Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

Professor Michael J. Wildes

Supplemental Materials

Class #4

992 F.2d 844 (1993)

UNITED STATES of America, Appellee,

v.

Homayoun BAZARGAN, Appellant.

No. 92-3058.

United States Court of Appeals, Eighth Circuit.

Submitted February 15, 1993.
Decided May 11, 1993.

845 *845 Jeff A. Bredahl, Fargo, ND, argued, for appellant.

Dennis Fisher, Asst. U.S. Atty., Fargo, ND, argued (Gary Annear, Asst. U.S. Atty., on the brief), for appellee.

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

Homayoun **Bazargan** appeals from his conviction in district court[1] for being an illegal alien in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(5), 924(a)(2). We affirm.

I.

On October 7, 1988, **Bazargan** was admitted to the United States as a nonimmigrant student,[2] status F-1, authorized to attend college at the University of Southern Mississippi, in Hattiesburg, Mississippi. From October until December 1988, **Bazargan** attended the University of Southern Mississippi. In January 1989, **Bazargan** transferred to Jackson State University in Jackson, Mississippi, where he attended classes until April 1989. **Bazargan** concedes that he failed to follow mandatory Immigration and Naturalization Service (INS) procedures when he transferred to Jackson State University. *See* 8 C.F.R. § 214.2(f)(8)(ii).

In May 1989, **Bazargan** submitted an application requesting asylum to the INS office in Arlington, Virginia. Pursuant to 8 C.F.R. § 208.7, the INS issues an employment authorization to every alien who files a non-frivolous asylum application and who requests the authorization. As a direct result of his asylum application, the INS issued **Bazargan** such an employment authorization, which it renewed in 1990, and which expired on May 7, 1991.

In the summer of 1989, **Bazargan** relocated to Fargo, North Dakota. In November 1989, **Bazargan** enrolled at Moorhead State University in Moorhead, Minnesota, just across the border from Fargo. Once again, **Bazargan** failed to follow the mandatory INS procedures in transferring to Moorhead State.

In January 1991, INS Special Agent Robert Gudmestad sent **Bazargan** a letter requesting him to come to the INS's Fargo office for an interview and to bring his immigration documents with him. On February 5, 1991, Agent Gudmestad met with **Bazargan**, notified him of the denial of his asylum application, and served him with an order to show cause why he should not be deported. Agent Gudmestad explained the nature of the order to show cause to **Bazargan** and outlined the allegations contained in it. The allegations were, essentially, that **Bazargan** had violated the terms of his nonimmigrant alien F-1 student status. Gudmestad explicitly represented to **Bazargan** that the government considered him to be illegally present in the United States. Gudmestad further explained to **Bazargan** that the INS would soon hold a deportation hearing before an immigration judge in
846 Bloomington, Minnesota. Gudmestad told **Bazargan** that he would *846 have to attend and that he had the right to testify and to present witnesses and evidence concerning why the government should not deport him. Gudmestad also informed **Bazargan** that he could renew his application for political asylum during the deportation hearing. Last, Gudmestad gave **Bazargan** a list of attorneys whom he could retain to represent him, without charge, at the upcoming deportation hearing.

In May 1991, Joseph Nahon, an agent with the Bureau of Alcohol, Tobacco, and Firearms in Fargo, North Dakota, received a "Report of Multiple Sales or Other Disposition of Pistols and Revolvers," filed by one Neil Scherr of Fargo, showing that **Bazargan** had purchased two pistols within a period of five business days. Nahon then obtained a National Crime Information Center printout on **Bazargan**. The printout revealed that **Bazargan** had been detained by the INS for an immigration violation on February 5, 1991.

On May 7, 1991, Agent Nahon visited Scherr, the licensed firearm dealer who had sold **Bazargan** the two pistols and had completed the multiple sales form. Scherr confirmed that he had in fact sold **Bazargan** two Raven MP-25, .25 caliber semi-automatic pistols on April 8, 1991.

Later that same day, Agent Nahon located **Bazargan** in the vicinity of Moorhead State. Nahon advised **Bazargan** that he was not under arrest and had no obligation to talk, but requested an interview. The two men proceeded to **Bazargan's** residence, where **Bazargan** showed Nahon the two Raven .25 caliber pistols, a Heckler & Koch nine millimeter semi-automatic pistol, ninety-nine rounds of .25 caliber ammunition, and seventy-nine rounds of nine millimeter ammunition. **Bazargan** also informed Nahon that he had recently sold a Beretta Carcano 6.5 millimeter bolt-action rifle (described in the indictment as a "6.5 caliber") to a man named Jerry in a nearby building. **Bazargan** then turned the three guns and all of the ammunition over to Nahon.

