

Questions for the Record from Chairman Grassley
Senate Committee on the Judiciary Hearing:
The Impact of High-Skilled Immigration on U.S. Workers
February 25, 2015

Question for Mr. Miano and Prof. Hira

RE: “Hacking” of the H-1B Program

Mr. Miano and Professor Hira: According to recent press reports, there is now a growing movement amongst some U.S. employers, universities, venture capitalists, and even some state and city governments, to “hack” the H-1B visa program in order to open up the program to more foreign workers. Each of you touched briefly on this in your testimony.

Would you please expand on your understanding of these schemes to “hack” the H-1B program and how they work?

I believe this area of the H-1B needs to be explored much further. An Inspector General’s investigation or an evaluation by the Government Accountability Office could help shed light on this rather murky area of H-1B usage.

My understanding is that the universities are exploiting two vulnerabilities in their privileged status as employers in the H-1B program.

First, as direct employers universities are exempt from the cap and are subject to looser prevailing wage rules. Universities are stretching the meaning of their employer-employee relationship. The H-1B worker is technically an employee of the university but in practice, the employee has very minimal, if any, duties with the university. The principal reason for the employment relationship with the university is to skirt the H-1B rules that apply to other types of employers. My understanding is that the recent scandal involving Wright State University in Ohio was a case where the university essentially had no employment relationship in practice with H-1B workers it was sponsoring.

The second vulnerability has to do with those employers that are “affiliated with” or “related to” a university or government research institution. While USCIS has issued policy guidance on what constitutes affiliation, the language is still quite vague. A full accounting of how these affiliations are being used is long overdue.

The number of H-1Bs that are exempt from the cap has been large and growing. In recent years it has been annually between 40,000 and 50,000. That’s about half of the 85,000 cap. How these

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exemptions are being used and why is an area that needs much more scrutiny, especially given how entrepreneurial universities have become.

**Responses by Dr. Ronil Hira to
Senator Jeff Sessions' QFRs
For Feb 25 2016 hearing, US High Skilled Immigration**

**Senator Jeff Sessions
Questions for the Record
Dr. Ronil Hira
Associate Professor of Public Policy
Howard University**

1. In his testimony, Mr. O'Neill said that senior software developers earn salaries equal to, or above, that of a United States Senator. What share of H-1B workers are paid salaries as equal to, or higher than, that of a United States Senator?

According to the U.S. Senate website, Senators have been paid \$174,000 per year since 2009. In fiscal year 2013, there were 122,902 H-1B I-129 petitions approved by USCIS for new workers. Of those 2,232 H-1B workers were paid \$174,000 or more. Only 1.8% of H-1B workers are paid a salary equal to or higher than a United States Senator. For Computer Occupations, the fields that Mr. O'Neill was specifically referencing, 176 of the 75,616 approved H-1B workers, a mere 0.2% (1 in 500) were being paid that salary or higher.

Mr. O'Neill's own company had no H-1Bs approved from FY08-13, but his parent company Thrillist had three. All three were for computer occupations, and all three were for salaries much lower than \$174,000. The H-1B workers were being paid \$70,000; \$80,000; and, \$125,000.

2. During the hearing, Senator Tillis said that reforms to the H-1B program should be done with care to ensure that they do not push more jobs offshore. Could you please address the relationship between offshoring and the H-1B program?

The H-1B program, when designed properly to bring in truly specialized worker, can have positive impacts on helping to retain jobs in the U.S. However, its current design is pushing jobs offshore by the tens of thousands. The top H-1B employers all specialize in offshoring of U.S. jobs, and the H-1B program is a critical link in helping to facilitate the movement of those jobs to low cost countries like India.

As the NY Times has documented in a series of articles in 2015, American workers at Disney, Toys R Us, and elsewhere are being asked to perform "Knowledge Transfer" to their H-1B replacements. Those H-1B workers then either take that knowledge and those jobs back to their home countries, or they train colleagues in low cost countries to do some or all of the tasks.

Senator Tillis' concerns are valid in theory, but all of the empirical realities of both the business models and the actual usage of the H-1B program have mooted those concerns. Employers

already have every incentive to offshore as much work as possible – there has been nothing slowing them down. The jobs that remain in the U.S., like those that were performed by Mr. Perrero, are geographically sticky, meaning they are difficult to offshore. That’s where the H-1B comes in. The H-1B makes those jobs, or at least many of the tasks, offshorable.

3. Professor Sparber testified that immigrants are more entrepreneurial than Americans. Could you please comment on the H-1B program and entrepreneurship?

H-1B workers are not able to start companies so they cannot become entrepreneurs.

H-1B workers who are entrepreneurial within their jobs, as employees, are not able to easily switch jobs, thus limiting the economic benefits of their entrepreneurial spirit.

4. Professor Sparber testified that H-1B workers increase patenting activity. Could you please comment on the H-1B program and patenting?

The studies on H-1Bs and patenting have significant methodological weaknesses including: 1) difficulty distinguishing between foreign and foreign-born; 2) questionable ways to guess at the ethnicity of an inventor by examining the last name; and, 3) relying on Labor Condition Applications, which are not actual H-1B petitions.

Even if one accepts the findings of these studies, which show a fairly small impact on patenting, the reality is that they were completed using data before the H-1B program became dominated by the offshore outsourcing firms. The studies are outdated and don’t reflect today’s H-1B.

All of the top ten H-1B employers are in the Information Technology Services sector. These firms file few, if any, patents. Further, by far the top H-1B occupation is 15-1121 Computer Systems Analysis. This is a job where almost no patents are filed.

If policymakers wished to design the H-1B program with a goal of increasing patenting then you should prioritize particular occupations that patent at high rates (e.g., mechanical engineering) and industries that patent at high rates.

5. Professor Sparber equates the effects of H-1Bs with technological process. Could you please comment on this issue?

Technological progress is the fundamental set of drivers of modern economic growth.

Technological progress is a complex, almost grab-bag, term used by economists to refer to increases in productivity. These things aren’t easily measured but they are supposed to reflect in individuals and firms being able to produce more output with less inputs, as well as produce new types of products. Technological progress comes from the generation of new knowledge (from

formal research as well as learning by doing), better education, innovations (managerial as well as technological), and automation.

Technological progress creates the opportunity to improve standards of living for most Americans. And while some jobs are lost to things like automation, it has generally resulted in higher standards of living. The reason is that automation is both a substitute and complement for many workers, and more importantly by extending the technological frontiers of what is possible it creates opportunities in new fields of work.

However, the H-1B program is being used to specifically to depress the wages and destroy the jobs and job opportunities of American workers. Unlike automation, these practices are not extending the technological frontiers of what is possible. It is simply increasing the supply of cheaper labor to undercut American workers. There is no new technology that is created or deployed. Further, the jobs that are offshored are a substantial net loss to America. Displaced Disney workers will move into less productive work and will draw more heavily on the social safety net programs. And most importantly, it undermines America's future capacity to innovate. People create innovations. Using the H-1B program to undercut American technology workers and to offshore those high-skilled jobs reduces America's human capital in technology. Thus it reduces our nation's future capacity to create the innovations to drive economic growth.

When a company automates and extends the technological frontiers through innovation employers wishing to take advantage of these new technological capabilities hire and train workers for these new jobs. On the other hand, when an American worker is undercut by the H-1B program or their job is offshored, there's no reason to hire American workers or train them. Thus, the impacts of technological progress have significantly different impacts on the American workforce than the use of H-1Bs for cheaper labor and to facilitate offshoring.

