



November 18, 2015

Katherine Westerlund,  
Policy Chief, Student and Exchange Visitor Program  
U.S. Immigration and Customs Enforcement  
500 12th Street SW  
Washington, DC 20536

Re: ***ICEB-2015-0002***

Dear Ms. Westerlund:

We, the undersigned organizations, representing a variety of industries and small, medium, and large businesses and professionals, write to provide comment on ICEB-2015-0002, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students issued October 18, 2015.

Our organizations find the Optional Practical Training (OPT) program very valuable to the continuing development of their workforce. In a recent survey of employers, over 87 percent stated that using the OPT program specifically for students in the fields of Science, Technology, Engineering and Math (STEM) will help their companies attract and/or retain high-skilled graduates of U.S. universities. However, we would like clarifications in the areas outlined under the Mentoring and Training Plans, the Safeguards for U.S. Workers in Related Fields and the Site Visits.

### **Background**

Since 1947, the U.S. Government has allowed foreign students with an F-1 student visa a 12-month work authorization in the United States. In 2008, the DHS, recognizing the deficit in U.S.-born STEM university graduates, 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, creating a total work-authorization eligibility for training of up to 29 months.

Following a challenge on the legal basis of the STEM extension piece of the OPT program, the U.S. District Court vacated the Department of Homeland Security's (DHS) 2008 rule on August 12, 2015. The judge determined that although DHS had the legal authority to create a STEM extension program, noting that, "Congress has tolerated practical training of alien students for almost 70 years..."<sup>1</sup> the process associated with the extension of time for STEM students, (i.e., the direct leap to an interim final rule in the absence of a proposed rule) under the context of an emergency situation is not viable. It states, "Defendant does not explain why it waited to initiate proceedings on this issue, and it has not pointed to any changed circumstances that made the OPT extension suddenly urgent. The Court therefore finds that DHS's self-imposed deadline of April 2008 lacks support in the record. DHS has thus failed to carry its burden to show that it faced an "emergency situation []," Jifry, 370 F.3d at 1179, that exempted it from subjecting the 2008 Rule to notice and comment."<sup>2</sup> The ruling, therefore, stated, "The Court will vacate the 17-month STEM extension described in the 2008 Rule, 73 Fed. Reg. 18,944 (Apr. 8, 2008), staying the vacatur until February 12, 2016, and will remand to DHS for further proceedings consistent with this Memorandum Opinion."<sup>3</sup>

In response to this decision, we are pleased to see these regulations promulgated through official rulemaking and the notice and comment process. We strongly urge the implementation of a final rule that will be effective as of February 12, 2016, the court-mandated date for elimination of the program. Our comments on various aspects of the proposed are provided below.

### **Lengthened STEM Extension Period for OPT**

In the case referenced above, the ruling stated that the program should be vacated because there was no evidence of an economic crisis. In fact, the ruling points to the limited data associated with a crisis, noting that, "Indeed, the 17-month duration of the STEM extension appears to have been adopted directly from the unanimous suggestions by... industry groups."<sup>4</sup> The time period of the STEM OPT expansion on which the October 18, 2015 proposed rule is based directly on the students' academic experience, stating, "The length of any extension should aim to produce an optimal educational experience in the relevant field of study, particularly given the complex nature of STEM projects and associated skill-development that require relatively lengthy time frames."

We are supportive of efforts by DHS to ensure that the timeframes set forth for the STEM OPT extension are grounded clearly in the basis of student training and research needs. As is noted in the proposed rule, many research grants awarded through the National Science Foundation (NSF) are for a time period of up to three years. Thus, the original 12-month OPT period, combined with the 24-month STEM extension, mirrors a cycle of research and training that is more in line with real-world, practical applications.

