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U.S. Immigration and Customs Enforcement Department of Homeland Security 425 I St. NW Room 7257 Washington, DC 20536

RE: Department of Homeland Security Docket No. ICEB-2008-0002

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the Department of Homeland Security's (DHS) Interim Final Rule for Extending Period of Optional Practical Training by 17 Months for F-1 Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions.

We appreciate the opportunity to comment on the interim rule and believe we are particularly well qualified to do so. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

AILA welcomes the STEM 17-month extension for OPT status and the interim final rule's cap-gap relief. Nevertheless, there are provisions in the interim final rule that are of concern. First, problematic is the absence a provision in the rule assuring that filing receipts are issued to individuals who have applied for benefits under the rule indicating continued employment authorization and status. Second, requiring that cap-gap applicants have change of status indicated on petitions filed on their behalf should be removed. Third, the requirement that employers wishing to hire individuals in OPT status enroll in E-Verify is overly burdensome and not rationally related to the STEM extension. Forth, the rule should be modified to allow an

expanded period of permissible unemployment for an individual's entire OPT period. And finally, the 17-month extension should not be limited to the rule's overly-restrictive list of STEM professions.

# 1. Filing Receipts Noting Employment Status

AILA urges DHS to issue a filing receipt for the I-765 that confirms the extension of employment authorization. The filing receipt should include language which matches the language of the regulation to the effect that the named applicant is authorized for employment pending the adjudication of the Form I-765 up to a maximum of 180 days from the expiration of his/her most recent EAD.

The rule amends 8 C.F.R. § 274a.12(b)(6)(iv) by providing that eligible students who apply for a 17-month extension of Optional Practical Training (OPT) shall remain eligible for employment pending the adjudication of the Application for Employment Authorization, for up to 180 days.

A filing receipt indicating work authorization is recommended for several reasons:

First, employers have an affirmative and ongoing obligation to verify the employment eligibility of their workforce. Without a filing receipt confirming the alien's continued eligibility to work, employers will be unable to verify the employment eligibility of an F-1 student with an OPT extension I-765 pending.

Second, provisions of the REAL ID Act require states to verify the lawful immigration status of persons applying for drivers licenses. Without a filing receipt confirming the continued employment authorization, the applicant will encounter difficulty obtaining, or be barred from obtaining or extending a state drivers license during the period when the I-765 is pending.

Third, without a filing receipt confirming the continued eligibility to work, an F-1 student with an I-765 pending who is seeking employment, or who is faced with unemployment, will be unable to find new employment. In light of the regulation's limit on periods of unemployment for F-1 students who received OPT, the lack of a document confirming employment eligibility increases the risk that unemployment will lead to violations of status.

There is precedent for issuing such a filing receipt confirming the continued eligibility of applicants to work and/or travel. Specifically, USCIS now issues filing receipts for Forms I-751, Petition to Remove Condition on Residence that extend the beneficiary's right to work and travel pending the adjudication of the Petition.

AILA urges DHS to modify its filing receipt for the Form I-765 to indicate that persons who are applying for STEM-based extensions of OPT pursuant to 8 C.F.R. § 274a.12(b)(6)(iv) shall remain authorized for employment from the filing of the I-765 until the adjudication of the I-765, up to a maximum period of six months.

## 2. Cap Gap Change of Status Requirement

AILA recommends DHS eliminate the requirement, in the cap-gap provision, that the H-1B petition filed on behalf of an F-1 OPT student request a change of status. Instead, the regulation should provide that the filing of an H-1B petition naming the F-1 OPT student as beneficiary is sufficient to permit an F-1 OPT student to benefit from the cap-gap provision if otherwise eligible.

