

A Rare Carrot for Employers: F-1 Optional Practical Training Extended

By: Ted J. Chiappari and Angelo A. Paparelli

Earlier this month, the Department of Homeland Security surprised employers – and the foreign students they employ – with two expansions of “optional practical training.” OPT, as it is known, is a form of employment authorization granted to foreign students, usually after completion of their course work, and it is considered an integral part of their stays here. DHS tied one of the benefits, however, to employers’ participation in its E-Verify program (and the other benefit is available only to those selected in the H-1B lottery). As previously discussed in this column,¹ E-Verify is a web-based system that allows (and, once the employer is registered, requires) the employer to verify the employment eligibility of all new hires by checking the information provided on Form I-9 against the DHS and Social Security Administration (SSA) databases. The linking of an immigration benefit – extension of employment authorization – to employer registration for E-Verify represents the creation of a rare incentive for employers in the federal government’s spotty attempts to battle unauthorized employment, a battle in recent times characterized by unprecedented reliance on criminal prosecutions, unannounced high-profile raids and leveraging the SSA’s “no-match letters” to force employers to investigate workers’ immigration status.²

DHS issued the regulations³ in response to the anticipated shortage of H-1B (specialty occupation) work visas used by employers to employ foreign professionals – including recent graduates of U.S. universities in F-1 student status (foreign students in an academic, non-vocational program) already employed under their OPT employment authorization. And a shortage there is – over 30,000 petitions were filed for the 20,000 slots reserved for graduates of U.S. master’s degree programs, with over 140,000 petitions competing for the remaining 60,000+ visa numbers,⁴ or less than 50-50 odds of a foreign student without a U.S. master’s degree getting an H-1B visa this year.

¹ Ted J. Chiappari & Angelo A. Paparelli, *The Lowly Form I-9 Gets a Makeover*, N.Y.L.J., Dec. 24, 2007, at 3, 6, *reprinted at* 13 *Bender's Immigr. Bull.* 65 (Jan. 15, 2008).

² See Angelo A. Paparelli & Ted J. Chiappari, *Despite Court Setback on No-Match Rule, Homeland Security's Outsourcing of Enforcement Gains Momentums*, N.Y.L.J., Oct. 22, 2007, at 3, *reprinted at* 12 *Bender's Immigr. Bull.* 1529 (Nov. 1, 2007).

³ 73 Fed. Reg. 18,944-56 (interim final rule, Apr. 8, 2008).

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⁴ See http://www.uscis.gov/files/article/USCIS%20Update_H1B_Preliminary%20Count1_10Apr08.pdf.

One of the expansions allows those foreign students lucky enough to win a number in the H-1B lottery to have their OPT automatically extended until October 1, 2008, when their H-1B status will begin. This makes permanent an accommodation that was first introduced in 1999,⁵ but that has lain fallow since 2004. In 2005, Immigration and Customs Enforcement (ICE), the sub-agency of DHS that took over responsibility for administering the F-1 student registration program known as the Student Exchange Visit Information System or SEVIS, refused to implement this provision any more because of its concerns about its ability to track foreign students if they were granted a blanket authorization to stay here beyond their period of OPT. These security concerns are addressed in the new rule, which now requires employers to notify the school's Designated Student Officer (DSO) of the departure or termination of the student within 48 hours.

The second expansion is an increase in OPT by 17 months to a total of 29 months for students with degrees in science, technology, engineering and mathematics (so-called STEM degrees). This appears to have been inspired directly by the March 12, 2008, testimony of Microsoft Chairman Bill Gates before the Committee on Science and Technology of the House of Representatives.⁶ In his testimony, Mr. Gates suggested: "Extending OPT from 12 to 29 months would help alleviate the crisis employers are facing due to the current H-1B visa shortage."⁷ He also correctly observed that "This only requires action by the Executive Branch," and he pleaded that "Congress and this Committee should strongly urge the Department of Homeland Security to take such action immediately."⁸ (The regulatory change may also have been inspired, indirectly or in part, by some ideas floated in legislative proposals introduced in 2006 and again in 2007 to meet U.S. employers' need for skilled workers with STEM degrees. The Securing Knowledge, Innovation, and Leadership Act or SKIL Act,⁹ which was never enacted, included a proposed

⁵ 64 Fed. Reg. 32,146 (interim rule, June 15, 1999).