Subsequent investigation by Agent Nahon revealed that **Bazargan** had purchased the Heckler & Koch nine millimeter semi-automatic pistol on November 20, 1990, and the Beretta rifle in April 1991.

On June 26, 1991, **Bazargan** was charged in a five-count indictment with three counts of knowingly making a false and fictitious written statement on a Firearms Transaction Record Form 4473, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(B) (Counts One, Two, and Three), one count of being an illegal alien unlawfully in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2) (Count Four), and one count charging the willful sale and delivery of a firearm by an unlicensed person to an unlicensed resident of another state, in violation of 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(D) (Count Five). **Bazargan** filed a motion to dismiss the indictment, and the district court stayed its decision on the motion pending the outcome of **Bazargan's** asylum application.

On January 15, 1992, Immigration Judge Robert D. Vinikoor granted **Bazargan's** request for asylum. On March 16, 1992, the district court granted **Bazargan's** motion to dismiss Counts I through IV of the indictment, based upon the one-page "Memorandum of Oral Decision" in **Bazargan's** asylum case.

On April 3, 1992, the United States filed a motion for reconsideration of the district court's order of March 16, 1992, based upon Judge Vinikoor's subsequently-issued eleven-page decision. Judge Vinikoor included a footnote stating that **Bazargan** had been an illegal alien at the time he had left school in Mississippi and had violated the terms of his F-1 student status by not complying with required INS procedures. *See* Oral Decision of Immigration Judge Robert D. Vinikoor of January 15, 1992, at 4, n. 2. The district court granted the United States' motion and vacated its previous order dismissing Counts I through IV of the indictment.

A jury found **Bazargan** guilty only on Count IV, the charge of being an illegal alien in possession of a firearm. The district court sentenced **Bazargan** to five months' imprisonment, with the recommendation that he be placed in a minimum security facility, to be followed by placement in a community
847 treatment center for a period not to exceed 847 five months, to be followed by a term of two years' supervised release.

II.

On appeal, **Bazargan** raises two issues: that he was not an illegal alien at the time he possessed the firearms and, in the alternative, that if he was an illegal alien at the time he possessed the firearms, the government cannot prosecute him on the firearms charge because of the defense of "entrapment by estoppel," allegedly arising from the government's issuance of an employment authorization to him. We examine these contentions in turn.

Title 18, United States Code, section 922(g) provides, in pertinent part:

> It shall be unlawful for any person
>
> . . . . .
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> . . . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Because the three firearms in this case indisputably were shipped in interstate commerce, the only issue the jury had to determine was whether **Bazargan** was an alien "illegally or unlawfully in the United States" at the time he bought or possessed the firearms. *See* 18 U.S.C. § 922(g)(5). To resolve this question, we address two subsidiary issues: (1) whether **Bazargan**, as a nonimmigrant alien F-1 student, became an alien "illegally or unlawfully in the United States" upon failing to follow the INS regulations concerning transferring between schools; and (2) if so, whether **Bazargan's** employment authorization, which arose from his asylum application and which expired on May 7, 1991, rendered him legally in the United States until its expiration.

A nonimmigrant alien F-1 student who wishes to transfer from the school specified in his visa must satisfy the transfer procedure requirements set forth in 8 C.F.R. § 214.2(f)(8). Title 8 C.F.R. § 214.2(f)(8) requires the student to, *inter alia,* (1) obtain a properly completed Form I-20A-B from the school to which he intends to transfer; (2) inform the school that he is currently attending of his intention to transfer; and (3) after completing the student's portion, submit the Form I-20A-B to the new school within fifteen days after the date he begins classes at the new school.

A nonimmigrant alien F-1 student becomes an illegal alien subject to deportation by failing to comply with the transfer procedures set forth in the INS regulations. *See* Youssefinia v. INS, 784 F.2d 1254, 1256 (5th Cir.1986); Mohammadi-Motlagh v. INS, 727 F.2d 1450, 1453 (9th Cir.1984); Kavasji v. INS, 675 F.2d 236, 239 (7th Cir.1982). The requirement of notifying the INS of the school to which the nonimmigrant alien intends to transfer "has been identified by the INS as an essential tool, the lax enforcement of which would severely hamper its obligation to keep track of the thousands of alien students within our borders." Ghorbani v. INS, 686 F.2d 784, 786 (9th Cir.1982), *citing* Matter of Yazdani, 17 I & N Dec. 626 (BIA 1981).