The rule's change of status requirement imposes unnecessary burdens on companies whose employees regularly travel abroad for work and on F-1 OPT workers with legitimate personal need to travel. An F-1 OPT student who is the beneficiary of an H-1B petition marked for change of status may not depart the United States during the adjudication of the petition. USCIS doctrine holds that departure during the pendency of a change of status application is treated as abandonment of the application. In addition, to maintain change of status eligibility, the beneficiary must remain in the United States until the petition and change of status is granted.<sup>2</sup> During the fiscal year 2009 H-1B filing period, most employers submitted H-1B petitions for receipt during the week of April 1. On April 14, 2008, USCIS ran the H-1B random selection generator. At the time of submission of this comment in early June 2008, cases that were selected under regular processing were still pending adjudication. Based on the processing times of regular H-1B cap cases for the last fiscal year – some of which had processing times of up to six months – the interim final regulation as written would require F-1 OPT students seeking H-1B status to be present in the United States on April 1 and for an indefinite time thereafter until the approval of the change of status request, even if the student is in possession of a valid F-1 visa, if required, and the other documents required for travel for some portion of that time.

Many F-1 students on OPT status work in positions that require international travel, and others may wish to travel abroad for a variety of legitimate personal reasons during those timeframes. Restricting those F-1 OPT workers from traveling abroad for periods of several months or more imposes excessive burdens on employers and individuals and serves no policy purpose.

We urge DHS to delete the change of status requirement to reflect that the filing of a petition, regardless of the specific filing mechanism, permits the F-1 OPT student to benefit from the OPT extension if he or she otherwise qualifies.

#### 3. E-Verify and OPT Extension

AILA strongly urges DHS to remove the rule's requirement that OPT employers enroll in E-Verify. The added requirement that employers hiring F-1 OPT students enroll in E-Verify is

<sup>1</sup> The statute requires an applicant for change of status to another nonimmigrant classification to be "lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status …." INA § 248(a).

<sup>&</sup>lt;sup>2</sup> This long-standing legacy INS and USCIS interpretation is articulated in Memo, Cook, Acting Asst. Comm. Program, Legacy INS HQ 70/6.2.9 (June 18, 2001) and Letter, Bednarz, Chief, NIV Branch, Adjudications, Legacy INS CO 248-C (Oct. 29, 1993).

not rationally related to the STEM OPT extension program, duplicative in efforts, overly burdensome, and subject to high error rates. Employers wanting to keep their U.S. operation competitive should not be penalized for their efforts to attract and retain top talent by being saddled with an unstaffed, overly expensive employment verification tool that is far from being ready for nationwide implementation.

First, the rule's E-Verify requirement bears no rational relationship to the STEM OPT extension. The requirement that OPT employers enroll in E-Verify is an effort by DHS to enroll more employers into E-Verify. However, due to the nature of OPT extensions, almost all individuals applying for an OPT extension would not be subject to the requirements of E-Verify. Importantly, an employer registering in E-Verify may not use the E-Verify process retroactively or for existing employees. Many students who are eligible for the STEM OPT extension are already employed and plan to continue working for the same employer. Thus, the employer would not be legally allowed to use E-Verify to confirm the student's employment authorization. It is evident that the sole purpose of the E-Verify requirement is unrelated to the retention of STEM OPT students, but rather, is to force employers to enroll in the E-Verify program.

While DHS may claim compelling reasons to encourage employers to enroll in E-Verify, this rule for OPT extension is not rationally related to E-Verify and is thus the wrong regulatory vehicle to impose mandatory enrollment in E-Verify.

Secord, E-Verify's high error rates will unnecessarily delay the employment of highly sought-after STEM applicants. E-Verify's highest error rates are for foreign-born new hires. The Federal Government's own WESTAT study published in September 2007 showed that foreign born U.S. Citizens were one hundred times more likely to receive an erroneous non-confirmation in E-Verify than natural born U.S. Citizens (10% initial error rate vs. 0.1% initial error rate). By making E-Verify enrollment mandatory for employers that want to hire students on through STEM OPT extensions, DHS makes the E-Verify program mandatory for the type of employer the E-Verify program is least equipped to competently handle: work-authorized foreign-born new hires.

