AMERICAN IMMIGRATION LAWYERS ASSOCIATION

American Immigration Council

November 18, 2015

Ms. Katherine Westerlund
Acting Policy Chief
Student and Exchange Visitor Program
U.S. Immigration and Customs Enforcement
500 12th Street SW
Washington, DC 20536

Submitted via: www.regulations.gov and OIRA_submission@omb.eop.gov

Re: Docket No. ICEB-2015-0002
Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students
80 Federal Register 63376 (Oct. 19, 2015)

Dear Ms. Westerlund:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) submit the following comments in response to the proposed rule, "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," that was published in the Federal Register on October 19, 2015.[1]

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of the U.S. immigration laws. We believe that our members' collective expertise and experience makes us particularly well qualified to offer views on this matter.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important professional and economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for

[1] 80 Fed. Reg. 63376 (Oct. 19, 2015).

understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

Background

Since 1947, the federal government has interpreted the F-1 nonimmigrant student classification not only to permit enrollment in a full course of study at a recognized academic institution, but also to encompass a limited period of optional practical training (OPT) as a supplement to classroom training.[2] Such on-the-job training may take place during the student's course of study (whether pre-completion OPT or curricular practical training (CPT)) or following completion of the academic program (post-completion OPT).[3] Post-completion OPT is permitted for a period of up to 12 months, limited by any amount of pre-completion OPT in which the student engaged.[4]

On April 8, 2008, DHS published an interim final rule extending the maximum period of OPT from 12 months to 29 months for F-1 students who obtained a degree in certain designated STEM (science, technology, engineering, mathematics) fields from a U.S. institution of higher education.[5] The interim rule allows such students to obtain a 17-month STEM OPT extension only if their employer is enrolled in E-Verify. The 2008 rule also addressed the "cap-gap" problem by extending the authorized period of stay and employment authorization for F-1 nonimmigrants who are the beneficiaries of timely filed "cap-subject" H-1B petitions, to avoid lapses in status and work authorization until they are able to commence their H-1B status on October 1.

On August 12, 2015, the U.S. District Court for the District of Columbia vacated the 2008 STEM OPT rule, finding that although the rule rested on a permissible and reasonable interpretation of the relevant provisions of the Immigration and Nationality Act (INA), DHS violated the Administrative Procedure Act by promulgating the regulation without sufficient advance notice and opportunity for comment.[6] Recognizing, however, the disruption and hardships that immediate vacatur would cause, the court stayed the vacatur until February 12, 2016 to provide DHS the opportunity to engage in new rulemaking. The rulemaking proposal under consideration is the result of those efforts. We commend DHS for taking swift action to publish the proposed rule at hand, and look forward to the full implementation of a final rule in advance of February 12, 2016. With an eye toward the final rule, we offer the following comments and suggestions.

Cap-Gap Provisions

The regulations at 8 CFR §214.2(f)(5)(vi) and 8 CFR §274a.12(b)(6)(v) provide for an automatic extension of status and employment authorization for an F-1 student with a timely filed H-1B

[2] 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947).
[3] 8 CFR §214.2(f)(10)(ii).
[4] *See id*. Students whose course of study includes at least 1 year of full-time CPT are not eligible for post-completion OPT. *See* 8 CFR §214.2(f)(10)(i).
[5] 73 Fed. Reg. 18944 (Apr. 8, 2008).
[6] *Wash. Alliance of Tech. Workers v. DHS*, 1:14-cv-00529 (D.D.C. Aug. 12, 2015).

petition and accompanying change of status, if the petition is subject to the numerical H-1B limitations and has a start date of October 1 of the following fiscal year. The purpose of these provisions is to prevent a gap in status and work authorization where the student's OPT would otherwise expire prior to the H-1B start date. Prior to the implementation of the cap-gap rule in 2008, thousands of employees were forced to stop work, return to their home countries, apply for H-1B visas, and wait until October 1 until they could come back to the United States and resume employment. The proposed rule would maintain the existing cap-gap provisions as currently provided. The cap-gap rule has done much to alleviate disruptions, inconvenience, and unnecessary expenses for both employers and employees, and we wholeheartedly support the retention of this rule. However, given the delays in H-1B adjudications that often arise during the H-1B cap-filing period, we ask DHS to amend the regulations to provide for a cap-gap extension that is valid through October 1, *or the date of the decision on the H-1B petition, whichever is later*.

