



# Questions & Answers #2

May 23, 2008

## EXTENSION OF OPTIONAL TRAINING PROGRAM FOR QUALIFIED STUDENTS

*Rule Expands 'Cap-Gap' Relief for Students with Pending H-1B Petitions*

The U.S. Department of Homeland Security released an interim final rule on April 4, 2008, extending the period of [Optional Practical Training](#) (OPT) from 12 to 29 months for qualified F-1 non-immigrant students. The extension is available to F-1 students with a degree in science, technology, engineering, or mathematics (STEM) who are employed by businesses enrolled in the E-Verify program.

The rule also addresses situations in which an F-1 student's status and work authorization expires before he or she can begin employment under the H-1B visa program. The interim final rule addresses this by automatically extending the period of stay and work authorization for all F-1 students with pending H-1B petitions. The rule will also implement certain programmatic changes, including allowing students to apply for OPT within 60 days of graduation.

U.S. Citizenship and Immigration Services published an initial set of [questions and answers](#) related to the rule on April 4; below are a supplemental group of questions and answers that will provide essential guidance and more specific details on the program.

### Supplemental Qs and As

#### Cap Gap Provision

**On April 18, 2008, USCIS announced an e-mail notification process allowing a petitioner whose pending H-1B petition on behalf of an F-1 student was randomly selected to receive an H-1B visa number for FY 09 to request change of status in lieu of consular processing, as originally indicated on the petition. Since some FY09 H-1B petitions for these students may have already been approved for consular processing when USCIS published this e-mail notification process, can the petitioner still request change of status?**

- Yes. The petitioner should send an e-mail to the USCIS service center that issued the approval, using the designated e-mail address. Such requests must include the H-1B receipt number, as well as the petitioner's and the beneficiary's name.
- If the H-1B petition and change of status application are pending, the change of status request should be submitted to the center within 30 days of the receipt notice. In addition to including the receipt number and the name of the petitioner and beneficiary, the request should also include the beneficiary's date of birth, I-94 (Arrival/Departure Record) number, and Student and Exchange Visitor Information System (SEVIS) number.
- Please note that separate e-mail addresses have been established for Premium and Non-Premium Processing Cases. These e-mail addresses are as follows:

### **Vermont Service Center**

Premium Processing cases: [VSCPPCAPGAP.Vscppcapgap@dhs.gov](mailto:VSCPPCAPGAP.Vscppcapgap@dhs.gov)

Non-Premium cases: [VSCNONPPCAPGAP.Vscnonppcapgap@dhs.gov](mailto:VSCNONPPCAPGAP.Vscnonppcapgap@dhs.gov)

### **California Service Center**

Premium Processing cases: [CSC.ppcapgap@dhs.gov](mailto:CSC.ppcapgap@dhs.gov)

Non-Premium cases: [CSC.nonppcapgap@dhs.gov](mailto:CSC.nonppcapgap@dhs.gov)

### **What does “timely filed” mean? Does this include a petition submitted to USCIS on April 1, but not yet selected under the random selection process for an H-1B visa number?**

- “Timely filed” means that the H-1B petition was filed during the H-1B acceptance period, while the student's authorized duration of status (D/S) admission was still in effect. The interim final rule states that the D/S admission includes the academic course of study, any authorized periods of post-completion OPT, and the 60-day departure preparation period, commonly known as the “grace period.”
- The interim final rule further states that once a timely filing has been made, the automatic cap gap extension will continue until September 30, if the petition is selected and approved, unless it is subsequently rejected, denied, or revoked. Students are strongly encouraged to stay in close communication with their employer during the cap gap extension. A Form I-797, Notice of Action, with a valid receipt number, is evidence that the petition was filed and accepted.

### **What if the post-completion OPT expired before April 1? It appears that F-1 status would be extended, but would OPT also be extended?**

- A student who completed his or her post-completion OPT and who subsequently was in a valid grace period on April 1, would benefit from an automatic extension of his or her D/S admission, if the H-1B petition was filed during the H-1B acceptance period, which began on April 1. The employment authorization, however, would not be extended automatically, because it already expired and the cap gap does not serve to reinstate or retroactively grant employment authorization.

