



June 9, 2008

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

Submitted via Federal Rulemaking Portal: <http://www.regulations.gov>

**Re: Department of Homeland Security Docket Number ICEB-2008-0002.  
Comments on OPT Extension Interim Final Rule published at 73 Fed. Reg.  
18944 (April 8, 2008)**

Dear Department of Homeland Security:

The American Council on International Personnel (ACIP) is pleased to submit these comments in response to the Department of Homeland Security's (DHS) interim final rule (IFR) extending the period of Optional Practical Training (OPT) by 17 months for certain F-1 nonimmigrant students with STEM degrees and expanding cap-gap relief for all F-1 students with pending H-1B petitions.

ACIP is an organization comprised of over 200 corporate and institutional members with an interest in the movement of personnel across national borders. Each of our members employs at least 500 employees worldwide, and in total, ACIP members employ millions of United States citizens and foreign nationals in all industries throughout the United States. ACIP sponsors seminars and produces publications aimed at educating human resource and legal professionals on compliance with immigration and employment verification laws, while working with Congress and the Executive Branch to facilitate the movement of international personnel. ACIP is in a unique position to comment on this rule because our membership includes both employers and universities so we bring multiple perspectives to the issues raised through this rulemaking.

ACIP appreciates the substantial amount of time and effort DHS committed to issuing this interim final rule and trying to address an important need for U.S. employers who are unable to obtain H-1B visas or green cards in a timely manner for foreign students graduating from U.S. universities. We acknowledge this IFR is a timely and positive development in response to a request ACIP and other stakeholders have been making for years to assist US employers in facilitating the transition from student to green card status. ACIP strongly agrees with the statement in the preamble to the IFR, explaining that the OPT extension is necessary to enable U.S. employers to retain key foreign

national talent to remain competitive in the global market. The National Science Foundation (NSF) and other entities are cited by DHS as support for this proposition. DHS rightly found this need for our struggling economy so extreme and time-sensitive that this rule was issued as an interim final rule instead of a proposed rule. In the preamble, DHS states (emphasis added)<sup>1</sup>:

“[t]o avoid a loss of skilled students through the next round of H-1B filings in April 2008, DHS is implementing this initiative as an interim final rule without first providing notice and the opportunity for public comment under the "good cause" exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b). The APA provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. 553(b)(B). *The exception excuses notice and comment, however, in emergency situations, or where "the delay created by the notice and comment requirements would result in serious damage to important interests."*

We applaud DHS' acknowledgement of the skills shortage and the need for immediate relief for employers.

However, ACIP believes that certain restrictions included in the IFR are unrelated to the purpose of this rule and undermine its implementation and the potential relief to our economy. Moreover, the unnecessarily complex implementation procedures have created widespread confusion in the employer, university and student communities and have imposed new costs and potential liabilities on employers and universities. These costs and potential liabilities undermine our economic competitiveness without enhancing our national security or deterring illegal immigration.

We respectfully request that DHS amend the IFR as noted in our comments below.

**A. E-VERIFY**

**1. The OPT Extension Should Not Be Linked to E-Verify**

ACIP does not support linking the 17 month OPT extension to enrollment in E-Verify, as we believe it undermines the very intent of the rule which is to provide access to talent for employers recruiting from U.S. universities. We respectfully request that this provision be stricken from the regulation.

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<sup>1</sup> <http://edocket.access.gpo.gov/2008/E8-7427.htm> page 18950

ACIP has long been an advocate of effective employment verification laws. We conduct employment verification compliance seminars several times annually and have trained thousands of professionals from America's leading employers over the years. ACIP is itself an E-Verify employer and a number of our member organizations are actively exploring E-Verify implementation at their worksites. We maintain a discussion forum devoted to E-Verify and maintain active liaison with E-Verify officials within DHS.

Our vast experience in this area gives us unique insight into the challenges of a one-size-fits-all approach to employment verification and the challenges of implementing any verification system at large, multi-jurisdictional employers. E-Verify cannot be implemented by large employers at the flip of a switch which is, essentially, what this rule requires. Consequently, many of the employers who are growth engines in our economy will not be able to benefit from the OPT rule.

**a. DHS Understates the Challenges and Cost of E-Verify Implementation for Large, Multi-Jurisdiction Employers**

Fewer than 70,000 of the nation's seven million employers are enrolled in E-Verify. The reason 99 percent of American employers have not enrolled in E-Verify is *not* because they are hiring undocumented workers or shirking their employment verification responsibilities, but rather because E-Verify enrollment is not easy or efficient for a large employer.

All ACIP members hire thousands of employees annually. Many have 100 or more worksites. The processes for recruiting, hiring and onboarding employees (including completion of the Form I-9) are as diverse as the employers themselves. For example, some employers have a centralized human resource department complete all I-9s. Others have local human resources, store managers, department chairs or other trained personnel throughout the organization complete the I-9s. Files may be maintained at each employment location or centralized. Remote employees may be verified by notaries retained by the employer or the entire process may be outsourced to a vendor. Whatever the process, most large employers have developed their own in-house training programs to keep recruiters, managers and staff apprised of their compliance obligations.

To the extent ACIP members are enrolled in E-Verify, most have enrolled only in certain states or hiring locations. Even this limited enrollment requires months of planning. This planning includes legal review of the Memorandum of Understanding, changing the process flow for onboarding new employees and documenting work authorization, developing new processes for handling tentative nonconfirmations, and training staff.

ACIP disagrees with assertions made in the preamble to the IFR which state:

“[t]he time and cost associated with registering for E-Verify largely depends on the access method a company chooses. The vast majority of companies will sign up for employer access which requires approximately 3 to 4 hours for a person to register online, read and review the Memorandum of Understanding, and take the tutorial. A recent cost analysis for the E-Verify program looked at the associated costs for an organization to undertake the above tasks based on an average salary and the time required. According to this analysis, a company would spend an average of \$170 per registration for the Employer Access method. This cost could increase if an employer chose to use a Designated Agent or Web Services as their access method.”<sup>2</sup>

ACIP members report that due to the volume of monthly new hires, they must have multiple people trained to run the E-Verify checks. The estimated 3 to 4 hours of time is based on one person registering, understanding the MOU and taking the tutorial. It does not include the time and costs associated with months of planning required at a larger organization. In addition, for those with multiple hiring sites, or where the E-Verify function is spread across the country, the costs would need to be multiplied to account for several staff members at each location as well as training and coordination of policies and practices across locations.

