

OKLAHOMA STATE REGENTS
FOR HIGHER EDUCATION



Improving our future by degrees

IMMIGRATION LAW AND HIGHER EDUCATION - HOT TOPICS

T. Douglas Stump and Matthew D. Stump
Immigration Attorneys



STUMP
& ASSOCIATES

Decline in Foreign Student Enrollment

Decline in Foreign Student Enrollment

Are you seeing declines in foreign student enrollment?

Are your foreign students expressing fear or stress as a result of recent policy changes?

Studies seem to suggest foreign students might be less willing to study at U.S. institutions than they were just a couple of years ago.

Decline in Foreign Student Enrollment

According to a report by The New York Times, campuses across the country, especially the Midwest, are being forced to make cuts due to a loss of international students.

Studies show a downturn in explosive growth in foreign student enrollment (currently over 1 million at US colleges and educational training programs).

Foreign students generally pay more than in-state students.

Account for \$39 billion in revenue in the U.S.

Began flattening in 2016 due to conditions abroad and increased competition from Canada, Australia and other countries.

The New York Times, 1/2/2018 - ***As Flow of Foreign Students Wanes, U.S. Universities Feel the Sting***

Decline in Foreign Student Enrollment

An analysis of U.S. Department of Homeland Security data by [the National Foundation for American Policy](#) has found that the number of international students enrolled at U.S. universities declined 4 percent between 2016 and 2017.

One of the primary reasons for that decline is a reduction in the number of students from India studying computer science and engineering in 2017.

Their ranks fell by 21 percent with 18,590 fewer graduate students enrolled in those programs last year.

- Forbes, 05/30/2018 - ***International Student Enrollment Declining In the U.S.***

Decline in Foreign Student Enrollment

The number of [F-1 visas](#) issued to foreign students seeking to attend college and other types of academic institutions in the United States decreased by 17% in the year that ended September 30, 2017, according to recent State Department data.

- CNN Money, 03/14/2018 - ***Sharp drop in international student visas worries some US colleges***

Decline in Foreign Student Enrollment

The headline findings of two international enrollment surveys released today: "Open Doors," a comprehensive annual survey of more than 2,000 colleges and universities that reports international enrollment numbers on a one-year delay, and a "snapshot" survey of about 500 institutions that reported on their international enrollment numbers for the current semester. The institutions that responded to the snapshot survey reported an average decline in new international students this fall of 7 percent.

- Inside Higher Ed, 11/13/2017 - ***New International Enrollments Decline***

ISSUES AFFECTING STUDENTS LAWFULLY PRESENT IN THE U.S.

- OPT STEM Extensions Under Scrutiny
- Effects of the Buy American Hire American Executive Order on Recent College Graduates - the Attack on Level One Wage Designations and Specialty Occupations (H-1Bs)
- F-1 to H-4 / H-1B 30-Day Rule
- Accrual of Unlawful Presence and F, J, and M Nonimmigrants
- DACA

OPT STEM Extensions Under Scrutiny

OPT STEM Extensions Under Scrutiny

Certain F-1 students who receive science, technology, engineering, and mathematics (STEM) degrees may apply for a 24-month extension of their post-completion optional practical training (OPT).

The Trump administration may attempt to eliminate via regulation STEM OPT (Optional Practical Training), the primary way the United States allows F-1 international students in science, technology, engineering and math (STEM) fields to work in America after graduation.

OPT = Optional Practical Training

- Generally defined, OPT is work authorization afforded to F-1 students following completion of their degree.
- Lawfully enrolled as full-time student for one academic year.
- May be employed anywhere by any employer but employment must be in field of study (see I-20).
- Initial 12 months of employment authorization but may receive additional 24 months if a qualified “STEM” graduate or eligible for “cap gap.”

OPT STEM Extensions Under Scrutiny

According to a National Foundation for American Policy Brief from October of 2017:

- STEM OPT was created by the Bush administration in 2008 to prevent the U.S. from losing outstanding students unable to obtain H-1B visas.
- The U.S. government has permitted work authorization for international students post-graduation since 1947.
- In 2008, the Bush administration extended OPT status an additional 17 months (29 months total) for international students in STEM fields.