24-Month Time Period

DHS proposes to amend 8 CFR §214.2(f)(10)(ii) and other relevant provisions to provide for a 24-month STEM OPT extension, increased from 17 months in the current rule. When combined with the initial 12-month OPT period, this would allow STEM graduates to engage in a total period of 36 months (3 years) of practical training. In explaining the need for the increase, DHS rightly states that the "complexity and typical durations of research, development, testing, and other projects commonly undertaken in STEM fields" requires a period of OPT that is longer than 29 months.[7] STEM projects often involve a grant or fellowship, research, and a published report, and "typically require several years to complete."[8] DHS also notes that in many STEM fields, the National Science Foundation (NSF) is the primary source of project funding and that the NSF "typically funds projects through grants that last for up to 3 years."[9] And importantly, improvements to the STEM OPT program such as this "also help the nation and its academic institutions remain competitive in light of global efforts offering international students longer post-study training experience without restrictions on the type of work that may be performed."[10]

We applaud DHS for its thoughtful approach to determining the overall length of the STEM extension and support this change. Due to the difficulties and uncertainties of obtaining H-1B status as a result of the annual numerical cap, the additional period of OPT for STEM students will provide added stability to U.S. institutions and employers who engage STEM students in projects and are currently faced with the risk that they might be forced to terminate their employees before the project is completed.

DHS also proposes to permit students who subsequently obtain another STEM degree at a higher educational level to receive an additional 24-month extension of post-completion OPT based on

[7] 80 Fed. Reg. at 63385.
[8] *Id*.
[9] *Id*.
[10] *Id*.

the second degree.[11] We find no discernible reason to limit the benefits of the STEM OPT program to a single STEM degree and fully support these changes to the current regulations. The benefits that accrue to employers, employees, and our nation's educational institutions will only be magnified by allowing an additional STEM extension for a second degree.

OPT for Previously Obtained STEM Degree

DHS also proposes to expand the benefits of OPT for students and employers by permitting a STEM OPT extension for students with a prior qualifying STEM degree, even if the most recent degree is in a non-STEM field.[12] More specifically, students who are currently in OPT status related to a non-STEM degree would be permitted to obtain a STEM OPT extension if, within the previous 10-year period, they obtained a U.S. STEM degree and seek a practical training opportunity directly related to the previous STEM degree. The proposed changes would not allow a student to obtain two immediately consecutive STEM OPT extensions because the student would be required to complete a new initial post-completion OPT period (12 months) prior to obtaining the second extension. The previous STEM degree must be on the STEM Designated Degree Program List at the time of applying for an extension. Therefore, if the degree was not on the list during the previous 10-year period, but is now on the list, the student may benefit from the STEM OPT extension. The Designated School Official (DSO) at the student's current school is permitted to certify a previously obtained STEM degree from a different school as long as the former school is accredited. This basis for a 24-month STEM extension meets the stated goals of complementing a student's academic experience and benefiting the U.S. economy by enhancing our competitive edge and fostering innovation.

Accreditation

DHS proposes to add to the current STEM OPT program a requirement that the student's STEM degree be received from an educational institution accredited by a Department of Education-recognized accrediting agency.[13] DHS states that this requirement will strengthen and better safeguard the integrity of the STEM OPT program since the accreditation process helps to ensure the quality of educational institutions and programs. We support the inclusion of this provision in the final STEM OPT rule.