### **Is a student who becomes eligible for an automatic extension of status and employment authorization, but whose H-1B petition is subsequently rejected, denied or revoked, still allowed the 60-day grace period?**

- The applicability of the 60-day grace period following rejection, denial or revocation of an H-1B petition is discussed in the Supplemental Section of the interim final rule. If USCIS denies, rejects, or revokes an H-1B petition filed on behalf of an F-1 student covered by the automatic cap gap extension, the student will have the standard 60-day grace period (from notification of the denial, rejection, or revocation of the petition) before he or she is required to depart the United States. 73 FR 18944, 18949 (April 8, 2008).
- For denied cases, it should be noted that the 60-day grace period does not apply to an F-1 student whose accompanying change of status request is denied due to discovery of a status violation. Such a student in any event is not eligible for the automatic cap gap extension. Similarly, the 60-day grace period would not apply to the case of a student whose petition was revoked based on a finding of fraud or misrepresentation discovered following approval. In both of these instances, the student would be required to leave the United States immediately.

**May students travel outside the United States during a cap gap extension period and return in F-1 status?**

- The regulations at 8 CFR 214.2(f)(13) state that a student who has an unexpired EAD issued for post-completion OPT and who is otherwise admissible may return to the United States to resume employment after a temporary absence. By definition, however, the EAD of an F-1 student covered under a cap gap extension is necessarily expired. As a result, if the student elects to travel outside the United States during a cap gap extension, he/she should be prepared to apply for an H-1B visa at a consular post abroad prior to returning. Because the H-1B petition is for an October 1 start date, the student should be prepared to adjust his/her travel plans, accordingly.

**Do the limits on unemployment time apply to students with a cap gap extension?**

- Yes. The 90-day limitation on unemployment during the initial post-completion OPT authorization continues during the cap gap extension.

**If a student was not in an authorized period of OPT on the eligibility date, can the student work during the cap gap extension?**

- No. In order for a student to have employment authorization during the cap gap extension, the student must be in an approved period of post-completion OPT on the eligibility date.

**May a student eligible for a cap-gap extension of status and employment authorization apply for a STEM OPT extension while he or she is in the cap-gap extension period?**

- Yes. However, such application may not be made once the cap-gap extension period is terminated (e.g., rejection, denial, or revocation of the H-1B petition), and the student enters the 60-day departure preparation period.

**STEM Degrees**

**Would a student with an undergraduate STEM degree but a master's degree in a non-STEM field be eligible for an extension of OPT based on the master's degree?**

- The interim final rule states that the "[t]he degree that was the basis for the student's current period of OPT is a bachelor's, master's or doctoral degree in one of the degree programs on the current STEM Designated Degree Program List, published on the SEVP website at <http://www.ice.gov/sevis>." This provision is found at 8 CFR 214.2(f)(10)(ii)(C)(2).
- Under the interim final rule at 8 CFR 214.2(f)(10)(ii)(C)(2), a student who received an undergraduate STEM degree, but whose graduate degree is in a non-STEM field and whose current post-completion OPT is based on that graduate degree, would not be eligible for the 17-month STEM extension.

**Would a student in post-completion OPT based on a non-STEM master's degree be eligible for an OPT extension if the job offered to the student directly relates to the student's undergraduate STEM degree and the non-STEM master's degree?**

- The student would not be eligible for an extension of OPT in such circumstances. The degree that was the basis of the current period of OPT must be a STEM degree.

**Will ICE be adding new degrees to the STEM Designated Degree Program List during the comment period?**

- New degrees will not be added to the list during the comment period. DHS, however, will consider all comments received regarding the possible inclusion of additional degrees and will be consulting with other interested government agencies regarding such possible additions. As stated in the interim final rule, however, the Department must also continue to ensure that the OPT extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled U.S. workers and that is essential to this country's technological innovative competitiveness.

**Can a student with a dual major qualify for the STEM OPT extension based on one of the degree programs?**

- If a student has a dual major, and one of the degrees is on the STEM Designated Degree Program List, and the job is directly related to the student's STEM degree, the student would be eligible to apply for the STEM OPT extension.

