

## STEM OPT Q&A

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*NEW STEM OPT EXTENSION RULES were published in the Federal Register on March 11, 2016 and went into effect on May 10, 2016. This document answers frequently asked questions to help F-1 students and employers understand the new rules.*

*The new rule affects F-1 students and employers in a variety of ways. Among other things, the rule contains new restrictions, including employer and employee attestations; a formal training program; possible surprise site visits by government agents; and restrictions on self-employment for startup entrepreneurs.*

### PART 1 - FAQ FOR STUDENTS

#### QUESTION #1

#### **Q: What is OPT?**

**A:** OPT stands for Optional Practical Training. OPT provides work opportunities to foreign students who are studying in the U.S. on an F-1 visa.

OPT offers opportunities to work both before graduation (pre-completion OPT) and after graduation (post-completion OPT). This document focuses on post-completion OPT.

Here are some things to know about post-completion OPT:

- If you don't use any OPT time before you graduate, you can apply for up to 12 months of post-completion OPT.
- Post-completion OPT allows you to work for any employer in the United States, including self-employment (subject to various rules and conditions, of course).
- You can apply for a new OPT period for each degree level you complete and not for each degree of the same level. For example, you can apply for 12 months OPT after completion of your Bachelor's degree, work for a year, and then go back to school. You can then apply for another 12 months of OPT after completion of your Master's degree, and so on.



\* Co-founders of the U.S. Alliance for International Entrepreneurs (USAIE). USAIE is a group of immigration attorneys working alongside business & tax professionals to help foreign nationals start and grow their businesses in the United States. Offering consultations and targeted presentations to individuals, companies, and incubators. For more info, contact us or visit our website.

## QUESTION #2

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### **Q: How does STEM OPT differ from normal OPT?**

**A:** STEM is an acronym that refers to education in the fields of Science, Technology, Engineering, and Math.

STEM OPT refers to a program under which certain foreign students, in certain degree programs, are eligible for an additional 17 months (under the old rule) or an additional 24 months (under the new rule) of work authorization on top of the standard 12 months discussed above.

The idea is that if we have talented foreign students coming to the United States to study, we want to offer opportunities to those students to gain work experience related to their degrees, while still having controls in place that protect U.S. workers. The program is also designed to help U.S. colleges and universities remain competitive globally.

## QUESTION #3

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### **Q: What qualifies as a STEM field?**

**A:** The National Science Foundation (NSF) created a STEM Designated Degree Program List. Many organizations in the United States follow the NSF's guidelines on what constitutes a STEM field for educational and employment purposes.

However, for immigration purposes, the Department of Homeland Security (DHS) developed its own list of STEM designated-degree programs that qualify eligible graduates on F-1 student visas for a STEM OPT extension. This list details the degrees that are eligible for consideration for this extra work authorization. It is available on the DHS website: <https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>

## QUESTION #4

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### **Q: From an immigration standpoint, how long has STEM OPT been available?**

**A:** The STEM OPT rule has been in effect since 2008 and underwent some changes in 2015. The 2015 changes extended the additional STEM OPT work authorization period from 17 months to 24 months. These changes took effect May 10, 2016.

**Q: What's different between the 2008 and 2016 rules?**

**A:** Among other things, the new rule:

- extends the eligibility period for STEM OPT from 17 months to 24 months;
- allows students who enroll in a new program and get another STEM designated degree at a higher level to qualify for an additional 24-month STEM OPT extension;
- requires employers to document and implement training programs that are specifically linked to the student's academic learning;
- allows a F-1 student participating in a 12-month period of post-completion OPT based on a non-STEM degree to use a prior eligible STEM degree to apply for a STEM OPT extension;
- revises compliance requirements and unemployment limitations.

Some things that remain the same are:

- employers must be enrolled in E-Verify;
- students must work at least 20 hours per week; and
- "cap-gap" relief is still included. Cap-gap relief refers to the regulations that allow certain students with approved H-1B petitions to remain in status in the United States between the time F-1 status ends and the time H-1B status begins.

**Q: I am currently enrolled in an MBA program that is not on the STEM list. However, my previous Bachelor's degree was in Information Technology, which qualifies me for STEM OPT, which I never used. Can I still apply for the 24 month OPT under the new rule?**

**A:** Yes, you can apply for the 24 months STEM OPT using an old degree that qualifies you for the STEM.

However, you need to be careful to include the correct SEVP-certified school name and SEVIS code where you are currently enrolled as the school recommending your STEM OPT, even if it is not the school where you earned your qualifying STEM degree. In addition, you must also include the name of the school from which you received the STEM qualifying degree. The school must be a SEVP-certified school.

**Q: How does the new rule affect students in F-1 status close to graduating and starting OPT, or students already in OPT that expired before May 10, 2016?**

**A:** If any of the facts you mentioned above apply to you, you will be considered one of the students immediately affected by the transition from the current rule to the new rule.

If you fit into one of the following categories, you will be able to qualify for new STEM OPT benefits, but you must take action to preserve your eligibility:

- Students who have already applied to USCIS for a 17-month STEM OPT extension but whose applications were still pending on May 10, 2016; or
- Students who already have an approved 17-month STEM OPT extension, but are interested in a possible 7-month additional extension under the new rule.

**Q: I fit one of the above categories. Which actions do I take to continue to be eligible for the STEM OPT benefit?**

**A:** It depends which category you're in. Follow these guidelines to determine what action applies to you:

**1. If you have applied for 17-month STEM OPT and your application was still pending on May 10, 2016:**

If your STEM OPT Application was still pending as of May 10, 2016, don't be alarmed if USCIS sends you a Request for Additional Evidence ("RFE").

Beginning May 10, 2016, USCIS started deciding all STEM OPT applications under the standards of the new final rule. The RFE will simply request documentation that will establish your eligibility for a 24-month OPT extension under the new final rule. So instead of denying your application and make you reapply for a new application, you simply have to provide the additional documents required under the new rule to establish your eligibility for the 24 months' extension. Eligibility is established by providing the following documents:

- A new Form I-20 endorsed on or after May 10, 2016, indicating that the Designated School Official (DSO) recommends you for a 24-month OPT extension; and
- A completed and signed Form I-983 Mentoring and Training Plan. For a blank form, visit <https://www.ice.gov/sites/default/files/documents/Document/2016/I-983.pdf>.

*(continued next page)*

**2. If your 17-month STEM OPT was already approved before May 10, 2016 and you want to add the extra 7-month STEM extension:**

If you already have a 17-month STEM OPT that was approved before May 10, 2016, your OPT will not be automatically extended. At this point, you basically have two choices:

**OPTION 1:** Continue in the 17-month STEM OPT until it ends, without applying for an extension. If you choose this option, the standards of the 17-month rule will govern that STEM OPT period throughout its term and you won't have to comply with the new STEM OPT rules.

**OPTION 2:** You can request the additional 7 months' extension. However, to be eligible for the 7-month extension, you must meet all of the following conditions:

- Properly file a Form I-765 with USCIS any time between May 10, 2016 and no later than August 8, 2016. The application must be filed within 60 days of the date the DSO enters the recommendation for the 24-month OPT extension into your SEVIS record. For example, if your DSO recommends you on May 20, you have 60 days from May 20 to file the I-765 application, which will take you to July 19 to file rather than August 8;
- Include \$380 in applicable fees and a new Form I-20 endorsed on or after May 10, 2016, indicating that the DSO recommends you for a 24-month OPT extension;
- A completed and signed Form I-983 Mentoring and Training Plan; and
- Have at least 150 calendar days remaining before the end of your 17-month OPT extension at the time the Form I-765 is properly filed.

If you qualify and apply for the 7-month extension, then you immediately become subject to the 24-month STEM OPT compliance rules as soon as you file the I-765 application. You, your employer, and your DSO are all subject to the new requirements of the 24-month OPT extension period.

Whether or not the 17-month STEM OPT is extended for 7 months, it will count as "one" period of STEM OPT, after which you will have only one more lifetime period of STEM OPT eligibility under the new rule, after completing a higher degree than the one you currently have, including a Master's or PhD.

**Q: As a STEM OPT participant, do I have to pay Federal Insurance Contributions Act (FICA) taxes for Social Security and Medicare?**

**A:** As a STEM OPT student, you are generally not subject to Social Security and Medicare contributions (FICA withholdings) until after the first five calendar years that you hold F-1 nonimmigrant status.

However, in most cases, by the time you get to the STEM OPT stage, you will have been in the United States in F-1 status for five years or more and the FICA withholdings will kick in. Consult with a tax accountant to ensure you are filing your taxes properly and continue to be compliant with your F-1 status.

**Q: I heard that F-1 students cannot qualify for the STEM OPT extension unless they are actual employees of the company signing the Form I-983. This differs from the old rule that allowed students to form their own companies and assume the employer's position without any issues.**

**How will this impact me as a student entrepreneur who already formed a company and is half-way through raising funds and hiring employees?**

**A:** You are correct: the new rule forbids STEM OPT applicants to provide an employer's attestation on their own behalf and sign Form I-983 on their own behalf. There has to be an employer-employee relationship for you to qualify for the STEM OPT and continue to work for your company.

**Q: How can I prove the employer-employee relationship if I am one of the co-founders and hold an executive position?**

**A:** One way of dealing with this is to form a board of directors and establish a majority rule vote where you can be fired at any time. Having a restricted stock purchase agreement will help prove that the intellectual property (IP) belongs to the company and not you.

Furthermore, signing an employment/training agreement clearly indicating the employer-employee relationship will also help strengthen a bona fide employer-employee relationship. Since the employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience, having one of the co-founders sign the Training Plan and make the attestation will help create the employer-employee relationship. This is one of the grey areas in the law where DHS is allowing STEM OPT to participate in a start-up as long as the regulatory requirements are met.

**Q: Why is a Training Plan required if I am going to be working at a job?**

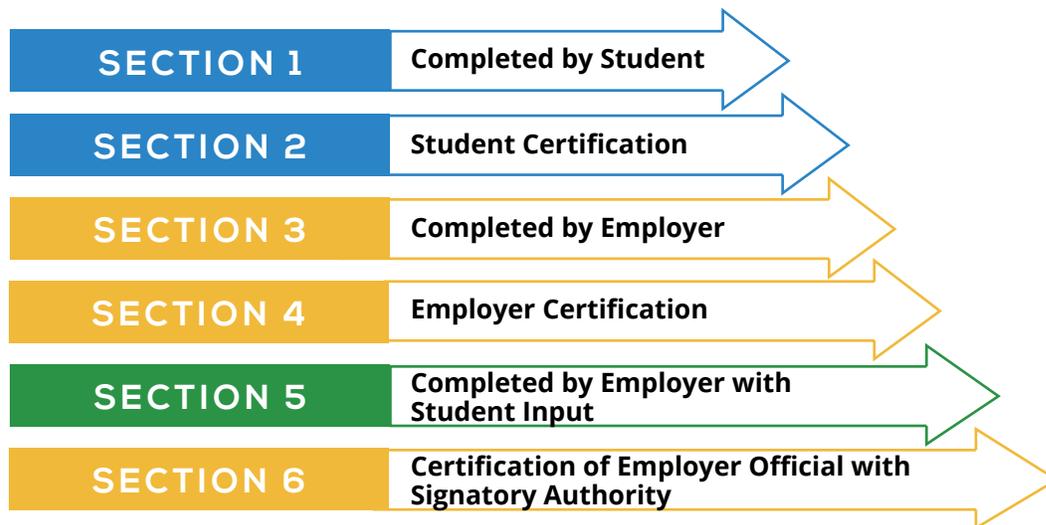
**A:** The government does not view this the same way as working at any other job. You are there to learn. In fact, you will be required complete a self-evaluation on your progress within the first 12 months of your position and again at the completion of the experience. You are responsible for the self-evaluation, but the employer has to sign off on the evaluation to attest that it is true and accurate. These evaluations have to be submitted to your DSO for inclusion in your records.

**Q: What exactly is this Training Plan mentioned above?**

**A:** The Training Plan is a form (I-983) that you and your employer complete that outlines the type of training you will be receiving, the period of training, the evaluation methods, and who will supervise you. It also has to show that the company is structurally equipped to handle a training program like yours, including the available resources for the training, including tools and mentorship. Part of the process of obtaining your STEM OPT time is working with your DSO to complete the Form I-983. You can take a look at what the form looks like by clicking [HERE](#). *(continued next page)*

By submitting the form, you will be bound to the terms and conditions laid out in the Form I-983 instructions, so make sure you review and understand them. Your responsibilities are effective as of the start date you request for STEM OPT on the Form I-983.

Different parts of the form have to be filled in by different people: some by you, some by the employer, and some by the school. DHS wants you to work with the employer to create the training plan. It's supposed to be a collaborative effort. The graph below indicates which section needs to be completed and by who:



As shown above, the Student needs to provide information in Sections 1, 2, and 5.

### **SECTION 1: STUDENT INFORMATION**

The government requires that you provide them with certain information about yourself. This information includes things like your full name, an email address, information on your school and DSO, information on your educational program and educational history, and whether you've been given work authorization before.

### **SECTION 2: STUDENT CERTIFICATION**

This part is easy – read the section and sign it if you agree with what it says.

### **SECTION 5: TRAINING PLAN FOR STEM OPT STUDENTS**

- The employer fills in this part, but you should expect to be part of the drafting of the training plan. It is intended to supplement your education. Furthermore, federal regulations require you to work together to develop this section.
- Basic information required includes: student's name; employer's name; site name (can be the same as or different from the employer's name); site address; name, title, phone number, and email of the company official who is familiar with and will monitor the student's goals and performance.
- Provide a description of all tasks and assignments you will carry out during the training and how these activities relate specifically to your degree. This must include detailed goals and objectives.
- Explain in detail how the employer will provide oversight and supervision, and measures whether or not you are acquiring new knowledge and skills.

**Q: This seems very comprehensive and detailed. What if I have co-founded a start-up and we only have two to three employees? How are we supposed to show the company is able to support this training program successfully?**

**A:** Show that by providing detailed information about the business idea and connecting it with your area of study, you will be able to learn the skills needed to assume whatever position you are looking for when you find employment.

The company structure needs to include someone who is superior to you and has a similar background or experience to be able to supervise and mentor you during the STEM OPT period. Planning all these steps and structural changes during your 12 months standard OPT period is key to the success of your request for the STEM OPT extension.

**Q: What if my STEM OPT period is about to end and I want to stay in the United States afterwards? I hope to continue growing my business, have my company sponsor me for an H-1B, or find a U.S. employer who will sponsor me. Does the new rule change anything from the H-1B perspective while on OPT or STEM OPT?**

**A:** Nothing changes in terms of cap-gap coverage or the process for obtaining H-1B status. The purpose of STEM OPT is to give you, the student, a chance to extend your education into “real world” situations. That’s why the new rule added the Training Plan component. View this time as a continuation of your education.

An article explaining various visa options for international entrepreneurs is on the USAIE website at [http://usaie.org/wp-content/uploads/2016/06/bib\\_visa\\_options\\_article.pdf](http://usaie.org/wp-content/uploads/2016/06/bib_visa_options_article.pdf).

## PART 2 - FAQ FOR EMPLOYERS

### QUESTION #1

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**Q: As an employer, what do I have to do to hire a foreign student in OPT/STEM under the new rule?**

**A:** You have to enroll and remain in good standing with the government's E-Verify program. See generally <https://www.uscis.gov/e-verify>. This is a program for electronically verifying the work authorization of all of your employees, including foreign and U.S. employees.

You also must create a training program specifically designed for the student, his or her area of study, the knowledge and skills the student will gain by working, and how the student will use these skills. Lastly, you must participate in an evaluation developed by the student to track his or her progress and confirm the skills learned during the employment period.

### QUESTION #2

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**Q: What are my tax responsibilities?**

**A:** It depends. STEM OPT participants aren't generally subject to FICA taxes or Social Security or Medicare contributions under they have held F-1 status for five calendar years. You have to work with your employees to see how long they've held F-1 status. Once they reach the five-year limit in F-1 status, they will become subject to these tax requirements and therefore, you will also become responsible for the tax withholdings of their salaries. Consult with your accountant or tax firm ensure tax compliance during their employment.

### QUESTION #3

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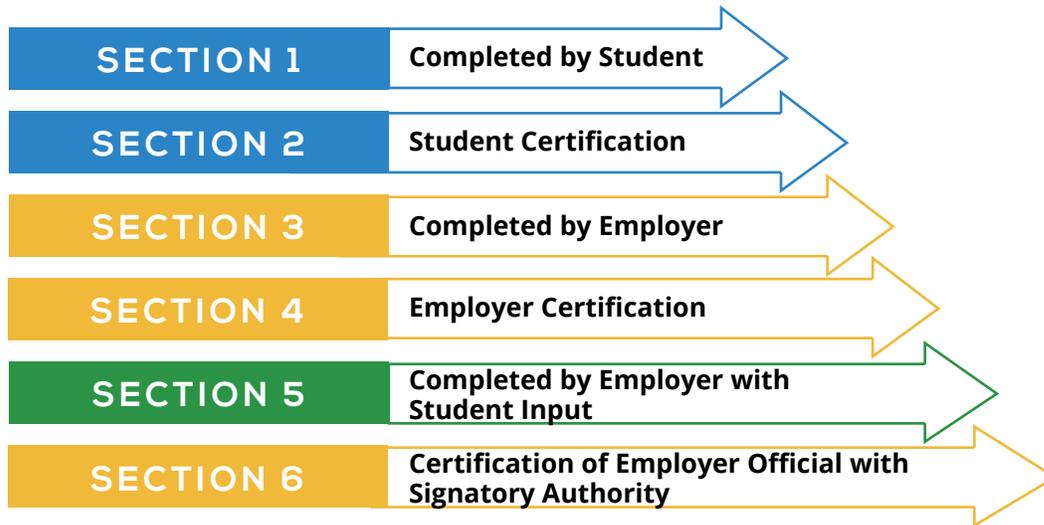
**Q: What does a Training Plan involve?**

**A:** If you already have an existing training program, you can probably continue to use it as long as it aligns with the goals of the OPT/STEM program. However, you now have to document it using Form I-983, available at <https://www.ice.gov/sites/default/files/documents/Document/2016/I-983.pdf>. Form 193 explains to the government how your training plan is customized to the individual's qualifying degree, goals, and learning objectives.

If you do not have a training program, you must develop one with the help of the student. The training program must include specific information about you, the student, field of study, work to be performed, goals to be achieved by end of the employment period, skills to be gained, methods of evaluation and the company contact who will supervise the student and has authority to sign on behalf of the company.

## Q: How do I fill out Form I-983, Training Plan?

**A:** The blank form is available on the DHS website. By submitting the form, you will be bound to the terms and conditions laid out in the Form I-983 Instructions, so make sure you review and understand them. Your responsibilities are effective as of the start date you request for STEM OPT on Form I-983.



You, the employer, must provide the information in Sections 3, 4, 5, and 6.

### SECTION 3: EMPLOYER INFORMATION

To complete the employer section, you will need to gather the following information:

- Basic employer information: your company name, mailing address, website;
- the company's Federal Tax ID number and your North American Industry Classification System (NAICS) code;
- the number of full-time employees in the United States and whether the Small Business Administration classifies your company as a Small Entity;
- when you want the student to start, and how many hours of week you want the student to work (minimum of 20 hours per week); and
- compensation information, including salary, stipend, and/or other compensation (such as housing allowance, tuition waivers, transportation costs), and frequency of pay. Remember that the total compensation must be commensurate with similarly situated U.S. workers.

### SECTION 4: EMPLOYER CERTIFICATION

- You must attest that the STEM OPT extension won't replace a full-time or part-time temporary or permanent U.S. worker.
- You must certify that the terms and conditions of the employment are commensurate with similarly situated U.S. workers.
- You must designate a company official with signatory authority for this certification.  
(continued next page)

### SECTION 5: TRAINING PLAN FOR STEM OPT STUDENTS

- Federal regulations require that the employer and student work together to develop this section.
- Basic information required includes: student's name; employer's name; site name (can be the same as or different from the employer's name); site address; name, title, phone number, and email of the company official who is familiar with and will monitor the student's goals and performance.
- Provide a description of all tasks and assignments the student will carry out during the training and HOW these activities relate to the student's degree. Must include detailed goals and objectives.
- Explain in detail how the employer will provide oversight and supervision, and measures whether the student is acquiring new knowledge and skills.
- Provide any other relevant remarks.

### SECTION 6: EMPLOYER OFFICIAL CERTIFICATION

- Additional certifications must be made.
- The person signing this section may be the same person who signed the employer certification in Section 4, or may be someone else, depending on your organization.

## **Q: What if the training plan changes? Am I stuck with it?**

**A:** You can change the training plan, in collaboration with your student employee. Certain "material changes" need to be reported to the DSO at the college or university. Those changes include:

- change in your Employer Identification Number (for example, during a restructuring); and
- reduction in compensation that is not due to a reduction in hours worked.

In both of the situations above, both you and the student need to sign a modified version of the training plan and file it with the DSO as soon as possible.

## **Q: How many hours does the student have to work?**

**A:** The STEM OPT student must work at least 20 hours per week and up to full time.

#### QUESTION #7

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**Q: How many days can a STEM OPT student be unemployed or not work during the 24-month period?**

**A:** The student has up to 90 days of allowed unemployment period during the initial 12 months standard OPT period. Under the old rule, they had an additional 30 days during the STEM period, for a total of 120 days. However, the new rule allows an additional 30 days of unemployment during the STEM OPT period, leading to a total of 150 days of unemployment during OPT and STEM OPT combined.

#### QUESTION #8

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**Q: Who is responsible for the evaluation, and how often should it be done?**

**A:** The new rule requires an annual self-evaluation. The student must develop an evaluation report, have the employer sign it, and then submit it to his DSO. Since it is a 24-month period, the first evaluation must occur during the first 12 months and the second evaluation must occur at the end of the 24-month period.

#### QUESTION #9

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**Q: What happens if I terminate the student's employment, or they don't show up?**

**A:** If you terminate the student's employment or they don't report for work, you must notify the student's DSO within five business days.

#### QUESTION #10

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**Q: What else do I need to know?**

**A:**

- DHS has the right to visit the worksite to verify the information you provide. In most cases, they will provide 48 hours' notice. However, if a complaint or other evidence suggests that you, the employer, aren't complying with all program rules, they can conduct the visit without warning.
- Always make sure to remain in good standing with the E-Verify reporting process.

# FOR FURTHER INFORMATION

For further information about STEM OPT or any other immigration issue, contact USAIE. We offer consultations and targeted presentations to individuals, companies, and startup incubators. For more info, contact us or visit our website.

[WWW.USAIE.ORG](http://WWW.USAIE.ORG)



[INFO@USAIE.ORG](mailto:INFO@USAIE.ORG)



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