List of STEM Occupations – STEM Designated Degree Program List

At the outset, though we note that the proposed rule very clearly limits an expansion of OPT to STEM students, we have long advocated for a broader approach that would permit OPT for more than 12 months for students pursuing areas of study outside the limited STEM fields. Expanding the OPT extension to all fields of study would do much to improve the competitiveness of U.S. colleges and universities in the foreign student market, with tremendous benefits to the U.S. economy and our global standing as a result.

[11] Proposed 8 CFR §214.2(f)(10)(2)(C).
[12] Proposed 8 CFR §214.2(f)(10)(ii)(C)(3).
[13] Proposed 8 CFR §214.2(f)(10)(ii)(C)(1).

Under the current rule, the STEM Designated Degree Program List includes all Department of Education Classification of Instructional Program (CIP) codes that are eligible for a STEM extension. The rule provides no formal definition of STEM fields, nor a formal notice process for updates to the list, other than posting changes on the SEVP website. The proposed rule sets forth the following general definition of "STEM fields," which is based on a 2009 description referenced by the DOE's National Center for Education Statistics (NCES) Institute of Education Services:

> *... a field included in the Department of Education's Classification of Instructional Programs taxonomy within the summary groups containing mathematics, natural sciences, (including physical sciences and biological/agricultural sciences), engineering/engineering technologies, and computer/information sciences, and related fields.*[14]

DHS also proposes a process for notifying the public of changes to the Designated Degree Program List through possible publication of notice in the Federal Register in addition to posting the changes on the SEVP website.[15] The Designated Degree Program List would continue to include the groups within the CIP taxonomy that qualify as appropriate categories for a STEM OPT extension. DHS also states its intention to revise the list from time to time "based upon the dynamic nature of STEM fields and potential changes to the CIP taxonomy."[16]

The CIP codes would be chosen from degrees that fall under the Department of Education's 2009 categories. We are concerned not with the use of CIP codes to determine what fields will be eligible for STEM extensions, but rather the lack of breadth and flexibility in the categories contained within the definition of "STEM fields" from which the CIP codes will be derived. These categories will not be flexible enough to encompass other STEM areas of importance, including essential fields in the health care and business sectors, such as physical, physio and occupational therapy, speech language pathology and financial engineering, financial economics econometrics and computational finance degrees. We are also concerned that new and more innovative educational degrees and programs, which do not squarely fit into the "STEM fields" definition described in the proposed rule, will not qualify for a STEM extension. Therefore, we encourage DHS to revisit the definition of "STEM fields" at proposed 8 CFR §214.2(f)(10)(ii)(C)(2)(i) and to amend the definition to provide greater flexibility in the selection of qualifying CIP codes.

Definition of Employment

To encourage entrepreneurship and job creation in the U.S., we ask DHS to expand the definition of "employment" and create a mechanism to address self-employment and non-salary compensation during the STEM OPT extension period. Upon graduation, an entrepreneurial STEM student may secure a job in an industry, join a fledgling incubator project, incorporate a business, or engage in other entrepreneurial ecosystems. The proposed rule at 8 CFR §214.2(f)(10)(ii)(C)(8)

[14] Proposed 8 CFR §214.2(f)(10)(ii)(C)(2)(i). DHS identifies the source as a 2009 study by NCES. *See* 80 Fed. Reg. at 63386 n.50.
[15] Proposed 8 CFR §214.2(f)(10)(ii)(c)(2)(ii).
[16] 80 Fed. Reg. at 63386.

would extinguish many of these start-up options by defining employment as strictly traditional: employer, supervisor, wages. We encourage DHS to expand this definition to include various models of employment. For example, the Mentoring and Training Plan (discussed in more detail below) could expand the definition of "supervisor" to include venture advisory board members, faculty advisors, and start-up mentors. Form I-910 could also follow the current STEM OPT guidance (SEVP Policy guidance April 23, 2010) by listing the employer as "self-employment business owner." In addition, many incubator start-up companies cannot offer salaries before they become profitable. Instead they offer all similarly situated workers compensation plans that might include stock options or alternative benefits. We commend DHS for allowing an expansion of STEM OPT, but ask that these modifications be added in the spirit of supporting innovative 21st century entrepreneurship in its many creative manifestations.