One multi-billion dollar ACIP member company explains the significant costs they are experiencing in implementing E-Verify: “[Our] company is moving to a web-based I-9 application that incorporates E-Verify through a designated payroll agent. Project implementation is extensive and costly to set up a robust process that will accommodate HR personnel changes, required training and other changes. The company has a team of about 8 professionals so far working on the project, including IT resources and a dedicated Project Manager.” This scenario is quite common for large companies with multiple business units. For these employers consistency and compliance are critical and must be built into the process from day one. This is especially important for implementing tentative nonconfirmation procedures. The same company reports that in their experience, corrections at the Social Security Administration (SSA) usually take in excess of 90 days. Employees must wait four or more hours per trip, with repeated trips to SSA frequently required to get their records corrected. Policies for handling this, e.g. does the employee get paid time off to go to SSA, must be consistent and fair.

Because enrollment for large employers is a time-consuming process, few ACIP employers will be able to take advantage of the OPT extension in the near future. Furthermore, employers are carefully weighing the costs of electronically verifying all new hires with the benefits of obtaining an OPT extension for a relatively small number

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<sup>2</sup> <http://edocket.access.gpo.gov/2008/E8-7427.htm> page 18952

of employees. Many ACIP members are determining that it is simply easier to relocate H-1B lottery losers and their research or projects to facilities abroad rather than undertake the expense of enrolling in E-Verify at this time. Other nations such as Canada, Australia and the United Kingdom have specifically amended their laws to encourage the migration of these talented professionals and employers will take advantage of this where it make sense for their global operations.

For the reasons outlined above, ACIP disagrees with the DHS assertion that this rule will not result in “significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign- based companies in domestic and export markets.”<sup>3</sup>

**b. DHS Overstates E-Verify’s Current Capability to Accommodate This New Enrollment Requirement**

E-Verify has made progress in the past several years in accommodating diverse employment situations. The fact remains, however, that, by statute, E-Verify is a voluntary pilot program. Recent testimony before Congressional committees highlights the fact that E-Verify is not ready for full implementation. Mandating enrollment for OPT extension violates Congressional intent that this be a voluntary pilot program.

**i. High Tentative Non-Confirmation Rate for Foreign National Employees Disrupts Business Operations**

Employers enrolling in E-Verify in order to take advantage of this IFR will be the ones most likely to hire large numbers of foreign nationals whom they wish to sponsor for an H-1B visa and/or permanent residence. It is ironic that this is the same group that is most likely to receive an erroneous tentative non-confirmation in E-Verify. The OPT rule was created to allow employers access to qualified, skilled foreign nationals so to then require them to use a system that could mistakenly exclude those same foreign nationals seems counterproductive. For example, the US Government recently released the following information (emphasis added)<sup>4</sup>:

*Q13. Does E-Verify provide an immediate response to an employment verification query?*

*A13. Although not apparent to the user, the electronic verification process differs slightly for persons who claim to be U.S. citizens and persons who claim to be foreign nationals.*

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<sup>3</sup> <http://edocket.access.gpo.gov/2008/E8-7427.htm> page 18950

<sup>4</sup> [http://www.foreignlaborcert.doleta.gov/pdf/Webinar\\_Everify\\_FAQs\\_Round3\\_final.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Webinar_Everify_FAQs_Round3_final.pdf)

For persons claiming to be U.S. citizens, approximately 96% of inquiries result in an immediate “authorized” finding. Approximately 4% of inquiries result in an immediate “tentative nonconfirmation.”

*For persons claiming to be foreign nationals, approximately 68% of inquiries result in an immediate “authorized” finding. Approximately 15% of inquiries result in an immediate “tentative nonconfirmation.” Approximately 17% of inquiries result in further analysis by a status verifier, which takes approximately 24 hours. Of the inquiries that result in further analysis by a status verifier, approximately 48% result in an “authorized” finding and approximately 52% result in a “tentative nonconfirmation.”*

Workers who have been issued a tentative nonconfirmation letter may choose to contest the finding. If a worker chooses not to contest the interim finding, the worker is issued an immediate “final nonconfirmation.” If a worker chooses to contest the interim finding, the worker is allowed eight Federal working days to resolve the discrepancy.

If employers receive immediate ‘authorized’ finding for 68% of their foreign national new hires, that means they will not receive immediate answers for 32% of them. Ironically, the tentative nonconfirmations are likely to be for the very foreign nationals that our employers have spent time and resources sponsoring for a visa in the first place.

One large multinational employer provided the following data on their experience with E-Verify between January 1, 2008 and May 22, 2008. Out of 598 queries submitted, they received tentative nonconfirmation (TNC) notices on 92 or 15.38%. Out of the 83 DHS TNCs (the remainder were SSA TNCs), about 80% of those TNCs required personal attention to resolve, at a great cost to the employer and the impacted foreign nationals.

Even where foreign employees are assured that this paperwork error can be corrected, it causes undue anxiety and lost productivity within the organization, once again undermining our economic competitiveness. At a minimum, the language used in the tentative nonconfirmation notice should be made more user-friendly to alleviate the emotional response experienced by those employees receiving them. Until this confirmation rate is improved, employers should not be mandated to enroll in E-Verify.

## **ii. E-Verify is Flexible; OPT Rule is Not Flexible Enough**

As a pilot program, we believe E-Verify has been very successful in responding to the varied needs of U.S. employers. ACIP applauds the flexibility that has been built into E-

Verify's expansion that enables companies to sign up for E-Verify in the manner making the most sense for a particular corporate structure. We are concerned that as E-Verify becomes linked to OPT extensions and H-1B applications, this flexibility may disappear or introduce confusion where none should exist.

In particular, E-Verify has been flexible in establishing an MOU in situations involving a family of companies. However, linking E-Verify to a particular student's EAD, and ultimately to their H-1B which is tax ID number driven leads to confusion. ACIP would like clarification on how we should reconcile these differences. For example, the E-Verify system, as it currently stands, may enter an MOU with a parent company. The HR office within the parent company might run the I-9 and E-Verify process for multiple affiliated companies, even those that are separate legally incorporated entities with separate tax ID numbers. Or, each entity might conduct its own I-9 process but then the information is passed to the parent company for running E-Verify and for storage. In either case, the employer's E-Verify name and number may not line up exactly with the name and tax ID number on other applications. This is not due to fraud or misrepresentation but may appear so to the uninitiated observer.

The current IFR is unclear on explaining how DHS will define 'employer.' We suggest that 'employer' be defined by DHS in the final rule the same was as E-Verify defines the 'employer' – in the manner making the most sense for a particular corporate structure. Until these issues are worked out, E-Verify should not be linked to this OPT rule.