6. At the hearing, you testified that the passage of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act (113th Cong.) "on net, would have been much worse for American workers than the status quo." Could you please elaborate on this statement?

S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act, passed the U.S. Senate in 2013. I would refer you to my detailed testimony on S.744 given on April 22, 2013. Back then, I thought the bill would do more harm than good but was a step in the right direction. It never solved the fundamental issue that H-1B workers could be paid less than American workers. It set the "prevailing wage" at 20% less than the wage Americans are getting.

Subsequent to that hearing, the bill was amended during markup, to strip key provisions that would protect American workers. One provision that was stripped is particularly important: the requirement that employers hire qualified Americans who apply. It rendered the recruitment protections meaningless. Firms could simply collect resumes and then ignore them, preferring to hire the H-1B who could be paid 20% less than the American worker.

S.744 had provisions targeting the heaviest users of the H-1B program in order to prevent the flagrant abuses of the H-1B program like those at Southern California Edison (SCE). But even if S.744 became law it wouldn't stop what happened at SCE. The outsourcing companies might be different names - Accenture, IBM, or Deloitte - instead of Tata and Infosys, but the result would be the same. SCE workers would be training their cheaper H-1B replacements, albeit at Accenture instead of Infosys.

Further, S.744 had overly generous greencard provisions in them for STEM workers and very low eligibility standards. These were not addressed in the hearings on S.744. While I believe that the US economy and American labor market can absorb somewhat higher levels of greencards for skilled workers without adversely impacting American workers, the numbers in these bills will be high enough to create significant negative impacts for American workers. Many of the skilled greencard provisions are uncapped and bypass the labor certification process, so there is no way to predict, nor control, the future dynamics of those seeking greencards.

S.744 proposed to eliminate labor certification for all STEM graduate students and eliminate the cap on their numbers. This would create perverse incentives in the market. Employers will be tempted to replace their older incumbent workers with cheaper fresh graduates, fueling age discrimination. And universities will be placed in a conflict of interest situation by becoming the sole gatekeeper for issuing greencards. Universities will essentially be able to sell greencards to foreign students. Given that Master's degrees are short in duration, and have little oversight from outside bodies, this provision will make it inexpensive for foreigners to purchase greencards. We will see a flood of foreign student applications, which will crowd out American students from the STEM fields. Those foreign students will in turn flood the labor market in the STEM fields, depressing wages, and further steering American students from studying these fields.

This key issue was not addressed in any of the hearings on this bill yet it might have the most lasting and largest impact on the American labor market. Congress, not Universities, should be making decisions on who can immigrate to the United States. Skilled greencard provisions should be carefully crafted to include high standards, institute a labor certification, and the program should be capped.

The upshot is that if S.744 was enacted it would inflict significantly more harm on American workers than the status quo. And the status quo is terrible for American workers - they are training their guestworker replacements.

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I. Follow-Up on Hearing Testimony

- Supporters of the H-1B visa program claim that the program is essential for modern industry because there are not enough U.S. citizens and/or legal permanent residents who possess the necessary science, technology, engineering, and mathematics (STEM) degrees to staff existing STEM positions.
- It is my understanding, however, that there might not actually be a shortage of advanced degree-holders here in the United States. There has also been little concrete explanation from H-1B visa program supporters as to why the program seems to disproportionately impact domestic IT workers, most of whom were not required to obtain advanced degrees to succeed in their fields.

1. Are there any recent, existing data regarding the number of U.S. citizen and/or legal permanent resident STEM degree-holders in the United States? If the answer is yes, please provide supporting information.

For more information on the supply – stock and annual degree production – of U.S. citizen and lawful permanent resident STEM degree-holders, I’d refer you to Professor Hal Salzman’s work and Dr. Michael Teitelbaum’s recent book, Falling Behind? The findings are that most STEM degree-holders do not work in STEM fields. Some of the work outside the field of training is voluntary and some of it is involuntary.

The National Science Foundation collects much data about the science and engineering workforce, but does not analyze it in a way that is usable for policy decisions.

2. If there are recent, existing data regarding the number of U.S. citizen and/or legal permanent resident STEM degree-holders in the United States, are there also data regarding the employment level of such STEM degree-holders? If the answer is yes, please provide supporting information.

The NSF’s most recent Science & Engineering Indicators 2016 report shows that about half of STEM degree holders work in a Science and Engineering field. See Figure 3-6 of the NSF S&E Indicators Report.¹ These data have not been broken down by U.S. citizen, lawful permanent resident, or guestworker status.

The larger question you are raising is whether STEM trained workers are being fully utilized. Here the data seem to indicate that there is significant underutilization of American STEM workers. We do know that wages have been stagnant for decades in most of these fields, an

¹ <http://www.nsf.gov/statistics/2016/nsb20161/#/report/chapter-3/u-s-s-e-workforce-definition-size-and-growth>

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indicator that STEM workers are being underutilized. What we do know is that the STEM field has rampant age discrimination. Further, employers have not been investing in the training of workers.

- 3. In the event recent, existing data show high levels of unemployment among U.S. citizen and/or legal permanent resident STEM degree-holders, please explain industry’s primary rationale for the current expansive use of the H-1B visa program.**

There is no relationship between H-1B usage and the unemployment rates for American STEM workers. Employers turn to H-1B workers when unemployment rates are high for Americans in those same occupations and also when they are low. Employers need not demonstrate the absence of talent before hiring an H-1B.

The majority of the H-1B program is being used because those workers are can be paid less than American workers and the employer has enormous leverage over the H-1B workers. The H-1B workers have often been described as indentured. The principal use of the H-1B program is for cheap and compliant labor.

- 4. Please provide any relevant information that can help explain why the H-1B visa program has such a disproportionately negative impact on IT workers.**

The IT services sector has come to dominate the H-1B program in part out of historical accident. The firms were first movers in creating a business model that used cheaper H-1Bs to replace American workers and to facilitate the offshoring of these jobs to low-cost countries. The business model is so successful that it has grown in scale and scope more than ten-fold in the past decade. Because the wage differential between an American IT worker and an Indian IT worker remains so large (\$90k vs. \$7k), replacing American IT workers with H-1Bs remains hugely profitable.

But there is no reason that the program’s vulnerabilities can’t be exploited in other occupations. For example the NY Times recently documented how Toys R Us and Cengage have used the outsourcers like Tata to bring in H-1Bs to replace their American accountants. It is simply a matter of time before more and more high-wage professional jobs come under the attack of the H-1B program.

An expansion of the H-1B program, like as has been proposed in the I-Squared Act, would accelerate the loss of more types of high-wage professional jobs.

- 5. In your opinion, would U.S.-based STEM companies face a domestic labor shortage if the H-1B visa program, as it is currently constituted, were curtailed or eliminated?**

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An elimination of the program would be the extreme case. Firms that exploit the H-1B program would have to adjust their business models, but even in this extreme case these adjustments would neither be difficult nor take a long time. As we know from the Disney case, Mr. Perrero trained his replacement in ninety days. That is more than sufficient time for the firms to adjust their hiring practices and employ American workers rather than H-1Bs.

Having said that, I do not advocate an elimination of the program unless alternative ways of bringing in foreign workers with truly specialized skills is created. Without knowing the specifics of the curtailment it is hard to determine its effects. But the current program is clearly too loose.

6. In your opinion, what impact would curtailment or elimination of the H-1B visa program have on the wages or earning power of U.S. citizen and/or legal permanent resident STEM degree-holders?