If a nonimmigrant alien F-1 student violates his status by failing to follow the transfer procedures set forth in 8 C.F.R. § 214.2(f)(8)(ii), he may apply to the district director of the INS for reinstatement to student status by following the procedures provided in 8 C.F.R. § 214.2(f)(16). Title 8 C.F.R. § 214.2(f)(16) provides in pertinent part:

> Reinstatement to student status —
>
> (i) General. A Service director may consider reinstating an F-1 student who makes a request for reinstatement on Form I-539, Application to Extend Time of Temporary Stay, accompanied by a properly completed Form I-20A-B from the school the student is attending or intends to attend, the student:

(A) Establishes to the satisfaction of the Service director that the violation of status resulted from circumstances beyond the student's control or that failure to receive reinstatement to lawful F-1 status would result in extreme hardship to the student;

848 *848 (B) Is currently pursuing ... a full course of study at the school which issued the Form I-20A-B;

(C) Has not engaged in unauthorized employment....

Bazargan admits that he failed to follow the requirements of 8 C.F.R. § 214.2(f)(8) when he transferred to Jackson State from the University of Southern Mississippi in January 1990. **Bazargan** also concedes that at no time thereafter did he apply to the INS for a reinstatement to his nonimmigrant alien F-1 student status, pursuant to 8 C.F.R. § 214.2(f)(16). Accordingly, we agree with the district court, which properly deferred to the Immigration Judge, in holding that **Bazargan's** status as a nonimmigrant alien F-1 student lawfully in the United States terminated in early 1990. *See* Oral Decision of Immigration Judge Robert D. Vinikoor of January 15, 1992, at 4, n. 2. As soon as he failed to maintain his F-1 student status, **Bazargan** became "without authorization to remain in this country," and "in the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission." *United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir.1985).

Thus, the next issue before **us** is whether the INS's grant of an employment authorization to **Bazargan** as a consequence of his asylum petition made him a legal alien for the purposes of 18 U.S.C. § 922(g)(5) during the period of time that he possessed the firearms. For the purposes of a section 922(g)(5) conviction, "the government must prove that the alien was in the United States without authorization at the time the firearm was received." *United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir.1990). **Bazargan** argues that because the employment authorization "authorized" him to work in the United States until May 7, 1992, he was not "without authorization."

Although the question is a close one, we do not agree with **Bazargan's** position. Our standard of review "`is a narrow one, deferential to the agency's interpretation of its own regulations and only permitting reversal if the agency action is without a rational basis.'" *State of Missouri v. United States Dep't of Education*, 953 F.2d 372, 375 (8th Cir.1992), *quoting Education Assistance Corp. v. Cavazos*, 902 F.2d 617, 622 (8th Cir.1990). The Immigration Judge, in the course of granting **Bazargan's** petition for asylum, held that **Bazargan** had been an illegal alien at the time he had possessed the firearms and that the application for asylum and the employment authorization had not cured this defect in status. Because we cannot say that this determination was without a rational basis, we uphold the district court's finding that **Bazargan** was an illegal alien at the time he possessed the firearms.

Bazargan's failure to apply for reinstatement to F-1 status pursuant to 8 C.F.R. § 214.2(f)(16) further supports the district court's holding. The INS has provided this means for nonimmigrant students who, for whatever reason, become illegal by failing to maintain the requirements of their status. **Bazargan** has failed at any time relevant to this prosecution to apply for a reinstatement. Consequently, **Bazargan** remained in violation of his student status until January 15, 1992, when his petition for asylum was granted.

Moreover, it would be contrary to the purpose of the immigration laws to permit **Bazargan** to use one INS regulation, 8 C.F.R. § 208.7, the procedure governing the issuance of employment authorizations to asylum applicants, to defeat another INS regulation, 8 C.F.R. § 214.1(f)(8), requiring the alien to notify the INS of any school transfers. The INS is required to grant an employment authorization to any alien who has requested it and has filed a non-frivolous application for asylum. 8 C.F.R. § 208.7. Such a request is granted routinely, to avoid creating a situation in which the applicant alien must choose either to rely "on friends and relatives for support, to work illegally and risk deportation or adverse action on his asylum application, or, ultimately, to abandon his application for asylum." *Ramos v. Thornburgh*, 732 F.Supp. 696, 699 (E.D.Tex. 1989). Consequently, the grant of an employment authorization is not part of some larger determination by the INS permitting the alien to purchase weapons, regardless of other violations of his status.
849 Indeed, it *849 would be unreasonable for the employment authorization to erase all violations of an immigrant's status. At the time the INS issues the employment authorization, it has not even fully reviewed the alien's asylum application, but simply has determined it to be non-frivolous. Because the INS does not interpret the employment authorization to have any effect on the alien's status with respect to anything other than his ability to engage in employment during the pendency of his case, we agree with the district court and the Immigration Judge that the employment authorization did not have the effect of converting **Bazargan** back into a legal alien.