### **c. Linking E-Verify to OPT Will Not Impact Unauthorized Employment**

As noted above, the multinational employers most likely to take advantage of an OPT extension already have extensive I-9 verification procedures in place. STEM OPT employers are NOT the employers at high risk of employing unauthorized workers. Further, international students are already tracked by DHS – both through SEVIS before the student even enters the US and by USCIS when it issues employment authorization documents to those very students. Requiring low risk employers to verify the work authorization and status of individuals already closely tracked by DHS does little to enhance an already legal workforce.

Requiring E-Verify of this select group is unlikely to impact the number of unauthorized workers employed in the United States. Further, E-Verify cannot be used to check the work authorization of existing employees. Thus an employee on an OPT extension would not even be run through this system. If DHS wants to implement E-Verify on a wide-scale to encourage participation, DHS should be focusing on areas known to be at high risk for employment of unauthorized workers.

### **d. Linking E-Verify Number to EAD Creates a Quasi-Sponsorship Relationship**

Forcing employers to enroll in E-Verify and to provide their E-Verify number for the student to use in applying for work authorization creates a completely new situation under immigration law. This rule binds the employer and ties work authorization to a specific employer which OPT was never intended to do. We are concerned that this rule creates a “quasi-sponsorship” relationship from which uncertain obligations will flow. We are also unclear what impact, if any, this will have on the maintenance of status for the student. Until DHS is able to clarify these obligations, we believe it inappropriate to link E-Verify enrollment to OPT.

For the above reasons, ACIP respectfully requests that DHS strike the E-Verify requirement from the IFR. In the event DHS maintains the E-Verify requirement in the final rule, ACIP requests that the following issues be resolved in the final rule.

**2. If DHS Insists on Retaining the E-Verify Requirement, Several Issues Must be Resolved**

**a. Use of E-Verify at Sites Listed on the MOU Should Satisfy the Enrollment Requirement**

ACIP requests DHS provide additional clarity and flexibility in the final rule regarding E-Verify enrollment and the location(s) where the student will be employed. ACIP has heard various explanations from government sources. One explanation is that DHS will be looking to determine if the employer has a valid E-Verify number, but that there is no requirement that the employer use E-Verify at the location where the student is located. ACIP has also heard that the actual site where the foreign national will be working needs to be enrolled in E-Verify to satisfy the intent of those drafting the rule.

USCIS attempted to answer this question through published guidance, but the guidance falls short of completely answering the question.<sup>5</sup> The guidance states: “If the hiring site where the student will be employed has not been identified in the MOU that the company signed during enrollment, that hiring site is not considered to be enrolled in E-Verify and therefore cannot employ an F-1 OPT STEM student under a 17-month extension.” The guidance talks about being enrolled at the “hiring site where the student will be employed”. However, the hiring site and the site where the student will be employed are often two separate places for employers with multiple worksites.

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ff791c491861a110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>

To simplify and clarify the process, we suggest that enrolling in E-Verify and using it at the locations listed on the MOU should satisfy the requirement. The current language leaves many questions unanswered. ACIP recommends the final rule clarify that the employer needs to be enrolled with E-Verify and must use E-Verify at the sites listed on the MOU, but that the employer does not need to be enrolled everywhere a foreign national student may be hired or may eventually work. Adopting this interpretation will allow E-Verify to continue with their much appreciated flexibility in allowing employers to enroll in whatever manner makes the most sense for the employer's structure.

The distinction in the FAQs between "hiring site" and "work site" are difficult to apply to many employment situations. This is particularly true for roving employees. In the consulting industry, and many other industries, roving employees - those moving from client site to client site or from one corporate location to another - are quite common. We would recommend that as long the employer is enrolled somewhere, that should suffice.

#### **b. Employer's E-Verify Number Should be Protected**

Many ACIP member organizations have expressed concern over giving the employer's E-Verify number to students. If the student shares the information with other students, the employer would have no way of knowing that other students are submitting I-765s with the employer's E-Verify number. Similarly, USCIS would have no way of knowing whether the employer, whose number is submitted, has actually offered employment to the applicant. To reduce the risk of misuse, some employers might not give out their E-Verify number, but instead will require the student to prepare the I-765 package and then the employer will add their number and submit the package. Other employers do not want to follow this course of action for fear of creating a quasi-sponsorship relationship. Some schools may object to the employer being involved to such an extent anyway, as OPT applications have traditionally been a school function and they may not want to change their process.

Through published guidance, USCIS has said that if employers have concerns about providing an employee with their E-Verify number, they are not required to disclose the number, but then the OPT extension cannot be approved.<sup>6</sup> This advice does not provide a useful solution. Instead of collecting the E-Verify number on the I-765, we recommend the form collect an employer e-mail address so DHS could then communicate directly with the employer. Such a system would serve multiple purposes – confirming the employer is enrolled in E-Verify, confirming the employer knows of

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ff791c491861a110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>

their obligations and confirming the employer knows that the student has filed for work authorization listing them as the employer.

Designated School Officials (DSOs) are also struggling with this issue for another reason. Some DSOs will require that a letter from the employer which includes their E-Verify number be sent to the DSO to verify employment before the DSO will make the SEVIS recommendation for an extension. Other DSOs do not believe they have an obligation or the authority to require such a letter from the employer. Employers need a uniform process across universities to protect DSOs and to protect employers from needing to follow 100 different processes for 100 different schools.

ACIP recommends that the information provided in *SEVP Policy Guidance 0801-01 - Updates to Post-Completion Optional Practical Training*<sup>7</sup> (SEVP Guidance) issued April 25, 2008 be incorporated into the final rule. First, Question 8.2.1. of that SEVP Guidance asks about the DSO's responsibilities when recommending a STEM OPT extension for a student. The answer provides, in part, "While the DSO must ensure that the student knows that he or she must work for an E-Verify employer, the DSO is not responsible for verifying an employer's registration with E-Verify." Second, Question 8.3.4. asks if the DSO is responsible for verifying that the student is working for an E-Verify employer. The answer states, "No. A USCIS adjudicator will make this determination by verifying the information in Item 17 of the student's Form I-765." ACIP would like to see this clarification of the DSO's role confirmed in the final rule.

**c. The EAD Should be Annotated to Provide Notice to Concurrent or Sequential Employers; Employer Obligations Should be Clear**

ACIP requests DHS add clarification to the final rule addressing various scenarios where multiple employers might be involved during the 17 month OPT extension. Most often, this would arise in one of two situations – concurrent or sequential employment as explained in more detail below.

