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# Building Bridges: Why Expanding Optional Practical Training is a Valid Exercise of Agency Authority and How it Helps F-1 Students Transition to H-1B Worker Status

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# Building Bridges: Why Expanding Optional Practical Training is a Valid Exercise of Agency Authority and How it Helps F-1 Students Transition to H-1B Worker Status

## **Keywords**

Washington Alliance of Technology Workers v. United States Department of Homeland Security, Immigration, Visa, Education, Brain drain

## BUILDING BRIDGES: WHY EXPANDING OPTIONAL PRACTICAL TRAINING IS A VALID EXERCISE OF AGENCY AUTHORITY AND HOW IT HELPS F-1 STUDENTS TRANSITION TO H-1B WORKER STATUS

PIA NITZSCHKE\*

*Should foreign students educated in the United States be encouraged to stay and join the workforce, thereby further driving the country's economy? It is this question that prompted this Comment. Over centuries, there has been an ongoing debate over whether migrants take natives' jobs and depreciate wages or whether they boost the economy. This debate shaped the issue in Washington Alliance of Technology Workers v. United States Department of Homeland Security before the D.C. Circuit in 2016. A technology worker's union challenged a Department of Homeland Security (DHS) regulation allowing certain foreign students educated in the United States to remain in nonimmigrant student status for twenty-four months after completing their studies and to gain practical experience in the workplace. The union argued that enacting the regulation was outside the agency's powers and expressed the desire to remove the program established under this regulation. The court ultimately ruled the case moot when DHS proposed—and, in March 2016, finalized—a new regulation allowing new graduates to remain for Optional Practical Training (OPT) for an even longer time. Considering Chevron and analyzing the validity of and authority with which DHS enacted the 2016 regulation, this Comment finds that the regulation is a valid exercise of agency authority and a necessary bridge to incorporate foreign*

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*students into the U.S. workforce. The U.S. immigration system leaves a gap where laws and regulations should assist U.S.-educated and highly trained migrants to establish a life in the United States. This Comment argues, inter alia, that DHS's regulation, discussed above, is a legally valid gap-filling measure and is crucial to continued American success and growth.*

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*“Strangers are welcome, because there is room enough for them all, and therefore the old inhabitants are not jealous of them; the laws protect them sufficiently, so that they have no need of the patronage of great men; and every one will enjoy securely the profits of his industry. But if he does not bring a fortune with him, he must work and be industrious to live.”*

—Benjamin Franklin<sup>1</sup>

#### INTRODUCTION

Ishwar Meyyappan, an engineering student from a small town in India, had one goal after he completed his graduate studies in the United States: to assist in developing India’s solar power capacity and do so in an energy-efficient manner.<sup>2</sup> Throughout his studies at Columbia University, he learned how solar power works, as well as what the policy and business implications of the industry are—principles he would not have been able to learn at an engineering school in India.<sup>3</sup> He then wanted to work at a U.S. solar panel company for a few years to gain experience that he could take back and apply to his work in India.<sup>4</sup> Before the Department of Homeland Security (DHS) finalized the new Optional Practical Training (OPT) regulation in March 2016,<sup>5</sup> Meyyappan worried about whether he would find a job that would allow him to stay and gain the valuable work experience for which he came to the United States to begin with. It can be difficult and impractical for U.S. firms to hire foreign students for just twelve months—the period of training foreign students received pursuant to the 2008 OPT rule—because a large part of that time may be spent training the new employee.<sup>6</sup> The new OPT regulation, which allows students in Science, Technology, Engineering, and Math (STEM) fields to stay an additional twenty-

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1. 7 THE COMPLETE WORKS OF BENJAMIN FRANKLIN 176 (John Bigelow ed., 1888).

2. Casey Tolan, *Why a Troubled Student Visa Program Could Send 34,000 Foreign Workers Home*, FUSION (Sept. 30, 2015, 6:02 PM), <http://fusion.net/story/206615/opt-stem-extension-international-students-visa>.

3. *Id.*

4. *See id.* (stating in an interview, “India is five years behind the U.S. in solar technology. . . . I want to work in a solar company here and apply the experience I’ve gained back home.”).

5. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students (“2016 Rule”), 81 Fed. Reg. 13,040 (Mar. 11, 2016) (to be codified at 8 C.F.R. pts. 214 & 274a).

6. Tolan, *supra* note 2.

four months<sup>7</sup> therefore benefits both U.S. employers and graduating international students: the new regulation makes it more economical for employers to hire these graduates, which in turn creates more on-the-job training opportunities.

The United States' immigration framework is a complex body of laws that places various restrictions on nonimmigrants—including students.<sup>8</sup> “Immigrant” visa holders are considered to be moving to the United States permanently, and the visa includes a work authorization.<sup>9</sup> “Nonimmigrant” visa holders, such as students, however, are not always authorized to work because their visa category states that they are coming to the United States temporarily to study.<sup>10</sup> Students from all over the world choose to come to the United States to attend the most prestigious institutions and receive the best training.<sup>11</sup> While some of these students may intend to stay only temporarily to study and establish contacts within their career field of choice, others are inclined to remain after graduation and transition into the working world.<sup>12</sup> After all, students attend college to study and specialize in a field to then apply those skills in the job market and earn a living.<sup>13</sup> This holds even truer for students interested in professional school, other advanced degrees, and technical degrees.<sup>14</sup>

The U.S. market loses foreign graduates of U.S. institutions to the competitive international workplace market every year because the

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7. 81 Fed. Reg. at 13,117 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)).

8. See *infra* Sections I.A–C (delineating the different statutory requirements for nonimmigrants with F-1 student visas and nonimmigrants with H-1B visas).

9. See Immigration and Nationality Act (INA) § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2012) (defining “immigrant” as any alien attempting to enter the United States who does not fit into one of the temporary visa categories contained therein); 8 C.F.R. § 274a.12(a) (2016) (describing the classes of immigrants that are authorized to work because of their immigration status).

10. See INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (creating the “student” nonimmigrant visa category for aliens “who hav[e] a residence in a foreign country which [they have] no intention of abandoning” and who are “bona fide . . . student[s]” or certain other individuals connected to the education field); 8 C.F.R. § 214.2(f)(9) (describing the limited circumstances in which a student visa holder may seek employment).

11. See Tolan, *supra* note 2 (providing a first-hand student perspective on immigrating to the United States).

12. *Id.*

13. Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473, 486 (2003).

14. See Tolan, *supra* note 2 (arguing that practical training is important for students in technological fields such as engineering).

immigration system has left a gap in the visa system.<sup>15</sup> The gap exists because there is no meaningful transition from nonimmigrant student status to nonimmigrant worker status.<sup>16</sup> Temporary foreign workers enter the United States on an H-1B visa, allowing them to stay for up to six years in specialty-skills occupations.<sup>17</sup> Foreign students enter the United States on an F-1 visa,<sup>18</sup> allowing them to remain for the duration of their studies.<sup>19</sup> Students deciding to stay in the United States after graduation in May would have to leave the country, find jobs in the United States, apply for H-1B visas eleven months later, hope to be selected in a visa lottery,<sup>20</sup> to then come back to the United States the following October (typically one year and four months after graduation) to start jobs. Congress did not formally set up a direct way for foreign students to stay in the United States and immediately start working after graduation. Thus, the transition to the working world is often difficult and costly.

OPT filled this gap and has created a necessary transition from student to worker status.<sup>21</sup> This optional program allows students to remain in the United States for an additional twelve months<sup>22</sup> after graduation to receive training in their field of study, essentially allowing students to work in their field.<sup>23</sup> Additionally, regulations have established the Cap Gap Extension, which bridges the time

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15. See Katherine L. Porter, Note, *Retain the Brains: Using a Conditional Residence Requirement to Keep the Best and Brightest Foreign Students in the United States*, 40 HOFSTRA L. REV. 593, 593–94 (2011) (explaining that too few opportunities exist for foreign students to adjust their status and remain in the United States).

16. *Id.*

17. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012); see *infra* Section I.B (explaining the immigration process for temporary workers).

18. “F-1 visas” get their name from the section of the INA that establishes these visas, see *infra* note 19, and this Comment will refer to them as such.

19. INA § 101(a)(F)(i), 8 U.S.C. § 1101(a)(F)(i); see *infra* Section I.C (outlining the immigration process for foreign students).

20. See *infra* Section I.B for a more detailed discussion of the visa lottery.

21. 8 C.F.R. § 214.2(f)(10)(ii) (2016); see *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 156 F. Supp. 3d 123, 135–36 (D.D.C. 2015) (quoting *Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap Gap Relief for All F-1 Students With Pending H-1B Petitions*, 73 Fed. Reg. 18,944, 18,946 (Apr. 8, 2008)) (“[M]any employers who hire F-1 students under the OPT program eventually file a petition on the students’ behalf for classification as an H-1B worker in a specialty occupation.”), *vacated as moot*, 650 F. App’x 13 (D.C. Cir. 2016).

22. 8 C.F.R. § 214.2(f)(10).

23. See *infra* notes 78–81 and accompanying text (discussing the creation of OPT for the purpose of allowing foreign students to remain in the United States and gain practical training in their respective fields of study).

between when a student's F-1 visa status expires—often around May—and when the H-1B worker status begins—typically in October.<sup>24</sup> Over the years, DHS has expanded the time frame that some students may remain in the United States; most students are authorized to stay for twelve months after graduation, but students in the STEM fields have the option to extend their stay for an additional twenty-four months.<sup>25</sup> The expansion has prompted a growing debate with workers' unions voicing concerns about Americans losing jobs on the one hand and U.S. firms, in need of more qualified workers, urging for further practical training expansions on the other.<sup>26</sup>

In recent years, these nonimmigrants have moved to the center of national attention—first because of extensive new restrictions introduced in response to the September 11th attacks, then because of various proposals amending the H-1B visa category, and most recently as part of the general debate on comprehensive immigration reform stemming from the rise of the Islamic State (ISIL) and the refugee wave flowing from the Middle East to Western countries.<sup>27</sup> In today's economy, communication and travel have augmented countries' economic growth but have also globalized previously isolated financial crises.<sup>28</sup> While migrating is easier than ever, the

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24. See 2016 Rule, 81 Fed. Reg. 13,040, 13,117 (Mar. 11, 2016) (to be codified at 8 C.F.R. § 214.2(f)(5)(vi)) (reestablishing the Cap Gap program first introduced in a 2008 DHS regulation for any F-1 student with a timely filed H-1B petition and request for change of status).

25. *Id.* (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)).

26. See Matthew Bultman, *OPT Extension Is Hurting Us, Tech Workers Tell DC Circ.*, LAW360 (Feb. 4, 2016, 3:22 PM), <http://www.law360.com/articles/754759/opt-extension-is-hurting-us-tech-workers-tell-dc-circ> (discussing a dispute between DHS and a group of American computer professionals who challenged the OPT regulations).

27. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 359 (6th ed. 2015); see also Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 381–88 (2016) (describing the recent influx of Syrian asylees and refugees); Dan Harris & Jackie Jesko, *Anti-Immigrant Protests Grow as Thousands of Refugees Flood Europe*, ABC NEWS (Dec. 21, 2015, 5:12 PM), <http://abcnews.go.com/International/anti-immigrant-protests-grow-thousands-refugees-flood-europe/story?id=35888428> (reporting on the anti-immigrant sentiments that many refugees from Syria and the Middle East face in Europe, and noting the debate has spilled over to the United States). Additionally, nonimmigrant students have numerical significance, with the State Department issuing 677,928 student visas in 2015. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, ANNUAL REPORT OF THE VISA OFFICE 2015 tbl.XVI(A) (2015), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableXVIA.pdf>.