**Can a student qualify for the STEM OPT extension based on the student's minor?**

- No.

**Timing and Reporting**

**By what means must a student report a change in the student's circumstances to the DSO?**

- Students pursuing STEM extension OPT must report to their DSO, within 10 days, loss of employment or change to any of the following:
  - The student's legal name
  - The student's residential or mailing address
  - The student's email address
  - Employer name
  - Employer address
- Additionally, these students must send a validation report to their DSO every six months starting from the date the STEM extension OPT starts and ending when the student's F-1 status ends or the STEM extension OPT ends, whichever is first. The validation report must include the student's:
  - Full legal name
  - SEVIS identification number (if requested by the school)
  - Current mailing and residential address
  - Name and address of the current employer

- Employment start date for the current employer
- Students should consult with their DSO as to the preferred method of reporting changes. SEVP recommends using e-mail as it provides both evidence of reporting and the date reported. Some schools may provide other electronic means (such as a web page) to accept reports from students.
- Students should keep a record of all reports made to the DSO and the method by which the report is made.

**By what means must an employer report a student's termination of employment to the student's school? Must an employer's report be *received* by the school within 48 hours of a student's termination?**

- The school may provide the student with instructions on how to report the end of the student's employment. The student must provide this information to the employer. If the school does not provide such instructions, the employer may send the report to the school address listed on the student's Form I-20.
- The employer should provide the student's name, SEVIS ID number (if available), and the date the student's employment ended.
- The employer has complied with the reporting requirement on the day the report is timely sent (i.e., sent within 48 hours of a student's termination). The school does not have to *receive* the employer's report within 48 hours of the student's termination for the employer to be in compliance with the requirement.

**I-9 Employer Verification Compliance**

**What document can an F-1 student applying for a 17-month STEM extension show his or her employer when completing the Form I-9?**

- According to the employment authorization regulations at 8 CFR 274a.12(b)(6)(iv), which were part of the April 8 interim final rule, an F-1 student who has timely filed an application on Form I-765 for a 17-month STEM extension of his or her post completion OPT, and whose employment authorization document (Form I-766) has expired, is authorized to continue working while that application is pending, for a period not to exceed 180 days.
- The expired Form I-766 EAD (issued under category (c)(3)(i)(B)), the USCIS receipt notice showing a timely filing of the STEM extension application (Form I-797, Notice of Action), combined with an I-20 updated to show that the DSO recommended the STEM extension for a work authorization period beginning on the date after the expiration of the EAD is the equivalent of an unexpired Employment Authorization Document under List A, #4 of the Form I-9. This combination of documents satisfies the Form I-9 requirements for 180 days (or less if the application is denied beforehand). If the 17-month STEM extension is approved, the student should receive a new Form I-766 EAD reflecting the 17-month STEM extension within the 180-day period.

**What documents can an F-1 student with automatic employment authorization under the cap-gap provision show his or her employer when completing the Form I-9?**

- The DSO will issue a “cap gap” I-20 which will show on page 3 that the student’s employment authorization has been extended and the effective dates. The student may need to provide the DSO with evidence of a timely filed H-1B petition during the H-1B acceptance period if the student’s record has not been updated via an interface with USCIS.
- The expired Form I-766 EAD (issued under category (c)(3)(i)(B) or (c)(3)(i)(C)) combined with a “cap gap” Form I-20, endorsed to show that the student’s employment authorization is still valid, and the USCIS receipt notice (Form I-797, Notice of Action), showing receipt of the H-1B petition are the equivalent of an unexpired Employment Authorization Document under List A, #4 of the Form I-9. This combination of documents satisfies the Form I-9 document presentation requirements until September 30, or on the date of rejection, denial, or revocation of the petition. If the receipt notice has not yet been issued, the expired EAD and cap gap Form I-20 are sufficient. This combination of documents satisfies the Form I-9 until the expiration date noted on the cap gap Form I-20, but not later than September 30. If the student presents a “cap gap” Form I-20 without a receipt notice, the employer must re-verify upon the expiration date noted on the Form I-20. The student may present another cap gap Form I-20 indicating continued employment authorization to satisfy the re-verification requirement.