In the first situation, the student might have concurrent employment where the student is working for two employers at the same time. ACIP recommends that the final rule make clear that both employers need to be E-Verify enrolled, as stated in the USCIS FAQs which read: "if a student wishes to continue with both employers, each employer would need to be enrolled in E-Verify." If DHS takes this position, then the final rule needs to make clear how the I-765 should be completed to account for two E-Verify numbers.

The second scenario would involve sequential employment - a situation where the student leaves the first employer and begins working at another employer during the 17

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<sup>7</sup> [http://www.ice.gov/doclib/sevis/pdf/opt\\_policy\\_guidance\\_pdf.pdf](http://www.ice.gov/doclib/sevis/pdf/opt_policy_guidance_pdf.pdf)

month period. ACIP recommends that the final rule incorporate Question 8.4.3 of the SEVP Guidance which asks whether a student can change employers while the STEM extension application is pending. The answer provided is, “Yes. However, if the STEM extension period has started, the employer must also be an E-Verify employer. The student must report the change in employment to his or her DSO.” We recommend the answer be clear that both the old and new employer need to be E-Verify enrolled whether the extension request is pending or approved.

In order for the second employer to know of its obligation to be enrolled in E-Verify, the EAD needs to be annotated to clearly indicate this requirement. ACIP has heard the suggestion that the obligation would be on the student to notify the second employer of this obligation, but ACIP believes in order to ensure compliance, that the employer needs to be provided with official government guidance which could be accomplished through an extra line of text on the EAD.

ACIP would also like clarification on what is expected of the second employer, if anything. After the student reports the new employer information to the DSO and the DSO updates SEVIS, does the second employer need to do anything? How will the second employer know they need to be E-Verify enrolled? How will the new employer know that conditions are placed on the student’s work authorization? Will the student’s Employment Authorization Document (EAD) state that any employer of that student must be enrolled in E-Verify? ACIP has heard that one interpretation would be that an employer should know that conditions exist if they see an EAD containing a 17 month validity period. Further, J-2 regulations allow flexibility for the EAD to be issued for up to 4 years, so a J-2 EAD could easily contain a 17 month EAD; the same is true for the spouse of an L visa holder. For these reasons, ACIP does not believe that the mere 17 month validity period is sufficient notice to the second employer that they must be E-Verify enrolled and we suggest the EAD be annotated accordingly.

ACIP would also like clarification on obligations of the various parties when a student moves from one employer to a new employer? Question 8.5 of the SEVP Guidance asks how an employer should report to a DSO that a STEM extension OPT student is no longer employed. The answer provided is, “The school may provide the student with information on how to report the end of the student’s employment. The student must provide this information to the employer. If the school does not provide alternative instructions the employer may send the report to the school address listed on the student’s Form I-20. The employer should provide the student’s name, SEVIS ID number (if available), and the date that the student’s employment ended.” For the sake of clear guidelines and to avoid the situation where an employer has to follow a different protocol for every school, ACIP recommends that one, uniform process be included in the final rule. We support the suggestion in the SEVP guidance that the first employer write to the school address listed on the I-20 and would like to see this clarification incorporated into the final rule. We would like the final rule to make clear that the

employer can either request the student provide a copy of the I-20 itself or that the student must provide the DSO's contact information. We believe employers should have 10 days to notify the school upon the termination of an employee, as explained in more detail below in our section discussing reporting requirements.

## **B. STEM DEGREES**

### **1. The OPT Extension Should Not Be Limited to STEM Degrees**

The Interim Final Rule extends the period of Optional Practical Training by 17 months for F-1 students with science, technology, engineering, or math (STEM) degrees. While ACIP greatly appreciates DHS' efforts to extend OPT by 17 months, we believe the STEM limitation runs contrary to the IFR's stated purpose of providing a remedy to the problem created by the inability of U.S. employers to hire highly skilled foreign talent.

This IFR is driven by the fact that Congress has failed to provide adequate numbers of H-1B visas. These visas are not limited to STEM candidates and preference is not given to them. These students are sponsored by U.S. employers because the employer has an economic need for their talents. The lottery, in and of itself, creates a competitive disadvantage for U.S. companies. The IFR attempts to overcome this by providing some relief for those who did not win the lottery. It simply does not make sense that we are eliminating non-STEM lottery losers from this benefit. If the United States is willing to accept someone as an F-1 student, to allow them one year of OPT and to allow them to receive an H-1B visa if they are lucky enough to win, why shouldn't we also provide the additional OPT time if they lose?

ACIP recommends DHS remove the STEM limitation and allow any student whose skills are sought by a US employer to obtain the 17 month extension.

In the event DHS keeps the STEM limitation in the final rule, ACIP requests DHS consider the points raised below and consider adding several more degrees to the list of those meeting the STEM requirement.

### **2. Foreign Nationals Should Qualify Based on Previously Earned STEM Degrees**

Students with more than one degree, including at least one STEM degree, should be eligible for the OPT extension even if the degree for which their current 12 months of OPT is authorized is not on the STEM list. The rationale provided by DHS in the preamble to the IFR is to extend the amount of time that individuals with STEM degrees can remain employed in specialty occupations due to the scarcity of H-1B visas. An individual with a STEM degree whose second or subsequent degree is not in a STEM

program but who has an earlier awarded STEM degree is no less qualified to be employed in a specialty occupation, than an individual whose most recent degree is in a STEM field. Furthermore, the very limitations on specialty occupation employment that this regulation is meant to address have encouraged individuals to enroll in higher degree programs to extend their status and work authorization with no indication or notice that only a specified list of degrees would make them eligible to receive an extension of status and work authorization. For the regulation to be effective at mitigating the impact of F-1 and H-1B status gaps on specialty occupation employers, it should provide for the extension of status of all qualified STEM degree holders, rather than merely those that were fortunate enough to enter the correct degree program at the correct time.

For example, many positions require an MBA and a certain STEM bachelor's degree. We understand that OPT students must be working for US employer in a job "directly related" to the student's major, but many positions require multiple degrees. We believe that if any one degree held by a foreign national student is a STEM degree and the position requires such degree, then that should be enough to satisfy the STEM requirement. To hold otherwise results in an absurd situation where someone with a STEM undergraduate degree has better work opportunities in the United States than someone with a STEM undergraduate plus a non-STEM graduate degree.

