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Management Alert

District Court Vacates F-1 STEM OPT Rule and Provides DHS With Six Months to Cure Defect

By Gabriel Mozes, Maura Travers, and Michelle Gergerian

On Wednesday, August 12, 2015, U.S. District Court Judge Ellen Huvelle of the District of Columbia vacated the Department of Homeland Security's (DHS) 2008 rule allowing F-1 students in the U.S. with college-level degrees in certain Science, Technology, Engineering, and Mathematics (STEM) fields to apply for an additional 17 months of Optional Practical Training (OPT). In response to an action brought by the Washington Alliance of Technology Workers (WashTech), the Judge determined that the 2008 DHS rule was deficient because the agency failed to publish the rule for a public notice and comment period as required by Federal rulemaking provisions. After acknowledging that immediately vacating the rule would be disruptive and harmful to the U.S. technology sector and force many foreign students to leave the U.S., the Judge stayed the vacatur until February 12, 2016, a period during which DHS may submit the rule for proper public notice and comment to cure the defect.

Background

F-1 OPT provides graduating students with 12 months of work authorization in the U.S. The rule was implemented in 1947, but on April 8, 2008, DHS issued an interim final rule permitting F-1 students who completed degrees in certain STEM fields to apply for a one-time, 17-month extension of post-completion OPT (in addition to the initial grant of 12 months) for a total eligibility period of up to 29 months. The rule was promulgated to help the U.S. remain competitive with other developed countries for this class of professional employees and to address increasing competition among employers of highly-skilled workers for the limited number of H-1B visas that are available each year -- 65,000 for bachelor's degree graduates and 20,000 for advanced degree graduates (master's or higher from a U.S. institution) -- otherwise known as the "H-1B Cap."

Many employers who hire F-1 students under the OPT program ultimately file an H-1B petition on the employee's behalf in an effort to retain talent beyond the OPT work period. The H-1B category has been oversubscribed in recent years, rendering OPT employees unable to obtain H-1B status within their authorized period of stay in F-1 status, which in many cases results in loss of work authorization. For example, the FY 2016 H-1B cap which opened on April 1, 2015 was reached on April 7, 2015 with USCIS receiving approximately 233,000 H-1B petitions, nearly three times the number of available visas. All petitions were subjected to a computer-generated random selection process. Annually, individuals whose petitions are not selected in the lottery and who are unable to extend their OPT or rely on another work-authorized visa status must terminate employment.

Once the H-1B Cap has been reached for the fiscal year, employers must wait until the following year to file H-1B petitions for highly skilled foreign students and foreign nonimmigrant workers. In 2008, DHS estimated that there were approximately 70,000 foreign nationals in F-1 status on OPT, and that one third of those students had earned degrees in STEM fields. The 2008 rule was introduced by DHS to address the immediate competitive disadvantage faced by U.S. high-tech industries, and with the hope of quickly ameliorating the adverse impact on the U.S. economy.

What does this ruling mean for F-1 students and their employers?

F-1 students with an approved STEM OPT extension are eligible to continue working while DHS complies with the court's ruling. USCIS is expected to continue to adjudicate pending applications for STEM OPT extensions and accept new applications. To reinstate STEM OPT and avoid interruption of employment authorization for current F-1 STEM OPT beneficiaries, DHS is now required to publish a STEM OPT regulation through regular notice and comment procedures and take necessary steps to implement the rule prior to February 12, 2016.

Could this be an opportunity for reform?

In November 2014, as part of the President's Executive Actions on Immigration, the White House announced that it would work with Immigration and Customs Enforcement (ICE) to develop regulations for notice and comment to expand and extend the use of OPT for foreign students, consistent with existing law. The U.S. District Court's ruling could potentially move this important issue to the top of the regulatory agenda and spur the White House to move forward with the Executive Actions to benefit and expand the STEM OPT program.

Seyfarth Shaw LLP's Immigration Group will closely monitor developments during the notice and comment period through February 12, 2016.

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