OPT STEM Extensions Under Scrutiny

The October 2017 National Foundation for American Policy Brief continued:

- In response to litigation, the Obama administration formalized STEM OPT in a March 11, 2016 final rule, following a period of notice and comment, extending the period for international students in STEM fields by 24 months, or 3 years total, if certain conditions were met.
- It is this additional 2 years the Trump administration may rescind or seek to alter, although it is theoretically possible the 12 it, too, is subject to regulation and not enshrined in statute. months of OPT granted to all international students also could be at risk, since

OPT STEM Extensions Under Scrutiny

The impact is huge . . . 81 percent of full-time graduate students at U.S. universities in electrical engineering and 79 percent in computer science are international students.

Many of these students go on to utilize OPT to work for U.S. employers upon completion of their degree program. STEM OPT allows U.S. employers to keep foreign nationals employed while applying for another form of status and work authorization such as H-1B.

OPT STEM Extensions Under Scrutiny

The Trump administration has begun making changes to the OPT program to “ensure the integrity of the program and provide safeguards for U.S. workers.”

Now, any U.S. employer wishing to employ a student participating in the STEM OPT extension program must ensure that . . .

OPT STEM Extensions Under Scrutiny

1. The employer will have and maintain a bona fide employer-employee relationship with the student.
2. The employer has sufficient resources and personnel available to provide appropriate training in connection with the specified opportunity at the location(s) specified in the Form I-983, *Training Plan for STEM OPT Students*.
3. The STEM OPT student will not replace a full- or part-time, temporary or permanent U.S. worker.
4. The training opportunity will assist the student in attaining his or her training goals.

OPT STEM Extensions Under Scrutiny

Will additional requirements on the OPT program be imposed moving forward?

Only time will tell...

Buy American Hire American
Attack on Level One Wage
Designations and Specialty
Occupations (H-1Bs)

H-1B Specialty Occupation Visa

The H-1B is a nonimmigrant visa in the United States under the Immigration and Nationality Act, section 101(a)(15)(H). It allows U.S. employers to temporarily employ foreign workers in **“Specialty Occupations.”**

The regulations define a "specialty occupation" as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including but not limited to architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, business specialties, theology, and the arts, **and** requiring the attainment of a bachelor's degree or its equivalent as a minimum.

In short: a bachelors degree and specialized knowledge.

H-1B – Specialty Occupation Visa

The current law limits the number of aliens who may be issued a visa or otherwise provided H-1B status each fiscal year to 65,000. The law also affords up to an additional 20,000 H-1Bs to foreign nationals holding a master's or higher degree conferred by U.S. universities. Free Trade Agreements carve out from the numerical limit an additional 1,400 H-1Bs for Chilean nationals and 5,400 for Singaporean nationals.

There are some exceptions to the cap, including (but not limited to):

- ***H-1B Petitioners that are institutions of higher education.***
- H-1B petitioners that are nonprofits maintaining affiliation agreements with institutions of higher education.
- H-1B non-immigrants who work at (not necessarily for) universities and non-profit research facilities.

“BAHA” and the Attack on H-1B

On 4/18/17, President Trump signed an Executive Order entitled "Buy American, Hire American." The stated purpose of the "Hire American" portion of the order is to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering the laws governing entry into the United States of foreign workers.

In an effort to advance his "Hire American" policy, President Trump directed the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to propose new rules and issue new guidance to protect the interests of U.S. workers in the administration of the U.S. immigration system. In particular, President Trump highlighted the H-1B visa program, directing the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to suggest reforms to help ensure that H-1B visas are awarded to the *most-skilled* and *highest-paid* beneficiaries.

BAHA – Based H-1B RFEs

In response to BAHA guidance and in efforts ensure that H-1B visas are “awarded to the *most-skilled* and *highest-paid* beneficiaries,” USCIS implemented a policy shift in H-1B adjudications. In late summer 2017, the American Immigration Lawyers Association (AILA) began compiling samples of Requests for Evidence (RFEs) wherein USCIS argues 1 of 2 claims (or in some cases a hybrid of the two claims):

The Level One Attack: a slight majority of the samples involve an RFE claiming that the duties involved in the occupation do not justify a Level One wage designation. In other words, the first RFE type is one which requires the petitioner to demonstrate that the Level One LCA used in furtherance of the underlying H-1B is appropriate for the position given the complexity of the job duties.

The Specialty Occupation Attack: the second attack claims that the position set forth in the H-1B does not rise to the level of Specialty Occupation.

Changing from B-1 or B-2 to F-1 Issues

B-1/B-2 to F-1 Issues

In April of 2017, USCIS posted FAQs for B-1/B-2 visitors who wish to enroll in school. USCIS made clear in its announcement that individuals in B-1 or B-2 status who have violated their nonimmigrant status by enrolling in a course of study are not eligible to extend their B status or change to F-1 or M-1 status.