Tightening the program requirements would increase wages and create more job opportunities for U.S. citizen and legal permanent resident STEM degree-holders. Most of the program is being used to substitute for American workers, not complement them.

- During your hearing testimony, you indicated that many of the problems and abuses associated with the H-1B visa program have gone unnoticed or unreported over the years because of the existence of so-called non-disparagement agreements, which are essentially non-disclosure agreements (and which you personally described at the hearing as the equivalent of gag orders). Employees subject to such non-disparagement agreements have generally avoided coming forward to report potential abuses of the program by their employers, despite possibly having legal rights to do so.

7. What sort of consequences do employers threaten for violation of a non-disparagement agreement?

Over the years, I have spoken to many American workers who have been displaced by H-1Bs and who have had to sign non-disparagement agreements. They are told and threatened in no uncertain terms that if they speak at all about their experience they will be sued by the company for their severance and perhaps even beyond that. This is not an idle threat. One worker I spoke with at Northeast Utilities was threatened over the creation of a private social media site to support fellow displaced Northeast Utilities workers.

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In a related case Molina Healthcare sued ex-employees for allegedly speaking to a reporter as well as filing a lawsuit against the contractor that replaced them, Cognizant. Molina claimed a breach of confidentiality related to a settlement.²

It is very clear that employers will exercise their power in order to ensure that the true stories do not get out. Having things out in the open allows workers and customers to get better market signals about how firms are using the H-1B program.

These non-disparagement agreements were not always the industry norm. From 2002-05, a number of workers were willing and able to speak out publicly about training their replacements. Around 2005 the industry figured out that requiring non-disparagement agreements would ensure very little public and media scrutiny. And it has been mostly successful.

8. In your opinion, would you consider non-disparagement agreements coercive?

I don't know if it is coercive in a legal sense, but most workers I have spoken with feel like they have no choice but to sign the agreement. If they don't sign the agreement, they can be terminated with cause, meaning that they won't be eligible for unemployment insurance. Further, they are dependent on a positive review from their current employer in order to find another position in the sector.

Even if the worker spoke out, they likely would be blacklisted in the industry. So, choosing not to sign the agreement has almost no upside.

Mr. Leo Perrero is the exception. He spoke out only because of two unusual circumstances. First, in an unusual move, Disney did not require such an agreement. Secondly, he made a decision to drop out of the IT industry. He had the opportunity, because of his family business, to move into a new and different occupation altogether.

Most of the workers I have spoken to are upset at their circumstances but afraid to speak publicly.

- During the hearing, Senator Charles Schumer (D-New York) expressed optimism that increases in the levels of fines that he had proposed in other legislation would end employer abuses of the H-1B visa program.

9. What is your assessment of the effectiveness of current levels of fines, as established in federal law?

² <http://www.courts.ca.gov/opinions/nonpub/B239208.DOC>

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The business model is so lucrative, the oversight of the program so lax, that the fines are not even a rounding error to the profits for these firms.

In one of the most extreme examples, Infosys, a major offshore outsourcing firms, settled an investigation by the Justice Department for allegedly violating the B-1 and H-1B programs. The firm paid a \$34 million fine, a record amount for an immigration violation. But the fine amounts to 0.4% of its nearly \$9 billion in revenues. Given that the H-1B is central to Infosys’ business model, the fine is a small cost to doing business. And most of the firms exploiting the H-1B program never face a fine.

Further, very few violations are ever discovered since the whole compliance system relies solely on whistleblowers coming forward. In virtually all cases it isn’t worth time, effort, and risk for an H-1B workers to blow the whistle. Adjudications can take six years and the most the worker gets back is back pay.

10. In your opinion, how would you rate the U.S. Department of Labor’s handling of reported H-1B visa program abuses?

I helped a number of American workers file H-1B complaints to the Wage & Hour Division. I found the process to be convoluted and difficult to navigate. The Labor Department is ill-equipped in handling these cases and is downright disinterested in investigating to the fullest extent of the current law. Labor has outsourced the call center that helps workers file complaints. I called that 1-800 number five times and got five different answers about how to file an H-1B complaint. The call center operators simply did not know the Department of Labor’s WH-4 form and gave me wrong advice every time.

I have spoken to workers who filed complaints who feel frustrated that the investigators did not do a thorough and timely job.

As an expert, I have personally tried to share information with Department of Labor about the H-1B Dependent firms – Cognizant, Infosys, Tata, and HCL - that replaced American workers at Disney, SCE, and elsewhere. Roughly one-third of Cognizant’s H-1B workers are *not* exempt from the H-1B Dependent rules. I have the government’s own data, the I-129s, to show this. Yet, no one at Wage and Hour Division will return my inquiries.

The upshot is that even if a violation has occurred it is very unlikely that a successful investigation will find and adjudicate it. The Department of Labor process is designed not to work.

- It is my understanding that there is what is known as the university exemption from the cap on the number of H-1B visas that can be issued in a given fiscal year under current federal law.

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11. Please provide additional details about how the university exemption works.

12. Are you aware of any fraudulent use of the university exemption? If the answer is yes, please provide supporting information, including any known instances of universities’ fraudulent use of the H-1B visa program.

Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), (U.S. P.L. 106-313), making H-1B workers employed by an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization, exempt from the annual numerical cap.

I believe this area of the H-1B needs to be explored much further. An Inspector General’s investigation or an evaluation by the Government Accountability Office could help shed light on this rather murky area of H-1B usage.

My understanding is that the universities are exploiting two vulnerabilities in their privileged status as employers in the H-1B program.

First, as direct employers universities are exempt from the cap and are subject to looser prevailing wage rules. Universities are stretching the meaning of their employer-employee relationship. The H-1B worker is technically an employee of the university but in practice, the employee has very minimal, if any, duties with the university. The principal reason for the employment relationship with the university is to skirt the H-1B rules that apply to other types of employers. My understanding is that the recent scandal involving Wright State University in Ohio was a case where the university essentially had no employment relationship in practice with H-1B workers it was sponsoring.

The second vulnerability has to do with those employers that are “affiliated with” or “related to” a university or government research institution. While USCIS has issued policy guidance on what constitutes affiliation, the language is still quite vague. A full accounting of how these affiliations are being used is long overdue.

The number of H-1Bs that are exempt from the cap has been large and growing. In recent years it has been annually between 40,000 and 50,000. That’s about half of the 85,000 cap. How these exemptions are being used and why is an area that needs much more scrutiny, especially given how aggressively entrepreneurial universities have become.

- Some critics of the H-1B visa program have expressed concern that the program is not only damaging to the economic prospects of American workers, but also actually

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facilitates abuse of foreign nationals who are brought to the United States to work pursuant to H-1B visas.

13. Please provide any information about potential abuses of foreign nationals under the current version of the H-1B visa program.

There is widespread abuse of foreign workers on the H-1B program. By law the employer holds their work visa, so these guestworkers are placed in a particularly vulnerable position.

There have been press reports over the years about foreign workers being abused. The most recent one is a series by the Center for Investigative Reporting called “Techsploitation.” This is only the most recent expose, much of the abuse never comes to light.³

14. Why are foreign nationals who are brought to the United States to work pursuant to H-1B visas hesitant to speak up about potential workplace issues?

The foreign worker’s ability to stay in the country depends on that specific employer. So, there’s a large disincentive for any H-1B worker filing a complaint. Further, given the convoluted H-1B complaint process (see answer to earlier question), there is little payoff. And even if a complaint is filed, the firm can file for liquidated damages. See Techsploitation series described above.

