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GUIDANCE TO THE PERPLEXED AFTER USCIS SNEAKS IN BAN ON THIRD-PARTY PLACEMENT OF STEM OPT WORKERS

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Recently, without any prior notice, USCIS quietly updated its STEM OPT webpage to reflect a ban on the placement of STEM OPT workers at third-party client sites. As background, on March 11, 2016 the Department of Homeland Security (DHS) published a final rule amending regulations to expand Optional Practical Training (OPT) for students with U.S. degrees in Science, Technology, Engineering, or Mathematics (STEM). This new rule took effect on May 10, 2016 and replaced the 17-month STEM OPT extension previously available to STEM students most significantly expanding the extension period to 24 months. The rule set forth various requirements that must be met by schools, students and employers. Briefly, in order to obtain 24-month STEM OPT, the employer must have an Employer Identification Number (EIN) and be enrolled in the E-Verify program. The employment opportunity must be directly related to the student's qualifying STEM degree and there must be an employer-employee relationship between the employer and the student. Therefore, employment for staffing agencies where an employer-employee relationship is not maintained or other labor-for-hire arrangements will not qualify. Within 10 days of the employment start date, the student and the new employer must complete a Training Plan on Form I-983 and submit it to the Designated Student Officer (DSO). I previously blogged about STEM OPT here where I examined the Form I-983.

In another blog, I specifically examined whether the student could be employed at a third-party client site and argued that there isn't anything in the governing regulations that expressly forbids this type of employment. The employer should be able to satisfactorily demonstrate the employer-employee

relationship and its control over the student despite placement of the student at an end client site. 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. Although having the student work at a client site makes for a more difficult case, I opined that 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. Since the implementation of the STEM OPT rule, thousands of students have obtained the required authorization to receive their STEM OPT at third party client sites. This authorization required the full disclosure of the employment arrangement to the DSO.

USCIS recently updated its website to now state:

he training experience must take place on-site at the employer's place of business or worksite(s) to which U.S. Immigration and Customs Enforcement (ICE) has authority to conduct employer site visits to ensure that the employer is meeting program requirements. This means that ICE must always have access to a student's worksite; if the student is sent to different worksite locations as part of the training opportunity, ICE must be able to access such worksite locations. For instance, the training experience may not take place at the place of business or worksite of the employer's clients or customers because ICE would lack authority to visit such sites.

Based on this update, the placement of a STEM OPT worker at a third-party client site is apparently unacceptable because ICE lacks authority to visit third-party client sites. No explanation was provided as to exactly why ICE supposedly lacks the authority to conduct a site visit on the premises of a third-party client if that client site had been clearly listed on an approved Form I-983. The Form I-983 sets forth that DHS may, at its discretion, conduct a site visit. It would be reasonable to conclude that by listing a third party client site as the student's work location on the I-983, that the worksite is open to a site visit by ICE.

By updating the USCIS website with no prior notice and no opportunity for

comment, USCIS has effectively created a state of confusion and has left employers and students, with previously approved Forms I-983, unsure of what action they must now take. *Have employers been unknowingly violating the STEM OPT rule? Will USCIS now deny H-1B petitions for change of status for OPT students employed at third party client sites?* Despite a denial of a request for a change of status, the underlying H-1B petition could still be approved but the STEM OPT worker would have to leave the US and apply for an H-1B visa abroad, a process that can come with its own set of issues such as administrative processing delays that can force the visa applicant to remain abroad for weeks or even several months.

Should employers scramble to relocate all STEM OPT workers to their headquarters or other office locations? And, if they do relocate them, would this change in worksite location be considered a material change necessitating a modification of the approved I-983? Based on how USCIS chose to update the STEM OPT rule, there are no immediate and definitive answers to these questions. However, some immigration attorneys are advising employers to relocate STEM OPT workers to headquarters or other office locations where there would be no question regarding ICE's authority to conduct a site visit. On the issue of a relocation being a material change, while the regulations at 8 C.F.R. §214.2(f)(10)(ii)(C)(9)(ii) do not specifically list relocation as an example of a material change, relocation is considered a material change in the H-1B context which leads one to think that it would similarly be considered in the STEM OPT context. Also, there is the potential practical problem of the student not being at the location listed on the I-983 when ICE attempts to conduct a site visit. On the other hand, since USCIS claims that ICE would not go to a client site anyway, due to a supposed lack of authority to do so, then there is a good argument that a relocation is not a material change that necessitates a modification of the I-983.

Is there any basis for continuing to employ STEM OPT workers at third-party client sites? Some immigration attorneys are advising employers to stay the course while we wait for additional guidance regarding USCIS' update to its STEM OPT page. One main basis is the fact that the Student and Exchange Visitor Program (SEVP) is governed by ICE and not by USCIS and therefore ICE ought to present any amendments to the program. Another reason is the fact that the mere modification of a web page does not have the same force as an amendment to the regulation or a Policy Memorandum. USCIS should issue a proposed

regulation and allow a period for public comment. In addition, provided all the requirements are being met under the regulations found at 8 C.F.R. §214.2(f)(10)(ii)(C)(6)-(12), then the employer's decision to continue to employ the STEM OPT worker at the third party client site may be justifiable. The following could serve as a reasonable defense although there is no guarantee that the DHS will agree: Under 8 C.F.R. §214.2(f)(10)(ii)(C)(7)(ii), the I-983 clearly identified the goals of the training and explained how these goals would be met through a work-based learning opportunity with the employer and described the employer's performance evaluation process including how oversight and supervision would occur at the third party client site perhaps by the employer's more senior staff also stationed at that site. This in turn may also meet the requirement under 8 C.F.R. §214.2(f)(10)(ii)(C)(10)(i) that the employer have sufficient resources and personnel to provide the training. Furthermore, if ICE would be welcomed at the client site (similar to how USCIS site visits are welcomed in the H-1B context) where ICE could satisfy itself that the employer possesses and maintains the ability and resources to provide structured and guided work-based learning experiences (8 C.F.R. §214.2(f)(10)(ii)(C)(11)), then the mere fact that the STEM OPT worker is stationed at a third party client site ought not invalidate a previously approved placement.

Still, the practical fallout may not be worth it and employers and students alike are justifiably worried. There are many unanswered questions and employers are hesitant to make any changes when it is not clear that these changes are actually required under the regulations. It appears that this is yet another way that USCIS is seeking to comply with President Trump's Buy American, Hire American Executive Order that allegedly protects US workers. The ultimate success of a challenge to USCIS' modification of their webpage is therefore hard to predict. But what is also clear is that the STEM OPT rule ought to encompass all kinds of modern work arrangements, including working at third party sites. US businesses should not be deprived of the opportunity to engage talented foreign students. DHS ought to bear in mind that the industries which rely on assigning workers to third party client sites – such as the Information Technology industry – are the industries that give American businesses that necessary competitive edge. It is not clear how seeking to destroy theses industries by wholly affecting how they do business is supposed to make America great again.