Last, we consider **Bazargan's** argument that if we find that he had become an illegal alien at the time he possessed the firearms, the doctrine of "entrapment by estoppel" precludes his prosecution on the section 922(g)(5) charge. **Bazargan** contends that because the government had issued him an employment authorization permitting him to stay in the United States until it expired on May 7, 1991, the government entrapped him into believing he was lawfully residing in the United States at the time of the charged offense.

The defense of entrapment by estoppel "`applies when an official tells the defendant that certain conduct is legal and the defendant believes the official.'" *United States v. Long*, 977 F.2d 1264, 1270-71 (8th Cir.1992), *quoting United States v. Austin*, 915 F.2d 363, 366 (8th Cir.1990). We have noted that "[n]either the Supreme Court nor this Court has decided whether equitable estoppel can apply against the Government in immigration cases." *Wellington v. INS*, 710 F.2d 1357, 1360 (8th Cir.1983). If "estoppel is available in immigration cases, it can be invoked only if the government is guilty of `affirmative misconduct.'" *Wellington*, 710 F.2d at 1360.

The defense of "entrapment by estoppel" has no application to **Bazargan's** case. At no time did the INS represent to **Bazargan** that his past failure to maintain his nonimmigrant F-1 student status was forgiven by the employment authorization. The only situation in which **Bazargan** could conceivably make a colorable estoppel claim with respect to the employment authorization would be if the government had prosecuted him for working during the period of the authorization. Far from reassuring him that he was a legal alien, the INS had served **Bazargan** with an order to show cause why he should not be deported for violations of his nonimmigrant student F-1 status before he had purchased the firearms. Likewise, Agent Gudmestad had also advised **Bazargan** orally that the INS considered him illegally present in the United States due to his violation of student status. Accordingly, **Bazargan's** claim that he was misled by the INS into believing that he was "legally here" for the purposes of purchasing firearms is without merit.

The judgment of the district court is affirmed.

[1] The Honorable Rodney S. Webb, Chief Judge, United States District Court for the District of North Dakota.

[2] A nonimmigrant student is an alien who has no intent of abandoning his permanent residence in his home country, but is present in the United States temporarily for the purpose of pursuing a course of study. *See* 8 U.S.C. § 1101(a)(15)(J)

U.S. Citizenship and Immigration Services

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Permanent Workers
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Students and Employment
Exchange Visitors
Conrad 30 Waiver Program
Temporary Visitors for Business

Students and Employment

If you would like to study as a full-time student in the United States, you will need a student visa. There are two nonimmigrant visa categories for persons wishing to study in the United States. These visas are commonly known as the F and M visas.

You may enter in the F-1 or M-1 visa category provided you meet the following criteria:

- You must be enrolled in an "academic" educational program, a language-training program, or a vocational program
- Your school must be approved by USCIS
- You must be enrolled as a full-time student at the institution
- You must be proficient in English or be enrolled in courses leading to English proficiency
- You must have sufficient funds available for self-support during the entire proposed course of study
- You must maintain a residence abroad which he/she has no intention of giving up.

F-1 Student Visa

The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate and your school must be authorized by the U.S. government to accept international students.

M-1 Student Visa

The M-1 visa (Vocational Student) category includes students in vocational or other nonacademic programs, other than language training.

Employment

F-1 students may not work off-campus during the first academic year, but may accept on-campus employment subject to certain conditions and restrictions. There are various programs available for F-1 students to seek off-campus employment, after the first academic year. F-1 students may engage in three types of off-campus employment, after they have been studying for one academic year. These three types of employment are:

- Curricular Practical Training (CPT)
- Optional Practical Training (OPT) (pre-completion or post-completion)
- Science, Technology, Engineering, and Mathematics (STEM) Optional Practical Training Extension (OPT)

M-1 students may engage in practical training only after they have completed their studies.

For both F-1 and M-1 students any off-campus employment must be related to their area of study and must be authorized prior to starting any work by the Designated School Official (the person authorized to maintain the Student and Exchange Visitor Information System (SEVIS)) and USCIS.

