

Immigration Policy Changes Are A Boon To STEM Employers

By **Timothy D'Arduini, Lynn O'Brien and Andrew Kuntz** (January 28, 2022)

Amid the "Great Resignation," as U.S. employers struggle to fill new or emerging STEM-related positions across in-demand fields such as data science, data analytics, and economics and computer science, the Biden-Harris administration announced changes to provide certain employers with additional recruitment or retention vehicles.

These policy changes highlight U.S. support of the use of immigration within the confines of existing legal regulations to advance America's competitiveness. For those U.S. employers who recruit foreign students to fill STEM-related jobs, the applicant pool likely just expanded.

First, the White House released a fact sheet titled "Biden-Harris Administration Actions to Attract STEM Talent and Strengthen our Economy and Competitiveness," announcing several immigration-related policy changes concerning foreign nationals possessing science, technology, engineering and mathematics degrees.[1]

U.S. Citizenship and Immigration Services then swiftly updated its policy manual to reflect these policy changes, providing private and public employers with significant opportunities to attract and retain top-tier STEM talent in business-critical positions.

The new policies:

- Expand what degree programs are eligible for STEM Optional Practical Training, or OPT;
- Update the USCIS policy manual as it relates to the adjudication of petitions for O-1A, or extraordinary ability, visas;
- Update the USCIS policy manual to reflect additional national interest waivers for STEM degree holders and entrepreneurs to secure a green card in the U.S.;
- Facilitate additional corporate training for J-1 visa holders in STEM fields; and
- Create an early career STEM research initiative.

E-Verified employers willing to recruit global talent from universities with degree programs



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in these additional STEM fields now have three separate chances to sponsor foreign nationals in the H-1B lottery.

Employers unwilling to provide sponsorship previously should recognize that foreign national employees under this policy guidance may provide services for 36 months instead of 12. An additional 24 months of work authorization may provide a suitable return on investment worthy of sponsorship. Green card options for these individuals may also be available for these foreign nationals before their three years of OPT and STEM OPT conclude.

If an employee is not selected in the H-1B lottery, employers may seek to use an additional option for highly educated, exceptional employees — the O-1A extraordinary ability visa. Because this visa type requires extraordinary ability, petitioning employers sponsor foreign national employees for O-1A visa status far more sparingly.

However, under the new policy, USCIS will accept comparable evidence where the beneficiary's evidence does not align with the specific legal criteria.

Therefore, employers may seek to use creative evidence or arguments to attempt an O-1A strategy for a certain subset of their employees under the new policy. Perhaps what were once marginal O-1A petitions could be approved under the revised policy. As employers test the O-1A waters, if USCIS approves petitions under the new policy guidance, this option may become more attractive.

Expansion of STEM OPT Fields of Study

Along with the White House announcement, the U.S. Department of Homeland Security published a Federal Register notice adding 22 qualifying fields of study to the STEM Designated Degree Program list.[2]

Foreign students who obtain a degree in a qualifying STEM field are eligible for a 24-month extension of their post-completion OPT, which is normally 12 months. Thus, foreign nationals who earn a qualifying STEM degree will be eligible for a total of 36 months of practical work experience so long as their employer establishes, in a training plan, the relationship between their degree fields and their employment.

What fields of study were added to the STEM OPT program?

Many of the degree fields added to the STEM OPT program are critical to the rapidly evolving technological landscape and include fields such as: bioenergy; cloud computing; economics and computer science; mathematical economics; data science, general; data analytics, general; business analytics; data visualization; financial analytics; and data analytics, among others.[3]

How will the expansion of the STEM OPT-eligible fields of study affect employers?

The DHS' expansion of the fields of study will increase the pool of talented F-1 students who are eligible to work in STEM OPT positions for up to 36 months.

An educational background in the above quantitative and technical fields provides students with skills that are essential in the technology, financial services/fintech, biotech and health, and consulting industries, among others.

Thus, this policy change provides additional opportunities for employers to hire key talent to

address their data analytics, software development and other engineering needs.

What are an employer's obligations to hire STEM OPT candidates?

In order to hire STEM OPT candidates, employers must:

- Be registered for the DHS' E-Verify program and remain a participant in good standing;[4]
- Implement a formal training program for the STEM OPT employee on Form I-983; and
- Provide OPT employment and training terms that are commensurate with other similarly situated U.S. workers.

Employers looking to rely on a STEM OPT recruitment strategy or to confirm that their program complies with regulations and requirements, including with registering in the E-Verify program, should plan now to take advantage of the expanded STEM OPT-eligible fields.

Changes to Adjudication of O-1A Visa Petitions

USCIS also updated its policy manual to reflect changes to how it will adjudicate O-1A visa petitions for foreign nationals with "extraordinary ability." [5]

Specifically, the policy update:

- Clarifies how USCIS determines eligibility for foreign nationals of extraordinary ability, such as Ph.D.- holders in STEM fields;
- Includes comparable evidence that companies may use if a particular legal criterion does not readily apply; and
- Provides examples of evidence and explanations regarding how the government will analyze that evidence for applicants with STEM degrees.

How will the changes to the policy manual affect employers filing O-1A petitions?

USCIS officers now have an updated appendix of the types of evidence that may satisfy O-1A evidentiary requirements, which immigration practitioners may use as a road map for development of O-1A petitions.[6]

Further, the appendix explains how practitioners can contextualize the evidence they present so that the evidence is readily apparent to officers on how they should evaluate the probative value of that evidence or "submit evidence that is of comparable significance to that criterion to establish sustained acclaim and recognition." [7]

The changes likely evidence a shift toward more favorable adjudication of O-1A status for Ph.D.-holders, particularly those who serve in critical research positions or are recognized among their peers as a leader in the relevant specialized field.

