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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.



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Katherine Westerlund
Policy Chief (Acting)
Student and Exchange Visitor Program
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20536

REF: DHS Docket No. ICEB-2015-0002, Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students

Dear Ms. Westerlund:

The Federation for American Immigration Reform (FAIR) submits the following comments to the U.S. Department of Homeland Security (DHS) in opposition to the proposed rule, as published in the Federal Register on October 19, 2015. (*See* 80 F.R. 63376)

FAIR is a nonprofit, nonpartisan public interest membership organization of concerned citizens who share a common belief that our nation’s immigration policies must be reformed to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. Since 1979, FAIR has been the leading voice advocating for true immigration reform, promoting an agenda that serves the interests of the American people.

The proposed rule seeks to significantly expand the number of foreign science, technology, engineering, and mathematics (STEM) degree-holders allowed to work in the United States. Specifically, DHS intends to make foreign nationals here on a student visa eligible to work for 36 months *after* receiving STEM degrees. The rule includes an additional grace period of authorization for aliens who subsequently receive an H-1B nonimmigrant visa—known as “Cap-Gap” relief. The rule also requires employers who hire foreign nationals on a student visa to establish a mentor training program to aid the alien in their professional development. The rule contains other components as well,



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ranging from supposed wage protections to increased accountability from American universities.

Upon review, FAIR has concluded that the proposed rule serves no legitimate interest and harms American workers, especially recent graduates with STEM degrees. Instead, the proposed rule only benefits the technology industry's desire for a reliable supply of lower cost labor. Foreign nationals would be taking jobs that otherwise would go to U.S. citizens. FAIR believes that our immigration system should supplement the American workforce not replace it. **This rule is contrary to these principles, therefore, FAIR urges DHS to abandon the proposed rule.**

OPT Exceeds the Student Visa Statutory Authorization

The U.S. Constitution grants Congress the plenary authority to make immigration laws. Article I, Section 8 of the Constitution declares that Congress has the power to “establish an uniform Rule of Naturalization.” (U.S. CONST. Art. I, sec. 8, cl. 4) The Supreme Court has interpreted this provision as granting Congress exclusive power over immigration policy. In *Galvan v. Press*, the Court held that “the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” (*Galvan v. Press*, 347 U.S. 522, 531 (1954)) Similarly, in *Kleindienst v. Mandel*, the Court ruled, “[t]he Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” (*Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972))

Through the legislative process, Congress has established criteria for foreign nationals to enter the country to obtain an education. According to Immigration and Nationality Act (INA) Section 101(a)(15)(F)(i), the criteria for admission on a student visa requires “an alien having residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study....” (8 U.S.C. § 1101(a)(15)(F)(i)) Consistent with federal law, these aliens are required to depart the U.S. within 60 days of graduating. (8 C.F.R. § 214.2(f)(5)(iv)) Thus, Congress clearly intended the F-1 visa to be limited to *bona fide students* who temporarily enter the U.S. *solely* for educational purposes; work authorization is noticeably omitted from the criteria. Congress intends for these students to take training acquired here and put it to work in their home countries.

Instead, the authorization of work on a student visa—now known as Optional Practical Training (OPT)—is merely the creation of the Executive Branch, implemented through the regulatory process. In 1952, when the current student visa was created, work on the student visa was (1) limited to the period the alien was actually enrolled at the school, (2)

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the work was part of the curriculum, (3) it was conducted by a training agency, and (4) the duration of work authorization was determined by the training requirements. (8 C.F.R. § 125.15(b) (1948)) Since this initial executive authorization, however, various administrations have continued to expand the scope of OPT without Congressional action, culminating in the 2002 removal of the requirement that aliens on OPT be enrolled at a school. (67 Fed. Reg. 76,256 (Dec. 11, 2002) (codified at 8 C.F.R. §§ 103, 214, 248, 274a)) By 2007, DHS was allowing all graduates to remain in the country to work for up to a year under OPT despite a statutory mandate to ensure that aliens admitted on student visas depart the country when they are no longer students. (*Compare* 8 U.S.C. § 1184(a) *with* 8 C.F.R. § 214.2(f)(10) (2007))

In 2008, DHS abandoned all pretext that OPT was geared towards *students*. At the behest of the deep-pocketed technology industry, the George W. Bush administration extended the period of OPT for aliens on an F-1 visa with a STEM degree by an additional 17 months—for a total of 29 months of work authorization *after* degree completion. (73 Fed. Reg. 18,944-56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a)) DHS even admitted during the 2008 STEM OPT extension that the purpose was to create a “significant expansion” in the amount of foreign labor available to employers. (73 Fed. Reg. 18,953) Along those lines, in 2011 the Obama administration greatly enlarged the number of majors that qualify for the STEM OPT extension to over 300 different fields, including Animal Breeding, Social Psychology, and Data Processing. This expansion was contrary to Congressional intent.