28. See, e.g., Dawn Foster, *Housing Blew up the Global Economy in 2008 and We Learned Nothing*, GUARDIAN (Jan. 29, 2016, 2:06 AM), <http://www.theguardian.com/>



topic of immigration has shifted to the forefront of an international debate. Overseeing and operating immigration systems poses complex inter- and intra-national problems for sovereign nations. Labor unions have challenged, and members of Congress have supported, practical training opportunities for foreign students.<sup>29</sup> It is therefore important to determine the program's validity by examining the statutory and common law.

Extending OPT status further and further raises the key question of whether DHS's regulations are beyond the scope of the amended Immigration and Nationality Act of 1952 (INA).<sup>30</sup> This Comment argues that by implementing a new regulation authorizing a twenty-four month extension of practical training for STEM students, DHS is constructing a necessary and valid bridge from student to worker status. Building this bridge is a valid exercise of the agency's power because the regulation comports with congressional intent to establish the two separate visa categories—student and worker—while also enacting safeguards for all domestic workers. Furthermore, the agency followed proper procedure in promulgating the regulation.

Part I provides an overview of the complexities of immigration law, focusing on the employment and academic categories and on the current law and recent developments regarding the OPT program. Part I also outlines the procedural and substantive standards the regulation must meet to be valid. Part II applies the standard to the regulation, revealing that Congress created the INA intending to construe the statute broadly so that the immigration system could grow with the country's needs and adapt to necessary changes over

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housing-network/2016/jan/29/housing-global-economy-2008-the-big-short-financial-crash (stating that the U.S. housing bubble had a direct impact on the domestic and global markets).

29. For example, a technology workers' union sued DHS to stop the OPT extension, which it called a "rogue guestworker program." Matthew Bultman, *Tech Workers Fight Student Visa OPT Ruling in DC Circ.*, LAW360 (Dec. 22, 2015, 5:24 PM), <http://www.law360.com/articles/740864/tech-workers-fight-student-visa-opt-ruling-in-dc-circ>. About two dozen members of Congress sponsored legislation in 2011 that would have revised the visa categories to attract and retain certain categories of foreign students and workers. Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Congress (2011). The bill was introduced on June 14, 2011, but it was not enacted. *Id.*

30. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.); see *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 144–45 (D.D.C. 2015) (finding the previous DHS regulations on OPT to be a reasonable exercise of agency authority under the INA but invalid on procedural grounds after a labor union challenged the rule as exceeding DHS's statutory authority), *vacated as moot*, 650 F. App'x 13 (D.C. Cir. 2016).

time. This Comment concludes that the current regulation is procedurally and substantively valid under the INA, that DHS should be afforded deference in constructing the regulation, and that the current construction is permissible.

## I. OVERVIEW OF THE PERTINENT IMMIGRATION LAWS & DEFINITION OF THE LEGAL STANDARD

It is crucial first to identify some basic principles pertinent to the study of immigration, provide an overview of the two relevant nonimmigrant visa categories: H-1B and F-1, present and outline the current status of the recently finalized regulation, and frame the standard for the analysis.

### A. *Principles of Immigration Law: Sorting Through the Alphabet Soup*

United States immigration law is riddled with complex theories often attempting to solve real life problems in complicated ways. Foreigners—or, for that matter, anyone not specializing in immigration law, may have trouble finding their way through the alphabet soup of visa categories. There are numerous classes of immigrants and nonimmigrants, and which visa a foreigner may receive depends on who is coming to the United States, for how long, and for what reason. Foreigners may also face immigration consequences for various offenses, such as violating the temporary intent requirement or overstaying their visas.

#### 1. *Immigrants v. nonimmigrants*

The Immigration Act of 1990<sup>31</sup> divides all non-American citizens into two groups—immigrants and nonimmigrants.<sup>32</sup> Immigrants are admitted with a green card for permanent residence, whereas nonimmigrants are only admitted for temporary visits of fixed duration.<sup>33</sup> The statute requires these temporary visits be tied to specific purposes, such as study, temporary work, business, or leisure visits, to name a few.<sup>34</sup>

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31. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

32. See INA § 101(a)(15)(A)–(V), 8 U.S.C. § 1101(a)(15)(A)–(V) (2012) (defining “immigrant” as every alien except one within a subsequently laid out class of nonimmigrant aliens, such as an ambassador, a business visitor, a crewman, a student, a skilled worker, etc.).

33. See LEGOMSKY & RODRIGUEZ, *supra* note 27, at 7 (explaining the terms immigrant and nonimmigrant).

34. INA § 101(a)(15), § 1101(a)(15).

Admissions criteria for nonimmigrants are generally less stringent than those for immigrants because of rigorous restrictions on nonimmigrants' lengths of stay and permitted activities.<sup>35</sup> At the core of U.S. immigration law is one crucial presumption: that noncitizens seeking admission are presumed to be immigrants.<sup>36</sup> To rebut the presumption, noncitizens must show that they qualify as nonimmigrants and must fit into one of the many categories of nonimmigrant laid out in section 101(a)(15) of the INA.<sup>37</sup> Thus, an immigrant faces more stringent admission requirements, whereas a non-immigrant is scrutinized when applying for the visa in the first place. A nonimmigrant seeking admission must overcome two separate hurdles: (1) the nonimmigrant must fit into one of the statutory nonimmigrant categories and (2) the nonimmigrant must avoid various affirmative grounds of inadmissibility.<sup>38</sup> The system is laborious and strict, ensuring that only those authorized to enter may remain in the United States. Once nonimmigrants have validly entered, they must adhere to more rules to avoid removal for violating their visa status. Section 237 of the INA lays out the grounds for which a foreigner may be removed.<sup>39</sup>

## 2. *Temporary v. dual intent*

Most nonimmigrant categories require either that the noncitizen seek to enter the United States "temporarily,"<sup>40</sup> or that the noncitizen have a foreign residence "which he has no intention of abandoning,"<sup>41</sup> or both. In immigration terminology, this requirement is referred to as temporary intent.<sup>42</sup> Consequently, any individual who intends to remain in the United States permanently is

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35. LEGOMSKY & RODRIGUEZ, *supra* note 27, at 7 (comparing nonimmigrant restrictions to immigrant restrictions; for example, immigrant admissions are numerically limited while most nonimmigrant admissions are not).

36. INA § 214(b), 8 U.S.C. § 1184(b).

37. *Id.*

38. See INA § 212(a), 8 U.S.C. § 1182(a) (listing the grounds of inadmissibility); see also LEGOMSKY & RODRIGUEZ, *supra* note 27, at 427 (stating that noncitizens are ineligible to receive visas and to be admitted to the United States under a wide range of subject matter, including communicable diseases, criminal activity, and protection of the U.S. workforce).

39. INA § 237(a), 8 U.S.C. § 1227(a). These reasons include inadmissibility at the time of entry, certain criminal conduct, marriage fraud, misrepresentation, and document fraud. *Id.*

40. See, e.g., INA § 101(a)(15)(B), (H), (L), 8 U.S.C. § 1101(a)(15)(B), (H), (L).

41. See, e.g., INA § 101(a)(15)(F), (J), 8 U.S.C. § 1101(a)(15)(F), (J).

42. 16 IMMIGRATION LAW AND PROCEDURE § 214.2(l)(6)(ii)(C) (2015).

statutorily ineligible for these nonimmigrant visa categories.<sup>43</sup> Thus, when foreign students interview to receive student visas, they must express the temporary intent to qualify.<sup>44</sup> This initial entry requirement may cause problems when students have to renew their visas after completing bachelor's degrees because they intend to come back for additional studies or simply when re-entering the United States after a trip home to visit family.<sup>45</sup>

Accordingly, a person might enter the United States on a temporary nonimmigrant visa with alternative plans in mind. These "alternative plans" manifest themselves in the law as "dual intent."<sup>46</sup> The Board of Immigration Appeals<sup>47</sup> and several courts have held that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status."<sup>48</sup> Thus even with an initial understanding that migration to the United States is meant to be temporary, roots do inevitably grow and expand.

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43. See INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (stating that if after admission DHS discovers that people originally entered with the intent to remain permanently, they might be deportable as inadmissible at entry); INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (recognizing that if nonimmigrants fail to maintain the requirements of their nonimmigrant status, they are deportable).

44. *But see generally* Walfish, *supra* note 13 (discussing the dual intent regime in regard to foreign students and arguing that it should be replaced with screening merely for intent to *illegally* remain in the United States).

45. For an example of how the temporary intent requirement can cause complications, see Phil Curtis, *The Doctrine of Dual Intent*, P. CURTIS & ASSOCIATES (Jan. 1, 2012, 2:04 AM), <http://www.pcurtislaw.com/doctrine-dual-intent> (recounting a firsthand experience of an F-1 client's problems with dual-intent). The student was attending school on an F-1 visa when his mother obtained lawful permanent resident status and wanted to file an immigrant visa petition for her son. *Id.* The son regularly visited his father in his home country. *Id.* The problem was that when the immigrant visa petition was filed, the son would not be able to prove upon re-entry that he did not intend to immigrate to the United States—as required under the nonimmigrant visa—and could therefore be denied re-entry. *Id.*

46. See Walfish, *supra* note 13, at 497–98 (explaining that "dual intent" was defined by courts as the "desire or purpose or intent" to remain in the United States if the law affords a nonimmigrant such an opportunity).

47. The Board of Immigration Appeals is the appellate-level administrative court responsible for reviewing many immigration matters. See 8 C.F.R. 1003.1(d) (2016).

48. See *In re Hosseinpour*, 15 I. & N. Dec. 191, 192 (B.I.A. 1975) (holding that filing an application for adjustment of status does not necessarily terminate nonimmigrant status); *accord* *Dandamudi v. Tisch*, 686 F.3d 66, 70 (2d Cir. 2012); *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960); *Brownell v. Carija*, 254 F.2d 78, 80 (D.C. Cir. 1957) (holding that an alien entering the United States in transit does not "become an unlawful entrant because he entertains a desire, purpose or intent to remain here if the laws of the country permit him to do so").

While dual intent is permitted for the H-1B visa category, it is not permitted for F-1 student visas.<sup>49</sup> The lack of such a provision exacerbates the problems students face when transitioning to worker status because they are unable to apply for immigrant visas.<sup>50</sup>

*B. The Migration Process for H-1B Temporary Workers*

INA section 101(a)(15)(H)(i)(b)<sup>51</sup> is the primary method of admission for temporary professional workers.<sup>52</sup> Subsection H(i)(b) requires that the person be “in a specialty occupation.”<sup>53</sup> A “specialty occupation” is one that requires “theoretical and practical application of a body of highly specialized knowledge” and that requires at least a bachelor’s degree in the particular specialty or the “equivalent” of a bachelor’s degree.<sup>54</sup> Section 214(i)(2) of the statute delineates the credentials that an individual must possess in order to be “in” the specified specialized occupation, such as holding a U.S. bachelor’s degree or higher.<sup>55</sup> Further, the H-1B nonimmigrant may be admitted for up to six years but must be “coming temporarily to the United States.”<sup>56</sup>

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49. Curtis, *supra* note 45; *Dual Intent—Did the Consulate Deny Your Nonimmigrant Visa Because of It?*, VISAPRO, <http://www.visapro.com/Immigration-Articles/?a=1575&z=31> (last visited Nov. 30, 2016).

50. See, e.g., *supra* note 45; see also Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT’L L. REV. 857, 868–70 (1998) (explaining that student visa applicants must prove that they do not have the dual intent to both study and remain in the United States after graduation).

51. This section of the INA establishes the “H-1B visa” and this Comment will refer to them as such.

52. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012); see also LEGOMSKY & RODRIGUEZ, *supra* note 27, at 375 (describing the types of visas for temporary workers).

53. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). See generally Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 840–41 (2012) (noting that subsection H(i)(b) also includes fashion models “of distinguished merit and ability”).