Finally, the Supplementary Information states that "DHS does not envision that [placement agencies] will generally be able to provide eligible opportunities under the proposed STEM OPT extension, including by complying with the Mentoring and Training Plan process and requirements."[17] Recognizing that there may be some legitimate situations where a staffing company that supervises and controls the STEM student should not be prohibited from participation in the STEM OPT program, we ask DHS to clarify this point in the final rule.

Duties of the Employer

In order to ensure that STEM OPT students obtain valuable practical work experience directly related to their fields of study, the proposed rule requires employers to develop a formal Mentoring and Training Plan.[18] The student would be required to work with the employer to complete Form I-910, "STEM Mentoring and Training Plan," and submit the plan to the DSO. The Supplementary Information to the proposed rule states that the "mentor should be an experienced employee or group of employees who would teach and counsel the student."[19] The employer must "take responsibility for the student's training and ensure that skill enhancement is the primary goal."[20] The proposed rule specifically states that the Mentoring and Training Plan must:

- State the specific goals of the STEM practical training opportunity and describe how those goals will be achieved;
- Detail the knowledge, skills, or techniques to be imparted to the student;
- Explain how the mentorship and training is directly related to the student's qualifying STEM degree; and
- Describe the methods of performance evaluation and the frequency of supervision.[21]

[17] *Id*. at 63390.
[18] Proposed 8 CFR §214.2(f)(10)(ii)(C)(7).
[19] 80 Fed. Reg. at 63387.
[20] *Id*.
[21] Proposed 8 CFR §214.2(f)(10)(ii)(C)(7)(ii).

The employer is also required to conduct an evaluation of the student's progress every six months, as well as a final evaluation at the conclusion of the OPT period.[22]
A draft Form I-910, "STEM Mentoring and Training Plan" has been published in accordance with this proposed rule. The form is six pages in length, and is comprised of the following sections:

- **Sections 1 and 2**: Student Information and Certification (1 page)
- **Sections 3 and 4**: Employer Information and Certification (1 page)
- **Section 5**: STEM OPT Extension Mentoring and Training Plan (1 page)
- **Section 6**: Supervisor Certification (1 page)

The last two pages contain space for evaluation of the student's performance and progress for the required six-month and final evaluations. As will be discussed in more detail below, the language of the preamble and the regulations indicate that the student will be primarily responsible for preparing the Mentoring and Training Program and the employer will be primarily responsible for the evaluations; however, the plain language on Form I-910 reverses these responsibilities. Since the employer must assume primary responsibility for preparing the Mentoring and Training Program and evaluating the student, as detailed below, we respectfully ask that DHS compare the regulatory language with Form I-910 and modify both accordingly to achieve this result.

According to Table 10, "Individual Employer—Cost of Compliance," it will take an employer no more than 30 minutes when working with the student to complete the Mentoring and Training Plan.[23] We take issue with this estimated time frame. The employer will be responsible for completing Section 3 and 4. Though the rule contemplates that the employer will "work with the student" to develop the Mentoring and Training Plan and articulate such plan in Section 5 of Form I-910, the form itself establishes that the employer will assume primary, if not sole responsibility for this task. The Form asks numerous questions which require careful consideration and significant detail, much of which only the employer will have knowledge. For example:

- Describe the student's role in this program and the program's direct relationship to the student's qualifying STEM degree.
- What are the supervisor's qualifications to provide this supervision or training?
    - How often and in what capacity will he or she directly supervise or train the student?
    - List the names and titles of those who, in addition to the supervisor, will provide supervision or training.
    - What are these persons' qualifications to provide this supervision or training?
    - How often and in what capacity will these additional persons directly supervise or train the student?

