

May 18, 2018

The Honorable Lee Francis Cissna  
Director  
U.S. Citizenship and Immigration Services  
20 Massachusetts Avenue NW  
Washington, D.C. 20529

Mr. Thomas D. Homan  
Deputy Director and  
Senior Official Performing the Duties of Director  
U.S. Immigration and Customs Enforcement  
500 12<sup>th</sup> Street SW  
Washington, D.C. 20536

Re: Implementation of “Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F–1 Students” Regulation

Dear Director Cissna and Acting Director Homan,

As you know, the higher education and business communities actively participated in the Department of Homeland Security’s (DHS) public rulemaking process regarding the STEM OPT extension program (the optional practical training program for certain F-1 nonimmigrants earning degrees in science, technology, engineering, and mathematics from U.S. universities). In April 2018, our organizations were surprised to learn U.S. Citizenship and Immigration Services (USCIS) updated its website to include the following statement in reference to the program: “[T]he training experience may not take place at the place of business or worksite of the employer’s clients or customers because [U.S. Immigration and Customs Enforcement (ICE)] would lack authority to visit such sites.”<sup>1</sup> This statement, which was updated in January 2018, appears overly broad and is inconsistent with the implementation by your two agencies of the program to date. As such, we respectfully request that you take corrective action concerning this issue.

Our organizations are committed to the continued availability of experiential learning, and we see the STEM OPT extension program as critical to that goal. We understand well the significance of protecting the integrity of the immigration system. The need for such integrity includes, but of course is not limited to, the STEM OPT extension program. We also know that the Student and Exchange Visitor Information System overseen by ICE is an important tool for monitoring compliance with immigration regulations. We have long appreciated ICE’s commitment to transparency in how its Student and Exchange Visitor Program is administered, in part reflected in its excellent [Study in the States](#) website and [STEM OPT Hub](#).

In 2016, your two agencies worked together to finalize a new regulation on the STEM OPT extension program after the Secretary of Homeland Security issued a directive for ICE and USCIS to strengthen it. The directive asked for STEM OPT extension improvements by “requiring stronger ties to degree-granting institutions, which would better ensure that a student’s practical training furthers the student’s full course of study in the United States” and taking “steps to ensure that OPT employment is consistent

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<sup>1</sup> U.S. Citizenship and Immigration Services, Optional Practical Training Extension for STEM Students (STEM OPT) (January 24, 2018), available at [https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/stem-opt#\\_Eligibility\\_for\\_the](https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/stem-opt#_Eligibility_for_the).

with U.S. labor market protections to safeguard the interests of U.S. workers in related fields.”<sup>2</sup> Acting with DHS headquarters to ensure satisfaction of these goals, your two agencies issued a final STEM OPT extension regulation in March 2016.

The Department’s long and detailed final rule preamble explanation<sup>3</sup> on how ICE and USCIS would interpret the 2016 regulatory text included the following three points in response to public comment:

1. DHS discussed the relevance of the STEM OPT extension program to the Department’s mission by stating:

“[T]he STEM OPT extension rule is grounded in the long-standing recognition by DHS and its predecessor agency that (1) experiential learning and practical training are valuable parts of any post-secondary educational experience and (2) attracting and retaining international students is in the short- and long-term economic, cultural, and security interests of the United States.”<sup>4</sup>

2. DHS confirmed that it had broad statutory authority to enforce the nation’s immigration laws including tracking and monitoring of F-1 students. There was no mention or suggestion that ICE was limited in its authority to conduct such monitoring at an employer’s client or customer sites. Indeed, USCIS’s Fraud Detection and National Security staff conduct such monitoring in the H-1B program at client and customer sites. DHS stated:

“The rule’s provisions regarding employer site visits are consistent with the foregoing authorities, which require DHS to monitor students pursuing STEM OPT training programs. The site visits reduce the potential for abuse and ensure that STEM OPT students receive structured and guided work-based learning experiences.”<sup>5</sup>

3. DHS focused on the type of employment arrangements where it would be impractical for the federal government to be able to confirm expected compliance with the I-983 Training Plan obligations. DHS stated:

"There are several aspects of the STEM OPT extension that do not make it apt for certain types of arrangements, including multiple employer arrangements, sole proprietorships, employment through “temp” agencies, [and] employment through consulting firm arrangements that provide labor for hire.”<sup>6</sup>