54. INA § 214(i)(1), 8 U.S.C. § 1184(i)(1). Many of the more difficult issues have concerned the kinds of equivalency determinations. See, e.g., *CareMax, Inc. v. Holder*, 40 F. Supp. 3d 1182, 1190–91 (N.D. Cal. 2014) (holding that the plaintiff’s combination of foreign and U.S. education was not equivalent to a bachelor’s degree in a required area of study from an accredited U.S. institution); *Viraj, LLC v. Holder*, No. 2:12-CV-000127-RWS, 2013 WL 1943431, at \*2–3, \*8 (N.D. Ga. May 8, 2013) (upholding a visa denial and finding the applicant’s three-year bachelor’s degree from Osmania University was not equivalent to a four-year bachelor of science degree from an accredited college or university in the United States).

55. INA § 214(i)(2), 8 U.S.C. § 1184(i)(2).

56. INA §§ 101(a)(H)(i)(b), 214 (g)(4), 8 U.S.C. §§ 1101(a)(H)(i)(b), 1184(g)(4).

In 1990, Congress limited the number of H-1B nonimmigrants admitted to the United States to 65,000 per year (not counting their spouses or children).<sup>57</sup> This was the first time that Congress placed numerical limits on nonimmigrant categories.<sup>58</sup> In the next decade, these quotas shifted dramatically according to global market trends such as the economic boom in the late 1990s, which required increased quotas,<sup>59</sup> and the economic slowdown in 2000, which led to decreased quotas because of large layoffs of professional workers.<sup>60</sup> Since 2004, the 65,000 cap has been met every year, often within the first few days of April 1, which is the first possible date to apply.<sup>61</sup>

The process of receiving an H-1B visa is complex, and an applicant must overcome multiple hurdles, including qualifying for a Labor Certification from the U.S. Department of Labor (DOL) and demonstrating that the applicant has a job offer.<sup>62</sup> In an H-1B case, an employer must file a “labor condition application” (LCA) with the DOL.<sup>63</sup> In the LCA, an employer attests to several things, including that (1) the employer is paying at least the prevailing wage level in the area of employment or the actual wage level received by others at the place of employment, whichever is greater; (2) the working conditions

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57. Immigration Act of 1990, Pub. L. No. 101-649, § 205, 104 Stat. 4978, 5019.

58. Compare Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (missing any reference to a quota system for nonimmigrants), with Immigration Act of 1990 § 205, 104 Stat. at 5019 (establishing numerical quotas for nonimmigrant categories).

59. See American Competitiveness and Workforce Improvement Act of 1998, Pub. L. 105-277, § 411, 112 Stat. 2681-641, 2681-642 (increasing the H-1B caps to 115,000 in the fiscal years 1999 and 2000, and to 107,500 in fiscal year 2001); American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. 106-313, §§ 102-03, 114 Stat. 1251, 1251-52 (increasing the H-1B cap further to 195,000 visas for each fiscal year between 2001 and 2003 as well as exempting higher education institutions, nonprofit, and governmental research institutions from the caps).

60. U.S. DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN., OIG-05-49, USCIS APPROVAL OF H-1B PETITIONS EXCEEDED 65,000 CAP IN FISCAL YEAR 2005 14 (2005) (explaining that in fiscal year 2004 the H-1B cap reverted back to 65,000).

61. See Press Release, U.S. Citizenship & Immigration Servs., USCIS Reaches FY2015 H-1B Cap (Apr. 10, 2014), <https://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap-0> (stating that the fiscal year 2015 cap for non-exempt H-1Bs was reached on April 7, 2014, just seven days after USCIS began receiving applications). See generally William A. Stock, *So, Now What? A Lighthearted Look at Strategies for Dealing with the H-1B cap*, 10 BENDER’S IMMIGR. BULL. 471 (Mar. 15, 2005) (suggesting creative solutions for living with the H-1B cap).

62. See INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101 (a)(15)(H)(i)(b) (2012) (listing the statutory requirements a foreigner must satisfy to receive an H-1B visa).

63. INA §§ 101(a)(15)(H)(i)(b), 212(n), 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n); see also 20 C.F.R. § 655.730 (2016) (answering questions about the LCA process).

of similarly-employed workers will not be adversely affected; (3) there is not a strike or lockout; and (4) the employer has notified its existing employees of the filing, in specified ways.<sup>64</sup> The DOL uses these certifications to ensure that employment of the foreign skilled workers will not preclude employment opportunities for U.S. workers.<sup>65</sup>

In the 2014 cycle, United States Citizenship and Immigrations Services (USCIS) received approximately 172,500 H-1B petitions during the filing period, which began on April 1, 2014.<sup>66</sup> When applicants submit petitions, a computer-generated process randomly selects applications until the annual quota is met.<sup>67</sup> The quota is met when USCIS has received at least 85,000 applications: 65,000 of these visa applications falling into the regular cap and an additional 20,000 falling into the advanced degree category.<sup>68</sup> This lottery process, which both the employer and the foreign employees depend on, is economically inefficient for the employer and the employee because it is unpredictable and limited. For example, the 2014 annual cap for H-1B visas had been reached within a week of the filing period.<sup>69</sup> If F-1 student visa holders are not selected for visas in this lottery, they must leave the country immediately and may not apply for another visa until the following year, leaving employers to find other ways to fill their vacancies. Thus, workers will often elect to take their skills elsewhere, and employers may choose to bypass the immigration laws by hiring workers illegally or refraining from hiring foreign workers all together.<sup>70</sup>

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64. INA § 212(n)(1), 8 U.S.C. § 1182(n)(1).

65. *Compare In re Griffiths*, 413 U.S. 717, 719 (1973) (“From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident especially during the periods when the demand for human resources greatly exceeded the native supply.”), *with Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (“A primary purpose in restricting immigration is to preserve jobs for American workers . . .”).

66. Press Release, U.S. Citizenship & Immigration Servs., *supra* note 61.

67. *Id.*

68. *Id.*

69. Laura D. Francis, *USCIS Announces H-1B Cap Was Reached Within First Week After Petitions Accepted*, DAILY LAB. REP. (Apr. 7, 2014), <http://www.bna.com/uscis-announces-h1b-n17179889540>.

70. Detracting even further from the little incentive that employers have to hire legal immigrants is the Obama Administration’s near discontinuation of worksite enforcement. See Jessica M. Vaughan, *ICE Records Reveal Steep Drop in Worksite Enforcement Since 2013*, CTR. FOR IMMIGR. STUD. (June 2015), <http://cis.org/sites/cis.org/files/vaughan-WSE.pdf>.

C. *The Migration Process for F-1 International Students*

Section 101(a)(15)(F)(i) of the INA authorizes the admission of students for schooling at U.S. institutions.<sup>71</sup> The INA defines a nonimmigrant falling into the F-1 category as a “bona fide student qualified to pursue a full course of study . . . at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution . . . approved by the Attorney General after consultation with the Secretary of Education.”<sup>72</sup> Section 101(a)(15)(F)(i) defines the requirements that a nonimmigrant demonstrate at the time of admission to gain entry to the United States on a student visa.<sup>73</sup> Foreign students may study in the United States for the duration of their degree on an F-1 visa.<sup>74</sup> Because these students are in the United States with the primary objective of receiving a degree, the INA extensively restricts their employment opportunities.<sup>75</sup> This is where the problems begin.

Internships and summer jobs are often an entry into the workforce because they provide benefits for both the student-employee and the employer.<sup>76</sup> Internships allow employers to test and train employees so that the employees may easily transition into full-time jobs with the employer’s company upon graduation. On the other hand, internships allow students to explore the many career paths they may take, gain

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71. INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (2012). Consequently, students are said to enter on F-1 visas.

72. *Id.*

73. *See* INA § 214(a)(1), 8 U.S.C. § 1184(a)(1) (reinforcing the reading of section 101(a)(15)(f)(i) as merely an entry requirement because Congress delegates the power to regulate a nonimmigrant’s duration of stay to the Attorney General).

74. *Compare* INA § 214(g)(4), 8 U.S.C. § 1185(g)(4) (admitting a foreign temporary worker for a specific time frame of up to six years), *with* INA § 101(a)(15)(F)(i), 8 U.S.C. 1101(a)(15)(F)(i) (admitting foreign students “temporarily and solely for the purpose of pursuing such a course of study”).

75. *See* 8 C.F.R. § 214.2(f)(9)(i) (2016) (authorizing a maximum of twenty hours per week during the semester of on-campus employment or off-campus employment that constitutes “an integral part of the student’s educational program”); § 214.2(f)(9)(ii)(A), (C) (authorizing F-1 students to work off-campus on a part-time basis in the case of severe economic hardship after having been in F-1 status for one full academic year provided that the student is in good academic standing); § 214.2(f)(10)(i) (providing that students may participate in Curricular Practical Training, which is compensated off-campus employment related to their course of studies and for academic credit).

76. *See* Jada A. Graves, *The New Concerns of an Evolving Workforce: Today’s Corporate Catchphrases will Become Tomorrow’s Commonplace Practices*, U.S. NEWS (Sept. 10, 2012, 4:00 PM), <http://money.usnews.com/money/careers/articles/2012/09/10/the-new-concerns-of-an-evolving-workforce> (“A lot of organizations will utilize internships and co-ops in the future as a way to bridge the experience gap . . .”).



experience, and build professional relationships. Internships are therefore the figurative first building blocks of the bridge that leads to employment after graduation. Conversely, the requirement that the students receive credit for off-campus employment results in prohibiting continuous work for the same employer for more than one semester or summer vacation period.<sup>77</sup> This requirement breaks down the foundations for potential employment by discouraging employers from hiring foreign students for internships while also making it particularly difficult for foreign students to establish long-term relationships with U.S. employers that may lead to full time employment. The current regulations limiting foreign student employment during their academic studies pose a serious roadblock to the transition from student to worker status and make a sturdy bridge even more necessary to retain these skilled workers.

*D. Building Bridges: Developments to Transition Students to Full-time Employees*

The OPT program, which allows nonimmigrant students to remain in the United States for an additional period after graduation to receive practical training in their field of study, was established by regulations and has been amended over time.<sup>78</sup> Similar laws allowing foreign students to participate in training opportunities after graduation existed long before DHS officially implemented the OPT Program.<sup>79</sup> OPT, which is available to F-1 students, is a form of temporary authorization for employment that directly relates to and complements a student's study in the United States.<sup>80</sup> Originally, the program was designed to extend a student's stay for twelve months after graduation; but, in 2008, DHS enacted a seventeen-month

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77. See *Working in the USA*, INT'L STUDENT, [http://www.internationalstudent.com/study\\_usa/way-of-life/working-in-the-usa/#cpt](http://www.internationalstudent.com/study_usa/way-of-life/working-in-the-usa/#cpt) (last visited on Nov. 30, 2016) (warning F-1 visa recipients that working for more than one year can jeopardize eligibility for Optional Practical Training).

78. See Special Requirements for Admission, Extension, and Maintenance of Status, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) (allowing foreign students to participate in practical training in their field of study if the training was not available in the student's country of origin).

79. See *infra* note 175 (observing that prior to the enactment of the INA, federal agencies, Congress, and courts supported opportunities for foreign students to gain on-the-job training).

