DHS Releases Proposed STEM OPT Rule, Canadian Government Issues New Immigration Regulations, Update on Work Authorization for H-4 Spouses, November Visa Bulletin

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DHS Releases Proposed STEM OPT Rule

The Department of Homeland Security (DHS) released a proposed regulation for F-1 nonimmigrant students on optional practical training (OPT) with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. The planned expansion of the OPT program was first announced in November 2014 as part of the President's executive action on immigration, see Clark Hill's November 2014 Immigration Update. The DHS's proposed rule is also in response to US District Court Judge Ellen Segal Huvelle's order on August 13, 2015, which invalidated the 17-month Optional Practical Training (OPT) extension rule. The judge gave the government until February 2016 to produce a new rule. See Clark Hills September 2015 Immigration Update for more information regarding the judge's ruling.

The proposed rule makes various changes to the current F-1 OPT STEM rule. Below is a summary of some of the most notable changes. For the full version of the proposed rule, see the Federal Register.

- Under the current rule, OPT students with a degree in a STEM field can receive an additional 17 months of optional practical training beyond the 12 months available to most F-1 students. The proposed rule extends the 17 month period to 24 months.
- If an F-1 student uses the 24 month STEM extension, and then enrolls in a higher level STEM program and completes the next degree, the student is eligible to receive a new 24 month STEM extension in addition to the 12 months of OPT available to most F-1 students.
- DHS will publish an extended list of the accepted STEM fields. Health and social sciences do not qualify for STEM extensions.
- STEM extensions will be available to F-1 students in non-STEM degree programs if the F-1 student previously earned a STEM degree from an accredited US university and now works in a position related to their STEM degree.
- Under the current rule, F-1 students are allowed up to 90 days of unemployment during the initial 12 months of OPT and up to 30 days of unemployment during the 17 month STEM extension. Under the proposed rule, F-1 students will be allowed up to 60 days of unemployment during the 24 month STEM extension.
- F-1 students currently on the 17 month STEM extension will be able to request an additional seven month STEM extension (to reach 24 months total). To apply for the seven month extension, F-1 students must apply within 120 days of the end of their 17 month period and the employer must meet the new requirements stated below.
- Under the proposed rule, employers will be required to implement formal mentoring and training plans, provide wage information to DHS, and will be forbidden from laying off US workers to hire a STEM OPT F-1 student.
- Only accredited US Universities may participate in the STEM program.

DHS anticipates that this proposed rule will be finalized by February 13, 2016 to meet the judge's deadline mentioned above. Like any proposed rule, these revisions are subject to change after the notice and comment period is complete. The 30 day comment period began on Monday, October 19, 2015.

Canadian Government Issues New Immigration Regulations

The Canadian government recently introduced new employer compliance immigration regulations that will affect all employers currently employing foreign workers in Canada. Under the new regulations, there will be governmental audits for employer compliance with immigration laws on a regular basis. Penalties will be issued for violating compliance requirements. Penalties include, but are not limited to, monetary fines, bans on future employment, and publication of the employer's information on public government website(s). The government announced that one in four employers will be audited and that employers will be given limited time to organize their records. These new regulations are expected to take effect on December 1, 2015. With these new regulations, it is reported that Canadian immigration law replaces Canadian tax law as the strictest compliance legislative scheme in Canada. While Clark Hill PLC does not provide Canadian immigration services, we believe our client employers should be aware of recent changes. If you are in need of Canadian immigration counsel, please contact our office for a reference.

Update on Work Authorization for H-4 Spouses

On May 26, 2015, United States Citizenship and Immigration Services (USCIS) began accepting applications for employment authorization documents (EAD) for eligible H-4 spouses of H-1B visa holders. In order for an H-4 spouse to be eligible for an EAD, the H-1B visa holder must be the beneficiary of an approved I-140 or have an H-1B approved beyond the normal six years, based on a pending PERM labor certification or I-140 Petition (also called AC21). For further information on eligibility details, see Clark Hill's February 2015 Immigration Update. The following trends have emerged, as more of these cases have been filed:

- When an H-4 EAD application is filed based on a seventh year H-1B extension, the H-4 applicant must provide proof that the H-1B worker had a PERM filed on his/her behalf more than 365 days before the end of six years in H-1B time. If the applicant does not have a copy of the filed PERM

form, but an I-140 is pending, the I-140 receipt notice can be submitted along with an explanation of how the PERM was filed more than 365 days before the end of six years in H-1B time.

- When an H-4 EAD application is filed on the basis of an approved I-140, the H-4 applicant should submit the I-140 approval notice. Applicants should utilize the USCIS case search function to ensure that the I-140 is still valid in cases where the I-140 was filed with a prior employer. In these cases, if the I-140 was revoked, the H-4 EAD petition will be denied.
- In cases where the H-4 EAD petition is filed based on a pending I-140, if the I-140 is denied prior to adjudication of the EAD, the EAD will be denied.
- When an H-4 EAD application is filed concurrently with an extension or change of status, the extension or change of status must first be approved before USCIS will adjudicate the H-4 EAD application, and the EAD start date may be based on the new approval date.

November Visa Bulletin

The November visa bulletin has been released. The priority date for filing an Adjustment of Status (AOS) Application in the employment-based second category (EB-2) for China is at January 1, 2013 and EB-2 India is at July 1, 2009. The priority dates for filing an AOS application in the employment-based third category (EB-3) for China EB-3 is at October 1, 2013 and EB-3 India is at July 1, 2005. The priority date for filing an AOS for EB-2 cases included in the worldwide limit remains current.

Immigrant visas for EB-2 cases for China are at February 1, 2012 and for EB-2 India are at August 1, 2006. Visas for EB-3 cases for China are at January 1, 2012 and for EB-3 India are at April 1, 2004. Visas for EB-2 cases included in the "worldwide" limit remain current. See the Clark Hill website for more information on priority dates.