15. In a situation where a foreign national who is brought to the United States to work pursuant to an H-1B visa wants to leave an abusive employer, what restrictions (if any) could prevent that foreign national from doing so?

There are two common practices in the industry that severely restrict job mobility. First, non-compete agreements restrict the worker’s ability to move to competitors and customers, the two most common destinations for job changers. Second, many of the large outsourcing firms employ bonding agreements, where a worker is literally bonded to the employer. If the worker leaves, he agrees to pay the company on the order of \$15,000. For many H-1B workers this is an overwhelming sum.

And there’s the threat of being sued for liquidated damages.

- The H-1B visa program is frequently criticized for how it permits abuse of both domestic STEM workers and foreign nationals who are brought to the United States under the program. Other visa programs that are not discussed as frequently, however, could also pose similar threats to domestic STEM workers’ job security and/or earning power.

³ <https://beta.cironline.org/investigations/techsploitation/>

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16. What other visa programs or categories pose an equal or greater threat to the job security and/or earning power of domestic STEM workers?

The L-1, OPT, B-1, and J-1 visa programs pose significant threats to the H-1B program. The reason these programs have come under less scrutiny is that there is virtually no public information about which firms are using them, for which occupations, and what they pay those workers. What is downright scary about these programs is that they have even fewer protections for American and foreign workers. For example, the L-1 and OPT have no prevailing wage requirement. Workers on L-1s can be paid home country wages, which are approximately \$4 / hour in India. And OPT workers can be paid zero wages.

The B-1 has been used in an abusive way as B-1 in lieu of H-1B. The B-1 is supposed to be a non-work visitor visa but it has become common practice for firms to employ B-1 workers under the B-1 in lieu of H-1B to get around H-1B restrictions.⁴

L-1 workers have little protection and have no job mobility. Accenture has recently been sued by an L-1 worker accusing discrimination because he was paid less than his American counterparts.⁵

17. Are any current federal guest worker programs authorized by regulation rather than statute?

I believe that the B-1 in Lieu of H-1B isn't even authorized by regulation. It was merely created by the State Department in the Foreign Affairs Manual.

The OPT was recently expanded by a recent regulation issued by DHS. DHS has essentially created a three-year work permit that is uncapped, has no effective protections for either foreign or American workers and students, and where employers can pay zero wages legally. See my formal comments submitted to DHS about the proposed rule.⁶ I am enclosing a copy of this letter along with these QFRs. I expressed grave concerns about the proposed rule and its obvious negative effects on both American workers and students. DHS has recently issued its final rules. Those rules do not in any way alter my assessment of the negative impacts these rules will have on American workers and students. DHS did not in any way adequately adjust its rules.

The spouses of H-1B workers, who are on H-4 visas, have recently been granted work authorization through new DHS regulations.

18. Does any provision of statutory law authorize any part of the federal government to establish a guest worker program via regulation?

⁴ <http://www.natlawreview.com/article/h-1b-alternatives-series-little-known-useful-b-1-lieu-h-1b>

⁵ <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=3HV070/dnH7x9/V1DA5byw==>

⁶ http://www.epi.org/files/2013/EPI_OPT_comments2015.pdf

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I don't have expertise on this.

II. Additional H-1B Visa Program-Related Legislation

- Some of our colleagues here in the Senate have introduced legislation entitled the “Immigration Innovation Act” (otherwise known as the “I-Squared Act”).

19. In your opinion, would the I-Squared Act have a negative impact on the employment level of domestic STEM workers, including domestic IT workers?

The I-Squared act would, in the words of IEEE-USA, the largest engineering professional society in America, “destroy the U.S. High-Tech workforce.”⁷ The I-Squared Act would ensure that many more Disney cases occurred.

The I-Squared act is dangerous for America's technology workforce.

20. In your opinion, would the I-Squared Act have a negative impact on the wages or earning power of domestic STEM workers, including domestic IT workers?

In addition to the loss of jobs and job opportunities, the I-Squared Act would provide an almost unlimited supply of cheaper guestworkers. It would depress wages significantly for American workers.

III. General Question

21. Are there any other points or issues that were not explored (or sufficiently explored) during the hearing that you would like to bring to the Subcommittee's attention?

⁷ <http://www.ieeeusa.org/communications/releases/2015/011415.asp>



November 18, 2015

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

Re: Department of Homeland Security, *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 80 Fed. Reg. 63376 (Oct. 19, 2015) (Notice of proposed rulemaking).

Dear Ms. Westerlund:

Thank you for the opportunity to provide comments on the proposed rulemaking for the STEM OPT extension.

Since 1986, the Economic Policy Institute has investigated and reported on labor market issues and the conditions of low- and middle-income workers. EPI examines the economic landscape and analyzes what is happening to working families—including workers born in the United States, the foreign-born workers who enter the country with temporary nonimmigrant visas seeking better opportunities for themselves, and also the U.S. workers who are unemployed and actively seeking employment opportunities.

Educating foreign students is a long-standing and laudable feature of the U.S. higher education system. By any measure, the U.S. remains the most attractive place for the international students looking to study outside of their home countries. The United States attracts the most, and more importantly the best and brightest students, from all corners of the globe. The principal reason for this is the massive long-term investment American taxpayers have made in the higher education system; equipping university laboratories with state of the art research equipment and attracting the best faculty. Yet the proposed rule excludes the interests of two key stakeholders: American students and workers. This runs counter to best practices when promulgating any government regulation, namely that the interests of all stakeholders should be considered and ultimately reflected in any final rule.

We both believe that U.S. policy should seek to attract and retain the best and brightest students from around the globe. Those who are eventually allowed to work in our labor market however, should be paid according to U.S. wage standards, and before being hired, employers should be required to test the labor market to ensure that no U.S. workers already present in the country are available. That general principle should guide our labor migration policy to ensure that foreign students entering the U.S. labor market will add value to the U.S. economy and fill demonstrated labor shortages, rather than allowing employers to exploit the immigration system in a way that puts downward pressure on the wages of all workers in the United States and overlooks local workers seeking employment opportunities. Sadly, the

proposed STEM OPT rule falls far too short, and will allow employers to both exploit foreign student workers while disadvantaging U.S. workers, especially recent graduates in STEM fields.

I. THE OPT AND OPT STEM EXTENSION PROGRAMS LACK ADEQUATE WAGE RULES THAT WOULD PROTECT AGAINST UNDERCUTTING U.S. WAGE STANDARDS AND THE EXPLOITATION AND UNDERPAYMENT OF F-1 NONIMMIGRANT STEM GRADUATES.

The provisions related to wages that must be paid to OPT STEM workers in the Department of Homeland Security's (hereinafter, "the Department") proposed rule at Section G are so vague and deferential to employers that they will be virtually unenforceable in practice in any meaningful way. Even the title of Section G hedges on whether it will actually protect U.S. workers: "Safeguarding U.S. Workers Through Measures Consistent With Labor Market Protections." The Department is proposing "measures" that are "consistent" with worker protections, rather than actually proposing to implement real, meaningful worker protections.

The following is the substance of the STEM OPT wage rule:

the proposed rule would require that 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.¹

The STEM OPT worker would then be responsible for reporting the wage/salary information on his or her Mentoring and Training Plan.

