

FEDERAL AGENCIES, PRACTICE RESOURCES

Practice Alert: STEM OPT at a Third-Party Location

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August 17, 2018

On August 17, 2018, U.S. Citizenship and Immigration Services (USCIS) [announced](#) that it updated the [Optional Practical Training Extension for STEM Students \(STEM OPT\)](#) page of its website relating to the reporting and training obligations of the STEM OPT program. Specifically, in its August 17, 2018 [announcement](#), USCIS provides the following information regarding training experiences that take place at a site other than the employer's principal place of business:

STEM OPT participants may engage in a training experience that takes place at a site other than the employer's principal place of business as long as all of the training obligations are met, including that the employer has and maintains a bona fide employer-employee relationship with the student.

USCIS further states on its updated [Optional Practical Training Extension for STEM Students \(STEM OPT\)](#) page that in order to be eligible to employ a STEM OPT student:

an employer must have and maintain a bona fide employer-employee relationship with the student. . . . To establish a bona fide relationship, the employer may not be the student's "employer" in name only, nor may the student work for the employer on a "volunteer" basis. Moreover, the employer that signs the Form I-983 must be the same entity that provides the practical training experience to the student.

Per the August 17, 2018 update to the USCIS website, the Department of Homeland Security (DHS) will review on a case-by-case basis whether the student will be a bona fide employee of the employer signing the Form I-983, Training Plan for STEM OPT students, and verify that the employer that signs the Training Plan is the same entity that employs the student and provides the practical training experience.

This updated language provided by USCIS reverses prior declarations published on the USCIS website earlier this year which, among other things, sought to restrict the ability of STEM OPT participants to be placed at third-party worksites. See the April 2018 section below for more information about the agency's previous statements on this topic. AILA will continue to update this practice alert as more information becomes available.

July 14, 2018

On July 14, 2018, a [lawsuit](#) was filed in the U.S. District Court for the Northern District of Texas against DHS (*ITServe Alliance Inc. v. Nielsen*). Plaintiffs argue that the change to the STEM OPT rules published on the [Optional Practical Training for STEM students \(STEM OPT\)](#) page of the USCIS website, discussed in the April 2018 section below, violate the Administrative Procedure Act (APA) by failing to comply with the APA's notice and comment requirements. Plaintiffs further argue that DHS is unlawfully enforcing this rule retroactively as students who have been approved to participate in the STEM OPT Program under the prior rule are now being penalized by DHS if their employer is now considered to be an ineligible employer.

April 2018

In April 2018, USCIS updated the page on its website relating to [Optional Practical Training for STEM students](#) which seems to indicate its view that F-1 students in the STEM OPT program are not permitted to engage in OPT at third-party locations. Of particular concern is the following statement: "For instance, the training experience may not take place at the place of business or worksite of the employer's clients or customers because ICE would lack authority to visit such sites." However, this is directly contradicted by both the preamble of the STEM OPT Regulation and ICE FAQs on the matter. According to the [preamble](#) to the March 11, 2016 STEM OPT Final Rule:

There are several aspects of the STEM OPT extension that do not make it apt for certain types of arrangements, including multiple employer arrangements, sole proprietorships, employment through "temp" agencies, employment through consulting firm arrangements that provide labor for hire, and other relationships that do not constitute a bona fide employer-employee relationship.... Accordingly, DHS clarifies that students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Training Plan, and the employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience.

In addition, [in response to an FAQ relating to its policy on placement agencies](#), ICE states:

STEM OPT students are permitted to use staffing/placement agencies to find a training opportunity. However:

- All STEM OPT regulatory requirements must be maintained, and
- The staffing/placement agency cannot complete and sign the Form I-983 as an employer, unless:
 - The staffing/placement agency is an E-verified employer of the student, and
 - The staffing/placement agency provides and oversees the training.

At the USCIS Open Forum at the 2018 AILA Annual Conference, USCIS reiterated its concern that if the training takes place at a third-party site, the "employer" who signed the training plan would not be the one to supervise the student.

Nevertheless, it appears that the change in language on the USCIS website is overreaching, and that a STEM OPT employee could be placed at the worksite of an employer's client or customer, as long as the STEM OPT student is a bona fide employee of the employer signing the training plan, and the employer that signs the training plan provides the practical training experience. In addition, "staffing agencies" may provide a training opportunity as long as they are an E-Verify employer and they directly employ the student and oversee the student's training.

AILA has received reports (as recent as June 2018) of third party STEM placements being approved after responding to a request for evidence (RFE) where the bona fide employer/employee relationship was thoroughly documented. At the same time, AILA has received reports of RFEs on change of status to H-1B petitions seeking "a detailed explanation and evidence why the beneficiary is working at a different location than the STEM employer's place of business."

Lastly, AILA members should note that if the new unlawful presence memo becomes effective on its terms on August 9, 2018, there is a risk that a finding that the employer was not properly supervising the student's training could lead to a status violation determination, which would result in the retroactive accrual of unlawful presence.

Related Resources

- *Forbes*: [USCIS Changed Website To Block Foreign Student Jobs](#)
- [Optional Practical Training Extension for STEM Students \(STEM OPT\)](#)
- [DHS Final Rule for STEM Students and Cap-Gap Relief](#)

Accessible to: Member, Student, Paralegal.