For more information on the Student and Exchange Visitors Program, see the "Student & Exchange Visitor Program, Immigration & Customs Enforcement" link to the right.

Special Instructions

If you are a B-1 or B-2 Visitor who wants to enroll in school, please see the "Special Instructions for B-1/B-2 Visitors" link to the right.

Last updated: 07/22/2011

Related Links

Extension of Post Completion Optional Practical Training (OPT) and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations
Special Instructions for B-1/B-2 Visitors Who Want to Enroll in School

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E-1 Treaty Traders
E-2 Treaty Investors
E-2 CNMI Investor
E-3 Certain Specialty Occupation Professionals from Australia
H-1B Specialty Occupations and Fashion Models
H-1C Registered Nurse
H-2A Agricultural Workers
H-2B Non-Agricultural Workers
H-3 Nonimmigrant Trainee
I Representatives of Foreign Media
L-1A Intracompany Transferee Executive or Manager
L-1B Intracompany Transferee Specialized Knowledge
O-1 Individuals with Extraordinary Ability or Achievement
P-1A Internationally Recognized Athlete
P-1B Member of Internationally Recognized Entertainment Group
P-2 Performer or Group Performing under Reciprocal Exchange Program
P-3 Artist or Entertainer Part of a Culturally Unique Program
Q Cultural Exchange
R-1 Temporary Religious Workers
TN NAFTA Professionals
Permanent Workers
Information for Employers & Employees
Students and Exchange Visitors
Temporary Visitors for Business

Home > Working in the United States > Temporary Workers > H-3 Nonimmigrant Trainee Printer Friendly

H-3 Nonimmigrant Trainee or Special Education Exchange Visitor

The H-3 nonimmigrant visa category is for an alien coming temporarily to the United States as either a:

Trainee to receive training, other than graduate or medical education training, that is not available in the alien's home country or

Special Education Exchange Visitor to participate in a special education exchange visitor training program for children with physical, mental, or emotional disabilities.

Trainees

An H-3 "trainee" must be invited by an individual or organization for the purpose of receiving training, other than graduate or medical education training, in any field including but not limited to:

- Commerce
- Communications
- Finance
- Government
- Transportation
- Agriculture
- Other professions

This classification is not intended for U.S. employment. It is designed to provide an alien with job-related training for work that will ultimately be performed outside the United States.

In order to obtain H-3 classification, a U.S. employer or organization must provide:

- A detailed description of the structured training program. The description should indicate the number of hours per week the trainee will be in classroom training and the number of hours per week that the trainee will be involved in on-the-job training
- A summary of the trainee's prior training and experience
- An explanation of why the trainee needs the training
- A statement explaining why the training is unavailable in the trainee's home country
- A statement explaining how the training will benefit the trainee in pursuing a career outside the United States
- A statement explaining who will pay for the training without the petitioner permanently employing the trainee

Special Education Exchange Visitor

There is a numerical limit (or "cap") on the number of H-3 special education exchange visitors. No more than 50 may be approved in a fiscal year. So far, one has been approved in fiscal year 2012.

A petition requesting an H-3 "special education exchange visitor" must be filed by a U.S. employer or organization. It should include a description of:

- The training the alien will receive
- The staff and facilities where the training will occur
- The trainee's participation in the training

In addition, the U.S. employer or organization must show that the trainee is:

- Nearing the completion of a baccalaureate degree program in special education
- Has already earned a baccalaureate degree in a special education program, or
- Has experience teaching children with physical, mental or emotional disabilities.

Note: Any custodial care of children must be incidental to the alien's training.

Application Process

In order to obtain H-3 classification, the U.S. employer or organization must file a Form I-129, Petition for Nonimmigrant Worker. The petition must be filed with the information provided above.

Period of Stay

he petition is approved, the trainee may be allowed to remain in the United States for up to 2 years. If the trainee petition is approved for a special education exchange visitor, the trainee may remain in the United States for up to 18 months.

Family of H-3 Visa Holders

Trainees' spouses and children who are under the age of 21 may accompany them to the United States. However, the family members will not be permitted to work in the United States.

