

Business Immigration Weekly for March 4, 2016

3/4/2016

Practices: Immigration

24-MONTH STEM OPT UPDATE

Last week, the Office of Management and Budget completed their review of the proposed rule for STEM OPT that it had received on February 2nd and which the Department of Homeland Security had released in October of last year. The Department of Homeland Security will now forward the rule to the Federal Register to be published in its final form. The final rule will most likely become effective before May 10, 2016, which is the date when the current STEM OPT rule will be invalidated per a court order. The public will not learn what changes were made to the rule until it is published in its final form. A summary of the rule as proposed (but not in its final format) can be reviewed here: <http://www.masudafunai.com/showarticle.aspx?Show=8650>

In August 2015, the U.S. District Court for the DC District vacated the rule that allowed STEM students in F-1 status to extend their OPT employment authorization for 17 months. To avoid hardship to thousands of foreign students currently present and working pursuant to this rule, the District Court postponed the invalidation of the rule for six months, until February 12, 2016. In late January 2016, the U.S. District Court granted the Department of Homeland Security's request to extend the current STEM OPT law for 90 days until May 10, 2016. The government requested the extension so that it might have a chance to review and process the more than 50,500 comments it received from the public in response to the proposed regulation.

In rendering its original decision, the District Court indicated that when issuing the rule in 2008, the Department of Homeland Security did not comply with the normal rulemaking process requiring the agency to issue a notice and allow for public comment. The Department of Homeland Security issued the 2008 rule pursuant to emergency rulemaking provisions that allow an agency to put into effect rules for good cause without public notice and comment. Unless the rule was issued, the Department of Homeland Security argued, thousands of foreign students who were unable to secure an H-1B work visa would be forced to leave the United States. The majority of foreign students will only qualify for the H-1B work visa, which is subject to an annual quota that is generally met the first week it opens. Due to this oversubscription, many foreign students were not able to secure an H-1B visa before their one-year period of OPT work authorization expired. The Department of Homeland Security insisted that the rule was necessary to allow these foreign students multiple opportunities to secure an H-1B work visa.