[22] Proposed 8 CFR §214.2(f)(10)(ii)(C)(9).
[23] 80 Fed. Reg. at 63397.

- How will the student's acquisition of new knowledge, skills, and techniques be measured?

Given the specificity of these questions, we estimate that it will actually take an employer at least 90 to 120 minutes to complete the Form I-910, depending on the employer's size, and not the 30 minutes contemplated in the notice of proposed rulemaking.

That said, we strongly encourage DHS to amend the regulations and revisit this form to reduce the time burdens on employers so as to encourage maximum participation in this important program. As is, the proposed Form I-910 could serve as a deterrent to prospective employers who are unfamiliar with immigration processes and uneasy about having to develop an extensive Mentoring and Training Plan for a student who may not have started employment yet. For those students already on board, many employers may find the plan difficult to complete since the student will no longer be an "entry-level" trainee, and will have already gained certain practical skills. We are also concerned that the onerous requirements of the Mentoring and Training Plan as currently contemplated are geared primarily toward larger employers with established infrastructures, and will deter the participation of small and emerging businesses who stand to benefit most from the innovative thinking and performance of today's STEM students. Finally, without additional guidance on what constitutes a "material change or deviation," it will not be clear to employers or supervisors when changes to the Mentoring and Training Plan must be reported to the DSO.

In terms of the evaluation requirement, Table 10 contemplates that each evaluation will take approximately 15 minutes of the employer/supervisor's time. Form I-910 indicates that it is the student's responsibility to conduct a "self-assessment" and complete Form I-910 for review with his or her supervisor. If this is the case, given that the primary burden for completing the evaluation form is on the student, 15 minutes might be a reasonable time burden on the employer, though we note that 30 minutes is more realistic in terms of facilitating a productive dialogue between student and employer. However, the regulations state that "*the employer develops procedures for evaluating the student, which shall include documentation of the student's progress toward the training goals described in the Mentoring and Training Plan.*"[24] This suggests that the onus is on the employer to complete the evaluation, which would take longer than the 15 – 30 minute estimate. We recommend comparing the language on Form I-910 with that of the regulations to ensure consistency.

Moreover, if the regulations are amended, as we suggest, to permit various models of employment, including self-employment, additional changes to the regulations and form would be required to support this initiative. For example, the definition of "supervisor" could be expanded to include venture advisory board members, faculty advisors, and start-up mentors. In terms of the evaluation process, the student could be required to submit detailed business and product plans, prototype blueprints, an investor deck, and other similar evidence to a "supervisor" to determine whether the on-the-job training is sufficiently related to the STEM field, and whether the student is progressing according to plan.

[24] Proposed 8 CFR §214.2(f)(10)(ii)(C)(9) (emphasis added).

Form I-910 requires the employer to make a number of attestations in connection with the Mentoring and Training Plan. In particular, the employer must attest that the terms and conditions of the opportunity, including duties, hours, and compensation, are commensurate with the terms and conditions applicable to the employer's similarly situated U.S. workers. As the proposed rule makes clear, the purpose of the STEM OPT program is to facilitate training. However, we note that trainees are not typically compensated at the same level as a fully productive employee. Therefore, we urge DHS to allow employers acting in good faith to factor in the impact of training time on productivity when setting the salary.

We also urge DHS to modify the employer attestation that the opportunity will not result in the termination, layoff or furlough of U.S. workers to target the conduct that the agency wants to prevent. The current language is so broad that any subsequent workplace events – including positive events, such as a student innovation that creates a net gain in jobs but has the effect of contracting other employee or department responsibilities – could be covered by this language and might adversely affect the employer. To avoid such unintended consequences but still address these important concerns, we recommend the following change to proposed 8 CFR §214.2(f)(10)(ii)(C)(10)(ii):

> The employer will not terminate, lay off, or furlough any full- or part-time, temporary or permanent U.S. worker *for the purpose of providing* ~~as a result of~~ the practical training opportunity *or with the intent to replace a U.S. worker with the F-1 student*.[25]

