

STEM OPT Updates Based on Court Decision:

On Wednesday, August 12, 2015 the U.S. District Court for the District of Columbia significantly curtailed immigration benefits for foreign students in the United States on F-1 visas based on her ruling in *Washington Alliance of Technology Workers vs. U.S. Department of Homeland Security*.

The judge invalidated USCIS's 2008 17-month Optional Practical Training (OPT) extension rule by holding that DHS failed to show it faced an emergency situation in 2008 that exempted it from carrying out the 90 notice and comment requirement, thus ***making the 2008 DHS' rule invalid.***

The 2008 rule had three main benefits.

1. The rule allowed F-1 students with degrees in certain Science, Technology, Engineering or Math (STEM) fields who work for employers enrolled in E-Verify to extend their OPT work authorization period from 12 to 29 months.
2. The rule eliminated the requirement that DHS expressly grant H-1B "cap gap" protection via notice in the Federal Register and instead made the granting of H-1B cap gap protections automatic.
3. The rule allowed F-1 students to apply for OPT during the 60-day period after graduation rather than requiring filing before graduation. *All of those benefits have been eliminated with the invalidation of the 2008 rule.*

As of February 12, 2016 all of the benefits of the 2008 rule will be eliminated unless USCIS issues a new OPT STEM extension rule via notice-and-comment rulemaking. The rulemaking process can take 90 days or more from the date a rule is prepared for publication, however, so DHS will have to issue a new rule very quickly to avoid the consequences of this decision.

Unless DHS passes a new rule for OPT the recent decision will adversely affect F-1 students and their employers in 3 significant ways:

1. F-1 STEM work authorizations will stop being valid on February 12, 2016. This will affect both F-1 students who currently hold STEM OPT as well as individuals who would be eligible for STEM OPT as of February 12, 2016.
2. H-1B/F-1 cap gap will no longer be automatic. DHS will have to formally announce that the H-1B cap is met and then publish a notice in the federal register. This will result in uncertainty for both employers and F-1 students, as "cap Gap" protections will no longer be automatic but will instead depend on affirmative action by DHS.
3. F-1 students will only be permitted to apply for work authorization while still in school; post-graduation applications will be no longer available.

1) QUESTION: Will the August 12, 2015 court decision impact students already authorized for STEM OPT?

1a) ANSWER: Yes, If the department of Homeland Security does not appeal, or loses an appeal on this decision, and if DHS does not issue any new regulations to fix this, then yes, STEM OPT will not exist after February 12, 2016. F-1 students authorized for STEM OPT are eligible to work only through February 12, 2016.

2) QUESTION: I am approved for OPT now. Am I eligible to apply for STEM OPT between now and February 12, 2016?

2a) ANSWER: You are eligible to apply for STEM OPT if you graduated in a STEM approved field. HOWEVER, we do not know if your STEM OPT application will be approved, or if it will be approved for a period beyond February 12, 2016.

- If your current OPT is valid until a date later than 2/12/2016 it is likely that your STEM OPT application will be denied. You may still wish to apply and the OIE will assist you but know that you may lose the money for the I-765 filing fee.
- If your current OPT is valid until a date before 2/12/2016, then your STEM OPT application may be approved, but for a period limited to an end date of 2/12/2016.

3) QUESTION: I am currently in a degree program in a STEM approved field. Will I be able to use a STEM OPT extension after I finish a first period of OPT?

3a) ANSWER: Based on the court's ruling, STEM OPT extension will not exist after February 12, 2016. IF DHS regulations change, or IF the court decision is appealed and over-turned, then applying for a STEM OPT might be possible.

4) QUESTION: I am approved for STEM OPT now. My STEM OPT end date on my work card is a date later than 2/12/2016. Will I have to end my employment as of 2/12/2016?

4a) ANSWER: Yes, at this time, you should plan for your employment authorization under the STEM OPT extension to end on 2/12/2016. We recommend you speak with your employer, and with a good immigration attorney to determine what options may be available for you to continue working after 2/12/2016.

5) QUESTION: I have a STEM OPT application pending right now. Will it be approved?

5a) ANSWER: USCIS makes decisions on I-765 OPT applications so we cannot say if it will be approved or not. When the OIE issues an I-20 with a STEM Extension recommendation it is because the F-1 is eligible for the STEM OPT. The STEM Extension will likely be approved if you are otherwise eligible for a STEM OPT extension although it will only be valid through February 12, 2016.

6) QUESTION: I have a STEM OPT application pending right now. Will it be approved to an end date past the deadline of February 12, 2016?

6a) ANSWER: Since the court decision indicates that STEM OPT will not exist after the deadline of February 12, 2016, it is likely that a STEM OPT application will not be approved for a date after February 12, 2016.