

OPT Class Action Settlement Will Help US Retain Talent

By **Lindsey Steinberg** (September 20, 2021, 5:13 PM EDT)

A class action, *Li v. USCIS*, filed in February against U.S. Citizenship and Immigration Services settled in July. The lawsuit alleged an impermissible delay in processing employment authorization document applications for post-graduate optional practical training, or OPT, as well as science, technology, engineering and math, or STEM, OPT extensions.

Eighteen named F-1 students who had applied, or planned to apply, for employment authorization asserted that the delay in processing caused them and other similarly situated students irreparable harm. This harm included potentially subjecting them to removal from the U.S. when the grace period following their education program ended, and loss of job offers, income, health insurance and opportunities to register for the H-1B lottery.



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The settlement is welcome news for F-1 students who have been delayed in their ability to begin work following graduation due to long processing delays at USCIS.

Impact of COVID-19 on USCIS Processing Time

Prior to the pandemic, an applicant for post-completion OPT work authorization would typically receive a notice that USCIS received their application in two to three weeks. USCIS would then process the case within about three months.

Processing times allowed students to begin working soon after graduation because they were able to apply for post-completion OPT work authorization 90 days prior to graduation. If for some reason an application was rejected, there was plenty of time to reapply and still obtain employment authorization for post-graduate employment.

In addition to gaining experience in their chosen careers, OPT and STEM OPT provides additional time for foreign students to enter, and chances to be selected in, the H-1B lottery. This is the most typical route taken by foreign students to gain long-term temporary work authorization and often be sponsored by their employers for green cards.

However, post COVID-19, the wait time to receive a receipt notice has been as long as three months. Because students must apply for the OPT and STEM OPT program within 60 days of graduation, the

delay does not allow time for applicants to correct clerical or typographical errors and resubmit their applications.

Approvals of employment authorization document applications have taken upward of eight months since the pandemic began. This is eight months during which students are without income or health insurance, and often losing job offers due to their inability to begin employment even though the delay is entirely out of their control.

Details of the USCIS Settlement

On July 23, the U.S. District Court for the Southern District of Ohio issued a consent order that outlines the terms of agreement between the parties. Key USCIS concessions in the settlement include, for OPT and STEM OPT extension applications filed between Oct. 1, 2020, and Oct. 31 of this year, USCIS commits to processing within 120 days — meaning USCIS will approve or deny the application, or issue a request for evidence, within 120 days of filing.

In addition, the settlement provides that interim relief announced on Feb. 26 will remain in effect for cases filed between Oct. 1, 2020, and Oct. 31 of this year. This includes:

- A full 12 months of OPT irrespective of the requirement that OPT be completed within 14 months of graduation;
- OPT will be granted for the full period recommended by the applicant's designated school official, irrespective of the time of adjudication;
- Upon request, where employment authorization was issued for less than these time periods, USCIS will issue a corrected employment authorization document;
- Rejected applications that were originally submitted on time and are resubmitted will be processed by USCIS as if received on the original date, meaning that the full period of OPT will be granted without the applicant being required to obtain a new Form I-20 showing eligibility for nonimmigrant student status;
- Requests for evidence will be issued instead of denials for missing or deficient signatures; and
- OPT applications can be submitted up to 120 days — instead of 90 days — before completion of the applicant's program until Oct. 31 of this year.

In addition to the 18 named plaintiffs, the settlement offers relief to similarly situated students, who are undoubtedly greatly relieved.

This welcome settlement came after months of negotiation. While nothing can make up for the lost time to earn income or rescinded job offers, the settlement is a step in the right direction to get the students back to where they would have been had their applications been processed in a timely manner.

This settlement is especially noteworthy for two reasons. First, USCIS has a long-standing policy of processing applications on a first-in, first-out basis. The 120-day processing time concession will certainly give OPT program applicants preferential treatment over employment authorization document applicants from other visa categories whose processing times are equally delayed.

Second, the fact that the government settled is a sign that USCIS realizes the critical importance to our economy of allowing young, highly educated, recent graduates to work here in the U.S., as opposed to leaving for jobs abroad after availing themselves of our high-quality education system.

H-4/L-2 Employment Authorization Document Processing Time Lawsuit

Spouses of H-1B specialty workers or executives transferred to the U.S., who are eligible for H-4 and L-2 visas based on their partners' status and have faced delays in their applications for employment authorization documents, have a pending class action against the government.

In *Deepthi Warriar Edakunni v. Alejandro Mayorkas*, in the U.S. District Court for the Western District of Washington, the H-4 and L-2 spouse plaintiffs have argued that due to the impermissible delay in processing their applications for employment authorization documents, their pending cases should be processed within a week. The government is arguing that it should be allowed to process the cases within a more nebulous "reasonable time period."

That case has yet to be settled. This shows that USCIS is less concerned with the work authorization of these nonimmigrant dependents whose spouses are, by definition, already gainfully employed in the U.S, and typically in high paying professions.

Additionally, the consent order in *Li*, which reflects a four-month time frame for processing, represents compromise on both sides. It shows a willingness of the parties involved to agree to a workable solution for students. The nearly immediate processing time requested in the *Edakunni* case presents legitimate logistical issues for USCIS in terms of adequacy of adjudication review, staffing and the need to balance processing priorities across all visa categories.

In fairness to USCIS, the agency has acknowledged the pandemic-related backlogs and is actively working to alleviate them. The abandonment of the biometrics requirement, effective May 17, is certainly a step in the right direction that will naturally lead to shortened processing times.

Additionally, it is likely that a settlement will eventually be reached in *Edakunni* in which both parties are granted relief — such as automatic validity extension of employment authorization cards for 180 days post expiration with timely filing, relief already available for some employment authorization document categories, or an increased filing window.

Both of these solutions were suggested by the plaintiffs in the *Edakunni* case. Neither solution would overburden the already overwhelmed USCIS system, and both would provide much deserved relief to spouses who dutifully maintained status and relied upon filing-timing regulations, but were still injured by the impossibility of maintaining continuous work authorization in this time of historic backlogs.

Practical Steps

We have not yet had the opportunity to see the *Li* settlement play out in terms of actual processing time, but students should still be encouraged to take advantage of the permission to submit applications 120 days before the end of the academic program and submit their initial OPT applications as soon as possible.

The interim relief granted in February, discussed above, was a commonsense solution to the processing

slowdown caused by the COVID-19 pandemic, but USCIS went further than anticipated in Li, by agreeing to a specific processing timeline for the students' employment authorization document applications.

It is vital that student employment authorization document applicants stay up to date on these flexibilities, to ensure their benefits remain undiminished. Practitioners in turn should carefully monitor these dates, especially the Oct. 31 deadline on which the interim relief is currently set to expire.

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