More Information

Forms
Employment-Based Forms
I-129, Petition for a Nonimmigrant Worker
Direct Filing Addresses for Form I-129, Petition for Nonimmigrant Worker

Other USCIS Links
Public Releases by Topic: H-2A and H-2B Visas
ViBE Program
TITLE 8 CODE OF FEDERAL REGULATIONS (8 CFR)
H-1B Fiscal Year (FY) 2012 Cap Season
Cap Count for H-2B Nonimmigrants

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Temporary Workers
Permanent Workers
Information for Employers & Employees
Students and Exchange Visitors
Students and Employment
Exchange Visitors
Conrad 30 Waiver Program
Temporary Visitors for Business

Exchange Visitors

The J-1 classification (exchange visitors) is authorized for those who intend to participate in an approved program for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, receiving training, or to receive graduate medical education or training.

In carrying out the responsibilities of the Exchange Visitor Program, the Department of State designates public and private entities to act as exchange sponsors. J-1 nonimmigrants are therefore sponsored by an exchange program that is designated as such by the U.S. Department of State. These programs are designed to promote the interchange or persons, knowledge, and skills, in the fields of education, arts, and science.

Examples of exchange visitors include, but are not limited to:

- Professors or scholars
- Research assistants
- Students
- Trainees
- Teachers
- Specialists
- Nannies/Au pairs
- Camp counselors

Application Process

The U.S. Department of State plays the primary role in administering the J-1 exchange visitor program, so the first step in obtaining a J-1 visa is to submit a Form DS-2019, Certificate of Eligibility for Exchange Visitor Status, (formerly known as an IAP-66). This form will be provided by your sponsoring agency. You should work closely with the officials at your sponsoring agency who will be assisting you through this process. An official who is authorized to issue Form DS-2019 is known as a Responsible Officer (RO) or Alternate Responsible Officer (ARO). Your RO or ARO will explain to you what documents are needed in order to be issued a DS-2019.

After you have obtained a Form DS-2019, you may then apply for a J-1 visa through the U.S. Department of State at a U.S. embassy or consulate. The waiting time for an interview appointment for applicants can vary, so submitting your visa application as early as possible is strongly encouraged (though you may not enter the United States in J-1 status more than 30 days before your program begins).

Employment

Some J-1 nonimmigrants enter the United States specifically to work (as a researcher, nanny, etc.) while others do not. Employment is authorized for J-1 nonimmigrants only under the terms of the exchange program. Please check with your sponsoring agency for more information on any restrictions that may apply to you working in the United States.

Family of J-1 Visa Holders

Your spouse and unmarried children under 21 years of age, regardless of nationality, are entitled to J-2 classification. Your spouse and children are entitled to work authorization; however, their income may not be used to support you. To apply for work authorization as a J-2 nonimmigrant, your spouse or child would file Form I-765, Application for Employment Authorization. For more information on the application procedures, see the "Work Authorization" link to the right.

Last updated: 09/04/2009

Related Links

I-612, Application for Waiver of the Foreign Residence Requirement
Conrad 30 Waiver Program

More Information

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Practical Training Program for Qualified Students

Regulations Relating to Practical Training:

What is optional practical training?

Optional Practical Training (OPT) is temporary employment that is directly related to an F-1 student's major area of study. Under the prior rules, an F-1 student could be authorized to receive up to a total of 12 months of practical training either before (pre-) and/or after (post-) completion of studies.

- Pre-completion OPT:

An F-1 student may be authorized to participate in pre-completion OPT after he or she has been enrolled for one full academic year. The pre-completion OPT must be directly related to the student's major area of study. Students authorized to participate in pre-completion OPT must work part-time while school is in session. They may work full time when school is not in session.

- Post-completion OPT:

An F-1 student may be authorized to participate in post-completion OPT upon completion of studies. The post-completion OPT must be directly related to the student's major area of study.

U.S. Citizenship and Immigration Services

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Monday, Jun. 18, 2012 at 12:08 PM

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What is the application process to participate in pre- or post-completion OPT?

- Students must initiate the process by requesting the Designated School Official (DSO) at their academic institution to

recommend the OPT. The DSO makes such recommendation by endorsing the student's Form I-20 and by making appropriate notation in SEVIS, the system used to track F-1 students.

- Students then file Form I-765, Application for Employment Authorization Document (EAD), with U.S. Citizenship and Immigration Services (USCIS). If approved, USCIS will issue an EAD to the student.
- The student may begin engaging in pre- or post-completion OPT only after an application has been approved and an EAD has been issued.

How many students stand to benefit from this interim final rule?

ICE records indicate that there are approximately 70,000 students currently in OPT and, of those, about 23,000 are studying in Science, Technology, Engineering, or Mathematics (STEM) fields. Some of these students will be selected for an H-1B to start in October 2008. Others may choose to continue their education, while some will depart the United States. ICE and USCIS estimate that approximately 12,000 will take advantage of the STEM extension.