Fortunately, the judiciary finally intervened and struck down the 2008 STEM OPT extension. The case, *Washington Alliance of Technology Workers v. USDHS (WashTech v. DHS)*, was brought by the Immigration Reform Law Institute—FAIR’s legal affiliate—on behalf of several displaced American technology workers. (Civil Action No. 14-529) In August, the U.S. District Court for the District of Columbia held that DHS failed to comply with the Administrative Procedure Act (APA) when it bypassed the public notice and comment process mandated by the APA. The court vacated the 17 month STEM OPT extension, effective February 12, 2016.

Yet, rather than let the STEM OPT extension expire in accordance with *WashTech* and return the F-1 student visa program closer to its legislatively intended purpose, DHS is doubling down on its executive overreach. The proposed rule intends to make foreign nationals here on a student visa eligible to work for 36 months after receiving STEM degrees, or seven months longer than the 29 month STEM OPT extension the *WashTech* court struck down. Indicative of the executive power grab, DHS made the proposed rule subject to only a 30-day comment period rather than the customary 60-day timeframe. Tellingly, this truncated comment period is intentionally designed to allow the rule to go into effect on February 13, 2016 which corresponds with when the 2008 STEM OPT extension will be vacated. Effectively, DHS will never have to stop processing applications if it decides to implement the proposed rule.

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FAIR believes that the OPT program in general, and the STEM OPT extension in particular, vastly exceeds the scope of what Congress authorized through the F-1 student visa. Allowing foreign nationals to work on a student visa for up to three years after degree completion, stretches the definition of “student” beyond any rationally accepted meaning of that term. The duly enacted student visa provision is clear: a *bona fide student* temporarily in the country *solely* for the purpose of pursuing the course of study. Upon degree conferral, these individuals can no longer legitimately be considered students. The award of work authorization, for any time, violates the limitation that the individual on the student visa be here solely for the purpose of pursuing a degree. Accordingly, FAIR calls on DHS to scrap the proposed STEM OPT extension because only Congress has the authority to make changes to our immigration laws, and this expansion is disruptive of the *American* labor market.

STEM OPT is Improper End-Run Around the H-1B Cap

It is undeniable that the STEM OPT expansion is a blatant attempt to circumvent statutorily established limits on the H-1B nonimmigrant visa program. The typical way tech employers bring in foreign workers is on H-1B temporary visas. Created in 1990 by Congress, the H-1B visa is supposed to be for “persons in specialty occupations.” (INA §101(a)(15)(H)(i)(b); 8 U.S.C. § 1101(a)(15)(H)(i)(b)) The annual cap for H-1B visas is currently set at 65,000 with an additional 20,000 visas set aside for foreign-born graduates with at least a master’s degree from a U.S. university. (INA § 214(g); 8 U.S.C. § 1184(g)) The H-1B program is particularly attractive to employers because they can *legally* pay H-1B workers less than the market rate. Although employers are required to pay H-1B workers the “prevailing wage,” that statutory term is flawed and filled with loopholes that it allows employers to undercut wages in full compliance with the law. (See INA § 212(n); 8 U.S.C. § 1182(n); see also MATLOFF, NORMAN, [How Widespread Is the Use of the H-1B Visa for Reducing Labor Costs?](#), updated July 19, 2011)

Unsurprisingly, the H-1B cap is met almost every year because it provides tech employers with an exploitable supply of cheap, immobile labor. Despite the intense lobbying effort by industry lobbyists, Congress has declined to pass legislation increasing the H-1B cap. In the absence of legislation, the industry decided to bypass Congress and seek access to more cheap foreign labor from the Executive Branch. Indeed, the judge in the *WashTech* case observed that DHS had improperly considered the desires of Microsoft CEO Bill Gates and other “interested stakeholders” when the Executive Branch illegally implemented the 2008 STEM OPT regulation in violation of the APA. (*WashTech v. USDHS* (Civil Action No. 14-529))

It is clear that the STEM OPT extension is designed to circumvent the statutory limits on H-1B guest workers. Allowing aliens to work on an F-1 student visa for 36 months beyond the completion of the degree, is incompatible with the statutory framework for

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the student visa. Moreover, the sole purpose of the “Cap-Gap” provision is to keep these aliens here as they transition to H-1Bs. This alone demonstrates that the beneficiaries of STEM OPT are exactly the individuals companies seek to utilize through the H-1B program.

