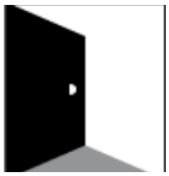

THE LEGAL IMMIGRANT

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EPISODE 11

U.S. Immigration Risks in Claiming F-1 OPT or H-1B Status When There is No Real Job

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Are you an F-1 student or H-1B worker who claimed to work for a U.S company when there was no actual job?

Did the company issue W2s or pay stubs showing you were paid when you really were not?

If you seek to maintain F-1 OPT, F-1 STEM OPT or H-1B status through employment – when there is no real job – you run the risk of being found inadmissible under INA 212a6ci. This law states that you have a lifetime bar if you engage in fraud or willful misrepresentation of a material fact to obtain a U.S. immigration benefit.

Even if you keep your status or visa for now, the bar can be raised at any time in the future. Sometimes years later. Toms

This is Episode 11 – U.S. Immigration Risks in Getting F-1 OPT or H-1B When There is No Real Job.

Hello and Welcome to the Legal Immigrant podcast. My name is Dyan Williams, your host and a U.S. immigration attorney at Dyan Williams Law.

F-1 OPT and F-1 STEM OPT students and H-1B workers must be careful about the employers and petitioners they associate with. Through various methods – such as workplace site visits and data tracking – US immigration agencies may question the legitimacy of OPT and H-1B employment.

Even if there are no criminal charges or conviction against the employer – like there were against Findream and Sinocontech's owner – a company can still be flagged for noncompliance with U.S. immigration and labor laws. This includes providing fake employment verification or failing to provide the required training and work experience.

Fake doesn't mean the verification didn't actually come from the employer or its authorized personnel. Rather it's a situation where there are no real, job-related tasks or activities to do. Or it involves an F-1 STEM OPT or H-1B position that has to be paid, but no actual payment is going into your pocket or bank account.

US Customs & Border Protection, USCIS, and U.S. Embassies and Consulates routinely share information and lookouts with each other.

Each agency can make the INA 212(a)(6)(C)(i) charge in different contexts.

The CBP may refuse admission at a U.S. port of entry, whether you're traveling by land, sea or air. While they could allow you to withdraw your application for admission, they may instead issue an expedited removal order. The removal order itself creates a 5-year bar to reentry under INA 212(a)(9)(A). If they add an INA 212(a)(6)(C)(i) bar, this creates a lifetime inadmissibility. And they will cancel or revoke your visa under federal regulation.

USCIS may deny an extension or change of status request based on a fraud/misrepresentation charge. The issue may be raised in a Form I-539 application for extension/change of status, a Form I-765 application for employment authorization, or a Form I-129 petition especially when it includes a status change/extension request.

A U.S Consulate or Embassy may refuse a new visa under INA 212(a)(6)(C)(i). If it's an F-1 visa, they may further deny it under INA 214(b), failure to overcome presumption of immigrant intent (simply due to violation of status). If you're in the U.S., they can also send you an email stating your visa has been revoked so that you will not be able to use it for re-entry if you depart the U.S.

Here are some key F-1 OPT and STEM OPT rules to follow:

When you're an F-1 international student, you have limited time to secure employment to avoid falling out of post-completion OPT status. OPT is Optional Practical Training.

F-1 students may apply for employment authorization to work in their field before or after completing their studies. You may apply for up to 12 months of OPT before completing studies and/or after completing studies. If you had pre-completion OPT, this period will be deducted from the available period of post-completion OPT.

To get post-completion OPT, you submit the Form I-765, Application for Employment Authorization, as early as 90 days before and no more than 60 days after completing your studies. You do not need to have a job offer at the time you file for post-completion OPT.

Students with degrees in STEM (designated Science, Technology, Engineering and Math fields) may apply for an additional 24 months of work authorization. This is known as 'STEM OPT Extension'. You must have a job offer from an E-Verified company at the time you file for STEM OPT extension. You may apply for it up to 90 days before your post-completion OPT expires and within 60 days of the Form I-20 issuance by your Designated School Official (DSO). You cannot file for STEM OPT extension after your post-completion OPT expires.

