



November 18, 2015

Katherine Westerlund
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U.S. Immigration and Customs Enforcement
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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 it 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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