



SUFFOCATING THE FOREIGN ENTREPRENEUR UNDER THE NEW STEM OPTIONAL PRACTICAL TRAINING RULE

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Facebook is a good example of an epically successful entrepreneurial venture that was hatched by students in the dorms of Harvard. It is important to allow students who have great dreams and ideas to flourish through startups, and this applies to foreign students who graduate from American universities. Why not encourage foreign students to launch their startups in the United States rather than boot them out? In our imperfect immigration system that has no true startup visa for the entrepreneur, it makes sense to allow a talented and driven foreign student to use the current nonimmigrant visa categories to establish startups, which in turn can potentially lead to economic growth, bring about paradigm shifts and create millions of new jobs.

This was recognized in the USCIS [Entrepreneur Pathways portal](#), especially with respect to the ability of foreign students to use the optional practical training (OPT) to launch their own ventures. On March 11, 2016, the Department of Homeland Security (DHS) [published a final rule](#) amending regulations to expand OPT for students with U.S. degrees in science, technology, engineering, or mathematics (STEM), but also dramatically create new obligations for F-1 students and F-1 employers starting May 10, 2016. While the rule expands STEM OPT from 17 months to 24 months, it creates many more restrictions, and makes it difficult for a student to become an entrepreneur. The new rule requires the establishment of an employer-employee relationship, requiring an employer to complete a formal training plan and make certain attestations, which would render it difficult for the sole founder and owner of a startup to comply and to take advantage of STEM OPT.

OPT is a form of temporary employment available to F-1 students (except those

in English language training programs) that directly relates to a student's major area of study in the United States. A student can apply to engage in OPT during or after completing his or her academic program. A student can apply for 12 months of OPT at each education level (e.g., one 12-month OPT period at the bachelor's level and another 12-month period at the master's level). While school is in session, the student may work up to 20 hours per week pursuant to OPT.

DHS first introduced an extension of OPT for STEM graduates in a 2008 interim final rule. Under the 2008 rule, an F-1 student with a STEM degree from a U.S. institution of higher education could apply for an additional 17 months of OPT (17-month STEM OPT extension), provided that the employer from which the student sought employment was enrolled in and remained in good standing in the E-Verify employment eligibility verification program. The Entrepreneur Pathways, as it applied to entrepreneurs utilizing the 17-month OPT did not interpret the existing rule as requiring a rigid employer-employee relationship. On August 12, 2015, the U.S. District Court for the District of Columbia [ordered the vacatur of the 2008 rule](#) on procedural grounds and remanded the issue to DHS. The court stayed the vacatur until February 12, 2016, to give DHS the opportunity to issue a new rule related to STEM OPT extensions through notice-and-comment rulemaking.

On October 19, 2015, DHS published a notice of proposed rulemaking (NPRM) to reinstate the STEM OPT extension, with changes intended to enhance the educational benefit afforded by the extension and to increase program oversight, including safeguards to protect U.S. workers. The rule received more than 50,500 comments—the most in DHS history. On January 23, 2016, the court gave DHS additional time to complete the rulemaking following review of public comments and to allow the Department to publish the rule with a 60-day delayed effective date to provide sufficient time for efficient transition to the new rule's requirements.

DHS has now completed the final rule. Highlights include:

Extension period to increase from 17 to 24 months. Under the amended regulations, F-1 STEM students will be able to extend OPT for an additional 24 months beyond the initial 12 months, replacing the 2008 regulation that allowed F-1 STEM students to receive a 17-month extension of OPT, providing work authorization for employment related to their field of study. The

extension from 17 to 24 months is indeed salutary as it would allow the STEM student to continue to be employed in the US even if he or she missed out on the H-1B lottery, and to re-apply for the lottery in the following year.

New reporting requirements for F-1 students and university officials. New reporting requirements include: (1) a six-month validation requirement, confirming the F-1 student applicant's application for work authorization through the OPT program; (2) an annual self-evaluation required of F-1 students, for designated school officials to review; and (3) an affirmative requirement for F-1 students to report any change in employment status or material departure from the adopted Training Plan. This is in addition to the requirement for F-1 employers to report similar changes to designated school officials within five business days, which remains in effect.