The FAQ cites the regulations at 8 CFR 214.2(b)(7), which specifically prohibit a course of study in the United States while in B-1 or B-2 status. The FAQ states “[b]efore enrolling in a course of study, individuals who are in B-1 or B-2 status must first acquire F-1 (academic student) or M-1 (vocational student) status. Enrolling in a course of study while in B-1/B-2 status will result in a status violation. Individuals in B-1 or B-2 status, who have violated their nonimmigrant status by enrolling in a course of study, are not eligible to extend their B status or change to F-1 or M-1 status.”

B-1 or B-2 to F-1 Issues

The FAQ goes on to state: “You must maintain your B-1 or B-2 status while your Form I-539 is pending. You will need to file a second Form I-539, with a separate fee, to request an extension of your B-1 or B-2 status if your current status will expire more than 30 days before the initial F-1 or M-1 program start date. We may approve your Form I-539 change of status request only if you are maintaining your B-1/B-2 status up to 30 days before your program’s initial start date. If your status will expire more than 30 days before your F-1 or M-1 program’s initial start date, you must file a second Form I-539 requesting to extend your B-1 or B-2 status. If you do not file this extension request on time, we will deny your Form I-539 request to change to F-1 or M-1 status.”

B-1 or B-2 to F-1 Issues

Bottom Line: USCIS will deny a student's change of status if he or she enrolls in school prior to changing status to F-1 or M-1 or if the B-1 or B-2 alien expires more than 30 days before the F-1 or M-1 program start date.

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

What is unlawful presence and how is it different than falling out of status?

Simply stated: unlawful presence (“ULP”) is defined as physical presence in the U.S. after the expiration of the period of stay authorized by the Department of Homeland Security or any presence without being admitted or paroled.

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

A foreign national who is out of status is subject to being placed in removal proceedings by the U.S. government.

A violation of status can also make it more difficult for one to obtain future immigration benefits, such as a visa approval or an extension of status.

Unlawful presence carries separate penalties that are triggered upon one's departure from the United States.

ULP penalties are severe . . .

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Big Problem:

INA § 212(a)(9)(B) and INA § 212(a)(9)(C):

Those who accrue “unlawful presence” in the US more than six months but less than a year, upon departure, have a three-year bar before they are allowed to apply for reentry.

Even Bigger Problem:

INA § 212(a)(9)(B) and INA § 212(a)(9)(C)

Those who accrue “unlawful presence” in excess of one year, upon departure, have a 10-year bar before they are allowed to apply for reentry.

Really Big Problem:

INA § 212(a)(9)(B) and INA § 212(a)(9)(C)

Those who accrue unlawful presence in excess of one year or are deported and leave but try to return to the US unlawfully have a non-waivable 10 year bar. AKA “The Permanent Bar”

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

Historically, a foreign student in F or J status who is present in the United States for “duration of status,” which is noted as “D/S” on the I-94, is typically considered in a period of authorized stay even if he or she commits a status violation and does not have a pending application or petition.

If this occurs, the individual does not begin to accrue unlawful presence until a formal finding of the violation of status is made. However, one who is in this situation is not permitted to remain in the United States and is subject to deportation.

UNTIL NOW...

USCIS Director Francis Cissna has changed this policy through See USCIS Policy Memo entitled Accrual of Unlawful Presence and F, J, and M Nonimmigrants published on August 9, 2018 (PM-602-1060.1).

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

“To reduce the number of overstays and to improve how USCIS implements the unlawful presence ground of inadmissibility under INA 212(a)(9)(B) and INA 212(a)(9)(C)(i)(I), USCIS is now changing its policy on how to calculate unlawful presence for F-1, J-1, and M-1 nonimmigrants, and their dependents (F-2, J-2, and M-2).”

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

The new policy clarifies that F, J, and M nonimmigrants, and their dependents, admitted or otherwise authorized to be present in the United States in duration of status (D/S) or admitted until a specific date (date certain), start accruing unlawful presence as follows . . .

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

F, J, or M nonimmigrants who failed to maintain nonimmigrant status before August 9, 2018 start accruing unlawful presence based on that failure on August 9, 2018, unless the alien had already started accruing unlawful presence on the earliest of the following:

- The day after DHS denied the request for an immigration benefit, if DHS made a formal finding that the alien violated his or her nonimmigrant status while adjudicating a request for another immigration benefit;
- The day after the Form I-94, Arrival/Departure Record, expired, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge ordered the alien excluded, deported, or removed (whether or not the decision is appealed).