The proposed rule essentially allows employers to decide what the commensurate wage is for a U.S. worker who is "similarly situated" to the OPT STEM worker, and attest that they believe this is true, i.e., "[so long as the attestation is made in good faith and to the best of the employer's knowledge, information and belief,"² then the wage calculated by the employer will be permissible

There are two main problems with this. First, the employer should not be allowed to set the STEM OPT worker's wage. The employer is not an uninterested party with the goal of ensuring fairness to U.S. and foreign workers. Employers are driven by a profit motive, and have a vested interest in, and derive profit from, paying employees the lowest wage possible (without losing the worker or violating the law). Instead, the wages paid to STEM OPT workers should be set according to data maintained by the U.S. Department of Labor (DOL) which show the average wages earned by workers in every region of the United States by occupation and local area. A simple and effective rule that would protect against the undercutting of U.S. wage standards would be to require that employers pay STEM OPT workers the prevailing wage according to one existing and reliable wage data source. We recommend that STEM OPT workers be paid the Level 3 wage in the Foreign Labor Certification Data Center's Online Wage Library,³ which is based on DOL's wage data collected from the Occupational Employment Statistics survey. The Level 3 wage represents approximately the 50th percentile wage by occupation and local area, and payment of this wage level would protect against employers who wish to hire STEM OPT workers in order to undercut the market rate for workers in the particular occupation and local area.

¹ 80 Fed. Reg. 63389 (October 19, 2015).

² Id.

³ <http://www.flcdatacenter.com/>

The only clear statutory authority that has ever existed for an OPT-like program was a three-year pilot program created by section 221 of the 1990 Immigration and Nationality Act⁴ that allowed foreign graduates to work in fields unrelated to their degree. That pilot program required employers—by statute and regulation⁵—to pay a prevailing wage and recruit U.S. workers for 60 days. That congressional direction about wages and employment opportunities for U.S. workers should inform the Department’s decision to mandate a clear, appropriate wage level for OPT participants who become employed after graduation.

Second, it is not clear to us how the Department’s proposed wage standard would be enforced under this attestation model. Would the Department review the training plan prior to approving the STEM extension, and reject the proposed plan and wage, if the commensurate wage was too low? Or would the university have an opportunity to review the proposed salary to determine if it is commensurate with similarly situated U.S. workers? Or would the Department simply rubber stamp the training plans and be deferential to employers, in part because the Department has no expertise in matters of labor and employment law enforcement, nor regarding wages and working conditions? Neither the Department nor the universities that participate in the OPT program have the expertise or competency to determine what an appropriate commensurate wage is for STEM OPT workers. Employers should be required to pay the Level 3 wage, and certify to DOL that they will pay the required wage.

Finally, the Department’s proposed rule does not contain an outright ban on employers who hire STEM OPT employees as unpaid interns. Under the proposed rule, employers could claim that recent graduates accept employment for similar jobs as unpaid interns, or that they normally only receive a small stipend. To prevent employers from hiring recent STEM graduate nonimmigrants and paying them nothing, the Department should include language in the final rule that prohibits employers from hiring STEM OPT workers as unpaid interns or paying them only a non-salary “stipend” for their work.

II. THE DEPARTMENT SHOULD END THE TAX LOOPHOLE THAT MAKES OPT WORKERS CHEAPER TO HIRE THAN U.S. WORKERS.

As discussed in the previous section, employers should be required to pay STEM OPT workers (and all employees hired through temporary visa programs) at the same rate they would pay local workers. As long as regulations allow visa-contingent workers to be paid less than their local counterparts for the same work, there are clear and inappropriate incentives for employers to prefer to hire through those programs. In the case of the OPT program, the fact that employers of OPT workers are not required to pay federal payroll taxes is a serious problem which disadvantages U.S. workers seeking entry level STEM jobs. Even at the same rate of pay, the cost savings associated with employing OPT workers instead of U.S. workers distorts the labor market to the detriment of U.S. workers. While the Department is aware of the existence of this tax loophole which benefits employers of OPT workers (they have been told directly by advocates and at least one author has written about it)⁶, the proposed rule does not make any mention of it whatsoever. To combat the potential discrimination this will result in against U.S. workers, the Department should require employers of STEM workers to pay an amount

⁴ Sec. 221. Off-Campus Work Authorization for Students (F Nonimmigrants), Pub. L. 101-649, 104 STAT. 4978.

⁵ 20 CFR 655.900, available at <https://www.law.cornell.edu/cfr/text/20/655.900>.

⁶ David North, “Don’t Look for Truth in Headlines when Reading DHS Press Releases,” CIS (Oct. 19, 2015), <http://cis.org/north/dont-look-truth-headlines-when-reading-dhs-press-releases>.

equal to the payroll taxes they would have been required to pay if they had hired a U.S. worker into a new fund to encourage employment of U.S. STEM workers, or at the very least, to the U.S. Treasury.

III. THE DEPARTMENT OF LABOR SHOULD PLAY A PRIMARY ROLE IN MANAGING THE OPT PROGRAM, OR AT LEAST PARTNER WITH THE DEPARTMENT IN MANAGING THE ASPECTS RELATED TO WAGES AND WORKING CONDITIONS.

In general, it is important to note that the OPT and STEM OPT programs are large temporary foreign worker programs—despite the Department’s efforts to mask this obvious fact with constant references in the proposed rule to “training” and “mentoring”—and should be managed as such. The appropriate agency that should primarily be responsible for the management of all temporary foreign worker programs is DOL, based on its mandate to protect the wages and working conditions of all workers in the United States, not to mention its role in workforce training.

More specifically, as noted in the previous section, the Department does not have expertise in labor and employment law, or in determining what adequate wage standards are for STEM OPT workers. The fact that the Department has included any language at all that requires STEM OPT workers to be paid a “commensurate” wage is a step forward, because the 2008 STEM OPT rule did not require that *any* minimum or commensurate wage be paid. Any enforceable wage rule would be better than no wage rule, but as noted above, this wage rule is inadequate and the attestation model is flawed. Instead, just as DOL’s Office of Foreign Labor Certification reviews applications for other employment-based visas, so should they certify that those applying to use the OPT program are paying market wages and have not displaced local workers. While we welcome the notion that OPT employers will for the first time be required to document and justify their rates of pay, we find it illogical and ineffective for the Department to be the agency to review and assess such information. The Department clearly plays a broad and essential role in enforcing our immigration system, but has neither the expertise nor the mandate to ensure fair wage rates or prevent worker exploitation. Protection of labor standards is the central work of the DOL, and the agency must have an oversight role in a program with the size and scope of the OPT visa and its STEM extension. DOL’s role in overseeing the program should include authority to initiate investigations of potential fraud and abuse, and must be adequately funded to ensure that the agency has the staff and resources to provide effective oversight. Moreover, it would be more appropriate for DOL to conduct the “on-site reviews” introduced in this rule to ensure employer compliance with program requirements than to send ICE agents into these worksites.

IV. THE OPTIONAL PRACTICAL TRAINING PROGRAM AND THE STEM OPT EXTENSION HAVE CREATED A NEW LARGE-SCALE GUESTWORKER PROGRAM BY REGULATIONS WHICH IS BEYOND THE AUTHORITY OF THE IMMIGRATION AND NATIONALITY ACT.

This proposed rule expands upon a rule that has already created a large-scale guestworker visa program that undercuts the wages and working conditions for young American graduates and job-seekers in STEM fields by lengthening the duration of stay and expanding the number of eligible OPT STEM workers. Because the expanded program will have very weak, virtually non-existent wage requirements to prevent employers who hire OPT employees from undercutting U.S. wage standards, it will put downward pressure on wages and reduce job opportunities for American workers, especially recent STEM graduates. It will also crowd out American students and students who are U.S. permanent residents from limited university slots, as well as internships and entry-level jobs with employers.