By implementing the STEM OPT extension through regulation, DHS is rewriting our immigration laws through executive fiat. First, the STEM OPT disregards the congressionally established eligibility criteria for the F-1 visa. The definition of an F-1 visa holder is designed as a limitation on who may qualify for that program. Permitting three years of work authorization beyond the course of student ignores the requirements that an F-1 visa go to a “*bona fide student*” and “*solely for the purpose of pursuing a course of study.*” (INA § 101(a)(15)(f)(i); 8 U.S.C. § 1101(a)(15)(f)(i) (emphasis added)) Additionally, allowing an F-1 alien to remain after completing the course of study, DHS is failing to adhere to its mandatory duty of ensuring aliens leave the country when they no longer have the status for which they were admitted. (8 U.S.C. § 1184(a)) Finally, given the direct correlation between the STEM OPT, “Cap-Gap,” and the H-1B program, *it is clear that the administration is impermissibly attempting to bypass the H-1B cap established by Congress to increase the available pool of cheap foreign labor.*

The STEM OPT Extension Does Not Serve a Legitimate National Interest

Additionally, FAIR urges DHS to reconsider implementing the STEM OPT extension because the proposed rule does not serve a legitimate national interest. Instead, DHS continues to materially misrepresent the viability of the American STEM market. Reiterating the claims from the 2008 proposed rule, DHS noted that the “STEM labor shortage” was “well documented” and the rule “addressed the severe shortage of U.S. workers in science, engineering, mathematics, and technology.” (Proposed Rule at 51) DHS’s justification is patently false. Indeed, the court in *WashTech* expressly rejected the government’s claim of a STEM shortage as a justification for circumventing the APA’s notice-and-comment period. The presence of a STEM worker shortage was not true in 2008 nor is it true today.

Rather than serving a national interest, the proposed rule is an assault on American STEM workers. If a genuine shortage existed, salaries would necessarily have risen dramatically over the years according to the basic principles of supply and demand. Instead, wages remain flat while profits skyrocket. Instead, there are approximately two million unemployed Americans with a STEM bachelor’s degree or higher, 10 million Americans with STEM degrees working in non-STEM fields, and major tech companies like Microsoft and Hewlett-Packard have laid off tens of thousands of employees. Clearly, the addition of hundreds of thousands of foreign STEM workers will continue to adversely affect job opportunities and wages of qualified Americans.

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Recent American STEM graduates will be particularly harmed by the proposed rule because OPT provides significant financial incentives for companies to bypass or discriminate against American workers. Specifically, because STEM OPT workers are considered “students” even though they graduated, they are exempt from the payroll tax. This amounts to an employer savings of \$10,000 per year per STEM OPT worker. DHS is aware of the payroll tax savings because it was brought up in the *WashTech* case. The failure to account for it here further illustrates that this rule is designed to benefit special interests rather than the national interest. Thus, employers will seek out STEM OPT workers over recent American STEM graduates, resulting in U.S. citizens missing out on quality jobs as they struggle to repay their massive student loans.

Along these lines, the worker protections DHS claims are built into the STEM OPT program are a mirage. Although employers must attest, among other things, that they “will not terminate, lay off, or furlough a U.S. worker as a result of providing the STEM OPT to the [foreign national on the student visa],” this is insufficient. (*Id.* at 52) First, this fails to account for employers hiring foreign workers *instead of* U.S. workers. This will be particularly true of recent American college graduates who will simply not be selected for the job and thus are not covered by the attestation. Additionally, DHS requires “the terms and conditions of an employer’s STEM practical training opportunity—including duties, hours and compensation—be commensurate with those provided to the employer’s similarly situated U.S. workers. (*Id.* at 53, citation omitted) This is similarly flawed. As mentioned above, DHS fails to take into account the payroll tax exemption in the footnote defining “compensation,” guaranteeing that foreign STEM workers will be the preferred (i.e., cheaper) hire. (*Id.*) Additionally, the proposed rule fails to provide a definition of “commensurate,” allowing a broad interpretation that includes a wage discount compared to the existing workforce.

In fact, the interests of the primary “stakeholders” in immigration policy—the American people—are completely omitted from DHS’s rationale for the STEM OPT rule. Throughout the proposed rule, DHS only identifies the “benefits” to (1) the foreign nationals allowed to work on a student visa for three years after graduation; (2) U.S. universities; and (3) U.S. employers. Noticeably absent from both the “benefit” and “cost” discussion is any mention of recent American STEM graduates or middle class workers in general—namely lost or depressed wages and dependence on unemployment and other taxpayer-provided benefits.

