Regarding Accrual of Unlawful Presence Memorandum & Third Party Employment Situations for STEM OPT

Dear Students,

This email is a reminder of recent USCIS Policy Updates, particularly those related to the USCIS Policy Memorandum “Accrual of Unlawful Presence and F, J, and M Nonimmigrants” as well as the USCIS webpage updates on OPT STEM extensions for “third party placements” or similar situations. ISSS does not offer legal advice and the below should not be taken as legal advice, but rather as a courtesy reminder. We share this information because we understand the concerns many students may have about these issues and wish to provide resources and a context for them.

*What do these updates mean for me as a F-1 or J-1 student?*

F-1 and J-1 students should always take care to be in accordance with all immigration rules and regulations. Now is a good time to again reinforce the need for students to be in full compliance with regulations, including but not limited to: being a full-time registered student, not engaging in unauthorized employment, and only engaging in employment which fully adheres to all the regulatory requirements. In cases of CPT, OPT, and STEM OPT, we urge students who feel their situation may be in a “grey area” to exercise caution. It is important to document how you are adhering to all of the regulatory requirements (for example: carefully document why the CPT is academically required and how your job duties directly relate to your major and/or research; only pursue employment on OPT that directly relates to your major; on STEM OPT, only accept positions that fully meet all regulatory requirements (see third party placement guidance below).

To read the *Policy Memorandum on “Accrual of Unlawful Presence and F, J, and M Nonimmigrants,”* please click here:
https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/AccrualofUnlawfulPresenceFJMNonimmigrantsMEMO_v2.pdf. To read NAFSA’s post about this change, please click here:
https://www.nafsa.org/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/Accrual_of_Unlawful_Presence_and_F,_J,_and_M_Nonimmigrants/. NAFSA is a professional organization for international educators.

*Accruing Unlawful Presence:*

The text below is taken from USCIS:

“Individuals in F, J, and M status who failed to maintain their status before Aug. 9, 2018, will start accruing unlawful presence on that date based on that failure, unless they had already started accruing unlawful presence, on the earliest of any of the following:
• The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the individual violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;
• The day after their I-94 expired; or
• The day after an immigration judge or in certain cases, the Board of Immigration Appeals (BIA), ordered them excluded, deported, or removed (whether or not the decision is appealed).

Individuals in F, J, or M status who fail to maintain their status on or after Aug. 9, 2018, will start accruing unlawful presence on the earliest of any of the following:

• The day after they no longer pursue the course of study or the authorized activity, or the day after they engage in an unauthorized activity;
• The day after completing the course of study or program, including any authorized practical training plus any authorized grace period;
• The day after the I-94 expires; or
• The day after an immigration judge, or in certain cases, the BIA, orders them excluded, deported, or removed (whether or not the decision is appealed).

What are the consequences of unlawful presence?

Individuals who accrue more than 180 days of unlawful presence during a single stay, and then depart, may be subject to three or 10 year bars to admission. If more than a year is accrued across an individual’s lifetime, they could be ruled permanently inadmissible to the U.S.

It could also have consequences for the adjudication of benefits (such as changes of status or employment authorizations).

What we don’t know:

As NAFSA points out, we do not yet know how this guidance will play out in a number of agencies: “It is not yet clear how this USCIS guidance will impact the policies of other agencies, for example:

• ICE, in its enforcement actions
• SEVP and DOS-EVP, regarding a student or exchange visitor's SEVIS record
• CBP, regarding admission to the United States in nonimmigrant status
• DOS-Consular Affairs, regarding eligibility for a nonimmigrant visa” (https://www.nafsa.org/Professional_Resources/Browse_by_Interest/International_Students_and_Scholars/Accrual_of_Unlawful_Presence_and_F,_J,_and_M_Nonimmigrants/)

Third Party Placements on STEM OPT:
To read USCIS’s updates to their interpretation of third party placements, please review the “STEM OPT Employer Requirements and Responsibilities” section on USCIS’s website, here: https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/stem-opt. Please also review NAFSA’s summary and interpretation, here: https://www.nafsa.org/Content.aspx?id=58662

A few key updates include:

- “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).”
- “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.”
- “Moreover, 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. This means that ICE must always have access to a student’s worksite; if the student is sent to different worksite locations as part of the training opportunity, ICE must be able to access such worksite locations. For instance, the 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.”

What does this mean?

The above suggests that third-party placement and staffing agencies, in many or even most cases, do not adhere to the regulatory requirements for STEM OPT. The training must be provided by the employer listed on the I-983, not another third party, and the training must take place at the employer’s business or worksite.

If you think your employment situation violates the above or may be considered a “third-party placement,” ISSS recommends you discuss these updates with your employer and their legal immigration counsel. Adjustments may need to be made to your situation to make you compliant, including possibly moving your site of work. Students may also seek new employment if they find it necessary. A student may also wish to seek independent legal counsel from an immigration attorney to help determine their compliance.

ISSS cannot determine a student’s compliance as it relates to the third-party placement because we are not immigration attorneys and we do not have direct access to the details of your employment situation.
Students who may not be compliant based on the above updates to the third-party placement policy should pay careful attention to the August 9th, 2018 date for accrual of unlawful presence. As a disclaimer, it is not yet clear how USCIS, ICE, or other agencies will be determining a violation of status. However, because the policy memorandum on unlawful presence refers to “engage[ment] in an unauthorized activity,” students should be cautious, as it appears that working under a third party placement may be considered an “unauthorized activity.” Students are recommended to seek resolutions to any third party placement issues as soon as possible so that they may be fully compliant and only engaged in authorized activity under STEM OPT.