

Legal Corner

Federal Rules For Foreign Graduates, STEM Extension & Cap Gap

By: Neelofer Syed, Esq.

By the time the present column will be printed, a number of foreign graduates who were also the first time applicants for the H-1B visa this year, may be struggling to figure the benefits of Cap Gap and STEM extensions in their particular case. These terms may not hold any importance to a regular reader but the foreign graduates know what I am writing about. In this column I will attempt to briefly explain these concepts in order to do away with some confusion that the students may be facing.

Last April, the Department of Homeland Security (DHS) introduced the policy guidance which affects the foreign students, especially the ones who have already graduated and are currently in their OPT status. OPT is a period of temporary employment that is directly related to F-1 student's major area of study. Under the old rules, the F-1 student could be authorized to receive up to a total of 12 months practical training, before (pre) or after (post) completion of their studies.

Under the new rules, students who receive degrees in science, technology, engineering and mathematics (STEM) are eligible to extend their OPT for an additional 17 months. The total period of OPT for STEM degree holders has, now, become 29 months instead of 12 months under the old rules that did not have any distinction for STEM degrees from other subjects.

In order to be eligible for a 17 month extension, the student must currently be in an approved post completion OPT period based on a STEM degree. In other words, if a student has an undergraduate degree in designated STEM field, but is currently in OPT status based on a NON STEM graduate degree, s/he will not be eligible for the 17 month extension.

For the students who believe that their course of study should be categorized as STEM degree but is currently not on the list of STEM designated degrees, please know that the list is open for updating. You can also point this out to your designated school official who may be able to recommend the updating of the list.

In order to be eligible for 17 month post completion extension, a student must:

- Have a bachelor's, master's, or doctorate degree included in the STEM Designated Degree Program List;
- The student must currently be in an approved post-completion OPT period based on a designated STEM degree;
- The student's employer must be enrolled in E-Verify; and
- The student must apply on time (i.e., before the current post-completion OPT expires).

If the post-completion OPT of the student expires while the 17-month extension application is pending, students who timely filed their STEM extension applications with USCIS will receive an extension of employment authorization for maximum 180 days after their current employment authorization expires and before the STEM extension is granted.

Unlike STEM extensions, Cap Gap does not have any specific requirements of the area of study. Every student can benefit from Cap Gap. The term has more relevance for students who are the first time applicants for the H-1B visa. Cap Gap occurs when an F-1 student's status and work authorization (OPT) expires before they can start their approved H-1B employment in the next fiscal

year beginning on October 1. Under the old rules, most of the times, an F-1 student in a Cap Gap situation had to leave the United States and return at the time his or her H-1B status becomes effective i.e. at the beginning of the next fiscal year. Depending on when the student's status expires, such circumstances could require the student to remain outside the United States for several months.

Under the new rules, if the H-1B petition filed on behalf of the student is selected, the student may remain in the United States and, if on post-completion OPT, continue working until the October 1 start date indicated on the approved H-1B petition. In other words the students are not required to leave the United States as the gap between the end of F-1 status/OPT and start of H-1B status is automatically abridged.

The eligibility date for the Cap Gap is the date when the USCIS Service Center receives a properly filed H-1B, Petition for a Non-immigrant Worker, naming the student as a beneficiary of the petition from the prospective employer. The Cap Gap extension starts when the student's current period of F-1 status ends, regardless of whether the student was in a period of OPT. A student who files an H-1B after the OPT expiration but while in 60 day post OPT grace period will still be eligible for Cap Gap, however his eligibility to work during that period will be affected.

It is very important that during the process of acquiring the Cap Gap or STEM extension, the students remain in constant touch with their Designated School Officers. The involvement of the DSO in the process is unavoidable. In addition, it is important for the students to consult with an immigration Attorney in order to discuss their available options and strategize the future plan.

Students on post-completion OPT may have up to 90 days of unemployment. Those who have OPT extended due to the Cap Gap provisions continue to accrue unemployment time and are subject to the 90-day limitation on unemployment. The rule is slightly different for the students who receive a 17 month STEM OPT, they are given an additional 30 days of unemployment for a total of 120 days over their entire post-completion OPT period.

If a student travels outside United States while unemployed, but after the start of the approved OPT period, the time spent outside the United States will count as unemployment against the 90/120-day limits. On the other hand, if a student travels while employed, either during a period of leave authorized by an employer or as part of their employment, the time spent outside the United States will not count as unemployment.

A student who exceeds the period of unemployment while on post-completion OPT has violated his or her status unless s/he applied to continue her/his education by a change of level or transferring to another SEVP-certified school, or s/he departs the United States, or otherwise takes action to maintain legal status. If a student is facing any such situation, it is important that s/he contacts an immigration Attorney in order to review all the available options to ensure that the legal status is not violated.

Ms. Syed is a practicing attorney with Perez and Associates, specializing in immigration law. Please send your questions concerning immigration issues to legal@citymasala.com