The E-Verify system is not properly funded or staffed to handle the influx of queries and non-confirmation appeals that will be brought on by this regulation. DHS' own projection in the interim final regulation discussion regarding the increase in use of E-Verify by employers to comply with the STEM OPT extension requirements confirms this concern. The Service anticipates that the number of employers enrolling in E-Verify may double; even conservative estimates forecast a 50% increase in its use from pre-regulation enrollment. USCIS has not demonstrated that it has the funding, staffing or technical capacity to handle this increase in usage in such a short period of time. Nor does the regulation provide funding to address these issues. E-Verify needs to be better staffed and adequately funded and its error rate needs to be sharply decreased before making it mandatory for private employers wishing to continue to employ STEM OPT students.

Finally, to avoid classification as an unfunded mandate, the government has grossly under-calculated the cost to employers of enrolling in E-Verify. The regulation's analysis states that its calculation does not include the cost to employers to buy or upgrade their electronic equipment or technology needed to run the E-Verify program. Further, the government calculation fails to take into account the fact that larger companies will have to train several employees to use E-Verify. The regulation fails to take into account the cost to companies to stay in good standing, as it does not include calculation for the amount of time the designated employee(s) must dedicate to verifying all new hires in the system for the duration of the OPT extension. It is not unreasonable to expect that large companies will have to hire full-time personnel to complete all the E-Verify queries and track the appeals of erroneous non-confirmations employees that will arise.

The regulatory analysis also states that it has not contemplated the additional cost to employers who already electronically store their I-9s or have them completed by a designated agent to then run them through the E-Verify system. Such designated agents can charge anywhere from \$.50 to \$5 per I-9 to act as the registered E-Verify agent.

Additionally, the government estimates a cost of \$170 per company to enroll in E-Verify, complete the MOU, and complete training. This estimate presumes all persons involved – the HR specialist, attorney, and general manager – are employees of the company and make the median salary for these positions. The regulation does not take into account that the majority of small businesses do not have in-house counsel and that most large businesses would consider I-9 compliance a "specialty" area that would require advice of outside counsel. According to the National Law Journal's 2008 billing study, the average attorney's hourly client rate is \$347, a far cry from the \$76 estimated in legal costs in the regulation. Even if we assume the companies affected by this regulation perform E-Verify work in-house, the cost of seeking an hour's worth of advice from counsel raises the cost of enrollment for 5300 employments from \$901,000 to \$2.337 million. Add the cost of new computer equipment, software upgrades, HR training and increased staff to handle the paperwork and time demands, and the real cost to employers could easily be double or triple this figure just for enrollment. The cost of using E-Verify would be in addition to the millions of dollars in start-up costs not contemplated by this regulation. In short, these are real costs to employers and must be factored into the government analysis.

#### 4. Periods of Unemployment

A. Permissible periods of unemployment should be extended to reflect fairness across the board.

AILA suggest that the period of permissible unemployment be expanded and that the definitions of what constitutes unemployment be revised. This regulation introduces new concepts – a numerical limitation on the time a student can be unemployed and what constitutes unemployment. AILA urges DHS to reconsider these limiting factors.

The rule governing periods of unemployment limits an F-1 OPT student to a maximum of 90 days of unemployment during the initial period of F-1 OPT authorization, and affords an F-1 OPT student under STEM OPT an additional 30 days of unemployment, for an aggregate of 120

days of unemployment over the entire 29-month combined OPT period. This formulation is disproportionate, in essence, granting an F-1 OPT student in the initial period an allowance for unemployment of 7.5 days per month, which is reduced to 4.14 days per month when 120 days of unemployment is allotted over 29 months. Recent economic cycles in the industries in which these F-1 OPT STEM students are seeking employment could lead to situations where an F-1 OPT STEM student could be facing a lengthy period of unemployment that would exceed the current 120 days.