During the OPT period, you may be unemployed but only for a limited number of days. With Post-Completion OPT, your grace period of unemployment is up to 90 days. If you're unemployed for more than 90 days, you fall out of status. With the 24-month STEM OPT extension, you have an additional grace period of unemployment of up to 60 days. If you're unemployed for more than 150 days during the entire post-completion OPT period, including regular OPT and STEM OPT period, you fall out of status.

Depending on the context, the CBP, USCIS or the US Consulate/Embassy may request information or documentary evidence showing you maintained status. If you claimed employment with a flagged company, you can expect some complications in your case. The situation is more problematic if – but for your association with this company – you would exceed the unemployment grace period.

What does employment mean?

An offer letter doesn't necessarily lead to employment. Even if you report the start date, based on a job offer, to your school, and the SEVIS records and I-20 get issued, these factors alone don't mean you're employed. If you're not actually doing work or training in your field of study, there's no real employment, from the U.S. government's perspective.

You need to watch out for the unemployment rules to avoid falling out of status. Failure to maintain F-1 status means you will be ineligible for a change of status, like H-1B, or for extension of status to complete further studies.

With Post-Completion OPT, the position must be related to your major area of study. It can be a paid job, a paid internship, an unpaid internship, volunteer work, contract work, agency work, or even self-employment.

Although you don't have to get paid, the tasks you perform must relate to your field of study and not violate U.S. labor laws. For example, the volunteer work should not be a normally paid position. The student reports all employment to their DSO to maintain status.

The position could be part-time or full-time, but must include at least 20 hours of work per week. You may have more than one employer to have the minimum number of work hours.

STEM OPT Extension, the position must be related to your field of study and be paid. Unpaid internships, volunteer work and self-employment are not allowed. The employer has to be enrolled in the 'E-Verify' program.

STEM OPT candidates must work at least 20 hours a week and perform tasks in accordance with the Form I-983, Training Plan for STEM OPT Students. You may work for more than one employer, but each employer has to be in the E-Verify Program and submit a separate Form I-983. Both the employer and student sign the form. The I-983 is submitted with the Form I-765, Application for Employment Authorization, to USCIS.

H-1B employment involves more paperwork. It too requires a real job and the position has to be paid as stated in the Labor Condition Application and in the Form I-129 Petition. The position must be a specialty occupation that requires a bachelor's degree in the specialty area and the beneficiary must have the required degree and qualifications.

F-1 students with a timely filed H-1B petition and whose F-1 work authorization will expire before the H-1B begins (earliest October 1), may be eligible for a cap-gap extension in the U.S. In many cases, the OPT or STEM OPT employment is what allows the F-1 student to change to H-1B status without departing for visa processing at the U.S. Consulate.

F-1 and H-1B visa fraud schemes are a major problem for international students and foreign national workers who use fake job offers to obtain a work permit.

Immigration agencies may do on-site visits to confirm the visa holder is actually working for the employer and performing the appropriate duties. When little-known companies like Findream and Sinocontech showed a high number of F-1 OPT and STEM OPT workers, this prompted further investigation.

In March 2019, the United States filed a criminal complaint against the owner of Findream. In an affidavit, the FBI Special Agent stated it was a company on paper only, with no actual physical presence, and was created to provide false employment verification to F-1 students seeking OPT.

The indictment stated that Huang advertised Findream as a "startup company in technology services and consulting," with clients in China and the U.S. They heavily recruited F-1 students from China using a WeChat platform.

Findream and Sincontech did not deliver any services, or employ any of the persons who responded to the ads, the indictment stated. In exchange for a fee, they provided job offer letters and employment verification letters as proof of employment, the charges alleged. Falsified payroll records and tax forms were also said to be provided.

Many F-1 and H-1B visa holders, particularly from China, had their visas revoked or denied or were refused entry to the United States (following travel abroad) because they had listed Findream or Sinocontech to receive work authorization.

F-1 and H-1B visa holders, most from India, also face U.S. immigration and visa problems if they listed Integra Technologies LLC, AZTech Technologies, Andwill, Wireclass or Tellon Trading to obtain OPT, STEM OPT or other work permit. Problems include refusal of entry to the US, visa denials, visa revocations, and denials of change/extension of status requests. In some cases, a 212(a)(6)(C)(i) charge is made.

