Happens Next?

There are some very essential procedural steps that need to be implemented before the International Students and Scholars office can begin accepting applications for an extension of OPT under these new rules. Those steps include:

- SEVIS needs to publish interim instructions to schools so that DSO’s will be able to implement the new procedure.
- SEVIS update of 5.8 needs to be available for processing application.
- Schools need to update their processes, procedures, and informational materials to accommodate all the new requirements

Web Resources

There are some excellent web resources available on the new OPT rule:

Department of Homeland Security Announcement

http://www.dhs.gov/xnews/releases/pr_1207334008610.shtm

US Citizenship and Immigration Services Q and A

http://www.uscis.gov/files/article/OPT_FAQ_4apr08.pdf

NAFSA: Association of International Educators Resource on the Interim Final Rule

http://nafsa.org/regulatory_information.sec/29_month_opt_rule_updates

Text of Interim Final Rule

<http://edocket.access.gpo.gov/2008/E8-7427.htm> (text format, 27 pages)

<http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf> (pdf file, 13 pages)

Thanks to NAFSA: Association of International Educators, Binghamton University, David Ware and Associates, and International Education Colleagues for providing timely information on the new OPT regulations, which was used for this article.

Updated April 2008