Educational institutions, research organizations, health companies and engineering firms should closely examine the new policy changes and assess whether a shift in their O-1A visa program would help attract and retain top STEM talent in critical positions.

National Interest Waiver of Job Offer Requirement for STEM and Entrepreneurs

Under U.S. immigration law, foreign nationals are eligible to self-petition for U.S. permanent residency without testing the U.S. labor market and without a full-time offer of employment from a U.S. company so long as their presence in the U.S. would be in the national interest.

In connection with the White House's announcement, USCIS updated its policy manual to expand those who may be eligible for a national interest waiver by:

- Explaining the framework for adjudicating a national interest waiver request for STEM field endeavors;
- Describing how the national interest waiver framework applies to entrepreneurs; and
- Confirming that "USCIS considers the date of a provisional degree certificate for purposes of calculating post-baccalaureate experience." [8]

How does the new policy affect adjudication of national interest waivers for STEM endeavors?

The amendment to the policy manual specifically recognizes "the importance of progress in STEM fields and the essential role of persons with advanced STEM degrees in fostering this progress, especially in focused critical and emerging technologies." [9]

The updated policy manual outlines how USCIS will approach the three-prong analysis for a national interest waiver as it relates to (1) persons with advanced STEM degrees pursuing a STEM endeavor, and (2) entrepreneurs who, through innovation and novel endeavors, advance U.S. national security interests, critical advancements in their field and the competitive advantage of the U.S.

How will the new policy manual framework for national interest waivers affect employers hiring those in STEM fields?

The addition of positive, STEM-related factors to the three-prong analysis for national interest waivers may result in more opportunities for talented individuals in STEM endeavors to receive a waiver of the labor market test and job opportunity requirements.

Accordingly, these policy changes provide an additional and faster pathway for some individuals in STEM-related positions to receive a permanent work authorization in the U.S.

How does the policy update affect adjudication of national interest waivers for entrepreneurs?

The update to the USCIS policy manual provides a framework for addressing the unique factors associated with an application for a national interest waiver of the job offer requirement as it relates to an entrepreneur-petitioner.

Specifically, the policy manual notes that USCIS "may consider the fact that many entrepreneurs do not follow traditional career paths, and there is no single way in which an entrepreneurial start-up entity must be structured."

The policy manual further highlights additional evidence that may be presented by entrepreneurs to meet the three-prong test — opening the door to creative arguments that may provide a pathway to a green card for foreign national entrepreneurs.

J-1 Academic Training Extensions

In connection with the White House announcement, the U.S. Department of State's Bureau of Educational and Cultural Affairs announced that it is extending the cap for STEM J-1 academic programs from 18 months to 36 months for students pursuing a STEM-related degree.

Institutions seeking an extension for STEM-related academic training must comply with all relevant rules and regulations. This expanded timeframe provides companies with an alternative to talent retention strategy if top talent — at junior and more senior-level employees — is not selected in the H-1B lottery.

Additionally, employees that may not yet be eligible for international transfers in the L-1 intracompany transferee visa category. More information about the extension program can be found at the BridgeUSA website.[10]

Early STEM Research Initiative

In connection with the White House announcement, the Bureau of Educational and Cultural Affairs also will create an Early STEM Research Initiative helping exchange visitors who enter the U.S. to engage in STEM research through host companies.[11]

Under the program, companies can partner with STEM sponsoring organizations to identify J-1 exchange visitors to fill positions and participate in educational experiences in 15 different education, research and professional development categories. Some notable categories include, but are not limited to, physicians, professors and specialists.[12]

How does this program benefit U.S. institutions and employers?

Through this program, organizations will have the opportunity to identify J-1 exchange visitors who can bring invaluable skills and knowledge to their company through the exchange program. This exchange of knowledge may be critical for higher education institutions, medical institutions and research institutions as they seek to meet continued talent demands in the current economic environment.[13]

Conclusion

The White House announcement aligns with policy priorities outlined by the Biden-Harris administration and is expected to allow companies to build on their recruitment and hiring strategies for certain foreign national employees. These changes also pave the way for keeping talented students and workers in the U.S. as a means to continue to spur growth of the U.S. economy.

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[1] <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/21/fact-sheet-biden-harris-administration-actions-to-attract-stem-talent-and-strengthen-our-economy-and-competitiveness/>.

[2] <https://www.govinfo.gov/content/pkg/FR-2022-01-21/pdf/2022-01188.pdf>.

[3] The full list of the 22 new fields of study and complete descriptions are available at <https://www.govinfo.gov/content/pkg/FR-2022-01-21/pdf/2022-01188.pdf>.

[4] <https://www.e-verify.gov/>.

[5] <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-ExtraordinaryAbility.pdf>.

[6] <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4#3>.

[7] 2 USCIS-PM M.4, <https://www.uscis.gov/policy-manual/volume-2-part-m-chapter-4>.

[8] USCIS Policy Alert, <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220121-NationalInterestWaivers.pdf>.

[9] 6 USCIS-PM F.5, <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

[10] <https://j1visa.state.gov/opportunity-for-academic-training-extensions-for-j-1-college-and-university-students-in-stem-fields/>.

[11] A presentation further detailing the program can be found at <https://j1visa.state.gov/wp-content/uploads/2022/01/Early-Career-STEM-Research-Initiative-1.pdf>.

[12] A full list of the categories is available at <https://j1visa.state.gov/wp-content/uploads/2017/06/Exchange-Visitor-Program-Category-Requirements.pdf>.

[13] More information regarding participation in the program can be found at the BridgeUSA website, at <https://j1visa.state.gov/programs/early-career-stem-research-initiative/#hosting-stem-exchange-visitors-the-process>.