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<sup>1</sup> Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec., 74 F. Supp. 3d 247, 28 (D.D.C. 2014)

<sup>2</sup> Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec., 74 F. Supp. 3d 247, 34 (D.D.C. 2014)

<sup>3</sup> Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec., 74 F. Supp. 3d 247, 37 (D.D.C. 2014)

<sup>4</sup> Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec., 74 F. Supp. 3d 247, 34 (D.D.C. 2014)

The proposed rule further states that additional time for STEM OPT training, after completion of an additional STEM degree, is “... due to the complexity and typical durations of research, development, testing and other projects commonly undertaken in STEM fields.”<sup>5</sup> This is consistent with existing training and research standards and allows students the opportunity and flexibility to pursue academic excellence and training opportunities with the additional security of knowing that training opportunities exist after pursuit of additional education from U.S. Universities.

### **STEM Definition Clarified**

The now invalidated 2008 rule identified the specific Department of Education CIP codes that qualify for the extension. The intent was to ensure the list was updated and maintained. There was not a formal process for updating those fields. This resulted in a stagnant list with many newer, technology-related education majors not having a clear pathway for inclusion. The 2015 proposed rule provides a more transparent method of defining the education fields that qualify for the STEM OPT extension through public notification in the Federal Register. It also employs the Department of Education’s National Center for Education Studies Institute of Education Services to clearly define STEM fields. This positive step towards transparency in the process will allow for more expedient updates aligned with advanced technology.

We are concerned, however, that it appears certain fields currently categorized as STEM will no longer be categorized as STEM under the new definition—for instance, architectural and building sciences/technology and archaeology. Furthermore, certain essential fields in the health care and business sectors are not included in either the existing list or the new definition. One such field of employment that should be included is accounting. This is a field wherein the field of study at the college level requires knowledge of both mathematics and statistics. Clearly, the progression of an accountant’s career will be directly linked to that accounting degree earned, and the accountant’s progression, over time, will be linked directly to his ability to apply knowledge of mathematics and statistics. We encourage the agency to clarify that no existing STEM fields will be removed on account of the new definition and add the essential health care and business fields.

### **Cap-Gap Relief**

We thank the Department for including the Cap-Gap protections that were first proposed in the 2008 rule. This provision is extremely helpful to employers if an individual being trained in the U.S., pursuant to his or her F-1 OPT status, has his or her status automatically extended if he/she is the beneficiary of an approved H-1B petition. Without it, students would lose their status as H-1B visas may not be ready for a period of months. As a result, the trainee would have to leave

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<sup>5</sup> Department of Homeland Security, Improving and Expanding Training Opportunities for F1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F1 Students, Proposed Rule. 80 Fed. Reg. 63375 – 63404.

the U.S. until receiving the visa. In addition, the disruption this causes in the workplace can be devastating to workplace morale, which will stall research deliverables. Retaining these provisions is extremely important and we are glad that the Department chose to include them in the proposal.

### **Mentoring and Training Plan**

We appreciate the concerns expressed by the Department in the preamble of the proposed rule to condition the usage of the STEM OPT extension with adequate measures to ensure that employers do not abuse this program. The signatories to this comment agree with the Department that employer abuses should be discouraged through reasonable means. However, some of the requirements that are imposed upon all of the interested stakeholders (the colleges, the STEM graduates, and the employers) under these Mentoring and Training Plan (MTP) provisions are either unnecessarily burdensome or they require further clarification from the Department to properly inform stakeholders of what is necessary to ensure compliance with OPT Extension program.

The establishment of the MTP is concerning to employers of all sizes, but the impact of the burden will be more acute on small to medium-sized businesses that utilize this program. The people who run these businesses must wear many hats at the worksite. CEOs at small and medium size firms have many responsibilities running their companies on a day-to-day basis; they are responsible for payroll, managing the Human Resources department, personally working with their customers or clients, among other responsibilities to the firm. The increased administrative burdens that will be borne by small businesses will likely take more time than is estimated by the Department. This is time that cannot be spent on the core competencies of the firm.

In addition, these firms will be responsible for informing the Designated School Official (DSO) if any of their OPT employees have been terminated or no longer work at the company. Given the many duties the operators of these small businesses have, it will be difficult to comply with the very short 48-hour requirement to inform the DSO of an OPT employee's employment termination before that person's OPT status expires.