According to the estimates on Table 1 in the Department’s STEM OPT rule, the program will add as many as 96,421 new OPT workers each year. The effect on the labor market will be amplified by the fact that they are targeted at very narrow labor markets (i.e., STEM occupations where limited experience is required). To put the scale and duration in perspective, the H-1B guestworker program has a cap of 85,000 new workers and a duration of three years. Congress has repeatedly chosen not to increase the H-1B cap. The proposed rule creates a new guestworker program on the scale and scope of the H-1B, but without any of the minimal oversight and protections included in the H-1B. It is an end-around Congress.

The section in the Immigration and Nationality Act that authorizes the F-1 international student visa does not authorize or anticipate any employment program for F-1 students—not the OPT or OPT STEM extension programs—much less a temporary foreign worker program for STEM workers that is larger than the program created by Congress through legislation for the same purpose (the H-1B). The F-1 statute reads:

an alien having a 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 consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien’s qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

The statute notes that a “bona fide student” who enters the United States temporarily should do so for one reason: “solely for the purpose of pursuing...a course of study...at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States.” (Emphasis added)

Employment by a nonimmigrant beneficiary of an F-1 visa, or “training” after completion of a course of study by a nonimmigrant in F-1 visa status, is not the “course of study” anticipated by the F-1 statute in the INA. The Department has not successfully explained how the OPT and OPT STEM extensions are consistent with, and do not violate the statutory language in the INA creating the F-1 visa. If the Department cannot explain the statutory authority for OPT, then OPT is *ultra vires* and unlawful.

Although federal executive agencies have allowed F-1 students to be employed in the United States for over 60 years, such agencies have acted outside the authority of the plain language of the F-1 statute. The Immigration and Naturalization service (INS) even admitted this fact in 1977, noting that “There is no statute under which employment of nonimmigrant students for practical training is authorized.”⁷

⁷ 42 Fed. Reg. 26411 (May 24, 1977)

Although Congress has not yet intervened to end the OPT programs, there is no evidence to suggest that Congress had anticipated that the OPT program would grow to its current and projected size and scope, and in any case Congressional acquiescence does not mean that a legal basis exists for OPT and OPT STEM.

The Department also cites INA section 274A(h)(3) as legal authority for OPT, referring to the authority the section provides the Department to issue employment authorization to certain aliens. INA § 274A(h)(3) reads:

Definition of unauthorized alien.— As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

While 274A(h)(3), in particular subsection (B), does provide the Department with some authority to issue employment authorization to certain aliens, for example in the case of unauthorized migrants who have had their deportations deferred by the Department,⁸ the Department cannot lawfully issue employment authorization to an alien if doing so would contradict another provision in the INA. The plain language of INA § 101(a)(15)(F) does not authorize employment by F-1 visa holders in any circumstance—in fact, Congress excluded any language in the statute that could reasonably be interpreted as permitting employment. Because employment is inconsistent with the F-1 visa's explicit limitation to education, the section effectively prohibits the Department from issuing employment authorization to F-1 nonimmigrants under the authority of INA § 274A(h)(3).

The only clear statutory authority that has ever existed for an OPT-like program was a three-year pilot program created by section 221 of the 1990 Immigration and Nationality Act⁹ that allowed foreign graduates to work in fields unrelated to their degree. That pilot program required employers—by statute and regulation¹⁰—to pay a prevailing wage and recruit U.S. workers for 60 days. However, Congress let the program lapse a few years after its creation, in part because an INS and DOL evaluation found that it "may have adverse consequences for some U.S. workers."¹¹

The Department, in its final rule, should address why granting F-1 nonimmigrants employment authorization in any circumstance does not violate the plain language of the statute at INA § 101(a)(15)(F).

V. THE IMMIGRATION AND NATURALIZATION SERVICE AND DEPARTMENT OF LABOR FOUND NEGATIVE IMPACTS ON THE EMPLOYMENT OF U.S. WORKERS AS A RESULT OF THE PRACTICAL TRAINING PROGRAMS FOR F-1 NONIMMIGRANTS.

⁸ See, e.g. Daniel Costa, "American Caesar? Not Even Close: The president has the statutory authority he needs to expand deferred action," Economic Policy Institute (Aug. 7, 2014), <http://www.epi.org/blog/american-caesar-president-statutory-authority-deferred-action/>.

⁹ Sec. 221. Off-Campus Work Authorization for Students (F Nonimmigrants), Pub. L. 101-649, 104 STAT. 4978.

¹⁰ 20 CFR 655.900, available at <https://www.law.cornell.edu/cfr/text/20/655.900>.

¹¹ See cover letter by Robert Reich, U.S. Secretary of Labor, in *Report to Congress: An evaluation of the pilot program of off-campus work authorization for foreign students (F-1 nonimmigrants)*, Joint report by the U.S. Department of Labor and the Immigration and Naturalization Service (Aug. 10, 1994).

An INS rulemaking promulgated by the Carter administration in 1977, which reduced the OPT program period to one year from 18 months, stated clearly that the agency's rationale for the reduction in program duration was its potential negative impact on U.S. workers:

[T]he Service has been advised by the Department of Labor that employment of nonresident alien students presents unfair competition to U.S. resident workers because some applicants worked for less than prevailing wages during their training period.¹²

As noted above in section I, the Department has not taken adequate steps to ensure that OPT and OPT STEM extension workers are paid adequately at prevailing wages, and thus, the outcome is likely to be the same as what the Department of Labor warned about: the employment of OPT workers willing to work "for less than prevailing wages during their training period." Some commenters on the proposed version of the OPT rule in 1977 were concerned that reducing the program from 18 to 12 months would make it more difficult for OPT workers to find employment in the United States, but the INS was unpersuaded that such a concern would trump the possible impact on U.S. students and unemployed workers:

It may be that foreign students will be less likely to find employment, and perhaps fewer aliens would enter the U.S. to obtain their education here. There must be considered, however, the loss of employment to each U.S. resident student or unemployed worker who is unable to find a job because it is filled by a nonimmigrant student.¹³

In addition, the aforementioned expired 1990 OPT pilot program mandated a report to Congress on the program's impact. The report, published in 1994 with cover letters from then-INS Commissioner Doris Meissner and Labor Secretary Robert Reich, advised Congress not to extend the pilot program because, even with the protections included in the program, it was found to be "inconsistent with the statutory intent of the F-1 nonimmigrant visa," "run[s] counter ... to an affirmative policy of U.S. labor force development," and "may have adverse consequences for some U.S. workers."

The Department has yet to conduct a reliable study, or any study, regarding the impact of the OPT and OPT STEM extension on U.S. workers. The Department should request that DOL assist it in assessing what the labor market impact of the proposed larger and longer duration program is likely to be. Would there be a positive impact, a negative impact, or no impact? Rather than taking an honest look at the data and asking for assistance from the appropriate federal agency with expertise in understanding the labor market (DOL), the Department has instead cited numerous publications in support of the Department's position that F-1 STEM students and workers provide substantial benefits to the U.S. economy.¹⁴ The Department has not cited reports that contradict its position, for example, Norman Matloff's 2013 report, "Are Foreign Students the 'Best and the Brightest'? – Data and Implications for Immigration Policy"¹⁵ or another report, by Hal Salzman, Daniel Kuehn, and Lindsay Lowell, which found that "the United States has more than a sufficient supply of workers available to work in STEM occupations" and that wages in the information technology (IT) sector "have remained flat, with real wages hovering around their late 1990s levels."¹⁶ Those two main findings by Salzman, Kuehn, and

¹² 42 Fed. Reg. 26411 (May 24, 1977).