F-1 employer requirement to complete formal Training Plan with F-1 student. The new regulations will increase DHS oversight over the OPT program. F-1 employers must complete a formal Training Plan, Form I-983, and comply with new wage requirements. The formal Training Plan must include concrete learning objectives with proper oversight. F-1 employers must set out the terms and conditions of employment, including the specific duties, hours, and compensation.

As part of the Training Plan, F-1 employers must attest that the F-1 employee is paid a salary commensurate with similarly situated workers and that: "(1) it has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity will help the student attain his or her training objectives."

It is these attestations that are going to be the bane for aspiring foreign student entrepreneurs. Specifically, the attestation requiring the student to not be replacing a full time or part-time US worker, whether temporary or permanent, that has come from left field. This attestation does not currently exist in the H-1B program too for most employers, unless they are dependent H-1B employers and are not petitioning for exempt employees (those who will be paid \$60,000 or have advanced degrees). Moreover, the anti-displacement provisions are currently administered by the Department of Labor for dependent H-1B employers, which has had the experience and expertise to define displacement stemming from employment law jurisprudence through

carefully crafted rules at 20 CFR 655 . The non-displacement attestation for STEM OPT students will be overseen by Immigration and Customs Enforcement, which has no expertise in these sorts of matters.

The following passage from the preamble to the final rule is worth noting:

Volunteering and Bona Fide Employer-Employee Relationships

The final rule clarifies issues relating to various types of practical training scenarios and whether such scenarios qualify an F-1 student for a STEM OPT extension. The rule specifically clarifies that a student may not receive a STEM OPT extension for a volunteer opportunity. The rule also requires that a student must have a bona fide employer-employee relationship with an employer to obtain a STEM OPT extension. In response to comments received, DHS clarifies that students may be employed by start-up businesses, but all regulatory requirements must be met and the student may not provide employer attestations on his or her own behalf.

While this portion of the preamble acknowledges that students may be employed by start-up businesses, it does signal the death knell for the entrepreneur who is the sole founder of the startup as it does not allow the student to provide employer attestations. DHS further clarifies that students in STEM OPT “may be employed by new ‘start-up’ businesses so long as all regulatory requirements are met, including that the employer adheres to the training plan requirements, remains in good standing with E-Verify, will provide compensation to the STEM OPT student commensurate to that provided to similarly situated U.S. workers, and has the resources to comply with the training plan.” This will be possible in a more elaborate startup potentially involving more than one shareholder so that an employer-employee relationship can be maintained and there are sufficient resources to implement a training plan.

The preamble also notes that alternate forms of compensation may be allowed, such as stock options, so long as the student can remain a bona fide employee, and such compensation is commensurate with what is provided to similarly situated workers. In fact, new 8 CFR 214.2(f)(10)(ii)(C)(8) provides that if an employer does not have other similarly situated workers, which would be the

case in a startup, the employer is still obligated to attest that the compensation and other terms would be commensurate with other US workers in the area of employment.

While all this appears that students can avail of STEM OPT at startups, it would be difficult to do so, as experience has shown with the H-1B program under the [Neufeld Memo](#), that requires a rigid and inflexible demonstration of the employer-employee relationship. The more flexible employment arrangements, which included self-employment, in prior [ICE SEVICS guidance](#) that would have been more conducive for the entrepreneur have all now been thrown out of the window under the new regulation. The saving grace is that the less rigid format still exists under the initial 12-month OPT, and thus an aspiring entrepreneur could start out in a more freewheeling way, and then develop a structured entity with an employer-employee relationship during the 24-month STEM OPT period. This would also pave the way for the startup to secure an H-1B visa, should the petition be selected under the annual lottery, which also would impose the same employer-employee requirement.