AILA suggests a formula that increases the limit on unemployment from the current maximum of 120 days, to a suggested aggregate of 145 days over the full 29 months (the equivalent of five days per month), limited to 90 days in the first 12 months, with an additional 55 days in the succeeding 17 months.

B. Time spent actively seeking employment should be considered time spent in lawful OPT status.

AILA recommends that time actively seeking employment should be time spent in lawful OPT status. Prior to rule's publication, DSOs had the authority to monitor a student's efforts to maintain employment and engage in permissible practical training activities. DSOs exercised discretion. If, on the one hand, a student was working in an employment setting related to his education or if the student was exercising reasonable efforts to find employment, the student was deemed to be maintaining status. If, on the other hand, the student was not working, not trying to locate employment, and using OPT as a means to simply remain in the U.S., the DSO could terminate practical training.

Considering the inherent difficulty in seeking employment when authorization is limited to a year or less, and being foreign born, the regulation should be amended to account for time spent in active job-search efforts. The regulation and SEVP guidance fail to give a student in OPT any credit for actively seeking employment. For example, if a student can document that the student has been to the state workforce agency; looked for jobs in newspapers, journals, and online; sought referrals from his or her university job placement office; sent resumes; and attended job interviews, the student should not be deemed to have accrued time in unemployment. This time, and these efforts, should be considered job training, which is exactly what OPT intends to provide – preparation for entering the occupation.

Students who cannot document active time in search of employment should, as the rule now contemplates, be considered as accruing time in unemployment (after the 10-day grace period).

C. The regulation should specifically include a 10-day grace period allowing students to report changes to the DSO.

Section 7.3.1 of the SEVP guidance allows a student 10 days to report a change in employment to the DSO.

AILA supports this policy but strongly urges DHS to include this language in the regulation. All three parties – students, DSOs, and DHS officials – need to be clear on the period of time in which a student is in lawful status and shielded from accrual of time toward a status violation. By incorporating this into the rule, the period of time in lawful status will be concrete and not subject to interpretation.

d. Time spent outside the U.S. should not count as unemployment.

AILA recommends that time spent abroad not be counted as time in unemployment, whether or not the student was unemployed prior to departing the U.S. Instead, AILA recommends that only time spent in the U.S., minus the applicable grace periods, count as unemployment.

Section 7.1.6 of the SEVP guidance and the USCIS Q&A #2 both state that if a student departs the U.S. while unemployed, the time abroad counts as impermissible unemployment. AILA opposes this policy for several reasons.

First, such a policy is unprecedented. No other nonimmigrant can violate status while not in the U.S. This rule encourages the student to remain in the country while unemployed, during which time the student is accruing time toward a potential status violation.

Second, this rule would vest CBP officials with the authority to determine, upon inspection at the border, whether or not a student has been unemployed to the extent his OPT is expired. CBP officers are not in a position to properly make this determination. Whether a student was impermissibly unemployed prior to departure is a determination for the DSO. The CBP officer should not be required to decide if the student has accrued time in unemployment so as to render him inadmissible.

Third, the policy is impractical and contradicts the objective of the OPT regulation, which is to ensure that students are given the opportunity to use OPT in a manner that is consistent with the education they gained in the United States. Deeming time spent outside the U.S. as unemployment will deny many students the opportunity to put their new skills and knowledge to practical use.

By way of example: Assume the unemployed student in OPT goes abroad. To return, he must apply for a new visa. But the student is delayed abroad for prolonged security checks conducted by the Department of State. Such a delay could easily extend beyond 90 days and should not be counted against the student's otherwise valid status. This is particularly true for STEM applicants, as many are trained and employed in high-technology sciences. These are precisely the applicants who will be subjected to scrutiny by the Department of State and delayed during the pendency of a VISA MANTIS check. As DHS is aware, a VISA MANTIS check can take months.<sup>3</sup> Thus, time abroad should not count as unemployment, especially when the student is delayed for reasons beyond his control as would be the likely case for STEM applicants.

