

CLIENT BULLETIN

TO: All Cohen & Grigsby P.C. Clients
FROM: Cohen & Grigsby, P.C. Immigration Group
DATE: April 10, 2008
RE: DHS Announces “Cap Gap” Solution for
Certain F-1 Student Visa Holders

On April 8, 2008, the Department of Homeland Security (DHS) released an interim final rule allowing certain F-1 nonimmigrant visa holders to extend their 12-month Optional Practical Training (OPT) for up to an additional 17 months. The extended OPT automatically terminates upon the effective date of the beneficiary’s approved H-1B visa petition (October 1). This interim final rule is now effective and DHS is accepting comments submitted by June 9, 2008.

Employers cannot file an H-1B petition earlier than six months before its effective date. Because the H-1B cap has been exhausted earlier each year since 2004, employers must file an H-1B petition on April 1 (i.e., the first day on which petitions are accepted) for an October 1 employment start date. Further, because DHS’s fiscal year does not correlate with the typical academic year, many F-1 students who have H-1B petitions filed on their behalf will run out of OPT time before their H-1B becomes effective. This is known as the “Cap Gap.”

DHS’s interim final rule allows certain F-1 students to extend their OPT for an additional 17 months (for a total of up to 29 months) and, in so doing, remain legally and work in the United States during the “Cap Gap,” provided that certain requirements are met.

- The F-1 student must have completed a science, technology, engineering, or mathematics degree;
- The student must have accepted employment with an employer which is enrolled in, and in good standing with, the E-V employment verification program administered by the U.S. Citizenship and Immigration Services (USCIS); AND

- The employer must have filed an H-1B petition on behalf of the student.

DEGREE CATEGORIES ELIGIBLE FOR THE OPT EXTENSION

As noted above, and to be eligible for this extension, the student must have a bachelors, masters, or doctorate degree in one of the following fields:

- Actuarial Science
- Computer Science
- Engineering
- Engineer Technologies
- Biological and Biomedical Sciences
- Mathematics and Statistics
- Military Technologies
- Physical Sciences
- Science Technologies
- Medical Scientist

BASIC PROCEDURES

The F-1 student with existing OPT authorization must meet with his/her Designated School Official (DSO) to request an extension of OPT time. After verifying the student's eligibility, the DSO makes the recommendation to extend OPT through the Student and Exchange Visitor Information System (SEVIS). After the DSO recommends the student for an extension, the student must apply for a new employment authorization document (EAD). If the EAD application is filed before the expiration of his/her OPT, the student will receive a 180-day grace period during which the student can continue to work and stay in the United States while the application is adjudicated.

THE E-VERIFY PROGRAM

The student must be employed by an employer who is registered and in good standing with E-Verify. This internet-based system is free to employers and available in all 50 states. E-Verify compares information from the

employment eligibility verification Form I-9 with the Social Security Administration and DHS records to verify identity and confirm employment eligibility of newly hired employees.

To register employers must agree to follow legal hiring practice as set forth in an agreement called a Memorandum of Understanding. Violating these terms can lead to termination of the employer's participation in the program.

Employers who participate in E-Verify must still complete an I-9 for each new hire. Once an employer enrolls in E-Verify, the employer must verify all new hires.

More information about the E-Verify program (including the Memorandum of Understanding) is available online at <http://www.uscis.gov/E-Verify>.

Please contact any member of the Cohen & Grigsby, P.C. Immigration Department if you have any questions regarding this announcement or how you may be able to utilize it to find a solution to the H-1B "Cap Gap."