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The Immigration Service has announced significant changes to the OPT regulations which both create new opportunities for F-1 students but also create new problems which will have to be planned for in advance. There are two major sections to the new rules which are treated separately below. All of the new regulations are effective as of April 8, 2008 but since they are effective as "interim final regulations" they are subject to change following the notice and comment period allowed by the Immigration Service until June 9, 2008. In other words, these new rules are effective now but may be changed later based upon input from the public over the notice and comment period.

Automatic Extension for OPT after Filing for H-1 Status

One of the major sections of the rule is an "automatic" extension of OPT for any student who filed an H-1B petition and request for change of status. The regulation does this by extending the "duration of status" and "employment authorization" for any student in OPT who properly files an H-1B petition and change of status request.

The automatic extension of status and employment authorization is valid until the following October 1st or until the H-1 petition is rejected, denied or revoked, whichever comes first.

This new provision would seemingly assist students who have a "gap" between the expiration of their OPT (including the sixty day grace period) and the start of the H-1 status on October 1st.

However, there are several serious problems with this new

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regulation. First, it only applies to students who have filed both an H-1 petition and a request for change of status. If the student filed the H-1 petition with a request for notification to the U.S. Consulate apparently the new regulation does not apply. Secondly, and more importantly, if the H-1B petition is denied or rejected because the quota has been filled, the "automatic" extension of OPT is terminated. If the student has not made prior arrangements to be admitted to a new degree program in the Fall of that year, he or she may be left without any status at all.

For example, assuming that the OPT expires on July 15th and the sixty day grace period on September 15th, the "automatic extension" would provide the student with work authorization until October 1st if the H-1 petition is accepted and approved along with the change of status request. However, if the H-1 petition is rejected or denied, the automatic extension terminates and the student reverts back to the OPT expiration date of July 15th and the sixty day grace period of September 15th. If the H-1 petition and change of status were denied, for example, on August 1st, the student would generally not have enough time to obtain a new I-20 and be admitted to a new degree program in order to continue status.

Finally, since the interim final regulation became effective on April 8, 2008, it would appear that it applies to H-1 petitions and change of status requests filed on April 1, 2008. However, this is not explicitly stated in the regulation and will need to be clarified by the Immigration Service in the near future. In addition, the new regulation does not provide any guidance as to how the student proves that he or she has work authorization beyond the expiration of their EAD card. It appears that the student does not have to formally apply for the extension nor is there any way for the Immigration Service to provide documentation validating that extension. Apparently, it is simply an extension of the preexisting EAD card by operation of law. This of course puts the employer in a difficult situation for I-9 purposes since there will be no proof of valid work authorization other than the statements contained in the regulations. Again, this is something the Immigration Service will have to clarify in the future.

Additional OPT Work Authorization for Certain Graduates in Science, Technology, Engineering and Mathematics (STEM)

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The new regulation also provides for an extension of OPT of up to seventeen additional months beyond the original twelve months of OPT granted following graduation. The regulation requires that the STEM degree must be the one granted immediately prior to the grant of OPT and by definition it means it is only applicable to graduates of U.S. colleges and universities.

In addition to limiting this seventeen month extension to only graduates with STEM degrees, the regulation also requires any employer of that student to enroll in the E-verify program. This means that the employer must register to have all of its employees verified through the Immigration Service prior to hire. The employer must also agree to notify the university if the employment is terminated.

General Changes to the OPT Process

Although the new regulations appear to provide some relief to students who need additional time in OPT status either because of the H-1 "gap" or simply to extend optional practical training following graduation with a STEM degree, they also place a tremendous burden on the designated school official (DSO) at each university to monitor each and every F-1 student in OPT status with various reports and updates to the Immigration Service. In addition, for the first time, the Immigration Service has specifically required employment by the student during the OPT period. The new regulation states that the student is only allowed an aggregate of ninety days where he or she is not employed during the initial twelve months of OPT or 120 days in the aggregate if granted the seventeen month extension for STEM graduates. This obviously will pose a potential hardship for students who have difficulty finding an initial employer or for those who lose their job and must find another employer. It also is unclear whether or not the new regulation is retroactive to cover prior years of OPT in which student may have had more than ninety days in the aggregate of unemployment.

Conclusion

Obviously, the new regulations provide some benefit to students but also create enormous problems for students, employers and the designated school officials at the universities. Many of these issues will have to be clarified in the coming weeks and months and we certainly

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anticipate many objections to these regulations during the notice and comment period. We will of course keep you informed of changes as they develop.

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