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<sup>&</sup>lt;sup>3</sup> In 2004, it was reported that VISA MANTIS checks were taking on average of 60 days. *See*. General Accounting Office, Streamlined Visas Mantis Program Has Lowered Burden on Foreign Science

Finally, the policy on accrual of unemployment while abroad violates the Administrative Procedure Act. If the Department of Homeland Security elects to deem time spent outside the U.S. in violation of status, it must create a new rule; it cannot enact a rule such as this through policy guidance. Therefore, DHS must follow the rulemaking procedure to implement this type of change.

In the alternative, and to avoid the consequences described in the above examples, AILA recommends that students who travel abroad while unemployed be granted a fixed period of unemployment. AILA recommends that these students be allowed a grace period up to 90 days while abroad.

#### **5. STEM Categories**

A. ICE's proposed definition of what constitutes a STEM field is unnecessarily restrictive

AILA urges DHS to expand the definition of STEM degrees to fall in line with other federal definitions of what constitutes a STEM-related field. The primary concern addressed by the rule is ameliorating the difficulty and "immediate competitive disadvantage faced by U.S. high-tech industries" when filling positions with "STEM" graduates. The rule provides a tentative list of what it considers to be "STEM fields." But, in so doing excludes a number of obvious STEM fields. For example, excluded CIP codes range from those beginning with the two-digit CIP code "30" (interdisciplinary studies), such as "Biological and Physical Sciences (30.0101)," "Neuroscience (30.2401)." They also exclude critical medical sciences such as "Medical Scientist (51.1401)," "Medicinal and Pharmaceutical Chemistry (51.2004)." These fields are indisputably STEM fields, but are inexplicably excluded from the rule's list of STEM fields. Many foreign graduates in excluded CIP fields go on to work for high-tech industries, whether the technology described is information technology or biotechnology.

Such exclusions create a counterintuitive and arbitrarily-defined new definition of STEM fields and contradict prior federal definitions of STEM. For example, an October 2005, GAO report describes a list of STEM fields and occupations that specifically includes Social, Behavioral, and Economic Science ("SBES") fields such as Social Sciences and Psychology.<sup>5</sup> This GAO report is typical of other federal government definitions of STEM as including the SBES fields.

Students and Scholars, but Further Refinements Needed, GAO-05-198, (Feb, 18, 2005), AILA InfoNet Document # 05022266; *see also* General Accounting Office, Report to the Chairman and Ranking Minority Member, Committee on Science, House of Representatives, Border Security: Improvements Needed to Reduce Time Taken to Adjudicate Visas for Science Students and Scholars, GAO-04-371, at 2 (Feb. 2004). AILA members consistently report that such delays can easily take 4 to 6 months.

4 73 Fed. Reg. 18,944, 18,947 (Apr. 8, 2008).

<sup>&</sup>lt;sup>5</sup> General Accounting Office, Report to the Chairman, Committee on Rules, House of Representatives, Higher Education: Federal Science, Technology, Engineering, Mathematics Programs and Related Trends, GAO-06-114, at 6 (Oct. 2005) (Table 2: List of STEM Fields Based on NCES's NPSAS and IPEDS Data and BLS's CPS Data). See also id. at 51-52 (Tables 19 and 20, which lists STEM fields as including Economics, Psychology, Sociology, etc.).

Further, the Office of Science and Technology Policy's (OSTP's) own American Competitiveness Initiative Report defines STEM fields as including the behavioral and social sciences in the same breath as engineering and the physical, life, and computer sciences. Moreover, in a report solely focused on American competitiveness in the global marketplace, the White House considers support of the SBES fields (and its graduates) no less critical to American competitiveness than other STEM fields. Finally, the National Science Foundation, has an entire Directorate devoted to the "SBE" Sciences, and treats those fields as a subset within STEM.<sup>6</sup> Congress allocates hundreds of millions of dollars to the NSF every year for promotion of these critical STEM fields. For FY 2009, Congress has accorded to the NSF over \$233 million toward development of SBES programs.