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

An F, J, or M nonimmigrant begins accruing unlawful presence, due to a failure to maintain his or her status **on or after** August 9, 2018, on the earliest of any of the following:

- The day after the F, J, or M nonimmigrant no longer pursues the course of study or the authorized activity, or the day after he or she engages in an unauthorized activity;
- The day after completing the course of study or program (including any authorized practical training plus any authorized grace period, as outlined in 8 CFR 214.2);
- The day after the Form I-94 expires, if the F, J, or M nonimmigrant was admitted for a date certain; or
- The day after an immigration judge orders the alien excluded, deported, or removed (whether or not the decision is appealed).

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

When assessing whether an F, J, or M nonimmigrant accrued unlawful presence and was no longer in a period of stay authorized, the USCIS officer should consider information relating to the alien's immigration history, including but not limited to:

- Information contained in the systems available to USCIS;
- Information contained in the alien's record; and
- Information obtained through a Request for Evidence (RFE) or Notice of Intent to Deny (NOID), if any. The officer should follow current USCIS guidance on the issuance of RFEs or NOIDs.

Accrual of Unlawful Presence and F, J, and M Nonimmigrants

The period of stay authorized for an F-2, J-2, or M-2 nonimmigrant dependent (spouse or child) admitted for D/S or for a date certain is contingent on the F-1, J-1, or M-1 nonimmigrant remaining in a period of stay authorized. An F-2, J-2, or M-2 nonimmigrant's period of stay authorized ends when the F-1, J-1, or M-1 nonimmigrant's period of stay authorized ends. In addition, an F-2, J-2, or M-2 nonimmigrant's period of stay authorized may end due to the F-2, J-2, or M-2 nonimmigrant dependent's own conduct or circumstances.

The Unauthorized and DACA

The Unauthorized and DACA

How many unauthorized immigrants are in Oklahoma?

An estimated 85,000 unauthorized immigrants resided in the Oklahoma as of 2014.

55% of the unauthorized immigrants in Oklahoma had been in the US more than 10 years.

Top Countries of Birth:

- Mexico = 63,000 (74%)
- Guatemala = 7,000 (8%)
- Honduras = 4,000 (4%)

Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, former Department of Homeland Security (DHS) Secretary Janet Napolitano issued a memo announcing that DHS will offered “deferred action” for two years to certain young people who came to the United States as children and meet other eligibility criteria. Individuals who receive "Deferred Action for Childhood Arrivals," more commonly known as “DACA,” will not be placed into removal proceedings or removed from the United States for the duration of the grant. Individuals in removal proceedings, those with final orders or a voluntary departure order, and those who have never been in removal proceedings can affirmatively request deferred action from USCIS as long as they are not in immigration detention.

As of mid 2017, more than 788,000 individuals have received DACA.

Deferred Action for Childhood Arrivals (DACA)

Who was eligible to apply for DACA?

- Individuals who were out of status after June 15, 2012;
- Who Arrived to the United States before the age of 16;
- Those who had continuously resided within the U.S. from June 15, 2007 to the present time;
- Were physically present in the U.S. on June 15, 2012, and at the time of filing for deferred action with USCIS;W
- Were currently in school, had graduated from high school, had obtained a general education development certificate (GED), or were an honorably discharged veteran of the Coast Guard or armed forces of the U.S.;
- Had not been convicted of a felony or significant misdemeanor;
- Did not pose a threat to public safety or national security; and
- Were under the age of 31 as of June 15, 2012.

Deferred Action for Childhood Arrivals (DACA)

What is the current state of DACA?

On **June 29, 2017**, Texas and nine other states sent a letter to Attorney General Jeff Sessions stating that legal action would be taken to challenge DACA unless DHS agreed to “phase out” the program by rescinding the 2012 DACA memo and halting approval of any new or renewal DACA applications.

On **September 4, 2017**, Attorney General Jeff Sessions sent a letter to DHS Acting Secretary Elaine Duke stating the DACA was an “unconstitutional exercise of authority by the Executive Branch” and that legal challenges to the program would “likely” result in DACA being deemed unlawful.

On **September 5, 2017**, President Trump caved to their demands and rescinded the DACA program.

On **September 5, 2017**, Acting Secretary Duke issued a memorandum officially rescinding the program along with FAQs.

Those who had initial DACA applications pending before September 5, 2017 remain in place to have their applications adjudicated.

Current DACA recipient's whose DACA expires between September 5, 2017 and March 5, 2017 were allowed to file a renewal until October 5, 2017.