What is the maximum duration of post-completion OPT under this interim final rule?

Under the new rule, certain students will be eligible to receive a 17-month extension of post-completion OPT.

Do the periods of pre-completion OPT count against the available periods of post-completion OPT?

Yes. All periods of pre-completion OPT are deducted from the available periods of post-completion OPT.

When must a student apply for an OPT extension?

- Under the prior regulations, F-1 students had to apply for post-completion OPT prior to graduation.
- This rule allows F-1 students seeking initial post-completion OPT to apply during their 60 -day departure preparation periods in the same way that they are allowed to apply for a change to H-1B status during their departure preparation periods.
- Students may apply for an OPT extension at any time prior to the expiration date of their current OPT period.

Is there additional post-completion OPT available to students working in the high-tech industry?

- F-1 students who receive science, technology, engineering, and mathematics (STEM) degrees included on the STEM Designated Degree Program List, are employed by employers enrolled in E-Verify, and who have received an initial grant of post-completion OPT related to such a degree, may apply for a 17-month extension.
- This extension of the OPT period for STEM degree holders gives U.S. employers two chances to recruit these highly desirable graduates through the H-1B process, as the extension is long enough to allow for H-1B petitions to be filed in two successive fiscal years.

What are the eligible STEM degrees?

- To be eligible for the 17-month OPT extension, a student must have received a degree included in the STEM Designated Degree Program List. This list sets forth eligible courses of study according to

Classification of Instructional Programs (CIP) codes developed by the U.S. Department of Education's National Centerfor Education Statistics (NCES).
- The STEM Designated Degree Program List includes the following courses of study:

o Computer Science Applications	o Biological and Biomedical Sciences
o Actuarial Science	o Mathematics and Statistics
o Engineering	o Military Technologies
o Engineering Technologies	o Physical Sciences
o Science Technologies	o Medical Scientist

- The STEM degree list is included in the preamble to the interim final rule and will be posted on the ICE website.
- Note that to be eligible for an OPT extension the student must currently be in an approved post-completion OPT period based on a designated STEM degree. Thus, for example, a student with an undergraduate degree in a designated STEM field, but currently in OPT based on a subsequent MBA degree, would not be eligible for an OPT extension.

What are the eligibility requirements for the 17-month extension of post-completion OPT?

- The student must have a bachelor's, master's, or doctorate degree included in the STEM Designated Degree Program List.
- The student must currently be in an approved post-completion OPT period based on a designated STEM degree.
- The student's employer must be enrolled in E -Verify.

- The student must apply on time (i.e., before the current post-completion OPT expires).

What is the E-Verify program?

- The E-Verify program is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA).
- The E-Verify program currently is the best means available for employers to determine employment eligibility of new hires and the validity of their Social Security Numbers.
- E-Verify electronically compares information contained on the Employment Eligibility Verification Form I-9 with records contained in SSA and DHS databases to help employers verify identity and employment eligibility of newly-hired employees.

Is there a cost associated with employers participating in the E-Verify program?

- No. E-Verify is a free, easy-to-use web-based system available to employers and in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

What is the application process for the 17 -month STEM extension?

- The student files Form I-765 with USCIS, Form I-20 endorsed by the DSO, a copy of the STEM degree, and the required application fee.
- Form I-765 is being amended to require the student to indicate the degree and provide the employer's E-Verify information.
- If their post-completion OPT expires while the 17-month extension application is pending, students who timely filed their STEM extension applications with USCIS will receive an extension of employment

authorization after their current employment authorization expires, but for no more than 180 days.

What must a student do after being granted the 17-month STEM extension?

- The student must report to his or her DSO (within 10 days) any change in:

- Legal name;
- o Residential or mailing address;
- o E-mail address;
- o Employer name;
- o Employer address;

- The student must also report to his or her DSO every six months, confirming the information listed above; even if there have been no changes.
- The requirement to report continues if the student's 17-month STEM extension is extended further by the automatic cap-gap extension.

Regulations Relating to F-1/H-1B Cap-Gap:

What is the H-1B cap?

The cap is the congressionally-mandated limit on the number of individuals who may be granted H-1B status during each fiscal year. For FY08, the cap is 65,000, with certain statutory cap exemptions.

What is the F-1/H-1B "cap-gap"?

Cap-gap occurs when an F-1 student's status and work authorization expire in the current fiscal year before they can start their approved H-1B employment in the next fisca year beginning on

October 1. An F-1 student in a cap-gap situation would, in most cases, have to leave the United States and return at the time his or her H-1B status becomes effective at the beginning of the next fiscal year. Depending on when the student's status expires, such circumstances could require the student to remain outside the United Statesfor several months.

