



EXPANSION OF STEM PRACTICAL TRAINING AND BROADENING OF O-1A STANDARDS ALLOWS FOREIGN TALENTED STUDENTS TO CONTRIBUTE TO THE US EVEN IF REJECTED IN THE H-1B LOTTERY

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By Cyrus D. Mehta and Kaitlyn Box*

On January 21, 2021, the Biden administration [announced](#) a series of actions aimed at attracting and retaining STEM students and workers to the United States. Among the most significant provisions, the U.S. Department of Homeland Security (DHS) has [added](#) 22 new fields to the STEM optional practical training (OPT) program to "enhance the contributions of nonimmigrant students studying" in STEM fields and to "support the growth of the U.S. economy and innovation." The additions include a number of new and emerging fields, including bioenergy, cloud computing, climate science, business analytics, and financial analytics, to name only a few. Nursing, among other significant science-related fields, was not included in the list. Additionally, DHS [has updated its guidance](#) to clarify how individuals with advanced degrees in STEM fields, as well as STEM entrepreneurs, can self-sponsor for green cards through the national interest waiver (NIW).

Furthermore, DHS also updated its guidance related to [O-1A nonimmigrant status](#) for noncitizens of extraordinary ability in the fields of science, arts, education, business, or athletics. For the first time, the update provides examples of evidence that might satisfy the criteria, focusing on the complex nature of the supporting evidence in STEM-related petitions. For instance, under the published material criterion, USCIS will accept a transcript of professional or major audio or video coverage of the beneficiary and the beneficiary's work. Regarding the critical role criterion, the contribution by a

founder of a startup might also qualify. Certain doctoral dissertation awards and Ph.D. scholarships will also be accepted under the receipt of national or international award criterion. The update “also emphasizes that, if a petitioner demonstrates that a particular criterion does not readily apply to their occupation, they may submit evidence that is of comparable significance to that criterion to establish sustained acclaim and recognition”, and provides examples of comparable evidence that could be submitted by individuals in STEM fields.

The Department of State (DOS) guidance will also provide for an extension of J-1 status for undergraduate and graduate students in STEM fields to facilitate additional academic training for periods of up to 36 months. The extension applies to the 2021-22 and 2022-23 academic years.

Taken together, these updates will alleviate some of the uncertainty employers and STEM workers face in contending with the H-1B cap. [Research](#) has shown that the OPT program benefits the U.S. economy and is important in the creation of job opportunities, so the Biden administration should take all possible measures to encourage foreign students to utilize the program. Expanding STEM OPT fields, as well as allowing students to work in the U.S. for three years pursuant to STEM OPT, are good first steps.

In the time afforded them by the STEM OPT program, students can potentially be entered in the H-1B lottery three to four times. Each year as more petitioners register under the lottery, the chances of being selected become correspondingly less. Even if individuals are unlucky enough to never be selected, they could potentially utilize the new O-1A guidance to obtain O classification. As discussed above, USCIS has broadened the evidentiary standards for O visas, including allowing online publications or videos to qualify as “published material”, which provides enhanced flexibility that may allow more STEM workers to qualify.

Potential for New Green Card Opportunities

For individuals from many countries, the PERM labor certification process can be completed for some during their time in STEM OPT, allowing them to obtain an employment-based green card. Unfortunately, those born in India or China will not be able to benefit from this strategy due to enormous green card backlogs in the employment-based second and employment-based third preferences. However, certain individuals who were born in India or China with

STEM degrees could try to obtain permanent residence through the employment-based first preference if they demonstrate extraordinary ability under EB-1A classification. Although the DHS has updated its guidance to make it easier for STEM graduates to obtain permanent residence through the national interest waiver, this category is of limited use to talented students who were born in India due to the decade plus long crushing backlogs in the employment-based second preference. The employment-based first preference is current for India unlike the employment-based second and third preferences for India. Since the evidentiary standards for O-1 visas have been broadened in the USCIS Policy Manual, the same should hold true for the EB-1A category as the legal standards for O-1A and EB-1 are the same. In addition, while we applaud the Biden administration for broadening the O-1A evidentiary standards, we urge the administration to do away with the final merits analysis under EB-1A in addition to broadening the EB-1A evidentiary standards. The final merits analysis rightfully does not exist for evaluating an O-1A petition, so it should not exist under the EB-1A either, or for that matter any employment based green card category. Under the final merits determination (see our [Curse of Kazarian](#) blog), the USCIS arbitrarily denies meritorious EB-1A petitions on a purely subjective and arbitrary basis even when the petitioner has readily met 3 or more out of the 10 criteria.

Consistent with this Administration's goal of removing barriers to legal immigration under President Biden's [Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans](#), the policy makers at the White House and DHS who fashioned these initiatives should be commended for removing obstacles for talented noncitizens to remain and contribute to the US in the face of inaction by the US Congress. This is a good first step but a lot more can be done.

(This blog is for informational purposes only and should not be viewed as a substitute for legal advice)

▣ ***Kaitlyn Box graduated with a JD from Penn State Law in 2020, and is an Associate at Cyrus D. Mehta & Partners PLLC.***