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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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June 8, 2015

Via Electronic Transmission

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Johnson:

On May 28, 2015, Senate Judiciary Committee staff received a briefing from officials of U.S. Immigration and Customs Enforcement (ICE) about proposed rules affecting foreign students. I'm concerned about the Department's plans to expand the Optional Practical Training (OPT) program, and urge you to reconsider expanding the program without adding adequate controls and safeguards.

Currently, Department regulations authorize an F-1 student who has attended an ICE-certified college, university, conservatory, or seminary on a full-time basis for at least one academic year to receive up to 12 months of employment authorization per education level.¹ In 2008, the Department published regulations authorizing a 17-month extension of the OPT period for foreign graduates of U.S. degree programs in a science, technology, engineering, or mathematical (STEM) discipline.² The 2008 OPT-STEM regulation is currently the subject of a lawsuit by an association of American tech workers challenging its legality.³

I understand, based on the May 28 briefing, that the Department is moving forward with new regulations on OPT—

- (1) allowing foreign students with degrees in STEM fields to receive up to two 24-month extensions beyond the original 12-month period provided under OPT regulations, for a total of up to *six years* of post-graduation employment in student status; and
- (2) authorizing foreign graduates of non-STEM U.S. degree programs to receive the 24-month extension of the OPT period, even if the STEM degree upon which the extension is based is an earlier degree and not for the program from which the student is currently graduating (e.g. student has a bachelor's in chemistry and is graduating from an M.B.A. program).

The proposed new regulations, while still being internally discussed, are irresponsible and dangerous considering the Government Accountability Office (GAO) report issued in March 2014

¹ 8 CFR 214.2(f)(10)(ii), (11)-(12).

² 73 Fed. Reg. 18944 (April 8, 2008).

³ Washington Alliance of Technology Workers v. U.S. Department of Homeland Security, United States District Court for the District of Columbia, Civil Action No. 1:14-cv-529.

finding that the program was full of inefficiencies, susceptible to fraud, and that the Department was not adequately overseeing it.⁴

Putting aside the legality of the OPT program, which I have questioned, I am greatly troubled by the proposal to lengthen to a full two years the OPT-STEM extension period. Doing that would authorize foreign STEM students to remain working in the United States after graduation, potentially for a total of up to *six years*, completely outside of the nonimmigrant employment-based visa programs, and their associated worker protections, established by Congress. As the plaintiffs in the Washington Tech Alliance lawsuit state in their complaint: “DHS’s OPT regulations deliberately circumvent the statutory caps on H-1B visas ... by allowing aliens who are unable to get an H-1B visa to remain in the United States and work on an F-1 student visa instead.”⁵ By increasing the total amount of time a foreign student may work in OPT after each degree to 3 years – the same amount of time that an H-1B visa would be valid – there is little doubt that the Administration has administratively established a de facto shadow H-1B program, in violation of Congressional intent. OPT is meant to be a temporary training program, not as a bridge to a longer-term work visa or a way for employers to hire cheaper foreign labor in lieu of Americans or foreign workers in visa programs with prevailing wage requirements.

The GAO found numerous problems with the OPT program. Their report found that foreign students, sometimes with help of designated school officials, were abusing the program to acquire unauthorized work. It also found that the Department was not adequately overseeing the program and did not have adequate monitoring mechanisms in place to ensure program compliance. In fact, it found that the Department was not tracking vital information that was necessary to ensure schools and students were following ICE regulations, such as accruing too much unemployment, completing the program within a certain amount of time, or ensuring students were engaging in work that was in their field of study.

The report also exposed a major national security problem in that the Department does not know where tens of thousands of foreign students are living and working in the country. The GAO said that “ICE cannot fully ensure foreign students working under optional practical training are maintaining their legal status in the United States.”⁶ The GAO report also found that ICE does not consistently collect information as to the type and timing of foreign students’ employment, thus leaving the agency in the dark as to where these students are and for whom they might be working.

Instead of addressing the weaknesses of the OPT program, or addressing the legitimate criticisms of the OPT-STEM program raised in the Washington Tech Alliance lawsuit, it appears the agency is intent on doubling down on the misguided policies that triggered the GAO report and lawsuit in the first place.

After the GAO issued its report in 2014, I wrote to you and urged you to consider issuing a moratorium on OPT approvals until the program was secured and students could be located. I also asked that the Department swiftly move to implement the GAO’s recommendations. The Director of U.S. Citizenship and Immigration Services, Alejandro Mayorkas, responded on your behalf to my letter. He said the Department concurred with the recommendations and was working on them. I would like to know the status of each GAO recommendation, whether they have been fully

⁴ “DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization,” U.S. Government Accountability Office, GAO-14-356 (March 7, 2014), available at <http://www.gao.gov/products/GAO-14-356>.

⁵ Supra, note 3, at par. 179.

⁶ Id. at 18.

implemented, and if not, why not. I also strongly urge the Department to undertake additional reforms to increase oversight and improve compliance monitoring beyond what the GAO has recommended. I want to know what specific actions the Department will take to locate students, rein in fraud and abuse, and ensure compliance.

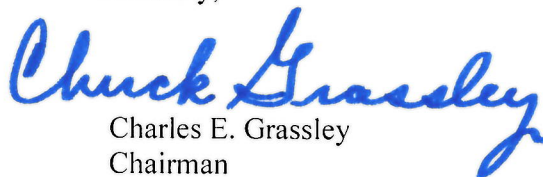
While I realize the agency is also considering requiring certifications that the employers will not displace U.S. workers, there does not seem to be any certification contemplated that the employer has recruited or tried to find U.S. workers who may be at least equally qualified as the foreign students. Nor will the regulations, as proposed, require substantive wage requirements in order to ensure that employers are not exploiting foreign students and thereby driving wages down for U.S. workers.

I urge you to reconsider the proposed rule for STEM students, and at a minimum, address the underlying issues with the standard OPT program. If you do not have the appetite to cease the program altogether, as I have suggested in the past, I would encourage the Department to, at a minimum: 1) increase oversight and monitoring compliance by schools as well as foreign students and those who employ them; 2) ensure that employment is secured before any OPT is granted; 3) ensure that foreign students report any changes in employment to designated school officials and be held accountable if they do not; 4) ensure that designated school officials are notifying the Department about the whereabouts of their students, including the employer's name and location and be held accountable if they do not; 5) require that employers who hire any foreign student with OPT be enrolled in E-Verify; 6) require employers to pay a reasonable wage to foreign students with OPT; 7) require employers of students with OPT to pay a fee equal to the wage savings from not having to pay FICA payroll taxes for OPT workers, in order to level the playing field between OPT and American workers; 8) more closely bind OPT training to the student's academic course of study; 9) establish avenues for foreign students to report employer abuse; and 10) place a numerical cap on the number of foreign students who may receive a work authorization.

In addition to providing me with updates on the GAO recommendations and any other oversight measures undertaken, I request your response to each of the ten recommendations I propose above and why the Department would not include them in the regulations being considered.

Please send a response to my questions and concerns no later than June 22, 2015. I appreciate the consideration of your views and look forward to your reply.

Sincerely,



Charles E. Grassley
Chairman
Senate Judiciary Committee