This illogical situation is further illustrated in Question 8.1.4 of the SEVP Guidance which asks whether a student with a dual major can qualify for the STEM extension based on one of the degree programs. The answer provided is, "Yes, if one of the degrees is on the STEM Designated Degree Program List and any job worked while on the STEM extension is related to the student's STEM degree. However, the CIP Code for the student's secondary major will not print on the Form I-20 recommending the STEM extension. The DSO must annotate the Form I-20 with the proper CIP Code for the secondary major." In essence, somebody obtaining two masters at the same time – one STEM and one non-STEM, could qualify for the 17 month extension. However, somebody obtaining the same two masters degree sequentially – first the STEM, then the non-STEM – would not qualify. This seems illogical, as the foreign national in both scenarios would possess exactly the same knowledge and skill set. If it is in our national economic interest to allow the 17 month extension in one scenario, it should follow that it is in our best interest to allow the extension in the other scenario.

ACIP recommends that the final rule change Question 8.1.6 of the SEVP Guidance which asks whether a student who has previously earned a degree in a STEM field and has now earned a non-STEM degree can apply for the extension. The answer provided is, "No. The STEM extension must be based on the same degree as the post-completion OPT." DHS also re-iterated this position through the Supplemental USCIS FAQs. We request that DHS change the final rule, the SEVP Guidance and the Supplemental FAQs

to allow an extension as long as the student holds any STEM degree and the position requires the STEM degree.

### 3. Additional STEM Degrees Should Qualify

DHS has published a list of Classification of Instructional Programs codes (CIP codes) that have been designated as STEM degrees for the purpose of obtaining the 17 month OPT extension.<sup>8</sup> In order for F-1 students to receive the 17 month extension, the code for the student's degree program must be on the list. ACIP appreciates that DHS is willing to evaluate and consider adding further degrees. Through these public comments, ACIP is requesting DHS consider adding the following degrees that have been identified by ACIP members as important to their businesses. Note, however, that this list in no way indicates that ACIP believes these are the only additional codes that should be added; they are just the ones of which we have been made aware.

**Actuarial Science:** The current list of covered STEM degrees includes Actuarial Science and ACIP understand DHS intended the rule to cover actuarial sciences to accommodate accountants and financial services. However, the list only includes the CIP code of 52.1304 and fails to include several other, equally appropriate codes. "Accounting" and "Auditing" degrees should be added to the list as they meet all the criteria set out by DHS:

- Accountants and auditors are "in demand" in the United States. "Accountants and Auditors" are ranked #16 by the Department of Labor as occupations with the largest numerical increases in employment projected for 2006-2016.<sup>9</sup> Projected need for trained Accountants with advance degrees outpaces the supply:
  - Projected growth (2006-2016) – "faster than average 14% to 20%".
  - Projected need (2006-2016) – 450,000 additional employees.<sup>10</sup>
- Accountants and auditors support strong capital markets, which are essential to maintaining technological innovative competitiveness in the United States.

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<sup>8</sup> [http://www.ice.gov/doclib/sevis/pdf/nces\\_cip\\_codes\\_rule.pdf](http://www.ice.gov/doclib/sevis/pdf/nces_cip_codes_rule.pdf)

<sup>9</sup> Department of Labor Occupational Outlook Handbook (2008-2009): Tomorrow's Jobs, Table 8: Top 20 Occupations with the largest numerical increases in employment, projected 2006-2016. Along with "Registered Nurses" (ranked at 1), and "Computer Software Engineers, Applications" (ranked at 15), "Accountants and Auditors" are the only occupations that may be considered "professional" and require, at a minimum, a bachelors degree.

<sup>10</sup> DOL O\*Net online tool @ April 14, 2008: Profile for Accountants and Auditors (13-2011)

- Accountants and auditors trained in the US with US resources are faced with no other choice but to find work in other countries. We should encourage the best and brilliant to stay in this country or we face a “brain drain”. Foreign students in U.S. schools tend to be among the highest achievers in their program of study. If permitted to stay in the U.S. following graduation to work long-term, and presented with a viable option to becoming a permanent resident, these individuals will be the U.S. citizens of tomorrow
  - A large percentage of the foreign students from U.S. schools that accounting firms hire are graduates of Master’s degree programs.
  - Accounting programs at U.S. post-secondary institutions are popular programs for foreign students.<sup>11</sup>
- Accounting and auditing are technical fields of study falling within “Mathematics” which is already included in STEM. The whole point of including “mathematics” in STEM is to include high-level occupations that require math skills, which are generally professional jobs that help the U.S. economy and help maintain competitiveness. Math, itself, is not an occupation in demand - i.e. there is little demand for mathematicians.<sup>12</sup> However, the Department of Labor list Accountants and Auditors as occupations in demand that utilize mathematical skills.

For the reasons outlined above, ACIP requests DHS add the following additional CIP codes:

Major	CIP Code
Accounting	52.0301
Accounting	52.0304
Accounting	52.0305
Audit	52.0303
Business Administration	52.0201
Business Administration	52.0299
Economics	52.0601
Finance	52.0801
Finance	52.0803
Finance	52.0806
Tax	52.1601

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<sup>11</sup> ICE, Student and Exchange Visitor Information System, General Summary and Quarterly Review (Dec 31, 2007): reports that of the top 10 majors for foreign students, “Accounting” is ranked #6 with 12,298 foreign students currently enrolled.

**Health Science:** ACIP believes that Health Sciences should fall under the science part of the STEM requirement. It would seem that DHS agrees that health sciences should be included because currently Medical Scientist - CIP Code 51.1401 – is included on the list. We believe the health science list should be expanded. The degrees listed below are awarded in MS, PhD, MD, DDS and Pharm.D. ACIP considers these health care professions to be in the field of science and we request DHS add them to the list of covered STEM degrees:

Major	CIP Code
Clinical Lab Science	51.1005
Dental Hygiene	51.0602
Dental Sciences	51.1101
Dentistry	51.0401
Exfoliative Cytology	51.9999
Human Development and Aging	51.9999
History of Health Sciences	45.9999
Medical Information Science	11.9999
Medical Physics	11.9999
Medical Anthropology	45.0299
Medical Sciences	51.9999
Medical & Bio Illustration	51.2703
Medicine	51.1201
Neurosciences	30.2401
Mental Health	51.1599
Clinical Research	51.1401
Nursing	51.1601
Nursing Science	51.1601
Oral Biology	51.0503
Orthodontics	51.0508
Periodontology	51.0510
Pedodontics	51.0509
Pharmaceutical Chemistry	51.2004
Pharmacy	51.2001
Physical Therapy	51.2308
Psychology	42.0101
Sociology	45.1101
Speech & Hearing Science	51.0204

**4. Interdisciplinary Degrees Should Meet the STEM Requirements; Changes in CIP Codes Should be Allowed**

ACIP requests DHS clarify how to classify interdisciplinary/multidisciplinary degrees. Through the following example, we will demonstrate some of the confusion surrounding these interdisciplinary degrees. We request DHS make clear whether Management Information Systems and Information Resources Management degrees are covered in the STEM list. The Classification of Instructional Programs is somewhat ambiguous as to whether students with these degrees would qualify. The degrees are initially listed under the STEM CIP code 11.10, which is the grouping for Computer/Information Technology Administration and Management. However, the entries include the cross-reference notations “Report under 52.1201” and “Report under 52.1206” which CIP codes are not on the OPT extension STEM list. The I-20s of the employees list their degrees as Management Information Systems, General and Information Resources Management/CIO Training which the CIP code manual states should be reported under 52.1201 and 52.1206 respectively. Universities are not sure whether to consider these degrees under the 11.10 CIP code, under the 52.xxxx codes, or under both and whether or not to approve extensions of these students’ OPT periods. ACIP would like DHS to clarify how multidisciplinary degrees that are cross-referenced and listed in multiple categories in the Classification of Instructional Programs should be treated. We also believe that the degrees in this particular example should qualify as STEM degrees.