On the issue of supervision and direction, it is evident that in-person oversight and evaluation of STEM OPT participants by the supervisors and managers of the employer signing the I-983 Training Plan is required. Weekly phone calls or emails are insufficient. However, this important element of qualifying STEM OPT participation has not led universities and employers to understand that the presence of a

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<sup>2</sup> U.S. Department of Homeland Security, Memorandum Regarding Policies Supporting U.S. High-Skilled Businesses and Workers (November 20, 2014), *available at* [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_business\\_actions.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf).

<sup>3</sup> U.S. Department of Homeland Security, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13040 et seq. (March 11, 2016), *available at* <https://www.federalregister.gov/documents/2016/03/11/2016-04828/improving-and-expanding-training-opportunities-for-f-1-nonimmigrant-students-with-stem-degrees-and>.

<sup>4</sup> Id. at 13050.

<sup>5</sup> Id. at 13065.

<sup>6</sup> Id. at 13079.

STEM OPT participant at a client or customer site dilutes a qualifying employer-employee relationship where the participant is providing services other than merely labor for hire. We are concerned that the new statement issued by USCIS on this matter is overly broad and inconsistent with previous interpretations. Moreover, the new USCIS statement does not take into consideration various business models and the mobile nature of modern work arrangements, and potentially limits the vital hands-on experience in training opportunities that employers can offer STEM OPT participants.

We respectfully request that the single sentence mentioned above<sup>7</sup> be struck from the USCIS website, unless ICE and USCIS intend to jointly change the Department's interpretation explained in the final regulation governing the STEM OPT extension program. Furthermore, it should be indisputable that suggesting or implementing policy changes through edits to website explanations that are not officially announced, highlighted, and clarified is problematic for the regulated community. At a minimum, if both ICE and USCIS do intend a change, the employers, colleges, and university designated school officials need advance notice and training concerning the type of policy change suggested by the overly broad sentence in the current USCIS website explanation.

Thank you for your attention regarding this matter.

Respectfully submitted,

Compete America  
Council for Global Immigration  
FWD.us  
Information Technology Industry Council (ITI)  
NAFSA: Association of International Educators  
Presidents' Alliance on Higher Education and Immigration  
Semiconductor Industry Association (SIA)  
Society for Human Resource Management (SHRM)  
TechNet

cc: Rachel Canty, Deputy Assistant Director, Student and Exchange Visitor Program, ICE  
Kathy Nuebel Kovarik, Chief, Office of Policy and Strategy, USCIS

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<sup>7</sup> The following sentence should be struck from the USCIS website as it is overbroad and inconsistent with the final rule preamble explanation, and inconsistent with ICE and USCIS implementation to date: "[T]he training experience may not take place at the place of business or worksite of the employer's clients or customers because ICE would lack authority to visit such sites."



**U.S. Citizenship  
and Immigration  
Services**

August 6, 2018

Ms. Karolina Filipiak  
Director, Government Affairs  
Information Technology Industry Council  
1101 K Street NW, Suite 610  
Washington, DC 20005

Dear Ms. Filipiak:

Thank you for your May 18, 2018 letter regarding the clarifications U.S. Citizenship and Immigration Services made on its website regarding a STEM OPT employer's roles and responsibilities.

As noted in the 2016 STEM OPT Final Rule, the Department of Homeland Security clarified that the employer must have a bona fide employer-employee relationship with the student. This means that the employer may not be the student's "employer" in name only, nor may the student work for the employer on a "volunteer" basis. The employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience. Further, as noted in the preamble to the 2016 Final Rule, there are several aspects of the STEM OPT extension that do not make it apt for certain types of arrangements, including multiple employer arrangements, sole proprietorships, employment through "temp" agencies, employment through consulting firm arrangements that provide labor for hire, and other arrangements that do not constitute a bona fide employer-employee relationship.

Due to pending litigation, we cannot comment beyond what is stated above. Thank you again for your letter and interest in this important issue. Please feel free to share this information with your cosigners.

Sincerely,

A handwritten signature in blue ink that reads "L. Francis Cissna".

L. Francis Cissna  
Director