



HERNANDEZ LAW FIRM, PLLC

IMMIGRATION LAW

## Foreign Students' Opportunities and Challenges

Presented to Arkansas Tech University, Fall '09  
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# TOPICS

- Work through Optional Practical Training (OPT)
  - Summer employment during school Pre Completion
  - Professional employment after school Post Completion
- Travel outside United States on OPT
- Change of status – transition to H-1B
- Travel during transition
- STEM Extension of OPT
- H-1B Automatic Extension of OPT

# Where We are Going

- When the studying ends, complications can arise
- Most international students have their immigration issues handled through their schools' Designated School Officer (DSO)
- After graduation the students often have new immigration challenges

# Work on OPT

- At the end of their academic studies, many students choose OPT, Optional Practical Training
- Can also be used by students before their studies are complete, under certain circumstances
- During annual breaks if students are going back the next semester
- During the school year if students do not exceed 20 hours per week
- Allows students to work for one year, per educational level
- Practical training must be in a position that is directly related to your major area of study

- Period of practical training must serve a legitimate purpose
- Cannot be used by a U.S. employer to train a foreign national for a permanent position in the U.S.
- Can be used by employer to assess your skills
- Any pre-graduation OPT counts against the one-year limit
- OPT only available for the 14 months following completion of studies, so keep that in mind as you near graduation



# Travel on OPT

- Although, you will usually have a valid F-1 visa in your passport, travel abroad during your OPT period is not advised!
- If you are going to travel outside the United States during this period, exercise caution
- Under certain circumstances, your F-1 visa may have expired
- If visa expired, you will need to apply for a new visa at a U.S. Consulate abroad
- The school's DSO must complete a Certificate of Eligibility (I-20) that's properly annotated so the consular officer will approve the visa application

- DSO also needs to update the SEVIS system with a separate entry indicating the student's OPT program
- Student must have proof of USCIS receipt of an application or approval for OPT – proof can be either an approved Employment Authorization Document (EAD) or an I-797 filing receipt showing the student has applied for OPT approval
- Bring your passport!
- If you plan on traveling during your OPT time, bring a letter from your employer! If you are on OPT but you do not have a job (or job offer) in the U.S., you will be denied entry into the country



# Transition to H-1B



- Beware of the cap!
- Number of H-1B visas available each year have been reduced dramatically (65,000 per fiscal year, some of which are set aside for special countries)
- There are an additional 20,000 H-1B visas available for persons who have a Master's Degree (or above) from a U.S. school
- This limitation on the number of H-1B visas is known as the "cap"
- The limit used to be 165,000, but by law there are only about 1/3 as many now

- The “cap” is, therefore, being met earlier and earlier
- This year the cap has not been filled (maybe because economic situation)
- Last year the main cap was filled in 1 day
- Applications can be filed a maximum of 180 days before employment commences, and you need to calculate that from the beginning of the federal government’s fiscal year, October 1st
- You need to apply as early as possible, so you need to identify an employer willing to sponsor your petition – even though you will not be able to begin work *under H-1B* until October
- You will still be able to work using OPT status until that runs out. If you time it right, you can transition straight from school to work without interruption in your immigration status or your ability to work.

# The Cap Gap

- In past years, the government has allowed an extension of the F-1 status until the beginning of October, provided certain conditions were met
- Such relief is granted on a year-by-year basis and there is no guarantee that it will be available the year you need it
- This year, The New Regulation alleviates this situation

# Travel During Transition Between F-1 and H-1B

- Officially, the Department of Homeland Security allows foreign nationals who are in valid F-1 status to leave and reenter the United States while they are waiting for their H-1B job to begin.
- **BEWARE:** The official policy of Homeland Security and the practice of the Customs and Border Protection officers may not always match up!
- Travel outside the United States during this transition period is not advised.
- Unless you need to leave the country because you are out of status, there may be difficulties in being readmitted into the United States if you have completed your studies but your H-1B job has not yet begun.

- Part of the problem is that you would not be seeking reentry to the United States for the stated purpose of your F-1 visa.
- Additionally, there have been some problems with the Student Exchange Visitor Information System (SEVIS) that could cause your SEVIS registration to be cancelled upon approval of your H-1B petition. As a result, a consular officer or border agent will not be able to verify your status when you try to reenter the United States.