Deferred Action for Childhood Arrivals (DACA)

What is the current state of DACA?

On **February 13, 2018**, the U.S. District Court for the Eastern District of New York granted a preliminary injunction ordering the federal government to fully restore the DACA program, including accepting brand new applicants as well as renewals

On **February 26, 2018**, the Supreme Court declined to hear the Trump administration's request for it to review the lower court order that the administration must continue to accept DACA applications, so the Supreme Court will allow the Ninth Circuit to review the ruling.

On **April 24, 2018**, a Senior United States District Judge of the United States District Court for the District of Columbia ruled that the Trump administration must resume accepting new applications for DACA but stayed his decision for 90 days to allow the Department of Homeland Security to explain why the program was being canceled.

On **August 3, 2018**, the same Senior Judge said the Trump administration has failed to justify its proposal to end DACA. However, he stayed the ruling for 20 days to allow the Trump administration time to respond and appeal, if it chooses.

Deferred Action for Childhood Arrivals (DACA)

What is the future of DACA or a similar program?

Following the Trump administration's rescission of DACA, there has been increasing pressure from both Democrats and Republicans to pass a permanent legislative solution protecting Dreamers.

On June 12, 2018, Speaker Paul Ryan (R-WI) announced that the House of Representatives will hold votes on two immigration bills. The first, [H.R. 4760](#), sponsored by Judiciary Committee Chairman Bob Goodlatte (R-VA) included provisions that would cut legal immigration, mandate harsher enforcement tactics, criminalize unlawful presence, and provide protections for a small group of Dreamers.

The [second, H.R. 6136](#), backed by Speaker Paul Ryan, pairs Deferred Action for Childhood Arrivals (DACA) provisions with cuts to legal immigration and ballooning funding for enforcement.

On June 21, 2018, the vote on H.R. 4760 [failed](#): 193-231. No Democrats voted for the bill. Forty-one Republicans voted against the bill.

On June 27, 2018, H.R. 6136 failed on a [121-301 vote](#); 112 Republicans voted against the bill.

T. Douglas Stump

Doug Stump is Past President of the 15,000+ member American Immigration Lawyers Association (AILA) and a member of its Board of Governors. He has been listed in the Bar Register of Preeminent Lawyers since 1996 and is listed in “Best Lawyers in America” for immigration law. Mr. Stump was recently recognized in Oklahoma Magazine as one of the Top 50 Super Lawyers in Oklahoma and has been repeatedly selected by Best Lawyers as the Best Immigration Lawyer in Oklahoma. He is also listed in CHAMBERS and Partners Immigration Nationwide. He has co-edited over 30 books on immigration law and presented at more than 150 national and international conferences on immigration law.

Mr. Stump is the former General Counsel of the Oklahoma State Council for Human Resource Management and adjunct professor on Immigration Law at the Oklahoma City University School of Law.



Matthew D. Stump

Matthew D. Stump focuses his immigration law practice on employment-based nonimmigrant and immigrant visa matters, corporate compliance, and federal mandamus litigation. Mr. Stump has broad experience representing the world's most elite scientists, researchers, professors, executives, inventors, entrepreneurs, artists, entertainers, musicians, and athletes. He counsels industry-leading multinational corporations, start-ups, government agencies, non-profits, medical and applied research organizations, and universities in efforts to recruit and retain highly skilled foreign employees utilizing E, H, L, O, P, and TN nonimmigrant visas and in efforts to procure green cards under the extraordinary ability, outstanding researcher, multinational manager, and national interest waiver categories. He places special emphasis on counseling clients through the arduous Alien Labor Certification (PERM) process.

Mr. Stump is Chair of the American Immigration Lawyers Association U.S. Department of Homeland Security Service Center Operations (SCOPS) Liaison Committee and is a member of AILA's USCIS HQ Liaison Committee. He was previously Chair of AILA's Vermont Service Center Liaison Committee and was a member of AILA's Ombudsman Service Center Operations Committee (2017-18) and was Chair of the AILA Interagency Committee for the same tenure. He served four years as AILA's Liaison to the Oklahoma City Sub-Office of the U.S. Citizenship and Immigration Services and served on the AILA National Distance Learning Committee from 2012 to 2013.



Contact Information

T. Douglas Stump: dstump@usvisagroup.com

Matthew D. Stump: mstump@usvisagroup.com

Stump & Associates, P.C.

6307 Waterford Boulevard, Suite 222

Oklahoma City, OK 73118

(405) 879-0800