

# Management Alert

## DHS to Eliminate “Cap-Gap” By Extending Employment Authorization for Certain F-1 Students

The Department of Homeland Security (DHS) has announced plans to give employers and recent college graduates much-needed relief resulting from the H-1B cap. Specifically, DHS will publish an interim final rule providing an automatic extension of optional practical training (OPT) for the so-called “cap-gap” experienced by students waiting for approval of H-1B petitions. The new rule will also grant certain students up to 29 months of employment authorization, allowing them three opportunities to apply for H-1B status before exhausting their work authorization. It is expected that DHS’ interim final rule will be published in the *Federal Register* in the coming days, at which time the rule will go into effect.

### *The Cap-Gap*

Students in F-1 status are currently allowed up to 12 months of post-graduation OPT, which gives them the opportunity to work in the U.S. for up to a year after graduation. Many employers wish to continue to employ these highly-skilled individuals and choose to file H-1B

petitions for these employees. However, because the H-1B “quota” is generally exhausted early, H-1B visas are only available beginning in October each year. As such, many students experience a gap in employment eligibility and authorized stay in the U.S. from early summer (when OPT typically expires) until the H-1B becomes available in October. This means that these students often must leave the U.S. for several months before they are eligible to return to work.

This problem has been further exacerbated in recent years, as the H-1B program has become a lottery system, and in any given year only a portion of qualified individuals are able to ultimately obtain H-1B status. This means that many F-1 students leave the U.S. at the end of their OPT and do not have the opportunity to return.

### *Cap-Gap Relief*

The new rule to be issued by DHS grants cap-gap relief to F-1 students whose employers have filed H-1B petitions

on their behalf. Such students will be given a bridge of status and work authorization until October 1, 2008. This means that individuals currently in F-1 status who are completing OPT and whose employers have filed H-1B petitions on their behalf will have their work authorization automatically extended until October 1, 2008 (the required start date on the H-1B petition). Such individuals will not experience a gap in employment eligibility or in status. Dependent family members will also benefit from the extension of status.

The new rule currently appears to require that the student be the beneficiary of “an H-1B petition and request for change of status.” The requirement that the petition be filed as a request for a change of status is illogical, because in cap-gap situations, most students would not have been eligible to file a change of status request. It is unclear whether this requirement will remain in the final rule and, if so, whether employers will be permitted to amend the already-filed petitions to indicate that a change of status is requested.

In contrast to the below-discussed extension of student employment authorization, this automatic extension provision does not require that the employer participate in E-Verify and does not require that the student have a degree in a particular field. If the H petition that is the basis for a student’s extension of status and employment authorization is rejected, denied, or revoked, the student’s employment authorization under this new cap-gap rule is terminated, and the student will have 60 days in which to leave the U.S.; a student whose H petition is rejected or denied but who has status and employment authorization independently of this new rule would be entitled to remain in the U.S. until 60 days following the OPT expiration date.

## *17-Month OPT Extension*

In addition to the proposed cap-gap relief, the new DHS rule will allow F-1 students to apply for a 17-month extension of OPT (to a maximum of 29 months) if the student’s degree is in a designated science, technology, engineering, or math field (a “STEM” field) *and* if the employer is registered for and participating in the Federal government’s E-Verify program (which allows employers to verify the employment eligibility of new hires) at the time that the student requests the OPT extension. This will allow some students up to three chances at obtaining H-1B status while in the U.S.

Designated fields of study include the following: actuarial science, computer science, engineering, engineering technologies, biological and biomedical sciences, mathematics and statistics, military technologies, physical science, science technologies, and medical science. A student can determine whether his or her degree falls into one of these categories by checking his or her degree code in the Student and Exchange Visitor Information System (SEVIS) against the National Center for Education Statistics codes on the SEVIS Program’s website, <http://www.ice.gov/sevis>.

This 17-month extension of OPT is not automatic. The eligible student must obtain a recommendation for OPT from his or her designated school official (DSO) and must apply for work authorization using Form I-765. The Form I-765 will be revised to require the student to list his or her field of study, the employer’s name [as it appears in E-Verify records], and the employer’s E-Verify registration information. It is not clear from the rule whether the employer must register for and use E-Verify nationwide or whether use of E-Verify just for the hiring site at which the student will work will

satisfy the requirement. The employer must be a “participant in good standing in the E-Verify program” as determined by USCIS in order for the extension to be granted.

A student who files the 17-month extension request prior to the expiration date of his or her current OPT period will have his or her work authorization automatically extended for up to 180 days while the 17-month extension request is pending. Students can request an extension up to 90 days before the expiration of the current employment authorization document.

To be considered to be maintaining lawful status, a student cannot accrue more than 90 days of unemployment during the first 12 months of OPT and cannot accrue more than 120 days of unemployment during the total 29-month OPT period (if obtaining a 17-month OPT extension). Employers must agree to report to the DSO any student employee whose employment terminates or who has failed to report for work for five days.

## *Effective Date*

Both parts of the new rule will take effect upon publication in the *Federal Register*. Seyfarth Shaw will alert our clients when that occurs.

If you have any questions about the new rule or about immigration in general, please contact the Seyfarth Shaw attorney with whom you work, or any Business Immigration attorney on our website, [www.seyfarth.com](http://www.seyfarth.com).

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