80. 8 C.F.R. § 214.2(f)(10)(ii).

extension for certain F-1 students, specifically those receiving degrees in the STEM fields.<sup>81</sup>

Considering the H-1B visa together with the F-1 OPT, OPT effectively functions as a bridge allowing foreign students educated in America to enter the working world and remain here to start their careers.<sup>82</sup> Many employers who hire F-1 students under the OPT program decide to sponsor the students for H-1B visas, classifying them as workers in a specialty occupation.<sup>83</sup> Having built a network of contacts in the United States, as opposed to with their home country's job market, it only makes sense for the foreign students to want to begin their careers in the United States.<sup>84</sup> Not only are students "model immigrants," they are young, educated, and have had an extended experience living in the host country; therefore, many of them want to stay.<sup>85</sup> In effect, the twelve-month OPT period allows employers to hire a foreign student after graduation in May to bridge the time between graduation and the following April when H-1B visa applications may again be submitted. That the regulations have granted an even longer extension for graduates with STEM degrees likely reflects the growth in demand for such positions in the U.S. economy.<sup>86</sup>

The problem employers are facing is that the cap for H-1B visas is set at 65,000 visas annually, and the demand far exceeds that

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81. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944, 18,954 (Apr. 8, 2008) (codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)).

82. See *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 136 n.3 (D.D.C. 2015), *vacated as moot*, 650 F. App'x 13 (D.C. Cir. 2016) (finding that the comprehensive scheme of the INA defining various nonimmigrant categories, many of which overlap in point of the subject matter regulated, establishes an integral relationship between F-1 and H-1B).

83. 73 Fed. Reg. at 18,946.

84. Meng Lu, Note, *Not Part of the Family: U.S. Immigration Policy and Foreign Students*, 34 T. MARSHALL L. REV. 343, 372 (2009).

85. See EXPERT COUNCIL OF GERMAN FOUNDATIONS ON INTEGRATION & MIGRATION, TRAIN AND RETAIN: CAREER SUPPORT FOR INTERNATIONAL STUDENTS IN CANADA, GERMANY, THE NETHERLANDS AND SWEDEN 4-6 (2015), [http://www.svr-migration.de/wp-content/uploads/2015/08/Study\\_Train-and-Retain\\_SVR-research-unit\\_WEB.pdf](http://www.svr-migration.de/wp-content/uploads/2015/08/Study_Train-and-Retain_SVR-research-unit_WEB.pdf) (calling attention to the explicit interest that host countries have in retaining international graduates and the ambitions of the graduates themselves to contribute and to gain valuable international experience).

86. See U.S. DEP'T OF COMMERCE, ECON. & STATISTICS ADMIN., ESA 03-11, STEM: GOOD JOBS NOW AND FOR THE FUTURE 1 (2011) (noting that STEM jobs are expected to grow by 17% between 2008 and 2018 in the United States, compared to 9.8% for non-STEM jobs).

number.<sup>87</sup> DHS's solution was to extend OPT to give employers and employees a second chance to apply for an H-1B visa.<sup>88</sup> This extension of the legal residence period for foreign students after graduation also incentivizes students to stay in the United States with the hope of engaging in the U.S. labor market.<sup>89</sup>

The Cap Gap Extension, instituted alongside OPT, is another example of how DHS intends to assist foreign students educated in the United States to transition into the workforce. Cap Gap was necessary to bridge the gap between the time that students complete OPT (usually around May or June) and before they can begin working on an H-1B petition (granted in October).<sup>90</sup> Thus, any F-1 student with a timely filed H-1B petition and request for change of status may extend the duration of his F-1 status and employment authorization until the beginning of the new fiscal year when he would receive his new H-1B visa.<sup>91</sup>

*E. Current Status: The WashTech Case and DHS's 2016 Regulation*

In August 2015, the U.S. District Court for the District of Columbia invalidated the 2008 DHS regulation that permitted STEM F-1 students to receive a maximum of twenty-nine months of practical training.<sup>92</sup> The court's holding in *Washington Alliance of Technology Workers v.*

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87. See Gary J. Beach, *Remove the H-1B Visa Cap*, WALL ST. J.: CIO J. (Apr. 1, 2015 9:00 AM), <http://blogs.wsj.com/cio/2015/04/01/remove-the-h1b-visa-cap> (arguing for lifting the work visa quota for nonimmigrants).

88. See U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTION AND ANSWER: EXTENSION OF OPTIONAL PRACTICAL TRAINING PROGRAM FOR QUALIFIED CANDIDATES (2008), [https://www.uscis.gov/sites/default/files/files/article/OPT\\_4Apr08.pdf](https://www.uscis.gov/sites/default/files/files/article/OPT_4Apr08.pdf) (stating that the OPT extension period gives employees two chances to recruit graduates through the H-1B process because "the extension is long enough to allow for H-1B petitions to be filed in two successive fiscal years").

89. Lu, *supra* note 84, at 372 (arguing that the OPT extension provides students who have had little contact with their home countries the opportunity to enter the U.S. workforce after graduation).

90. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,042 (Mar. 11, 2016); see 8 C.F.R. § 214.2(f)(5)(vi) (2016) (allowing certain students with pending or approved H-1B petitions to remain in F-1 status during the Cap Gap period because an employer may not file an H-1B petition more than six months in advance of the date of actual need for the beneficiary's employment). Thus, the earliest date on which an employer can file an H-1B petition is April 1, for the following fiscal year, starting on October 1.

91. 8 C.F.R. § 214.2(f)(5)(vi).

92. *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 128–29, 149 (D.D.C. 2015), *vacated as moot*, 650 F. App'x 13 (D.C. Cir. 2016).

*Department of Homeland Security* (“WashTech”)<sup>93</sup> was based on a procedural deficiency, specifically that DHS did not lawfully issue the 2008 regulation because the agency failed to provide the public with notice and an opportunity to comment in advance of issuing it.<sup>94</sup> The additional seventeen-month extension was designed to allow U.S. employers to compete more effectively for U.S.-educated, STEM-trained foreign students by allowing more time for these individuals to work in the country on an F-1 visa while they tried to obtain an H-1B visa.<sup>95</sup> The court stayed the decision until February 2016, later granting a ninety-day extension, for DHS to hold a notice and comment rulemaking and institute a procedurally valid regulation.<sup>96</sup>

Following this ruling, DHS issued a notice of proposed rulemaking on October 19, 2015, and received comments on the regulation until November 18, 2015.<sup>97</sup> The final STEM OPT regulation was published in the Federal Register on March 11, 2016, and the pertinent text of the rule states,

[A] qualified student may apply for an extension of OPT while in a valid period of post-[graduation] OPT . . . An extension will be for 24 months for the first qualifying degree for which the student has completed all course requirements . . . , including any qualifying degree . . . . If a student completes all such course requirements for another qualifying degree at a higher degree level than the first, the student may apply for a second 24-month extension of OPT while in a valid period of post-[graduation] OPT . . . . In no event may a student be authorized for more than two lifetime STEM OPT extensions.<sup>98</sup>

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93. 156 F. Supp. 3d 123 (D.D.C. 2015).

94. *Id.* at 146–47.

95. See *infra* Section I.D (discussing the practical effects of allowing an OPT extension).

96. *Wash. All. of Tech. Workers*, 156 F. Supp. 3d at 149; see also *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 153 F. Supp. 3d 93, 101 (D.D.C. 2016) (staying the August 2015 decision for an additional ninety days).

97. 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. 63,376 (proposed Oct. 19, 2015).

98. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,117–18 (Mar. 11, 2016) (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)).

To qualify for an extension of OPT based upon a STEM degree, a graduate must meet additional requirements, including “eligibility”<sup>99</sup> requirements of the practical training opportunity, “qualification”<sup>100</sup> and “reporting”<sup>101</sup> requirements for the employer, completion of a “Training Plan,”<sup>102</sup> additional “reporting”<sup>103</sup> and “evaluation”<sup>104</sup> obligations, as well as additional supervision of the “terms of training.”<sup>105</sup>

The rule adds a new requirement that limits eligibility for a STEM OPT extension to students with degrees from an accredited U.S. educational institution.<sup>106</sup> The regulation further specifically defines

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99. *See id.* at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)) (explaining that an “eligible practical training opportunity” “must be directly related to the degree that qualifies the student for such extension”).

100. *See id.* (explaining that “employer qualification” means that the student’s employer is enrolled in the E-verify program); *see also* *What Is E-Verify?*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 26, 2016), <https://www.uscis.gov/e-verify/what-e-verify> (explaining that E-verify is an online program that compares employees’ Form I-9 to data from DHS and Social Security Administration records to confirm their employment eligibility).

101. *See* 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(6)) (requiring an employer to sign the Training Plan and to agree to “report the termination or departure of an OPT student to the [Designated School Official] at the student’s school”).

102. *See id.* (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(7)) (requiring a Training Plan (Form I-983) in which a student must complete an individualized plan and obtain requisite signatures from his employer). The Training Plan must identify specific goals for the training opportunity and explain how the applicant and employer will work to achieve those goals. *Id.* (to be codified at § 214.2(f)(10)(ii)(C)(7)(ii)). It must further detail the knowledge, skills, or techniques the student is expected to gain, explain how the mentorship and training is directly related to the student’s qualifying STEM degree, and describe the methods of performance evaluation and the frequency of supervision. *Id.*

103. *See id.* at 13,120–21 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(12)(ii)) (imposing additional reporting obligations on students with approved STEM extensions, such as reporting within ten days the change of a residential or mailing address or an employer’s name, making a validation report, and submitting a supervisor-approved evaluation every six months).

104. *See id.* at 13,119 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(9)) (requiring students to submit self-evaluations every year detailing progress toward training goals).

105. *See id.* (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(8)) (listing terms of training measures for “duties, hours, and compensation,” including that employment “must be commensurate with the terms and conditions applicable to the employer’s similarly situated U.S. workers in the area of employment[, but a] student may not engage in practical training for less than 20 hours per week”).

106. 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(1)); *see also* 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. 63,376, 63,388 (proposed Oct 19, 2015) (explaining that “due to the

“STEM” fields by referencing the fields included in the Department of Education Classification of Instructional Programs (CIP) taxonomy.<sup>107</sup> Under the revised rule, an F-1 student may remain unemployed during the STEM OPT extension period for sixty days instead of thirty, which is in addition to the ninety-day maximum period of unemployment during the regular OPT period.<sup>108</sup> Many requirements of the 2008 regulation remain the same, including the requirement that the practical training must be related to the student’s degree, the student’s obligation to report any name or address changes to the Designated School Official (DSO) within ten days, and the student’s duty to report changes to or interruptions in employment.<sup>109</sup>

*F. The Question of Deference: Framing the Standard*

The central question is whether DHS has the authority to issue the regulation extending the timeframe of OPT. Article I of the U.S. Constitution provides Congress with the power to legislate.<sup>110</sup> Because the legislative process is not designed to create every rule or standard regulating the public, it delegates the power to legislate to agencies, such as DHS.<sup>111</sup> When Congress delegates its power, the result is agency rulemaking.<sup>112</sup> There are three different types of rulemaking: (1) formal rulemaking,<sup>113</sup> (2) informal rulemaking,<sup>114</sup>

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difficulty in determining the equivalency of a degree obtained at a foreign institution, and because the purpose of OPT is to further one’s course of study in the United States, STEM degrees from foreign schools will not be permitted to qualify under the proposed program”).

107. 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(i)(C)(2)(i)) (defining “science, technology, engineering or mathematics” as a field containing “engineering, biological sciences, mathematics, and physical sciences, or a related field”). Related fields include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or physical, biological, and agricultural sciences. *Id.*

108. *Id.* at 13,119 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(E)).

109. *Id.* at 13,118, 13,120 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(4), (f)(12)).

110. U.S. CONST. art. I.

111. See ANDREW F. POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 65 (2d ed. 2010) (asserting that agencies are designed to adapt to the technological and resource changes that the legislative process cannot appropriately respond to).

112. *Id.* Rulemaking involves promulgating standards or, in other words, agency-articulated legal requirements that the public must follow. *Id.*

113. *Id.* at 66 (describing formal rulemaking as “a trial-like process” that produces rules that carry the force of law).

114. *Id.* (describing informal rulemaking, often called the notice and comment rulemaking, as a participatory process that establishes binding law); see also *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (explaining the twofold

and (3) rulemaking exempt from process.<sup>115</sup> DHS used informal rulemaking, known as notice and comment rulemaking, to issue the OPT extension rule.<sup>116</sup> Section 553 of the Administrative Procedure Act (APA)<sup>117</sup> outlines the timing, content, and procedural requirements for the publication of the notice of a proposed rulemaking and further sets forth requirements to issue a final rule.<sup>118</sup>

Section 702 of the APA states that parties aggrieved by agency action can seek relief through judicial review.<sup>119</sup> When an agency follows the notice and comment procedure required in informal rulemaking, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>120</sup> provides the standard of review for the agency action in question.<sup>121</sup> In that case, the Supreme Court found that the Environmental Protection Agency regulation allowing states to treat all pollution-emitting devices within the same industrial grouping as if encased within a single “bubble” was a reasonable construction of the term “stationary source” in the Clean Air Act Amendments and that the regulation was therefore valid.<sup>122</sup> To determine whether the term “stationary source” included the “bubble concept,” the Court scrutinized the statute and legislative history, in that order, searching for an explicit answer that Congress may have provided to the

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purpose of providing notice and comment rulemaking, namely (1) “to reintroduce public participation and fairness to affected parties” and (2) to “assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions” (first quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), then quoting *Guardian Fed. Sav. & Loan Ass’n v. FSLIC*, 589 F.2d 658, 662 (D.C. Cir. 1978))).

115. POPPER ET AL., *supra* note 111, at 66 (describing rulemaking “exempt from process” as “a non-participatory system by which agencies issue interpretive rules, policy statements, guidelines, or other standards that do not have the force of law”).

116. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,041 (Mar. 11, 2016).

117. Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

118. Administrative Procedure Act (APA), 5 U.S.C. § 553 (2012). For a more detailed explanation of notice and comment rulemaking, see POPPER ET AL., *supra* note 111, at 89–92.

119. 5 U.S.C. § 702.

120. 467 U.S. 837 (1984).

121. See *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001) (holding that *Chevron* deference is only applicable if the agency has been given statutory authority to issue rules with the force of law); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that only agency decisions which have the force of law—in other words, that follow the notice-and-comment requirements—warrant *Chevron* deference).

122. *Chevron*, 467 U.S. at 839–40, 845.

question “whether a plantwide definition of a stationary source is permissible under the permit program.”<sup>123</sup> Because it found none, the bubble concept was permissible as the EPA had previously adhered to and made rulemaking proposals involving the bubble concept, and the Court upheld the EPA’s regulation.<sup>124</sup> *Chevron* holds that if a statute is clear, then both the court and the agency must adhere to Congress’s unambiguously expressed intent.<sup>125</sup> However, if the statute is silent or ambiguous, courts must defer to the agency’s interpretation if the interpretation is a “permissible construction” of the law in question.<sup>126</sup> A court does not have to agree with the agency’s interpretation of the statute for there to be a “permissible construction”; rather, the court need only find that the agency’s interpretation was reasonable.<sup>127</sup> Under the APA, a court shall set aside an agency action if the action is in conflict with the statutory mandate, if the agency misread the statute, or if the agency proceeds in a manner violating due process.<sup>128</sup>

For agency action to pass muster it must pass the following five-step test. The first step asks whether the *Chevron* framework should apply to the agency action in the first place.<sup>129</sup> The framework applies when agency decisions “have the force of law or follow a formal procedure.”<sup>130</sup> Administrative regulations have the force of law when they are legislative<sup>131</sup> and when they are legally binding on private parties.<sup>132</sup>

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123. *Id.* at 851.

124. *Id.* at 862–63.

125. *Id.* at 842–43.

126. *Id.* at 843.

127. *Id.* at 843 n.11, 866.

128. 5 U.S.C. § 706(2) (2012) (stating that a court should “hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”). Judicial review of agency action implicates the separation of powers issue. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 151–66 (1803) (balancing the need for judicial review with the need for the executive to govern and express the will of the electorate).

129. This step is sometimes also referred to as “*Chevron* step zero.” *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *GEO. L.J.* 833, 836 (2001) (coining the term *Chevron* “step zero” and illustrating the importance of the step zero inquiry).

130. Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 193 (2006).

131. *See* Susan L. Thomas & Edward K. Esping, *Legal Status and Effect of Regulations*, in 1 *M.L.E. ADMINISTRATIVE LAW & PROCEDURE* § 23 (2016) (explaining that regulations are “legislative” when they have an impact on legal duties and the agency’s intent was to create a legislative rule, as indicated by following official rulemaking procedures).

132. *See* Sunstein, *supra* note 130, at 222 (explaining that an agency decision has “the ‘force of law’ when it is binding on private parties in the sense that those who act in violation of the decision face immediate sanctions”).



Step two examines Congress's explicit or implicit intent to delegate its law making power to the agency.<sup>133</sup> Thus, step two asks whether the agency has the authority to take the action at issue.

The third step focuses on the procedure of the rulemaking and asks whether the process was fair, specifically focusing on notice and comment rulemaking, asking whether there was legitimate notice, and whether the agency accepted comments.<sup>134</sup> Only if the agency followed the complete process will the rule be procedurally valid and upheld in an Article III court.<sup>135</sup>

Step four focuses on the specific statutory provision at issue and asks whether the statute is so unambiguous and clear that there is no question about its meaning.<sup>136</sup> If the statutory provision is in fact unambiguous, no *Chevron* problem exists and courts strictly follow the legislative mandate.<sup>137</sup> However, if the statutory provision leaves gaps for the agency to fill, the inquiry shifts to determine whether the agency's interpretation should be afforded deference.<sup>138</sup>

Whether a reviewing court should afford deference to agency decisions largely depends on whether the agency's interpretation of the statute is permissible. Thus, the fifth and final step of the analysis, asking whether the agency's interpretation of the statute is permissible, is analyzed in a separate section below.<sup>139</sup> That analysis

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133. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). When Congress has explicitly left a gap in the statute, “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” and these “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843–44. When the legislative delegation to an agency is implicit “a court may not substitute its own construction of a statutory provision for a reasonable interpretation.” *Id.* at 844; *see also* *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (stating that initially “the rule must be promulgated pursuant to authority Congress has delegated to the official”).

134. Administrative Procedure Act, 5 U.S.C. § 553(b)–(e) (2012).

135. § 553(b) (allowing an agency to dispense with the notice and comment requirement “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest”).

136. *Chevron*, 467 U.S. at 842; *see also* *Eurodif S.A. v. United States*, 423 F.3d 1275, 1277 (Fed. Cir. 2005) (stating that the court determines “whether the statute’s plain terms ‘directly address[s] the precise question at issue’” (alteration in original) (quoting *Chevron*, 467 U.S. at 843)).

137. *Chevron*, 467 U.S. at 842–43.

138. *Id.* at 843.

139. *See infra* Section II.B (arguing that the STEM OPT regulation is a permissible construction of the INA); *see also* *Chevron*, 467 U.S. at 843 n.11 (finding that the agency construction need not be “the only one it permissibly could have adopted to

takes into account several considerations, including whether the agency's interpretation of the statute is time-tested.<sup>140</sup> An agency interpretation is time-tested if Congress has acquiesced to an agency interpretation for a long period of time.<sup>141</sup> Similarly, the "legislative reenactment" doctrine calls for judicial deference for an agency regulation when Congress implicitly adopts the agency's interpretation by reenacting the underlying statute without any amendments.<sup>142</sup> For this doctrine to apply, there must be "some evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue."<sup>143</sup>

Finally, a regulation is permissible and deference is afforded unless (1) the rule is arbitrary and capricious, or (2) the rule is manifestly contrary to the statute.<sup>144</sup> By examining the specific sections of the statute and the regulations affecting these sections, in this case comparing the seemingly conflicting provisions of the F-1 OPT regulation authorizing training for students and the H-1B statutory provision authorizing employment for temporary workers, this Comment determines whether the two separate categories conflict and therefore whether the regulation manifestly contradicts the statute. In this process, Congress's overall goals—as well as intent in creating the two visa categories—must be considered. Critics of the OPT program argue that it is an invalid use of agency power, but an analysis of the program under the *Chevron* framework shows otherwise.

## II. APPLYING THE FIVE-STEP TEST: IS THE REGULATION A VALID EXERCISE OF DHS'S POWER?

The regulation extending STEM OPT satisfies every step of the five-step analysis and is therefore a valid exercise of DHS's power to regulate the field of immigration. The regulation should be afforded

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uphold the construction"); Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 314 (2004) (equating "permissible" to "reasonable").

140. See *Conn. State Med. Soc'y v. Conn. Bd. of Exam'rs in Podiatry*, 546 A.2d 830, 835 (Conn. 1988) (recognizing that when an agency has "consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable," deference is warranted).

141. See *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (suggesting that "[c]ourt[s] will normally accord particular deference to an agency interpretation" that has received "longstanding acquiescence" from Congress).

142. *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985).

143. *Pub. Citizen, Inc. v. U.S. Dep't Health & Human Servs.*, 332 F.3d 654, 669 (D.C. Cir. 2003).

144. *Chevron*, 467 U.S. at 844.

deference and upheld as a permissible construction if challenged in an Article III court.

A. *The STEM OPT Regulation Is Authorized, Procedurally Valid, and Fills a Gap in the Immigration and Nationality Act*

The five-step test resolves whether an agency's decision is authorized, procedurally fair, reasonable, and therefore should be afforded deference.<sup>145</sup> DHS's OPT regulation is authorized, expressly and impliedly, by Congress, is procedurally fair because it followed proper notice and comment rulemaking, and is reasonable because the need for more highly-trained foreign workers rationally connects to the need for the time extension.

Step one of the analysis, whether the *Chevron* framework should apply to DHS's rule extending the timeframe of STEM OPT at all, is satisfied because DHS adhered to informal rulemaking procedure, and the rule itself establishes norms that bind the public.<sup>146</sup> Administrative regulations have the force of law when they are legislative.<sup>147</sup> DHS published a notice of proposed rulemaking on October 19, 2015, received comments until November 18, 2015, reviewed the thousands of comments—requesting a ninety-day extension from the D.C. District Court on January 23, 2016—and published the notice in the Federal Register on March 11, 2016.<sup>148</sup> Thus, the regulation followed a prescribed procedure. Further, the final rule carries the force of law because it is binding on private parties; foreign students on F-1 visas, and employers employing those students and acting in violation of the rule, face immediate legal consequences including, but not limited to, employer sanctions and loss of legal status necessary to remain in the United States.<sup>149</sup>

Under *Chevron*, the Secretary of DHS has the express and implied power to act pursuant to the INA, thus establishing the requisite

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145. See *supra* Section I.F.

146. But see *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (observing that interpretations in opinion letters, “which lack the force of law[,] do not warrant *Chevron*-style deference”).

147. See *Thomas & Esping*, *supra* note 131.

148. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,046–47 (Mar. 11, 2016).

149. See *id.* at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(c)(6)) (stating that employers who do not agree to report the termination or departure of an OPT student shall not be approved for placement of an OPT student); *id.* at 13,120 (to be codified at 8 C.F.R. § 214.2(f)(12)(ii)) (stating that “[c]ompliance with [the] reporting requirements is required to maintain F-1 status”).

authority essential under step two. The Secretary has broad authority to administer and enforce the immigration laws.<sup>150</sup> Section 103 of the INA details the powers and duties of the Secretary. Under section 103(a) the Secretary “shall be charged with the administration and enforcement of . . . all [] laws relating to the immigration and naturalization of aliens,” except such powers conferred upon the President, Attorney General, or others.<sup>151</sup> Further, the Secretary “shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions” of the INA.<sup>152</sup> The INA additionally provides the Secretary with broad authority to act in numerous other ways, such as (1) determining the time and conditions under which nonimmigrants, including H-1B workers and F-1 students, may be admitted to the United States;<sup>153</sup> (2) determining which individuals may be authorized for employment in the United States;<sup>154</sup> (3) managing the oversight and reporting programs;<sup>155</sup> and (4) collecting information about visa holders, such as F-1 students’ physical location and full-time status during their courses of stay in the United States.<sup>156</sup> Thus, in examining the text of both the current and earlier versions of the INA, Congress explicitly authorized the Secretary to regulate the field of immigration, including the regulation at issue here.

The process DHS followed was fair, conformed to the APA, and is thus procedurally valid under step three; specifically, the agency provided legitimate notice, accepted comments, and reviewed and

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150. *See generally* 6 U.S.C. § 202 (2012) (establishing the Secretary’s authority in the field of immigration).

151. INA § 103(a), 8 U.S.C. § 1103(a).

152. *Id.*

153. INA § 214(a)(1), 8 U.S.C. § 1184(a)(1).

154. *See* INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) (defining the term “unauthorized alien” to mean that the alien is neither a lawful permanent resident nor authorized to work by the INA or the Attorney General).

155. *See generally* Jeh Charles Johnson, Memorandum, Policies Supporting U.S. High-Skilled Businesses and Workers (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_business\\_actions.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_business_actions.pdf) (providing direction for DHS future policies and recognizing the need to evaluate, strengthen, and improve practical training as part of an overall strategy to enhance the country’s economic, scientific, and technological competitiveness).

156. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 641(a)(1), (c)(1)(A)–(C), 110 Stat. 3009-546, 3009-704–05 (codified as amended at 8 U.S.C. § 1372 (a)(1), (c)(1)(A)–(C)).

responded to them.<sup>157</sup> After the 2008 regulation was vacated by court order in August 2015, DHS chose to update the regulation to meet the current workplace needs more effectively and, on October 19, 2015, provided notice of the proposed rulemaking.<sup>158</sup> Over the next thirty days, DHS received over 50,000 comments on the proposed rule.<sup>159</sup> The procedure was fair because DHS provided notice of the rulemaking, received over 50,000 comments, asked for a ninety-day extension to review meaningfully the provided comments, incorporated changes suggested in comments, and did not make any unexpected or uncalled for changes to the final rule.<sup>160</sup>

A textual examination of the INA demonstrates that the statute is ambiguous, and therefore—under step four—the agency may fill gaps in interpretation and application by issuing regulations.<sup>161</sup> The INA does not define the terms “course of study” or “student,” and is silent on the precise issue of whether nonimmigrants admissible under this category are authorized for employment.<sup>162</sup> Because the INA provides no guidance as to the limitations or authorizations on employment, the statute is ambiguous.<sup>163</sup> It does not speak clearly to whether employment is permitted, nor does it completely bar employment for F-1 nonimmigrants. Further considering section 101(a)(15)(f)(i), the terms “course of study” and “student” are also ambiguous because neither is defined in the statute.<sup>164</sup> Looking at the statute in context,

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157. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,046, 13,049 (Mar. 11, 2016).

158. *Id.*

159. *Id.* For a comment submitted in support of the regulation, see Marlene M. Johnson, Executive Director and CEO, NAFSA: Association of International Educators, Response to the Notice of Proposed Rulemaking (Nov. 13, 2015), [http://www.nafsa.org/\\_/File/\\_/NAFSA\\_STEM\\_OPT\\_Comment\\_Letter\\_11-13-2015.pdf](http://www.nafsa.org/_/File/_/NAFSA_STEM_OPT_Comment_Letter_11-13-2015.pdf) (suggesting, inter alia, OPT extensions for all fields).

160. For DHS’s discussion of and response to several comments, see 81 Fed. Reg. at 13,049–109.

161. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

162. Compare INA § 101(a)(15)(f)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (2012) (lacking any reference to employment authorization), with INA § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (providing skilled employees with temporary employment authorization), and INA § 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i) (authorizing a foreigner with “extraordinary ability” with employment authorization).

163. See *Chevron*, 467 U.S. at 843 (finding that when a statute is silent on the issue, it is ambiguous).

164. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011) (holding that in the terms of the Federal Insurance Contributions Act, the

section 101(a)(15)(f)(i), presenting an initial entry requirement for students, controls the meaning of “course of study” or “student.”<sup>165</sup> This understanding is further augmented by Congress’s delegation of the power to prescribe regulations related to a nonimmigrant’s duration of stay.<sup>166</sup> Thus, the INA in section 101(a)(15)(f)(i) is ambiguous and leaves the door open for agency action.

When an agency takes action—for instance, by issuing the STEM OPT regulation—it is crucial to determine whether the agency action is permissible. Because *Chevron* announced the permissibility standard, courts methodically analyze the reasonableness of regulations to ensure that agency action is valid.<sup>167</sup>

*B. The STEM OPT Regulation Is a Permissible Interpretation of the Immigration and Nationality Act*

The fifth step of the analysis under *Chevron* is whether an agency made its regulation pursuant to a permissible construction of the statute. Because DHS’s interpretation of the INA allowing post-graduation employment for foreign students has been afforded longstanding acquiescence, announces a rational purpose, and is not manifestly contrary to the INA, the regulation is reasonable and therefore permissible.

DHS interpreted the INA’s ambiguity on March 11, 2016, by publishing its final OPT regulation, which established when the scope

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term “student” was ambiguous concerning medical residents because “the statute does not define the term ‘student,’ and does not otherwise attend to the precise question whether medical residents are subject to FICA”); Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec., 156 F. Supp. 3d 123, 139 (D.D.C. 2015), *vacated as moot*, 650 F. App’x 13 (D.C. Cir. 2016) (finding that the INA’s lack of a definition of the term “student” creates ambiguity); WILLIAM LITTLE ET AL., OXFORD UNIVERSAL DICTIONARY ON HISTORICAL PRINCIPLES 2049–50 (C.T. Onion ed., 3d ed. 1955) (defining the term “student” as a person who engages in “study,” which it defines as “apply[ing] the mind to the acquisition of learning, whether by means of books, observation, or experiment”).

165. See INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (defining the requirements that that an individual must demonstrate at the time of admission to gain entry on a nonimmigrant student visa).

166. INA § 214(a)(1), 8 U.S.C. § 1184(a)(1).

167. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 454 (1997) (analyzing “whether the Secretary of Labor’s ‘salary-basis’ test for determining an employee’s exempt status reflected a permissible reading of the [Fair Labor Standards Act] as it applies to public sector employees”); *Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 55 (2007) (holding that the FCC’s determination of the meaning of “unreasonable practice” in section 201(b) of the Communications Act of 1934 was a reasonable one).

of the F-1 student visa encompasses post-graduation OPT related to the student's field of study.<sup>168</sup> Under step five, this regulation interpreting the INA's gap is valid and deserves deference because it is reasonable.<sup>169</sup> DHS's regulation interpreting the gap in the INA is reasonable because Congress has acquiesced to that interpretation over a long period of time.<sup>170</sup> The regulation's construction is reasonable under the APA because it is a "reasonable explanation of how [the] agency's interpretation serves the statute's objectives."<sup>171</sup> Further, it is not "arbitrary, capricious, or manifestly contrary to the statute."<sup>172</sup> The agency's reasoning presents a "rational connection between the facts found and the choice made."<sup>173</sup>

*1. Congress's longstanding acquiescence to DHS's interpretation approving practical training for foreign students*

DHS's interpretation of the INA allowing for post-graduation practical training has been afforded longstanding acquiescence from Congress and is therefore reasonable.<sup>174</sup> Since 1947, Congress, courts, and federal agencies have interpreted the immigration laws concerned with foreign students as including on-the-job training as a supplement to theoretical training.<sup>175</sup> Even after Congress

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168. See Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,117 (Mar. 11, 2016) (to be codified at 8 C.F.R. § 214(f)(10)(ii)(C)) (amending DHS's F-1 nonimmigrant student visa regulations on OPT allowing STEM students who have elected to pursue twelve months of OPT to extend the period by twenty-four months and increasing oversight over extension by, among other things, requiring the implementation of formal training plans by employers).

169. *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (finding that when an agency's interpretation is reasonable, then a court shall afford deference rather than substitute its own interpretation).

170. See *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 145 (D.D.C. 2015) (acknowledging Congress's acquiescence to DHS's interpretation of F-1 visas), *vacated as moot*, 650 F. App'x 13 (D.C. Cir. 2016).

171. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 219 (D.C. Cir. 2015) (quoting *Northpoint Tech, Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005)).

172. *Chevron*, 467 U.S. at 844; see also *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998) (stating that courts must uphold "agency interpretation[s] as long as they are reasonable—regardless whether there may be other reasonable, or even more reasonable, views").

173. *Motor Vehicles Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

174. See *Barnhart v. Walton*, 535 U.S. 212, 220 (2002).

175. See Immigration Act of 1990, Pub. L. 101-649, § 221(a), 104 Stat. 4978, 5027 (expanding employment opportunities for foreign students by allowing them to

overhauled the immigration laws in 1952 and created the modern category of nonimmigrant students, the Immigration and Naturalization Service (INS) continued to interpret the law to permit foreign students to engage in practical training.<sup>176</sup> Since 1952, Congress has knowingly and repeatedly amended the laws governing nonimmigrant students without disturbing the interpretation allowing practical training.<sup>177</sup>

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participate in a three-year pilot program in which students could be employed off-campus in positions *unrelated* to their field of study); *In re Ibarra*, 13 I. & N. Dec. 277, 277-78 (B.I.A. 1986) (noting that foreign students were allowed to participate in practical training after graduation); *In re T*, 7 I. & N. Dec. 682, 684 (B.I.A. 1958) (noting that the “length of authorized practical training should be reasonably proportionate to the period of formal study in the subject which has been completed by the student [and only in] unusual circumstances [is] practical training . . . authorized before the beginning of or during a period of formal study”); H.R. REP. NO. 87-721, at 15 (1961) (reprinting a notice to Department of State and INS officers stating that students recommended for practical training by their schools should be allowed to remain for that training for up to eighteen months after graduation); S. REP. NO. 81-1515, at 503, 505 (1950) (stating that “practical training has been authorized for six months after completion of the student’s regular course of study” and suggesting that “the laws . . . be liberalized to permit foreign students to take practical training before completing their formal studies”); *Review of Immigration Problems: Hearing Before the Subcomm. on Immigration, Citizenship, & Int’l Law of the H. Comm. on the Judiciary*, 94th Cong. 21, 26 (1975) (statement of the Hon. Leonard F. Chapman, Jr., Comm’r of INS) (stating that although there “is no express provision in the law for an F-1 student to engage in employment,” the INS’s program of allowing a foreign student to engage in full-time practical training for up to eighteen months is “consistent with the intent of the statute”); 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) (stating that “[i]n cases where employment for practical training is required or recommended by the school, the district director may permit the student to engage in such employment for a six-month period subject to extension for not over two additional six-month periods”).

176. See, e.g., Special Requirements for Admission, Extension, and Maintenance of Status, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) (allowing foreign students to participate in practical training in their field of study for a maximum of eighteen months, if the training was not available in the student’s country of origin). The INS no longer enforces U.S. immigration laws as this power was transferred to DHS in 2002. 6 U.S.C. § 202(3) (2012).

177. See Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (2010) (amending the F-1 language training program); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 625(a), 110 Stat. 3009-546, 3009-699 (adopting limitations concerning F-1 students at public elementary and secondary schools); Immigration Act of 1990, Pub. L. 101-649, § 221(a), 104 Stat. 4978, 5027 (allowing F-1 students to participate in limited employment opportunities unrelated to their field of study); Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, § 75 Stat. 527, 534 (permitting the spouse and minor children to accompany an F-1 nonimmigrant).



Additionally, multiple congressional hearings have discussed the practical training program.<sup>178</sup> Considering the legislative history demonstrating that DHS's interpretation of section 101(a)(15)(f) allowing employment for training purposes after graduation is "longstanding," the regulation is reasonable.<sup>179</sup> Congress is clearly familiar with DHS's interpretation and considers the agency's interpretation reasonable, especially because it kept the interpretation intact for almost seventy years—even after the immigration system was significantly overhauled in 1952.

2. *DHS's STEM OPT extension is justified by a rational connection between economic, educational, and social concerns*

DHS established a rational connection between rectifying highly skilled worker shortages, providing a complete education, and preventing the "brain drain" phenomenon, and the need for the STEM OPT extension. Considering the economic impacts of extending the OPT program, such as creating the necessary qualified workforce for the STEM fields, a rational connection exists and renders the regulation reasonable. One of DHS's statutorily enumerated goals is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland."<sup>180</sup> Moreover, a significant purpose of immigration policy is to balance the productivity gains that foreigners bring to the United States against the potential threat to the domestic labor market.<sup>181</sup> The interest of safeguarding U.S. labor is intricately connected with practical training on F-1 student visas. In the 2013–2014 academic year, international students made a net contribution of \$26.8 billion to the

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178. See, e.g., *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15–16 (2001) (statement of Warren R. Leiden, American Immigration Lawyers Association) (suggesting the streamlining of the immigration system to cure backlogs by, for example, enabling foreign student advisors at universities to authorize OPT).

179. See, e.g., *Olympus Corp. v. United States*, 792 F.2d 315, 320 (2d Cir. 1986) (holding that congressional acquiescence in the longstanding agency interpretation allowing the Customs Service to refuse to exclude goods from importation legitimizes the interpretation as an exercise of the agency's discretion); *Barnhart*, 535 U.S. at 220 (finding that "[c]ourt[s] will normally accord particular deference to an agency interpretation of longstanding duration").

180. 6 U.S.C. § 111(b)(1)(F) (2012).

181. See *supra* note 65 and accompanying text (acknowledging that while immigration brings many beneficial contributions, it needs to be restricted to preserve jobs for U.S. citizens).

U.S. economy.<sup>182</sup> STEM students, specifically, further contribute to the economy through research, which grows the academic fields and provides the knowledge and skills that sustain and expand important economic sectors.<sup>183</sup> Studies have suggested that international students contribute to the overall economy, finding that highly skilled foreigners have led to the growth of international business and trade, as well as the strengthening of the relationship between foreigners' countries of origin and the United States through direct investment.<sup>184</sup> All STEM fields diversify the economy, drive economic growth, and produce increased employment opportunities and higher wages for all U.S. workers.<sup>185</sup> DHS also took careful measures to protect the domestic labor market by implementing tighter oversight measures, such as the Training Plan, and requiring students to notify their school of any job or address changes.<sup>186</sup> Thus, the consideration of economic effects on the U.S. workforce and economy is a reasonable explanation of how DHS's interpretation serves the INA's objectives.<sup>187</sup>

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182. NAFSA: ASS'N OF INT'L EDUCATORS, THE ECONOMIC BENEFIT OF INTERNATIONAL STUDENTS: ECONOMIC ANALYSIS FOR ACADEMIC YEAR 2013–2014, [http://www.nafsa.org/\\_/File/\\_/eis2014/USA.pdf](http://www.nafsa.org/_/File/_/eis2014/USA.pdf) (last visited Nov. 30, 2016).

183. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,047 (Mar. 11, 2016).

184. *Id.*

185. See MICHAEL GREENSTONE & ADAM LOONEY, A DOZEN ECONOMIC FACTS ABOUT INNOVATION 2–3 (Aug. 2011), [https://www.brookings.edu/wp-content/uploads/2016/06/08\\_innovation\\_greenstone\\_looney.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/08_innovation_greenstone_looney.pdf) (arguing that innovation, driven by those in STEM fields, increases working productivity and therefore increases compensation); Bureau of Labor Statistics, *STEM 101: Intro to Tomorrow's Jobs*, BLS OCCUPATIONAL OUTLOOK Q. 6 (Spring 2014), <http://www.stemedcoalition.org/wp-content/uploads/2010/05/BLS-STEM-Jobs-report-spring-2014.pdf> (demonstrating that employment in occupations related to STEM fields has been projected to grow more than thirteen percent, between 2012 and 2022, which is two percent faster than the rate of growth projected for all occupations); see also AUSTRALIAN GOV'T, STRATEGIC REVIEW OF THE STUDENT VISA PROGRAM 2011 REPORT ix (2011), <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/2011-knight-review.pdf> (concluding that the economic benefit of international master's degree and doctoral research students includes third-party job creation).

186. 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(c)(12)). The 2016 regulation requires students to notify their schools of any job changes within ten days. *Id.*

187. See *Council for Urological Interests v. Burwell*, 790 F.3d 212, 219 (D.C. Cir. 2015) (holding that a regulation's construction is permissible under the APA if it is a "reasonable explanation of how an agency's interpretation serves the statute's

Another benefit of extending practical training is that it will help the United States remain competitive in the international market for foreign students.<sup>188</sup> Foreign students not only boost the economy but also increase the benefits of academic exchange, reinforce ties with other countries, and foster increased understanding of culture and society.<sup>189</sup> Since September 11th, an ever-increasing number of foreign students are choosing other countries in which to pursue education and employment, such as Australia and Canada, over the United States.<sup>190</sup> The international education industry is a \$15 billion industry in the United States and thus justifies the need to ensure that U.S. visa rules do not discourage these students from pursuing their education in the United States.<sup>191</sup> Furthermore, countries such as the United Kingdom, Canada, China, and Malaysia are actively instituting new strategies to attract international students.<sup>192</sup> For example, in 2008, Canada modified its Post-Graduation Work Permit Program to allow international students who graduate from a recognized Canadian post-secondary institution to stay and gain valuable work experience for a period equal to the length of the student's program, up to a maximum of three years, without any restrictions on the type of employment.<sup>193</sup> In this competitive international market, the U.S. immigration system has to keep up;

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objectives" (quoting *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005)).

188. 81 Fed. Reg. at 13,049.

189. See *International Students and Visiting Scholars: Trends, Barriers, and Implications for American Universities and U.S. Foreign Policy: Joint Hearing Before the Subcomm. on Int'l Orgs., Human Rights, & Oversight of the H. Comm. on Foreign Affairs, and the Subcomm. on Higher Educ., Lifelong Learning, & Competitiveness of the H. Comm. on Educ. & Labor*, 110th Cong. 5-6 (2007) [hereinafter *Joint Hearing*] (statement of Rep. Ruben Hinojosa, Chairman, Subcomm. on Higher Education, Lifelong Learning, and Competitiveness) (commenting on the variety of benefits foreign students bring to the United States).

190. *Id.*

191. *Id.*

192. Brandan O'Malley, *Schools Are the New Battleground for Foreign Students*, U. WORLD NEWS (July 15, 2015), <http://www.universityworldnews.com/article.php?story=201507150915156>.

193. *Study Permits: Post Graduation Work Permit Program*, GOV'T CAN. (Sept. 28, 2016), <http://www.cic.gc.ca/english/resources/tools/temp/students/post-grad.asp>. Australia also offers international students who graduate with a higher education degree from an Australian institution, regardless of their field of study, a post-study work visa for up to four years, depending on the student's qualifications. *Working After Studying in Australia*, AUSTL. DEP'T IMMIGR. & BORDER PROTECTION: MIGRATION BLOG (Nov. 24, 2014), <http://migrationblog.border.gov.au/2014/11/24/working-after-studying-in-australia>.

allowing students to receive practical training will attract more students.<sup>194</sup> Ensuring that the United States remains competitive in the international student market requires the STEM extension, which shows that DHS made a rational decision when considering that other countries have vastly increased training and employment opportunities for foreign students.<sup>195</sup>

The F-1 visa's history similarly shows that DHS's interpretation of the INA to issue the STEM OPT extension is reasonable. A purpose of the student visa is to attract the world's brightest students and shape them into experts in their fields. U.S. institutions, at which these students are trained, look to retain these highly skilled graduates to develop, innovate, and experiment; thus, it seems contrary to the visa's purpose to force these students to leave after they only complete their theoretical studies. Additionally, the F-1 visa's explicit purpose of completing a "full course of study" may be interpreted to be both theoretical and practical.<sup>196</sup> Merely grasping theories may not exhaust the student's course of study. This is especially true for the STEM fields because many of the theories these students focus on in school are most effectively applied in experimental, practical settings.<sup>197</sup> The OPT extension provides students with a more complete educational experience by allowing them to apply their theoretical skills in practical work settings.<sup>198</sup> By promoting the student's ability to experience the connection between theory and practical application, including by applying abstract concepts in attempts to solve real-world problems, the OPT program enhances their educational experiences. Because students

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194. *Joint Hearing, supra* note 189, at 6 (statement of Rep. Ruben Hinojosa, Chairman, Subcomm. on Higher Education, Lifelong Learning, and Competitiveness).

195. *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,051 (Mar. 11, 2016).

196. INA § 101(a)(15)(f), 8 U.S.C. § 1101(a)(15)(f) (2012). "Course of study" is defined as "an integrated course of academic studies." *Course of Study*, FREE DICTIONARY, <http://www.thefreedictionary.com/course+of+study> (last visited Nov. 30, 2016). "Integrated" is defined as "to make into a whole by bringing all parts together." *Integrated*, FREE DICTIONARY, <http://www.thefreedictionary.com/integrated> (last visited Nov. 30, 2016); *see also* *Integrated*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/integrated> (last visited Nov. 30, 2016) (defining "integrated" as "having different parts working together as a unit").

197. *See* 81 Fed. Reg. at 13,051 (finding that a well-developed ability to work with real-world conceptualizations in the use of advanced technology is important in science-based professions).

198. *Id.*

on F-1 visas come to the U.S. to receive a full training in their fields of study, and the OPT program enhances these educational experiences, the regulation is rational.

3. *The STEM OPT regulation is not manifestly contrary to the Immigration and Nationality Act*

DHS's interpretations of the ambiguous provisions of the INA are reasonable because the interpretations are not "manifestly contrary to the statute."<sup>199</sup> Administrative agencies are legally bound to strictly comply with their enabling statutes and therefore cannot modify or contravene the policy established by Congress.<sup>200</sup> Thus, a reasonable statutory interpretation must account for both "the specific context in which [the] language is used" and "the broader context of the statute as a whole."<sup>201</sup> The agency is "free to write the regulations as broadly as [it] wishes, subject only to the limits imposed by the statute."<sup>202</sup>

Considering the INA in a broader context, the F-1 OPT opportunities do not conflict with the H-1B visa because OPT does not effectively circumvent the H-1B's strict statutory restrictions imposed on foreign workers.<sup>203</sup> Thus, DHS's interpretations are not "manifestly contrary" to the INA. Section 101(a)(15)(h)(i)(b) applies to foreigners seeking to work in a "specialty occupation," and is thus far broader than the employment the OPT program permits, that is "directly related to the student's major area of study."<sup>204</sup> Further, Congress has allowed practical training of foreign students for seventy years and has not addressed a potential overlap between F-1 and H-1B visas, even when it created the modern H-1B category in 1990.<sup>205</sup> When establishing the modern H-1B category, Congress imposed further safeguards for the U.S. labor market, such as requiring temporary foreign workers to present a job offer and to apply for an LCA from the DOL, thereby assuring DHS that allowing

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199. See *Emokah v. Mukasey*, 523 F.3d 110, 116 (2d Cir. 2008).

200. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (noting that an agency interpretation merits deference only when it is not contrary to the design of the statute as a whole).

201. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

202. *Auer v. Robbins*, 519 U.S. 452, 463 (1997).

203. See *supra* Section I.B (describing the statutory requirements to obtain a H-1B visa).

204. See 8 C.F.R. § 214.2(h)(4)(i)(A)(1) (2016) (defining "specialty occupation" within the H-1B classification as one requiring the attainment of a bachelor's degree and "theoretical and practical application of a body of highly specialized knowledge"); § 214.2(f)(10)(ii) (defining when a student may be granted authorization to engage in OPT).

205. See Immigration Act of 1990, Pub. L. 101-649, § 205(c), 104 Stat. 4978, 5027.

the foreigner to work in the United States will not negatively affect the domestic labor market.<sup>206</sup>

On the other hand, Congress did not impose any such requirements on foreign students participating in OPT. The regulation ensures similar protections for the U.S. workforce and is therefore not contrary to INA section 101(a)(15)(h)(i)(b).<sup>207</sup> For example, the regulation imposes employer qualifications requiring all employers training a foreign student to enroll and be in good standing in the E-Verify program with the goal of tracking the employer and the foreign student trainee.<sup>208</sup> Before the start of his practical training, the student must file an Application for Employment Authorization with USCIS, pay the accompanying fee, and provide supporting documentation.<sup>209</sup> These initial requirements guarantee that the student qualifies for OPT and is authorized to work. The H-1B visa imposes similar, somewhat more stringent, qualifications on employers and employees, requiring employers to comply with the prevailing wage requirement,<sup>210</sup> pay most fees related to sponsoring the visa,<sup>211</sup> and applying for an LCA.<sup>212</sup>

Further, section 214.2(f)(10)(ii)(C)(7) imposes stricter reporting measures on the employer, requiring the employer to sign a Training Plan and to report within five business days the termination or departure of an OPT student (if before the end of the authorized

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206. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012).

207. *But see* *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387, 1398–1401 (N.D. Cal. 1985) (holding that the operation instruction directly conflicted with the H-1B visa because it allowed skilled laborers to circumvent the labor condition application process and was therefore not a permissible interpretation).

208. Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13,040, 13,118 (Mar. 11, 2016) (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(5)).

209. 81 Fed. Reg. at 13,119–20 (to be codified at 8 C.F.R. § 214.2(f)(11)(i)(A)).

210. 20 C.F.R. § 655.731(a) (2016) (requiring employers to pay a wage that is the greater of the actual wage rate or the prevailing wage).

211. 20 C.F.R. § 655.731(c)(9) (2016) (stating that an employer may not generally deduct its costs of filing the LCA and H-1B petition from the employee's wages). However, an employer may receive liquidated damages from an H-1B nonimmigrant who leaves the employment early. § 655.731(c)(10)(i)(B). Employees may also pay for expedited processing of certain petitions. *See How Do I Use the Premium Processing Service?*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 26, 2015), <https://www.uscis.gov/forms/how-do-i-use-premium-processing-service>.

212. 20 C.F.R. § 655.700(a)(3) (requiring H-1B employers to file the LCA).

period of OPT).<sup>213</sup> The Training Plan guarantees that the student has found a training opportunity related to his field of study and imposes liability on the signing employer for any violations.<sup>214</sup> Specifically, the plan requires a detailed explanation of the goals of the work-based learning opportunity, a description of how those goals will be achieved, a listing of the skills, knowledge, or techniques to be imparted, and an attestation to the methods of performance evaluation and frequency of supervision.<sup>215</sup>

An employer must also ensure that the duties, hours, and compensation are commensurate with terms and conditions applicable to the employer's similarly situated U.S. workers in the area of employment.<sup>216</sup> This requirement coincides with the employment oversight procedures imposed on an H-1B employee.<sup>217</sup> Also similar to the H-1B obligations imposed on employers is that under the regulation, an employer must attest (1) that the employer has sufficient resources and personnel to provide appropriate mentoring and training; (2) that the employer will not terminate or lay-off any full- or part-time temporary or permanent U.S. worker as a result of the practical training; and (3) that the student's training helps the student reach his training goals.<sup>218</sup> On the contrary, the periods of unemployment allowed under F-1 OPT exceed any unemployment allowed under H-1B. OPT allows for a total of 150 days of unemployment during OPT, including any subsequent twenty-four-month extension period,<sup>219</sup> whereas H-1B provides no unemployment grace period, although USCIS may exercise limited discretion on a case-by-case basis.<sup>220</sup> However, it is much more likely that a professional trained in a specialty occupation will find a job in a short period of time than a trainee just graduating from school.

Comparing the obligations that the STEM OPT regulation and the

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213. 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(6)-(7)); *see supra* note 102 (acknowledging the Form I-983 requirement, in which students must complete an individualized Training Plan and obtain requisite signatures from their employers).

214. 81 Fed. Reg. at 13,118 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(6)).

215. *Id.*

216. *Id.* at 13,119 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(8)).

217. INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see also supra* notes 62-65 (discussing LCA requirements for H-1B employers).

218. 81 Fed. Reg. at 13,119 (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)(10)).

219. *Id.* (to be codified at 8 C.F.R. § 214.2(f)(10)(ii)(E)).

220. *Practical Immigration Consequences for Foreign Workers in a Slowing Economy*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 15, 2010), <https://www.uscis.gov/tools/ombudsman-liaison/practical-immigration-consequences-foreign-workers-slowng-economy>.

H-1B regulations impose on employers shows that the STEM OPT regulation also seeks to ensure that the presence of foreign STEM students does not harm the U.S. workforce. The OPT extension does not circumvent the H-1B safeguards and instead imposes more substantive obligations on employers and foreign trainees.

Because DHS's regulation is procedurally and substantively valid, it should be upheld in an Article III court. The rule followed the proper notice and comment process and is reasonable because it is longstanding and not arbitrary, capricious, or manifestly contrary to the statute.

### C. Recommendations

Revamping the immigration system is crucial to America's future as a world power, especially because travel and migration have become so simple and the planet is growing more connected by the day. Amending OPT to build a necessary bridge from student to worker status without creating a "rogue" visa category should be the goal. The U.S. can accomplish this objective by ensuring that only a specific, limited amount of students are allowed to pursue OPT and ensuring that employment of foreign students educated at U.S. institutions will not harm U.S. workers.

Some of the comments submitted to DHS during the notice and comment period proposed that OPT extensions should be issued to all foreign students educated at U.S. institutions, not just STEM students.<sup>221</sup> The extensions, even though a beneficial bridge for foreign students, should be limited to graduate or professional degree students. Pursuing a second degree in a specialized field and choosing to commit at least another two years (for a total of six years) to the United States should justify OPT extensions for such students because they, unlike foreigners applying from abroad, have already become a part of the community, paid their social dues, and invested themselves in a life and career in the United States.

Canada's immigration policy, specifically its Skilled Worker Program, provides a good example of how the United States could implement this recommendation. To qualify for the Skilled Worker Program, a person must have achieved a specified educational level, possess a specified number of years of work experience, be of a certain age, and be able to substantiate their language abilities under

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221. See, e.g., Johnson, *supra* note 159 (suggesting, inter alia, OPT extensions for all academic fields, not just STEM fields).



one of Canada's official languages.<sup>222</sup> Persons are evaluated on a points system against six categories and must obtain 67 points out of 100 to qualify for permanent residency.<sup>223</sup> These factors are: education (maximum of 25 points), language (minimum threshold of 16 points, maximum of 28 points), employment experience (minimum of 9 points, maximum of 15 points), age (maximum of 12 points), arranged employment in Canada (0 or 10 points), and adaptability (maximum of 10 points).<sup>224</sup> Just as a person educated in or who has worked in Canada receives additional points in the adaptability section, a student in the United States should receive a boost for their U.S. education. The Canadian skilled worker immigration policy is just one of many programs around the world actively encouraging the immigration of skilled migrants.<sup>225</sup>

On another note, explicitly allowing foreign graduate students educated in the U.S. to have dual intent, as permitted in H-1B status, would bring stability and confidence to the market because students could then consider remaining in the United States after graduating if the chance arose. Student visas are granted for a period of five years; therefore, if a foreign student elects to remain in the United States to pursue a graduate degree, the student will most likely have to renew his visa before or during pursuit of the additional degree. Acknowledging dual intent would help this student obtain a new visa even if the student was unsure of his post-graduate destination; it would also prevent fraud, as applicants may feel forced to say that they will return to their home countries after completion of studies when they in fact have no idea where they will be going after graduation and might want to remain in the United States if given the chance. Realistically, many students transition from F-1 to H-1B or to some type of immigrant status anyway. Max Frisch once said, "We sought workers, and human beings came."<sup>226</sup> As this quote suggests, the subject of foreign workers is complex. People are not just students or workers: they have families, they contribute to the

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222. *Determine Your Eligibility—Federal Skilled Workers*, GOV'T CAN., <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> (last visited Nov. 30, 2016).

223. *Id.*

224. *Id.*

225. *See supra* text accompanying note 192.

226. *See* MAX FRISCH, SCHWEIZ ALS HEIMAT?: VERSUCHE ÜBER 50 JAHRE 219 (1990) (Ger.) ["Man hat Arbeitskräfte gerufen, und es kommen Menschen."] (discussing the hardships that workers coming to Switzerland after World War II and the immigration system faced).

economy by spending money as well as paying taxes,<sup>227</sup> and as a result, they become an integral part of the community. Immigration policy should reflect this reality.

Another possibility would be to create a pool of applicants, consisting of foreign students educated in the United States that apply for H-1B visas, for whom a specific number of H-1B visas are allocated each year. Similar to the 20,000 additional visas that are allocated to foreign students with masters (or higher) degrees from U.S. universities, 10,000 visas could be allocated to foreign students with bachelor's degrees from U.S. universities, thus excluding those students from having to compete with foreign workers applying for H-1B visas from abroad. Because the students educated in America have already contributed to the U.S. economy and society, the preference for this class is justified.

#### CONCLUSION

The regulation is a valid exercise of DHS's powers. The extension of OPT is a necessary and legally valid solution to the problem that the immigration system, U.S. employers, and foreign students educated in the United States face. Retaining these highly skilled, already integrated members of the community is beneficial for the current and future U.S. economy. Because Congress wanted to allow for the INA to grow with time, and because no changes have been made to the H-1B visa cap in more than fifty years, simultaneously expanding OPT to build a necessary bridge from student to worker status is crucial and legally justified.<sup>228</sup>

The question remains as to how much longer the OPT may be extended before it no longer serves its original purpose—educational training tied to the person's degree of study. It is possible that as long as the OPT program ensures increased oversight mechanisms and requires the same worker protections necessary to obtain a work

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227. See 26 U.S.C. § 871(a)(1)(A) (2012) (requiring nonresident aliens to pay taxes for all "interest . . . dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income" received from sources in the United States). Because foreigners are not able to receive Medicare or Medicaid payments, the taxes they pay are primarily for the benefit of U.S. citizens.

228. See *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 135 (D.D.C. Aug 12, 2015), *vacated as moot*, 650 F. App'x 13 (D.C. Cir. 2016) ("F-1 and H-1B perform the interlocking task of recruiting students to pursue a course of study in the United States and retaining at least a portion of those individuals to work in the American economy.").

visa, the program may remain in place as a bridge for foreign students educated in America to enter the workforce. In the long run, and to ensure that the United States can compete in attracting skilled migrants, Congress will have to adjust more actively and/or completely change the skilled worker program.

The United States must ensure that valuable foreign students continue to attend its institutions and drive the country's economy and social evolution. Yet, allowing for the OPT extension and continuing to build a meaningful transition for foreign students is a topic feverously debated in Congress. To ensure that students have access to these opportunities, it is necessary to take a step back from politics and recognize the long-term benefits that this bridge will bring.