

## New Rules For Practical Training Of Foreign STEM Students?

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Globally, there is significant competition, especially in the technology sector, for highly skilled workers with practical experience. According to the U.S. Department of Homeland Security, there are currently 1.05 million foreign students studying at nearly 9,000 U.S. schools authorized to enroll international students. Some 38 percent of foreign students are studying in technology fields. The top three STEM (science, technology, engineering and mathematics) majors for foreign students are engineering, computer and information sciences and support services, and biological and biomedical sciences. Eighty-five percent of foreign STEM students studying in the United States are from Asia.

Foreign students are admitted to the United States for the period of time necessary to complete their academic studies. In addition, as early as 1947, immigration authorities have interpreted the Immigration and Nationality Act (INA) and related authorities to permit the regulation of on-the-job training intended to supplement a student's classroom training. Regulations published by DHS and its predecessor agencies have long authorized such practicum in the form of pre-completion and post-completion Optional Practical Training (OPT).

### **The 2008 STEM OPT Rules**

Before 2008, a student could only be authorized for 12 months of OPT, which had to be completed within a 14-month window following completion of the student's course of study. In 2008, DHS published an interim final rule intended to expand practical training opportunities for foreign students in the STEM disciplines, providing for a 17-month extension of practical training beyond the standard 12-month training period available to all foreign students. The longer period of practical training in the STEM disciplines reflects the importance of STEM capabilities to the United States.

The rule also closed the so-called “cap-gap” occasioned by the mismatch between the typical academic year ending in May and the beginning of the government fiscal year on Oct. 1. The rule became effective immediately, but offered the opportunity for post-publication public comment. In 2011 and 2012, DHS published modifications to the list of STEM disciplines.

### **Federal Court Challenge**

In March 2014, the Washington Alliance of Technology Workers (WashTech), a collective bargaining organization that represents STEM workers, filed suit in federal district court in Washington, D.C., challenging the 2008 regulations as well as the 2011 and 2012 modifications. In a preliminary order dated Nov. 21, 2014, the court granted in part and denied in part the defendant’s motion to dismiss. The court dismissed allegations that the OPT program exceeds the statutory authority of DHS and conflicts with other statutory requirements, including the labor certifications related to H-1B visas. The court held that “the Complaint does not identify a single WashTech member who has suffered an injury as a result of the twelve-month OPT program.” In the alternative, the court held that these allegations were barred by Administrative Procedures Act’s (APA) six-year statute of limitations. The court found, however, that the complaint did allege sufficient facts to confer standing on WashTech to challenge the 2008 rule and the 2011 and 2012 modifications.

On Aug. 12, 2015, the district court issued a 37-page opinion in which it upheld the authority of DHS to publish the 2008 STEM OPT and H-1B Cap-Gap rule; found that the 2008 rule is entitled to deference under *Chevron USA Inc. v. NRDC Inc.*, 467 U.S. 837 (1984); and found that the rule was a reasonable interpretation under the Chevron standard of the statutory authority. Nonetheless, the court held that the 2008 DHS interim final rule was invalid because DHS had promulgated the rule without the public notice and comment period required under the APA. Significantly, the court found that vacating the rule immediately would cause substantial hardship for F-1 STEM students and would create a major labor disruption for the technology sector. Accordingly, the court ordered that the 2008 rule and subsequent amendments thereto be vacated, but that the vacatur be stayed until Feb. 12, 2016, to allow DHS sufficient time to publish a new rule with proper notice and opportunity for public comment. The plaintiffs have appealed the district court decision.

### **2015 Notice of Proposed Rulemaking**

On Oct. 19, 2015, DHS published in the Federal Register a notice of proposed rulemaking (NPRM) under the title, “Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students.” Public comments on the proposed rule will be accepted for a 30-day period through Nov. 18, 2015. Unlike the 2008 interim rule, which relied heavily on the connection between student visas and H-1B “specialty occupation” work visas to meet the emergency exception to the APA notice and comment rulemaking requirement, the NPRM points to the benefits to the U.S. economy and to the country’s global technology leadership as reasons for encouraging bright and motivated foreign students to choose the United States for their academic and practical training and for expanding practical training opportunities for students engaged in the STEM disciplines.

### **Highlights of the NPRM**

***Expansion of OPT Time Period.*** In the NPRM, DHS has proposed expanding the OPT period for STEM students to an additional 24 months for a total of 36 months of OPT after graduation.

**Definition of STEM Degree.** DHS aims to more clearly defined what programs are classified as STEM by utilizing the Department of Education Classification of Instructional Program categories as the basis for defining degree programs. Any future updates that DHS makes to this list would be published in the Federal Register.

**Mentoring and Training Program.** DHS has proposed that employers of OPT STEM students be required to implement a formal mentoring and training program. The program outline would need to be submitted to the student's Designated School Official (DSO) prior to approval of OPT and would require the student to regularly report to the DSO on the status and progress of the training program.

**Previously Obtained STEM Degrees.** Students who have obtained a prior STEM degree from an accredited institution in the United States may apply for the STEM OPT extension based on that earlier degree so long as their current degree was also earned at an accredited institution and the employment is directly related to the previously obtained STEM degree.

**Student Compliance.** DHS has proposed a revision to the number of days a student in OPT status may remain unemployed. Currently, students may be unemployed for no more than 90 days during the initial 12 month OPT period and 30 days during the 17 month extension period. Under the NPRM, a student would be allowed to be unemployed for up to 60 days during the proposed 24 month extension period.

**E-Verify.** The rule carries over the existing requirement that employers of F-1 OPT students be enrolled in e-verify (electronic verification of employment authorization) and report changes in students' employment.

**Cap-Gap.** The NPRM also includes the so called "cap-gap" provision that allows student status to be extended automatically if the student is the beneficiary of a timely filed H-1B visa petition. Under the cap-gap rule, students OPT status would be extended until Oct. 1 of the fiscal year for which the H-1B was requested.

DHS anticipates receiving a large number of public comments within the comment period, but expects to be able to publish a final rule before the court's deadline of Feb. 12, 2016.

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