The Role of the Designated School Official (DSO)

The role of the DSO, as described in "An Introduction to SEVP," is as follows: "[The] DSO serves as a link between nonimmigrant students and SEVP and plays a central role in ensuring the nonimmigrant students at their school maintain status while in the United States."[26] In carrying out these responsibilities, the DSO engages in recordkeeping, provides students with information on maintaining student status, and terminates SEVIS records when a student fails to maintain nonimmigrant status. Under current 8 CFR §214.2(f)(11)(ii)(A), prior to recommending a 17-month OPT extension, the DSO must simply certify that the student's degree, as shown in SEVIS, is a bachelor's, master's, or doctorate degree with a degree code that is on the current STEM Designated Degree Program List. This essentially requires the DSO to match the CIP code on the I-20 to the CIP code on the STEM list.

Under the new rule, the "DSO may only recommend a student for a 24-month OPT extension … if the Mentoring and Training Plan … has been properly completed and executed by the student and prospective employer. A DSO may not recommend a student for an OPT extension … if the practical training would be conducted by an employer who has failed to meet the requirements

---

[25] A corresponding change to Form I-910 would also be required: "The Student's practical training opportunity *is not for the purpose of* ~~will not result~~ *or is not with the intent of* ~~the~~ terminati*ng*~~on~~, laying off, or furloughing any full or part-time temporary or permanent U.S. worker~~s~~ *in order to replace a U.S. worker with the Student*.

[26] https://www.ice.gov/exec/sevp/Module1.htm

under paragraphs (f)(10)(ii)(C)(5) through (9) of this section or has failed to provide the required assurances of paragraph (f)(10)(ii)(C)(10) of this section."[27]

Though the first sentence of proposed 8 CFR §214.2(f)(11)(ii)(A) indicates that the DSO's role in the review of the Mentoring and Training Plan is limited to a simple technical review of the form to ensure completeness, the second sentence seems to require more. It is equally unclear how a DSO would know, prior to the commencement of the STEM OPT training, whether the employer had failed to meet the program's regulatory requirements. The language in proposed 8 CFR §214.2(f)(11)(ii)(A) should be amended to clarify that the DSO is solely responsible for completing a technical review of Form I-910 (essentially ensuring the proper completion and execution of the form), and is not responsible for guaranteeing the substance of the plan. If DHS contemplates more than just a technical review of Form I-910, the DSO is not the appropriate individual to conduct such a review. DSOs should not be expected to become experts in each STEM field, nor should they be burdened with the weighty responsibility of fraud detection.

Proposed 8 CFR §214.2(f)(10)(ii)(C)(3) sets forth the rule for a STEM OPT extension for a previously obtained degree. According to the Supplementary Information, "DHS proposes to permit DSOs at the student's school of most recent enrollment to certify prior STEM degrees, so long as the STEM degree was earned at [an accredited school]."[28] However, the regulations are unclear as to what exactly the DSO's responsibilities are in this regard. Must the DSO simply verify the existence of the qualifying degree? Or must the DSO also determine that the issuing school is accredited, and that the degree was conferred within the previous ten years?

Proposed 8 CFR §214.2(f)(10)(ii)(C)(7)(iii) requires a student who initiates a new practical training opportunity during the OPT extension period to submit, within 10 days of beginning the new job, a new Mentoring and Training Plan to the DSO and "subsequently obtain a new DSO recommendation." DHS should amend the regulation to clarify the "subsequent" time period within which the DSO must issue the recommendation.

Conclusion

We appreciate the opportunity to provide comments on the STEM OPT Rule and Draft Form I-910 and look forward to a continuing dialogue with the DHS and ICE on these matters.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G Street NW, Suite 300, Washington, DC 20005, Main: 202.507.7600

THE AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200, Washington, DC 20005, Main: 202.507.7500

[27] Proposed 8 CFR §214.2(f)(11)(ii)(A).
[28] 80 Fed. Reg. at 63388.