There are more Requests for Evidence (RFE) and Notices of Intent to Deny (NOID) by USCIS to I-765 STEM extension applicants and H-1B petitioners for similar reasons. The RFE or NOID often requests a complete employment history (including start and end dates) and proof of employment for the initial grant of OPT. The notice will list examples such as letters from employer(s) establishing job title(s), duties, location, pay rate, and number of hours worked per week. It will also request copies of your earning statements/pay stubs and copies of your W-2s. It may ask if you worked for an employment agency or consultancy, you must provide evidence of the jobs you worked on and dates worked. It also asks for information on remote work and client sites.

Giving a job offer letter is not enough because this just shows an offer was made, not that you actually worked at the company. And if you claim to have performed certain duties, when you did not, this is a misrepresentation. And if you fail to disclose

your association with a flagged company, but your I-20 or other records reflect this employment, you may be hit with a 6ci charge.

Fraud or willful misrepresentation of material fact to obtain a U.S. immigration benefit is a permanent inadmissibility ground. It's a tough bar to overcome.

Federal agencies have made it a priority to deter and detect immigration fraud and have increased site visits, interviews, and investigations of petitioners who use the F-1 OPT and H-1B visa programs.

If you're seeking to get or maintain F-1 OPT or H-1B status, you must watch for 3 key indicators that the petitioner/employer may be flagged:

1) Does the company require you to pay a training fee, including before it issues the job offer letter or Form I-983 training plan? They might offer to give you training, work experience, client contact and networking experience, but first you have to pay the fee. A $200 to $400 fee might seem reasonable, but you really should not be paying a fee for training that the employer ought to be offering as part of its obligations.

   As the beneficiary, you have no or little data on how many F1 or H1B applicants they are associated with, or whether they are complying with the laws and rules, but the U.S. immigration agencies do. These companies can be quite aggressive in their recruitment, advertising and outreach, and often market specifically to foreign nationals in F-1 and H-1B status.

2) Does the company fail to assign roles and responsibilities as stated in the job offer letter, Form I-983 for STEM OPT, or Form I-129 Petition for H-1B? Is your workplace location the same as what's reported to USCIS and the Department of Labor? You might fill out onboarding paperwork and get a welcome packet, but is any real work or training opportunities being assigned to you? You might get a bit of training or materials to read here and there. But as the days, weeks and months go by, it starts to become obvious that there's no real work. F-1 OPT and F-1 STEM OPT students must perform tasks for at least 20 hours per week. H-1B workers may have flexible hours, but still need to be paid regardless of whether have no assignments.

   If you have a lot of idle time, it's time to find a new job. Again, you need to be working at least 20 hours per week to maintain F-1 OPT or F-1 STEM OPT. And you have to be receiving pay for a STEM OPT or H1B job. While you're looking for a new job, follow up with the employer about work assignments. Keep a paper trail, whether in the form of emails, text messages, telephone records, letters, and so on. You want evidence to show you did what you could to maintain status and any violation is not willful on your part.

3) Does the company offer employment verification, pay stubs and W2s when there was actually no real work or no pay received for an F-1 STEM OPT or H-1B position? This is where you have the most problems.

While the employer is responsible for assigning work, the employee/beneficiary bears responsibility in what they submit to the U.S. immigration agency. So if, for example, a new employer is filing an H-1B petition for you, and you give them an employment verification letter or paystubs from a prior employer that failed to assign real work or failed to provide real pay for what was supposed to be a paid position, it's harder to challenge a fraud or misrepresentation charge.

The longer you're associated with a flagged company, the more U.S. immigration risks and visa problems you will have. As soon as you find out there's no real job, move on quickly.

If you're running out of time, you might be tempted to use fake employment to maintain status or stop the accrual of unlawful presence. But you run the risk of not only falling out of status, but also being charged with a lifetime inadmissibility bar under INA 212(a)(6)(C)(i). US immigration agencies are less forgiving when it comes to fraud or misrepresentation. It basically means you've been found to have lied to the U.S. government to gain an immigration benefit.

Have you been associated with a flagged company like Findream, Sinocontech, Integra or AzTech? Have you encountered U.S. immigration and visa problems because of your work history?

Contact me through my website at dyanwilliamslaw.com to request a consultation and to discuss possible remedies. In the meantime, check out the show notes for links to more resources on this topic.

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