In light of GAO, OSTP and NSF pronouncements, AILA recommends that DHS consider Social, Behavioral, and Economic (SBE) sciences as falling within the STEM concept for the purpose of the F-1 OPT extension regulations.

Additionally, clinical health sciences and allied health sciences are also STEM fields, but have been largely excluded from the regulation's proposed CIP list. The October 2005 GAO report<sup>8</sup> lists all recent NSF STEM Education grants to various academic programs. Many of those STEM education grants went to programs in the health sciences and related medical sciences, including Nursing and Clinical Research. It is inarguably true that these are scientific fields, and therefore fall within the STEM paradigm simply as a matter of common sense and plain construction. The exclusion of clinical health sciences and allied health sciences graduates is important because many foreign graduates in these fields will not go on to clinical practice, 10 but rather into the biotechnology, pharmaceutical, or medical device industries, which are the sectors the rule is designed to assist. These sectors also serve global markets in which America is striving to maintain its global competitive advantage. They are also sectors for which a shortage of qualified U.S. workers continues to exist. Therefore, their needs should be accorded no less weight, which argues in favor of DHS expanding the STEM field list to include clinical health science/allied health science fields.

B. Limiting eligibility to STEM graduates is an unnecessary restriction on the 17-month F-1 OPT extension.

<sup>&</sup>lt;sup>6</sup> See, e.g., Home Page, National Science Foundation Directorate for Social, Behavioral and Economic Sciences, available on the WWW at http://www.nsf.gov/dir/index.jsp?org=SBE.

<sup>&</sup>lt;sup>7</sup> See FY 2009 NSF Budget Request to Congress, at SBE-1 (2008), available on the WWW at http://www.nsf.gov/about/budget/fy2009/pdf/entire\_fy2009.pdf.

<sup>8</sup> supra

<sup>&</sup>lt;sup>9</sup> See General Accounting Office, Report to the Chairman, Committee on Rules, House of Representatives, Higher Education: Federal Science, Technology, Engineering, Mathematics Programs and Related Trends, GAO-06-114, at 59-60 (Oct. 2005) (Appendix II, Federal STEM Education Programs).

<sup>&</sup>lt;sup>10</sup> If for no other reason, most medical, nursing, and related clinical professionals cannot go into clinical practice due to inherent restrictions in the Immigration and Nationality Act.

In addition to expanding its list of eligible CIP codes to reflect the through breadth of STEM fields, AILA recommends that the 17-month F-1 OPT work authorization extension period should be available to all U.S. university graduates, regardless of whether their degrees were in STEM fields. Of course America's high tech industry needs STEM graduates in order to maintain global competitiveness. However, this policy is not well-served by limiting the 17-month extension period to an exclusive list of CIP codes. America's high tech industry will secure access to just as many STEM graduates if there is no limit placed on the degrees eligible for the 17-month extension.

Many foreign university graduates contribute to high technology companies in the U.S., even if they do not hold STEM degrees. Importantly, American employers in high tech industries have need of individuals who hold STEM undergraduate degrees, but who gained a U.S. graduate degree in a non-STEM field. For example, individuals with English degrees go on to work in technical writing; individuals with foreign language degrees (*e.g.*, Chinese, Russian or Japanese), go on to work in software localization; MBA degree holders often go on to work in Management Information Systems; and, psychology degree holders go on to work in Artificial Intelligence or Human Factors.

Assuming that all F-1 OPT students typically seek visa sponsorship in the H-1B classification, it stands to reason that they will find U.S. employers who have a need for their U.S. academic training. AILA suggests that America's high tech sector is better served by a policy that allows all U.S. high technology employers the opportunity to hire F-1 OPT students without regard to major.