## H-1B Non-immigrant worker: Eligibility

- An alien who will be employed temporarily in a specialty occupation
- Specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent
- Immigration and Nationality Act §214(i)(1), codified at 8 U.S.C. 1184

## H-1B Non-immigrant worker: Miscellaneous

- Worker can be full-time or part-time
- Worker is authorized to work only for sponsoring employer in the job described in the petition
- Material change in job or a change in job location must be reported to CIS on amended petition
- Worker is considered to be “in status” as long as employment relationship exists with sponsor
- New petition required if H-1B worker changes employers but can begin work upon filing

## H-1B Non-immigrant worker: Miscellaneous - continued

- Three year maximum at one time but can be extended up to a total of six years (additional time possible in certain cases)
- Annual cap of 65,000 with some exemptions
- H-1B worker can travel outside the U.S. during the period of employment, but must have the visa in her passport to re-enter the U.S.
- H-1B worker can pursue permanent residence with no effect on H-1B status

## H-1B Non-immigrant worker: Time frame

- Normal processing by CIS currently ranges from six weeks to three months.
- “Premium processing” by CIS is available for an additional fee. The case is processed within 15 calendar days.
- Aliens abroad must go to a U.S. Consulate to apply for a visa to enter the U.S.

## H-1B Non-immigrant worker: Recent Developments

- The cap for FY2007, FY2008 was met on the first day of filing
- 2009 there's still numbers available
- The Omnibus Appropriations Act (OAA) contained provisions authorizing an additional 20,000 H-1B visas per year for individuals with a Master degree from a U.S. Institution

## H-1B Non-immigrant worker: \$ Cost \$

- Base filing fee currently \$320
- For new H-1B cases, additional fees apply:
  - \$1,500 – companies with more than 25 employees
  - \$ 750 – companies with 25 or fewer employees
  - \$ 500 – fraud prevention fee for all new cases
- CIS “Premium Processing” fee is \$1,000

## H-1B Non-immigrant worker: Sources of Information

- U.S. Department of Labor:  
<http://www.doleta.gov>
- U.S. Citizenship and Immigration Services  
<http://uscis.gov>

## K-1 Fiancé and Fiancée

- Must be engaged to marry U.S. citizen
- Must have met in person within preceding two years
- Must marry in the United States within 90 days of admission on K-1 visa

See 8 C.F.R. 214.2

# What if I get married?



- Your foreign national spouse may be eligible to live in the United States while you are on H-1B
- If you were on J-1 with a residency requirement, marrying a U.S. citizen will not overcome that requirement
- If you marry a U.S. citizen while you are in school or shortly thereafter, you will probably not need to go through the same employment processes explained here. There are other options available to allow you to live and work in this country.

# Special Note for J-1 Exchange Students

- For those students with two-year residency requirements, it is very important to address those issues fully before you travel outside the country if you change your status.
- If you were in J-1 and then changed to F-1, or some other status, without fulfilling the requirement to return to your home country for two years, you may very well be denied a visa to reenter the United States.
- Waivers can be acquired, but depending on the circumstances these can be very difficult to secure.
- These waivers are outside the scope of this presentation, but it is very important to know that the two-year residency requirements can come back to haunt you years after your exchange program is concluded.

# Extension of OPT for STEM students

- Application process is the same, but now a student can apply during the 60 day “departure preparation” period
- If on current OPT → can apply at any time prior to expiration
- STEM → Science, Technology, Engineering & Mathematics

## STEM OPT: What are STEM eligible degrees?

- Most common courses: Computer Science Applications, Actuarial Science, Engineering, Engineering Technologies, Science Technologies, Biological & Biomedical Sciences, Mathematics & Statistics, Military Technologies, Physical Sciences, Medical Scientist
- STEM Degree list included in the preamble of new regulation available in the USCIS website.

# General requirements for the OPT STEM-based extension

- The Student must have a BS, Master, PhD included in the STEM designated Program list
- Must be currently in an approved post completion OPT period based on the designated STEM degree
- Employer must be enrolled in E-Verify
- Must apply on time (Before current Post Completion OPT expires)

# WHAT IS E-VERIFY?

- Internet-based program operated by the Department of Homeland Security and Social Security Administration
- Is currently the best means available for employers to determine employment eligibility of new hires
- Employer can enroll at no cost

# What is the application process for STEM extension of OPT?

1. File Form I-765 with USCIS, Form I-20 endorsed by DSO, copy of the stem degree and the fee (\$340 currently)
2. Form has been amended to indicate the degree and provide employer E-verify information
3. If current OPT expires while STEM extension pending → Automatic extension for 180 days.

# WHAT YOU NEED TO DO AFTER EXTENSION IS GRANTED

- Report to your DSO within 10 days if there has been changes in:
  1. Legal Name
  2. Residential or mailing address
  3. E-mail address
  4. Employer name
  5. Employer address
  6. Report every six months with information above even if there has been no changes
  7. Requirement continues as long as student is on OPT

# AUTOMATIC CAP-GAP EXTENSION

- ❑ 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.
- ❑ Under old rule, the extension was granted to stay, but not to work
- ❑ The H-1B Petition must be timely filed for this to apply → Last year "Timely filed" meant 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. This will most likely happen again

# 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.