How does cap-gap occur?

- Under the prior regulation (and unchanged by this rule), an employer may not file, and USCIS may not accept, an H-1B petition submitted earlier than six months in advance of the date of actual need for the beneficiary's services or training.
- As a result, the earliest date that an employer can file an H-1B petition for consideration under the next fiscal year cap is April 1, for an October 1 employment start date. If that H -1B petition and the accompanying change-of -status request are approved, the earliest date that the student may start the approved H-1B employment is October 1.
- Consequently, F-1 students who are the beneficiaries of approved H-1B petitions with October 1 employment start dates, but whose periods of authorized stay (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expire before October 1, are in many cases required to leave the United States, apply for an H-1B visa at a consular post abroad, and then seek readmission to the United States in H-1B status.

What were the prior cap-gap regulations for F-1 students?

- The prior regulations addressed the cap-gap problem by authorizing an extension of an F-1 student's authorized stay, but they did not extend the student's employment authorization. This extension was not

automatic; a notice had to be published in the Federal Register announcing the extension.

- Under the prior regulations, when this Federal Register notice was published, the student's authorized stay was extended, but not the employment authorization. This meant the student could remain in the United States until October 1, when the approved H-1B employment began, but could not work until then.
- If a Federal Register notice authorizing an extension was not published, affected students would in many cases be required to leave the United States, apply for an H-1B visa, and seek readmission to the United States in H-1B status.

How is the cap-gap situation changed under the interim final rule?

- F-1 academic students on post-completion OPT maintain valid F-1 status until the expiration of their OPT. Once that OPT has ended, they are authorized to remain in the United States for up to 60 days to prepare for departure.
- Under this rule, the F-1 status of students is automatically extended when the student is the beneficiary of an H-1B petition for the next fiscal year (with an October 1 employment start date) filed on his or her behalf during the period in which H-1B petitions are accepted for that fiscal year.
- The automatic extension terminates when USCIS rejects, denies, or revokes the H-1B petition.
- If the H-1B petition filed on behalf of the student is selected, the student may remain in the United States and, if on post-completion OPT, continue working until the October 1 start date indicated on the approved H-1B petition.
- The student may benefit from this provision only if he or she has not violated his or her status.

Office of Communications
U.S. Citizenship and Immigration Services

Question and Answer

April 4, 2008
(Revised April 10, 2008)

EXTENSION OF OPTIONAL TRAINING PROGRAM FOR QUALIFIED STUDENTS

Regulations Relating to Practical Training:

What is optional practical training?

Optional Practical Training (OPT) is temporary employment that is directly related to an F-1 student's major area of study. Under the prior rules, an F-1 student could be authorized to receive up to a total of 12 months of practical training either before (pre-) and/or after (post-) completion of studies.

- Pre-completion OPT:

An F-1 student may be authorized to participate in pre-completion OPT after he or she has been enrolled for one full academic year. The pre-completion OPT must be directly related to the student's major area of study. Students authorized to participate in pre-completion OPT must work part-time while school is in session. They may work full time when school is not in session.

- Post-completion OPT:

An F-1 student may be authorized to participate in post-completion OPT upon completion of studies. The post-completion OPT must be directly related to the student's major area of study.

What is the application process to participate in pre- or post-completion OPT?

- Students must initiate the process by requesting the Designated School Official (DSO) at their academic institution to recommend the OPT. The DSO makes such recommendation by endorsing the student's Form I-20 and by making appropriate notation in SEVIS, the system used to track F-1 students.
- Students then file Form I-765, Application for Employment Authorization Document (EAD), with U.S. Citizenship and Immigration Services (USCIS). If approved, USCIS will issue an EAD to the student.
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What is the maximum duration of post-completion OPT under this interim final rule?

Under the new rule, certain students will be eligible to receive a 17-month extension of post-completion OPT.

Do the periods of pre-completion OPT count against the available periods of post-completion OPT?

Yes. All periods of pre-completion OPT are deducted from the available periods of post-completion OPT.

Are there fees associated with filing for extended OPT?

Yes. USCIS charges $340 when an applicant files a Form I-765 for optional practical training.

When must a student apply for an OPT extension?

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- This rule allows F-1 students seeking initial post-completion OPT to apply during their 60-day departure preparation periods in the same way that they are allowed to apply for a change to H-1B status during their departure preparation periods.
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– USCIS –