DHS to conduct on-site visits. The new regulations state that DHS has discretion to conduct employer site visits to ensure that F-1 employers meet the requirements of the OPT program. Generally, DHS must provide notice 48 hours before an on-site inspection, unless the visit is conducted in response to a complaint or evidence of noncompliance. As noted, the site visits will be conducted by DHS officials who may have no expertise in determining whether the student is being paid the salary commensurate to other similar workers or whether the employer has displaced US workers. Moreover, while the preamble contemplates employment at startups, there is nothing in the actual rule that clarifies this, making it harder to convince the untrained site visitor that a bona fide employer-employee relationship is possible even in a startup.

Cap-gap extension language clarified. DHS has revised the cap-gap extension regulation to clarify that the extension for F-1 students with pending H-1B petitions and requests for change of status temporarily extends the OPT period until October 1, the beginning of the new fiscal year.

Transition Procedures. A student may still file for STEM OPT 17-month extension up to May 9, 2016. However, as a practical matter, if this extension is still pending as of May 10, 2016, the USCIS will issue a Request for Evidence ("RFE") so that the student may amend his or her application for the 24-month

extension without incurring additional fees or having to refile the Form I-765, Application for Employment Authorization. Therefore, given that the USCIS is granting a 90 day processing time for STEM extension applications, an application filed today may likely not get approved by May 9, 2016 under the existing rule.

Students who have valid 17-month STEM OPT prior to May 10, 2016 will not automatically be extended to 24 months. Those who are under the 17-month STEM OPT rule are not subject to the new requirements imposed under the 24-month rule. On the other hand, they may apply for an additional 7-month extension if they choose to, but a self-employed entrepreneur who is the sole founder with no employer-employee structure would need to alter the business model. The qualifying student must meet the following requirements and must file between May 10, 2016 and August 8, 2016 for the additional 7 months:

1. The student must meet all the requirements for the 24-month STEM OPT extension under the new Final Rule as described in 8 CRR 214.2(f)(1)(ii)(C), and
2. must submit of the Training Plan (Form I-983), completed by the student and the employer, to the DSO, and
3. must have 150 calendar days remaining on their current 17-month STEM OPT Extension at the time the Application for Employment Authorization is filed, and
4. must apply within 60 days of the date the DSO enters the recommendation for 24-month STEM OPT.

Additionally, the final rule states:

- Only students who earned a degree from a school accredited by a U.S. Department of Education-recognized accrediting agency and certified by the Student and Exchange Visitor Program (SEVP) may apply for a STEM OPT extension.
- Participating students who receive an additional qualifying degree from an accredited college or university can apply for a second STEM OPT extension.
- Participating students can use a previously earned qualifying degree to apply for a STEM OPT extension. The prior degree must not have already formed the basis of a STEM OPT extension and must be from a school that is both accredited by a U.S. Department of Education-recognized

accrediting agency and certified by SEVP at the time of the student's STEM OPT application. The student's most recent degree must also be from an accredited and SEVP-certified institution.

- Students must work at least 20 hours per week per employer to qualify.
- Students are permitted a limited period of unemployment during the initial period of post-completion OPT and the STEM OPT extension.
- All STEM OPT employers must participate in DHS's E-Verify program.

Also on March 11, 2016, SEVP launched a STEM OPT Hub at <https://studyinthestates.dhs.gov/stem-opt-hub>. The Hub includes resources for students, designated school officials, and employers.

While the 24 months provides a good opportunity for a foreign student to remain in the United States after graduating especially in light of the uncertainties under the H-1B lottery, this student will also be subject to several new and novel restrictions, and it remains to be seen how they will be enforced through DHS site visits. Although the F-1 STEM OPT program had nothing to do with the opprobrium caused by the [layoff of US workers at Disney](#) and other large US employers by H-1B workers, that effect has unfortunately spilt into these new STEM OPT rules. These rules now require novel compensation and non-displacement attestation, which in turn would dissuade the foreign student from founding a startup unless it can accommodate other overseers and busybodies who would serve as trainers and employers. When protectionism, whether in the spheres of trade or jobs, has become the flavor of the season, the tantalizing possibility of a foreign entrepreneur exponentially enhancing trade and jobs has sadly taken a back seat.