Not only do we seek clarification for coding of multidisciplinary degrees, ACIP would also like to inquire about what would happen if a school discovers that a more appropriate CIP code could have been used for a student currently on OPT. Will DHS consider an OPT extension application that changes the CIP code to one on the designated list? For example, students on OPT who earned an M.S. in Genomics, Proteomics, and Bioinformatics are facing a similar issue to the one described above for Management Information Systems. Their program is currently coded with a CIP code ending in 99 because of the interdisciplinary nature of the studies. Schools are looking at the possibility of changing the coding for the future but seem to have no way to change the field code in SEVIS for a student who already graduated. If a more appropriate code is on the list and the school can document the appropriateness of the updated code, will DHS consider such applications? We recommend SEVIS be updated to allow schools to update the CIP code, where appropriate and that USCIS process applications indicating such a change. In the alternative, we recommend that DHS allow the universities to request a SEVIS data fix to change a CIP code.

ACIP would like to provide background information to DHS to demonstrate the complex nature of changing a student’s CIP code as a way to show that universities will not take this action lightly even if through the final rule DHS does allow changes to the CIP code. At many universities, the CIP codes table is maintained by the school’s Institutional Research Office with input from certain level administrators in Academic Affairs. Institutional Research is responsible for federally mandated reporting to the U.S. Department of Education as a condition of the university’s eligibility for participation in any federal student financial aid programs. CIP codes were originally

developed specifically for U.S. Department of Education reporting. The higher education community asked the government to use CIP codes when developing SEVIS since universities already had elaborate, complex crosswalks that map university majors to CIP codes/names. Universities can pull information from the Institutional Research Office's database and upload the information to SEVIS. Any decision to change a code will be made by Academic Affairs -- which includes Institutional Research, not by the office who interfaces with SEVIS. Many offices within the school will need to work together to ensure that majors are coded consistently for federal reporting purposes.

## **C. CAP GAP**

### **1. The Cap Gap Provision Should Extend Duration of Status and Grant Employment Authorization to all Students Meeting the Requirements**

ACIP believes the cap gap provision should extend duration of status and grant employment authorization to all students meeting the cap gap requirements. The IFR states that the cap gap provision applies to an F-1 student who is the beneficiary of a timely filed H-1B petition and request for change of status that requests an employment start date of October 1 of the following fiscal year. A plain reading of the regulation is consistent with ACIP's position that the cap gap includes duration of status and employment authorization. However, the SEVP Guidance seems to indicate that only students currently on approved OPT qualify for work authorization; all others will benefit by an extension of duration of status but will not have work authorization.

The answer to Question 9.1.2 of the SEVP Guidance goes beyond the information included in the regulation by explaining that "in order for a student to have employment authorization during the cap gap extension, the student must be in an approved period of OPT on the eligibility date." The eligibility date is defined in the SEVP Guidance as the date a USCIS Service Center receives a properly filed Form I-129 which for all intents and purposes this year was April 1 through 7, 2008 – prior to the publication of the IFR on April 8, 2008.

ACIP requests DHS reconsider this interpretation of the regulation. First, and arguably most important, this interpretation of the regulation would actually force students to violate their status. For example, a student whose OPT expired March 20 could apply for an H-1B on April 1 during their 60 day grace period. If their H-1B was approved, that student could stay here in duration of status until October 1, but could not work. The cap gap would cover them from May 20 (the day the initial grace period ends) to September 30. This foreign national would be here accruing unemployment for over 4 months and would then have jeopardized their status. Question 9.4.2 of the SEVP states, "[t]he 90 day limitation on unemployment continues during the cap gap extension."

Second, this interpretation would eliminate the ability of recent graduates to benefit from the work authorization part of the cap gap extension, even those lucky enough to be the beneficiary of an approved H-1B petition – thus creating a gap in employment, the very “gap” this regulation was intended to bridge. Third, this interpretation would create an arbitrary disparity between somebody whose OPT expired March 31 (when, by law, it is too early to apply for an H-1B) and somebody else whose OPT happens to expire one day later on April 1 when the law allows an H-1B to be filed. That one day difference in expiration date would cause one foreign national to be allowed to work and the other to be prohibited from working.

We do not understand the policy reason for this distinction and believe it negates the benefits DHS tried to confer through the IFR. To avoid these arbitrary and legally perplexing results, ACIP recommends the cap gap provision should extend of duration of status and grant employment authorization to all students meeting the cap gap requirements.

## **2. DHS Should Notify H-1B Cap Gap Students of the Cap Gap Provisions**

ACIP appreciates and supports DHS in creating the much needed cap gap provision. As currently written, the rule requires DSOs to take responsibility for implementing the cap gap provision even though DSOs do not have the knowledge of when an H-1B petition has been filed on behalf of a foreign national student. DHS, through the USCIS CLAIMS database, tracks when a foreign national student requests change of status from F to H-1B status and therefore should be the entity responsible for implementing the cap gap provisions. ACIP recommends that instead of placing the burden on DSOs, that through issuance of the H-1B change of status receipt notice, DHS informs the beneficiary of the cap gap status and related procedures.

## **D. EMPLOYMENT PERIODS**

ACIP supports clarification of the periods of allowable unemployment under OPT. We believe, however, that there are many unanswered questions surrounding this new policy regarding who is responsible for tracking and enforcing periods of unemployment. These uncertainties are causing confusion and could inadvertently jeopardize a student’s current and future immigration status.