¹³ Id. at 26412

¹⁴ 80 Fed. Reg. 63383 (October 19, 2015).

¹⁵ <http://www.epi.org/publication/bp356-foreign-students-best-brightest-immigration-policy/>

¹⁶ <http://www.epi.org/publication/bp359-guestworkers-high-skill-labor-market-analysis/>

Lowell suggest that the benefits some researchers have found from foreign born U.S. STEM students and workers might be offset by the flat wages and limited employment opportunities for U.S. born STEM graduates.

We wish to reiterate that while we strongly believe that attracting and retaining the best and brightest STEM graduates and allowing them a pathway into the U.S. labor market does indeed benefit the U.S. economy, management of the temporary and permanent migration process must be fair to U.S. workers and not undercut U.S. wage standards. The OPT and OPT STEM extension rules fail on both counts, by limiting STEM job opportunities for U.S. workers and by allowing OPT employers to pay below-average wages.

VI. THE FINAL RULE DOES NOT REQUIRE THAT EMPLOYERS ADVERTISE OPT JOB OPENINGS TO U.S. WORKERS BEFORE HIRING F-1 NONIMMIGRANTS.

Well over 100,000 F-1 nonimmigrants are employed in the United States every year through the OPT program, and about one-quarter have their status extended through the STEM OPT provision. However, employers are not required to first advertise jobs filled by OPT workers for a set period of time. That means that U.S. workers—especially recent STEM grads looking for entry level opportunities—may miss out on a chance to even apply for these positions. In order to ensure that U.S. born and legal permanent residents STEM graduates are not overlooked for entry level jobs in the United States, employers should have to advertise STEM OPT job opportunities on an electronic public database for at least 30 days, and be required to hire any equally or better qualified U.S. workers who apply for those positions.

Employer attestation of recruitment efforts is an insufficient means of assessing real labor market need and has been found by the DOL to be inconsistent with their mandate to protect the U.S. labor market. A more meaningful system must be put in place for all visa programs, including the OPT. In order to ensure that all workers are protected, it is essential to prevent employer practices that exploit visa programs to undercut or displace an existing local workforce. Given the already substantial size of the OPT program, and the fact that it is uncapped, the potential for adverse effects is real unless more meaningful measures—such as those we have proposed here—are implemented to ensure that local candidates are given fair consideration for all relevant job opportunities.

Finally, proposed 8 C.F.R. § 214.2(f)(10)(C)(10)(ii) should be amended to more broadly prohibit an employer from employing an OPT worker where it has laid off any similarly employed U.S. worker in the occupation in the area of intended employment within the period beginning 120 calendar days before the date the OPT worker is to begin work. In addition, during the term of employment, employers should be required to lay off any OPT worker before laying off any similarly employed U.S. worker, as is already required in other employment-based visa programs.¹⁷ This section of the proposed regulation should also be amended to prohibit an employer from employing an OPT worker when there is a strike or lockout at any of the employer's worksites within the area of intended employment of the OPT worker, as again is already required in other employment-based visa programs.¹⁸

¹⁷ See 29 C.F.R. § 503.16(v).

¹⁸ See 29 C.F.R. § 503.16(u).

VII. NO BRIGHT LINE EXISTS BETWEEN "PRACTICAL TRAINING" AND EMPLOYMENT.

As discussed above, the proposed rule is convoluted, logically incoherent, and unenforceable in practice. The proposed rule's language clearly creates a guestworker visa in practice but tries to hide this reality by referring to it as "practical training" aimed at improving the "academic educational experience" of F-1 students. This logical incoherence and complexity creates an environment where the proposed rule is unenforceable. There are no standards by which an adjudicator can determine whether an OPT beneficiary is being "trained" rather than working. No one, including DHS staffers, can define the bright line between practical training and work. This proposal does not even attempt to create a clear set of standards. As a result, every "training" plan will be approved whether it is achieving a bona fide educational experience or not. Why? Because no plan is excludable. This is particularly evident by reading the expansive and vague language set forth in Section 5: STEM Mentoring and Training Plan in the proposed Form I-910. Given the long-standing tradition of the OPT being viewed as a work permit by all participants—employers, students, universities, and DSOs—there is no doubt that the proposed STEM extension will be viewed as a work permit, and in practice the training plan as simply a summary of standard work (akin to a job description).

The system to assess whether a plan meets the standards is designed to fail. A basic principle for any assessment system is that the assessor should be independent. Yet DSOs are the key adjudicator to decide whether or not a plan meets the standards. Since DSOs are employed by universities, which can generate significant revenue from international students, who are also their customers, they have inherent conflicts of interest in their job as adjudicators. They have every incentive, and likely pressure from their administrations, to approve all work permits.

To provide the appearance of accountability in the process, the Department proposes that, "it may request a copy of the Mentoring and Training Plan...when there is suspected fraud in the application."¹⁹ But DHS employees have no expertise in evaluating what is, and is not, practical training. And as discussed above, employers have strong economic incentives to hire OPT workers because they can pay them for work at below-market rates, and OPT workers are excluded from payroll taxes, making them systemically cheaper than U.S. workers.

Further, the Department has set a precedent in the market that the OPT STEM extension is a work permit. The 2008 IFR created an expectation amongst all of the rule's direct beneficiaries—OPT beneficiaries, employers, universities, NAFSA, and international student recruitment brokers—that the OPT STEM is a *work permit*. The language in this rule about "training" and "educational experience" does nothing to change the practical dynamic that all of the participants will see this as a work permit and treat is as such.

VIII. STEM EXTENSION HAS NO BASIS IN EDUCATIONAL OR LABOR MARKETS

Extending the OPT work permit from one year to three years has no educational or labor market basis. The Department provides a list of eligible STEM degrees in the docket. The list is expansive and includes hundreds of degrees. The Department claims that it is too cumbersome to determine the "optimal" duration for each degree and has instead chosen three years for all degrees at all levels (Bachelors, Masters, and Ph.D.). Even a cursory examination of a few key STEM degrees shows that there is no

¹⁹ 80 Fed. Reg. 63387 (October 19, 2015).

justification for any STEM extension. The current 12 month OPT period is more than adequate to accommodate these degrees.

Most STEM degrees are professional, not pre-professional, degrees, meaning that graduates are able to practice their profession right away. There is no need for an extended apprenticeship or internship. Below we give just a few examples.

The ACT organization administers one of the most widely-taken college readiness assessment exams to high school students. It also provides a "map" of college majors so that high school students can better select one. It describes a major in electrical engineering this way, "A bachelor's degree is sufficient for electrical engineering jobs."²⁰ Note that there is no discussion of any extended internship.

The U.S. Department of Labor has a guidebook to occupations it publishes called the Occupational Outlook Handbook. This guide provides information about each of the 800+ standard occupations including, "how to become one." What's needed to become an electrical engineer? The DOL states, "Electrical and electronics engineers must have a bachelor's degree. Employers also value practical experience, so participation in cooperative engineering programs, in which students earn academic credit for structured work experience, is valuable as well."