**How is the cap gap Form I-20 endorsed to indicate employment authorization?**

- SEVIS will generate a cap gap Form I-20 that takes into account the different stages of the H-1B filing, selection, and adjudication process. The cap gap Form I-20 will contain the following endorsement:

“F-1 status and employment authorization for this student have been automatically extended to [the applicable date will be inserted, as noted below]. The student is authorized to remain in the United States and continue employment with an expired employment authorization document. This is pursuant to 8 CFR 214.2(f)(5)(iv) and 8 CFR 274a.12(b)(6)(iv), as updated April 8, 2008 in a rule published in the Federal Register (73 FR 18944). Additional information about the automatic extension can be found on the Student and Exchange Visitor Program Web site at [www.ice.gov/sevis](http://www.ice.gov/sevis).”

- The DSO will note an expiration date on the cap gap Form I-20 as follows:
  - If the student’s post-completion OPT EAD expires before June 2 and the student can only show the DSO evidence of a properly filed H-1B petition that also includes a change of status request, then the DSO will note an expiration date of June 2 and August 2, respectively.
  - If the student’s post-completion OPT EAD expires before July 28 and the student can show the DSO evidence of being on the wait list for an H-1B slot, the DSO will note an expiration date of July 28 and September 27, respectively.
  - If the student can show the DSO a filing receipt (Form I-797, Notice of Action), or approved the H-1B petition and change of status request, the DSO will note an expiration date of October 1.

## **Limits on Periods of Unemployment**

### **What are the limits on periods of unemployment?**

- Students on post-completion OPT may have up to 90 days of unemployment.
- Students who have OPT extended due to the cap gap provisions continue to be subject to the 90-day limitation on unemployment.
- Students who receive a 17-month STEM OPT extension are given an additional 30 days of unemployment for a total of 120 days over their entire post-completion OPT period.

### **Do the limits on unemployment apply to any periods of unemployment prior to April 8, 2008?**

- No, the limits on unemployment do not apply retroactively.

### **Do the limits apply to students who had post-completion OPT approved before April 8, 2008?**

- For students who started post-completion OPT prior to April 8, 2008, unemployment time will accrue only for time spent unemployed after April 8, 2008. Time unemployed prior to April 8, 2008, will not be counted.

### **Is a student who splits OPT between two degrees at the same level limited to a total of 90 days of unemployment?**

- No, the student is not limited to a total of 90 days of unemployment in this case. For each new period of post-completion OPT, the student will have the full 90-day period of unemployment.

### **What counts as time unemployed?**

- Each day during the period when OPT authorization begins and ends that the student does not have qualifying employment counts as a day of unemployment. The only exception is that periods of up to 10 days between the end of one job and the beginning of the next job will not be included in the calculation for time spent unemployed.

### **How does travel outside the United States impact the period of unemployment?**

- If the student whose approved period of OPT has started travels outside of the United States while unemployed, the time spent outside the United States will count as unemployment against the 90/120-day limits.
- 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.

### **What types of employment are allowed for students during an OPT STEM extension?**

- Students granted an OPT STEM extension must work at least 20 hours per week for an E-Verify-enrolled employer in a position directly related to the student's STEM degree.
- STEM students may work multiple jobs related to their STEM degree, but all the employers must be enrolled in E-Verify.

- Students on an OPT STEM extension are allowed to volunteer, incidental to their status. This means that volunteer work is allowed but does not count as employment for the purpose of maintaining F-1 status.

**How do students show employment is directly related to their degree program?**

- SEVP recommends that students maintain evidence that they held a particular position, proof of the duration of that position, the job title, contact information for the student’s supervisor or manager, and a description of the work.
- If it is not clear from the job description that the work is related to the student’s degree, SEVP highly recommends that the student obtain a signed letter from the employer’s hiring official, supervisor, or manager stating how the student’s degree is related to the work performed.

**E-Verify**

**What E-Verify information is required for an F-1 STEM student to extend his or her OPT?**

- The student must provide his or her employer’s name and its E-Verify company ID, or Client Company ID if it uses a third party designated agent to perform its verification queries, in item #17 of the Form I-765 (revised 04/08/08).