⁶ Written Testimony of William H. Gates, Chairman, Microsoft Corporation and Co-Chair, Bill & Melinda Gates Foundation, Before the Committee on Science and Technology, United States House of Representatives (Mar. 12, 2008), *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2008/Full/12mar/gates_testimony_12mar08.pdf (last visited Apr. 21, 2008). In its discussion of the economic factors leading to the seventeen-month expansion of OPT for STEM graduates, DHS cites to Mr. Gates's 2007 testimony before the U.S. Senate Committee on Health, Education Labor & Pensions, "Strengthening American Competitiveness for the 21st Century" (Mar. 7, 2007, *available at* http://help.senate.gov/Hearings/2007_03_07/Gates.pdf), but not Mr. Gates's 2008 testimony with the suggestion to extend OPT status. See 73 Fed. Reg. 18,944, 18,947 (Apr. 8, 2008), discussed below.

⁷ Written Testimony of William H. Gates, *supra* note 6, at 14.

⁸ *Id.*, at 14-15.

⁹ The bills (S. 2691/H.R. 5744) were initially introduced in 2006. The same bills were reintroduced in 2007 as S. 1083 (<http://thomas.loc.gov/cgi-bin/query/z?c110:S.1083>; last visited on April 21, 2008) and H.R. 1930 (<http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1930>; last visited on April 21, 2008). The Senate

extension of F-1 OPT to 24 months and would have relaxed for STEM students the statutory restriction prohibiting F-1 foreign students from intending, at the time they enter the United States or apply for a visa, to stay in the United States indefinitely.)

DHS did in fact take action quickly, but it added a requirement that was not part of Mr. Gates's testimony: mandatory participation by F-1 students' employers in E-Verify in order to qualify for the additional 17-month extension. Moreover, DHS limited the 17-month extension to those in practical training in connection with one of the identified STEM degrees. The STEM degrees include a variety of disciplines in computer science, engineering, engineering technologies, biological and medical sciences, physical sciences, mathematics and statistics and science technologies, as well as in actuarial science, military technologies and health professions and related clinical sciences.¹⁰ DHS has designated STEM programs using the list of Classification of Instructional Programs (CIP) codes published by the National Center for Education Statistics (NCES).¹¹

DHS justifies the benefit it grants to foreign students and their employers in terms of the country's ability to compete:

The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.¹²

The preamble in the *Federal Register* devotes an entire page to a discussion of U.S. economic competitiveness, citing extensively to the National Science Foundation's *Science and Engineering Indicators 2008*; referring to the "large and growing populations of STEM-graduate scientists" in China, India and Russia; and expressing concern that "high-tech industries in these three countries and others in the OECD now compete much more effectively against the U.S. high technology industry."¹³ It concludes:

also included the SKIL Act language in its ultimately unsuccessful comprehensive immigration reform bill, Comprehensive Immigration Reform Act of 2007 (S. 1348) (see <http://thomas.loc.gov/cgi-bin/query/D?c110:3:./temp/~c110gXsf5s>; last visited on April 21, 2008).

¹⁰ A list is published online at <http://www.ice.gov/doclib/sevis/pdf/stemlist.pdf>, last visited on April 21, 2008.

¹¹ More information on NCES's CIP codes and the disciplines identified there is available at <http://nces.ed.gov/Pubsearch/pubsinfo.asp?pubid=2002165> (last visited Apr. 23, 2008).

¹² 73 Fed. Reg. 18,946 (Apr. 8, 2008).