A *small* but important group of engineering oriented schools run "Cooperative" programs where students work while they earn their Bachelors degree (note co-op programs are typically not run at the Masters degree level). These programs were created to allow students to earn money to pay for college and gain practical experience. One of the largest ABET accredited cooperative engineering programs in the country is offered by Rochester Institute of Technology in Rochester, NY. The following is the description of its mechanical engineering co-op requirements: "Students must complete nominally one year of co-operative education work experience as a degree requirement. Students are scheduled for four semesters of co-op, to achieve at least 48 weeks of work experience."²¹

So, even for the small number of cooperative engineering programs, one-year of practical experience is sufficient training. The standard OPT duration of 12 months is more than sufficient to become a fully trained engineer.

At the Masters level, many STEM degree programs are 18-24 months in duration though a growing number can be completed in a mere 12 months. For example, one can earn a Masters degree in Engineering from the prestigious University of Illinois in 12 months.²²

The proposed rule claims that these students need "practical training" that is three-times (36 months) as long as the time it took to complete the underlying degree. It is doubtful that anyone in the marketplace believes that someone with a Masters degree in engineering requires any "practical training" as part of his or her educational experience, let alone three years of it.

The Department has provided no objective evidence that the three-year duration has any basis in what is known about the educational or labor markets. According to the proposed rule, the three-year duration is based on the average duration of NSF grants, a measure that has no connection to the vast

²⁰ <http://www.act.org/wwm/majors/maj549.html>

²¹ <https://www.rit.edu/kgcoe/mechanical/student-resource/co-operative-education>

²² <https://mechanical.illinois.edu/graduate/mechse-graduate-degrees/master-engineering-mechanical-engineering>

majority of potential OPT STEM extension beneficiaries. Very few STEM graduates will have any post-graduation connection to any NSF grant, which are typically awarded to universities to conduct basic research. Virtually all of the STEM graduates will work in the private sector on applied projects and tasks that typically require six months or less.

IX. TEMPORARY PLACEMENT AGENCIES AND COMPANIES THAT PLACE WORKERS WITH OTHER EMPLOYERS SHOULD NOT BE ALLOWED TO EMPLOY WORKERS PARTICIPATING IN THE STEM OPT PROGRAM.

The proposed rule repeatedly states that “DHS does not envision that . . . ‘temp’ agencies will generally be able to provide eligible opportunities under the proposed STEM OPT extension” because they cannot comply with proposed mentoring requirements.²³ We also do not believe that temporary employment agencies, especially those that would outpace F-1 nonimmigrant workers in STEM OPT, could comply with proposed duties, hours, and compensation requirements.²⁴ We therefore ask that the Department amend proposed 8 C.F.R. § 214.2(f)(5)(C)(4) to explicitly disqualify temporary employment agencies from employing OPT workers.

Our concern—and belief that further regulatory action is needed by the Department to prevent temp agencies from hiring STEM OPT workers—is justified by non-public DHS data on OPT employers that we have reviewed. At least 500 STEM OPT participants that we know of have in fact been hired by temporary employment companies, which furthermore have a business model that facilitates the outsourcing and offshoring of U.S. STEM jobs. The OPT program should not be allowed to facilitate outsourcing and offshoring, which is done for the purpose of earning profits for a corporation, and often at the cost of U.S. jobs, and is certainly not consistent with the Department’s stated goals for the OPT program.

X. THE DEPARTMENT SHOULD ANNUALLY PUBLISH DATA TO SHOW THE IMPACT OF THE OPT PROGRAM ON THE U.S. LABOR MARKET.

In order to improve oversight and understanding of our legal immigration system, relevant agencies should publish timely online information for each visa category and subcategory, as well as any other work programs created by federal regulations or federal agency guidance, including OPT. This public disclosure should include the underlying raw data gathered from the I-910 and I-765 and other relevant forms as to the gender, age, country of origin, level of training, field of training, institution(s) of higher education, occupation, wages, employer, and work locations and of all OPT visa holders. Unfortunately, nonimmigrant visa programs continue to be plagued with fraud and abuse, including violations of wage and anti-discrimination laws by employers. Transparency is a critical tool to keep the public and policymakers informed, as well as to empower advocates to ensure fair treatment and high standards within these visa programs. Unfortunately, the reality is that we still have access to far too little information on work visa programs in general and on OPT visas in particular. The most recent review by the Government Accountability Office found that ICE had not developed adequate monitoring

²³ 80 Fed. Reg. 63390 (October 19, 2015).

²⁴ See also 80 Fed. Reg. at 63395 (“DHS assumed that most temporary agencies would not be able to comply with the requirements of the Mentoring and Training Plan.”).

mechanisms to ensure basic compliance with OPT regulations.²⁵ We consider public disclosure to be an essential element of a more effective accountability system.

XI. THE DEPARTMENT'S REGULATORY IMPACT ANALYSIS IGNORES KEY COSTS TO AMERICAN WORKERS & STUDENTS.

The regulatory impact analysis (RIA) is systematically biased by omitting key and obvious impacts. The RIA assumes away any adverse impact on American workers by stating that the new rule includes safeguards. And it completely disregards adverse impacts to American students.

The proposed wage and displacement safeguards are too weak and unenforceable to level the playing field for American workers. Employers will have very strong financial incentives to hire OPT workers instead of American ones. As we have seen in other similar guestworker visa programs, like the H-1B, when major companies like Disney have strong financial incentives to do so, they find creative ways to replace American workers with guestworkers who earn much lower wages.²⁶

The OPT STEM extension creates additional burdens on American students. American students will be crowded out of the limited STEM seats in American universities. These are significant concerns for American students and their parents as chronicled in a number of news articles including this recent one in the *Wall Street Journal*, titled "Foreign Students Pinch University of California Home-State Admissions."²⁷

As the labor market continues to be slack, internships have become ever more competitive to find. This is clearly illustrated by the new norm that many internships are unpaid. The competition for these unpaid internships is so fierce that parents and students sometimes pay brokers large sums of money to land *unpaid* internships.²⁸

XII. CALL FOR PUBLIC MEETING.

Section I(D) asks commenters whether a public meeting should be held to discuss the rules. Given the major impact that the rules will have on the educational and labor markets, and the lack of attention in the rule to the adverse impacts the program's insufficient regulations and worker protections can have on U.S. workers and students, we request that the Department hold a public meeting to discuss these changes. These rules will have wide ranging and significant impact and they should be discussed at a full and public meeting.

²⁵ Government Accountability Office, *STUDENT AND EXCHANGE VISITOR PROGRAM: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization*, GAO-14-356 (Feb. 27, 2014), <http://gao.gov/products/GAO-14-356>.

²⁶ See e.g. Julia Preston, "Pink Slips at Disney. But First, Training Foreign Replacements," NY Times (June 3, 2015), http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html?_r=1.

²⁷ <http://www.wsj.com/articles/foreign-students-pinch-university-of-california-home-state-admissions-1447650060>

²⁸ See e.g. Mollie Berg, "Unpaid internships aren't cheap," Daily Trojan (Nov. 10, 2015), <http://dailytrojan.com/2015/11/10/unpaid-internships-arent-cheap/>.

XIII. CONCLUSION

We thank the Department for the opportunity to provide comments on the STEM OPT extension. Despite the serious questions about the legality of the program which we have discussed here, if OPT will continue to exist, the Department nevertheless has an opportunity to vastly improve how the program functions and to create new protections for F-1 nonimmigrant workers and U.S. STEM graduates. We hope the Department will consider our recommendations.

Sincerely,

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