### **1. DSOs Should Not be Responsible for Tracking Periods of Unemployment**

The IFR explains that during post-completion OPT, F-1 status is dependent upon employment. Students may not accrue more than 90 days of unemployment during any initial post-completion OPT; and not more than 120 days during the total OPT period consisting of the initial 12 months and the subsequent 17 month extension. After reading the IFR, employers, universities and students had many questions about this new

limit on unemployment. DHS attempted to answer many questions through Section 7 of the SEVP Guidance.

While we appreciate the answers provided to date, ACIP seeks more guidance on employer and DSO obligations. Specifically, Question 7.4.2. of the SEVP Guidance asks if DSOs are responsible for determining if a student has exceeded the limit of unemployment time while on OPT? The answer is, “No. DSOs are responsible for updating SEVIS with employment information provided by the student or the student’s employer. DHS will determine if the student has violated his or her status by exceeding the permissible unemployment period.” However, according to the regulatory text of the IFR, “Prior to making a recommendation, the DSO must ensure that the student is eligible for the given type and period of OPT and that the student is aware of his or her responsibilities for maintaining status while on OPT.”<sup>13</sup> These two statements conflict with each other. ACIP requests that the final rule make clear that the DSO is not obligated to verify how much initial post-completion OPT time the student spent unemployed.

We also ask for clarification on the ramifications of a student accruing too much unemployment time. Will such students be barred from future immigration benefits? If so, employers will rightly seek to determine the student’s unemployment time before extending any job offers or sponsoring the student for a visa.

## **2. Time Spent Volunteering Should Not Count as Period of Unemployment**

ACIP supports Question and Answer 7.2.1 of the SEVP Guidance which states, “Students may work as volunteers or unpaid interns, where this does not violate any labor laws. The work must be at least 20 hours per week for students on post-completion OPT.” However, we request the final rule change the information provided in Question and Answer 7.2.2 which currently states, “Students on a STEM extension are allowed to volunteer, incidental to their status. This means that volunteer work is allowed but does not count as employment for the purpose of maintaining F-1 status.” Having a different standard for initial post-completion OPT than the standard for the additional 17 month extension is confusing. ACIP supports the proposition that volunteer or unpaid internships should be allowed, and time spent doing such activities should not count as unemployed time.

## **3. Time During the 60 Day Grace Period or Travel Abroad Should Not Count as Period of Unemployment**

In the final rule, ACIP requests DHS clarify how the 60 day grace period ties into the 90 and 120 days of unemployment. Does time spent looking for employment during the 60

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<sup>13</sup> 8 CFR 214.2 (f)(11)(ii)(A)

day grace period count against the total days of unemployment? What if the student applies at or close to day 60 and it takes USCIS several months to process and approve the application? By that time, the student would have exceeded the 90 days. ACIP requests the final rule contain a provision explaining that unemployment accrued during the 60 day grace period does not count against the aggregate number of accrued unemployment days.

Similarly, time spent abroad after the EAD has been obtained but before the student begins work should not count as unemployment.

## **E. REPORTING REQUIREMENTS**

### **1. The Final Rule Should Contain One Comprehensive List of Items the Student Must Report**

According to the IFR, F-1 students with approved OPT extensions must report to their DSO: changes in the student's name or address and changes in the employer's name or address within 10 days of the change, as well as periodically verify the accuracy of this reporting information with the DSO every six months. However, according to Questions and Answers published twice by USCIS,<sup>14</sup> the student must also report a change in e-mail address. And, Question 8.6 of the SEVP Guidance states the student must also report a loss of employment within 10 days. The SEVP Guidance, also in Question 8.6 expands the information that must be verified every six months to include the date the student began working for the current employer. To minimize confusion, ACIP requests that the final rule confirm the reporting requirement for the student and all other DHS guidance publish a consistent list of the requirements.

### **2. Employers Should Report to DHS, Not to DSOs**

The IFR requires the employer and student to report certain changes to the DSOs so the DSO can enter the change into SEVIS. However, this is much like a game of telephone where misunderstandings and miscommunication are more likely the more people are involved in conveying a message. Instead, it makes much more sense to have the people possessing the information – namely the employer and/or the student – report the change directly to the government. Luckily, a mechanism for doing so already exists. Form AR-11, the Alien's Change of Address Card, readily available online and which students are already required to file, includes fields for employer and employer's address.

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<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9a3d3dd87aa19110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> and through the Supplemental FAQs dated May 23, 2008.

Using the AR-11 would not only increase the integrity of the data reported, but it would relieve a substantial burden placed on the DSOs by this IFR. The workload created by this IFR is substantial for the DSOs and that is assuming the information is even accurately and timely reported. DSOs report that it is difficult to force students to be in touch about what they are doing when they are no longer on campus and instead live and work halfway across the US. We recommend that instead of requiring employers and students to report to the DSOs, that instead they be required to use AR-11 to convey the information to DHS.

### **3. If Employers Must Report to DSOs, Reasonable Standards Should be Created**

#### **a. Employers Should Have 10 Days to Report to the DSO After a Student Leaves Employment**

Although the student has 10 days to report this information to the DSO, the IFR gives employers only 48 hours to report to the DSO after the student leaves employment with that employer. At the same time the student, who has the best information, has 10 days to report these changes. This does not make sense.

The timing of this requirement will pose a challenge to many employers. Some offices are not sufficiently staffed to report to the DSO within 48 hours if an employee leaves because some organizations centralize this feature to one office for the whole country. For example, the immigration team often works at corporate headquarters. Student-employees, however, are dispersed at client sites and facilities across the nation. If a student fails to report to work and is subsequently terminated by a local manager, it may take more than a few days for this information to be sent to the immigration office and then reported to the DSO. At minimum, the employer should have as much time as the student to make these reports. For practical and consistency reasons, ACIP requests the final rule be changed to allow the employer 10 days to report.

#### **b. Employers Reporting Obligation Should be Satisfied by Keeping a Record of the Report**

ACIP also would like DHS to clarify what qualifies as ‘reporting’? If an employer reports to the DSO on time, but the DSO is on vacation or it is a holiday weekend, does that count? ACIP recommends the final rule make clear that the employer’s obligation is satisfied by making the report to the DSO, and keeping a record of that report, regardless of whether the DSO is in the office or not. This interpretation is consistent with guidance published by USCIS in the Supplemental FAQs which state: “[t]he employer has complied with the reporting requirement on the day the report is timely sent (i.e., sent within 48 hours of a student’s termination). The school does not have to

receive the employer's report within 48 hours of the student's termination for the employer to be in compliance with the requirement."

