

Business Immigration Weekly for January 29, 2016

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Practices: Immigration

STEM OPT LITIGATION UPDATE

On Saturday, the U.S. District Court granted the Department of Homeland Security's request that the invalidation of its STEM OPT 2008 final rule set for February 12, 2016, be extended 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 its Notice of Proposed Rulemaking issued in October 2015. 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 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.

A summary of the Department of Homeland Security's October 2015 Notice of Proposed Rulemaking can be found at: <http://www.masudafunai.com/showarticle.aspx?Show=8650>