While the proposed rule undoubtedly benefits the above special interest groups, DHS’s claimed national benefit is without merit. Specifically, DHS claims that “international students have historically made *significant contributions* to the United States, both through *the payment of tuition and other expenditure* in the U.S. economy.” (*Id.* at 26)(emphasis added) FAIR rejects the notion that paying tuition to an American university or otherwise spending money in the U.S. economy constitutes a “significant contribution.” DHS’s comments on universities are even less persuasive. “And public

colleges and universities particularly benefit from the payment of tuition by foreign students, especially in comparison to the tuition paid by in-state students.” (*Id.* at 27) DHS then goes on for several pages to highlight the benefits of having international students attend American universities. (*Id.* at 26-28) However, that is completely irrelevant to whether foreign nationals who entered the country on a student visa should be allowed to stay in the country and work for up to three years after earning the degree. *And, as repeatedly stated above, employers benefit at the expense of American workers.*

Formal Mentoring Program Further Benefits Foreign Workers at Expense of Americans

The attack on American workers continues through the mandatory mentoring and training program employers must provide STEM OPT workers. According to DHS, “real-world experience is a vital part of the educational experience.” (*Id.* at 43) “Mentoring is a time-tested and widely used strategic approach to developing professional skills.... As part of this mentoring and training program, the employer would agree to take responsibility for the student’s (sic) training and ensure that skill enhancement is the primary goal.” (*Id.*) DHS declares that “STEM students in particular may benefit from an extended period of time in practical training.” (*Id.* at 25) Yet, at no point in the 107 page proposed rule does DHS advocate or encourage employers to offer practical training for *American* STEM students.

Clearly, the mandatory mentoring program further benefits the foreign STEM OPT workers at the expense of Americans. If mentoring is so beneficial at the early stages of a STEM career, FAIR finds it objectionable that DHS is more concerned with promoting the career advancement of foreign nationals while leaving Americans behind the curve. The inability to receive—and benefit from—employer mentoring will interfere with the ability of recent American STEM graduates to succeed in the workplace. The opportunities to enter the STEM workforce are already limited; the Executive Branch should not impose additional obstacles to thwart the career development of American workers without the approval of Congress.

FAIR believes the mandatory mentoring program component in the proposed rule demonstrates that STEM OPT violates the INA and is a special interest program without merit to American STEM graduates or the broad public interest. Despite proclaiming the importance of mentoring, DHS never suggests that American STEM graduates could benefit from it. If DHS believes Americans are already poised to succeed without mentoring, then foreign STEM OPT workers are necessarily inferior. Additionally, the need for mandatory training contradicts the claims by the technology industry that it needs foreign workers because there are not qualified Americans to do the job.

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DHS Materially Misrepresents Public Support for Proposed Rule

DHS materially misrepresents the support it has for the proposed rule. Referencing the 2008 STEM OPT rule that the *WashTech* case struck down, DHS mentions that the public comments received were “overwhelmingly positive.” (*Id.* at 25) Doubling down, DHS adds that “the vast majority of commenters—including students, educational institutions, advocacy groups, and STEM employers—expressed strong support for the rule’s main provisions.” (*Id.*) It is clear from the context of the proposed rule that DHS means foreign nationals allowed to work on a student visa after degree completion when they use the term “student.”

FAIR objects to DHS’s reliance of input from the special interests that directly benefit from the proposed rule to perpetuate the myth that the proposed rule is widely supported. Predictably, foreign nationals who are allowed to remain in the country for three years beyond their education and work for wages higher than in their home country support the rule. It is inappropriate for DHS to consider any of their comments when evaluating the proposed rule. Second, it is unsurprising that U.S. universities support the rule because they directly benefit from the higher tuition rates foreign students pay. FAIR believes that only Congress, which is elected by the American people, should set the criteria for alien admissions rather than be dictated by university presidents. Finally, employers obviously favor the proposed rule because it gives them access to a large, reliable source of cheap labor that is unlikely to switch jobs.

The voice DHS should actually give weight to is the American people. FAIR believes it is clear they do not support STEM OPT because the rule has the effect of taking away good jobs from Americans and suppressing wages for those fortunate enough to have a STEM job. Alarming, DHS appears uninterested in hearing from American STEM graduates and workers. “In particular, DHS requests comment from STEM students, educational institutions, and employers on the appropriate STEM OPT extension length to ensure that practical training for STEM students is most meaningfully educational and beneficial to them, and less disruptive for institutions and employers.” (*Id.* at 39) The omission of the American people underscores the fact that the proposed rule (1) violates the INA and does not serve the national interest; (2) harms and discriminates against American workers; and (3) functions only to the benefit of narrow special interests.

Sincerely,

Robert Law
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