## **F. TRAVEL**

### **1. Students Covered by the IFR Should be Safe to Travel Internationally**

ACIP asks DHS, through the final rule, to clarify how the IFR impacts the ability of a foreign national to travel. Can those students who have timely filed H-1B petitions submitted on their behalf travel during the time they are covered under the cap gap provision? Many students have been advised to avoid international travel for fear that doing so will cause the change of status application to be deemed abandoned and instead the student would have to apply for an H-1B visa at a U.S. consulate abroad, and reenter in order to begin the H-1B employment. This position was also stated by DHS through the USCIS Supplemental FAQs. ACIP recommends that DHS make clear that students covered by cap gap are safe to travel internationally while the H-1B is pending and after approval and that any such provisions be clearly shared with officials at both the ports of entry and with the consulates abroad. Similarly, ACIP requested DHS make clear that students in a period of approved OPT are safe to travel internationally.

We understand this request is beyond the scope of the current rulemaking but we are raising the point anyway because we believe the current policy makes little sense and is further exacerbated by this IFR. We allow people to apply for certain benefits but those benefits can be jeopardized simply by traveling. In the modern day global economy, those working for multi-national employers must have the ability to travel whether for business or personal commitments.

## **G. DRIVER'S LICENSES**

### **1. DHS Should Ensure the DMVs Understand the IFR**

ACIP thanks DHS for adding the cap gap provisions to the IFR. Under the cap gap automatic extension of work authorization, a new EAD application is not required. Unfortunately, in many jurisdictions, driver's licenses for F-1 students expire based on the expiration of the EAD. Students in this scenario seem to have no way to extend their driver's licenses and thus no way to get to work.

The regulations do not prohibit applying for the 17 month extension of OPT even if the student is eligible for cap gap. For the purposes of obtaining a driver's license, many students are applying for the 17 month extension even if they also qualify for the cap gap. This work-around is not in the best interest of students or the government who now has to process extra extension requests.

ACIP requests that DHS communicate with DMVs across the country to establish an acceptable protocol to allow students in this situation to obtain a driver's license. Perhaps the DMVs could accept the expired EAD and proof of the timely filed H-1B as the needed documentation to issue the driver's license. In the alternative, we recommend SEVIS be updated to allow documentation to be printed on the I-20 that would be acceptable to the DMVs. The benefits of the "cap gap" provision are greatly diminished if students cannot physically get to work.

## **H. I-9**

### **1. The Interplay Between the IFR and I-9 Compliance Should be Clarified**

In the final rule, ACIP requests DHS explain how I-9 compliance works in relation to the automatic cap-gap provision and the automatic extension when the 17 month OPT application is pending. To qualify for cap gap, the student must be the beneficiary of a timely filed H-1B petition. ACIP requests DHS confirm that for I-9 purposes, an employer could include a copy of the H-1B receipt notice to show employment authorization until October 1. We believe this interpretation is more flexible and workable than that stated by DHS in the USCIS Supplemental FAQs which state, in part: "[t]he expired Form I-766 EAD (issued under category (c)(3)(i)(B) or (c)(3)(i)(C)) combined with a "cap gap" Form I-20, endorsed to show that the student's employment authorization is still valid, and the USCIS receipt notice (Form I-797, Notice of Action), showing receipt of the H-1B petition are the equivalent of an unexpired Employment Authorization Document under List A, #4 of the Form I-9.... If the receipt notice has not yet been issued, the expired EAD and cap gap Form I-20 are sufficient."

The regulations provide work authorization for up to 180 days from the date of filing for the 17 month extension until the application is rejected or denied. ACIP requests DHS confirm that to complete the I-9 for the individual, an employer could use evidence of filing for the 17 month extension and a copy of the old EAD card. ACIP believes the evidence of filing could be a government issued receipt, or the Federal Express (or other delivery service) receipt and a copy of the I-765. Once the new employment authorization document is received, the employer would update the I-9 to indicate the full 17-month period of work authorization. We believe this interpretation is more flexible and workable than that stated by DHS in the USCIS Supplemental FAQs which state: "[t]he expired Form I-766 EAD (issued under category (c)(3)(i)(B)), the USCIS receipt notice showing a timely filing of the STEM extension application (Form I-797, Notice of Action), combined with an I-20 updated to show that the DSO recommended the STEM extension for a work authorization period beginning on the date after the expiration of the EAD is the equivalent of an unexpired Employment Authorization Document under List A, #4 of the Form I-9."

ACIP also recommends that DHS issue a Press Release of some official government guidance explaining that these students are allowed to remain employed, even though they do not have a valid EAD card, in both scenarios. Employers' compliance anxiety would be relieved if they had an official document from DHS stating that they can continue to employ an individual in the scenarios above.

## **I. SINGLE DHS AGENCY**

### **1. A Single Source of OPT Information Would Minimize Stakeholder Confusion and Increase Compliance**

ACIP requests that the final rule and any supplementary guidance be issued by a single agency at DHS. Employers, universities and students find it confusing to understand their own obligations when they read a rule issued by ICE, followed by USCIS FAQs, followed by revised USCIS FAQs, followed by SEVP Guidance, followed by another round of USCIS FAQs. The situation becomes ever more perplexing when such guidance is released and posted to the USCIS website on a federal holiday. While ACIP appreciates the efforts by DHS to supply the public with additional information, the manner, delivery and details sometimes cause more confusion than necessary.

The situation becomes more complicated when the guidance from various agencies purports to expand the requirements in the original regulation. ACIP believes the process would be more efficient for the government and for the stakeholders if all guidance related to this rule could be found on the website of one agency, and in one consolidated part of that website. In the alternative, we request that each agency's page cross-link to other agency's pages containing all relevant OPT information. DHS was created to consolidate many different entities, not to create separate agencies that do not communicate with each other. ACIP recommends DHS centralize the function of overseeing this rule which crosses over multiple agencies (namely ICE and USCIS) and impacts other agencies (e.g. CBP) and other departments (e.g. Department of State).

### **2. Where Appropriate, DHS Should Formalize Policy Guidance by Incorporation into the Final Rule**

Finally, ACIP believes that policy guidance should supplement and explain the plain language of regulatory text but should not purport to expand the requirements of the regulation. Doing so causes further confusion among public stakeholders who do not know whether DHS intends for policy guidance to have the force and effect of law. For these reasons, we recommend that all guidance issued on this rule be incorporated into the plain language of any final rule, taking into account the recommended changes provided through these comments.

## Conclusion

We thank the Department of Homeland Security for this opportunity to submit comments and for their on-going efforts to provide relief through the extension of optional practical training and the cap-cap provisions. We would be happy to provide any additional information necessary to facilitate the efficient implementation of the final OPT rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Shotwell". The signature is written in a cursive, flowing style.

Lynn Shotwell  
Executive Director