Many of the same concerns expressed in the above paragraphs are shared by larger companies, as well. The main concern expressed by companies with at least 100 OPT employees is the individualized MTP plan that must be tracked by a supervisory employee at the firm for each worker. Many of these firms already have workable mentoring and training programs in place at their firms. The STEM OPT extension requirement, in many cases, will force companies to make drastic changes to their current mentoring programs. Forcing companies to comply with these new requirements would be an unreasonable cost burden on employers.

Some employers interviewed for this comment informed us that they do perform reviews of their employees every six months; however, given when students graduate and start their employment, the time of the year in which these reviews occur might not coincide precisely with

the schedule that is being mandated by the Department. Other employers have told us that even in their current MTP plans, they need flexibility in determining the plan because there are many things that can change for an employer over a two-year period. Companies can gain and lose clients, or their focus as a company can change from one product line to another. As such, the initial plans relied upon by DHS to verify that employers are not undermining American workers should not be so prescriptive from the outset such that an employer risks noncompliance because an OPT employee is now working on a different project because the prior project was for a former client.

There is also concern that the individualized MTP plans could be used as a reason for additional adjudication. The Department should clarify if it has concerns with the MTP either before or after the 18-month grace period for electronic filing.

Our employers, large and small, understand the need to verify employers are using the program properly. However, there are many different ways that the Department could provide more flexibility to employers that will, concurrently, provide the desired Department oversight without placing unnecessary burdens on businesses. For example:

- Allowing employers to meet this requirement by providing any documentation evidencing a MTP program that is currently operated by the company.
- Requiring only a final evaluation of the student's progress, as opposed to a documented evaluation of each OPT student every six months would cut down on the time and resources needed to comply.
- The 48-hour notice requirement to inform the OPT employee's DSO is a burden on larger employers who tend to have more document-intensive procedures with the termination of an individual's employment. If the Department provided employers 10 business days to inform the DSO of the employee's departure, it would help ensure proper compliance with the program while still providing SEVP with up-to-date information on the whereabouts of OPT employees.
- Lastly, the Department could adjust the language in the proposed Form I-910 to only ask for general objectives at the beginning of the OPT employee's employment. This would allow the employer the flexibility to use the employee however they see fit, so long as that employee is assigned to duties that are directly related to their STEM degree and their work is achieving the more generalized objectives of the program process.

### **U.S. Worker Safeguards**

The business community agrees with the Department that efforts should be made to prevent employer abuses of the program. However, the attestation language proposed in the NPRM is too broad. There are instances where a company makes a decision to expand in one department and contract in another. The proposed language creates the potential for liability if the company hires individuals, both American workers and STEM OPT workers, in the expanding department, while there are presumably American workers who are being laid off in the department that is

being downsized. Under this hypothetical situation, there presumably is no direct correlation to show that the hiring of a STEM OPT worker in one department directly caused the firing of an American worker in another, but the use of the phrase “as a result of the practical training opportunity” creates the possibility of a legal liability where none should attach.

If the company in the aforementioned example were using the STEM OPT program to hire workers that would **replace American workers** that were being laid off, furloughed or terminated is something that is legitimately viewed as an abuse of the program. Those types of activities should be prevented through reasonable rules. However, the proposed language could be read to go further than that and it would unreasonably interfere with companies that have to make strategic decisions for their companies. Businesses make these decisions every day; choosing to focus on the departments and projects that are in the best interest of the company and downsizing those particular projects that are no longer in demand is a legitimate business function and the proposed rules in the NPRM should not interfere with these legitimate practices. As such, we request that the Department change the following language:

- In proposed 8 CFR 214.2 (f)(10)(C)(10)(ii) in the NPRM to read as “The employer to attest that it is not providing the STEM OPT opportunity for the purpose of and with the intent to directly lay off or furlough any full- or part-time, temporary or permanent, U.S. worker and replace that worker with the F-1 student.”
- The language used in Question 4d in the proposed Form I-910 should read as “The employer is not providing the practical training opportunity for the purpose of and with the intent to directly terminate, lay off, or furlough, any full- or part-time, temporary or permanent U.S. workers.”