¹³ *Id.*

“The ability of U.S. high-tech employers to retain skilled technical workers, rather than losing such workers to foreign business, is an important economic interest for the United States.”¹⁴

A 2006 Congressional Research Service Report for Congress, *Science, Technology, Engineering and Mathematics (STEM) Education Issues and Legislative Options*, provides some background as to why foreign students play such an important role in maintaining our competitive advantage. According to this report, “the United States has one of the lowest rates of STEM to non-STEM degree production in the world.”¹⁵ At the same time, “[e]nrollment of U.S. citizens in graduate science and engineering programs has not kept pace with that of foreign students in these programs.” For example, “[a]ccording to the National Science Foundation (NSF) Survey of Earned Doctorates, foreign students earned one-third of all doctoral degrees awarded in 2003.”¹⁶

DHS’s interest in pushing its E-Verify program may undercut whatever competitive advantage the OPT extension might have brought, because the E-Verify program remains unattractive to most employers. The E-Verify online registration process includes accepting a “Memorandum of Understanding” – an agreement among the employer, DHS and SSA. Although it is set up like any license or other agreement seen when conducting business online (“just click yes”), whoever is completing the registration process is acting on behalf of the employer to bind it to the terms of the MOU. One potentially unpleasant aspect of the MOU is that the employer would agree to allow the DHS and SSA to make periodic visits to the employer in order to review E-Verify-related records, including Forms I-9. (Without the MOU in effect, DHS must ordinarily provide three days’ notice or obtain a subpoena or warrant before inspecting I-9 records.¹⁷)

As discussed in this column in December, participation in E-Verify doesn’t reduce the workload of employers, who must still complete the I-9 verification process. Rather, it adds an additional step – submission of the electronic inquiry after completion of the I-9. Another potentially burdensome aspect of participation in E-Verify is that, if employment is not confirmed electronically (for whatever reason), there are additional steps that must be taken to insure that the person is authorized to work. Employers must also agree to provide adequate training to users of E-Verify.

DHS’s use of a carrot and not just sticks is a step in the right direction. In connection with extending the employment authorization of foreign students, much more can be done. Issuing two-year employment

¹⁴ *Id.* at 18,950.

¹⁵ Jeffrey J. Kuenzi, Christine M. Matthews & Bonnie F. Mangan, Congressional Research Service Report for Congress RL33434, *Science, Technology, Engineering and Mathematics (STEM) Education Issues and Legislative Options 17* (Congressional Research Service, Library of Congress (May 22,2006) available at <http://fas.org/sgp/crs/misc/RL33434.pdf> (last visited Apr. 23, 2008).

¹⁶ *Id.* at 14.

¹⁷ 8 C.F.R. § 274a.2(b)(2)(ii).

authorization for all foreign students – not just STEM graduates – would address the difficulties facing all H-1B employers and would encourage continued enrollment by foreign students at our universities. DHS, by allowing only the “STEM cells” to flourish within the H-1B body politic, offers little solace to other globally competitive U.S. employers, for example, a museum seeking to employ a fine arts graduate for an international exhibition or a consulting firm providing country risk analysis for U.S. clients. In addition, as suggested in the SKIL Act,¹⁸ Congress should eliminate the requirement imposed on foreign students that they maintain an unabandoned foreign residence to which they intend to return upon completion of their studies.

In connection with the expansion of E-Verify, DHS must improve the accuracy of the DHS/SSA database and make the program more user-friendly by relieving E-Verify participants from their I-9 paperwork compliance obligations, two critical steps before it can expect to see further voluntary employer participation. Unfortunately, those are both orders most likely too tall for DHS without substantial additional funding. The capacity for consistent, predictable and effective enforcement of the rules will also continue to remain out of DHS’s reach. So, despite the new rule’s invitation for more employers to participate in E-Verify, the ball to expand participation in E-Verify is still in DHS’s court, where it is likely to stay for some time.

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¹⁸ S. 1083 (<http://thomas.loc.gov/cgi-bin/query/z?c110:S.1083>); last visited Apr. 21, 2008) and H.R. 1930 (<http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1930>); last visited Apr. 21, 2008).