



CAN A STEM OPT STUDENT BE EMPLOYED AT A THIRD PARTY CLIENT SITE?

Posted on June 13, 2016 by Cora-Ann Pestaina

The most frequently asked question in response to my recent blog entitled, [“A Closer Look At The Form I-983 – Training Plan for STEM OPT Students”](#), is whether a STEM OPT student can be employed at a third party client site or at multiple client sites. I would argue that the answer to this question ought to be YES! Since the new rule only took effect on May 10, 2016, there isn't yet any strong anecdotal evidence on whether Designated Student Officers (DSO) will approve Forms I-983 which set forth training to take place at client sites. However, there isn't anything in the governing regulations that expressly forbids this type of employment.

This is a big issue for many students and employers because under the standard 12-month OPT program, the employer may employ the student in a regular job, even at third party sites, as long as the employment is related to their major area of study in the US. However, in order for the student to obtain a 24-month STEM OPT extension, the employer and student, through the submission of the Form I-983 to the DSO, must demonstrate that the student will be employed only as a trainee. The Form I-983 specifically requires the employer to attest that the student will “receive on-site supervision and training by experienced and knowledgeable staff” and that the employer “has sufficient resources and personnel to provide the training and is prepared to implement the program.” Department of Homeland Security (DHS) has made it clear in the preamble to the new [regulations](#) that the STEM OPT extension is not apt for certain types of employment arrangements which include multiple employer arrangements, sole proprietorships, employment through “temp” agencies, employment through consulting firm arrangements that provide labor for hire,

and other relationships that do not constitute a bona fide employer-employee relationship. Students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Form I-983, and the employer that signs the Form I-983 must be the same entity that employs the student and provides the practical training experience.

None of the above listed requirements prevent the employment of a STEM OPT student at a third-party client site. I would argue that the issues surrounding such employment are similar to the issues surrounding the employment of an H-1B beneficiary at a third party client site. In the case of the H-1B, the employer must also establish that a valid employer-employee relationship will exist with the H-1B beneficiary throughout the requested H-1B validity period. By now, most H-1B employers are used to the USCIS requirements published in its memo entitled, [“Determining Employer-Employee for Adjudication of H-1B Petitions, Including Third-Party Site Placements”](#) (“the Neufeld Memo”). Under the Neufeld Memo, in considering whether or not there is a valid "employer-employee relationship," USCIS must determine if the employer exercises a sufficient level of "control" over the prospective H-1B employee. To demonstrate control, the employer can submit various evidence including a copy of its employment agreement with the prospective employee; copies of its contractual agreement(s) with the end client where the employee will work; a letter from the end client describing its relationship with the employer and the prospective employee; sample staff evaluation forms to demonstrate how the employee will be evaluated; a clear description of how employee supervision will be conducted; a list of the various benefits provided to the employee by the employer; and so on.

I would argue that similarly, in the case of the STEM OPT student, the employer should be able to satisfactorily demonstrate its control over the student despite placement of the student at an end client site. Under the final rule, the Form I-983 must, among other things: (1) Identify the goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student; (2) explain how those goals will be achieved through the work-based learning opportunity with the employer; (3) describe a performance evaluation process; and (4) describe methods of oversight and supervision. Admittedly, having the student work at a client site makes for a more difficult case. However, if the employer already has employees at that site who can implement the employer's training program by providing the training,

on-site supervision and evaluation of the student, then the Form I-983 ought to be approvable. The employer may face a more insurmountable hurdle in a case where the student would be its only employee stationed at the client site. In such a case it would be very difficult to argue that the employer will provide a structured and guided work-based learning experience for the student, although a case could still potentially be made for a bona fide training program if the employer has ready access at the site to supervise the trainee.

With regard to multiple worksites, in the preamble to the regulations, DHS made it clear that the Form I-983 may incorporate provisions for project, position, or department rotations that directly relate to the STEM student's field of study, provided there will be appropriate supervision during each rotation and the employer otherwise meets all relevant requirements. Similarly, changes in client site locations can be well documented and explained upon submission of the Form I-983. New and previously unforeseen changes can always be addressed through the preparation and submission of a modified Training Plan to the DSO.

The fact that the Form I-983 must be submitted to the DSO and not to DHS is significant because with filings submitted to DHS, there is usually a filing fee and the potential for costly (time *and* money) rejections by an inaccessible, unseen and unknown officer. A DSO is an individual who is typically more accessible. Should the DSO not approve the initial Form I-983, there should, hopefully, be more of an opportunity for the employer and student to understand the Training Plan's defects and to provide additional information in a new submission.

The new STEM OPT rule would allow talented students who have graduated from US universities in vital STEM fields to remain for an additional 24 months. As a result, the rule must encompass all kinds of modern work arrangements, including working at third party sites. Otherwise, entire industries, including IT, management consulting or accounting, would be deprived of engaging talented foreign students. Foreign students can also benefit by receiving training in industries whose business model relies on assigning employees to third party client sites. It is industries that rely on assigning workers to third party sites that give American businesses a competitive edge by providing them with much needed flexibility. They should not be left out from the new rule!