**Where does an employer find its E-Verify company ID #?**

- The employer’s Company Identification Number is located on the upper left-hand corner of the Memorandum of Understanding (MOU) which was printed or saved upon registration with E-Verify. Employers who are unable to locate their company identification number on the MOU can find their identification number in the system by logging into their E-Verify account and running a report. To do this, select “View Reports” from the Reports Menu and then select one of the three reports available. Enter the report parameters and then select Excel as the format. The company ID will be located in the upper left hand corner of the report.

**If an employer has concerns about providing an employee with their E-Verify Company ID, are they still required to provide it?**

- The E-Verify Company ID number may be disclosed to an employee or a prospective employee for this purpose. An employer is not required to disclose the number, but if it does not, the Form I-765 cannot be completed and the application for extension of OPT cannot be approved.

**If a company enrolls in E-Verify in order to retain or hire an F-1 OPT STEM student for a 17-month extension, does that company only have to verify the employment eligibility for that F-1 OPT STEM student and/or future F-1 OPT STEM students, or for all new hires?**

- Once an employer has enrolled in E-Verify, the employer is responsible for verifying employment eligibility for *all new hires*, including newly hired F-1 OPT STEM students with 17-month extensions. The verification of all new hires must be done at all the hiring sites identified in the MOU. The E-Verify system is designed only for verifying the employment eligibility of new hires. If an employer enrolls in E-Verify to retain the employment of an F-1 OPT STEM student, the

employer may not verify the employment eligibility of that F-1 OPT STEM student employee as he or she is already an existing employee and not a new one. However, the student's I-9 will need to be updated when the STEM extension is approved in order to document the continuity of the work authorization.

**Does the Designated School Official (DSO) need to confirm that the F-1 STEM student's prospective employer is enrolled in E-Verify?**

- No. DSOs are not required to check the employer's E-Verify enrollment; however, they are strongly encouraged to advise the student that the STEM extension will be denied if their employer is not enrolled.

**If an F-1 OPT STEM student currently works for two employers and wishes to apply for the 17-month extension, would both employers have to be enrolled in E-Verify?**

- Yes, if a student wishes to continue with both employers, each employer would need to be enrolled in E-Verify. Additionally, each job must be directly related to the student's STEM degree.

**What if my company is enrolled in E-Verify at some locations, but the hiring site where the student will be employed is not enrolled – is this sufficient?**

- If the hiring site where the student will be employed has not been identified in the MOU that the company signed during enrollment, that hiring site is not considered to be enrolled in E-Verify and therefore cannot employ an F-1 OPT STEM student under a 17-month extension.
- Employers seeking to employ an F-1 OPT student under a 17-month extension may enroll in E-Verify in one of two ways: register the hiring site individually by signing its own MOU or registering the intended job location as an additional hiring site under the employer's existing MOU.

**This interim final rule allows an F-1 OPT STEM student to extend his or her employment authorization provided that the student has accepted employment with an employer who "...is a participant in good standing in the E-Verify program, as determined by USCIS." How is "in good standing" defined?**

- To be considered in good standing, an employer must be enrolled in E-Verify either individually by signing its own MOU or as a hiring site under another MOU for another location. Once enrolled, the employer must adhere to the terms and conditions set forth in the MOU. This requires that the employer verify the employment eligibility of all new hires, not just the F-1 OPT students.
- The regulatory reference to good standing is intended to emphasize and clarify that E-Verify participation for purposes of this rule means more than simply the one-time execution of the MOU; rather, it means continuing use of the system as provided under the MOU and in compliance with program requirements. Failure to be a participant in good standing could include (but is not necessarily limited to) these circumstances: The employer terminates the MOU; USCIS terminates the MOU, or suspends the employer's system access, because of an employer's substantial failure to follow its terms and conditions; the employer uses the system for a discriminatory or otherwise illegal or unauthorized purpose; or the employer has executed the MOU but substantially fails to use the

system to verify newly hired employees at participating hiring sites. A copy of the MOU and more information on E-Verify can be found at [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify).