



Memorandum

To: Client HR

From: Vaman Kidambi, Attorney at Law

Sub: A Memo to IT Consulting Companies in the STEM OPT Context

You specifically wanted to know more about the Employer's Training Obligation under the STEM OPT program and whether your company could complete Form I-983, *Training Plan for STEM OPT Students*.

This question assumes special significance given the fact that you are an IT Consulting Company and engaged in the business of contracting out employees to client sites.

In March 2016, the USCIS issued a [final rule](#) amending regulations to expand Optional Practical Training (OPT) for students with U.S. degrees in Science, Technology, Engineering, or Mathematics (STEM).

Recently, the USCIS updated the STEM OPT [Employer Requirements and Responsibilities](#) on their website

One of the requirements in the final rule requires the submission of a formal training plan. A very important part of this formal training plan is the articulation of the STEM OPT student's learning objectives and additionally the affirmation of the employer's commitment to helping the student achieve those objectives.

To fulfill this requirement, a student and their employer must complete and sign Form I-983. DHS has created a special site called the STEM OPT Hub with information regarding this process. Specifically, the USCIS has a training tutorial for employers trying to complete Form I-983.

A persistent issue for IT consulting companies is whether the modified Form I-983 may be completed by an employer seeking to employ a student at an end-client site. USCIS addresses this question in several relevant portions of the final rule. In fact, even in the comment section of the final rule, the USCIS addressed this matter.

Comment: DHS received several comments concerning various types of employment relationships and whether F-1 students could request STEM OPT extensions based on such relationships. For example, commenters suggested that an F-1 student be allowed to obtain a STEM OPT extension based on a business established and staffed solely by the student. Commenters stated that such a change would allow students to remain in the United States to start their own companies, while also improving their ability to directly benefit from their own innovations. Other commenters suggested that DHS allow STEM OPT students to engage in employment with more than two employers and be employed through a temporary agency or a consulting firm arrangement that provides labor for hire. A commenter asked DHS to clarify its position relating to placement agencies, asserting that there may be some legitimate situations in which a staffing company that supervises STEM students should not be prohibited from participating in the STEM OPT extension. In addition, a commenter suggested that DHS expand the definition of “supervisor” to include advisory board members of venture capital firms, faculty advisors, and “start-up mentors.” The commenter stated that many start-up companies are not able to offer salaries before they become profitable (instead offering compensation plans that might include stock options or alternative benefits), and recommended that DHS allow STEM OPT students to work for such companies.

Response: 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 relationships that **do not constitute a bona fide employer-employee relationship**. One concern arises from the difficulty individuals employed through such arrangements would face in complying with, among other things, the training plan requirements of this rule. Another concern is the potential for visa fraud arising from such arrangements. Furthermore, evaluating the merits of such arrangements would be difficult and create additional burdens for DSOs. Accordingly, DHS clarifies that students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Training Plan, and the employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience. DHS recognizes that this outcome is a departure from SEVP’s April 23, 2010 Policy Guidance (1004-03).

In addition, the USCIS website offers the following guidance:

1. To establish a bona fide relationship, the employer may not be the student's "employer" in name only, nor may the student work for the employer on a "volunteer" basis. Moreover, the employer that signs the Form I-983 must be the same entity that provides the practical training experience to the student. See [2016 STEM OPT Final Rule](#) (pp. 13072, 13079).
2. Under no circumstances would another F-1 student on OPT or a STEM OPT extension (who is undergoing training in their own right) be qualified to train another F-1 student on a STEM OPT extension. See 8 C.F.R. 214.2.(f)(10)(ii)(C)(10) and [2016 STEM OPT Final Rule](#) (pp. 13041, 13042, 13065, 13079, 13080-81, 13119).
3. Employers may rely on their otherwise existing training programs or policies to satisfy the requirements relating to performance evaluation and oversight and supervision, the student's Training Plan must nevertheless be customized for the individual student.
4. A STEM OPT employer may not assign, or otherwise delegate, its training responsibilities to a non-employer third party (e.g., a client/customer of the employer, employees of the client/customer, or contractors of the client/customer). See 8 C.F.R. § 214.2.(f)(10)(ii)(C)(7)(ii) and [2016 STEM OPT Final Rule](#) (pp. 13042, 13079, 13090, 13091, 13092, 13016).
5. The training experience must take place on-site at the employer's place of business or worksite(s) to which U.S. Immigration and Customs Enforcement (ICE) has authority to conduct employer site visits to ensure that the employer is meeting program requirements.
6. Online or distance learning arrangements may not be used to fulfill the employer's training obligation to the student. For instance, the employer may not fulfill its training obligation to provide a structured and guided work-based learning experience by having the student make periodic visits to the employer's place of business to receive training, while the student is actually working at the place of business or worksite of a client or customer of the employer. Similarly, the employer may not fulfill its training obligation by having the student make periodic telephone calls or send periodic email messages to the employer to describe and discuss their experiences at the place of business or worksite of a client or customer of the employer. See 8 C.F.R. § 214.2.(f)(10)(ii)(C)(11) and [2016 STEM OPT Final Rule](#) (p. 13041, 13042, 13049, 13062, 13064-66, 13070, 13071, 13090, 13113).

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7. Staffing and temporary agencies may seek to employ students under the STEM OPT program, but only if they will be the entity that provides the practical training experience to the student at its own place of business and they have a bona fide employer-employee relationship with the student. For instance, a student might possibly receive STEM-related training while working in such an entity's information technology (IT) department. Such entities **may not, however, assign or contract out students to work for one of their customers or clients**, and assign, or otherwise delegate, their training responsibilities to the customer or client.

Some clients have asked if they can house the STEM OPT student in their own facility working on both internal and external (read client) projects. The problem here is that the language on the USCIS website specifically prohibits "contracting out" students. The very act of billing for the student's time may be a violation of the final rule and therefore unacceptable.

USCIS may seek to corroborate any statements made by the employer through a verification process that involves contacting clients directly. Any rejection/contradiction of the training plan by the client may be viewed as a violation.

I believe, USCIS does not foresee a situation where "third-party placement", or "third-party work-related arrangements" are acceptable when it comes to STEM OPTs and therefore cannot recommend having your company complete the I-983, Training Plan for STEM OPT Students.

Thank you.