

Federal Court Rules on OPT Extension

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On Wednesday, August 12, 2015, the US District Court for the District of Columbia ruled that the US Department of Homeland Security ("DHS") did not follow required procedures when it promulgated regulations allowing for certain extensions of F-1 Optional Practical Training ("OPT") employment authorization. However, in a compromise move, the Court vacated the DHS regulation and all subsequent amendments ("vacatur"), but ordered that the vacatur be stayed for six months to February 12, 2016, to allow DHS time to submit the rule again with appropriate notice and comment. There is no immediate impact on STEM or "cap-gap" OPT extensions.

Background

In April of 2008, DHS issued an interim final rule that extended eligibility for OPT employment authorization for 17 months for graduates from US educational institutions with degrees in science, technology, engineering or mathematics ("STEM") fields provided their employer is enrolled in E-Verify. The impact of this new rule was to allow a period of OPT employment authorization for qualified foreign nationals for 29 months – the initial 12 months of OPT plus the additional 17 months for those with qualifying STEM degrees and E-Verify registered employers. This rule included the so-called H-1B "cap-gap" extension for F-1s with OPT to extend OPT employment authorization with the filing and eventual acceptance of a cap-subject H-1B petition. This rule was implemented with a comment period, but as an interim final rule under an emergency exception to the usual 60-day full notice and comment period as outlined in the Administrative Procedures Act ("APA").

In March 2014, the Washington Alliance of Technology Workers filed suit in the United States District Court for the District of Columbia alleging DHS acted "arbitrarily and capriciously" in promulgating the 2008 rule without first subjecting it to a notice and comment period in violation of the Administrative Procedures Act. DHS argued that the emergency rule was needed to ameliorate the problems experienced by high-tech employers due to the H-1B quota and that they wanted to implement the rule so that eligible STEM graduates could immediately take advantage of it.

Decision

After significant discussion of the standing of the Plaintiffs (Washington Alliance of Technology Workers) to bring suit and the appropriate level of deference that should be given DHS as the government agency vested with the authority over immigration issues, the Court concluded that no deference should be afforded DHS with regard to the emergency exception to normal notice and comment. The Court ruled that DHS's stated reasons for the emergency exception were too general and not specific enough to constitute an emergency. Therefore, the agency acted improperly in promulgating the OPT extension rule without notice and comment from the public.

However, the judge decided that immediately vacating the new rule "would be seriously disruptive" to not only thousands of F-1s in the US with currently valid employment authorization who would have to scramble to depart the US, but also to employers if STEM employees have to suddenly leave their employment.

Impact

The judge's decision does not invalidate the employment authorization for current STEM extension holders, nor does it preclude an individual from applying for and being granted a STEM extension up until February 12, 2016. With the six month vacatur, DHS should have sufficient time to issue the rule again for notice and comment and finalization prior to February 12, 2016. If DHS follows the Court's direction, there should continue to be no impact on STEM or "cap-gap" OPT extensions. We will continue to monitor this important development and provide updates as new information becomes available.

If you have any questions about OPT employment authorization extensions, please contact your Mintz Levin attorney.

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