### **School Accreditation**

We thank the agency for allowing foreign nationals to apply for STEM OPT extensions based on a prior degree. The language of the regulation is unclear about whether foreign nationals can use degrees from accredited U.S. universities operating abroad for this purpose (i.e., a U.S. university with an overseas campus). We recommend that DHS clarify that an F-1 student also can obtain a STEM OPT extension based upon a prior STEM degree earned at a U.S. accredited institution abroad.

### **Site Visits**

The proposed rule is unclear about the extent of the Department’s authority to conduct employer site visits. The discussion section of the NPRM states that Immigration and Customs Enforcement (ICE) will have discretion to conduct “on-site reviews” to ensure employers are complying with assurances in the MTP, and they have the ability and resources to implement the plan. However, the proposed regulatory text in the NPRM and a note on the MTP says that DHS will have the authority to conduct site visits to ensure employer compliance. While we understand that DHS deems these audits as a necessary mechanism to ensure compliance, the inconsistency between

the NPRM's preamble and the proposed regulatory text and note on the MTP is concerning because it leaves the door open to multiple agencies within DHS to conduct these site visits. Businesses understand the government's desire to ensure that employers are complying with the program's requirements, but businesses need certainty in terms of what is required of them in order to comply with the program. We believe the Department intends that ICE will conduct these site visits, which is why we request that the Department replace any reference to DHS in the proposed regulatory text for 8 C.F.R. § 214.2(f)(10)(C)(11) and note on the MTP to provide the clarity that ICE is the agency within DHS that will be responsible for conducting these site visits.

Another concern shared by the signatories is the lack of procedural and privacy protections contained in the NPRM's site visit provisions. For example, the regulation does not specify the manner in which a site visit would be conducted, how information gained in the course of a site visit would be stored, shared or relied upon by the government, how a company or individual could correct or update information gained through a site visit, or how confidential business and personal information will be protected during a site visit. Additionally, the proposed regulation does not require any form of notice to be provided to an employer that it will conduct a site visit. We recommend that DHS provide clear guidance on the scope and process for such investigations and recommend the following specifications:

- To the extent that specific pieces of information can be verified by email and phone, those methods should be used. This saves resources and time for both DHS and the employer.
- Site visits should be "complaint driven." ICE should not have broad discretion to conduct random site visits without specific suspicion of wrongdoing by the employer.
- Site visits should be limited in scope to ensuring that the F-1 student is employed by the employer sponsor noted in SEVIS and that the STEM degree is related to the job description.
- ICE Officers visiting employer worksites should limit their investigation to the F-1 STEM OPT employee. These investigations should not be an opportunity to do other investigations on-site without notice, such as I-9 audits.
- Employers should generally be provided with advance notice of a site visit. I-9 audits can be used as a model, where employers are given three days advance notice.
- Contractors should not be used by ICE in conducting such site visits. FDNS found that the Agency has worked significantly more efficiently, and employers have had vastly fewer complaints since it stopped using contractors in 2014. ICE should follow this model and only use ICE officers for site visits.

### **Conclusion**

The undersigned organizations appreciate the efforts and goals of ICEB-2015-0002, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students. We want to ensure this program is as effective as possible for student trainees, as well as employers, and that the proposed rule takes clear steps

towards that goal. Although, as employers, we have some concerns regarding implementation and request clarification on issues such as the broadening the taxonomy of the STEM definition, implementation of the mentoring and training plan, determination of the worker protections and the scope and process of site visits and audit procedures, we support this effort and encourage the Department to implement a final rule effective prior to February 12, 2016.

As the proposed rule moves forward, please do not hesitate to contact any of our organizations for further clarification of our comments. We look forward to working with the Department in the coming months and hope to be a resource for implementation of this important program.

Sincerely,

Aerospace Industries Association  
American Immigration Lawyers Association  
Compete America Coalition  
Council for Global Immigration  
Information Technology Industry Council  
National Association of Manufacturers  
National Foreign Trade Council  
Semiconductor Industry Association  
TechNet  
U.S. Chamber of Commerce