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17-Month STEM CAP GAP OPT Extension Voided by Court

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[1]

Submitted by Rajiv S. Khanna on Aug 13th 2015

24 December 2015

DHS has asked for an additional extension of stay to 10 May 2016 of the court order under which the STEM extension of OPT was invalidated by the DC federal court. DHS needs time to review appx. 50,500 comments they have received on the new proposed regulations. I am moving the new discussion to this link: <http://www.immigration.com/blogs/new-rules-17-month-stem-extension-ongoing-updates-until-completed> [2]

19 November 2015

In a meeting with AILA (**10 September 2015**), NSC

said that STEM OPT EAD cards will remain valid even beyond February, despite the court ruling. *AILA Doc No. 15111902*:

4. Will STEM OPT EAD cards that are issued with validity beyond February 2016 continue to be valid if the STEM OPT rule is changed or revoked as a result of holding in the federal court case on STEM OPT (*Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*)?

Answer: Yes.

As I had hoped and said on 18 August (see below), it does appear the USCIS may not consider itself bound by the court ruling, at least as far as already issued EAD's are concerned.

WARNING: Note the timeline of events. This comment by NSC was made on **10 September 2015** (posted to AILA web site in November, today) **AFTER** the **court ruling passed on 12 August 2015**

. So, it does reflect a written comment about what the USCIS position most likely is, while we wait for the new regulations.

However, after the September 10 comment above, in the proposed regulations, **published on 19 October 2015**, USCIS has said in various places that the court ruling could hurt students (whether just the new OPT applications or existing ones remains unclear):

Litigation in this matter is ongoing, as the plaintiff has appealed a portion of the court's August 12, 2015 decision. It is thus unclear what the final disposition of the case may be. Nevertheless, it is clear that if DHS does not act before the court's vacatur takes effect on February 12, 2016, a significant number of students may be unable to pursue valuable training opportunities that would otherwise be available to them.

DHS seeks comments on these and other options for addressing pending applications if a final rule is not in place prior to the court's vacatur, including comments on the harm that such a gap may cause.

Practical Tip: Unless we hear otherwise from the USCIS, we will continue to advise our clients to use their STEM extended EAD's.

19 October 2015

New rules announced by the USCIS:

<http://www.immigration.com/blogs/new-rules-17-month-stem-extension-ongoi...>^[2]

All of The following text is outdated as of 19 October 2015

A Washington DC Federal court has held that DHS improperly promulgated the 2008 regulations creating the 17-month OPT CAP GAP extension for STEM graduates (strictly speaking, this is not really "CAP GAP" issue). According to the court, DHS should have placed the proposed regulation before the public, allowed everyone to comment, considered the comments and then published the final regulation. Thus, DHS violated the procedural mandate requiring "notice and comment." According to the court, there was no good reason to skip the "notice and comment" mandate.

The program has been "canceled," but the cancellation will not become effective until 13 February 2016. DHS, therefore, has until 12 February 2016 to "redo" the regulations with proper opportunity for notice and comment. There is every likelihood that DHS will be able to do just that. We shall wait, watch and keep you updated.

The court said:

Court concludes that immediate vacatur of the 2008 Rule would be seriously disruptive. In 2008, DHS estimated that there were approximately 70,000 F-1 students on OPT and that one-third had earned degrees in a STEM field. 2008 Rule at 18,950. While DHS has not disclosed the number of aliens currently taking advantage of the OPT STEM extension, the Court has no doubt that vacating the 2008 Rule would force “thousands of foreign students with work authorizations . . . to scramble to depart the United States.” (Def.’s Opp. at 44.) Vacating the 2008 Rule could also impose a costly burden on the U.S. tech sector if thousands of young workers had to leave their jobs in short order. The Court sees no way of immediately restoring the pre-2008 status quo without causing substantial hardship for foreign students and a major labor disruption for the technology sector. As such, the Court will order that the 2008 Rule “and its subsequent amendments” be vacated, but it will order that the vacatur be stayed.¹⁴

The stay will last until February 12, 2016, during which time DHS can submit the 2008 Rule for proper notice and comment.

14 August 2015

There was a question on LinkedIn whether we need to stop applying for the 17-month extension. The answer is: absolutely not. Keep applying. You will be approved until February 2016 rolls around. If USCIS has done nothing to make their regulations compliant with the necessary procedures, only then we need to worry. A question from my Twitter account: What if you have been granted extension before Feb 2016? Does that get invalid if the rule is revoked?

The answer I believe, unfortunately, is yes. But, I expect USCIS to fix that issue as a part of the new regulations.

18 August 2015

Can USCIS Choose to ignore this ruling?

One of the questions raised in a discussion with some concerned students was whether or not USCIS would appeal this ruling. My preliminary thought was (and is) that USCIS can actually choose to ignore a local ruling from any Federal Court at the trial level (known as District Court), which is the level at which this decision was issued. This may sound strange, but the Board of Immigration Appeals said back in 1993 that they are not bound by the rulings of a District Court outside the boundaries of just the case that was decided. This interpretation has been followed by BIA and by AAO (both appellate bodies within the USCIS) consistently all the way into the year 2015. So, if the case was not raised as national class action lawsuit (which this case was not), could USCIS just ignore the ruling? Probably yes. Like I said earlier, we are waiting and watching to see what the government decides.

19 August 2015

Nonimmigrant Visas:

[F-1 Visa](#) ^[3]

[STEM](#) ^[4]

Source URL (retrieved on 20 Sep 2020 - 08:21): <https://immigration.com/blogs/17-month-stem-cap-gap-opt-extension-voided-court>

Links:

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