While there is no cost to eliminating the STEM requirement, there are significant costs to imposing it. Universities and the DHS will be required to keep track of which CIP codes are qualifying "STEM" codes for the purpose of the F-1 OPT extension rule, including an apparently ongoing monitor/update process. Additionally, graduates holding university degrees in fields that are arguably STEM-related, but do not appear on the DHS STEM list, will be "penalized" for not having graduated under the "right" (i.e., 17-month extension eligible) academic major. (Neither university students nor their academic counselors can be expected to "master" which CIP codes count as DHS-defined STEM codes until after they have already graduated.) Finally, students working in emerging scientific fields will be penalized, as the very nature of new interdisciplinary STEM programs is such that new CIP codes will have made it to DHS's STEM list.

Contrary to the potential negative ramifications of imposing the STEM-field limitation to the 17-month extension, there is no negative outcome resulting from abandoning the STEM-field limitation. Non-STEM degree holders are already entitled to 12 months of "regular" OPT status anyway, so no harm is done by allowing them to benefit from the same extension of work authorization. There will be a practical, self-imposed limitation to individuals who are eligible for H-1B sponsorship, as anyone with a degree that would not qualify for H-1B sponsorship is unlikely to be hired, and in any event would likely depart the US after the F-1 OPT period, as there would be no subsequent work-authorized visa category into which they could change status.

### 6. Change of employer and reporting requirements for STEM OPT holders

In the STEM OPT extension provisions, AILA urges DHS to clarify that a student can change employers during the 17-month extension and state that the student should report such change to the DSO. While the interim final regulation implies in a number of places that STEM OPT holders may change employers during the 17-month period of work authorization, the rule does not explicitly permit the STEM OPT holder to change employers. To fully maximize the skill sets that the STEM OPT holders contribute toward our country's economy and its competitiveness, DHS should revise the rule to expressly permit job mobility for STEM OPT holders. In addition, based on the existing language in the rule, we recommend that DHS clearly define the process for switching employers to consist of reporting the new employment to the DSO to ensure that the STEM OPT holder continues to meet all the requirements of the STEM OPT program.

The interim rule at 8 C.F.R. § 214.2(f)(10)(c)(4) provides that an employer "agrees to report the termination or departure of an OPT employee to the DSO...if the termination or departure is prior to the end of the authorized period of OPT." Under the rule employers must report the STEM OPT individual's termination or departure within 48 hours. The rule, however, fails to describe how the employer has knowledge that the employee is an OPT extension individual; fails to explain how the employer knows of its agreement to report the OPT individual's termination; fails to provide a mechanism for the employer to report to the DSO; and fails to explain how the employer would know who the DSO they need to report is.

Additionally, employers have never before been required to report changes in work status of F-1 OPT holders and do not have regular contact with the DSOs. From a practical standpoint, after a STEM OPT holder is terminated, the employer may not have information about the contact information for the former employee's DSO. Moreover, the requirement that employers report an OPT individual's termination within 48 hours is unreasonably short.

In addition, this reporting requirement will impose significant costs on employers of STEM OPT holders in terms of tracking and compliance regarding this special subgroup of workers, which directly contradicts the regulation's stated objective of increasing these employers' ability to compete globally.

Finally, the rule cannot impose a requirement on entities other than the STEM OPT holder to report changes to the DSO without establishing a secure and verifiable mechanism for the employer to report this important information to the DSO. As written, the employer reporting requirement would leave the STEM OPT holder exposed to the significant impact of any number of intentional and unintentional acts, including erroneous employer reports of terminations; deliberate misinformation of a termination provided by a disgruntled co-worker or other unauthorized person; and any number of other unfortunate types of "reporting" to which the STEM OPT holder would be vulnerable.

The better option would be to place the reporting requirement on the STEM OPT holder, who is in a much better position to bear this responsibility than the employer. The STEM OPT holder is aware of his or her special status and requirements, is already in regular contact with the DSO, and due to the significant consequences of non-compliance on his or her work authorization, has significant incentives to comply with this rule.

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that our feedback will inform ICE's decisions on this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION