APPENDIX

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APPENDIX A

No. 21-5028

United States Court of Appeals
for the
District of Columbia Circuit

Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 50 F.4th 164 (D.C. Cir. 2022)

[Filed] October 4, 2022
Rehearing En Banc Denied February 1, 2023

Before: HENDERSON, TATEL, and PILLARD, *Circuit Judges*.

OPINION

PILLARD, *Circuit Judge*: Since before Congress enacted the Immigration and Nationality Act of 1952 (INA), the Executive Branch under every President from Harry S. Truman onward has interpreted enduring provisions of the immigration laws to permit foreign visitors on student visas to complement their classroom studies with a limited period of post-coursework Optional Practical Training (OPT). A 1947 Rule allowed foreign students "admitted temporarily to the United States . . . for the purpose of pursuing a definite course of study" to remain here for up to eighteen months following completion of coursework for "employment for practical training" as required or

recommended by their school. That program has persisted and been continually updated across the ensuing seventy years.

Today, over one million international students come to the United States each year on student visas, and over one hundred thousand of them complete a period of practical training. *See* U.S. Immigration and Customs Enforcement: Student and Visitor Exchange Program, 2021 SEVIS By the Numbers Report 2, 4-5 (April 6, 2022). The current Department of Homeland Security (DHS) OPT Rule authorizes up to one year of post-graduation on-the-job practical training directly related to the student's academic concentration, with up to 24 additional months for students in science, technology, engineering and mathematics (STEM) fields. The OPT Rule requires an applicant for practical training to be enrolled on a full-time basis at an authorized academic institution that requires or recommends it as directly related to the student's coursework. The practical training must be approved by both the school and DHS, the student must be registered with DHS as an OPT participant, and the student's practical training must be overseen by both the employer and the school.

The Secretary of Homeland Security promulgated the challenged OPT Rule pursuant to the Executive's longstanding authority under the INA to set the "time" and "conditions" of nonimmigrants' stay in the United States. 8 U.S.C. § 1184(a)(1). The Rule is an exercise of that authority over foreign students authorized to enter the country on nonimmigrant F-1 student visas. 8 U.S.C. § 1101(a)(15)(F)(i). The time-and-conditions authority and the foreign student visa category were

both already on the books when Congress conducted its in-depth review and synthesis of immigration law to enact the 1952 INA. Congress knew that the statutory powers it chose to preserve in that Act had long been used by the Executive to permit foreign students who had entered the United States in order to attend school to stay after graduation for a period of practical training as required or recommended by their school. Lawmakers have closely scrutinized the immigration laws many times since then. Congress has repeatedly amended the pertinent provisions. But it has never once questioned the statutory support for the Optional Practical Training program.

Washington Alliance of Technology Workers (Washtech) argues that the statutory definition of the F-1 visa class precludes the Secretary from exercising the time-and-conditions authority to allow F-1 students to remain for school-recommended practical training after they complete their coursework. But that argument wrongly assumes that, beyond setting terms of entry, the visa definition itself precisely demarcates the time and conditions of the students' stay once they have entered. Congress gave that control to the Executive. The F-1 definition tethers the Executive's exercise of that control, but by its plain terms does not exhaustively delimit it. We hold that the statutory authority to set the time and conditions of F-1 nonimmigrants' stay amply supports the Rule's OPT program.

The practical training opportunities the Rule permits reasonably relate to the terms of the F-1 visa. The INA's text and structure make clear that Congress intended the Secretary's time-and-conditions authority

to be exercised in a manner appropriate to the types of people and purposes described in each individual visa class—a constraint that the Secretary's overarching administrative-law obligations confirm. To be valid, the challenged post-graduation OPT Rule, including its STEM extension, must reasonably relate to the distinct composition and purpose of the F-1 nonimmigrant visa class. We hold that they do. The Rule closely ties students' practical training to their course of study and their school. OPT is time-limited, and the extension period justified in relation to the visa class. The record shows that practical training not only enhances the educational worth of a degree program, but often is essential to students' ability to correctly use what they have learned when they return to their home countries. That is especially so in STEM fields, where hands-on work is critical for understanding fast-moving technological and scientific developments.

Finally, Washtech sees another lack of statutory authority for the Rule: In its view, the Executive cannot authorize any employment at all, including for Optional Practical Training. That argument fails, too. As Congress itself has recognized, the Secretary's statutory authority to set the "conditions" of nonimmigrants' stay in the United States includes the power to authorize employment reasonably related to the nonimmigrant visa class. Authorizing foreign students to engage in limited periods of employment for practical training as their schools recommend according to the terms set out in the Rule is a valid exercise of that power.

As further explained below, we affirm the judgment of the district court sustaining the OPT Rule's

authorization of a limited period of post-coursework Optional Practical Training, if recommended and overseen by the school and approved by DHS, for qualifying students on F-1 visas.

I. Background

A.

The INA sets the terms on which consular officers at U.S. embassies and consulates abroad may issue visas to both prospective "immigrants" and "nonimmigrants." 8 U.S.C.§ 1201(a)(1). "Immigrant" visas are issued to foreign nationals intending to move to the United States permanently. "Nonimmigrant" visas are for foreign nationals seeking to come into the country temporarily for an identified purpose. The INA's definitional section lists several dozen classes of foreign nationals who may be eligible for nonimmigrant visas. 8 U.S.C. § 1101(a)(15). Those classes are often referred to by their clause number within subparagraph (a)(15) of section 1101. For example, "A-1" visas grant entry to certain foreign dignitaries, "B-1" to business travelers, "H-1B" to persons in certain specialty occupations, "H-2A" to temporary agricultural workers, "I" to journalists, and "P" to certain types of visiting performers. *See* 8 U.S.C. §§ 1101(a)(15)(A)(i), 1101(a)(15)(B), 1101(a)(15)(H)(i)(b) & (ii)(a), 1101(a)(15)(I), 1101(a)(15)(P).

An F-1 foreign-student visa may be issued to:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of

> study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn . . . .

Id. § 1101(a)(15)(F)(i). Like other visa classes defined in section 1101(a)(15), F-1 identifies entry conditions but "is silent as to any controls to which these aliens will be subject after they arrive in this country." *Rogers v. Larson*, 563 F.2d 617, 622-23 (3d Cir. 1977).

Those post-arrival controls are spelled out pursuant to section 1184(a)(1), providing the Executive authority to set the "time" and "conditions" of admission for nonimmigrant visa- holders, including those who enter the country with F-1 visas. Section 1184(a)(1) provides:

> The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . .

8 U.S.C. § 1184(a)(1); *see Rogers*, 563 F.2d at 622-23. The balance of section 1184(a)(1) affords the Attorney General the authority, as he "deems necessary," to require of any nonimmigrant

> the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title [allowing change in nonimmigrant status], such alien will depart from the United States.

8 U.S.C. § 1184(a)(1).[1] The INA authorizes the Secretary to "establish such regulations" as are "necessary for carrying out his authority under" the statute and enforcing its terms. *Id.* § 1103(a)(1)-(3).

The INA thus defines categories of visa eligibility and empowers the Secretary, guided by those visa categories, to regulate how long and under what conditions nonimmigrants may stay in the country.

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[1] A note on nomenclature: Section 1184(a)(1), which was enacted when the Immigration and Naturalization Service was housed in the Department of Justice, refers to the Attorney General. That authority was transferred in 2002 to DHS so is currently exercised by the Secretary of Homeland Security. At times we refer to either or both DHS or its United States Customs and Immigration Service (USCIS) and DOJ or its Immigration and Naturalization Service (INS) simply as the Executive.

B.

Pertinent aspects of the INA's statutory framework date back nearly a century, to the Immigration Act of 1924. In that Act, Congress established a student visa category materially the same as its modern F-1 counterpart, authorizing entry of "[a]n immigrant who is a bona fide student . . . who seeks to enter the United States solely for the purpose of study at an accredited school . . . which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student." Immigration Act of 1924, Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155; *accord* 8 U.S.C. § 1101(a)(15)(F)(i). Then, as today, the Act specified that "[t]he admission to the United States" of what were then called "non-quota immigrants," including visiting students, would "be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed." Immigration Act of 1924 § 15, 43 Stat. at 162-63; *accord* 8 U.S.C. § 1184(a)(1). The 1924 Act authorized the Attorney General to require foreign students to post bonds to ensure compliance with any prescribed time and conditions. § 15, 43 Stat. at 163.

Congress has repeatedly reinforced that approach, with F-1 directly setting entry conditions and the Executive regulating the terms of stay pursuant to its statutory time-and-conditions authority. Congress made no changes across the intervening decades to disapprove post-graduation practical training, even as it overhauled other aspects of our immigration laws: The Immigration and Nationality Act of 1952 created the modern nonimmigrant categories—including the

F-1 class—and restated both the basic eligibility criteria for student visas and the grant to the Executive of time-and-conditions authority over the terms of nonimmigrants' stay. *See* Immigration and Nationality Act, Pub. L. No. 82-414, §§ 101(15)(F), 214(a), 66 Stat. 163, 168, 189 (1952).

Since it overhauled immigration law in 1952, Congress has made some tweaks to the student visa and practical training regimes. It has, for example, authorized the noncitizen spouses and children of F-1 students to accompany them, Pub. L. No. 87-256, § 109(a), 75 Stat. 527, 534 (1961), required specific employment authorization and verification by employers for most noncitizens as a condition of their employment in the United States, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360-74 (1986), and, after the September 11, 2001 attacks, strengthened the program for monitoring permissions and approvals of foreign students' study in the United States, Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (2002). But Congress has left unchanged the key terms and basic framework that statutorily define visa categories and empower the Executive to specify by regulation the terms of nonimmigrants' presence in the United States.

The Executive has consistently exercised those enduring statutory powers to maintain and control the OPT program. From at least the 1940s onward, the Executive has used its statutory time-and-conditions authority to permit post- coursework employment as a form of practical training for student visa-holders. With key terms strikingly similar to the wording in the current OPT Rule, the 1947 rule governing students who were "admitted temporarily to the United

States . . . for the purpose of pursuing a definite course of study" provided that:

> In cases where employment for practical training is required or recommended by the school, the [INS] 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, but any such extensions shall be granted only upon certification by the school and the training agency that the practical training cannot be accomplished in a shorter period of time.

12 Fed. Reg. 5,355, 5,355, 5,357 (Aug. 7, 1947). The 1947 regulation authorized practical training to occur "after completion of the student's regular course of study." S. Rep. No. 81-1515, at 503 (1950).

The Executive has explicitly reaffirmed that understanding in regulations spanning a dozen presidential administrations: It has long used its statutory authority over the "time" of nonimmigrant admission to set the length of F-1 visa-holders' permitted presence in the United States and the "conditions" they must meet while here.[2] Rather than admitting F-1 students for a

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[2] *See, e.g.*, 34 Fed. Reg. 18,085, 18,085 (Nov. 8, 1969) (extending the availability of practical training from 6 to 18 months); 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) (reauthorizing the preexisting practical training regime); 42 Fed. Reg. 26,411, 26,413 (May 24, 1977) (permitting students in certain fields to engage in practical training "[a]fter completion of a course or courses of study"); 48 Fed. Reg. 14,575, 14,581, 14,586 (Apr. 5, 1983) (allowing practical training "after the completion of a course of study" regardless of degree program); 57 Fed. Reg. 31,954, 31,956 (July 20,

particular interval of time, DHS admits them for the "duration of [their] status." 8 C.F.R. § 214.2(f)(5)(i); *see id.* § 214.2(f)(7)(i). Per DHS regulations, the duration of that status includes the time during which they are full-time students in approved courses of study. *Id.* § 214.2(f)(5)(i). And it includes standardized periods when they may be here under other, related conditions—for example, for up to a month before and two months after starting coursework, *id.*

§ 214.2(f)(5)(i), (iv), up to five months during approved gaps between educational levels, *id.* § 214.2(f)(5)(ii), (f)(8)(i), on vacation between terms, *id.* § 214.2(f)(5)(iii), and—the subject of this case—while they engage in capped periods of practical training after completion of coursework, *id.* § 214.2(f)(5)(i), (f)(10)(ii)(A)(3).

C.

Washtech challenges the Secretary's statutory authority to permit F-1 visa-holders who have completed their coursework to undertake a capped period of employment as a form of practical training—as recommended or required by their schools and approved by the Secretary. *See* 8 C.F.R. § 214.2(f)(5)(i). As already noted, OPT continues the Executive's longstanding policy of authorizing visiting students to work here in

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1992) (using the term "Optional [P]ractical [T]raining" for the first time to describe the temporary employment available to F-1 students); 81 Fed. Reg. 13,040, 13,041 (Mar. 11, 2016) (extending the OPT period for up to twenty-four months for F-1 students in STEM fields). We discuss these regulations in further detail infra at 31-32.

their field, under the auspices of their school, for a limited period to cement their classroom learning and ensure they can use that knowledge effectively at work when they return to their home countries. *See* 57 Fed. Reg. 31,954, 31,954-57 (July 20, 1992) (detailing the terms of OPT).

The regulations governing practical training allow approved students to remain in the United States for up to one year following completion of their course of study if they are "engag[ed] in authorized practical training." 8 C.F.R. § 214.2(f)(5)(i), (f)(10), (f)(11). In 2008, the Department promulgated a rule allowing F-1 visa-holders with STEM degrees to apply for an OPT extension of up to seventeen months. *See* 73 Fed. Reg. 18,944 (Apr. 8, 2008). The district court vacated that rule as unlawfully issued without notice and comment but stayed the vacatur to allow DHS to correct that error. *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* (*Washtech I*), 156 F. Supp. 3d 123 (D.D.C. 2015). In 2016, the Secretary did so, promulgating after notice and comment a renewed STEM practical training extension program. *See* 81 Fed. Reg. 13,040 (Mar. 11, 2016). We then vacated the district court's 2015 decision as moot. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. (Washtech II)*, 650 F. App'x 13 (D.C. Cir. 2016). The 2016

Rule carries forward the existing allowance of up to a year of practical training related to the student's field of study and adds an extension for STEM students of up to twenty-four months. *See* 81 Fed. Reg. at 13,041; 8 C.F.R. § 214.2(f)(10)(ii)(C).

The current OPT Rule defines the post-coursework practical training at issue here as follows:

> General. Consistent with the application and approval process in paragraph (f)(11) of this section, a student may apply to [United States Customs and Immigration Service] for authorization for temporary employment for optional practical training directly related to the student's major area of study. The student may not begin optional practical training until the date indicated on his or her employment authorization document, Form I-766. A student may be granted authorization to engage in temporary employment for optional practical training:
>
> * * *
>
> (3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent). Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training. A student must complete all practical training within a 14-month period following the completion of study, except that a 24-month extension pursuant to paragraph (f)(10)(ii)(C) of this section [for STEM students] does not need to be completed within such 14-month period.

8 C.F.R. § 214.2(f)(10)(ii). The Rule limits post-coursework OPT to "an F-1 student who has been lawfully enrolled on a full time basis, in a [United States Customs and Immigration] Service-approved college, university, conservatory, or seminary for one full

academic year," allowing such a student to seek "employment authorization for practical training in a position that is directly related to his or her major area of study." *Id.* § 214.2(f)(10).

The preamble to the final rule explains that the "core purpose" of the challenged STEM OPT extension is to "allow participating students to supplement their academic knowledge with valuable practical STEM experience." 81 Fed. Reg. at 13,041. More specifically, the 24-month STEM extension will, according to DHS, "enhance [participating] students' ability to achieve the objectives of their courses of study by allowing them to gain valuable knowledge and skills through on-the-job training that may be unavailable in their home countries." *Id.* at 13,042-43. The rule also "improves and increases oversight over STEM OPT extensions" in order to further "guard[] against adverse impacts on U.S. workers." *Id.* at 13,040, 13,049.

To realize those purposes, the OPT Rule requires specific actions by students, schools, employers, and the government to design, approve, and monitor the practical training component for each participating student. First, a school administrator responsible for overseeing the education of F-1 students—the Designated School Official—must recommend the student to DHS as someone whose education will be enhanced by on-the- job practical training, and DHS must favorably adjudicate the application. 8 C.F.R. § 214.2(f)(10)(ii)(C)(3), (f)(11)(i)-(iii); *id.* § 214.3(*l*)(1). Second, the student and the school official must settle on a proposal for practical work "directly related to the degree that qualifies the student for" the extension—in this case, certain STEM degrees. *Id.*

§ 214.2(f)(10)(ii)(C)(4). Third, the student and the prospective employer must then agree on a "training plan" that identifies the specific ways in which the practical training will enhance the participant's education. *Id.* § 214.2(f)(10)(ii)(C)(7). They must submit their agreed plan to the school's designated official for review and approval. *Id.* Finally, the prospective employer must attest, among other things, that the employment will help the student attain his or her training objectives, and that the student will not replace a full- or part-time temporary or permanent U.S. worker. *Id.* § 214.2(f)(10)(ii)(C)(10).

Once the student-trainees begin working, the school official continues to superintend the practical training; the students and their employers must periodically report back to the school with evaluations of the student's progress toward the training goals. *Id.* § 214.2(f)(10)(ii)(C)(9)(i). The Designated School Official must, in turn, submit the training plans and follow-up reports to DHS. *Id.* § 214.2(f)(10)(ii)(C)(9)(iii). DHS may, at its discretion, conduct site visits to ensure that employers are meeting program requirements. *Id.* § 214.2(f)(10)(ii)(C)(11). Recordkeeping obligations of the schools that are approved by DHS to enroll F-1 students include maintenance of records on each student reflecting "[w]hether the student has been certified for practical training, and the beginning and end dates of certification." *Id.* § 214.3(g)(1)(vii).

D.

Washtech challenged the 2016 OPT extension and underlying practical training regime as unlawful on

several grounds. The district court dismissed the case. *Wash. All. Of Tech. Workers v. U.S. Dep't of Homeland Sec. (Washtech III)*, 249 F. Supp. 3d 524 (D.D.C. 2017). It held that Washtech had standing to challenge the 2016 Rule's extension of the maximum OPT period for STEM graduates, though not the preexisting regime generally authorizing a year of post- graduation OPT. *Id.* at 535-54, 556. On the merits, the district court credited the government's argument that Washtech's "single, conclusory sentence" in its complaint asserting "that the 2016 OPT Program Rule exceeds DHS's authority" was "facially implausible given the absence of any alleged facts supporting this conclusory legal claim." *Id*. at 555. Because in opposing the motion to dismiss "Washtech failed to address" the government's arguments in support of its statutory authority, the district court treated the government's characterization as "conceded." *Id.* As for the APA challenge, the district court observed that "Washtech contends that the 2016 OPT Program Rule was implemented arbitrarily and capriciously because it 'requires employers to provide foreign- guest workers OPT mentoring without requiring that such program be provided to American workers.'" *Id*. (quoting the complaint). The district court rejected that argument as similarly "threadbare" insofar as it simply ignored "the extensive explanations provided in the 2016 OPT Program Rule, including the explanations provided in the notice of proposed rulemaking on which Washtech publicly commented . . . ." *Id.* at 556.

We reversed the dismissal of the statutory-authority challenge to the 2016 Rule, reasoning that by its nature "[a] claim that a regulation exceeds statutory

authority" does not "require[] factual allegations about the defendant's actions" and that Washtech's complaint "plainly identifies the perceived disconnect between what the statute permits . . . and what the regulations do." *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. (Washtech IV)*, 892 F.3d 332, 343-44 (D.C. Cir. 2018). Washtech could therefore "rest on its complaint" which "itself adequately states a plausible claim for relief," without thereby conceding that its claim was insufficiently pled. *Id.* at 345. We directed the district court on remand to consider whether the 2016 Rule placed in issue not just the 2016 STEM extensions but, under the reopening doctrine, the Secretary's statutory authority to implement "the entire OPT program." *Id.* at 345-46.

Although Washtech had not timely challenged the underlying rule itself, the district court on remand held that the 2016 Rule restarted the clock to challenge the statutory authority for the OPT program as a whole along with the new, STEM-specific extension. *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* (*Washtech V*), 395 F. Supp. 3d 1, 10-15 (D.D.C. 2019). The district court also permitted the National Association of Manufacturers, Chamber of Commerce, and Information Technology Industry Council to intervene in support of DHS to defend the OPT Rule. *Id.* at 15- 21.

Before us is the appeal of the district court's order granting summary judgment to DHS and the Intervenors. *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* (*Washtech VI*), 518 F. Supp. 3d 448 (D.D.C. 2021). The district court held that Washtech had standing to challenge OPT, *id.* at 458-62, and that

the program was within the Secretary's statutory authority, *id.* at 463-75. The court reasoned that the INA's text, together with decades of apparent congressional approval, sufficed to support the Department's interpretation that it had authority to allow post-graduation OPT. *Id.* The court also denied Washtech's motion to strike an amicus brief. *Id.* at 453 n.2.

II. Analysis

A. Standard of Review

We review *de novo* the district court's grant of summary judgment, *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504, 508 (D.C. Cir. 2019), including its determinations about the plaintiff's standing, *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011), and other legal conclusions, *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 623 (D.C. Cir. 2020). A movant is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For the reasons that follow, we affirm the judgment of the district court.

B. Standing

On the earlier appeal from dismissal of Washtech's case for failure to state a claim, we relied on allegations in the complaint to hold that the organization had standing. *Washtech IV*, 892 F.3d at 339-42. Because Washtech at the summary judgment stage supplied evidence supporting the allegations we already

held sufficient, we recognize its standing at this stage, too. Washtech members submitted declarations in opposition to summary judgment confirming that they currently hold STEM jobs and that they have actively sought and been denied other STEM positions, including with employers that regularly hire OPT participants. Under the legal standard established by binding circuit precedent, we hold that a reasonable jury could find on this record that Washtech suffered competitive injury in fact cognizable under Article III.

Because Washtech claims associational standing on behalf of its members, it must show that "(1) at least one of its members has standing to sue in her or his own right, (2) the interests it seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit." *Save Jobs USA*, 942 F.3d at 508 (internal quotation marks omitted) (formatting modified). Here, DHS contests only whether the identified Washtech members have standing in their own right. We, too, focus our attention there.

To establish Article III standing, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Humane Soc'y of the U.S. v. Perdue*, 935 F.3d 598, 602 (D.C. Cir. 2019) (quoting *Lujan v.*

Defs. of Wildlife, 504 U.S. 555, 561 (1992)). So, at the summary judgment stage, "the plaintiff 'must set forth by affidavit or other evidence specific facts' that prove standing." *Id.* (quoting *Defs. of Wildlife*, 504 U.S. at 561).

Here, Washtech asserts that its members have suffered injury based on the competitor standing doctrine. The "basic requirement" of competitor standing "is that the complainant must show an actual or imminent increase in competition" in the market in which he or she is a "direct and current competitor[]." *Washtech IV*, 892 F.3d at 339-40; *see Save Jobs USA*, 942 F.3d at 509-10; *Mendoza v. Perez*, 754 F.3d 1002, 1011-14 (D.C. Cir. 2014). The Supreme Court has long recognized that businesses may be "aggrieved" by increased competition in their sector. *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970). And we have held that workers may likewise suffer injury from an action that increases competition for jobs in their labor market. *See Mendoza*, 754 F.3d at 1011; *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 802-03 (D.C. Cir. 1985) (recognizing construction craftworkers' union standing based on allegations that, "under the guise of B-1 status, the INS is allowing aliens into the country to perform work which would otherwise likely go to union members").

Even at the pleading stage, we recognized that "allegations of increased competition in the STEM labor market are supported by 'facts found outside of the complaint,'" including that 34,000 individuals participated in the STEM OPT extensions in 2016. *See Washtech IV*, 892 F.3d at 340. The district court on

remand accepted as "undisputed" for summary judgment purposes "that the OPT program increases the amount of foreign labor in the STEM labor market." *Washtech VI*, 518 F. Supp. 3d at 461.

The dispute centers on whether Washtech's members are direct and current competitors in that labor market. We hold that they are. At the motion-to-dismiss stage, we deemed adequately alleged that Washtech members "compete with F-1 student visa-holders who are working in the OPT program pursuant to the DHS's regulations" and therefore that they "'participat[e] in the [STEM] labor market' in competition with OPT workers." *Washtech IV*, 892 F.3d at 339-40 (quoting *Mendoza*, 754 F.3d at 1013).

Washtech has now presented specific facts to support those allegations. All three member declarations show that the members have applied for many jobs within the STEM field and continue to work in that field now. J.A. 201-22. And the attachments to Mr. Sawade's declaration include copies of job postings stating that at least some of the STEM positions to which he applied were also advertised as open to OPT applicants. *Id.* 223-25. Thus, Washtech's members have sufficiently supported their allegations that they are direct and current competitors with OPT participants and have therefore suffered cognizable injury under the competitor standing doctrine.

The Department's objections to Washtech's standing fail here for the same reasons that they did at the motion-to-dismiss stage. The main thrust of DHS's argument is that the Washtech members have not provided evidence that they were, at the time Washtech initiated the suit, "*currently* competing with F-1 students

receiving OPT" or "*currently* searching for" STEM jobs. Appellee Br. at 20, 25 (emphases in original). But because the "supply side of a labor market is made up of those individuals who are employed *and* those actively looking for work," *Save Jobs USA*, 942 F.3d at 511 (emphasis in original), Washtech's members can qualify as direct and current competitors even if they were not actively seeking new jobs at the time the suit commenced. To require evidence that Washtech's members were actively seeking a STEM job would "overread[] our 'direct and current competitor' formulation, which simply distinguishes an existing market participant from a potential—and unduly speculative—participant." *Id.* at 510; *see also Mendoza*, 754 F.3d at 1013-14. It is enough that nonimmigrant foreign workers "have competed with [Washtech's] members in the past, and, as far as we know, nothing prevents them from doing so in the future." *Save Jobs USA*, 942 F.3d at 511. Washtech has shown injury to its members that is cognizable under the competitor standing doctrine.

Those injuries are also traceable to the practical training rule and redressable by the relief Washtech seeks. As discussed above, there is little dispute that the 2016 OPT Rule has increased the labor supply in the STEM field. As we did at the motion to dismiss stage, we reject the Department's contention that Washtech's injury is not traceable to the Rule because employment involves the independent hiring or firing actions of third parties, *see* Appellee Br. at 19-20; we have already identified the cognizable injury as "exposure to increased competition in the STEM labor market—not lost jobs, per se," *Washtech IV*, 892 F.3d at

341. And the relief Washtech seeks, a holding that the INA bars post-graduation practical training for F-1 visa-holders, would accordingly reduce competition in that market, likely redressing the harms that Washtech asserts. *See id.* at 341-42. As a result, we hold that Washtech has standing to sustain its challenge to the 2016 Rule's STEM extension.

C. Statutory Authority for Optional Practical Training

The 2016 Rule is within DHS's statutory authority. Section 1184(a)(1)'s time-and-conditions provision is the source of that authority, and the F-1 visa class definition guides its use. Because the 2016 Rule regulates the "time" and "conditions" of admission for F-1 visa-holders, and because it is reasonably related to the distinct composition and purpose of that visa class, as defined in the F-1 provision, the Secretary had authority to promulgate it.

1.

We begin with the source of the Secretary's authority. Congress granted the Executive power to set the duration and terms of statutorily identified nonimmigrants' presence in the United States. The INA provides that nonimmigrants' "admission to the United States . . . shall be for such time and under such conditions" as the Executive prescribes "by regulations." 8 U.S.C. § 1184(a)(1). The plain text of section 1184(a)(1) validates continued admission for periods of practical training specified in the Rule: The allowance of up to a year of practical training as

recommended by the school and approved by DHS, with up to an additional 24 months for STEM graduates, is "time" that the Department has "by regulations" set for the duration of F-1 students' continued "admission to the United States" on the condition that they engage in qualifying practical training as the Rule defines it. *See, e.g., CDI Info. Servs., Inc. v. Reno*, 278 F.3d 616, 619 (6th Cir. 2002) (recognizing section 1184(a)(1)'s grant of authority over duration and terms of extension of nonimmigrants' stay). Section 1184(a)(1) thus empowers the Department to permit temporary, post-graduation practical training for F-1 visa-holders.

Section 1184(a)(1)'s interplay with the INA's definitions of admissible nonimmigrants reinforces that section 1184(a)(1) supports the OPT Rule. It provides time-and-conditions authority specifically for the "admission to the United States of any alien *as a nonimmigrant*." 8 U.S.C. § 1184(a)(1) (emphasis added). Notably, however, the INA does not define "nonimmigrant" as a general category, but only as a set of discrete classes. *Id.* § 1101(a)(15)(A)-(V). Those dozens of class definitions are each very brief, specifying little more than a type of person to be admitted and the purpose for which they seek to enter. No definition states exactly how long the person may stay, nor spells out precisely what the nonimmigrant may or may not do while here for the specified purpose.[3] Those are

[3] Unlike F-1, two of the twenty-two nonimmigrant visa class definitions state the maximum allowable time of admission for that class. *See* 8 U.S.C. § 1101(a)(15)(Q) ("for a period not to exceed 15 months"); *id.* § 1101(a)(15)(R) ("for a period not to exceed

parameters that Congress expected the Executive to establish "by regulations," which is exactly what section 1184(a)(1) grants DHS the authority to do. In short: The INA uses visa classes to identify who may enter temporarily and why, but leaves to DHS the authority to specify, consistent with the visa class definitions, the time and conditions of that admission.

Here, the F-1 class definition serves as the Secretary's guide. It provides that the F-1 visa applicant must be a "bona fide student" who is "qualified to pursue a full course of study"; her purpose must be "to enter the United States temporarily" and to do so "solely for the purpose of pursuing such a course of study" at a DHS-approved U.S. academic institution. 8 U.S.C. § 1101(a)(15)(F)(i). This definition governs the decisions of consular and immigration officers who are responsible for granting visas and who must ensure that the qualified F-1 student's purpose in coming to the United States is genuinely for study. But the F-1 provision says nothing about when that visit should begin or end. *Id.* In fact, the provision cannot rationally be read as setting forth terms of stay. For example, F-1 requires that the prospective nonimmigrant must "seek[] to enter the United States." *Id.* Once admitted, an F-1 visa-holder cannot continuously "seek[] to enter the United States" throughout his or her stay. *Id.* The F-1 provision therefore sets the criteria for entry and guides DHS in exercising its authority to set the time and conditions of F-1 students' stay; it does not, itself, delineate the full terms of that stay.

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5 years"). Even those provisions do not dictate the time of admission that DHS could set within those limits.

Preexisting regulations applicable to F-1 visa-holders (and not at issue here) illustrate how this structure plays out. To allow F-1 students time for moving in and out of the country, Department regulations admit them into the United States for up to 30 days before their course of study begins, 8 C.F.R. § 214.2(f)(5)(i), and permit them to remain in the country for up to 60 days after it ends, *id.* § 214.2(f)(5)(iv). The rules also allow F-1 students to stay during periods of academic vacation between terms, *id.* § 214.2(f)(5)(iii), and even during gaps between entirely distinct educational programs, *id.* § 214.2(f)(5)(ii).

Washtech accepts that the Executive's time-and-conditions authority empowers it to authorize students' presence in the United States beyond the time they are actually enrolled in and attending classes. Oral Arg. Tr. at 15-16. But it claims the 2016 Rule goes too far. We disagree. Where Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be "'reasonably related' to the purposes of the legislation." *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 871 (D.C. Cir. 2019) (quoting *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973)); *see also, e.g., Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009) (agency action "was not arbitrary or capricious" because agency "articulated rational reasons related to its statutory responsibility"). As noted, the INA grants general regulatory authority to DHS to, among other things, set the time and conditions for the lawful continued admission of each nonimmigrant class. 8 U.S.C.§§ 1103(a)(1)-(3), 1184(a)(1). Thus, in *Narenji v. Civiletti*, "[r]ecognizing the broad authority

conferred upon" DHS by sections 1184(a) and 1103(a), we held that the INA "need not specifically authorize each and every action taken by [DHS], so long as [its] action is reasonably related to the duties imposed upon [it]." 617 F.2d 745, 747 (D.C. Cir. 1979). We recognize that same constraint here. Pursuant to the Secretary's obligation to exercise its rulemaking power in keeping with the statute's text and structure, DHS must ensure that the times and conditions it attaches to the admission of F-1 students are reasonably related to the purpose for which they were permitted to enter.

The 2016 Rule is reasonably related to the nature and purpose of the F-1 visa class: pursuing a full course of study at an established academic institution. The 2016 Rule explains in detail DHS's educational rationale for authorizing practical training for F-1 students. Many students, especially those in the fields of science, technology, engineering, and mathematics, can succeed at classroom training but need practical training in a workplace setting to operationalize their new knowledge. In computer science, for example, practical opportunities to work with colleagues and managers supplied with the requisite hardware and software and adept with skills to deploy what a recent graduate learned only in the classroom may be critical to the graduate's ability to transfer the value of the classroom education to a workplace in their home country.

DHS notes, for example, that the Optional Practical Training program "enriches and augments a student's educational experience by providing the ability for students to apply in professional settings the theoretical

principles they learned in academic settings." 81 Fed. Reg. 13,040, 13,051 (Mar. 11, 2016); *see also id.* at 13,041-43, 13,049, 13,051.

Hundreds of students and academic institutions confirmed that view during the rulemaking, observing, for example, that "OPT allows students to take what they have learned in the classroom and apply 'real world' experience to enhance learning and creativity while helping fuel the innovation that occurs both on and off campus," that "[l]earning through experience is distinct from learning that takes place in the classroom," and that "[e]xperential learning opportunities have become an integral part of U.S. higher education." *Id.* at 13,050. The Department agreed, explaining that "practical training is an accepted and important part" of F-1 students' education. *Id.*

With respect to the STEM extension specifically, DHS further explained that the duration of the extension "is based on the complexity and typical duration of research, development, testing, and other projects commonly undertaken in STEM fields." *Id.* at 13,088. Notably, the Department rejected the suggestion that it allow practical training unrelated to the F-1 student's field of study, instead imposing a requirement of a "nexus" with the academic concentration in order to "minimize[] potential abuse or exploitation." *Id.* at 13,051. The Department also observed that work authorization without such a nexus would be inconsistent with the purposes of Optional Practical Training, which is, "at its core, . . . a continuation of the student's program of study." *Id.* Washtech does not challenge any of those observations or conclusions.

The 2016 OPT Rule's design closely ties it to the purposes of the F-1 visa class. Before an F-1 student can even apply for OPT, an administrator at the student's academic institution must recommend the student for it. 8 C.F.R. § 214.2(f)(10)(ii)(C)(3), (f)(11)(i); *id.* § 214.3(*l*)(1). Once recommended, an OPT applicant can only seek practical training via employment that is "directly related to the student's major area of study." *Id.* § 214.2(f)(10)(ii)(A); *see id.* § 214.2(f)(10)(ii)(C)(4) (STEM OPT extensions must be "directly related to the degree that qualifies the student for [the] extension"). STEM OPT students and their potential employers must submit to the institutional recommender a "training plan" that "identif[ies] goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student, and explain[s] how those goals will be achieved through the work-based learning opportunity with the employer; describe[s] a performance evaluation process; and describe[s] methods of oversight and supervision." *Id.* § 214.2(f)(10)(ii)(C)(7). The recommender must then submit that training plan to DHS. *Id.* § 214.2(f)(10)(ii)(C)(9)(iii). Then, while the practical training is ongoing, participants and their employers must report back to the institutional recommender—who in turn reports to DHS—on participants' educational progress. *Id.* § 214.2(f)(10)(ii)(C)(9)(i)-(iii). At every stage of the program, OPT and its STEM extension are confined to professional opportunities that enhance the value and practical effectiveness of the classroom study for which all F-1 nonimmigrants come in the first place.

The INA constrains the Department to set only such times and conditions for F-1 students' admission as are reasonably related to their visa class. OPT falls within those limits. The program is thus a valid exercise of DHS's statutory authority.

2.

Before turning to the other bases Washtech urges for invalidating the OPT Rule, we review the powerful historical evidence that Congress meant to do what section 1184(a)(1)'s text says: to grant the Executive power to allow nonimmigrants who come to the United States for higher education to engage in limited periods of practical training as an educational complement to their classroom studies.

Congressional ratification of post-graduation practical training periods dates back over 70 years. Congress enacted the Immigration and Nationality Act in 1952 using terms and phrases it knew were present in the predecessor legislation, and that it also knew had been relied on by the Executive at least as early as 1947 to permit foreign students to engage in practical training following their regular course of study. Just as enactment of "a statute that had in fact been given a consistent judicial interpretation . . . generally includes the settled judicial interpretation," *Pierce v. Underwood*, 487 U.S. 552, 567 (1988), "repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative . . . interpretations as well," *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). "If a statute uses words or phrases that have already received authoritative

construction by . . . a responsible administrative agency, they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Text 322 (2012).

It is unusually clear that Congress was aware of the prior practice of authorizing foreign students' practical training. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). That presumption is "particularly appropriate" when "Congress exhibited both a detailed knowledge of the [relevant] provisions" and interpretations of those provisions when it adopted the new law. *Id.* But there is no need for presumptions here, given that Congress readied itself to enact the INA in 1952 by directing the Senate Judiciary Committee to conduct "a full and complete investigation of our entire immigration system," S. Rep. No. 81-1515, at 1 (1950). The resulting study disclosed the same kind of program as an exercise of the same statutory power at issue here. The Senate Judiciary Committee's "two-year study" was the "genesis" of the Immigration and Nationality Act, overhauling the 1924 statutory regime and providing the foundation for U.S. immigration law that persists today. 1 Charles Gordon et al., Immigration law & Procedure § 2.03[1] (2019).

Five years before Congress enacted the 1952 INA, the Immigration and Naturalization Service had promulgated a regulation governing visiting students

which provided 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." 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947). The 1950 Senate Report specifically recognized that, "since the issuance of the revised regulations in August 1947 . . . practical training has been authorized for 6 months *after completion of the student's regular course of study*." S. Rep. No. 81-1515, at 503 (1950) (emphasis added).

With full knowledge that the Executive was permitting post-graduation practical training for visiting students under the time-and-conditions authority conferred on it by the 1924 statute, and "[a]gainst [that] background understanding in the . . . regulatory system," Congress in 1952 "made a considered judgment to retain the relevant statutory text." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015). The 1952 INA, like the 1924 Immigration Act, authorized the Executive to admit nonimmigrants "for such time" and "under such conditions" as it set by regulation. *Compare* Immigration Act of 1924, Pub. L. No. 68-139, § 15, 43 Stat. 153, 162-63, *with* Immigration and Nationality Act, Pub. L. No. 82-414, § 214(a), 66 Stat. 163, 189 (1952). And the F-1 student visa defined by the 1952 INA, like the analogous permission under the 1924 Act, rendered eligible "a bona fide student" seeking to enter "solely for the purpose of . . . study at an" academic institution. *Compare* Pub. L. No. 68-139, § 4(e), 43 Stat. 153, 155, *with* Pub. L. No. 82-414, § 101(15)(F), 66 Stat. 163,

168. *See Review of Immigration Problems: Hearings Before the Subcomm. on Immigr., Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 24 (1975) ("Chapman Testimony") (statement of Hon. Leonard F. Chapman, Jr., Comm'r, INS) (noting that F-1 "is a provision that has really been in effect under earlier law for about 50 years, starting in 1924"). This is "convincing support for the conclusion that Congress accepted and ratified" the INS's interpretation and implementation of that reenacted text. *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 536.

In sum, evidence reaching back several generations shows "that Congress intended to ratify" the Executive's interpretation "when it reiterated the same definition[s] in" the INA that it had used in the 1924 Act. *Bragdon*, 524 U.S. at 645.

3.

More than seventy years of history and practice since it enacted the 1952 INA shows that Congress has not changed its mind. If Congress has continually declined to disturb a longstanding interpretation of a statute, that "may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation"—particularly "if evidence exists of the Congress's awareness of and familiarity with such an interpretation." *Jackson v. Modly*, 949 F.3d 763, 772-73 (D.C. Cir. 2020) (formatting modified) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979)); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983); *cf. Abourezk v. Reagan*, 785 F.2d 1043, 1055-56 (D.C. Cir. 1986), *aff'd,* 484 U.S. 1 (1987). And indeed,

Congress is well aware that, time and again, immigration authorities under multiple administrations of both major parties reaffirmed a practical training component available to F-1 students under executive branch rules pursuant to the Executive's time-and-conditions powers.

In this case, evidence of congressional acquiescence abounds. The INS under the Nixon administration, for instance, reauthorized the practical training regime for training recommended by the student's school following completion of coursework, and increased the training period from 6 to 18 months. *See* 34 Fed. Reg. 18,085, 18,085 (Nov. 8, 1969); 38 Fed. Reg. 32,425, 34,426 (Dec. 28, 1973). During the Carter administration, the INS continued practical training programs, again explicitly describing their availability "[a]fter completion of a course or courses of study." 42 Fed. Reg. 26,411, 26,413 (May 24, 1977). The Reagan administration did the same, clarifying that post-graduation practical training was not limited to particular degree programs. 48 Fed. Reg. 14,575, 14,581, 14,586 (Apr. 5, 1983). When it reorganized the practical training system for F-1 students, the administration of George H.W. Bush coined the term "Optional practical training" in describing temporary, on-the-job educational opportunities. 57 Fed. Reg. 31,954, 31,956 (July 20, 1992). And, in the 2016 Rule Washtech challenges here, DHS in the Obama administration extended the maximum post-coursework practical training period for F-1 students in STEM fields. 81 Fed. Reg. 13,040 (Mar. 11, 2016).

That longstanding practice was no secret to Congress. Witnesses at congressional hearings across the

decades spoke directly of F-1 students staying in the country for temporary periods of practical training. In 1975, for example, the INS Commissioner told Congress that, while "[t]here is no express provision in the law for an F-l student to engage in employment," the INS had "[n]evertheless, for many years . . . permitted students to accept employment under special conditions." Chapman Testimony at 26. That permission included "employment for practical training," which could "be engaged in full time" for "increments of 6 months, not to exceed 18 months." *Id.* at 23. In the Commissioner's view, that program was entirely "consistent with the intent of the statute" to ensure that a student "come[s] here solely to pursue his education" rather than "with the expectation and intention of working." *Id.* at 21. Similarly, 1989 testimony publicly reminded Congress that F-1 visa-holders were being "appropriately given the opportunity to engage in a brief period of practical training upon completion of their university education and in furtherance of their educational goals." *Immigration Reform: Hearing Before the Subcomm. on Immigr. and Refugee Affs. of the S. Comm. on the Judiciary on S. 358 and S. 448*, 101st Cong. 485-486 (1989) (statement of Frank Kittredge, Pres., Nat'l Foreign Trade Council). And decisions by the Board of Immigration Appeals throughout this period also confirm the existence of post-graduation practical training. *See, e.g., Matter of Lee*, 18 I. & N. Dec. 96, 96 (BIA 1981); *Matter of Kalia*, 14 I. & N. Dec. 559, 559 (BIA 1974); *Matter of Wang*, 11 I. & N. Dec. 282, 283 (BIA 1965); *Matter of Alberga*, 10 I. & N. Dec. 764, 764-65 (BIA 1964).

Washtech argues that prior practical training programs have not always been identical to the 2016 Rule at issue here. But the variations are immaterial. What matters is that multiple presidential administrations for over 70 years have read section 1184(a)(1) to empower the Executive to authorize F-1 students to remain in the United States for post-graduation practical training overseen by their schools. And Congress is well aware of that shared understanding and the continuous executive practice in conformity with it, yet has never disturbed the Department's determination that it has authority to allow post- graduation practical training for F-1 visa-holders.

This is not a case of longstanding provisions persisting unnoticed in some statutory backwater. Congress regularly amends the INA. And it has several times amended provisions bearing specifically on F-1 visas and nonimmigrant work rules. *See*, *e.g.*, Pub. L. No. 87-256, § 109(a), 75 Stat. 527, 534 (1961) (allowing noncitizen spouse and minor children to accompany F-1 visa-holder); Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360-74 (1986) (requiring specific employment authorization for nonimmigrant workers); Pub. L. No. 101-649, § 221(a), 104 Stat. 4978, 5027-28 (1990) (adding temporary pilot program for off-campus employment unrelated to F-1 visa-holder's field of study); Pub. L. No. 104-208, §§ 625, 641, 110 Stat. 3009, 3009-699-700, 3009-704-07 (1996) (adding limitations related to F-1 nonimmigrants at public schools); Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (2002) (adding monitoring requirements for foreign students); Pub. L. No. 111-306, 124 Stat. 3280, 3280-81

(2010) (requiring accreditation for language training programs).

Congress's repeated amendments of INA provisions regarding foreign students and nonimmigrant work opportunities evidence its approval of the practical training programs it left undisturbed. The Supreme Court has underscored that, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). We recently reemphasized that the interpretive value of congressional acquiescence is strengthened where "Congress has amended various parts" of a statutory regime, "including the specific provision at issue" in the case at hand, "but has never sought to override" the relevant interpretation. *Modly*, 949 F.3d at 773.

Washtech raises just two arguments against the weight of all this history. First, it points to the wording of the 1947 practical training rule in place when Congress enacted the 1952 INA. Washtech contends that the rule's reference to practical training as "required" by the academic institution means it "must have taken place before graduation," so shows no congressional approval of post-coursework practical training. Appellant Br. at 37. But that slender reed bears no weight. The 1947 rule supported practical training "required *or recommended*" by the school, 12 Fed. Reg. 5,355, 5,357 (Aug. 7, 1947) (emphasis added), undercutting the point on its own terms. And, again, the Senate

Committee itself, based on its investigation of the operation of the 1947 rule soon after it was promulgated, expressly reported to the Congress that the rule authorized practical training "after completion of the student's regular course of study." S. Rep. No. 81-1515, at 503 (1950).

Washtech's second effort to rebut the weight of history draws on three isolated statements in congressional reports that, in its view, reveal Congress's actual intent to disallow post-graduation practical training. Those statements establish no such thing. First, a 1952 House Report noted that foreign students "are not permitted to stay beyond the completion of their studies." H.R. Rep. No. 82-1365, at 40 (1952). But the point there had nothing to do with post-coursework practical training; rather, it explained that, because of the temporary nature of their stay, foreign students were identified in the bill as "nonimmigrants," *i.e.*, persons intending to return home, rather than "nonquota immigrants" as they had been in past legislation, which erroneously implied they intended to resettle here permanently. *Id.*; *see* Immigration Act of 1924, Pub. L. No. 68-139, § 15, 43 Stat. 153, 162-63 (referring to foreign students as "non-quota immigrant[s]").

Second, Washtech pulls out of context a reference in a Senate Judiciary Committee Report preceding the 1982 INA amendments. That report noted the amendments would "specifically limit [the F-1 provision] to academic students," S. Rep. No. 96-859, at 7 (1980), which Washtech says shows Congress's intention to confine F-1 students to academic, as distinct from practical, forms of education. In fact, the report

distinguished "academic" students admitted under F-1 from "nonacademic or vocational students" for whom Congress had "create[d] a new nonimmigrant category, subparagraph (M)," which "provide[d] for their entry according to the same terms and conditions as those set forth for (F) academic students." *Id.* The Report has no bearing on the lawfulness of the OPT program.

Lastly, Washtech highlights a House Report accompanying the Immigration Act of 1990, which noted that, "to assure compliance with the student visa," the Act would require visiting students "to be in good academic standing," H.R. Rep. No. 101-723, at 66 (1990). Washtech claims the report "directly contradicts" allowing F-1 students "employment outside of a course of study." Appellant Br. At 32. The report's reference to good academic standing sought to ensure that the program not be "administered as a temporary worker program" under which workers might seek to enter as F-1 students without the requisite purpose to complete coursework. H.R. Rep. No. 101-723, at 67 (1990). But that comports with Congress's approval of OPT. The government agrees that OPT participants must fulfill academic requirements as well as obtain their school's recommendation of OPT. Indeed, the very passage Washtech quotes in the House Report also identifies a "concern[]" that those OPT participants "do not have adequate labor protections" in their practical training jobs. *Id.* at 66. Consistent with the terms and intent of the entire OPT program to authorize employment as practical training opportunities for foreign students without displacing U.S. workers, Congress sought to ensure "payment of prevailing wages" to F-1

students so they would not undercut wages to which U.S. employees are entitled. *Id.*

The statements Washtech identifies do nothing to call into question the robust legislative and administrative practice showing Congress's longstanding awareness and repeated embrace of post-coursework practical training for qualifying F-1 students.

4.

The centerpiece of Washtech's challenge is the F-1 provision, which it interprets to preclude reliance on section 1184(a)(1) as support for the 2016 Rule. Washtech misreads F-1 to exhaustively delineate rather than inform and constrain the authority Congress separately conferred on the Executive to set the time and conditions of nonimmigrants' admission.

The F-1 provision appears in the "Definitions" section of the INA. *See* 8 U.S.C. § 1101. Its primary function is to establish one of several dozen categories of foreign nationals who may be eligible for a nonimmigrant visa: The applicant for an F-1 visa must be a "bona fide student" who is "qualified to pursue a full course of study," and she must be "seek[ing] to enter the United States temporarily and solely for the purpose of pursuing such a course of study" at a U.S. academic institution. *Id.* § 1101(a)(15)(F)(i).

Washtech's central argument is that F-1 goes beyond identifying who may enter for what purposes; in its view, F-1 also imposes a bright-line graduation-day limit on the Secretary's authority to set nonimmigrants' terms of stay. Washtech argues that, because F-1 describes "a bona fide student . . . temporarily and

solely . . . pursuing . . . a course of study . . . at an established . . . academic institution," id. (emphasis added), the Secretary lacks authority under section 1184(a)(1) to allow F-1 students to remain in the United States for any period after they have graduated. That is to say, according to Washtech, post-graduation practical training exceeds the Department's statutory time-and-conditions authority as constricted by the F-1 provision.

But Washtech overreads F-1's text, prompted in large part by its misapprehension of the relationship between F-1 and section 1184(a)(1).

Start with the text. The F-1 provision itself shows that the student-visa entry criteria are not terms of stay. Again, take for example the F-1 criterion that the person "seeks to enter the United States . . . ." 8 U.S.C. § 1101(a)(15)(F)(i). Washtech's reading, which treats any failure to continually meet the F-1 definition as grounds for deportation, nonsensically would require an admitted F-1 student to continue throughout her stay to seek to enter the country. It is also awkward at best to read F-1 to require students to be continually "qualified to pursue a full course of study" once they have already been admitted and enrolled, let alone after they have already completed any significant portion of that course of study. *Id.* These "implausible" and "counterintuitive" readings illustrate the error in Washtech's view of the F-1 provision and its role in the statutory scheme. *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2448 (2021); *see also, e.g., Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1060 (2019). Correctly understood, the F-1 provision

sets threshold criteria for entry; it does not spell out the ongoing terms of stay.

Washtech itself acknowledges that the F-1 criteria it highlights as continuous requirements are not invariable constraints on the government's section 1184(a)(1) power to regulate the terms of stay. Despite its claim that F-1 prevents students in that visa class from staying in the country beyond graduation, for example, Washtech recognizes the Department's "discretion" to adopt a rule that permits F-1 students to remain at least for 60 days past graduation, since students "can't leave the next day and instantly be gone." Oral Arg. Tr. at 16; *see* 8 C.F.R. § 214.2(f)(5)(iv). *But see* Diss. Op. 5 n.3. More generally, Washtech does not challenge the stretches of time DHS allows F-1 students to remain in the country between school terms or between degree programs, *see* 8 C.F.R. § 214.2(f)(5)(ii)-(iii), even though students are not "pursu[ing] a full course of study" at an "academic institution" during those periods, *see* 8 U.S.C. § 1101(a)(15)(F)(i).

To some extent, then, Washtech acknowledges the Department's authority to allow students to remain here at times that do not strictly meet the F-1 provision's entry criteria. In so doing, it implicitly accepts that F-1 works together with section 1184(a)(1) to empower the Executive to design workable and meaningful educational programs for nonimmigrant foreign students. Washtech points to no statutory support for its distinction between the Rule's allowance for practical training after graduation, which it challenges, and the exercises of section 1184(a)(1) time-and-conditions authority that Washtech approves—even though

the latter, too, would contravene F-1 if the provision were treated as specifying the outer limit of the Secretary's regulatory authority over nonimmigrants' terms of stay.

By seizing on graduation day as the bright-line limit, Washtech both misapprehends the primary function of F-1 and fails to grapple with the critical role of the Executive's time- and-conditions power under section 1184(a)(1). Congress's decision in F-1 to admit foreign students "solely for the purpose of pursuing" a "full course of study" at an academic institution was not to impose an end-of-coursework time limit on F-1 nonimmigrants' admission, but to prevent entry into the country for the wrong reasons or under false pretenses. "By including restrictions on intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently." *Elkins v. Moreno*, 435 U.S. 647, 665 (1978); *see* S. Rep. No. 81-1515, at 503 (1950) (emphasizing, in the Senate report on which the INA was based, that despite delays in approving foreign students' applications for work authorization, including for practical training, the INS should remain involved to "prevent people from coming in as students when their real intention is to reside and work here").

By design, both the longstanding practical-training regime and its iteration in the 2016 Rule challenged here comport with the F-1 provision's purpose requirement. The mere availability of OPT to students for whom it is ultimately recommended does not render foreign students ineligible to enter the United States

"solely for the purpose of pursuing" study at an academic institution. Nor does a decision to participate in practical training render foreign students retroactively ineligible to have entered solely for that purpose. Training through real-world employment overseen by one's academic institution has undisputed educational benefits. *Supra* at 14, 25-26. The 2016 Rule's programmatic requirements link employment for practical training with the student's coursework at, and recommendation from, their sponsoring academic institution, and they demand ongoing oversight by that institution as well as the employer and DHS. *Supra* at 14- 15, 25-27. Congress understood that it does not detract from the accuracy or sincerity of F-1 students' purpose to come to this country "solely" to undertake a degree program that they may, once here, participate in practical training recommended, approved, and overseen by their school to augment the educational value of that degree. That holds true whether the student undertakes practical training as a limited period of full- time employment after completion of coursework, or on a part- time basis during the academic term. *See* 8 C.F.R. § 214.2(f)(10)(ii)(A)(2), (3).

Washtech's insistence that practical training conflicts with the terms of entry under F-1 is exceedingly formalistic. If the statute did make graduation the temporal outer bound, colleges and universities aware of the powerful educational advantages of practical training could presumably design programs for foreign students that included additional time to follow their coursework with a year (or up to three years for STEM students) of full-time practical training before they

graduated. Indeed, the Rule itself allows schools to postpone foreign students' graduation until the completion of practical training, specifying that "[c]ontinued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for [O]ptional [P]ractical [T]raining." *Id.* § 214.2(f)(10)(ii)(A)(3). The Rule reflects how closely OPT aligns with familiar educational models—such as undergraduate "co-op" programs, externships, work in STEM research laboratories, and medical internships—that incorporate practical training upon completion of related coursework, whether before or after students receive their degrees. And, importantly, for many decades and currently, schools are directly involved in recommending and overseeing practical training whether or not it occurs after graduation.

Washtech's statutory theory would seem to approve practical training on the employment-before-graduation model even as Washtech asserts lack of authority for post-graduation practical training overseen by the same schools for the same purposes. But the existing practical training regime and an employment-before-graduation replacement structure are almost identical: OPT participants pursue employment in their fields to "improve[] their ability to absorb a full range of project-based skills and knowledge directly related to their study." 81 Fed. Reg. 13,040, 13,049 (Mar. 11, 2016). And, just as they would for a pre-graduation, post-coursework OPT stint, school administrators—the Designated School Officials—screen post-graduation work opportunities for their educational value and monitor the specific work-based experience to

ensure that it enriches the participant's course of study. *See* 8 C.F.R. § 214.2(f)(11); *supra* at 14-15. The only distinction between the hypothetical program and the challenged one is its timing relative to graduation. But the F-1 provision makes no mention of "graduation" as the bright-line outer bound for an F-1 student's stay. And there is no evidence Congress intended the Executive's authority under section 1184(a)(1) and F-1 to turn on such formalities in enrollment structure. Indeed, all the relevant evidence suggests that Congress has understood and approved of post-graduation practical training for over seventy years.

Washtech's only other argument from the text of F-1 is that the provision's instruction to schools to inform the government if nonimmigrant students stop attending "requires the alien's course of study to take place at an academic institution" that can be in a position to make such a report. Appellant Br. at 19-20. The phrase on which Washtech relies states that an F-1 student's approved academic institution "shall have agreed to report to the [Department] the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn." 8 U.S.C. § 1101(a)(15)(F)(i). According to Washtech, that text "presupposes" that the academic institution will have "an ongoing relationship" with the F-1 student "after admission," and therefore precludes F-1 students from remaining in the United States for post-graduation practical training. Appellant Br. at 19-20.

The most obvious shortcoming of that argument is that the 2016 Rule *does* require an ongoing relationship between the academic institution and the F-1 student. As described above, a school administrator oversees both the F-1 students' academic studies and every stage of their practical training. *See supra* at 14-15, 27. In any event, as the district court noted, the reporting requirement applies to schools, not F-1 students; the consequence of a school's failure to communicate with DHS regarding its F-1 students' activities is that the school may lose its status as an approved participant, not necessarily that the student must leave the country. *Washtech VI*, 518 F. Supp. 3d at 467-68. Students who remain after graduation pursuant to DHS rules are not subject to immediate removal except under the flawed inference Washtech draws from the reporting requirements, bolstered by its misreading of the F-1 provision as stating criteria for the duration of an admitted F-1 student's stay.

Washtech's repeated reliance on the second clause of section 1184(a)(1) is misplaced for similar reasons. That clause authorizes the Executive in its discretion to require nonimmigrants to post bonds to ensure their timely departure: Congress told the Executive that its regulations "may . . . prescribe . . . the giving of a bond" as an additional enforcement tool "to insure that at the expiration of such time" as the nonimmigrant is authorized to remain in the United States, "or upon failure to maintain the status under which he was admitted," the nonimmigrant "will depart from the United States." 8 U.S.C. § 1184(a)(1). The 2016 Rule does not include a bond requirement, *see* 8 C.F.R. § 214.2(f)(10)(ii)(A)(3), nor does Washtech argue that

it must. Its point is simply that the provision highlights the Executive's duty—with or without the aid of a bond—to "insure that" F-1 students "will depart from the United States" at the "expiration" of their authorized "time," or when they "fail[] to maintain the status under which [they were] admitted." The 2016 Rule's allowance for post-coursework practical training, says Washtech, violates that duty. But, as the district court explained, "Washtech's argument assumes the conclusion" that a period of post-graduation practical training is not within the permissible duration or status for F-1 students. *Washtech VI*, 518 F. Supp. 3d. at 468. "Washtech cannot answer a question about the proper scope of the F-1 visa category by pointing to an obligation to enforce that scope, whatever it may be." *Id.* For the reasons explained above, that conclusion is belied by the text of both section 1184(a)(1) and the F-1 provision, as well as their long history of interpretation by the executive and legislative branches, all of which confirm the Department's authority to act within reason to set the duration of F-1 students' authorized stay.

In sum, we reject Washtech's reading of the purpose and dropout-reporting language in the F-1 provision and of section 1184(a)(1)'s bond clause as establishing that foreign students who enter lawfully on F-1 visas may not be allowed to remain in the United States for Optional Practical Training after completion of their coursework. That reading misreads the text, produces unworkable and arbitrary results, and contravenes the demonstrated intent of Congress.

5.

Washtech's final argument is a floodgates warning: If we do not read the definitions of visa types in 8 U.S.C. § 1101(a)(15)(A)-(V) as specifying continuous terms of stay on nonimmigrants, then DHS's authority is effectively boundless. The Department could "regulate out of existence all differences among non-immigrant visas—other than what the alien has to show at the time of admission," such as by allowing tourist visa-holders to stay and work in the country. Appellant Br. at 21. Likewise, there would be "no limit to the amount of time DHS can permit any non-immigrant to remain in the United States." *Id.* at 27. Specifically, if the F-1 provision does not require DHS to treat F-1 students as unauthorized to remain in the country once they graduate, then the Department could "allow them to abandon" their purpose of studying at an academic institution "immediately after [their] entry" into the United States and stay here indefinitely. *Id.* at 20.

The INA's structure and basic principles of administrative law constrain DHS's regulatory authority and prevent Washtech's predicted flood. As noted above, *supra* at 25-27, the exercise of the time-and-conditions authority must "reasonably relate[]" to the distinct composition and purpose of the subject nonimmigrant class. *Doe, 1*, 920 F.3d at 871; *Narenji*, 617 F.2d at 747. That principle is built into the relationship between the Department's section 1184(a)(1) time-and-conditions authority and the visa class definitions, including F-1. Section 1184(a)(1) applies to "admission to the United States of any alien as a nonimmigrant," and

the INA defines "nonimmigrant" class-by-class rather than in gross.

As explained in the prior section, the time and conditions DHS sets are not cabined to the terms of the entry definition, even as the cross-reference in section 1184(a)(1) links the two provisions. The F-1 provision at issue here defines the purposes of that student visa class, and accordingly provides the touchstone for assessing the validity of the Department's exercise of its time-and-conditions authority over this class of nonimmigrants. Time-and-conditions rules must be reasonably related to the purpose of the nonimmigrant visa class. That requisite relationship rebuts Washtech's floodgates concern and makes clear that DHS has no "plenary authority" to allow F-1 visa-holders to stay indefinitely. Diss. Op. 10, 15. It likewise prevents the Department from, to take Washtech's example, granting indefinite work authorization as a condition of a B-2 tourist's admission, the purpose of which is to enter the country "temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B). Admitting a nonimmigrant tourist is different from admitting a nonimmigrant student, business traveler, diplomat, agricultural worker, performer, or crime witness, *see* 8 U.S.C. § 1101(a)(15)(A), (B), (F)(i), (H)(ii), (P)(ii), (S), and the authority to set times and conditions on those distinct admissions differs accordingly.

For the reasons discussed at length above, the 2016 Rule is reasonably related to the nature and purpose of the F-1 visa class. *See supra* at 25-28. DHS designed the 2016 Rule to advance the core purpose of admission for the F-1 visa class: pursuing a full course of study at an established academic institution. And the

Rule imposes strict requirements to ensure a "direct relat[ionship]" between the F-1 student's practical training and his or her coursework. 8 C.F.R. § 214.2(f)(10)(ii)(A); *see id.* § 214.2(f)(10)(ii)(C)(7); *supra* at 26-27. The OPT program is therefore a valid exercise of the Secretary's statutory authority.

III. OPT's Work Authorization

Washtech further claims that OPT is unlawful because DHS lacks the authority to provide any work authorization at all. Appellant Br. at 27-32. That claim fails, too. The Department's charge to set the "conditions" of nonimmigrant admission includes power to authorize employment—a fact that Congress has expressly recognized by statute. The Immigration Control and Reform Act (IRCA) defines non-nationals authorized to work as persons so authorized "either" by the statute "or by the Attorney General." 8 U.S.C. § 1324a(h)(3). IRCA thereby acknowledges the Executive's prerogative, where otherwise appropriate, to use powers that do not expressly mention non-nationals' work to grant work authorization.

A.

In its arguments regarding work authorization, Washtech again ignores the INA's explicit grant of authority to the Department. The statute commands DHS to "establish such regulations" as its Secretary "deems necessary for carrying out his authority." 8 U.S.C. § 1103(a)(3). And it specifically provides that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such

conditions as the Attorney General may by regulations prescribe." *Id.* § 1184(a)(1). Here, the operative term is "conditions," which grants DHS authority to determine the circumstances of a nonimmigrant's stay in the United States. *See Condition*, Webster's Third New International Dictionary 473 (2002) ("*pl*: attendant circumstances"). The Department exercises that authority over F-1 visa-holders in many ways. For instance, DHS regulations determine where they can study, 8 C.F.R. § 214.2(f)(6), how many courses they must take, *id.*, what any accompanying spouse or children may do while in the country, *id.* § 214.2(f)(15), and when visa- holders can take temporary absences from the United States and re-enter on the same visa, *id.* § 214.2(f)(4). Whether they can work is no different; Washtech provides no basis to conclude that employment opportunities are excluded from the Department's comprehensive control over nonimmigrant students' time in the United States. *See* 8 U.S.C. § 1184(a)(1).

History corroborates that Congress meant what it plainly said in the INA when it granted DHS authority in section 1184(a)(1) to set the conditions of F-1 students' admission. Washtech does not contest, for instance, that DHS and its predecessors have been authorizing student visa-holders to work at jobs related to their studies since at least 1947. *See* 12 Fed. Reg. 5,355, 5,355-57 (Aug. 7, 1947). And across decades of the Executive doing so openly, we have explained, Congress has chosen to maintain the relevant provisions of the F-1 student category when it enacted the INA in 1952 and made many ensuing amendments—all of which preserved both the F-1 category and the

section 1184(a)(1) authority under which the Executive had long granted work authorizations. *See, e.g., Proposed Rules for Employment Authorization for Certain Aliens*, 44 Fed. Reg. 43,480, 43,480 (July 25, 1979) ("authority to grant employment authorization").

Indeed, when amending the INA in 1986 to create its employment authorization regime, Congress appears to have borrowed key terminology and concepts from earlier Department regulations—regulations that both expressly declared DHS's power to grant work authorization and granted it to certain nonimmigrant classes. *See* Br. of American Immigration Council at 7-15. Even earlier, in 1961, Congress also expressly exempted F-1 students from several forms of wage taxes—a measure that would be completely unnecessary if those students lacked authorization to work. 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19); *see* Pub. L. No. 87-256, § 110, 75 Stat. 527, 536-37 (1961). In other words, "Congress has not just kept its silence by refusing to overturn [an] administrative construction, but has ratified it with positive legislation." *Schor*, 478 U.S. at 846 (quoting *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 381-82 (1969)). We "cannot but deem that construction virtually conclusive." *Id.*

B.

The 1986 Immigration Control and Reform Act further confirms that DHS may lawfully authorize employment for nonimmigrants, including F-1 students. IRCA established a "comprehensive scheme" to govern the employment of foreign nationals in the United

States. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). As relevant here, IRCA prohibits the employment of "unauthorized aliens." 8 U.S.C. § 1324a(a)(1). And it defines an "unauthorized" alien as one who is neither "lawfully admitted for permanent residence" nor "authorized to be so employed by this chapter or by the Attorney General"—now DHS. *Id.* § 1324a(h)(3).

IRCA's express recognition that aliens may be "authorized to be . . . employed . . . by" DHS confirms that Congress has deliberately granted the Executive power to authorize employment. In denying a petition for rulemaking, the Reagan administration reaffirmed the position the Executive has maintained for decades:

[T]he only logical way to interpret [Section 1324a] is that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined "unauthorized alien" in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute. *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987); *see also* 1 Charles Gordon et al., Immigration Law &Procedure § 7.03[2][c] (2019) (reaching same conclusion).

Washtech asserts that section 1324a(h)(3) does not expressly confer any authority to DHS, Appellant Br. at 28-30, and that if it did, it would violate the nondelegation doctrine, *id.* at 30-31. Because section 1324a(h)(3) could not grant the power to issue work authorization, Washtech concludes, DHS must not

have that power at all. Those arguments miss the mark. Washtech is right that section 1324a(h)(3) is not the source of the relevant regulatory authority; it just defines what it means for an alien to be "unauthorized" for employment. But that was never the government's point. What matters is that section 1324a(h)(3) expressly acknowledges that employment authorization need not be specifically conferred by statute; it can also be granted by regulation, as it has been in rules promulgated pursuant to DHS's statutory authority to set the "conditions" of nonimmigrants' admission to the United States. The OPT Rule's authorization for F-1 students to work in jobs that provide practical training related to their course of study is just such a rule. Washtech's claim that the OPT Rule conflicts with the congressional prohibition against unauthorized aliens' employment therefore fails.

IV. Any Remaining Ambiguity Counsels Deference

The most straightforward reading of the INA is that it authorizes DHS to apply to admitted F-1 students the additional "time" and "conditions" that enable them to remain here while participating in OPT recommended and overseen by their respective academic institutions. But at a minimum, even if it is ambiguous on the point, the statute may reasonably be understood as the Department has read it in support of the 2016 OPT Rule. That interpretation thus merits our deference. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). We readily conclude that OPT is "neither arbitrary or capricious in substance, nor

manifestly contrary to the statute," and "thus warrant[s] the Court's approbation." *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 558 (2012) (internal quotation marks omitted) (formatting modified). "[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (internal quotation marks omitted); *see also Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56-67 (2014) (opinion of Kagan, J.); *Wang v. Blinken*, 3 F.4th 479, 483 (D.C. Cir. 2021).

"[W]hen Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016). Accordingly, Step One of the *Chevron* test asks whether the statute is unambiguous in the relevant sense—that is, whether Congress has "directly addressed the precise question at issue." *Mayo Found. v. United States*, 562 U.S. 44, 52 (2011). Here, the question is whether DHS's time-and-conditions authority empowers the Department to permit F-1 students to stay in the United States for post-graduation practical training. If the statute is ambiguous on that point, we ask at Step Two whether the agency has made a "a reasonable choice within [the] gap left open by Congress." *Chevron*, 467 U.S. at 866.

Washtech claims that Congress has directly addressed the relevant question—specifically, that the F-1 provision's visa entry criteria impose continuous terms of stay, so preclude DHS from allowing F-1

students to remain in the country if they are not currently enrolled at an academic institution. But, as we have explained, the best reading of the F-1 provision is that it imposes threshold entry criteria; it does not itself spell out the ongoing conditions under which F-1 students may lawfully stay but rather constrains the exercise of time-and-conditions authority under Section 1184(a)(1). Even if alternative readings are available, making the statute materially ambiguous, it is at least reasonably susceptible of the Department's interpretation.

The Department's view of its F-1 and time-and-conditions authority as supportive of the 2016 Rule is wholly reasonable. Substantial and uncontested evidence in the record, together with other public analyses amici highlighted, demonstrates the educational value of practical training for OPT participants, especially in the STEM field. *See, e.g.*, 81 Fed. Reg. 13,040, 13,051, 13,088 (Mar. 11, 2016); J.A. 173-78 (Comment letter of 12 major university associations); *id.* 147-50 (Comment letter of NAFSA: Association of International Educators); Br. of Amicus Curiae Presidents' Alliance on Higher Education and Immigration at 6-11. And OPT's nexus to an F-1 student's course of study, together with the student's application to the school for approval and the school's reporting responsibilities to DHS, ensure that the additional time and practical training opportunities available through the program help F-1 students to cement the knowledge acquired in their coursework consistent with legal limits. *See* 8 C.F.R. § 214.2(f)(10)-(11); 81 Fed. Reg. at 13,041-42, 13,090-98, 13,063, 13,068-69. In short, DHS applied its expertise to conclude that OPT serves the purposes

of the F-1 visa category and comports with the powers and limits of the INA.

As neither "experts in the field" nor "part of either political branch of the Government," we have a "duty to respect legitimate policy choices made by those who [are]." *Chevron*, 467 U.S. at 865-66. We appreciate that Washtech strongly disagrees with those policy choices. Nonetheless, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* at 866. The evidence and analysis on which DHS relied in promulgating the 2016 OPT Rule demonstrate the reasonableness of the Department's interpretation of its time-and-conditions authority, 8 U.S.C. § 1184(a)(1), in the context of the F-1 visa program, *id.* § 1101(a)(15)(F)(i). That interpretation warrants "particular deference" where, as here, it takes the form of a "longstanding," *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *see NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274-75 (1974), and widely known executive-branch program that Congress has left undisturbed, even as it has frequently revisited and amended the statutory scheme in other closely related respects, *Schor*, 478 U.S. at 845-46; *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, 539 F.3d 492, 500 (D.C. Cir. 2008); *see supra* at 28-36. As a result, any ambiguity in the scope of the time-and-conditions authority counsels deference to the Executive's interpretation.

V. Washtech's Motion to Strike

There is one final issue to resolve. Washtech asserts that the district court erroneously denied its Motion to Strike the Brief Amici Curiae of Institutions of Higher Education in Support of Intervenors. As the district court noted, it has broad discretion to allow amicus briefs when they provide "unique information or perspective" that "can help the [c]ourt beyond the help that the lawyers for the parties are able to provide." *Washtech VI*, 518 F. Supp. 3d at 453 n.2 (quoting *Hard Drive Prods. Inc. v. Does 1–1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012)). Washtech asserts that the amicus brief contained information that would be "inadmissible under the federal rules of evidence" and that it "attempted to supplement the record." *See* Appellant Br. at 44-46. But the district court relied on nothing outside the administrative record; it decided only the legal question whether OPT exceeded the Department's statutory authority and mentioned the brief only to acknowledge its existence when denying the motion to strike. *Washtech VI*, 518 F. Supp. 3d at 453 n.2. Even if the disputed amicus brief were impermissible, it was not shown to be prejudicial in any way. We therefore affirm the district court's valid exercise of its discretion to deny the motion to strike.

* * *

For the foregoing reasons, we affirm the district court decision denying Washtech's motion for summary judgment, granting the Department's and Intervenors' motions for summary judgment, and denying Washtech's motion to strike.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in part and dissenting in part:

Although I agree with my colleagues on standing, I part company on the merits. On appeal from the district court's grant of summary judgment for the Department of Homeland Security (DHS), the merits question is whether either 8 U.S.C. § 1101(a)(15)(F)(i) or 8 U.S.C. § 1324a(h)(3) authorizes the DHS to allow nonimmigrant "students" to work in the United States for up to three years past completion of their degree. Because the first statute, the F-1 statute, plainly does not delegate the asserted authority and the district court relied entirely on that provision to grant summary judgment to the government,[1] I would reverse and remand.

I. BACKGROUND

A. STATUTORY BACKGROUND

The Immigration and Nationality Act of 1952 (INA), Pub.L. No. 82-414, 66 Stat. 163, and its subsequent amendments define "classes of nonimmigrant aliens" for admission to the United States. *See* 8 U.S.C. § 1101(a)(15). The DHS administers the INA and is authorized to admit the specified classes of nonimmigrants and to prescribe regulations setting the duration and conditions of their admission. *See id.*

[1] As discussed *infra* at 20–22, the district court did not address whether section 1324a(h)(3) provides independent statutory authority for the optional practical training (OPT) program.

§ 1184(a)(1).[2] DHS regulations "insure that at the expiration of such [duration] or upon failure to maintain the status under which he was admitted, . . . such alien will depart from the United States." *Id.*

Colloquially, a nonimmigrant's class designates the type of visa he holds. An F-1 visa holder is thus a nonimmigrant admitted under the F-1 statute, 8 U.S.C. § 1101(a)(15)(F)(i). A number of provisions of the INA are at issue in this case but the primary provision is the F-1 statute, which describes an F- 1 visa holder as follows:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the [Secretary of Homeland Security] after

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[2] The statute refers to the Attorney General because the Immigration and Naturalization Service (INS) was within the Department of Justice and administered the INA before the DHS was created in 2002. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (citing 6 U.S.C. §§ 251(2), 252(a)(3), 271(b)). For ease of reference, I refer to the DHS as the responsible government agency. *See Wash. All. of Tech. Workers v. DHS (Washtech IV)*, 892 F.3d 332, 337 n.1 (D.C. Cir. 2018).

> consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the [Secretary of Homeland Security] the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn.

8 U.S.C. § 1101(a)(15)(F)(i).

Another class of nonimmigrant is the H-1B visa holder. An H-1B visa is available for employment in a "specialty occupation," 8 U.S.C. § 1101(a)(15)(H), or in those occupations requiring "(A) theoretical and practical application of a body of specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States," *id.* § 1184(i)(1). To qualify for a specialty occupation, the nonimmigrant applicant must have received "full state licensure to practice in the occupation, if such licensure is required to practice"; have "complet[ed] . . . the degree described [above] for the occupation"; or have "experience in the specialty equivalent to the completion of such degree, and . . . recognition of expertise in the specialty through progressively responsible positions relating to the specialty." *Id.* § 1184(i)(2). Since the creation of the modern H-1B visa in 1990, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 205(c), 104 Stat. 4978, 5020, the Congress has capped the total number of H-1B visas the DHS may issue each year. 8 U.S.C. § 1184(g)(1), (g)(5).

The final piece of the statutory puzzle is the Immigration Reform and Control Act of 1986 (IRCA), Pub.

L. 99-603, 100 Stat. 3359 (1986), in which the Congress made the "employment of unauthorized aliens unlawful," *id.* § 101, 100 Stat. 3360 (codified at 8 U.S.C. § 1324a(a)). More precisely, the IRCA makes it unlawful for an employer to "hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3))." 8 U.S.C. § 1324a(a)(1)(A). The definitional provision, section 1324a(h)(3), states:

> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the [Secretary of Homeland Security].

8 U.S.C. § 1324a(h)(3).

B. REGULATORY AND PROCEDURAL BACKGROUND

Because we have previously addressed much of the regulatory and procedural background during the long life of this litigation, *see Wash. All. of Tech. Workers v. DHS (Washtech IV)*, 892 F.3d 332 (D.C. Cir. 2018), I confine this background to the relevant components only.

The INA authorizes the Secretary of Homeland Security to promulgate regulations "and perform such other acts as he deems necessary for carrying out his authority under the [INA]." 8 U.S.C. § 1103(a)(3). Relying on that authority and the other authorities

outlined above, the DHS thrice—in 1992, 2008 and 2016—promulgated regulations extending the F-1 nonimmigrant visa to include a period of employment after the visa holder finishes his degree, which employment is termed post-completion "optional practical training" or OPT. *See, e.g.*, Pre-Completion Interval Training; F–1 Student Work Authorization, 57 Fed. Reg. 31,954, 31,955–56 (July 20, 1992) (1992 OPT Rule). To capture post-completion OPT, the DHS defines a nonimmigrant student's duration of F-1 status as "the time during which an F–1 student is pursuing a full course of study at an educational institution approved by the [agency] for attendance by foreign students, or engaging in authorized practical training following completion of studies." 8 C.F.R. § 214.2(f)(5)(i).[3]

The 1992 OPT Rule allowed "[a]n F–1 student [to] apply . . . for authorization for temporary employment for [OPT] directly related to the student's major area of study" and authorized OPT to extend "[a]fter completion of all course requirements for the degree" or "after completion of the course of study." 57 Fed. Reg. at 31,956 (codified at 8 C.F.R. § 214.2(f)(10)(ii)(A) (1992)). The 1992 OPT Rule permitted up to twelve months of post-completion OPT. *Id.* (codified at 8 C.F.R. § 214.2(f)(11) (1992)).

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[3] Because foreign students are often admitted for "duration of status," they are not admitted until a specific date but instead until their status ends. 2 Charles Gordon et al., Immigration Law & Procedure § 18.03[7][b] (rev. ed. 2022). In the case of an F-1 student, the termination date is the day the "course of study" for which he was admitted ends. 8 U.S.C. § 1101(a)(15)(F)(i).

In 2008, the DHS promulgated a regulation that allowed F-1 students with Science, Technology, Engineering and Mathematics (STEM) majors to apply for up to a seventeen- month extension of OPT. 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, 18,944–56 (Apr. 8, 2008) (2008 OPT Rule). After the Washington Alliance of Technology Workers (Washtech), a labor union representing STEM workers, successfully challenged the DHS's failure to undertake notice and comment before issuing the rule, the district court vacated the rule but stayed its vacatur until 2016 to allow the DHS to correct the error. *Wash. All. of Tech. Workers v. DHS (Washtech I)*, 156 F. Supp. 3d 123, 145–49 (D.D.C. 2015).[4]

In 2016, after undertaking notice and comment, the DHS issued the final rule now under attack. 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, 13,040–122 (Mar. 11, 2016) (2016 OPT Rule). The 2016 OPT Rule again extended the duration of permissible OPT—this time to twenty-four months for STEM students. When combined with the

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[4] I use *Washtech I* to remain consistent with the majority's numbering. The district court's earlier judgment in the case was vacated as moot and is not relevant to this appeal. *See Wash. All. of Tech. Workers v. DHS*, 74 F. Supp. 3d 247 (D.D.C. 2014*), judgment vacated, appeal dismissed*, 650 F. App'x 13 (D.C. Cir. 2016) (*Washtech II*).

twelve-month extension promulgated in 1992, the 2016 OPT Rule thus permitted STEM F-1 students to remain and work in the U.S. for up to thirty-six months after receiving their degree. *Id.* at 13,087.

Shortly after the 2016 OPT Rule's promulgation, Washtech filed the instant complaint alleging, *inter alia*, that the DHS's issuances of the 1992 OPT Rule (Count I) and the 2016 OPT Rule (Count II) exceeded its statutory authority. The district court dismissed the complaint, reasoning that Washtech lacked standing as to Count I and that Washtech had "conceded" that it had failed to state a claim for relief by not responding to the DHS's arguments in opposition to Count II. *Wash. All. of Tech. Workers v. DHS (Washtech III),* 249 F. Supp. 3d 524, 536–37 (Count I), 555 (Count II) (D.D.C. 2017).

Washtech appealed and we reversed in 2018. *Washtech IV*, 892 F.3d at 339. We affirmed the district court's dismissal of Count I on the alternative ground that the claim was untimely because the six-year window to challenge the rule had closed in 1998. *Id.* at 342. We noted, however, that "the dismissal of Count I does not foreclose Washtech's challenge to the statutory authority of the OPT program as a whole because the 2016 Rule may have reopened the issue anew." *Id.* We instructed the district court to consider on remand "whether the reopening doctrine applies to the issue raised in Count II." *Id.* at 339. On Count II, we reversed the district court's dismissal, concluding that Washtech had standing to challenge the 2016 OPT Rule based on increased competition faced by its members as a result of the rule. *Id.* at 341–42.

On remand, the district court held the DHS had reopened the statutory authority issue as to the entire OPT program because the DHS had "reconsidered its authority to implement the OPT Program" in the 2016 OPT Rule. *Wash. All. of Tech. Workers v. DHS (Washtech V)*, 395 F. Supp. 3d 1, 14 (D.D.C. 2019). It also allowed three parties to intervene. *Id.* at 15–21.[5] The case proceeded to summary judgment solely on Count II of the complaint, which alleges that the "DHS policy of allowing aliens to remain in the United States after completion of the course of study to work or be unemployed is in excess of DHS authority." Compl. ¶ 63. In the order *sub judice*, the district court granted summary judgment to the DHS and the intervenors. *Wash. All. of Tech. Workers v. DHS (Washtech VI),* 518 F. Supp. 3d 448, 453 (D.D.C. 2021). Borrowing much of its reasoning from its vacated *Washtech I* opinion, the court applied the *Chevron* doctrine and determined that at *Chevron* step one, the F-1 statute is ambiguous because "Congress has not directly addressed the precise question at issue, namely, whether the scope of F-1 encompasses post-completion practical training." *Id.* at 465 (citations and internal quotation marks omitted). In particular, the district court determined that "the statute's lack of a definition for the term 'student' creates ambiguity." *Id.* (quoting in entirety *Washtech I*, 156 F. Supp. 3d at 139). At *Chevron* step two, the district court concluded that "the [2016 OPT Rule] is a reasonable interpretation of the

[5] The intervenors are the National Association of Manufacturers, the Chamber of Commerce of the United States of America and the Information Technology Industry Council.

F-1 statute." *Id.* at 475. The district court did not address whether another statutory provision independently provides adequate authority for post-completion OPT.[6]

ANALYSIS

"We review *de novo* the District Court's grant of summary judgment," *Castlewood Prods., LLC v. Norton*, 365 F.3d 1076, 1082 (D.C. Cir. 2004), and more precisely, because the district court in this case reviewed an agency action under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 706(2)(C), '[w]e review the administrative record and give no particular deference to the District Court's views.'" *Genus Med. Techs. LLC v. FDA*, 994 F.3d 631, 636 (D.C. Cir. 2021) (alteration in original) (quoting *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 329–30 (D.C. Cir. 2020)). We review the DHS's decision to promulgate the 2016 OPT Rule "under the familiar standards of the [APA], which require that we uphold the [agency's] decision unless it is . . . 'in excess of statutory jurisdiction, authority, or limitations.'" *Id.* (citing 5 U.S.C. § 706(2)).

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[6] The DHS primarily relied on the F-1 statute and its "broad authority" under 8 U.S.C. § 1184(a)(1) "to determine the time and conditions under which nonimmigrants, including F–1 students, may be admitted to the United States." 2016 OPT Rule, 81 Fed. Reg. at 13,044–45. It also cited 8 U.S.C. § 1324a(h)(3) as statutory support for the assertion that the Secretary "has broad authority to determine which individuals are authorized for employment in the United States." *Id.* at 13,045. The district court only held that the F-1 statute authorizes OPT and did not mention whether section 1324a(h)(3) additionally or independently authorizes the program. *See Washtech VI*, 518 F. Supp. 3d at 475.

I first address whether the F-1 statute authorizes the DHS to promulgate the 2016 OPT Rule and to grant post-completion OPT.[7] I would hold that it does not, necessitating a reversal of the district court. Next, I address the other asserted statutory authorities for the 2016 OPT Rule and the OPT program and conclude that a remand is appropriate. *See infra* at Section II.B.

A. The F-1 Statute

The parties agree that the two-step *Chevron* framework applies to the F-1 statute analysis. Under this familiar framework, we first ask "whether Congress has directly spoken to the precise question at issue," *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984), and, if it has, we "give effect to [its] unambiguously expressed intent," *id*. at 843. If we instead find that the Congress has not spoken to the precise question at issue, we apply step two and examine whether the agency's interpretation "is based on a permissible construction of the statute." *Id.*

1.

I begin with the text. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citations omitted)). Because "the

[7] As noted earlier, I agree with my colleagues' standing analysis and join it *in toto*.

plain language of [the F-1 statute] is 'unambiguous,' '[the] inquiry [should] begin[] with the statutory text, and end[] there as well.'" *See Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617, 631 (2018) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion)).

The F-1 statute, *see supra* at 2–3, includes three modifiers of the words "an alien" that effectively create requirements that a nonimmigrant must meet to qualify for F-1 status. The DHS may grant F-1 status to only an alien (1) "having a residence in a foreign country which he has no intention of abandoning," (2) "who is a bona fide student qualified to pursue a full course of study" and (3) "who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study." 8 U.S.C. § 1101(a)(15)(F)(i).

The DHS and the intervenors argue that the latter two requirements plausibly include on-the-job training and impose only *entry* requirements. *See, e.g.*, Appellee Br. 28–31. As the argument goes, the F-1 statute is silent as to the meaning of "student" and "course of study," which purportedly allows a reading that "an F-1 student's course of study . . . include[s] a period of post-graduation practical training in the student's field of study." *Id.* at 30; *see also* Intervenor Br. 15–16. As the district court concluded, *see Washtech I*, 156 F. Supp. 3d at 139, they argue that the inclusion of "seeks to enter" means that the F-1 statute's "bona fide student" and "course of study" requirements apply only at entry and that once the nonimmigrant qualifies for entry, the DHS has plenary authority to "formulat[e], by regulation, the 'conditions' for

maintaining [F-1] status after entry." Intervenor Br. 16 (quoting 8 U.S.C. § 1184(a)(1)); *see also* Appellee Br. 31.

I am not so persuaded. Our court has previously interpreted the first modifier—"having a residence in a foreign country which he has no intention of abandoning," 8 U.S.C. § 1101(a)(15)(F)(i)—as an ongoing requirement to maintain F-1 status. *See Anwo v. INS*, 607 F.2d 435, 437 (D.C. Cir. 1979) (per curiam). The intervenors argue that unlike the first requirement, the latter two requirements are set off by a comma, a syntactic distinction that, by their lights, differentiates the first as an ongoing requirement and the latter two as entry requirements. Intervenor Br. 23 n.5. Where the intervenors see a distinction, I see a list of three requirements and the omission of an Oxford comma. More to the point, the intervenors' minor syntactic distinction is of no help because in prioritizing syntax and separating the latter two modifiers from the first, the intervenors ignore critical portions of the text, leading to an "unnatural reading" of the F-1 statute. *See Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001); *see also United States v. Barnes*, 295 F.3d 1354, 1361 (D.C. Cir. 2002) ("In interpreting a statute, . . . we are to determine its true, natural meaning, where ascertainable, irrespective of cumbersome syntax."); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82–83 (1932) ("To determine the intent of the law, the court, in construing a statute will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." (citations omitted)).

The second modifier is also naturally read as an ongoing requirement because it contains no temporal restriction on its requirement that an F-1 visa holder must be "a bona fide student qualified to pursue a full course of study." *See* 8 U.S.C. § 1101(a)(15)(F)(i). Intervenors obliquely argue that the inclusion of "*qualified* to pursue a full course of study" indicates that the Congress was "looking to matters as of the date of entry." Intervenor Br. 16 (emphasis added by intervenors) (quoting 8 U.S.C. § 1101(a)(15)(F)(i) in the first quotation). Of course, the potential F-1 visa holder must "qualif[y]" for admission into the United States but there is nothing in the text of this modifier indicating that once admitted, the F-1 visa holder may stop being a student. To the contrary, the text reads "an alien . . . , who *is* a bona fide student," without mentioning entry at all. 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). Even the DHS seems to acknowledge the ongoing nature of this requirement. *See* Oral Arg. Tr. 32:4–23 (DHS noting that because "some of the September 11 attackers" entered on F-1 visas, the Congress put the "onus on the universities to report students who were not complying or were not going to classes, because at that point they were out of status"). [8] Moreover, reading the second and third

[8] The intervenors also seem to acknowledge that "student" or "course of study" constrain the DHS's authority after entry. They argue that "[a]fter a graduate reaches a certain point in his or her career, continued employment would cease to be 'reasonably related' to the educational 'purposes' of the F-1 statute, and would no longer be permitted." Intervenor Br. 20 (quoting *Doe, 1 v. FEC*, 920 F.3d 866, 871 (D.C. Cir. 2019)). Where this point may be is undisclosed but they concede that the educational aspects of

requirements as entry-only requirements makes superfluous the "is" in the "is a bona fide student" requirement. Interpreting the second requirement as an ongoing requirement, however, "gives effect to every clause and word of [the F-1] statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (some internal quotation marks omitted).

To support its entry-only-requirement interpretation, the DHS primarily relies on the third modifier's use of "seeks to enter" and on absurdly overbroad interpretations of "student" and "course of study." *See* 8 U.S.C. § 1101(a)(15)(F)(i) (requiring an F-1 visa holder to be, *inter alia*, an "alien . . . who seeks to enter the United States temporarily and *solely* for the purpose of pursuing such a course of study" (emphasis added)). The DHS argues that the "textual focus on the 'purpose' for which one 'seeks to enter'" makes the third requirement an "initial requirement of admission," not a "continuing requirement." Appellee Br. 31 (quoting 8 U.S.C. § 1101(a)(15)(F)(i)) (alteration accepted). It also argues that because the Congress did not define "student" or "course of study," the legislature left it up to the "DHS 'to [reasonably] fill the statutory gap'" and that "the statutory language naturally lends itself to the reading that a student could be permitted to work as part of his 'course of study.'" Appellee Br. 16 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)), 30 (quoting 8 U.S.C. § 1101(a)(15)(F)(i)). I cannot join in

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the statute— "student" and "course of study"—are not entry-only requirements.

this tortured interpretation—what Holmes dubbed "verbicide"[9]—of "seeks to enter" and "student."

In view of "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," however, "student" and "course of study" cannot reasonably be read to include post-completion OPT. *See United States v. Wilson*, 290 F.3d 347, 353 (D.C. Cir. 2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Read in its entirety, the statute places a key limitation on the "course of study" referenced in both the second and third requirements; it requires that the course of study be "at an established college, university . . . or other academic institution . . . , which institution or place of study shall have agreed to report to the [Secretary of Homeland Security] the termination of attendance of each nonimmigrant student." 8 U.S.C. § 1101(a)(15)(F)(i). Accordingly, because post-completion OPT occurs after "attendance" "at an academic institution" has concluded, the definition of "course of study" affirmatively excludes those who "study" other than at academic institutions and thus those engaged in post-completion OPT. That leaves "student" and "seeks to enter" as the only statutory hooks supporting post-completion OPT.

The district court referenced two definitions of "student" and determined that "while some definitions of the word 'student' require school attendance, most

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[9] Life and language are alike sacred. Homicide and verbicide—that is, violent treatment of a word with fatal results to its legitimate meaning, which is its life—are alike forbidden." Oliver Wendell Holmes, Sr. The Autocrat of the Breakfast Table (1858).

include broader notions of studying and learning." *Washtech VI*, 518 F. Supp. 3d at 467 (cleaned up) (citing *Student*, Merriam-Webster Dictionary Online, www.merriam-webster.com/dictionary/student and *Student*, Oxford Eng. Dictionary, (visited Jan. 10, 2021)) [J.A. 25.]. Granted, "student" in other contexts can have a broader meaning, *cf. Student*, Webster's Third International Dictionary (2d ed. 1950) ("A person engaged in study; one devoted to learning; a learner; a scholar; esp., one who attends a school, or who seeks knowledge from teachers or books"), but the explicit academic-institution attendance requirement of a "course of study" in which the student is engaged narrows the meaning of "student" in the F-1 statute to include only those who have yet to "terminat[e] [their] attendance" "at an . . . academic institution," 8 U.S.C. § 1101(a)(15)(F)(i); *see also Am. Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n*, 796 F.3d 18, 25 (D.C. Cir. 2015) ("General-usage dictionaries cannot invariably control our consideration of statutory language, especially when the 'dictionary definition of ...isolated words[] does not account for the governing statutory context.'" (quoting *Bloate v. United States*, 559 U.S. 196, 205 n.9 (2010)). I am at a loss to see ambiguity in "student" that would capture post-graduation *employment*.

As for the "seeks to enter" modifier, *see* 8 U.S.C. § 1101(a)(15)(F)(i) (requiring an F-1 visa holder to be, *inter alia*, an "alien . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution . . . , which institution or place of study shall have agreed to report to the [Secretary of

Homeland Security] the termination of attendance of each nonimmigrant student"), the parties again diverge on whether this language establishes an ongoing obligation or an entry-only requirement to attend an academic institution. I see the third modifier as an ongoing requirement but under either approach, I fail to see how it transforms the second requirement into entry-only requirement. *See Ala. Power Co. v. EPA*, 40 F.3d 450, 455 (D.C. Cir. 1994) ("Statutory text is to be interpreted to give consistent and harmonious effect to each of its provisions.").

The ongoing nature of the first two requirements necessarily informs the reading of the third's "seeks to enter" language. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (requiring an F-1 visa holder to be, *inter alia*, an "alien . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution . . . , which institution or place of study shall have agreed to report to the [Secretary of Homeland Security] the termination of attendance of each nonimmigrant student"). As the DHS reads the statute, the "seeks to enter" provision provides the DHS plenary authority to define "student" and "course of study" to allow F-1 visa holders to stay and work for years beyond their "termination of attendance" at "an academic institution." *See* Appellee Br. 30–31. As already described, however, "student" and "course of study" take on specific meanings that the second requirement extends beyond admission. Far from expanding the DHS's authority after admission, the language in the "seeks to enter" modifier confirms the ongoing limits on F-1 status set by the first two modifiers. In

particular, "temporarily" and "solely for the purpose of pursuing such a course of study" and the "attendance" requirement manifest that there are limits to the duration of stay, to who qualifies as a "student" and to what counts as a "course of study." *See* 8 U.S.C. § 1101(a)(15)(F)(i). Moreover, even assuming *arguendo* that the third requirement is an entry-only requirement, it does not follow that the second requirement—"is a bona fide student"—is also an entry requirement. That misreading is belied by the text itself and would impermissibly rewrite the statute by inserting entry language where none exists. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute."). Accordingly, the second requirement serves as an ongoing constraint on maintaining F-1 status, even if, again, *arguendo*, the third is only an entry requirement.

2.

Reading the "seeks to enter" modifier to transform the F-1 statute into an entry-only requirement is also incompatible with the structure and text of the INA. First, the F-1 statute details that a nonimmigrant may enter "solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution," 8 U.S.C. § 1101(a)(15)(F)(i), and the INA separately requires that all DHS regulations placing conditions on a nonimmigrant's admission must, *inter alia*, "insure that . . . upon failure to maintain the status under which he was admitted, . . . such alien will depart from the United States," *id.* § 1184(a)(1). In

other words, because the "solely" requirement is an ongoing part of the nonimmigrant's "status under which he was admitted" but the 2016 OPT Rule permits F-1 visa holders to stay past the completion of their "course of study," the DHS exceeded its statutory authority by expanding F-1 status to include those *not* "solely . . . pursuing a course of study" at an academic institution.

Second, interpreting the "seeks to enter" modifier as an entry-only requirement is inconsistent with its use elsewhere in the INA. To wit, similar to the "attendance" and the "academic institution" limitations on "student" and "course of study," the "seeks to enter" modifier in the K-1 visa provision, which gives nonimmigrant status to the fiancé of a U.S. citizen, includes an ongoing requirement that the fiancé complete the marriage "within ninety days after admission." 8 U.S.C. § 1101(a)(15)(K)(i); *see Birdsong v. Holder*, 641 F.3d 957, 958 (8th Cir. 2011) (interpreting "seeks to enter" provision as ongoing requirement of maintaining status after admission); *see also Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1066 (9th Cir. 2008) (interpreting managerial-capacity requirement as ongoing requirement notwithstanding "seeks to enter" modifier in 8 U.S.C. § 1101(a)(15)(L)).

Finally, interpreting "seeks to enter" as an entry requirement effectively removes any statutory constraint on the DHS's authority after admission. Unsurprisingly, the DHS sees this discretion as a feature, not a bug. But the interpretation leads to an incongruous result when read in conjunction with the rest of the INA. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of

statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). For instance, the M-1 visa, which applies to vocational students, includes the continuing residency modifier and the "seeks to enter" modifier in language almost identical to the F-1 statute. *See* 8 U.S.C. § 1101(a)(15)(M)(i). Accordingly, if "seeks to enter" provisions apply at admission only, there is no statutory constraint on who may qualify for an M-1 visa as long as he continues to "hav[e] a residence in a foreign country which he has no intention of abandoning." *See id.* Moreover, the DHS interpretation has led to post-completion OPT rivaling the H-1B visa as the largest highly skilled guest worker program. Indeed, in 2016, the year in which the DHS authorized the twenty-four-month STEM extension, post-completion OPT surpassed the H-1B visa program as the greatest source of highly skilled guest workers. Neil G. Ruiz & Abby Budiman, *Number of Foreign College Graduates Staying in U.S. to Work Climbed Again in 2017, but Growth Has Slowed*, Pew Rsch. Ctr. (July 25, 2018). This makes the DHS interpretation even more unlikely given the long history of statutory caps on the number of H-1B visas. *See* 8 U.S.C. § 1184(g)(1) (general caps), 1184(g)(5) (creating exceptions to caps, including separate quota of 20,000 for nonimmigrants with master's or higher degree). The DHS's assertion of authority in this case creates an exception that swallows the Congress's caps. As the Supreme Court has consistently reminded us, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981) (citations omitted).

The entry-only requirement interpretation accomplishes neither of these statutory-interpretation goals.[10]

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[10] The district court and DHS rely extensively on legislative history and the theory of congressional ratification or acquiescence. See *Washtech VI*, 518 F. Supp. 3d at 471 n.14; Appellee Br. 4–5, 15–17. But "[g]iven the straightforward statutory command [described *supra*], there is no reason to resort to legislative history," which in this case "muddies the waters." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). As the DHS stated at oral argument, the "best" piece of legislative history supporting its notion that the Congress envisioned post-completion OPT in drafting the F-1 statute is a Senate Report from 1950 before the INA's 1952 enactment. *See* Oral Arg. Tr. 29:1–7; *see also* Appellee Br. 34 (citing S. REP. NO. 81-1515, at 503 (1950) ("[P]ractical training has been authorized for 6 months after completion of the student's regular course of study.")). The Senate Report, however, conflicts with a contemporary House Report indicating that legislators assumed those on a student visa were "not permitted to stay beyond the completion of their studies." H.R. REP. NO. 82-1365, at 40 (1952). The district court ignored the danger of using legislative history as it neglected to consider conflicting legislative history relied on by Washtech. *See* Pl. Mot. for Summ. J. at 3, *Washtech VI*, 518 F. Supp. 3d 448 (citing H.R. REP. NO. 101-723, at 66 (1990); S. REP. NO. 96-859, at 7 (1980)).

As for congressional acquiescence, at whichever *Chevron* stage it may apply, *see* Appellee Br. 46–53 (evaluating acquiescence at *Chevron* step two); Intervenor Br. 24–41 (using acquiescence at *Chevron* step one), it does not apply here. "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *see also Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("A regulation's age is no antidote to clear inconsistency with a statute . . . ."). Because the DHS's reading of the F-1 statute contravenes the statute's plain meaning, I cannot understand how the Congress has "agreed with" that reading. *See*

There is no dispute that the DHS, via its 2016 OPT Rule, believes that it has the authority to allow F-1 students to stay and work for up to three years after completion of their "course of study . . . at an established college, university . . . or other academic institution." 8 U.S.C. § 1101(a)(15)(F)(i); *see, e.g.*, 2016 OPT Rule, 81 Fed. Reg. at 13,045 ("[A]n F–1 student in post-completion OPT does not have to leave the United States within 60 days after graduation, but instead has authorization to remain for the entire post-completion OPT period."), 13,087 ("The 24-month [STEM] extension, when combined with the 12 months of initial post-completion OPT, allows qualifying STEM students up to 36 months of [OPT]."). Because the F-1 statute is plainly not an entry-only requirement, its constraints on F-1 nonimmigrant status are ongoing, making the DHS's 2016 OPT Rule "in excess of [its] statutory . . . authority." 5 U.S.C. § 706(2)(C). Accordingly, I would reverse the district court and remand for further consideration, as explained *infra*.[11]

Brown, 513 U.S. at 121 ("[C]ongressional silence lacks persuasive significance, particularly where administrative regulations are inconsistent with the controlling statute." (internal quotation marks and citations omitted)).

[11] After oral argument, the Supreme Court decided *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). The implication of that decision is that the major questions inquiry appears to be a threshold question to *Chevron* analysis. Because I believe that this dispute may be a major question, I would either ask for supplemental briefing to us or direct the district court on remand to treat the applicability of *West Virginia* to the 2016 OPT Rule.

B. OTHER STATUTORY AUTHORITY

As briefly mentioned by the district court, *Washtech VI*, 518 F. Supp. 3d at 468–69, Washtech also argues that the DHS's separate statutory authority for its action, 8 U.S.C. § 1324a(h)(3), is inadequate to uphold the 2016 OPT Rule. *See* Appellant Br. 27–32; Appellant Reply Br. 9–14; *see also* 2016 OPT Rule, 81 Fed. Reg. at 13,044–45 (asserting 8 U.S.C. §§ 1103, 1184(a)(1) and 1324a(h)(3) as statutory authorities). Recall that it is unlawful to employ "an unauthorized alien," as defined by section 1324a(h)(3). 8 U.S.C. § 1324a(a)(1)(A). Section 1324a(h)(3) in turn states that an alien is *not* "unauthorized" to work if "lawfully admitted for permanent residence, or . . . authorized to be so employed by this chapter or by the [Secretary of Homeland Security]." In particular, Washtech argues that section 1324a(h)(3)'s definition of "unauthorized alien" confers on the DHS only the authority to issue work authorizations expressly authorized by statute, not independent authority to authorize the employment of any alien. Washtech provides two grounds for its argument. Washtech first argues that the structure of the INA supports its interpretation of section 1324a(h)(3) and that the Congress would not have delegated the elephant-sized "co-equal power to authorize alien employment" through a mousehole-sized definitional provision. Appellant Br. 29–30 (citing, *inter alia*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Second, Washtech argues that the DHS's section 1324a(h)(3) interpretation, which would purportedly allow the DHS to

authorize employment for any alien class, violates the nondelegation doctrine. *Id.* at 30–31.

For its part, the DHS asserts almost in passing that section 1324a(h)(3)'s language—"authorized to be so employed by this chapter or by the [Secretary of Homeland Security]"— plainly confers on DHS the authority to authorize employment, unless a statute "expressly prohibit[s]" such authorization. Appellee Br. 17, 49–50. Expanding on the DHS's argument, the intervenors argue that the INA's general delegation of authority—to "establish such regulations . . . and perform such other acts as [the Secretary] deems necessary for carrying out his authority under the [INA]," 8 U.S.C. § 1103(a)(3), and to promulgate regulations establishing the "conditions" of admission for nonimmigrants, *id.* § 1184(a)(1)—includes work authorization. Intervenor Br. 43–45. They also argue that with the enactment of the IRCA, the Congress ratified the DHS's broad authority to authorize employment for any alien. *Id.* at 45–52.

I would not reach the merits of this dispute. Neither the district court, nor any of the parties, explained how a post-completion OPT program based on section 1324a(h)(3) only— independent of the F-1 statute and F-1 status—would operate. The district court's brief analysis of section 1324a(h)(3) assumed that the F-1 statute provided adequate statutory authority and thus did not address whether section 1324a(h)(3) independently provides sufficient statutory authorization for post-completion OPT. *See Washtech VI*, 518 F. Supp. 3d at 468–69 ("[T]he [2016 OPT Rule] only grants work authorization to nonimmigrant

foreign nationals who are already legally present in the United States under the F-1 student visa program.").

Accordingly, in assessing section 1324a(h)(3) authority, I would instruct the district court to decide whether F-1 status is severable from the post-completion OPT program. Severability requires examining whether there is "'substantial doubt' that the agency would have adopted the severed portion [of an agency action] on its own," *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam) (citations omitted), and whether the non-offending "part[] of the agency action can 'function sensibly without the stricken provision,'" *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1144 (D.C. Cir. 2022) (quoting *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351 (D.C. Cir. 2019)). I believe "substantial doubt" exists as to whether the DHS *could* have adopted post-completion OPT if the participant aliens lacked F-1 status, *see Davis Cnty. Solid Waste Mgmt.*, 108 F.3d at 1459, because the entire premise of post-completion OPT is that the "workers" are "students," *see, e.g.*, 2016 OPT Rule, 81 Fed. Reg. at 13,117 (stating that "a qualified [STEM] *student* may apply for an extension of OPT while in a valid period of post-completion OPT authorized under 8 C.F.R. 274a.12(c)(3)(i)(B)," which in turn authorizes employment of a "nonimmigrant (F–1) student" (emphasis added)); *id.* at 13,040 (describing in "Purpose of the Regulatory Action" that "[t]his final rule affects certain F–1 nonimmigrant students who seek to obtain an extension of [OPT] based on study at a U.S. institution of higher education in a [STEM] field, as well

as certain F–1 nonimmigrant students who seek so-called Cap-Gap relief").

Moreover, far from "function[ing] sensibly," the post-completion OPT program would not function at all if the participants lacked F-1 status. *See Carlson*, 938 F.3d at 351. The 2016 OPT Rule includes that "[a] student who violates his or her F–1 status during the STEM OPT extension period . . . will not be able to continue working during the pendency of [a] reinstatement application; such employment would be considered unlawful." 81 Fed. Reg. at 13,099. If it is unlawful to work without F-1 status, it is hard to see how anyone applying for a twenty-four-month STEM extension without F-1 status could receive authorization. Further, DHS regulations set out three classes of aliens authorized to obtain employment: "Aliens authorized employment incident to status"; "Aliens authorized for employment with a specific employer incident to status or parole"; and (c) "Aliens who must apply for employment authorization." 8 C.F.R. § 274a.12. In those regulations, the only mentions of post-completion OPT appear under subsections for "nonimmigrant (F–1) student[s]." *See* 8 C.F.R. § 274a.12(b)(6), (c)(3). Even on its own terms, therefore, the DHS could not grant work authorization to OPT participants sans F-1 status unless it amends its employment classifications—an agency action not before us. *See MD/DC/DE Broads. Ass'n v. FCC*, 236 F.3d 13, 23 (D.C. Cir. 2001) (holding "entire rule must be vacated" because severing only unlawful aspects "would severely distort the [agency's] program and produce a rule strikingly different from any the [agency] had

ever considered or promulgated in the lengthy course of these proceedings").

On remand, the district court should also treat the effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on the section 1324a(h)(3) analysis. *See supra* note 11. In that decision, the Supreme Court determined that a certain section of the Clean Air Act did not give the EPA the authority to require, by regulation, energy generators to shift from higher- to lower-emitting generation. *West Virginia*, 142 S. Ct. at 2616. Relying on "[1] the 'history and the breadth of the authority that [the EPA] ha[d] asserted[;]' . . . [2] the 'economic and political significance' of that assertion," *id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60); and [3] the principle that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s],'" *id.* at 2609 (alteration in original) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), the Court held that the case was a "major questions case," *id.* at 2610, and required the government to "point to 'clear congressional authorization'" of the regulatory action, *id.* at 2614 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Because the relevant section of the Clean Air Act did not "clear[ly] delegat[e]" to the EPA the authority to force generation shifting, *id.* at 2616, the Court determined that the EPA lacked the statutory authority to issue the generation-shifting regulation, *id.* at 2615–16. As in *West Virginia*, section 1324a(h)(3), a definitional provision, may well be too "subtle [a] device" and a "'wafer-thin reed' on which to rest" post-completion OPT, 142 S. Ct. at 2608–09 (quotation omitted), which, in

2016, surpassed the H-1B program as the largest highly skilled guest worker program, Ruiz & Budiman, *supra*. Moreover, as to breadth, the twenty-four-month STEM extension triples the amount of time that STEM F-1 graduates may stay in the country—an alarming expansion of DHS authority under the F-1 statute. Like the EPA's asserted authority in *West Virginia*, *see* 142 S. Ct. at 2612, the limit of the DHS's asserted authority is unclear; if the DHS's authority to authorize employment is as broad as the intervenors suggest, the DHS could extend post-graduate OPT beyond sixty months, which would be greater than the *statutory* limit for H- 1B visa holders.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

No. 16-CV-1170

United States District Court
for the District of Columbia

Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 518 F. Supp. 3d 448 (D.D.C. 2021)

[Filed: January 28, 2021]

Memorandum Opinion and Order Denying Plaintiff's Motion for Summary Judgment

MEMORANDUM OPINION

The plaintiff, the Washington Alliance of Technology Workers ("Washtech"), a collective-bargaining organization representing science, technology, engineering, and mathematics ("STEM") workers, brings this action against the defendants, the United States Department of Homeland Security ("DHS"), the Secretary of DHS, the United States Immigration and Customs Enforcement ("ICE"), the Director of ICE, the United States Citizenship and Immigration Services ("Citizenship and Immigration Services"), and the Director of Citizenship and Immigration Services (collectively, the "Government"), and the intervenor-defendants, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council

(collectively, the "Intervenors"), *see* Complaint ("Compl.") ¶¶ 8, 10-15, challenging, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06 (2012), (1) DHS's 1992 regulation creating a twelve-month optional practical training ("OPT") program (the "OPT Program") for nonimmigrant foreign nationals admitted into the United States with an F-1 student visa, *see* Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. pts. 214 & 274a) (the "1992 OPT Program Rule"); *see* Compl. ¶¶ 54-61; and (2) DHS's 2016 regulation permitting eligible F-1 student visa holders with STEM degrees to apply for extensions of their participation in the OPT Program for up to an additional twenty-four months, *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 (Mar. 11, 2016) (codified at 8 C.F.R. pts. 214 & 274a) (the "2016 OPT Program Rule"), *see Compl.* ¶¶ 62-84. Currently pending before the Court are (1) the Plaintiff's Motion for Summary Judgment ("Pl.'s Mot."); (2) the Defendants' Opposition and Cross-Motion for Summary Judgment ("Defs.' Mot."); (3) the Intervenors' Motion for Summary Judgment ("Intervenors' Mot."); and (4) the Plaintiff's Motion to Strike the Brief *Amici Curiae* of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike"). Upon careful consideration of the parties' submissions,[1] the Court

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the

concludes for the following reasons that it must deny Washtech's motion for summary judgment, grant the Government's and the Intervenors' motions for summary judgment, and deny Washtech's motion to strike.[2]

Memorandum in Support of Defendants' Opposition and Cross-Motion for Summary Judgment ("Defs.' Mem."); (2) the Statement of Points and Authorities in Support of Intervenors' Combined Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Intervenors' Mem."); (3) the Brief of Amici Curiae of Institutions of Higher Education in Support of Intervenors ("Amici Br."); (4) the Plaintiff's Reply on its Motion for Summary Judgment and Response to Defendant[]s['] and Intervenors' Cross Motions for Summary Judgment ("Pl.'s Reply"); (5) the Defendants' Reply in Support of Cross-Motion for Summary Judgment ("Defs.' Reply"); (6) the Reply in Support of Intervenors' Motion for Summary Judgment ("Intervenors' Reply"); (7) the Memorandum of Points and Authorities in Support of Plaintiff's Motion to Strike the Brief Amici Curiae of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike Mem."); (8) the Amici Curiae Institutions of Higher Education's Opposition to Plaintiff's Motion to Strike ("Amici's Opp'n"); and (9) the Reply in Support of Plaintiff's Motion to Strike the Brief Amici Curiae of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike Reply").

[2] The Court concludes that the intervenors' Brief Amici Curiae of Institutions of Higher Education in Support of Intervenors (the "Amici Curiae Brief") "present[s] ideas, arguments, theories, insights, facts[,] or data that are not . . . found in the parties' briefs." *N. Mariana Islands v. United States*, No. 08-CV-1572, 2009 U.S. Dist. LEXIS 125427, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (internal quotation marks omitted). Therefore, this "unique information or perspective [ ] can help the [C]ourt beyond the help that the lawyers for the parties are able to provide." *Hard Drive Prods., Inc. v. Does 1 - 1,495*, 892 F. Supp. 2d 334, 337 (D.C. Cir.

2012) (internal quotation marks omitted); *see Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (granting "the non-party movants' [m]otions to participate as *amicus curiae*" because the Court found that the "non-party movants [had] a special interest in th[e] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of this case"). Accordingly, the Court will exercise its broad "discretion to determine 'the fact, extent, and manner' of participation by the amicus[,]" *Hard Drive Prods.*, 892 F. Supp. 2d at 337, and therefore deny Washtech's motion to strike. *See id.* (noting that "[a]n amicus curiae, defined as 'friend of the court,' does not represent the parties but participates only for the benefit of the Court[,]" and that "it is solely within the Court's discretion to determine 'the fact, extent, and manner' of participation by the amicus"). Washtech's arguments in support of its motion to strike are unavailing. Washtech asserts that the Amici Curiae Brief "go[es] beyond attempting to supplement the record" and instead "tries to introduce outside statements as evidence that would not be admissible under any circumstances." Pl.'s Mot. to Strike at 3 (asserting, inter alia, that the anecdotal statements contained in the Amici Curiae Brief "are made without oath or affirmation[,]" "are inadmissible hearsay[,]"and "lack relevance"). However, as the Intervenors correctly note, "[a]mici are not parties to this action, and they are not seeking to supplement the administrative record at issue here[,]" Amici's Opp'n at 3 n.1, but rather, they are "supply[ing] the [Court] with [an] important perspective as [it] evaluate[s] the administrative record against the applicable legal standard[,]" *id.* at 3. Additionally, Washtech's "reliance on cases addressing the evidentiary standards for sworn testimony is misplaced[,]" id. at 5, and "[Washtech] fails to provide a single example where those standards have been applied to amicus briefs[,]" *id.* Indeed, this Circuit has previously considered amicus briefs that contain anecdotal statements, including anonymous accounts. See, e.g., Br. of American Veterans Alliance, et al. as Amici Curiae in Supp. of Pls.-Appellees at 8-21, 23-25, *Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (No. 1:17-cv-01597) (amicus brief containing several quoted statements from

I. BACKGROUND

A. Statutory and Legal Background

An F-1 visa provides foreign national students valid immigration status for the duration of a full course of study at an approved academic institution in the United States. *See* 8 U.S.C. § 1101(a)(15)(F)(i). Since 1947, F-1 visa students, in conjunction with pursuing a course of study, have been able to engage in some version of OPT during their studies or on a temporary basis after the completion of their studies. *See* 8 C.F.R. § 125.15(b) (1947). And since 1992, F-1 visa students have been allowed to apply for up to twelve months of OPT, to be used either during or following the completion of their degree requirements. *See* 8 C.F.R. § 214.2(f)(10).

1. 2008 OPT Program Rule

In April 2008, DHS issued an interim final rule with request for comments that extended the period of OPT in which a student could participate by seventeen months for F-1 nonimmigrants with a qualifying STEM degree. *See* Extending Period of Optional

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anonymous veterans and service members to advise the Court about the impact of the challenged Department of Defense policy barring openly transgender individuals from serving in the military); Br. of Immigrant Rights Advocates as Amici Curiae Supporting Pls.-Appellees at 12-14, *Jane Doe v. Azar*, 925 F.3d 1291, 441 U.S. App. D.C. 224 (D.C. Cir. 2019) (No. 18-5093) (amicus brief recounting experiences of individuals affected by the challenged Office of Refugee Resettlement policy precluding unaccompanied alien minors from obtaining an abortion).

Practical Training by [Seventeen] 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 (Apr. 8, 2008) (to be codified at 8 C.F.R. pts. 214 & 274a) (the "2008 OPT Program Rule"). The goal of this extension was to help alleviate a "competitive disadvantage" for United States employers recruiting STEM-skilled workers educated in the United States under the H-1B visa program. *See* 73 Fed. Reg. 18,944. H-1B visas are temporary employment visas granted annually to foreign nationals in "specialty occupations," including many occupations in the STEM field. 8 C.F.R. § 214.2(h)(1)(ii)(B). The number of H-1B visas issued on an annual basis is limited, and the program is oversubscribed. *See* 73 Fed. Reg. at 18,946. The extension provided by the 2008 OPT Program Rule sought to "expand the number of alien STEM workers that could be employed in the [United States]," Compl. ¶ 46; *see also* 73 Fed. Reg. at 18,953, and explicitly referenced the specific concern regarding the rigidity of the H-1B visa program, *see* 73 Fed. Reg. at 18,946-47.

In 2014, Washtech filed suit, challenging on procedural and substantive grounds, both the underlying twelve-month 1992 OPT Program Rule and the seventeen-month extension added by the 2008 OPT Program Rule. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* ("*Washtech I*"), 74 F. Supp. 3d 247, 251-52 (D.D.C. 2014). There, another member of this Court found that Washtech lacked standing to challenge the 1992 OPT Program Rule, *see id.* at 252-53, but did have standing to challenge the 2008 OPT Program Rule, *see id.* at 253. The Court vacated the

2008 OPT Program Rule because it had been promulgated without notice and comment, *see Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* ("*Washtech II*"), 156 F. Supp. 3d 123, 149 (D.D.C. 2015), *judgment vacated, appeal dismissed*, 650 Fed. App'x 13 (D.C. Cir. 2016) ("*Washtech II Appeal*"), and stayed *vacatur* of the rule to allow DHS to promulgate a new rule, *see id.* On appeal of that decision to the District of Columbia Circuit, Washtech alleged that the Court "had improperly allowed DHS to continue the policies unlawfully put in place in the 2008 OPT [Program] Rule" and that "the OPT program was not within DHS's authority." *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* ("*Washtech III*"), 249 F. Supp. 3d 524, 531-33 (D.D.C. 2017) (Walton, J.) (internal quotation marks and alterations omitted), *aff'd in part, rev'd in part*, 892 F.3d 332, 436 U.S. App. D.C. 83 (D.C. Cir. 2018) ("*Washtech III Appeal*").

2. 2016 OPT Program Rule

In response to the ruling issued by this Court's colleague, DHS issued a notice of proposed rulemaking on October 19, 2015, requesting the submission of public comments prior to November 18, 2015. *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 80 Fed. Reg. 63,376 (Oct. 19, 2015). While the 2008 OPT Program Rule had extended the OPT Program tenure by seventeen months for eligible STEM students, this notice instead proposed extending the OPT Program tenure by twenty-four months. *See id.* (explaining that "[t]his [twenty-four] month extension would

effectively replace the [seventeen] month STEM OPT [Program] extension currently available to certain STEM students"). The notice also deviated from the 2008 OPT Program Rule in several other respects. *See id.* at 63,379-94 (discussing the proposed changes in detail). Namely, the notice contained a distinct change in tone—it dropped all references to the H-1B visa program that had been in the 2008 OPT Program Rule and instead explained that its purpose was to "better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to [United States] workers." *Id.* at 63,376.

On March 11, 2016, after the expiration of the public notice-and-comment period, DHS issued the final version of the 2016 OPT Program Rule. *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a). The District of Columbia Circuit then dismissed as moot Washtech's appeal challenging the 2008 OPT Program Rule and vacated the judgment issued by this Court's colleague in its entirety. *See Washtech II Appeal*, 650 Fed. App'x at 14.

B. This Case

On June 17, 2016, Washtech initiated this action. *See* Compl. at 1. As previously noted by this Court, Washtech allege[d] that the 1992 OPT Program Rule and the 2016 OPT Program Rule exceed[ed] the authority of DHS [under] several provisions of the Immigration and Nationality Act ("INA")[, Pub. L. No. 82-

414, 66 Stat. 163 (1952),] (Counts I and II); that the 2016 OPT Program Rule was issued in violation of the Congressional Review Act . . . because of non-compliance with the notice and comment and incorporation by reference requirements of the statute (Count III); and that the 2016 OPT Program Rule [was] arbitrary and capricious (Count IV). *Washtech III*, 249 F. Supp. 3d at 533 (third alteration in original) (citations and internal quotation marks omitted), *aff'd in part, rev'd in part, Washtech III Appeal*, 892 F.3d 332. Thereafter, the Government moved to dismiss "the Complaint on the grounds that this Court lacks subject matter jurisdiction . . . and Washtech [ ] failed to state a claim upon which relief may be granted." *Id.* at 531. On April 19, 2017, the Court granted the Government's motion to dismiss and dismissed Washtech's Complaint in its entirety. *See id.* at 556. Specifically, the Court dismissed Count I of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) "for lack of standing to challenge the 1992 OPT Program Rule," and dismissed Counts II through IV pursuant to Federal Rule of Civil Procedure 12(b)(6) "due to Washtech's failure to plausibly state claims that are entitled to relief." *Id.*

On appeal, the District of Columbia Circuit "affirm[ed] th[is] [ ] [C]ourt's dismissal of Counts I, III[,] and IV," but "reverse[d] its dismissal of Count II." *Washtech III Appeal*, 892 F.3d at 348. With respect to Count II, the Circuit reasoned that "whether Count II may proceed remains in question" because, although "the six-year statute of limitations on . . . [Washtech's] challenge closed in 1998[,] Washtech asserts[] [ ] that it may still [raise its] challenge . . . under the reopening doctrine," *id.* at 345, and "if [ ] DHS reopened the

issue of whether the OPT [P]rogram as a whole is statutorily authorized in its notice of proposed rulemaking vis-à-vis the 2016 [OPT Program] Rule, its renewed adherence is substantively reviewable, and the challenge to the entire program may proceed," *id.* at 346 (citation and internal quotation marks omitted). The Circuit "decline[d] to address the question in the first instance [of whether the reopening doctrine is applicable] and le[ft] it for th[is] [ ] Court to address on remand." *Id.*

On remand, this Court ordered the Government to file a renewed motion to dismiss addressing the issue of whether the reopening doctrine applies to Washtech's challenge to the OPT Program. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.* ("*Washtech IV*"), 395 F. Supp. 3d 1, 8 (D.D.C. 2019) (Walton, J.). On October 18, 2018, the Government filed its renewed motion to dismiss, seeking dismissal of Count II of Washtech's Complaint pursuant to Rules 12(b)(1) and 12(b)(6), and the Intervenors filed their motion to intervene in this case. *See id.* On July 1, 2019, the Court denied the Government's renewed motion to dismiss, concluding that the 2016 OPT Program Rule "reopened the issue of [] DHS's statutory authority to implement the OPT Program[,]" and that therefore "Washtech's challenge to that authority is timely." *Id.* at 15. In that same Order, the Court granted the Intervenors' motion to intervene as of right. *See id.* at 15-21.

On September 25, 2019, Washtech filed its motion for summary judgment on Count II of its Complaint, asking the Court "to . . . hold that [the 2016 OPT Program Rule] is in excess of agency authority and [to] set

it aside pursuant to the [APA.]" Pl.'s Mot. at 1. On November 25, 2019, the Government filed its opposition and cross-motion for summary judgment. *See* Defs.' Mot. at 1. On that same date, the Intervenors filed their motion for summary judgment. *See* Intervenors' Mot. at 1-2. These motions are the subjects of this Memorandum Opinion.

II. STANDARD OF REVIEW

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In the APA context, summary judgment is the mechanism for deciding whether, as a matter of law, an agency action is supported by the administrative record and is otherwise consistent with the standard of review under the APA. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). But, because the district court's role is limited to reviewing the administrative record, the typical summary judgment standards set forth in Federal Rule of Civil Procedure 56 are not applicable. *See Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Id.* (quoting *Occidental Eng'g Co. v. Immigr. &*

Naturalization Serv., 753 F.2d 766, 769-70 (9th Cir. 1985)). In other words, "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal[,]" and "[t]he 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083, 348 U.S. App. D.C. 77 (D.C. Cir. 2001).

The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness[.]" *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009). It requires a district court to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law[,]" 5 U.S.C. § 706(2)(A); "contrary to constitutional right, power, privilege, or immunity[,]" *id.* § 706(2)(B); or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[,]" *id.* § 706(2)(C). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). However, the district "[c]ourt[] 'will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Pub.*

Citizen, Inc. v. Fed. Aviation Admin., 988 F.2d 186, 197, 300 U.S. App. D.C. 238 (D.C. Cir. 1993) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)).

III. ANALYSIS

Washtech argues that it is entitled to summary judgment because the OPT 2016 Program Rule is "contrary to law and in excess of DHS authority." Pl.'s Mot. at 11. The Government responds that it is entitled to summary judgment because "Washtech lacks Article III standing to challenge the 2016 OPT [Program] Rule[,]" Defs.' Mem. at 1, and alternatively, because "DHS possesses statutory authority to authorize post-graduation [OPT] for F-1 students[,]" *id.* at 2. While the Intervenors do not dispute Washtech's standing to challenge the 2016 OPT Program Rule, they join the Government in asserting that they are entitled to summary judgment because "the OPT regulations represent a lawful exercise of executive branch authority." Intervenors' Mem. at 1. The Court will first address whether Washtech has demonstrated that it has Article III standing to bring this case, and if it concludes that it does, then it will address whether the 2016 OPT Program Rule exceeds DHS's statutory authority.

A. Article III Standing

The Circuit has already concluded, at least at the motion-to-dismiss stage of this litigation, that

"Washtech has standing [to challenge the 2016 Program Rule] under the competitor standing doctrine." *Washtech III Appeal*, 892 F.3d at 339. However, the Government now argues that "[t]he Court should grant summary judgment to DHS because Washtech has failed to establish, using the proof required at the summary judgment stage, that it has standing to maintain this lawsuit."[3] Defs.' Mem. at 10. Specifically, the Government asserts that "Washtech has failed to provide specific, particularized evidence demonstrating that its three identified members are in direct and current competition for jobs with students engaged in OPT." *Id.* Washtech, however, contends that it has standing to maintain this action pursuant to the competitor standing doctrine, because it allegedly suffers "increased competition injury from alien guestworkers on OPT." Pl.'s Mot. at 9. Additionally, Washtech asserts in support of its summary judgment motion that it has "submitted updated standing evidence . . . containing facts that support the allegations made related to standing in the Complaint as well as affidavits of its members." Pl.'s Reply at 21.

The "irreducible constitutional minimum" of standing contains three elements: (1) an injury-in-fact; (2) causation; and (3) the likely possibility of redress by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "The party invoking federal jurisdiction bears the burden of establishing standing[,]" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412, 133 S. Ct.

[3] As noted above, the Intervenors do not contest that Washtech has standing to bring this case. *See generally* Intervenors' Mem.

1138, 185 L. Ed. 2d 264 (2013) (internal quotation marks omitted), and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation[,]" *Lujan*, 504 U.S. at 561. "[A]t the summary judgment stage, such a party 'can no longer rest on [] mere allegations[] but must set forth by affidavit or other evidence 'specific facts.'" *Clapper*, 568 U.S. at 412 (quoting *Lujan*, 504 U.S. at 561).

Additionally, an association seeking to establish standing to sue on behalf of its members must further show that "(1) at least one of its members would have standing to sue in his [or her] own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Chamber of Com. v. Envtl. Prot. Agency*, 642 F.3d 192, 199, 395 U.S. App. D.C. 193 (D.C. Cir. 2011) (quoting *Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002)). Here, the focus of the parties' dispute is whether any of the named Washtech members would have standing to sue in his or her own right, therefore providing Washtech standing to pursue the claims it has asserted.[4] *See generally*

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[4] Because the Government does not appear to dispute the second and third prongs of the associational standing test in its opposition and cross-motion for summary judgment, *see generally* Defs.' Mem. at 10-18, the Court concludes that the Government has conceded the satisfaction of these two prongs. *See Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) (Walton, J.) ("It is well understood in this

Pl.'s Mot. at 9; Defs.' Mem. at 10-18. And, considering the requirements for satisfying the competitor standing doctrine,[5] the Court concludes for the reasons that follow that Washtech has standing to bring this case.

First, Washtech has established that it has suffered an injury-in-fact under the competitor standing doctrine. Washtech asserts that its members have been injured by the OPT 2016 Program Rule because the program "increase[s] competition injury from alien guestworkers on OPT." Pl.'s Mot. at 9. "The doctrine of competitor standing addresses the first requirement [of standing] by recognizing that economic actors

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Circuit that when a [party] files an opposition to a dispositive motion and addresses only certain arguments raised by the [moving party], a court may treat those arguments that the [party] failed to address as conceded."). Therefore, the Court will solely address the first prong of the associational standing test—whether "at least one of [Washtech's] members would have standing to sue in his [or her] own right," *Chamber of Com.,* 642 F.3d at 199—which in turn depends on whether Washtech has satisfied the requirements of competitor standing. Accordingly, this question will be the sole focus of the Court's standing analysis.

[5] Because the Government disputes only the injury and causation elements of standing for Washtech's individual members, the Court will address only these two elements in determining whether Washtech has established standing on the basis of the competitor standing doctrine. *See Defs.*' Reply at 11, 16 (asserting that the plaintiff must "affirmatively demonstrate [] causation" and that "no concrete injury has been shown at this stage"). Moreover, the Court notes that the Circuit has already determined that "Washtech's injury is redressable by a favorable decision[,]" as "[a] court order invalidating the [OPT] 2016 [Program] Rule would eliminate workers from the STEM job market and therefore decrease competition for the STEM jobs pursued by Washtech's members." *Washtech III Appeal*, 892 F.3d at 341.

'suffer [an] injury[-]in[-]fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition' against them." *Sherley v. Sebelius*, 610 F.3d 69, 72, 391 U.S. App. D.C. 258 (D.C. Cir. 2010) (second alteration in original) (quoting *La. Energy & Power Auth. v. Fed. Energy Regul. Comm'n*, 141 F.3d 364, 367, 329 U.S. App. D.C. 400, 329 U.S. App. D.C. 401 (D.C. Cir. 1998)). To establish competitor standing, a party in a particular market must "show an actual or imminent increase in competition" in the relevant market, *id.* at 73, and "demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action[,]" *Mendoza v. Perez*, 754 F.3d 1002, 1013, 410 U.S. App. D.C. 210 (D.C. Cir. 2014) (quoting *KERM, Inc. v. Fed. Commc'ns Comm'n*, 353 F.3d 57, 60, 359 U.S. App. D.C. 200 (D.C. Cir. 2004) (emphasis in original)); *see also Arpaio v. Obama*, 797 F.3d 11, 23, 418 U.S. App. D.C. 163 (D.C. Cir. 2015) ("Plaintiffs may claim predictable economic harms from the lifting of a regulatory restriction on a direct and current competitor, or regulatory action that enlarges the pool of competitors, which will almost certainly cause an injury[-]in[-]fact to participants in the same market. But [this Circuit] ha[s] not hesitated to find competitor standing lacking where the plaintiff's factual allegations raised only some vague probability that increased competition would occur." (internal citations and quotation marks omitted)).

Here, Washtech has presented specific facts, through affidavits and other evidence, to establish that its members are direct and current competitors with F-1 student visa holders who are working in the

OPT program pursuant to DHS's regulations. *See Clapper*, 568 U.S. at 412. As Washtech correctly notes, "[f]or its summary judgment motion, [it] has submitted affidavits from its members showing that they have worked in the computer job market for years and continue to be active in that market[,]" Pl.'s Reply at 21; *see* Pl.'s Mot., Exhibit ("Ex.") 5 (Declaration of Douglas J. Blatt) ("Blatt Decl."); *id.*, Ex. 6 (Declaration of Caesar Smith) ("Smith Decl."); *id.*, Ex. 7 (Declaration of Rennie Sawade) ("Sawade Decl."). Moreover, as Washtech also correctly notes, "the OPT program increases the amount of foreign labor in the [STEM] job market because that was DHS's intent in creating the OPT extension for STEM . . . graduates." Pl.'s Reply at 21 (citing the 2008 OPT Program Rule) (stating that the changes made by this rule were expected to increase the attractiveness of the OPT program, and that the size of the increase could not be precisely estimated)); *see also* Press Release, The White House, Impact Report: 100 Examples of President Obama's Leadership in Science, Technology, and Innovation (June 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/21/impact-report-100-examples-president-obamas-leadership-science (last visited Jan. 5, 2021) (noting that, as of June 2016, DHS estimated that there were 34,000 STEM students already participating in the OPT Program as a result of the now-defunct 2008 OPT Program Rule and expected an estimated growth to 92,000 participants within ten years). Accordingly, Washtech has demonstrated that its members are "participating in the [STEM] labor market" in competition with OPT workers, *Mendoza*, 754 F.3d at 1013, and that the OPT

program "increase[s] [the] supply of labor—and thus competition—in that market," *id.* at 1011.

Consequently, Washtech has sufficiently demonstrated that DHS's regulations "allow increased competition against" Washtech's members, *Sherley*, 610 F.3d at 72, such that its members' "bottom line[s] may be adversely affected by the challenged government action[,]" *Mendoza*, 754 F.3d at 1013. And, by establishing that DHS's regulations "have the clear and immediate *potential*" to subject Washtech's members to increased workforce competition in the STEM labor market, *La. Energy & Power Auth.*, 141 F.3d at 367 (emphasis in original), Washtech has demonstrated that its members suffer a concrete injury-in-fact. *See Mendoza*, 754 F.3d at 1011 ("[A]n individual in the labor market for open-range herding jobs would have standing to challenge [agency] rules that lead to an increased supply of labor—and thus competition—in that market."); *Save Jobs USA v. Dep't of Homeland Sec.*, 942 F.3d 504, 510-11, 444 U.S. App. D.C. 268 (D.C. Cir. 2019) (holding that the plaintiffs established standing at the summary judgment stage, where the administrative record reflected an increase in labor, and the affidavits of association members demonstrated that they competed with specialty occupation visa holders in the same job market).

The Government's arguments to the contrary are not convincing. The Government asserts that "[b]ecause . . . [the] most recent factual attestation [in the declarations from Washtech's members] is from June 2018, the[] [declarations] do not establish that Washtech's members are actually competing with F-1 students receiving OPT." Defs.' Mem. at 12.

Specifically, the Government asserts that the declarations do not indicate that Washtech's members "are *currently* searching for any new programmer-type job[,]" *id.* at 14 (emphasis in original), but rather, the declarations merely "show that Washtech's members work in software engineering, computer systems and network administration, and computer programming, and that they have held jobs or previously applied for jobs in these fields[,]" *id.* at 12-13. However, the Circuit has previously rejected similar arguments. *See Save Jobs USA*, 942 F.3d at 511 (concluding that the plaintiff association had demonstrated that its members were direct and current competitors with H-1B visa holders, even though the H-1B visa holders "by definition are already employed[,]" because "H-1B visa holders have competed with [the association's] members in the past, and . . . nothing prevents them from doing so in the future" (internal quotation marks omitted)); *Washtech III Appeal*, 892 F.3d at 340 (concluding that "Washtech's members [ ] [were] not removed from the STEM labor market simply because they ha[d] not filled out formal job applications since the 2016 [OPT Program] Rule took effect[,]" in light of the facts that they "[were] currently employed on a full-or part-time basis in STEM positions," "they ha[d] affirmed their desire to work[,]" and "their job searches [were] constant[ ] and continuous") (last alteration in original) (internal quotation marks and citations omitted)). Therefore, contrary to the Government's assertions that "no concrete injury has been shown at this stage" and that Washtech's "declarations simply highlight [its members'] general opposition to the 2016 OPT [Program] Rule[,]" Defs.' Mem. at 16 (internal

quotation marks omitted), Washtech has established with particularized evidence that its members are direct and current competitors with the F-1 student visa holders in the OPT program, and therefore, its members have suffered a concrete injury-in-fact.

Second, Washtech has demonstrated that its injury is caused by the 2016 OPT Program Rule. As already noted, it is undisputed that the OPT program increases the amount of foreign labor in the STEM labor market, as evidenced by the Government's stated expectation in creating the OPT extension for STEM graduates. *See* 73 Fed. Reg. at 18,951 (stating that the changes made by the 2008 OPT Program Rule rule [sic] were expected to increase the attractiveness of the OPT program, and that the size of the increase could not be precisely estimated). And, as this Circuit noted when considering the Government's motion to dismiss previously filed in this case, "[t]he increase in competition is directly traceable to [ ] DHS because [ ] DHS's regulations authorize work for the OPT participants with whom Washtech members compete for jobs." *Washtech III Appeal*, 892 F.3d at 341;[6] *see New*

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[6] Although the Circuit in the *Washtech III Appeal* was assessing Washtech's standing to bring this action at the motion-to-dismiss stage of the proceedings, which has a different burden of proof than that at the summary judgment stage, the Circuit's conclusion that Washtech's injury is "directly traceable to [DHS]," 892 F.3d at 341, still remains true at this stage of the proceedings. As this Court has already concluded, see supra pp. 13-17, Washtech has presented specific facts, through affidavits and other evidence, to establish that DHS's regulations "allow increased competition against" Washtech's members, Sherley, 610 F.3d at 72, which constitutes a concrete injury-in-fact. And,

World Radio, Inc. v. Fed. Commc'ns Comm'n, 294 F.3d 164, 172, 352 U.S. App. D.C. 366 (D.C. Cir. 2002) (noting that an agency action "imposes a competitive injury" by "provid[ing] benefits to an existing competitor or expand[ing] the number of entrants in the [plaintiff's] market"); *Honeywell Int'l Inc. v. Envtl. Prot. Agency*, 374 F.3d 1363, 1369, 362 U.S. App. D.C. 538 (D.C. Cir. 2004) (concluding that an agency regulation that "legalizes the entry of a product into a market in which [the plaintiff] competes" causes the plaintiff injury), *as amended by*, 393 F.3d 1315, 364 U.S. App. D.C. 244 (D.C. Cir. 2005) (per curiam). Accordingly, the Court concludes that Washtech has satisfied the causation element of competitor standing.

Although the Government asserts that the evidence presented by Washtech does not establish "the necessary nexus between the 2016 OPT [Program] Rule's effect on non-party F-1 students and Washtech's members" to demonstrate causation, Defs.' Mem. at 11-12, that finding is not necessary for Washtech to satisfy the causation element of standing. Rather, this Circuit has held that "injurious private conduct is fairly traceable to the administrative action contested in the suit

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because DHS's regulations, including the 2016 OPT Program Rule, authorized this increased competition in the STEM labor market, *see Tel. & Data Sys., Inc. v. Fed. Commc'ns Comm'n*, 19 F.3d 42, 47, 305 U.S. App. D.C. 195 (D.C. Cir. 1994) ("[I]njurious private conduct is fairly traceable to the administrative action contested in [a] suit if that action authorized the conduct or established its legality"), Washtech has "demonstrate[d] a causal relationship between the final agency action and the alleged injur[y,]" *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160, 364 U.S. App. D.C. 416 (D.C. Cir. 2005). *See* infra p. 17.

if that action authorized the conduct or established its legality[,]" *Tel. & Data Sys., Inc. v. Fed. Commc'ns Comm'n*, 19 F.3d 42, 47, 305 U.S. App. D.C. 195 (D.C. Cir. 1994); *see also Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 45 n.25, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (identifying its prior cases providing that privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action"). Here, Washtech has met its burden by demonstrating that the 2016 OPT Program Rule authorized the injury-in-fact suffered by Washtech's members—namely, increased competition in the STEM labor market. *See Sherley*, 610 F.3d at 72 ("Because increased competition almost surely injures a seller in one form or another, he [or she] need not wait until 'allegedly illegal transactions . . . hurt [him] [or her] competitively' before challenging the regulatory . . . governmental decision that increases competition." (second alteration in original) (quoting *La. Energy*, 141 F.3d at 367)). Accordingly, Washtech has "'demonstrate[d] a causal relationship between the final agency action and the alleged injur[y].'" *Washtech III Appeal*, 892 F.3d at 341 (quoting *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160, 364 U.S. App. D.C. 416 (D.C. Cir. 2005)) (alterations in original).

Based on these findings, the Court concludes that Washtech has demonstrated that "at least one of its members would have standing to sue in his [or her] own right" under the competitor standing doctrine by satisfying the three elements of standing—injury-in-fact, causation, and redressability. *Sierra Club*, 292 F.3d at 898. Moreover, because Washtech has

satisfied its burden at the summary judgment stage by setting forth specific facts that demonstrate that its members would otherwise have standing to sue, and because it is uncontested that Washtech satisfies the other prongs of the associational standing test, Washtech has satisfied the associational standing requirements to survive the Government's motion for summary judgment. *See id.* The Court will therefore proceed to address the parties' arguments on the merits regarding whether the adoption of the 2016 OPT Program Rule exceeded DHS's statutory authority.

B. Whether the 2016 OPT Program Rule Exceeds DHS's Statutory Authority

Washtech's primary argument on the merits is that DHS exceeded its statutory authority by issuing the 2016 OPT Program Rule. *See* Pl.'s Mot. at 9-15. Specifically, Washtech asserts that "Congress has [not] authorized DHS to allow aliens to remain in student[-]visa status when they are no longer students" and "Congress has [not] authorized DHS to allow such non-students to work while in student[-]visa status." *Id.* at 1. In response, the Government asserts that "DHS did not exceed its statutory authority in issuing the 2016 OPT [Program] Rule" because "[t]he 2016 OPT [Program] Rule accords with the agency's reasonable and longstanding interpretation of its statutory authority, and Congress has ratified—or at least acquiesced in—that interpretation." Defs.' Mem. at 18. Similarly, the Intervenors argue that "OPT is a lawful exercise of DHS['s] authority" because "[t]he federal government has interpreted the immigration laws to

permit programs like OPT for over [seventy] years, and, while repeatedly amending the immigration laws, Congress has never questioned the authority of the Executive Branch to implement this program." Intervenors' Mem. at 8.

As an initial matter, the Court notes that another member of this Court has previously addressed this same issue in response to "regulations materially identical to the ones at issue here[.]" *Id.* at 1; *see Washtech II*, 156 F. Supp. 3d at 137-45. Specifically, the Court in *Washtech II* analyzed whether DHS exceeded its statutory authority by issuing the 2008 OPT Program Rule, *see* 156 F. Supp 3d at 137-45, which "extended the period of OPT [during which a student could participate] by [seventeen] months for F[-]1 nonimmigrants with a qualifying STEM degree[,]" *id.* at 129 (citing 2008 OPT Program Rule, 73 Fed. Reg. 18,944). The parties do not dispute that "[t]he 2016 OPT [Program] Rule is effectively the same as the 2008 OPT [Program] Rule[,] except that the [seventeen]-month STEM exception was increased to [twenty-four] months." Pl.'s Mot. at 7; *see* Defs.' Mem. At 6; Intervenors' Mem. at 7. The *Washtech II* Court concluded that DHS did not exceed its statutory authority by issuing the 2008 OPT Program Rule because the F-1 statute was ambiguous, *see* 156 F. Supp. 3d at 140, and DHS's interpretation of that statute was not unreasonable "[i]n light of Congress'[s] broad delegation of authority to DHS to regulate the duration of a nonimmigrant's stay and Congress'[s] acquiescence in DHS's longstanding reading of F[-]1," *id.* at 145. However, the *Washtech II* Court invalidated the 2008 OPT Program Rule for failure to comply with

notice-and-comment procedures and stayed vacating the rule to allow DHS to issue a new rule following adherence with the notice and comment requirement. *See id.* at 147-49.

After the notice-and-comment process was completed in this case, DHS issued the 2016 OPT Program Rule. The Circuit therefore vacated *Washtech II* as moot "because the 2008 [OPT Program] Rule [wa]s no longer in effect." *Washtech II Appeal*, 650 Fed. App'x at 14. However, the Circuit's vacatur of the *Washtech II* opinion "does not undermine the validity of its reasoning[in the opinion,]" Intervenors' Mem. at 8 n.4, because, although a vacated opinion is "no longer the law of the case, [it] may serve as a valuable source of guidance on the legal issues raised in the absence of contrary authority." *Boehner v. McDermott*, 332 F. Supp. 2d 149, 156 (D.D.C. 2004) (citing *Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989)). Accordingly, because *Washtech II* was vacated for reasons unrelated to the underlying merits of the opinion, this Court concludes that *Washtech II* remains "appropriate for consideration and citation" as persuasive authority. *Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 52 n.17 (D.D.C. 2019) (citing *Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83, 289 U.S. App. D.C. 192 (D.C. Cir. 1991)).

This Court therefore begins its analysis by first determining the appropriate standard under which to evaluate the reasonableness of the 2016 OPT Program

Rule, which interprets 8 U.S.C. §§ 1103(a)(1),[7] 1103(a)(3),[8] 1184(a)(1),[9] and 1324a(h)(3).[10] *See* 2016 OPT Program Rule, 81 Fed. Reg. at 13,045. "In reviewing an agency's interpretation of the laws it administers, [a reviewing court] appl[ies] the principles of *Chevron[] U.S.A.[] Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)." *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754, 375 U.S. App. D.C. 110 (D.C. Cir. 2007). "If the agency enunciates its interpretation through notice-and-comment

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[7] *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens[.]").

[8] *See* 8 U.S.C. § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA].").

[9] *See* 8 U.S.C. § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when [the Attorney General] deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which [the alien] was admitted, . . . such alien will depart from the United States.").

[10] *See* 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.").

rule[]making or formal adjudication, [the reviewing court] give[s] the agency's interpretation *Chevron* deference." *Id.* Here, the Department promulgated the 2016 OPT Program Rule pursuant to notice-and-comment rulemaking. *See* 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, 63,376 (Oct. 19, 2015); *see also* 2016 OPT Program Rule, 81 Fed. Reg. at 13,041. Accordingly, the Court must proceed in accordance with the two-part test adopted in *Chevron*.

"Pursuant to *Chevron* [s]tep [o]ne, if the intent of Congress is clear, the reviewing court must give effect to that unambiguously expressed intent." *Animal Legal Def. Fund v. Perdue*, 872 F.3d 602, 610, 432 U.S. App. D.C. 444 (D.C. Cir. 2017) (quoting Edwards, Elliot, & Levy, *Federal Standards of Review* 166-67 (2d ed. 2013)). In determining whether "Congress has directly spoken to the precise question at issue," *Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 414 F.3d 50, 57, 367 U.S. App. D.C. 159 (D.C. Cir. 2005) (internal quotation marks omitted), a reviewing court "us[es] the traditional tools of statutory construction[,]" *Cal. Indep. Sys. Operator Corp. v. Fed. Energy Reg. Comm'n*, 372 F.3d 395, 400, 362 U.S. App. D.C. 28 (D.C. Cir. 2004), including "evaluation of the plain statutory text at issue, the purpose and structure of the statute as a whole, while giving effect, if possible, to every clause and word of a statute, and—where appropriate—the drafting history[,]" *Pharm. Research & Mfrs. of Am. v. Fed. Trade Comm'n*, 44 F. Supp. 3d 95, 112 (D.D.C. 2014), *aff'd*, 790 F.3d 198, 416 U.S. App.

D.C. 129 (D.C. Cir. 2015). However, "[i]f Congress has not directly addressed the precise question at issue, the reviewing court proceeds to *Chevron* [s]tep [t]wo." *Ass'n of Priv. Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441, 401 U.S. App. D.C. 96 (D.C. Cir. 2012) (quoting Harry T. Edwards & Linda A. Elliot, *Federal Standards of Review—Review of District Court Decisions and Agency Actions* 141 (2007)). At step two, "the [reviewing] court defers to the [agency]'s interpretation so long as it is 'based on a permissible construction of the statute.'" *Nat'l Treasury Emps. Union*, 414 F.3d at 57 (quoting *Chevron*, 467 U.S. at 842-43). The Court will therefore first address *Chevron* step one, and then, if necessary, address *Chevron* step two.

1. *Chevron* Step One

As to *Chevron* step one, Washtech asserts that "unambiguously, Congress has not authorized OPT, and indeed has set clear limits on student visa eligibility that OPT transgresses." Pl.'s Mot. at 11. Specifically, Washtech argues that "alien guestworkers in the OPT program do not conform to the requirements for student[-]visa status in 8 U.S.C. § 1101(a)(15)(F)(i)[,]"[11] *id.*, because, according to Washtech, this statute

[11] *See* 8 U.S.C. § 1101(a)(15)(F)(i) (noting that an F-1 visa provides entry for an individual who qualifies as "an alien having a residence in a foreign country which he [or she] has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution").

"requires the alien to be a *bona fide* student, solely pursuing a course of study at an approved academic institution that will report termination of attendance[,]" *id.* at 9, whereas "[i]n contrast, the OPT program allows aliens to remain in student[-]visa status after they have graduated [and] are no longer students[,]" *id.* The Government responds that because "[t]he statute is silent as to the meaning of the terms 'student' and 'course of study[,]'" the statute "leaves a gap for DHS to resolve [ ] the question of whether an F-1 nonimmigrant may engage in practical training as part of his [or her] educational program while holding F-1 status in the United States." Defs.' Mem. at 19. Additionally, the Intervenors respond that "the INA unambiguously permits DHS to authorize post-completion practical training for F-1 students[,]" but that even "[i]f the INA does not unambiguously permit [the] OPT [Program], it is at least not plainly foreclosed by the statute[.]" Intervenors' Mem. at 34.

This Court agrees with the conclusion reached by the Court in *Washtech II* that "the statute's lack of a definition for the term 'student' creates ambiguity." 156 F. Supp. 3d at 139; *see Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [C]ourt is whether the agency's answer is based on a permissible construction of the statute."). By failing to define this statutory language, Congress has not "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, namely, "whether the scope of F-1 encompasses post-completion practical training related to the student's field of study[,]" *Washtech II*, 156 F. Supp. 3d at 140. *Cf. Mayo Found. for Med. Educ. &*

Rsch. v. United States, 562 U.S. 44, 52, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011) (holding that, in the context of a tax statute, the word "student" was ambiguous with respect to medical students because "the statute does not define the term 'student,' and does not otherwise attend to the precise question whether medical residents are subject to" the statute). As the *Washtech II* Court noted, although the F-1 visa statute provides entry for nonimmigrant[s] "who [are] [] bona fide student[s] qualified to pursue a full course of study and who seek[] to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution[,]" 156 F. Supp. 3d at 128 (quoting 8 U.S.C. § 1101(a)(15)(F)(i)) (fifth and sixth alterations in original), "this clause could sensibly be read as an *entry requirement*[,]" *id.* at 139 (emphasis in original); *see* Defs.' Mem. at 20 ("[T]his text is best read to impose an initial requirement for admission[,] particularly given the textual focus on the 'purpose' for which one 'seek[s] to enter[,]' rather than a continuing requirement that persists throughout the nonimmigrant's time in the United States." (third alteration in original)); Intervenors' Mem. at 26 ("[T]he statute is aimed at the individual's qualifications and characteristics at the time he or she is granted the F-1 visa and 'seeks to enter' the country."). Additionally, "[t]his reading is bolstered by Congress'[s] delegation of the power to prescribe regulations related to a nonimmigrant's duration of stay." *Washtech II*, 156 F. Supp. 3d at 139; *see* 8 U.S.C. § 1184(a)(1) (noting that "[t]he admission to the United States of any alien as a nonimmigrant

shall be for such time and under such conditions as the Attorney General may by regulations prescribe[.]").[12]

Moreover, as the Court in *Washtech II* correctly noted, "several pieces of evidence indicate that Congress understood F-1 to permit at least some period of employment." *Washtech II*, 156 F. Supp. 3d at 139-40. For example, "Congress implemented a pilot program that allowed F-1 students to work up to [twenty] hours per week in a job unrelated to their field of study[,]" *id.* (citing Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978), and "F-1 nonimmigrants are explicitly exempted from several wage taxes[,]" *id.* (citing 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19)). "These statutory provisions lend credence to [the Government's and the Intervenors'] argument that the clause in F-1—'solely for the purpose of pursuing such a course of study'—does not foreclose employment[,]" *Washtech II*, 156 F. Supp. 3d at 140, and, because "F-1 does not bar *all* foreign student

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[12] Washtech contends that "the definition of student[-]visa status uses the qualifier 'solely' to exclude all other activities, including OPT, as qualifying an alien for student[-]visa status." Pl.'s Mot. at 11. However, this argument is unavailing in light of the Court's conclusion that "this clause could sensibly be read as an entry requirement[,]" Washtech II, 156 F. Supp. 3d at 139 (emphasis omitted), "rather than a continuing requirement that persists throughout the foreign student's time of study in the United States for the purposes of his [or her] education[,]" Defs.' Mem. at 27. As the Washtech II Court correctly notes, "[n]o one disputes that all F-1 aliens enter the United States as 'students' under any conceivable definition, since they must enroll at a qualifying academic institution[,]" but "[t]he ambiguity is whether the scope of F-1 encompasses post-completion practical training related to the student's field of study." 156 F. Supp. 3d at 140.

employment, it is not clear what employment the statute does permit[,]" *id.* (emphasis in original). Accordingly, the Court concludes that "the statute's text is ambiguous as to whether such employment may extend for a period of time after [F-1 students] complete their studies." *Id.*

Washtech's arguments to the contrary are unpersuasive. Washtech first contends that "[t]he obvious problem with the OPT program is that its participants are not students," and "when aliens stop attending school, they no longer maintain student[-]visa status." Pl.'s Mot. at 9-10. After analyzing various dictionary definitions, however, the Court in *Washtech II* observed that while "some definitions of the word 'student' require school attendance[,]" "[m]ost . . . include broader notions of studying and learning." 156 F. Supp. 3d at 140; *see, e.g., Student*, Merriam-Webster Dictionary Online, www.merriam-webster.com/dictionary/student (last visited Jan. 10, 2021) ("SCHOLAR, LEARNER, especially: one who attends a school[.] . . . [O]ne who studies: an attentive and systematic observer[.]"); *Student*, Oxford English Dictionary, http://www.oed.com (last visited Jan. 10, 2021) ("A person engaged in or dedicated to the pursuit of knowledge, esp. in a particular subject area[.] . . . A person studying at a university or other place of higher education.").[13] Therefore, "[d]ictionary

[13] Washtech cites limited case authority to support its assertion that "[w]hen aliens stop attending school, they no longer maintain student[-]visa status." Pl.'s Mot. at 9-10 (citing *Sokoli v. Att'y Gen. of U.S.*, 499 F. App'x 214, 215 (3d Cir. 2012); *Yadidi v. Immigr. & Naturalization Serv.*, 2 F.3d 1159 (9th Cir. 1993); *Narenji*

definitions are [ ] unhelpful in clarifying this statutory ambiguity[,]" as they "do not address the fundamental ambiguity presented by this case"—i.e., "whether the scope of F-1 encompasses post-completion practical training related to the student's field of study." *Washtech II*, 156 F. Supp. 3d at 140.

Washtech also argues that the term "student" is unambiguous because the F-1 statute only includes "alien[s who are] *bona fide* student[s], solely pursuing a course of study at an approved academic institution that will report termination of attendance." Pl.'s Mot.

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v. Civiletti, 617 F.2d 745, 753, 199 U.S. App. D.C. 163 (D.C. Cir. 1980) (MacKinnon, J., concurring in denial of reheating en banc)). However, as the Intervenors correctly note, the authorities cited by Washtech "do not address whether an individual who complies with regulations governing F-1 status is properly within the scope of the F-1 statute." Intervenors' Mem. at 32 n.17; *see Sokoli*, 499 F. App'x at 215-16 (explaining that the nonimmigrant student "received a [n]otice to [a]ppear charging her with a failure to maintain [student-visa] status" when she "did not immediately depart from the country after graduation" and that she "[s]he conceded removability but requested asylum, withholding of removal, and protection under the Convention Against Torture"); *Yadidi*, 2 F.3d at 1 [published in full-text format at 1993 U.S. App. LEXIS 20855] (affirming the Board of Immigration Appeals' deportation order of a nonimmigrant student who "admitted that he had graduated from high school" because he "ha[d] not suggested to [the court], nor did he suggest to the [Board of Immigration Appeals], that he had complied with the transfer procedures . . . or was in any other way eligible to remain in the United States"); *Narenji*, 617 F.2d at 747 (concluding that a "regulation [that] provides that [the] failure to comply with [a] reporting requirement . . . will subject [a nonimmigrant] to deportation proceedings" was "within the authority delegated by Congress to the Attorney General under the [INA]").

at 9 (paraphrasing 8 U.S.C. § 1101(a)(15)(F)(i)). While Washtech is correct that the statute states that the relevant "institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly[,] the approval shall be withdrawn[,]" 8 U.S.C. § 1101(a)(15)(F)(i), that language merely "reflects congressionally mandated reporting requirements for schools certified to enroll[] F-1 nonimmigrant and the consequences for schools that fail to report that important data point[,]" Defs.' Mem. at 25-26. Accordingly, this text does not require the conclusion "that Congress imposed a continuing academic-institution-attendance requirement after entry and thereby barred any practical training that occurred after a student graduated from an academic institution." *Id.* at 26; *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Moreover, the Court does not find persuasive Washtech's suggestion that the inclusion of the term "bona fide" in the phrase "bona fide student" means that the phrase is strictly limited to individuals who are currently enrolled at academic institutions. Rather, as the Government correctly notes, "bona fide" simply "reflects a basic requirement of good faith—that a foreign student must be in the United States truly to engage in learning." Defs.' Mem. at 26; *see United States ex rel. Antonini v. Curran*, 15 F.2d 266, 267 (2d Cir. 1926) (concluding that a

foreign "student can . . . alternat[e] [ ] periods of work outside of the college with periods of academic study within the college . . . not only [as] a means of self-support during the college years, but [as] a fundamental principle of education" and that, "[d]espite work of this kind during the time of study[,] . . . the [foreign national] is and remains a bona fide student").

Furthermore, Washtech asserts that "DHS has no authority to allow aliens to remain in the United States in student[-]visa status after graduation" because to do so would contravene the "statutory requirements of 8 U.S.C. § 1184(a)(1) that non-immigrant aliens must leave the country when they do not conform to the status under which they were admitted[.]" Pl.'s Mot. at 12. However, as the Intervenors correctly note, Washtech's "argument assumes the conclusion" that F-1 students are no longer eligible for protection under the F-1 visa category when they are participating in post-graduation practical training. Intervenors' Mem. at 27 n.15. Here, the relevant issue is "whether the scope of F-1 encompasses post-completion practical training related to the student's field of study[,]" *Washtech II*, 156 F. Supp. 3d at 140, and Washtech "cannot answer a question about the proper scope of the F-1 visa category by pointing to an obligation to enforce that scope, whatever it may be[,]" Intervenors' Mem at 27 n.15.

Finally, Washtech argues that, even if Congress "has somehow conferred on DHS the authority to allow aliens to maintain student[-]visa status when they are no longer students, the 2016 OPT Program Rule faces the insurmountable problem that Congress has not authorized DHS to permit such non-students to

engage in employment." Pl.'s Mot. at 12. To support its argument, Washtech relies on *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), and asserts that the *Texas* Court held that DHS does not have "the power to authorize alien employment independently of Congress." Pl.'s Reply at 9. However, that case does not support Washtech's position. As the Intervenors correctly note, "*Texas* said nothing about the question implicated by this case: whether DHS has authority to provide work authorization to individuals *already lawfully present in the United States*." Intervenors' Mem. at 24. Rather, the Court concluded that it was beyond DHS's power to grant deferred action—"a decision . . . not to pursue deportation proceedings against an individual or class of individuals otherwise eligible for removal[,]" *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 487 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020)—to 4.3 million undocumented individuals. *See Texas*, 809 F.3d at 178-86. Accordingly, the *Texas* Court concluded that DHS regulations that provide work authorization for deferred action recipients, *see* 8 C.F.R. § 274a.12(c)(14), could not be utilized to authorize work for these undocumented immigrants, because this would "undermin[e] Congress's stated goal of . . . preserving jobs for those lawfully in the country." *Texas*, 809 F.3d at 181; *see also id.* at 184 (rejecting as "untenable" the agency's interpretation, which "would allow [DHS] to grant lawful presence and work authorization to any illegal alien in the United States"). Here, however, F-1 students are "*lawfully present* in the United States[,]" *id.* at 181 (emphasis in original), and the 2016 OPT

Program Rule does not purport to reclassify individuals who were originally unlawfully present in the United States as lawfully present, *cf. id.* at 184 (noting that "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization"). Instead, the 2016 OPT Program Rule only grants work authorization to nonimmigrant foreign nationals who are already legally present in the United States under the F-1 student visa program. *See* 8 C.F.R. § 214.2(f)(10) (stating that OPT "may be authorized to an F-1 student who has been lawfully enrolled on a full[-]time basis, in a [s]ervice-approved college, university, conservatory, or seminary for one full academic year"). Accordingly, F-1 students are outside of the scope of the Fifth Circuit's holding in *Texas*, and it would be improper to glean any authority from that case that could apply to this case.

Having concluded that 8 U.S.C. § 1101(a)(15)(F)(i) is ambiguous and that Congress has not "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, the Court proceeds to the second step of the *Chevron* analysis.

2. *Chevron* Step Two

As to *Chevron* step two, Washtech argues that "OPT does not reflect a reasonable interpretation of the law[,]" Pl.'s Reply at 17, because "[i]n order for OPT to survive *Chevron* [s]tep [t]wo, this Court must hold that aliens who have finished school and are either working in [the STEM] industry or are employed are

students[,] [b]ut to do so makes hash of the language[,]" *id.* (internal quotation marks omitted). Additionally, Washtech asserts that "[u]sing student visas to supply labor to [an] industry is not a longstanding policy[,]" *id.*, and "[the Government] cannot show congressional approval of the current student visa work policy that is at issue[,]" *id.* at 19. In response, the Government contends that because DHS was "[f]aced with the statutory gap in the F-1 provision, in the 2016 OPT [Program] Rule, DHS adopted a reasonable and longstanding interpretation that the F-1 student provision allows for employment of students after graduation and during a period of practical training." Defs.' Mem. at 20. Similarly, the Intervenors contend that "it was reasonable for DHS to exercise its discretion under this statute to conclude that an individual remains in lawful F-1 status during a time-limited period following graduation, when that individual engages in practical training directly tied to his or her principal field of study." Intervenors' Mem. at 27.

"An agency receives deference at *Chevron* step two if it has 'offered a reasoned explanation for why it chose [its] interpretation." *Athenex Inc. v. Azar*, 397 F. Supp. 3d 56, 63 (D.D.C. 2019) (alteration in original) (quoting *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660, 394 U.S. App. D.C. 353 (D.C. Cir. 2011)), *appeal dismissed sub nom. Athenex Pharma Sols., LLC v. Azar*, No. 19-5223, 2019 U.S. App. LEXIS 31939, 2019 WL 5394642 (D.C. Cir. Oct. 1, 2019).

As in step one, this requires application of the traditional tools of statutory interpretation, including reviewing the text, structure, and purpose of the statute. The difference at this stage, however, is the criteria—

i.e., whereas step one asked whether Congress *require[d]* a certain interpretation, step two asks whether the same statutory text, history, and purpose *permit* the interpretation chosen by the agency.

Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury, 392 F. Supp. 3d 22, 42 (D.D.C. 2019) (alteration and emphasis in original) (citation and internal quotation marks omitted). "[I]n order to withstand judicial scrutiny, the [agency's] actions need not be [ ] the only permissible construction that [it] might have adopted, nor may the [C]ourt substitute its own judgment for that of the [agency]." *United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 11 (D.D.C. 2010) (fourth alteration in original) (citation and internal quotation marks omitted). Rather, in determining whether the agency's policy is reasonable under *Chevron* step two, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox Television Stations, Inc.*, 556 U.S. at 515 (emphasis in original).

Here, too, this Court agrees with the *Washtech II* Court in concluding that DHS's interpretation is not unreasonable, "[i]n light of Congress' broad delegation of authority to DHS to regulate the duration of a nonimmigrant's stay and Congress' acquiescence in DHS's longstanding reading of F-1[.]" 156 F. Supp. 3d at 145.

As a preliminary matter, the Court notes that "Congress has delegated substantial authority to DHS to issue immigration regulations[,]" including "broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants." *Id.* at 138; *see*

8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens . . . ."); *id.* § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."); *id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which [the alien] was admitted, . . . such alien will depart from the United States."). Accordingly, "DHS has been broadly delegated the authority to regulate the terms and conditions of a nonimmigrant's stay, includ[ing] its duration[,]" *Washtech II*, 156 F. Supp. 3d at 144, and matters addressed by the 2016 OPT Program Rule plainly falls within the scope of this delegated authority.

Not only does DHS enjoy broad, delegated authority to enforce the INA and issue rules governing nonimmigrants, but "DHS's interpretation of F-1—inasmuch as it permits employment for training purposes without requiring ongoing school enrollment—is 'longstanding' and entitled to deference." *Id.* at 143. "Since at least 1947, [the Immigration and

Naturalization Service ("INS")] and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes." *Id.* at 141; *see* 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) ("In 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[.]"). And, in 1952, after "Congress overhauled the immigration laws with the [INA], which created the modern category of student nonimmigrants[,]" *Washtech II*, 156 F. Supp. 3d at 141 (citing INA, § 1101(a)(15)(F)), "INS continued to interpret the law to permit foreign students to engage in practical training[,]"[14] *id.*; *see,*

[14] As the *Washtech II* Court explained in detail, "[w]hile the 1947 and 1973 regulations do not explicitly authorize post-completion practical training, several pieces of evidence strongly suggest that these provisions allowed alien students to engage in full-time, post-completion employment without simultaneously attending classes." 156 F. Supp. 3d at 141 n.7. First, the Court noted that while "both the 1947 and 1973 regulations, in addition to permitting students to engage in practical training, allowed students to work out of financial necessity, but only if the employment would not interfere with the student's ongoing course of study[,]" id. (citing 12 Fed. Reg. at 5357; Special Requirements for Admission, Extension, and Maintenance of Status, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973)), "[t]he practical training subsections included no similar limitation[,]" id. Second, the Court explained how "contemporary documents demonstrate an understanding that those practical training regulations allowed full-time, post-completion employment." Id.; see Matter of 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

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 secure "employment in order to obtain practical training . . . in his [or her] field of study" for a maximum of

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period of formal study in the subject which has been completed by the student" and that only "[i]n unusual circumstances[would] practical training [ ] be authorized before the beginning of or during a period of formal study"); *Matter of Yau*, 13 I. & N. Dec. 75, 75 (B.I.A. 1968) (noting that an alien student "ha[d] been in student status continuously[,]" including during a "period of practical training following graduation"). Third, the Court noted that "a 1950 Report by the Senate Committee on the Judiciary, in describing foreign student employment, stated that 'practical training has been authorized for [six] months after completion of the student's regular course of study.'" *Washtech II*, 156 F. Supp. 3d at 141 n.7 (citing S. Rep. No. 81-1515, at 505 (1950) (noting a "suggestion that the laws . . . be liberalized to permit foreign students to take practical training before completing their formal studies")). Fourth, the Court explained that "a House Report from 1961 disclosed that, on April 24, 1959, the Department of State, acting in concert with INS, issued a notice to its officers that '[s]tudents whom the sponsoring schools recommend for practical training should be permitted to remain for such purposes up to [eighteen] months after receiving their degrees or certificates.'" *Id.* (citing H.R. Rep. No. 87-721, at 15 (1961)) (first alteration in original). Fifth and finally, the Court observed that "in a 1975 statement to Congress on the subject of foreign students, the Commissioner of INS noted that, although there 'is no express provision in the law for an F[-]1 student to engage in employment,' such a student could engage in practical training on a full-time basis for up to eighteen months." *Id.* (citing Review of Immigration Problems: Hearings Before the Subcomm. on Immig., Citizenship, and Int'l Law of the H. Comm. on the Judiciary, 94th Cong. 21, 23 (1975) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of Immigr. & Naturalization Serv.)).

eighteen months, if such training "would not be available to the student in the country of his [or her] foreign residence"). Moreover, "at least as early as 1983, INS explicitly authorized post-completion practical training." *Washtech II*, 156 F. Supp. 3d at 142; *see* Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing students to engage in practical training "[a]fter completion of the course of study"); Retention and Reporting Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256, 76,274 (Dec. 11, 2002) (same).

This longstanding interpretation by DHS is further bolstered by the fact that "Congress has repeatedly and substantially amended the relevant statutes without disturbing [DHS's] interpretation" permitting post-graduation practical training. *Washtech II*, 156 F. Supp. 3d at 143. "Since 1952, Congress has amended the provisions governing nonimmigrant students on several occasions." *Id.* at 142; *see, e.g.,* Accreditation of English Language Training Programs, Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (2010) (amending F-1 with respect to English language training programs); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501-02, 116 Stat. 543, 560-63 (implementing monitoring requirements for foreign students); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 3009-699 (adding limitations related to F-1

nonimmigrants at public schools); Immigration Act of 1990 § 221 (permitting F-1 nonimmigrants to engage in limited employment unrelated to their field of study). And, "[d]uring that time, Congress has also imposed various labor protections for domestic workers[,]" yet "Congress has never repudiated INS['s] or DHS's interpretation permitting foreign students to engage in post-completion practical training." *Washtech II*, 156 F. Supp. 3d at 142-43 (citing Immigration Act of 1990 § 205 (requiring a labor condition certification for H-1B nonimmigrants from the employer attesting that the alien will be paid the prevailing wage and that the employer "will provide working conditions for [the] alien[] that will not adversely affect the working conditions of workers similarly employed"); *id.* § 221 (requiring similar certification for F-1 nonimmigrants working in a position unrelated to their field of study); American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 412, 112 Stat. 2681-641, 2681-642 (requiring employers of H-1B nonimmigrants to certify that they "did not displace and will not displace a United States worker")).

Accordingly, this Court agrees with the Court's conclusion in *Washtech II* that "[b]y leaving the agency's interpretation of F-1 undisturbed for almost [seventy] years, notwithstanding these significant overhauls, Congress has strongly signaled that it finds DHS's interpretation to be reasonable." *Id.* at 143; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without

pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (internal quotation marks omitted)); *Barnhart v. Walton*, 535 U.S. 212, 220, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002) ("Court[s] will normally accord particular deference to an agency interpretation of 'longstanding' duration."). And, although "the so-called 'legislative reenactment' doctrine is of 'little assistance' when Congress 'has simply enacted a series of isolated amendments to other provisions[,]'" *Washtech II*, 156 F. Supp. 3d at 131 (quoting *Pub. Citizen, Inc. v. U.S. Dep't of Health & Hum. Servs.,* 332 F.3d 654, 668, 357 U.S. App. D.C. 1 (D.C. Cir. 2003)), here the amendments made by Congress to the provisions governing nonimmigrant students "have not been 'isolated[,]'" *id.* at 143 (quoting *Pub. Citizen, Inc.*, 332 F.3d at 668). Rather, "[t]he Immigration and Nationality Act of 1952 . . . radically changed the country's immigration system[,]" and "the Immigration Act of 1990 imposed a host of new protections for domestic workers and explicitly authorized F-1 students to engage in certain forms of employment."[15] *Id.*

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[15] Washtech contends that the application of the legislative reenactment doctrine is inapposite in this case because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute *without change*[,] not when it enacts a statute with the same basic parameters." Pl.'s Reply at 20 (internal quotation marks omitted) (emphasis in original). According to Washtech, "the [INA] of 1952 brought a major change to student visas[,]" because "[u]nder the Immigration Act of 1924, alien students were 'immigrants' and under the [INA] of 1952, students

Washtech's arguments to the contrary are not convincing. Washtech first asserts that "[u]sing student visas to supply labor to [an] industry is not a longstanding policy[,]" and that the legislative history instead reflects "a constantly changing policy in regard to student visa employment." Pl.'s Reply at 17. Specifically, Washtech contends that "[t]he policy of allowing aliens to work on student visas in a training program for six months that is required by their school is entirely different from the policy of allowing aliens to work on student visas for years after graduation[.]" *Id.* (citation omitted). The Court disagrees. As the Government correctly notes, "[t]hat the *specifics* of the F-1 student visa program have changed does not alter the conclusion that Congress ratified the Executive Branch's *general* authority over this area[,]" Defs.'

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are admitted as 'nonimmigrants.'" *Id.* at 21. However, Washtech fails to explain why this shift in terminology undermines the application of the legislative reenactment doctrine. Rather, as the Intervenors correctly note, "[s]tudents admitted as non-quota immigrants under the 1924 Act were required to 'maintain the status under which [they were] admitted' just like nonimmigrant students under the 1952 Act[,]" Intervenors' Reply at 12 (citing Immigration Act of 1924, Pub. L. No. 68-139, § 15, 43 Stat. 153, 163), and "the 1952 INA switched the student visa from the non-quota immigrant category to the nonimmigrant category precisely because 'the term 'immigrant' is somewhat inappropriate' given the term-limited nature of student status even under the 1924 Act[,]" *id.* at 12-13 (citing H.R. Rep. No. 82-1365, at 40 (1952) (reproducing letter from John L. Thurston, Acting Adm'r, Fed. Sec. Agency)). Accordingly, this change "was merely an updating of terminology—not a change in the substance of the student definition—and does not undermine the application of the [ ] reenactment canon." Id. at 13.

Reply at 13 (emphasis in original), and these modifications do not undermine the Court's conclusion that "Congress has acquiesced in DHS's interpretation that F-1 can cover students post-[graduation,]" *Washtech II*, 156 F. Supp. 3d at 136 n.3.

Washtech also argues that DHS "cannot show congressional approval of the current student visa work policy that is at issue" and that "[t]he constant change in student[-]visa work policy undercuts any congressional ratification or acquiescence argument because it is impossible to identify any specific policy [to which] Congress acquiesced or [that it] ratified." Pl.'s Reply at 19. However, as explained previously, "DHS's interpretation of F-1 clearly dates back to 1982, and likely to 1947[,]" and "[c]ongressional obliviousness of such an old interpretation of such a frequently amended statute str[uck the *Washtech II* Court] as unlikely." *Washtech II*, 156 F. Supp. 3d at 143; *see supra* note 14, at p. 32. Moreover, "ample evidence indicates congressional awareness" of DHS's interpretation. *Washtech II*, 156 F. Supp. 3d at 143. For example, in 1990, Congress amended the INA and "included a three-year pilot program authorizing F-1 student employment for positions that were 'unrelated to the alien's field of study.'" *Id.* (citing Immigration Act of 1990 § 221(a)). Although "[c]onsidered in isolation," it may seem "perplexing" that Congress would "only authorize foreign students to do work *unrelated* to their schooling[,]" *id.*, this provision demonstrates Congress's understanding that "INS's regulations already authorized student employment related to the student's field of study, and these regulations were explicit in permitting post-completion employment." *Id.*

(citing 8 C.F.R. § 214.2(f)(10) (1989) (authorizing F-1 students to engage in "[p]ractical training prior to completion of studies" or "after completion of studies" upon certification that "the proposed employment . . . is related to the student's course of study")). This 1990 pilot program therefore provides "further evidence that Congress knew about the existence of post-completion [practical training] and acquiesced in its continuance." Intervenors' Mem. at 17 n.8. Additionally, "[s]everal other pieces of legislative history suggest that Congress was aware of the practical training program[,]" as "[t]he program was described at length in a 1950 Senate Report, a 1961 House Report, and 1975 congressional testimony by the Commissioner of INS." *Id.* at 143; *see also supra* note 15, at p. 35. Accordingly, "[t]he Court finds this evidence more than sufficient to demonstrate 'congressional familiarity with the administrative interpretation at issue.'" *Washtech II*, 156 F. Supp. 3d at 144 (citing *Pub. Citizen, Inc*, 332 F.3d at 669).

Finally, Washtech argues that the 2016 OPT Program Rule is unreasonable because allowing post-graduation practical training "circumvent[s] the statutory alien employment scheme[,]" Pl.'s Mot. at 15, and "the annual quotas on H-1B visas[,]" *id.* at 16. *See generally id.* at 15-17. However, "H-1B—which applies to aliens seeking to work in a 'specialty occupation,' 8 U.S.C. § 1101(a)(15)(H)(i)(b)—is far broader than the employment permitted by the OPT program[,]" and therefore "DHS's interpretation of the word 'student' does not render any portion of H-1B, or its related restrictions, surplusage." *Washtech II*, 156 F. Supp. 3d at 144 (noting that "Congress has tolerated

practical training of alien students for almost [seventy] years, and it did nothing to prevent a potential overlap between F-1 and H-1B when it created the modern H-1B category in 1990"). Accordingly, the Court concludes that "DHS's interpretation is [not] unreasonable merely because of its limited overlap with [the] H-1B [visa program]."[16] *Id.*

Accordingly, "the [C]ourt determines that [DHS] 'has offered an explanation that is reasonable and consistent with the regulation[]s[']language and history,' thus supporting [DHS's] objectives." *United Farm Workers*, 697 F. Supp. 2d at 10 (quoting *Trinity Broad.*

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[16] Washtech also relies on *Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985), as support for its position that "the OPT regulations [ ] violate both the terms of the F-1 visa . . . being used to admit [ ] foreign labor and the provisions of the H-1B visa . . . that should be used to admit such labor." Pl.'s Mot. at 16 (citing *Bricklayers*, 616 F. Supp. at 1398-99). However, that case is not analogous to this case. In *Bricklayers*, the Court concluded that an individual on a B-1 visa—a visa provided to business visitors—could not perform skilled or unskilled labor while in the United States, because "an alien coming to the United States for the purpose of 'performing skilled or unskilled labor' is expressly excluded from the [class of business visitors able to obtain B-1 visas]." 616 F. Supp. at 1398 (citing 8 U.S.C. § 1101(a)(15)(B) (emphasis omitted)). The F-1 visa statute, however, contains no such "express[] exclu[sion]" from its scope. *Id.*; see Defs.' Mem. at 29 ("The F-1 provision is silent on the parameters of a foreign student's permitted course of study, or whether hands-on training or employment may accompany or follow the academic-institution portion of a course of study as a practical part of the student's education in the United States." (*citing* 8 U.S.C. § 1101(a)(15)(F)(i))). This distinction defeats Washtech's argument that the *Bricklayers* case supports its position.

of Fla., Inc. v Fed. Commc'ns Comm'n, 211 F.3d 618, 627, 341 U.S. App. D.C. 191 (D.C. Cir. 2000)). The Court therefore concludes that the 2016 OPT Program Rule is a reasonable interpretation of the F-1 statute and that the DHS's interpretation is entitled to substantial deference under *Chevron* step two.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Washtech has Article III standing to bring this action, and that DHS did not exceed its statutory authority in issuing the 2016 OPT Program Rule. Accordingly, the Court denies Washtech's motion for summary judgment, grants the Government's and the Intervenors' motions for summary judgment, and denies Washtech's motion to strike.

SO ORDERED this 28th day of January, 2021.[17]

REGGIE B. WALTON
United States District Judge

ORDER

In accordance with the Memorandum Opinion issued on this same date, it is hereby

ORDERED that the Plaintiff's Motion for Summary Judgment, ECF No. 56, is **DENIED**. It is further

ORDERED that the Defendants' Opposition and Cross-Motion for Summary Judgment, ECF No. 69, is **GRANTED**. It is further

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[17] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

ORDERED that the Intervenors' Motion for Summary Judgment, ECF No. 73, is **GRANTED**. It is further

ORDERED that the Plaintiff's Motion to Strike the Brief *Amici Curiae* of Institutions of Higher Education and Objections to Evidence Submitted in the Brief, ECF No. 93, is **DENIED**. It is further

ORDERED that summary judgment is **ENTERED** for the defendants and the intervenor-defendants on Count II of the plaintiff's Complaint. It is further

ORDERED that this case is **CLOSED**.

SO ORDERED this 28th day of January, 2021.

REGGIE B. WALTON
United States District Judge

APPENDIX C

No. 17-5110

United States Court of Appeals
for the
District of Columbia Circuit

Wash. All. of Tech. Workers v. *United States Dep't of Homeland Sec.*, 892 F.3d 332 (2018)

[Filed] June 8, 2018

Before: HENDERSON, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

OPINION

KAREN LECRAFT HENDERSON, *Circuit Judge*: The Washington Alliance of Technology Workers (Washtech), a union representing workers throughout the country in the Science, Technology, Engineering and Mathematics (STEM) labor market, challenges United States Department of Homeland Security (DHS) regulations that allow nonimmigrant aliens temporarily admitted to the country as students to remain in the country for up to three years after finishing a STEM degree to pursue work related to their degree. Washtech's complaint alleged that the regulations exceed their statutory authority, suffer from multiple procedural deficiencies and are arbitrary and capricious. The district court dismissed Washtech's complaint in full, relying on a mixture of grounds—

standing; failure to state a plausible claim for relief; and a deficient opposition to the DHS's motion to dismiss—depending on the precise claim at issue. As detailed below, we affirm in part and reverse and remand in part.

I. Background

The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1101 *et seq*., authorizes the DHS to admit certain classes of nonimmigrant aliens. Nonimmigrant aliens are foreign nationals who enter the country for fixed, temporary periods of time pursuant to a visa. The F-1 student visa authorizes admission of "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study . . . at" certain academic institutions, including colleges and universities. 8 U.S.C. § 1101(a)(15)(F)(i).

The Congress provided that "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the" DHS Secretary [1] "may by regulations prescribe." *Id.*

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[1] The Congress originally delegated authority to administer the INA to the Immigration and Naturalization Service, housed in the United States Department of Justice. In 2002, when it created the Department of Homeland Security, the Congress transferred responsibility for administering the INA to the DHS Secretary. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (citing 6 U.S.C. §§ 251(2), 252(a)(3), 271(b)). For consistency and ease of reference, we refer to the DHS throughout the opinion as the

§ 1184(a)(1). The DHS has three times—in 1992, 2008 and 2016—promulgated regulations that allow nonimmigrant aliens with student visas to remain in the country after finishing their degree to participate in the workforce for a specified period of time. *See Wash. All. of Tech. Workers v. DHS*, 857 F.3d 907, 909–10 (D.C. Cir. 2017).

A. 1992 Regulation

In 1992, the DHS promulgated a regulation that established an "optional practical training" (OPT) program for a nonimmigrant admitted with an F-1 student visa. Pre- Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31954 (July 20, 1992) (1992 Rule). The regulation allowed a student to "apply . . . for authorization for temporary employment for [optional] practical training directly related to the student's major area of study." 8 C.F.R. § 214.2(f)(10)(ii)(A) (1992). The student "may be authorized" to engage in such employment "[a]fter completion of all course requirements for the degree" or "[a]fter completion of the course of study" for which the student was granted the F-1 visa. *Id.* § 214.2(f)(10)(ii)(A)(3), (4). The 1992 Rule authorized a student to remain in the country for one year after completing his degree, *see id.* following completion of studies," *id.* § 214.2(f)(5)(i).

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responsible government agency even though the INS exercised the relevant authority before 2002.

B. 2008 Regulation

In 2008, the DHS promulgated a regulation that authorized an F-1 student visa holder with a STEM degree who was participating in the OPT program to apply for an extension of OPT of up to seventeen months. 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. 18944 (Apr. 8, 2008) (2008 Rule); 8 C.F.R. § 214.2(f)(10)(ii)(C) (2008). In 2014, Washtech filed a complaint challenging the 2008 Rule and the district court ultimately vacated the 2008 Rule. *Wash. All. of Tech. Workers v. DHS* (*Washtech I*), 156 F. Supp. 3d 123 (D.D.C. 2015). Although the district court held that the DHS had statutory authority to create the OPT program, *id.* at 137–45, it held that the DHS improperly issued the 2008 Rule without notice and comment, *id.* at 145–47. The district court stayed vacatur to allow the DHS to correct its error. *Id.* at 147–49.

C. 2016 Regulation

After *Washtech I*, the DHS issued a notice of proposed rulemaking with a request for comments. 80 Fed. Reg. 63376 (Oct. 19, 2015). After comments, the DHS issued its final rule. 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. 13040 (Mar. 11, 2016) (2016 Rule). The 2016 Rule authorizes an F-1 student visa holder with a STEM degree who is participating in the OPT program to "apply for an extension of OPT" of up

to twenty-four months. 8 C.F.R. § 214.2(f)(10)(ii)(C) (2016).

The 2016 Rule includes certain "safeguards" against "adverse [effects] on U.S. workers," 81 Fed. Reg. at 13042: employers who want to participate in the program must attest, *inter alia*, that the OPT student "will not replace a full- or part- time, temporary or permanent U.S. worker," 8 C.F.R. § 214.2(f)(10)(ii)(C)(10)(ii), and that the "duties, hours, and compensation" of OPT workers "[will] be commensurate with" those of "similarly situated U.S. workers," *id.* § 214.2(f)(10)(ii)(C)(8).

After the 2016 Rule was promulgated, we "vacate[d]" as "moot" the district court's decision invalidating the 2008 Rule "because the 2008 Rule is no longer in effect." *Wash. All. of Tech. Workers v. DHS* (*Washtech II*), 650 F. App'x 13, 14 (D.C. Cir. 2016).

D. Procedural History

In June 2016, Washtech filed a complaint challenging both the 1992 Rule and the 2016 Rule. Washtech brought four counts, alleging: (1) the 1992 Rule "exceeds" the DHS's statutory "authority"; (2) the 2016 Rule "is in excess of" the DHS's statutory "authority"; (3) the DHS committed three procedural violations in promulgating the 2016 Rule; and (4) the 2016 Rule "was implemented arbitrarily and capriciously." Compl. ¶¶ 54–84.

The DHS moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(1) for lack of jurisdiction because Washtech did not have standing and pursuant to FRCP 12(b)(6) for failure to

state a claim for relief. Washtech timely filed a response in opposition to the motion to dismiss.

The district court granted the DHS's motion to dismiss. *Wash. All. of Tech. Workers v. DHS* (*Washtech III*), 249 F. Supp. 3d 524 (D.D.C. 2017). It dismissed Count I—the challenge to the 1992 Rule's statutory authority—on two alternative grounds. *First*, the district court held that Washtech "conceded" its lack of standing because it "fail[ed] to address the Government's argument that it lacks standing" in its opposition to the motion to dismiss. *Id.* at 536. *Second*, the district court held that Washtech in fact did not have standing. *Id.* at 536–37. The district court dismissed Count II—the challenge to the 2016 Rule's statutory authority—because Washtech "conceded" that it failed to state a claim for relief by "fail[ing] to address the Government's arguments" that Washtech insufficiently pleaded the claim in its opposition to the motion to dismiss. *Id.* at 555. The district court dismissed Count III on two alternative grounds. *First*, the district court held that Washtech conceded that it failed to state a claim for relief by not addressing the Government's arguments in its opposition to the motion to dismiss. *Id.* at 554. *Second*, the district court held that Washtech did not sufficiently plead a cause of action in Count III. *Id.* at 555. The district court dismissed Count IV for failure to state a claim for relief. *Id.* at 555–56. This appeal followed.

II. ANALYSIS

The "allegations of the complaint are generally taken as true for purposes of a motion to dismiss." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam). We review the district court's dismissal of a complaint for lack of standing or for failure to state a claim *de novo*. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (standing); *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (failure to state a claim). We review the district court's dismissal of a complaint for failure to respond to a motion to dismiss for abuse of discretion. *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004).

We first address Washtech's standing. We conclude that Washtech had standing to bring Counts II, III and IV—all challenges to the 2016 Rule—under the doctrine of competitor standing. We do not decide whether Washtech had standing to bring Count I—the challenge to the 1992 Rule—because we affirm dismissal of Count I on the alternative jurisdictional ground of untimeliness. We then address the district court's dismissal of Counts II, III and IV. We reverse dismissal of Count II because we believe the district court abused its discretion in dismissing a plausible claim for relief based on Washtech's inadequate opposition to the DHS's motion to dismiss. On remand, the district court must consider whether the reopening doctrine applies to the issue raised in Count II. We affirm the district court's dismissal of Counts III and IV pursuant to FRCP 12(b)(6) because neither states a plausible claim for relief.

A. FRCP 12(b)(1) challenges

The DHS challenges Washtech's standing to bring all four counts. Washtech "must demonstrate standing for each claim [it] seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). We address first Washtech's standing to bring Counts II, III and IV—its challenges to the 2016 OPT Rule. Washtech "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 342 (internal quotation omitted). We believe Washtech has standing under the competitor standing doctrine.[2] We address the three standing requirements in turn.

First, Washtech has suffered an injury in fact under the competitor standing doctrine. "The doctrine of competitor standing addresses the first requirement [of standing] by recognizing that economic actors suffer an injury in fact when agencies . . . allow increased competition against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (internal quotation and alterations omitted). Although "our cases addressing competitor standing have articulated various formulations of the standard for determining whether a plaintiff . . . has been injured," the "basic requirement common to all our cases is that the complainant show an actual or imminent increase in competition, which

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[2] Washtech asserted multiple alternative standing theories in its brief. Because we dismiss Count I on alternative jurisdictional grounds and find that Counts II, III and IV are supported by the doctrine of competitor standing, we need not address Washtech's other theories. *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1287 (D.C. Cir. 2016).

increase we recognize will almost certainly cause an injury in fact." *Id.* at 73.

As an initial matter, Washtech's complaint includes allegations that its members compete with F-1 student visa holders who are working in the OPT program pursuant to the DHS's regulations. The complaint alleges that three of Washtech's members have applied to companies for STEM jobs and that F-1 student visa holders who work at the same companies have applied for OPT extensions. *See, e.g.*, Compl. ¶¶ 109–10 ("Since 2010, [a Washtech member] applied to Microsoft for computer programming jobs three times. At least 100 applications for OPT extensions have been made . . . for workers at Microsoft."); *id.* ¶¶ 151–53 (alleging that member "applied for a programming job at" Computer Sciences Corporation (CSC); that "[a]t least 5 contract computer labor companies that claim to supply workers to CSC have placed advertisements seeking workers on OPT"; and that "[a]t least 6 applications for OPT extensions have been made . . . for workers at CSC"). Washtech has thus alleged that its members are "participating in the [STEM] labor market" in competition with OPT workers. *Mendoza v. Perez*, 754 F.3d 1002, 1013 (D.C. Cir. 2014).

The DHS argues that Washtech's members are not direct and current competitors of OPT workers because Washtech members have not "bothered to even apply" for STEM jobs since the 2016 Rule took effect. Appellees' Br. 42. True enough, the complaint's allegations do not state that Washtech's members have applied after March 11, 2016, the date the DHS promulgated the 2016 Rule. But *Mendoza* forecloses the

DHS's argument. In *Mendoza*, domestic herders challenged agency regulations that allegedly increased the number of foreign herders in the labor market. We held the plaintiffs suffered an injury in fact. 754 F.3d at 1011. Although the agency argued the plaintiffs were not competitors of foreign herders because the plaintiffs had not held a herding job for several years, we explained that domestic herders who "affirmed their desire to work" were "not removed from the herder labor market simply because they do not currently work as herders and have not filled out formal job applications." *Id.* at 1013–14. Unlike in *Mendoza*, Washtech's complaint alleges that at least three of its members are currently employed on a full- or part-time basis in STEM positions, *see* Compl. ¶¶ 106–07, 137, 184–85, and that their job searches are "constant[]," *id.* ¶ 107, and "continuous," *id.* ¶ 184. Washtech's members, then, are not removed from the STEM labor market simply because they have not filled out formal job applications since the 2016 Rule took effect. To the contrary, they have affirmed their desire to work.

Moreover, Washtech alleges that the 2016 Rule increased the labor supply in the STEM job market. *See* Compl. ¶ 108 (alleging that "[c]omputer programming is one of the degrees DHS targeted for increasing the labor supply under the 2016 Rule"). Although the DHS argues that Washtech's claim that the 2016 Rule has increased competition in the job market compared to pre-2016 levels is "imagin[ary]," Appellees' Br. 42, Washtech may rely on "mere allegations" rather than "specific facts" to establish standing at the motion to dismiss stage, *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

561 (1992). Additionally, Washtech's allegations of increased competition in the STEM labor market are supported by "facts found outside of the complaint," which "we are permitted" to "consider . . . on a Rule 12(b)(1) motion to dismiss for lack of jurisdiction." *Mendoza*, 754 F.3d at 1016 n.9; *see* White House Press Release, IMPACT REPORT: 100 Examples of President Obama's Leadership in Science, Technology, and Innovation (June 21, 2016) ("Approximately 34,000 individuals are participating in the STEM Optional Practical Training program at present, and with the[] improvements [of the 2016 Rule] the total may expand to nearly 50,000 in the first year and grow to approximately 92,000 by the tenth year of implementation."), https://obamawhitehouse.archives.gov/the-press-office/2016/06/21/impact-report-100-examples-president- obamas-leadership-science.

Therefore, Washtech has sufficiently pleaded that the DHS's regulations "allow increased competition against" Washtech's members, *Sherley*, 610 F.3d at 72, which is a concrete injury-in-fact, *see Mendoza*, 754 F.3d at 1011 ("[A]n individual in the labor market for open-range herding jobs would have standing to challenge [agency] rules that lead to an increased supply of labor—and thus competition—in that market."); *cf. Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 802 (D.C. Cir. 1985) (plaintiff union's members challenging procedural validity of immigration rules that "allow[ed] aliens into the country to perform work which would otherwise likely go to [plaintiff's] members" suffered injury in fact because "those alien workers represent competition which

[plaintiff's members] would not face if the Government followed the procedures required by law").

Second, Washtech's injury is caused by the 2016 Rule. The increase in competition is directly traceable to the DHS because the DHS's regulations authorize work for the OPT participants with whom Washtech members compete for jobs. *See Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004) (per curiam) (agency regulation that "legalizes the entry of a product into a market in which [plaintiff] competes" causes plaintiff injury), *withdrawn in part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005) (per curiam). The DHS argues that Washtech's injury is not caused by the DHS because employers in the STEM labor market independently decide whether Washtech members are hired. We have heretofore rejected this line of reasoning as "inconsistent with the competitor standing doctrine." *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996). In *Bristol- Myers*, the manufacturer of a pioneer drug challenged an agency regulation authorizing the manufacture of generic versions of the same drug. *Id.* at 1495–97. After concluding that the increase in competing products in the market was a sufficient injury in fact, we held the challenged regulation caused the injury. *Id.* at 1499. Because "the injury claimed is exposure to competition" rather than "lost sales, per se," it was "no answer to say that the FDA is merely permitting a competitive product to enter the market and leaving the purchasing decision to the consumer." *Id.* The same rationale obtains here. The injury claimed is exposure to increased competition in the STEM labor market—not lost jobs, per se. Accordingly, the DHS's

argument that its regulation leaves the hiring decision to the employer is unavailing. *See also Honeywell Int'l*, 374 F.3d at 1369 (rejecting argument that plaintiff's injury was not caused by regulation allowing competing products into market because plaintiff could only "speculat[e] about the purchasing decisions of third parties not before the court"). Washtech has therefore "demonstrate[d] a causal relationship between the final agency action and the alleged injur[y]." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1160 (D.C. Cir. 2005).

Third, and finally, Washtech's injury is redressable by a favorable decision. Washtech has alleged that it is injured because of increased competition from workers who are eligible to work only because of the 2016 Rule. A court order invalidating the 2016 Rule would eliminate workers from the STEM job market and therefore decrease competition for the STEM jobs pursued by Washtech's members. The specific injury suffered, then, would be remedied by a favorable court order. *See Sherley*, 610 F.3d at 72 (stem-cell research plaintiffs challenging regulations that increased competition for research grants had standing; redressability "clear"); *Honeywell Int'l*, 374 F.3d at 1369 ("As a favorable opinion of the court could *remove the competing* [products] from the market, redressability is satisfied . . . ." (emphasis added)). Accordingly, Washtech has standing to bring its three claims challenging the 2016 Rule.

Washtech's standing to bring Count I, a claim that the 1992 Rule exceeds the DHS's statutory authority, is less certain. Washtech argues that the 1992 Rule caused the same injury as the 2016 Rule—an increase

in competition for STEM jobs as a result of the Rule's permitting OPT workers in the STEM field—but Washtech's complaint provides less substance regarding the 1992 Rule. The complaint alleges that Washtech members compete with workers operating under the extensions authorized by the 2016 Rule but does not specifically allege that they compete with workers operating under the initial twelve-month OPT period authorized by the 1992 Rule. The DHS urges us to agree with the district court that Washtech's failure is fatal to its standing to challenge the 1992 Rule. We are skeptical of the DHS's argument. No OPT participants could apply for extensions to work without first working for twelve months as authorized by the 1992 Rule. The allegations regarding the 2016 Rule naturally and inevitably encompass allegations against the 1992 Rule, even if not explicitly spelled out that way in the complaint. Nevertheless, we need not decide this issue because there is another jurisdictional bar.[3]

We affirm dismissal of Count I on the alternative ground that the claim is untimely. Under 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first

[3] The district court also held that Washtech had conceded Count I and therefore dismissed it pursuant to Local Rule 7(b). We take no position on the district court's 7(b) holding because we dismiss Count I on the basis of a threshold jurisdictional ground. We further address application of Local Rule 7(b), *infra* at Part II.B.1.

accrues."[4] The "right of action first accrues on the date of the final agency action." *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004). The 1992 Rule was unquestionably final agency action. Therefore, the six-year window to directly challenge the statutory authority of the 1992 Rule closed in 1998. As discussed *infra*, however, the dismissal of Count I does not foreclose Washtech's challenge to the statutory authority of the OPT program as a whole because the 2016 Rule may have reopened the issue anew.

B. FRCP 12(b)(6) and Local Rule 7(b) challenges

We now turn to Washtech's claims attacking the 2016 Rule. The DHS asserts that all three of the remaining counts, II, III and IV, fail to state a claim for relief. A complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). A defendant may file a motion to dismiss for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

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[4] Section 2401(a) "is a jurisdictional condition attached to the government's waiver of sovereign immunity." *Spannaus v. DOJ*, 824 F.2d 52, 55 (D.C. Cir. 1987). Accordingly, we may decide the claim on this alternative jurisdictional ground without reaching other jurisdictional issues such as standing. *P&V Enters. v. U.S. Army Corp. of Eng'rs,* 516 F.3d 1021, 1026–27 (D.C. Cir. 2008) (holding claim time-barred under section 2401(a) and affirming dismissal of claim "for lack of subject-matter jurisdiction" without "reach[ing] the [defendant's] alternative objection that [plaintiff] lacks standing"); *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("While . . . subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.").

"To survive a [12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint must provide "more than labels and conclusions"; although it "does not need detailed factual allegations," the factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The DHS also asserts that we should affirm the district court's decision to treat two of the remaining counts—II and III—as "conceded" pursuant to the United States District Court for the District of Columbia's Local Rule 7(b), which provides:

> Within 14 days of the date of service [of a party's motion] or at such other time as the Court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded.

D.D.C. Local Rule 7(b).

1. Count II

Count II alleges that the "2016 Rule is in excess of DHS['s] authority" because the DHS's "policy of allowing aliens to remain in the United States after

completion of the course of study to work or be unemployed is in excess of DHS authority to admit academic students under 8 U.S.C. § 1101(a)(15)(F)(i) and conflicts with" other cited INA provisions. Compl. ¶¶ 62–63. Elsewhere in its complaint, Washtech's allegations flesh out the core of its claim: the INA's F-1 visa provision authorizes the admission of "students"; nonimmigrants who work under the OPT program are not "students" under the statute; and the regulation authorizing nonimmigrants to work under the OPT program is therefore in excess of statutory authority. *See id.* ¶ 35 ("[N]o statute currently permits F-1 student visa holders to work."); *id.* ¶ 39 ("DHS has [now] created several extra-statutory regulatory F-1 student visa work programs" by authorizing F- 1 visa holders to work).

The DHS argues this is not enough to state a plausible claim for relief. It asserts Washtech needs to "explain[]" how the regulation exceeds the DHS's statutory authority. Appellees' Br. 51. But we are hard-pressed to imagine what more Washtech needs to allege to satisfy the "lesser showing required at the pleading stage," *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 18 (D.C. Cir. 2011), particularly in light of the kind of claim it brings. A claim that a regulation exceeds statutory authority is not a claim that requires factual allegations about the defendant's actions in order to demonstrate lack of authority. *Compare Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002) (dismissing complaint alleging simply "President acted unconstitutionally and *ultra vires* under the Property Clause" because plaintiff "fail[ed] to

allege any facts sufficient to support its *ultra vires* claim" and "present[ed] no more than legal conclusions"). Here, the complaint plainly identifies the perceived disconnect between what the statute permits (admitting nonimmigrant aliens as "students") and what the regulations do (allowing the same nonimmigrant aliens to remain in the country to work after they are no longer students). The complaint also cites the relevant statutory and regulatory provisions. Washtech's claim survives a 12(b)(6) motion to dismiss.

Despite the fact that Washtech stated a plausible claim for relief, the district court concluded that Washtech's response in opposition to the motion to dismiss was inadequate. The district court thus "deem[ed]" it "appropriate" to treat the issue as "conceded" and dismissed Count II pursuant to Local Rule 7(b). *Washtech III*, 249 F. Supp. 3d at 555. We review "the district court's application of [Local Rule] 7(b) for abuse of discretion." *Fox*, 389 F.3d at 1294. We think the district court's decision to dismiss Washtech's plausible claim for relief because its timely response to the motion to dismiss purportedly failed to state Washtech's opposition with sufficient substance—notwithstanding Washtech's response in fact disagreed with the DHS's contention that it failed to state a plausible claim for relief and also included a citation to the allegedly deficient complaint—was an abuse of discretion.

The circumstances here are distinguishable from our precedent affirming the application of Local Rule 7(b). We have endorsed dismissing a complaint pursuant to Local Rule 7(b) if the plaintiff failed to timely

file a response in opposition to the defendant's FRCP 12(b)(6) motion to dismiss. *Fox*, 389 F.3d at 1294 (dismissing amended complaint after plaintiff failed to respond to motion to dismiss because of counsel's alleged lack of notice of motion to dismiss due to case filing system malfunction); *see also Cohen v. Bd. of Trs. of the Univ. of D.C.*, 819 F.3d 476, 483–84 (D.C. Cir. 2016) (dismissing complaint after plaintiff failed to timely file response in opposition to FRCP 12(b)(6) motion to dismiss but holding that dismissal *with prejudice* was abuse of discretion because plaintiff attempted to remedy error by filing late response and filing amended complaint). That is not the case here: Washtech did timely file a response in opposition to the DHS's motion to dismiss. Therefore, *Fox* does not control.

In the context of non-dispositive motions, we have affirmed district court decisions that treated as conceded an issue left entirely unaddressed by the plaintiff in a timely filed response. *See Texas v. United States*, 798 F.3d 1108, 1110, 1113–16 (D.C. Cir. 2015) (affirming grant of defendant's motion seeking attorneys' fees when plaintiff's response did not dispute assertion that defendant was "prevailing party" within meaning of statute); *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428–29 (D.C. Cir. 2014) (affirming grant of defendant's motion to strike untimely declaration because plaintiff "did not raise the argument" that FRCP 26(e) permitted admission of untimely declaration "in his opposition to the defendant's motion to strike"). That, too, is not the case here. Washtech included a section in its response specifically addressing the sufficiency of its claims for relief. *See* Pl's Resp. to

Mot. to Dismiss at 43, *Washtech III*, 249 F. Supp. 3d 524 (No. 1:16-cv-01170), ECF No. 20. Washtech asserted that "[e]ach count contains both a legal and factual basis" for relief. *Id.* And Washtech cited its complaint—the pleading on which an FRCP 12(b)(6) motion to dismiss focuses—in its response. *See id.*

Granted, Washtech would have been wise to more fully develop its argument that it met FRCP 12(b)(6)'s pleading standard. Doing so would have helped the district court more efficiently evaluate the sufficiency of Washtech's claim. But it is plain that Washtech did not "concede[]," D.D.C. Local Rule 7(b), that it failed to state a claim: Washtech did not "yield or grant" its argument, *Concede*, American Hertiage College Dictionary 296 (4th ed. 2007), nor did it "acknowledge" or "accept" the DHS's position, *Concede*, Webster's Third New International Dictionary 469 (3d ed. 1993). Unlike the plaintiffs in *Texas* and *Wannall*, Washtech was not silent when confronted with the argument that its allegations fell short.

We conclude that a party may rest on its complaint in the face of a motion to dismiss if the complaint itself adequately states a plausible claim for relief. The district court decision turned what should be an attack on the legal sufficiency of the complaint into an attack on the legal sufficiency of the response in opposition to the motion to dismiss. That transformation undermines "the clear preference of the Federal Rules to resolve disputes on their merits." *Cohen*, 819 F.3d at 482. Although Local Rule 7(b) "is a docket-management tool that facilitates efficient and effective resolution of motions by requiring the prompt joining of issues," *Fox*, 389 F.3d at 1294, it is not a tool to subvert

the FRCP 12(b)(6) inquiry simply because the court finds the plaintiff's opposition to the motion to dismiss, although pressed, underwhelming. We recognize we have only once before found an abuse of discretion in the district court's application of Local Rule 7(b). *See Cohen*, 819 F.3d 476.[5] But Washtech's complaint in fact stated a plausible claim for relief that the regulation exceeded the DHS's statutory authority. And Washtech timely filed an opposition to the FRCP 12(b)(6) motion to dismiss that indicated it adhered to its position that its complaint was well-pleaded. In this circumstance, we believe that, in kicking Washtech out of court under Local Rule 7(b), the district court abused its discretion.

That said, whether Count II may proceed remains in question. Count II as framed alleges that the entire OPT program is *ultra vires*. *See* Compl. ¶¶ 62–63. The challenge to the DHS's authority to provide for OPT

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[5] *Cohen* also raised "concerns" about allowing the district court to rely on Local Rule 7(b) at all in the context of a 12(b)(6) motion to dismiss. 819 F.3d at 481–83; *cf. Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 508 (D.C. Cir. 2016) (holding that "a motion for summary judgment" pursuant to FRCP 56 can never "be deemed 'conceded'" pursuant to Local Rule 7(b) "for want of opposition"). Assuming without deciding we share *Cohen*'s concerns, we are bound at the panel stage by our precedent permitting district courts to apply Local Rule 7(b) in the context of a 12(b)(6) motion to dismiss. *Fox*, 389 F.3d 1291; *see Cohen*, 819 F.3d at 483 (stating that *Fox* "compels us to affirm the district court's decision insofar as it granted the motion to dismiss the complaint" after plaintiff failed to timely file response). We also need not resolve the "tension" between the local and federal procedural rules, *Cohen*, 819 F.3d at 481, because we find the district court abused its discretion and reverse on that ground.

workers at all implicates the authority first granted by the 1992 Rule. As discussed *supra*, the six-year statute of limitations on such a challenge closed in 1998. Washtech asserts, however, that it may still challenge the statutory authority for the entire OPT program under the reopening doctrine. The "doctrine arises where an agency conducts a rulemaking or adopts a policy on an issue at one time, and then in a later rulemaking restates the

policy or otherwise addresses the issue again without altering the original decision." *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (internal quotation and alterations omitted). If the reopening doctrine applies, it "allows an otherwise stale challenge to proceed because the agency opened the issue up anew, and then reexamined and reaffirmed its prior decision." *P&V Enters. v. Army Corps of Eng'rs*, 516 F.3d 1021, 1023 (D.C. Cir. 2008) (internal quotation and alteration omitted). Accordingly, if the DHS reopened the issue of whether the OPT program as a whole is statutorily authorized in its notice of proposed rulemaking vis-à-vis the 2016 Rule, "its renewed adherence is substantively reviewable," *CTIA-Wireless Ass'n*, 466 F.3d at 110 (internal quotation omitted), and the challenge to the entire program may proceed. *See Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988) (applying reopening doctrine and allowing challenge to "unchanged [and] republished portion of" new regulation that was "originally enacted" in old regulation).

The district court did not decide whether Washtech's challenge to the OPT program's statutory authority was reviewable under the reopening doctrine. *See*

Washtech III, 249 F. Supp. 3d at 537 n.3. We therefore decline to address the question in the first instance and leave it for the district court to address on remand. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (stating "general rule . . . that a federal appellate court does not consider an issue not passed upon below"); *Liberty Prop. Trust v. Republic Props. Corp.*, 577 F.3d 335, 341 (D.C. Cir. 2009) ("Although we . . . have the discretion to consider questions of law that were not passed upon by the District Court, this court's normal rule is to avoid such consideration." (internal quotation and alterations omitted)).

3. Count III

Washtech's third claim alleges three procedural deficiencies in the DHS's promulgation of the 2016 Rule: (1) failure to comply with the Congressional Review Act; (2) failure to provide "actual" notice and comment; and (3) failure to comply with incorporation-by-reference requirements. The complaint does not state a plausible claim for relief based on any of the three purported procedural violations. We therefore affirm the district court's dismissal pursuant to FRCP 12(b)(6). We take no position on whether the district court abused its discretion in also dismissing the claim pursuant to Local Rule 7(b).

First, Washtech alleged that the 2016 Rule was published in the Federal Register fewer than 60 days before it took effect, contrary to the Congressional Review Act's mandatory 60-day delay. Compl. ¶¶ 64–66 (citing 5 U.S.C. § 801(a)(3)(A)). Even taking the factual allegation as true, it does not state a claim for

relief. The Congressional Review Act provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. This judicial-review prohibition "denies courts the power to void rules on the basis of agency noncompliance with the Act." *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009). Whether or not the 2016 Rule took effect less than 60 days after its publication, then, there is no "relief" we can "grant." FED. R. CIV. P. 12(b)(6); *see Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (motion to dismiss may be granted if plaintiff "would not have a claim upon which relief could be granted even with [sufficiently pled] facts").

Second, Washtech alleged that the DHS "failed to subject the question of whether the OPT program should be expanded beyond a year to actual notice and comment." Compl. ¶ 67. In addition to the fact that the DHS did in fact subject the question to notice and comment, *see* 80 Fed. Reg. at 63385–86 (requesting and responding to "public comment" on proposed 24-month OPT extension), the complaint makes no further allegations supporting its bare legal conclusion. Therefore, the complaint offers nothing more than "[t]hreadbare recitals of the elements of" a notice-and-comment "cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. That is not enough to survive a 12(b)(6) motion to dismiss. *See id.*

Third, Washtech alleged that the provision of the OPT 2016 Rule that the Secretary is to "maintain" a "complete list of qualifying [STEM] degree program categories" to be published on the "Student and Exchange Visitor Program Web site," 8 C.F.R.

§ 214.2(f)(10)(ii)(C)(2)(ii), improperly incorporates an external source without following the five incorporation-by-reference requirements set forth in 1 C.F.R. § 51.1–51.9. Compl. ¶¶ 69–80. If the incorporation-by-reference requirements are not followed, the external material is not "published." 5 U.S.C. § 552(a)(1). But the failure to publish material in a rulemaking is cognizable only if (1) the material was "required to be published"; (2) the aggrieved party did not have "actual and timely notice of the terms thereof"; and (3) the aggrieved party is "required to resort to, or [is] adversely affected by," the unpublished material. *Id.*; *cf. PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981). Washtech's complaint contains no allegations regarding these three requirements. Without them, Washtech has not pleaded a claim for relief on the basis of the alleged incorporation-by-reference violations. *See Harris v. D.C.* Water *&* *Sewer Auth.*, 791 F.3d 65, 69 (D.C. Cir. 2015) (plaintiff's complaint must allege sufficient facts of each element of claim to survive motion to dismiss).

3. Count IV

Washtech's fourth and final claim alleges that the 2016 Rule is arbitrary and capricious because it "requires employers to provide foreign-guest workers OPT mentoring without requiring that such program be provided to American workers" and because it "singles out STEM occupations for an increase in foreign labor through longer work periods with no justification." Compl. ¶¶ 81–84.

Neither allegation "permit[s] the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. The complaint's allegation that the Rule deals with two different things—OPT workers and American workers—in two different ways—the former group receives mentoring programs but the latter does not—does not state a plausible claim that the regulation is arbitrary and capricious. Washtech's desire for its own members to participate in mentoring programs does not sufficiently allege illegality on the DHS's part. *Cf. Twombly*, 550 U.S. at 555–57 (pleading defendant's "parallel conduct" in antitrust case insufficient even though parallel conduct *could* indicate intent to conspire because, without more, alleging "parallel conduct" placed defendant in "neutral territory"). Further, the complaint's allegation that Washtech arbitrarily increased foreign labor in the STEM market with no justification for not doing so in other fields is unsupported by any factual allegations. Washtech has set forth no more than an insufficient "defendant-unlawfully- harmed-me accusation." *Iqbal*, 556 U.S. at 678; *see also L. Xia v. Tillerson*, 865 F.3d 643, 660 (D.C. Cir. 2017) ("conclusory allegation" of unlawfulness insufficient to survive 12(b)(6) motion to dismiss). Accordingly, we affirm the district court's dismissal of Count IV under FRCP 12(b)(6).

For the foregoing reasons, we affirm the district court's dismissal of Counts I, III and IV. We reverse its dismissal of Count II and remand Count II for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

No. 16-CV-1170

United States District Court
for the District of Columbia

Wash. All. of Tech. Workers v. *United States Dep't of Homeland Sec.*, 249 F. Supp. 3d 524 (D.D.C. 2017)

[Filed: April 19, 2017]

Memorandum Opinion and Order Granting Defendant's Motion to Dismiss

MEMORANDUM OPINION

The plaintiff, the Washington Alliance of Technology Workers ("Washtech"), a collective-bargaining organization representing science, technology, engineering, and mathematics ("STEM") workers, brought this action against the defendants, the United States Department of Homeland Security ("DHS"), the Secretary of Homeland Security, the United States Immigration and Customs Enforcement ("ICE"), the Director of ICE, the United States Citizenship and Immigration Services ("Citizenship and Immigration Services"), and the Director of Citizenship and Immigration Services (collectively, the "Government") challenging, pursuant to the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-06 (2012), DHS's 1992 regulation creating a twelve-month optional practical

training program ("OPT or OPT Program") for nonimmigrant foreign nationals on F-1 student visas (the "1992 OPT Program Rule"), 8 C.F.R. § 214.2(f)(10)(ii)(1992), and DHS's 2016 regulation extending the OPT Program by an additional twenty-four months for eligible STEM students (the "2016 OPT Program Rule"), Complaint ("Compl.") ¶¶ 1-5, 8; *see also* 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a). Currently pending before the Court is the Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) ("Gov't's Mot."), ECF No. 18, which seeks dismissal of the Complaint on the grounds that this Court lacks subject matter jurisdiction to adjudicate Washtech's complaint; Washtech lacks standing to pursue this action; Washtech's challenge to the 1992 OPT Program Rule is time-barred; and Washtech has failed to state a claim upon which relief may be granted. Upon careful consideration of the parties' submissions,[1] the Court concludes that it must deny in part and grant in part the Government's motion to dismiss.

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[1] In addition to the filings already identified, the Court considered the following submissions in reaching its decision: (1) the Defendants' Memorandum and Points of Authorities in Support of the Motion to Dismiss ("Gov't's Mem."); (2) the Plaintiff's Response to Defendant[s'] Motion to Dismiss ("Washtech's Opp'n"); and (3) the Defendants' Reply in Support of the Motion to Dismiss ("Gov't's Reply").

I. BACKGROUND

A. Statutory and Legal Background

An F-1 visa provides foreign national students valid immigration status for the duration of a full course of study at an approved academic institution in the United States. *See* 8 U.S.C. § 1101(a)(15)(F)(i). Since 1947, F-1 visa students, in conjunction with pursuing a course of study, have been able to engage in some version of OPT during their studies or on a temporary basis after the completion of their studies. *See* 8 C.F.R. § 125.15(b) (1947). And since 1992, F-1 visa students have been allowed to apply for up to twelve months of OPT, to be used either during or following the completion of their degree requirements. *See* 8 C.F.R. § 214.2(f)(10) (2016).

"In April 2008, DHS issued an interim final rule with request for comments extending the [twelve]-month OPT [P]rogram by an additional [seventeen] months for F-1 [visa] nonimmigrants with qualifying STEM degrees, to a total of [twenty-nine] months." Gov't's Mem. at 4 (citing Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (the "2008 OPT Program Rule")); *see also* Washtech's Opp'n at 3. The goal of this extension was to help alleviate a "competitive disadvantage" for United States employers recruiting STEM-skilled workers educated in the United States under the H-1B visa program. 73 Fed. Reg. 18,944. H-1B visas are temporary employment visas granted annually to foreign nationals in "specialty

occupations," including many occupations in the STEM field. 8 C.F.R. § 214.2(h)(1)(ii)(B). The number of H—1B visas issued on an annual basis is limited, and the program is oversubscribed. *See* 73 Fed. Reg. at 18,946. The extension provided by the 2008 OPT Program Rule sought to "expand the number of alien STEM workers that could be employed in the [United States]," Compl. ¶ 46; *see also* 73 Fed. Reg. at 18,953, and explicitly referenced the specific concern regarding the rigidity of the H-1B visa program, *see* 73 Fed. Reg. at 18,946-47.

In 2014, Washtech filed suit, challenging on procedural and substantive grounds, both the underlying twelve-month 1992 OPT Program Rule and the seventeen-month extension added by the 2008 OPT Program Rule. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. ("Washtech I")*, 74 F. Supp. 3d 247, 251-52 (D.D.C. 2014). There, another member of this Court found that Washtech lacked standing to challenge the 1992 OPT Program Rule, *see id.* at 252-53, but did have standing to challenge the 2008 OPT Program Rule, *see id.* at 253. The Court, however, vacated the 2008 OPT Program Rule because it had been promulgated without notice and comment, *see Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. ("Washtech II")*, 156 F. Supp. 3d 123, 149 (D.D.C. 2015), *judgment vacated, appeal dismissed*, 650 Fed. Appx. 13 (D.C. Cir. 2016), and stayed *vacatur* of the rule to allow DHS to promulgate a new rule, *id.* On appeal of that decision to the District of Columbia Circuit, Washtech alleged that the court "had improperly allowed DHS to continue the policies unlawfully put in place in the 2008 OPT Rule . . . [and that] the OPT

program was [not] within DHS['s] authority." Washtech's Opp'n at 4.

In response to this Court's colleague's ruling, DHS issued a notice of proposed rulemaking on October 19, 2015, requesting the submission of public comments prior to November 18, 2015. *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 80 Fed. Reg. 63,376 (Oct. 19, 2015). Whereas the 2008 OPT Program Rule had extended the OPT Program tenure by seventeen months for eligible STEM students, this notice instead proposed extending the OPT Program tenure by twenty-four months. *See id.* (explaining that "[t]his [twenty-four] month extension would effectively replace the [seventeen] month STEM OPT [Program] extension currently available to certain STEM students"). The notice also deviated from the 2008 OPT Program Rule in several other respects. *See id.* at 63,379-94 (discussing the proposed changes in detail). Namely, the notice contained a distinct change in tone—it dropped all references to the H-1B visa program that had been in the 2008 OPT Program Rule and instead explained that its purpose was to "better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to [United States] workers." *Id.* at 63,376.

On March 11, 2016, after the expiration of the public notice and comment period, DHS issued the final version of the 2016 OPT Program Rule. *See* Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214

and 274a). The District of Columbia Circuit then dismissed as moot Washtech's appeal challenging the 2008 OPT Program Rule and vacated this Court's colleague's judgment in its entirety. *See Washtech II*, 650 Fed. Appx. at 14. On June 17, 2016, Washtech initiated this action.

B. Current Posture of Washtech's Challenges to the OPT Program

Washtech alleges that the 1992 OPT Program Rule and 2016 OPT Program Rule "exceed the authority of DHS [under] several provisions of the Immigration and Nationality Act ('INA')," Compl. ¶ 4, (Counts I and II); that the 2016 OPT Program Rule was issued in violation of the Congressional Review Act (the "CRA") because of non-compliance with the notice and comment and incorporation by reference requirements of the statute (Count III), *see id.* ¶¶ 64-80; and that the 2016 OPT Program Rule is arbitrary and capricious (Count IV), *see id.* ¶¶ 81-84. Also in its Complaint, Washtech names three of its members that have allegedly suffered injury as a result of the 1992 and 2016 OPT Program Rules—Rennie Sawade, Douglas Blatt, and Ceasar Smith (collectively, the "Named Washtech Members"). *See id.* ¶¶ 106, 137, 184. Sawade and Blatt work in computer programming, and Smith is a computer systems and networking administrator—all fields that fall within the STEM designation.[2] *Id.*

[2] Although STEM has no standard definition, the fields in which Washtech members work are commonly considered part of the same job market. Indeed, the 2016 OPT Program Rule consistently refers to the "STEM field" to describe the job market in

Between April 2008 and March 2016, the Named Washtech Members unsuccessfully applied for several jobs in the STEM field with companies that either "placed job advertisements seeking workers on OPT," *see id.* ¶ 140, or sought multiple OPT extension applications for their current workers, *see id.* ¶¶ 186-219. Washtech alleges that all three named members were unable to obtain the jobs for which they had applied because "the 2016 OPT [Program] Rule and the 1992 OPT [Program] Rule allow additional competitors into Washtech members' job market," thereby forcing Washtech members to compete with foreign labor for employment opportunities. Washtech's Opp'n at 15.

In response to Washtech's Complaint, the Government has filed a motion to dismiss, arguing that Washtech lacks standing to challenge both the 1992 and 2016 OPT Program Rules, that Washtech's "challenge to the 1992 Rule is time-barred," and that Washtech "fails to allege any plausible claim for relief as to all counts as [Washtech] is not within the zone-of-interests protected by [the F-1 visa statute] and because [Washtech] fails to plead facts satisfying Rule 12(b)(6)'s plausibility standard." Gov't's Mot. at 2. The Court will address each of the Government's arguments in turn.

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question, and DHS maintains a list of fields within the STEM umbrella on its website pursuant to 81 Fed. Reg. 13,118. *See* Washtech's Opp'n at 8, 13; *see also* STEM Designated Degree Program List, U.S. Immigration Customs and Enforcement, https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf . Sawade, Blatt, and Smith all work in professions that are on DHS's list, *see* Compl. ¶¶ 106, 137, 184, therefore qualifying them as STEM workers.

II. STANDARDS OF REVIEW

A. Rule 12(b)(1) Motion to Dismiss

Federal district courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), and "[a] motion for dismissal under [Federal Rule of Civil Procedure] 12(b)(1) 'presents a threshold challenge to the court's jurisdiction . . . .'" *Morrow v. United States*, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (Walton, J.) (quoting *Haase v. Sessions*, 835 F.2d 902, 906, 266 U.S. App. D.C. 325 (D.C. Cir. 1987)). Thus, a district court is obligated to dismiss a claim if it "lack[s] . . . subject matter jurisdiction[.]" Fed. R. Civ. P. 12(b)(1). Because "it is presumed that a cause lies outside [a federal court's] limited jurisdiction," *Kokkonen*, 511 U.S. at 377, the plaintiff bears the burden of establishing by a preponderance of the evidence that a district court has subject matter jurisdiction, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

In deciding a motion to dismiss based upon lack of subject matter jurisdiction, the district court "need not limit itself to the allegations of the complaint." *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001). Rather, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir.

2005). Additionally, a district court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005)). However, "the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (citation and internal quotation marks omitted).

B. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) tests whether the complaint properly "state[s] a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 8(a) requires only that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). But although "detailed factual allegations" are not required, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)), a plaintiff must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *id.* Rather, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*

(quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint alleging "facts [that] are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

"In evaluating a Rule 12(b)(6) motion, the Court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.'" *Hettinga v. United States*, 677 F.3d 471, 476, 400 U.S. App. D.C. 218 (D.C. Cir. 2012) (quoting *Schuler v. United States*, 617 F.2d 605, 608, 199 U.S. App. D.C. 23 (D.C. Cir. 1979)). However, conclusory allegations are not entitled to an assumption of truth, and even allegations pleaded with factual support need only be accepted insofar as "they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Along with the allegations made within the four corners of the complaint, the court can consider "any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997).

III. ANALYSIS

A. Constitutional Standing

As the starting point of its analysis, the Court must "begin . . . with the question of subject matter jurisdiction." *Am. Freedom Law Ctr. v. Obama*, 106 F. Supp. 3d 104, 108 (D.D.C. 2015) (Walton, J.) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1028, 408 U.S. App. D.C. 291 (D.C. Cir. 2014)); *see also NO Gas Pipeline v. Fed. Energy Regulator Comm'n*, 756 F.3d 764, 767, 410 U.S. App. D.C. 392 (D.C. Cir. 2014) ("It is fundamental to federal jurisprudence that Article III courts such as ours are courts of limited jurisdiction. Therefore, 'we must examine our authority to hear a case before we can determine the merits.'" (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47, 334 U.S. App. D.C. 98 (D.C. Cir. 1999))). "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, __ U.S. __, __, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting U.S. Const., art. III, § 2). "The doctrine of standing gives meaning to these constitutional limits of Article III by identify[ing] those disputes which are appropriately resolved through the judicial process." *Id.* (quoting *Lujan*, 504 U.S. at 560). "Indeed, the Court 'need not delve into [a plaintiff's] myriad constitutional and statutory claims [where] the [plaintiff] lacks Article III standing . . . .'" *Am. Freedom Law Ctr.*, 106 F. Supp. 3d at 108 (quoting *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915, 356 U.S. App. D.C. 327 (D.C. Cir. 2003)). "This is because a court may not 'resolve contested questions

of law when its jurisdiction is in doubt,' as '[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by [the Supreme] Court from the beginning.'" *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)).

The irreducible constitutional minimum of standing contains three elements: (1) an injury in fact; (2) causation; and (3) the possibility of redress by a favorable decision. *Lujan*, 504 U.S. at 560-61. Furthermore, the doctrine of ripeness "shares the constitutional requirement of standing that an injury in fact be certainly impending." *Chlorine Inst., Inc. v. Fed. R.R. Admin.*, 718 F.3d 922, 927, 405 U.S. App. D.C. 272 (D.C. Cir. 2013) (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427, 322 U.S. App. D.C. 135 (D.C. Cir. 1996)). "'The party invoking federal jurisdiction bears the burden of establishing' standing," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411, 133 S. Ct. 1138, 1148, 185 L. Ed. 2d 264 (2013) (citations omitted), and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation," *Susan B. Anthony List*, __ U.S. at __, 134 S. Ct. at 2342 (quoting *Lujan*, 504 U.S. at 561). "In analyzing whether [a plaintiff] has standing at the dismissal stage," the Court must "assume that [the plaintiff] states a valid legal claim and 'must accept the factual allegations in the complaint as true.'" *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029, 358 U.S. App. D.C. 37 (D.C. Cir.

2003) (citations omitted) (quoting *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 871, 353 U.S. App. D.C. 245 (D.C. Cir. 2002)).

Furthermore, an association seeking to establish standing to sue on behalf of its members must further show that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Chamber of Commerce v. EPA*, 642 F.3d 192, 199, 395 U.S. App. D.C. 193 (D.C. Cir. 2011) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002)). Here, the focus of the parties' dispute is whether any of the Named Washtech Members would have standing to sue in his own right, therefore providing Washtech standing to pursue the claims it has asserted.

1. Washtech's Standing to Challenge the 1992 OPT Program Rule

Washtech first challenges the Government's 1992 OPT Program Rule, alleging in Count I of its Complaint that DHS's "policy of allowing non-student aliens to remain in the United States and work on student visas exceeds DHS authority under 8 U.S.C. § 1101(a)(15)(F)(i)." Compl. at ¶¶ 54-61. In moving to dismiss Count I of Washtech's Complaint, the Government contends that Washtech "fails to satisfy any element of Article III standing as to its challenge to the 1992 [OPT Program] Rule." Gov't's Mem. at 34-35

("[Washtech] has not identified a single member suffering a cognizable, let alone redressable, injury caused specifically by the pre-2008 OPT program . . . ."). Washtech, in its opposition, fails to address the Government's argument that it lacks standing to challenge the 1992 OPT Program Rule. *See generally* Washtech's Opp'n at 34-42 (addressing *only* the Government's argument that its challenge to the 1992 OPT Program Rule is time-barred, not the Government's arguments that its challenge to the 1992 OPT Program Rule is non-justiciable). Accordingly, the Court may treat the Government's position regarding Washtech's lack of standing to pursue its challenge to the 1992 OPT Program Rule as conceded. *See Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) (Walton, J.) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citations omitted)), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004).

In any event, the Court concludes that Washtech has failed to establish "that at least one identified member ha[s] suffered or would suffer harm" resulting from the 1992 OPT Program Rule. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009). In its Complaint, Washtech represents that its named members applied for STEM jobs from April 2008 until March of 2016. *See* Compl. ¶¶ 106-219. During that period of time, the 2008 OPT Program Rule was in effect and remained in effect after August 12, 2015, when another member of this

Court stayed *vacatur* of the 2008 OPT Program Rule until DHS promulgated the 2016 OPT Program Rule, *see Washtech II*, 156 F. Supp. 3d at 149, which DHS did not do until March 11, 2016, *see* 81 Fed. Reg. 13,040. Therefore, the Court assumes that Washtech's reliance on these job applications from its named members implicates the OPT Program extension provided by the 2008 OPT Program Rule, which is now defunct, and not the OPT Program established under the 1992 OPT Program Rule. Notwithstanding this assumption, Washtech's Complaint suggests that its named members were unable to obtain the jobs for which they had applied because those jobs were filled by beneficiaries of the *extension* provided by 2008 OPT Program Rule, rather than beneficiaries of the original 1992 OPT Program Rule. *See, e.g.*, Compl. ¶¶ 109-10, 138-40 (alleging that a named member applied for a STEM job with a particular employer followed by the number of applications for OPT extensions made to the Citizenship and Immigration Services for workers already employed by that employer).

Consequently, the Government correctly notes that "[n]othing in [Washtech's] Complaint articulates factual matter connecting any alleged injury to the [1992] OPT [P]rogram." Gov't's Mot. at 35. Thus, because Washtech failed to address the Government's argument that its claims regarding the 1992 OPT Program Rule are non-justiciable, and because Washtech has not identified a member of its association who has suffered any injury arising from the 1992 OPT Program and who would have standing to sue in his or her own right, Washtech does not have standing to challenge

the 1992 OPT Program Rule on behalf of its members.[3] Accordingly, the Court must dismiss Count I of Washtech's Complaint.[4]

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[3] The parties devote a significant portion of their submissions on whether Washtech's challenge to the 1992 OPT Program Rule is time-barred by the six-year statute of limitations period provided by 28 U.S.C. § 2401(a), or is exempt from this statute of limitations period based on the reopening doctrine, which permits pursuit of an otherwise time-barred challenge to a prior rule if "the agency has undertaken a serious, substantive reconsideration of the existing rule . . . [or] substantively chang[ed it]." *Mendoza v. Perez*, 754 F.3d 1002, 1019 n.12, 410 U.S. App. D.C. 210 (D.C. Cir. 2014) (internal quotation marks and citation omitted); *see also* Washtech's Opp'n at 34-42; Gov't's Reply at 15-18. Having concluded that Washtech does not have standing to challenge the 1992 OPT Program Rule, the Court deems it unnecessary to assess whether DHS's promulgation of the 2016 OPT Program Rule substantively changed the 1992 OPT Program Rule, such that it reopened the statute of limitations to challenge the 1992 OPT Program Rule.

[4] Washtech argues that "[a]n order dismissing Washtech's challenge to the entire OPT program would be inconsistent with the [District of Columbia] Circuit's holding in *Washtech II* that the issues with the 2008 OPT [Program] Rule are moot." Washtech's Opp'n at 42. In other words, Washtech claims that "[i]f [it] can only challenge the provisions of the 2016 OPT [Program] Rule (and not the entire policy of authorizing guest[-]workers on F-1 student visas), the only thing [it] can accomplish in this action is to invalidate the 2016 OPT [Program] Rule." *Id.* Therefore, Washtech contends that "[v]acating the 2016 OPT [Program] Rule would then restore the regulatory scheme that was previously in place: the 2008 OPT [Program] Rule that the [District of Columbia] Circuit held was moot." *Id.* However, this is not so because the Circuit, in dismissing the appeal of *Washtech II* as moot, stated that "the 2008 [OPT Program] Rule is no longer in effect." 650 Fed. Appx. at 14. Thus, invalidating the 2016 OPT

2. Washtech's Standing to Challenge the 2016 OPT Program Rule

For Article III purposes, the injury-in-fact requirement "helps to ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List*, __ U.S. at __, 134 S. Ct. at 2341 (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (citations and quotations omitted). Furthermore, there must be "a sufficient causal connection between theinjury and the conduct complained of, and [ ] a likelihood that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks and citation omitted).

To demonstrate standing to challenge the 2016 OPT Program Rule, Washtech alleges that its named members have suffered the following five injuries: (1) a deprivation of "procedural right[s] to notice and comment [required by the APA]," Compl. ¶ 88, (2) "discrimination because [the 2016 OPT Program Rule] requires employers to provide mentoring programs to OPT participants that are not available to Washtech members," *id.* ¶ 89, (3) "unfair competition with foreign workers" due to taxation differences between the

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Program Rule would not leave in effect the 2008 OPT Program Rule, as that rule no longer exists; rather, the 1992 OPT Program Rule would remain in effect. Accordingly, the Court finds that this argument advanced by Washtech has no merit.

H--B1 visa program and the F-1 visa program, *id.* ¶ 87, (4) a deprivation of "statutory labor protective arrangements," *id.* ¶ 85, and (5) "increased competition [between] Washtech [m]embers [and] foreign workers," *id.* ¶ 86. Additionally, Washtech contends that these injuries are traceable to the 2016 OPT Program Rule and are redressable by a favorable decision from the Court. *See generally* Compl. The Court will address each of Washtech's alleged injuries to its named members in turn.

a. Deprivation of Procedural Rights Injury

Washtech alleges that "DHS . . . violated [its] procedural rights . . . by failing to put the question of whether the OPT [P]rogram should be expanded beyond a year to notice and comment." Compl. ¶ 226. The Government argues that Washtech's allegation is flawed because it has not "establish[ed] an injury-in-fact flowing from the 2016 [OPT Program] Rule under the procedural injury doctrine," and because "DHS explicitly sought notice and comment on precisely this issue, and many commenters commented on exactly this issue, including [Washtech's] two counsel in this case." Gov't's Mem. at 32 (citing 80 Fed. Reg. at 63,382, 63,385, 63,394).

"Where [a] plaintiff[ ] allege[s] [an] injury resulting from [the] violation of a *procedural* right afforded to [him or her] by statute and designed to protect [his or her] threatened concrete interest, the courts relax—while not wholly eliminating—the issues of imminence and redressability but not the issues of injury in fact or causation." *Ctr. for Law & Educ. v. Dep't of*

Educ., 396 F.3d 1152, 1157, 364 U.S. App. D.C. 416 (D.C. Cir. 2005). Therefore, a plaintiff will "have standing only if . . . (1) the government violated [his or her] procedural rights designed to protect [his or her] threatened concrete interest, and (2) the violation resulted in injury to [his or her] concrete, particularized interest." *Id.*; *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65, 320 U.S. App. D.C. 324 (D.C. Cir. 1996) ("[A] procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.").

Washtech stumbles at the outset in its attempt to establish a procedural injury because it has "failed to show that a procedural right *sufficient for standing* has been violated." *Ctr. for Law & Educ.*, 396 F.3d at 1157. Washtech cannot genuinely demonstrate that DHS omitted or failed to subject the question of whether the OPT Program should be expanded beyond twelve months to notice and comment because DHS explicitly submitted this question for notice and comment. *See* 80 Fed. Reg. at 63,385-86 (explaining the proposed increase of the STEM OPT extension period to twenty-four months, requesting "public comment on the proposed [twenty-four]-month STEM OPT extension," and noting a "particular[ ] interest[ ] in public input regarding whether [twenty-four] months is the appropriate duration . . . or whether a shorter or longer duration is preferable, and why").

Despite this critical oversight, Washtech argues that "DHS's reliance in the 2016 OPT [Program] Rule on its conclusions made without public notice and

comment in the 2008 OPT [Program R]ule deprived Washtech of its procedural right to proper public notice and comment." Washtech Opp'n at 19-20 (citing *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 281 F. Supp. 2d 1, 37 (D.D.C. 2003) for the proposition that "[i]f an agency relies on substantive conclusions made in a rule vacated for failure to give notice and comment in subsequent rulemaking, it deprives the plaintiff of its procedural rights."). However, in *Haw. Longline Ass'n*, another member of this Court held that an agency's subsequent rule was arbitrary and capricious because the rule "rested on the conclusions of the vacated and unlawful [prior rule] without reevaluating the merits of its analysis." 281 F. Supp. 2d at 31. Here, DHS did not rely on its conclusions regarding the prior 2008 OPT Program Rule. Rather, as it relates to the question of whether the OPT Program should be expanded beyond twelve months, the 2008 OPT Program Rule permitted an extension of seventeen months, whereas the 2016 OPT Program Rule provides for a twenty-four month extension, which was adopted after consideration of numerous comments. *See* 81 Fed. Reg. at 13040. Consequently, because Washtech is unable to demonstrate that DHS denied Washtech's procedural right to notice and comment, and because DHS did not rely on its conclusions regarding the prior 2008 OPT Program Rule, the Court finds that Washtech has not demonstrated a cognizable injury caused by the deprivation of a procedural right sufficient to confer standing to challenge the 2016 OPT Program Rule.

b. Employment Discrimination Injury

Additionally, Washtech alleges that its members face employment discrimination because the "2016 OPT [Program] Rule requires employers and universities to provide foreign workers under the OPT [P]rogram mentoring programs without requiring such programs be made available to Washtech members and other American workers," and because "employers seek[ ] OPT workers to the exclusion of Americans." Compl. ¶ 224-25. The Government responds that Washtech's members do not have a "legally protected interest in receiving mentoring programs simply because someone else in the population benefits from such programs." Gov't's Mem. at 30 (internal quotation marks omitted) (citing *Lujan*, 504 U.S. at 560). The Government also argues that "the alleged illegal acts of third parties do not create Article III standing to challenge a rule that does not permit the acts to occur." *Id.* at 31. The Court agrees with the Government.

Washtech's "mere assertion that something unlawful benefited [its] competitor[s]," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, __, 133 S. Ct. 721, 731, 184 L. Ed. 2d 553 (2013) (citations omitted), and allegedly constitutes employment discrimination is not sufficient to demonstrate a legal cognizable injury that is particularized and concrete, *see id.* Nonetheless, Washtech asserts that "the 2016 OPT [Program] Rule effectively mandates disparate treatment for American workers" because "DHS did not require that employers make the same [training] programs available to American workers." Washtech's Opp'n at 20. However, the theory that "a market participant is injured for Article III

purposes whenever a competitor benefits from something allegedly unlawful . . . [is] a boundless theory of standing" that has "never [been] accepted." *Nike, Inc.*, __ U.S. at __, 133 S. Ct. at 731. This Court therefore declines this theory of standing now.[5]

Furthermore, in promulgating the 2016 OPT Program Rule, DHS received several comments which suggested that the 2016 OPT Program Rule's Training Plan "would induce employers and universities to discriminate against [United States] workers" and would also "discriminate against [United States] citizen and lawful permanent resident students because it would not require employers to offer an identical 'program' to such students." 81 Fed. Reg. at 13097. In response,

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[5] Washtech cites various cases for the proposition that "disparate treatment is an injury in fact." Washtech's Opp'n at 21 (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); *Davis v. Guam*, 785 F.3d 1311 (9th Cir. 2015); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991)). But, Washtech's reliance on these cases is of no avail because standing in each of those cases "was based on an injury more particularized and more concrete than the mere assertion that something [purportedly] unlawful benefited the plaintiff's competitor." *Nike, Inc.*, __ U.S. at __, 133 S. Ct. at 731. Moreover, each of the cases cited involved the alleged denial of equal protection in violation of the Equal Protection Clause of the United States Constitution. In this case, Washtech does not assert an equal protection violation, but rather claims that the 2016 OPT Program Rule is arbitrary and capricious because it "requires employers to provide foreign guest-workers OPT mentoring programs without requiring that such program be provided to American workers." Compl. ¶ 82.

DHS noted that the Training Plan established by the 2016 OPT Program Rule "requires an employer to certify that the training conducted pursuant to the plan complies with all applicable Federal and State requirements relating to employment." 81 Fed. Reg. at 13098. Also, DHS stated that

> [n]either the rule nor the Training Plan . . . requires or encourages employers to exclude any of their employees from participating in training programs. And insofar as an employer may decide to offer training required by the regulation only to STEM OPT students, doing so does not relieve that employer of any culpability for violations of . . . any . . . federal or state law related to employment. Moreover, the training plan requirement is not motivated by any intention on the part of DHS to encourage employers to treat STEM OPT students preferentially. Rather DHS is requiring the Training Plan to obtain sufficient information to ensure that any extension of F-1 student status under this rule is intended to augment the student's academic learning through practical experience and equip the student with a broader understanding of the selected area of study.

81 Fed. Reg. at 13098. Thus, contrary to Washtech's assertion, *see* Washtech's Opp'n at 20, the Court does not find that the 2016 OPT Program Rule "mandates disparate treatment for American workers *vis-à-vis* OPT [Program] guest[-]workers by requiring the latter to receive the benefit of mentoring," *id.* Accordingly, the Court does not find Washtech's allegation of

employment discrimination to constitute an injury sufficient to confer standing to challenge the 2016 OPT Program Rule.

c. Unfair Competition Injury

Washtech also asserts that its "members suffer an injury in fact from the OPT regulations because they create unfair competition from alien guest[-]workers." Washtech's Opp'n at 17 (citing Compl. ¶ 87). Specifically, Washtech asserts that " [a]liens on F-1 visas are classified as [n]on-[r]esident [a]liens so that they and their employers do not pay Medicare and Social Security taxes as required for Washtech members [and t]his taxation treatment makes workers on OPT inherently cheaper to employ than Washtech members." Compl. ¶¶ 220-21. The Government argues in response that "it is [the] specific, explicit Acts of Congress, not the 2016 Rule, which create[] any differential tax treatment," Gov't's Reply at 12, and such third party acts are not sufficient to confer Washtech standing to challenge the 2016 OPT rule, *see* Gov't's Mem. at 27-28. The Court agrees.

"[T]he Supreme Court has made clear that a plaintiff's standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938, 361 U.S. App. D.C. 257 (D.C. Cir. 2004), *abrogated on other grounds by Perry Capital LLC v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017). For instance, in *Simon v. Eastern Kentucky Welfare Rights Organization*, the

plaintiffs, which were organizations that represented the interests of low-income individuals, challenged an IRS "Revenue Ruling [that] allow[ed] favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents." 426 U.S. 26, 28, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976). In holding that the plaintiffs lacked standing, the Supreme Court concluded that the regulated hospitals, not the IRS Revenue Ruling, caused the plaintiffs' asserted injury of being denied access to certain hospital services. *See id.* at 40-46. The Court also determined that the plaintiffs' theory that the IRS's policy encouraged hospitals to provide fewer services to indigents was "speculative [as to] whether the desired exercise of the court's remedial powers . . . would result in the availability to [the plaintiffs] of such services." *Id.* at 43.

Similarly, Washtech's "unadorned speculation," *id.* at 44, that DHS's 2016 OPT Program Rule creates unfair competition because of the taxation differences between foreign labor employed under the F-1 visa provision and domestic labor is too speculative to confer Washtech standing. Washtech argues that its "members do not have to show any job loss or that they would have (or might have) obtained a job absent this unequal [tax] treatment. [Rather, it contends that it] only needs to demonstrate that DHS's rule creates unequal treatment, which the unequal rates of taxation plainly provides." Washtech's Opp'n at 18 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). However, Washtech's reliance on *Pena* as support for its position is misplaced. In *Pena*, the plaintiff argued that "the Federal Government's practice of giving general

contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals," was unconstitutional under the Fifth Amendment's Due Process and Equal Protection Clauses. 515 U.S. at 204. The Supreme Court noted that the plaintiff's "claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is 'particularized' as to [the plaintiff]." *Id.* at 211 ("The injury in cases of this kind is that a discriminatory classification prevents[s] the plaintiff from competing on an equal footing. The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing." (internal quotation marks and citations omitted)). Here, Washtech has not alleged any equal protection or due process violations, and it has not alleged that the 2016 OPT Program Rule provides financial incentives to employers to discriminate based on race or some other impermissible form of discrimination. *See* Compl. ¶¶ 220-23. Rather, Washtech asserts that the taxation treatment for F-1 visas "makes workers on OPT inherently cheaper to employ than Washtech members." *Id.* ¶ 221. Thus, because the facts in *Pena* are not parallel to the facts here, and because the interest at issue in *Pena*—the constitutional prohibition against racial discrimination—greatly exceeds Washtech's concerns, *Pena* does not support Washtech's proposition that it only needs to

demonstrate that its members suffer unequal treatment to show an injury in fact sufficient for standing.

Washtech also contends that the tax differences stemming from the 2016 OPT Program Rule create a "powerful incentive for employers to violate the discrimination provisions of the [Immigration and Nationality Act (the 'INA')]," Washtech's Opp'n at 19, and to "place [unlawful] job advertisement[s] seeking alien guest[-]workers on the OPT [P]rogram to the exclusion of American workers," *id.* at 18. However, nothing in the 2016 OPT Program Rule "permits or authorizes," *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 940, employers to discriminatorily act in violation of the INA, *see generally* 81 Fed. Reg. at 13,040. In any event, Washtech's position is flawed because the 2016 OPT Program Rule does not itself create the unequal tax treatment that Washtech identifies. As the Government correctly notes, Congress enacted the tax exemptions for F-1 visa holders more than fifty years before DHS implemented the OPT Program. *See* Gov't's Mem at 27-28. Thus, Washtech cannot demonstrate that its alleged unfair competition injury was caused by or is traceable to the 2016 OPT Program Rule, or that a favorable decision by this Court invalidating the 2016 OPT Program Rule would redress its alleged injury, as the taxation treatment for F-1 visa holders would still remain. As the Supreme Court has noted, "the 'case or controversy' limitation of [Article] III still requires that a federal court act only to redress [an] injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 41-42.

Simply, Washtech invites the Court to speculate as to the "myriad [of] economical, social, and political realities," *Arpaio v. Obama*, 797 F.3d 11, 21, 418 U.S. App. D.C. 163 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 900, 193 L. Ed. 2d 792 (2016), *reh'g denied*, 136 S. Ct. 1250, 194 L. Ed. 2d 247 (2016), relating to the complexities of the tax code that either benefits or disadvantages employers,[6] how third party employers select and hire employees, and whether these third party employers are engaging in unlawful actions. The Court declines that invitation, as it is too speculative and attenuated for the Court to infer that Washtech members have suffered an injury resulting from unfair competition due to differential taxation treatment purportedly created by the 2016 OPT Program Rule. Accordingly, the Court concludes that Washtech does not have standing based on the alleged injury of unfair competition to challenge the 2016 OPT Program Rule.

d. Deprivation of Statutory Labor Protective Arrangements Injury

Washtech next alleges that "DHS's OPT regulations allow college-educated labor in computer fields to

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[6] In the 2016 OPT Program Rule, DHS noted the receipt of voluminous comments regarding taxation issues. *See* 81 Fed. Reg. at 13056-58. Among those comments were observations that "any employer savings related to tax laws are at least in part offset by administrative costs, legal fees, and staff time related to securing the authority under [United States] immigration law to employ the foreign-born worker," and that some F-1 visa holders "eligible for STEM OPT extensions, may not be exempt [from taxes] because they have already been in the United States for parts of five calendar years." *Id.* at 13058.

work in the job market without complying with the statutory protections under the H-1B program, denying [its] members [ ] those protections." Compl. ¶ 97. Through its opposition, Washtech appears to argue that it has union status standing due to the loss of labor-protective arrangements for its members to challenge the 2016 OPT Program Rule. *See* Washtech's Opp'n at 9-10, 13. The Government contends that the cases Washtech relies upon are distinguishable from the facts in this case because "they arise in the context of labor-protective arrangements governing unions and the Interstate Commerce Commission, a unique body of administrative law inapplicable here." Gov't's Reply at 11 (noting that Washtech failed to cite any cases applying this reasoning to the INA). The Government also argues that

> the fact that the H-1B visa provision, which governs the admission of nonimmigrants for *employment* purposes, contains explicit domestic labor protections, in no way creates a labor protection requirement for a separate, unrelated statute, the F-1 provision, which contains no such explicit requirement, and governs the entire different statutory purpose of the admission of nonimmigrant[ ] for *educational* purposes.

Id. at 11-12 (citations omitted).[7]

[7] Additionally, the Government argues that Washtech's "claim alleging deprivation of alleged statutory protections 'goes to the merits,' and cannot serve as the basis of [Washtech's] injury theory" for the purposes of establishing standing. Gov't's Reply at 10 (citing *Sherley v. Sebelius*, 610 F.3d 69, 73-74, 391 U.S. App. D.C.

Here, Washtech has not met the standard required to establish an injury to itself or its members sufficient for Article III purposes. Washtech contends that "it is the denial of the statutory protection itself that is the injury in fact, not the secondary question of whether that denial causes a harm, such as being hired for a specific job or winning a contract." Washtech's Opp'n at 10; *see also id.* at 11 ("The injury here is that DHS OPT regulations deprive Washtech members—and American STEM workers generally—of numerous statutory protections that should rightly be applied to such foreign labor."). As support, Washtech relies upon *Warth v. Seldin*, 422 U.S. 490, 514, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), for the proposition that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer [judicial] standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of [a] statute." *Id.* at 10. In addition, Washtech cites *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 322 U.S. App. D.C. 45 (D.C. Cir. 1996), which observed that this Circuit has "repeatedly held that the loss of labor-protective arrangements may by itself afford a basis for standing." *Id.* at 9 (quoting *Bhd. of Locomotive Eng'rs*, 101 F.3d at 724 (noting that "as long as there is a reasonable possibility that

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258 (D.C. Cir. 2010)). However, in noting this limitation, the Circuit was referring to "[t]he requirement of a protected competitive interest." *Sherley*, 610 F.3d at 72. Thus, because Washtech's allegations of denial of statutory protections is not synonymous with the requirement of a protected competitive interest, it is unnecessary for the Court to consider this argument.

union members will receive and benefit from labor-protective arrangements, the loss of those arrangements stemming from [government action] provides a sufficient basis for union standing")); *see also id.* at 10 (citing *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 852-55, 371 U.S. App. D.C. 463 (D.C. Cir. 2006), and *Simmons v. Interstate Commerce Comm'n*, 934 F.2d 363, 367, 290 U.S. App. D.C. 75 (D.C. Cir. 1991)).

The Court finds that Washtech's reliance on these two cases is to no avail because the circumstances in both *Seldin* and *Brotherhood of Locomotive Engineers* are distinguishable from the facts presented in this case. In *Seldin*, the plaintiffs challenged a "town's zoning ordinance . . . [that] effectively excluded persons of low and moderate income from living in the town, in contravention of" their constitutional rights. 422 U.S. at 493. Particularly, one of the organizational plaintiffs argued that a select group of its members were "deprived of the benefits of living in a racially and ethnically integrated community . . . as a result of the persistent pattern of exclusionary zoning practiced," and therefore, "such deprivation is sufficiently palpable injury to satisfy the Art[icle] III case or controversy requirement." *Id.* at 512. The Supreme Court, however, held that this organizational plaintiff did not have standing because it did "not assert on behalf of its members any right of action under the 1968 Civil Rights Act." *Id.* at 513. And, although the Court "observed [that] Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the

absence of [the] statute," the Court observed that "[n]o such statue [was] applicable." *Id.* at 514.

Also, in *Brotherhood of Locomotive Engineers*, the union plaintiffs "petition[ed] for review of three Interstate Commerce Commission decisions in which the Commission found it lacked jurisdiction over several railroad transactions." 101 F.3d at 719-20. At the outset, the Circuit noted that "[t]he injury at issue is not the job loss resulting from the transactions, but rather the loss of coverage by labor-protective arrangements flowing from the [Commission's] determination that the transactions fall outside its jurisdiction." *Id.* at 723-24. In determining that the union plaintiffs "ha[d] demonstrated [an] injury-in-fact" with respect to only two of the Commission's decisions, the Circuit concluded that "the labor-protective provisions at stake [were] mandatory," which "create[d] an extremely strong presumption that Union members suffered a concrete and immediate injury when the [Commission] found it lacked jurisdiction." *Id.* at 724 (analyzing the effect of *Simmons* on the facts presented to the court). The Circuit also determined that "because a reasonable possibility of job dislocation exits, labor-protective arrangements would have been meaningful and valuable." *Id.*; *see also id.* at 725 ("In mandatory-protection cases, denial of jurisdiction necessarily entails a loss of labor protection; as long as there is any reasonable possibility of economic dislocation that would make such labor protection meaningful, workers who would have been protected suffer concrete and immediate injury when the [Commission] refuses jurisdiction.").

In this case, Washtech has not asserted any right of action under a statute established by Congress that creates "a statutory right or entitlement the alleged deprivation of which can confer standing," *Seldin*, 422 U.S. at 514, nor has Washtech shown that there are "labor-protective provisions at stake [that] are mandatory," *Bhd. of Locomotive Eng'rs*, 101 F.3d at 724. Washtech argues that "Congress established the H-1B visa program to admit college-educated foreign labor, the very type of guest[-]worker labor allowed to enter the [United States] job market under OPT." Washtech's Opp'n at 11. And, "[t]he H-1B visa program requires foreign labor to respect domestic labor protections prescribed by Congress." *Id.* (citations omitted). According to Washtech, "the 2016 OPT [Program] Rule . . . allows alien guest[-]workers to enter Washtech members' job market without complying with the statutory protections established for such labor." *Id.* at 12; *see also id.* at 12 ("DHS's cancellation of statutory protections (by using the OPT [P]rogram to circumvent the labor protections under the H-1B program) confers standing on those whom Congress intended to protect: American workers including [its] members."). But, while the H-1B visa program targets foreign labor already in the workforce, Congress specifically created the F-1 visa program as an additional program that "authorizes admission [into the United States] to *bona fide* students, who are solely pursuing a course of study, at an approved academic institution that will report termination of attendance." *Id.* at 1 (citing 8 U.S.C. § 1101(a)(15)(F)(i)). In so doing, Congress elected not to include language providing for domestic labor protections or to condition entry into the

United States on the entry having no impact on domestic labor. *See* § 1101(a)(15)(F). In fact, throughout the long history of the F-1 visa program, including amendments and revisions, Congress has repeatedly declined to include any provision that requires analogous domestic labor protections. Simply, Washtech cannot compel the Court to infer that Congress intended to provide domestic laborers, such as Washtech's members, labor protections under the F-1 visa program, when Congress itself had multiple opportunities to do so, but chose not to. Thus, the Court finds that the actual complaint of Washtech's alleged deprivation of statutory protections injury is not against DHS, but rather against Congress, who is not a party in this case.[8]

Consequently, Washtech has not demonstrated that it has a statutory right or entitlement to statutory labor protections or that any such labor protection provisions are mandatory under the F-1 visa provision. Therefore, the Court concludes that Washtech has not

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[8] Washtech also cites *Clinton v. New York*, 524 U.S. 417, 433, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) as additional support for its proposition that the deprivation of a statutory right confers standing. *See* Washtech's Opp'n at 11-12. In *Clinton*, the Court noted its prior ruling which held that plaintiffs have standing when the injury alleged is harm resulting from the deprivation of a benefit in the negotiation process and "not the ultimate inability to obtain the benefit." 524 U.S. at 433 n.22 (citation omitted). However, the Court finds that *Clinton* does not weigh in Washtech's favor because Washtech has not alleged, and is most likely unable to show, that its members engage in any negotiation processes with respect to applying for and obtaining available jobs in the STEM labor market.

demonstrated that its members have suffered an injury-in-fact based on alleged deprivation of statutory protections sufficient to confer standing to challenge the 2016 OPT Program Rule.

e. Increased Competition Injury

Finally, Washtech asserts that its members have suffered an injury-in-fact due to increased competition because the 2016 OPT Program Rule "allows additional foreign workers to compete with [its] members that would not be in the job market but for DHS regulations." Compl. ¶ 98. Invoking the requirements for the doctrine of competitor standing, the Government argues that Washtech fails to show an actual or imminent injury resulting from the 2016 OPT Program Rule because its allegations "are *backward* looking, focusing exclusively on events that precede the existence of the 2016 [OPT Program] Rule, that arise entirely under the now-defunct 2008 regime." Gov't's Reply at 4. The Government also argues that Washtech's named members are not "direct and current" competitors with STEM OPT recipients because, as employees with over thirty years of experience in the STEM field, they do not compete with students applying for entry-level jobs. Gov't's Reply at 3.

"The doctrine of competitor standing addresses the first requirement [of standing] by recognizing that economic actors 'suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition' against them." *Sherley v. Sebelius*, 610 F.3d 69, 72, 391 U.S. App. D.C. 258 (D.C. Cir. 2010) (alterations in original) (quoting

La. Energy & Power Auth. v. Fed. Energy Regulatory Comm'n, 141 F.3d 364, 367, 329 U.S. App. D.C. 400 (D.C. Cir. 1998)). To establish competitor standing, a party in a particular market must "show an actual or imminent increase in competition" in the relevant market, *Sherley*, 610 F.3d at 73; *see also Mendoza*, 754 F.3d at 1011, and "demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action," *Mendoza*, 754 F.3d at 1013 (quoting *KERM, Inc. v. FCC*, 353 F.3d 57, 60, 359 U.S. App. D.C. 200 (D.C. Cir. 2004) (emphasis in original)); *see also Arpaio*, 797 F.3d at 23 ("Plaintiffs may claim predictable economic harms from the lifting of a regulatory restriction on a 'direct and current competitor,' or regulatory action that enlarges the pool of competitors, which will 'almost certainly cause an injury in fact' to participants in the same market. But [this Circuit] ha[s] not hesitated to find competitor standing lacking where the plaintiff's factual allegations raised only 'some vague probability' that increased competition would occur." (internal citations omitted)).

Washtech asserts that its "injury in fact is the mere 'exposure to competition' created by [the] regulatory actions." Washtech's Opp'n at 14 (citing *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308, 350 U.S. App. D.C. 40 (D.C. Cir. 2001)). And, Washtech notes that "[a] plaintiff does not have to demonstrate specific lost sales to establish an injury in fact from increased competition; only that the agency action permits a competitor to enter the market." *Id.* Indeed, "an individual in the labor market for [STEM] jobs would have standing to challenge [the]

Department of [Homeland Security's] rules that lead to an increased supply of labor—and thus competition—in that market." *Mendoza*, 754 F.3d at 1011 (discussing prior case law). It cannot be credibly argued that DHS's 2016 OPT Program Rule has not led to an influx of employees in the STEM labor market, and thus, an increase in competition. *See* Press Release, Impact Report: 100 Examples of President Obama's Leadership in Science, Technology, and Innovation, The White House (June 21, 2016), https://www.whitehouse.gov/the-press-office/2016/06/21/impact-report-100-examples-president-obamas-leadership-science (last visited Jan. 26, 2016) (noting that, as of June 2016, DHS estimated that there were 34,000 STEM students already participating in the OPT Program as a result of the now-defunct 2008 OPT Program Rule and expected an estimated growth to 92,000 participants within ten years).[9] Therefore, Washtech does have standing to challenge the 2016 OPT Program Rule under the

[9] "In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059, 378 U.S. App. D.C. 355 (D.C. Cir. 2007) (citation omitted). And, "public records and government documents available from reliable sources," *Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015) (citing *Hamilton v. Paulson*, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008), *rev'd on other grounds*, 666 F.3d 1344, 399 U.S. App. D.C. 77 (D.C. Cir. 2012)), are "among the documents 'subject to judicial notice on a motion to dismiss,'" *Latson v. Holder*, 82 F. Supp. 3d 377, 382 (D.D.C. 2015) (citation omitted). Accordingly, the Court takes judicial notice of this governmental document.

doctrine of competitor standing, if it can identify members who are "direct and current competitor[s]" in the STEM labor market who "may be adversely affected by" the 2016 OPT Program Rule. *Mendoza*, 754 F.3d at 1011.

To this end, Washtech argues that its named members are direct and current competitors with beneficiaries of the 2016 OPT Program Rule because, even though currently employed, they remain "active participants in the programming and system administration job market." Washtech's Opp'n at 23. Nonetheless, the Government contends that Washtech "provide[s] no basis for concluding [that its named members] 'personally compete[] in the same arena' as beneficiaries of the 2016 [OPT Program] Rule, . . . let alone that they do so *directly* and *currently*." Gov't's Mem. at 16 (citations omitted) (first alteration in original). In assessing this issue, the Court finds the District of Columbia Circuit's decision in *Mendoza* to be particularly instructive.

In *Mendoza*, the Circuit found that former sheepherders had standing to challenge Department of Labor regulations affecting the wages and working conditions in the herding market because the former herders sought to return to the market, but were prevented from doing so by increased competition from foreign labor as a result of the regulations. *See* 754 F.3d at 1011-14. In its assessment, the Circuit concluded that the plaintiffs, who "averred [that] they [were] experienced and qualified herders" and "ha[d] not worked as herders since 2011 and may not have applied for specific herder jobs since that time," made a clear affirmation of "their desire to work as herders

and . . . their intention to do so if wages and working conditions improve." *Id.* at 1013. The Circuit noted that "[t]he plaintiffs are not removed from the herder labor market simply because they do not currently work as herders and have not filled out formal job applications. A person can involve himself in a job market by means other than submitting formal applications. Job searches are not such rigid processes. The plaintiffs continue to monitor the herder job market with the intention of applying for work in the industry if conditions improve . . . . And because the plaintiffs retained ties to the industry, it was reasonable for them to conclude that formally applying for jobs would be futile when they would not accept a job offering the prevailing wage and working conditions.

Id. at 1014 (internal citations omitted). In sum, the Circuit concluded that the *Mendoza* plaintiffs "presented more than 'general averments' and 'conclusory allegations.'" Rather, they "attested to specific experience that qualifies them to work as herders; the particular working conditions that led them to leave the industry; the specific wages and conditions they would require to accept new employment as workers; [and] the manner in which they have kept abreast of conditions in the industry." *Id.*

In light of the Circuit's reasoning in *Mendoza*, the Court finds for the following reasons Washtech's allegations, albeit not in significant depth, sufficient to demonstrate that its named members are in direct and current competition with beneficiaries of the 2016 OPT Program Rule. In its Complaint, Washtech proffers evidence of its named members applying for STEM jobs and evidence of those employers seeking

extensions of its current OPT employees. *See* Compl. ¶¶ 106-219. But, unlike the plaintiffs in *Mendoza*, Washtech has not provided the Court with any affidavits from its named members that indicate their involvement in the STEM labor market. Nonetheless, Washtech asserts that its named members "are members of a labor union, . . . are currently working in specific fields in which aliens with degrees under the 2016 OPT [Program] Rule are authorized for extended work periods, and frequently apply for jobs in those fields." Washtech's Opp'n at 22-23 (citing Compl. ¶¶ 106-209). Given the broad interpretation of what amounts to participating in the relevant market under the Circuit's decision in *Mendoza, see* 754 F.3d at 1013 ("We believe the district court took too narrow a view of what qualifies as participating in the herding labor market."), Washtech has clearly identified members that actively participate in the STEM labor market, and therefore, are in direct and current competition with beneficiaries of the 2016 OPT Program Rule.

Even on this record, the Government attempts to distinguish the facts in *Mendoza* from those at issue in this case. The Government argues that the *Mendoza* plaintiffs "were 'willing and available to work as herders' in the precise *types* of jobs foreign laborers had *already taken* at depressed wages." Gov't's Reply at 7 (quoting *Mendoza*, 754 F.3d at 1014). Washtech's named members, the Government continues, have more experience than entry-level STEM OPT participants and thus, would not accept the same types of jobs. *See id.* at 6 ("[I]t is impossible to conclude, even at the motion to dismiss stage, that three extremely *experienced* STEM workers are in fact *direct* and

current competitors with recent graduates of [United States] educational program engaged in on-the-job training, either as STEM OPT participants, or as OPT participants generally." (footnote omitted)). But, even though the Circuit in *Mendoza* recognized that the plaintiffs there were "experienced and qualified" and chose not to apply for sheep herding jobs at the depressed wages and working conditions, it did not consider the plaintiffs' experience level in assessing their "*direct* and *current* competitor" status in the sheep herding labor market. 754 F.3d at 1013. The Government's argument overextends the requirements articulated in *Mendoza*, and taking Washtech's factual allegations to be true, as the Court must at this stage in litigation, it is clear from Washtech's Complaint that its named members have applied on multiple occasions for jobs at companies either specifically seeking OPT recipients and/or filing OPT extensions on behalf of current employees. *See, e.g.*, Compl. ¶¶ 109-10, 138-40.

In addition, the Government argues that since Washtech's named members were not seeking employment as of the date of the Complaint, their "claims of past job applications do 'nothing to establish a real and immediate threat that [Washtech's members] would again be [injured in the future.]'" Gov't's Mem. at 18 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). Although the three named members were employed at the time, the Complaint sufficiently alleges that all three remain members of the STEM job market, noting the temporary nature of their work and the fact that their "job search is continuous," such that they are "constantly

seeking new employment opportunities." *See, e.g.*, Compl. ¶¶ 107, 184. This is directly parallel to the circumstances in *Mendoza*, which held that the plaintiffs were still members of the sheep herding market because they "continue[d] to monitor the herder job market with the intention of applying for work in the industry if conditions improve[d]," even though they had not worked in or applied for positions in that market for several years. 754 F.3d at 1014. The Circuit therefore considered the sheep herders' current employment status (or lack thereof) irrelevant to the standing inquiry. *Id.*

Washtech has also pleaded facts sufficient to establish causation and redressability. The Government argues that "[n]othing in [Washtech's] Complaint demonstrates that the 2016 [OPT Program] Rule is responsible for [Washtech's named] members' underemployment," Gov't's Mem. at 22, which "can be attributed to [a] myriad [of] potential and interlocking causes," such as "their insufficient qualifications or skills, macroeconomic trends, increased industry demand for entry-level rather than experienced computer programmers or other factors," *id.* at 23. The Government also argues that Washtech's purported competitive injury is "unlikely to be redressed by a favorable decision, asserting that invalidating the 2016 [OPT Program Rule] would neither eliminate competition for computer jobs, nor guarantee improved economic conditions or job opportunities." *Id.*; *see also* Gov't's Reply at 9-10 (citing cases for its proposition that Washtech's traceability and redressability arguments "depend on a 'chain of events' of speculative, future conduct by third parties").

However, in the competitor standing context, the causation requirement is satisfied when an agency allows competitors into the plaintiff's market, and the redressability requirement is met when vacating a regulation would remove those competitors. *See Honeywell Intern. Inc. v. EPA*, 374 F.3d 1363, 1369, 362 U.S. App. D.C. 538 (D.C. Cir. 2004) (rejecting agency's argument that traceability was not satisfied because "doing so would require speculation about the purchasing decisions of third parties not before the court"), *withdrawn in part on other grounds*, 393 F.3d 1315, 364 U.S. App. D.C. 244 (D.C. Cir. 2005); *see also Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499, 320 U.S. App. D.C. 32 (D.C. Cir. 1996) (finding the traceability requirement satisfied because, under the competitor standing doctrine, the plaintiff's injury was "exposure to competition as a result of the [agency's action]"). Here, Washtech has alleged that the 2016 OPT Program Rule permits increased competition by foreign labor in the STEM labor market where its named members compete, *see* Washtech's. Opp'n. at 17, and that "a favorable decision from the [C]ourt would remove the [increased competition]," Compl. ¶ 104. Consequently, the Court does not find that Washtech's allegations regarding traceability and redressability are speculative, as the 2016 OPT Program Rule undoubtedly increases competition in the STEM labor market. *See Bristol-Myers Squibb Co.*, 91 F.3d at 1499 (noting that the focus for the causation element of standing as it relates to the plaintiff's injury for competitor standing purposes was not the "lost sales, per se," rather the focus is on the increased "exposure to competition"). Accordingly, the Court

finds that Washtech has satisfied all three elements required for constitutional standing as it relates to its alleged injury due to increased competition to challenge the 2016 OPT Program Rule. *See Permapost Prods., Inc. v. McHugh*, 55 F. Supp. 3d 14, 21-22 (D.D.C. 2014) ("[T]he [District of Columbia] Circuit has found all three elements of standing to be met by plaintiffs where an agency . . . passed rules that led to an increased number of market participants." (citing *Mendoza*, 754 F.3d at 1010-12)).

B. Zone of Interests

Even though the Court has determined that Washtech has satisfied the constitutional requirements for standing, the Court's inquiry does not end here; the Court "must also inquire whether [Washtech] fall[s] within the class of persons whom Congress has authorized to sue under the [APA]." *Mendoza*, 754 F.3d at 1016. For this inquiry, the Court must decide "whether '[Washtech's] grievance . . . arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, __ U.S. __, _, 134 S. Ct. 1377, 1387, 188 L. Ed. 2d 392 (2014) (holding that although "zone of interests" has traditionally been referred to as "prudential standing," that "is a misnomer," and the proper analysis asks "whether 'this particular class of persons ha[s] a right to sue under this substantive statute.'" (quoting *Ass'n of Battery Recyclers, Inc. v.*

EPA, 716 F.3d 667, 675-76, 405 U.S. App. D.C. 100 (D.C. Cir. 2013) (J. Silberman, concurring))). Although the parties agree that the relevant statute is the Immigration and Nationality Act (the "INA"), *see* Gov't's Mem. at 37; *see also* Washtech's Opp'n at 26, they disagree on the precise provisions of the INA that can be considered in making the zone of interests determination.

"[I]n considering whether [Washtech is] authorized to sue under [the applicable statute, the Court] look[s] to whether [it] fall[s] within the zone of interests sought to be protected by the substantive statute pursuant to which the Department of [Homeland Security] acted." *Mendoza*, 754 F.3d at 1016. The zone of interests test "is not meant to be especially demanding," as courts "apply the test in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211 (2012) (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). The Supreme Court has "often conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," *Lexmark Intern., Inc.*, __ U.S. at __, 134 S. Ct. at 1389, and "[t]he test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit,'" *Patchak*, 567 U.S. 209, 132 S. Ct. at 2199. In analyzing congressional intent, the District of Columbia Circuit has looked to both the language of

the specific statutory provision in question and the broader history of the statute as a whole. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 804, 245 U.S. App. D.C. 395 (D.C. Cir. 1985) (finding the zone of interests test satisfied where "the wording of the statute gives a clear indication of the interests which [the challenged INA provision] was meant to protect . . . [and] [t]he background of the statute reinforces this conclusion"); *Mendoza*, 754 F.3d at 1017-18 (finding the zone of interests test satisfied upon review of the statutory language in question and the legislative history of the INA).

The Government alleges that Washtech "fails to satisfy the zone of interest test with respect to section 1101(a)(15)(F)(i)" of the INA relating to the F-1 visa status provision. Gov't's Reply at 19. Specifically, the Government contends that the "protection of domestic workers was not among Congress's concern in enacting and re-enacting the F-1 status provision." Gov't's Mem. at 40 (quoting *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239, 244 (3d Cir. 2009)). Washtech, however, contends that the protection of American workers is arguably within the zone of interests of section 1101(a)(15)(F)(i), because DHS has recognized this interest under this particular provision, *see* Washtech's Opp'n at 27, and because Congress, the Supreme Court, and several lower courts have recognized this interest in its assessment of the INA, *see id.* at 28-30.

Washtech's interest in protecting American workers is one that arguably falls within the zone of interests protected by section 1101(a)(15)(F)(i), and therefore, Washtech has prudential standing to challenge the

2016 OPT Program Rule. Broadly speaking, Washtech argues that DHS used the F-1 visa provision in promulgating the 2016 OPT Program Rule to circumvent Congressional restrictions imposed on H-1B visas. In its Complaint, Washtech asserts that the 2016 OPT Program Rule exceeds DHS's authority because it "conflicts with the statutory provisions of 8 U.S.C. §§ 1182(a)(5), 1182(n), 1184(a)(1), 1184(g), and 1227(a)(1)(C)(i)," which impose limitations on H-1B visas, *see* Compl. ¶ 63; *see also* Washtech's Opp'n at 26-27 (citing Compl. ¶ 4). Despite these allegations, the Government seeks to confine Washtech's allegations solely to violations of the F-1 visa program. *See* Gov't's Mem. at 37-42. But, "[i]n determining whether a petitioner falls within the 'zone of interests' to be protected by a statute, [the Court can] not 'look [only] at the specific provision said to have been violated in complete isolation[,]' but rather in combination with other provisions to which it bears an 'integral relationship.'" *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147, 351 U.S. App. D.C. 127 (D.C. Cir. 2002) (quoting *Fed'n for Am. Immigration Reform, Inc. v. Reno ("FAIR")*, 93 F.3d 897, 903, 320 U.S. App. D.C. 234 (D.C. Cir. 1996)); *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179, 402 U.S. App. D.C. 307 (D.C. Cir. 2012). Therefore, it is proper for the Court to examine the zone of interests protected by the H-1B visa provision also, and there is little doubt that Washtech's interest in protecting American workers is clearly within the zone of interests of this visa provision and its related statutes. *See* 8 U.S.C. § 1182(n) (requiring employer certification that the H-1B nonimmigrant will be paid prevailing market wages,

that the employer will provide working conditions for the nonimmigrant employee that will not adversely affect working conditions for the other workers, and that there is not a strike at the location of the employment); *id.* § 1184(g) (setting caps on the number of H-1B visas).

The Government contends that the H-1B visa provision and its related statutes are not integrally related to the F-1 visa provision. *See* Gov't's Reply at 21-22 (opining that "[n]one of these provisions [cited by Washtech] are related to section 1101(a)(15)(F)(i)," but are rather "integrally related to *each other*"). As support for its position, the Government argues that Congress had ample opportunities to subject the F-1 visa provision to the same domestic labor protections as the H-1B visa provision, but elected not to, which "suggests 'that protection of domestic workers was not among Congress's concerns in enacting and re-enacting the F-1 status provision, and it tends to suggest that Congress [ ] was concerned with increasing the country's pool of available STEM workers.'" *Id.* at 24 (quoting *Programmers*, 338 Fed. Appx. at 244). However, Congress's election to not extend certain domestic labor protections provided to H-1B visa holders to F-1 visa holders does not necessarily imply that the two statutory provisions are not integrally related. Rather, a review of the codification scheme of the F-1 and H-1B visa provisions' and the class of individuals targeted by the two visa provisions suggests that they are integrally related. As another member of this Court reasoned,

> [t]he provisions are part of the same statute; indeed, they are contained within a single subsection of the statute. Even more important than the statute's codification scheme, though, is the substantive relationship between the provisions. F-1 is directed at students studying at an American academic institution, including colleges and universities. H-1B is limited to individuals who have completed their bachelor's degree. As such, 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.

Washtech II, 156 F. Supp. 3d at 135 (internal citations omitted). The Court agrees with its colleague's analysis, and consequently, finds that the H-1B and the F-1 visa provisions are integrally related, and thus, consideration of the zone of interests protected by the H-1B provision is appropriate. Therefore, because Washtech's interest of protecting American workers arguably falls within the zone of interests protected by the H-1B provision, it has prudential standing to challenge the 2016 OPT Program Rule.

C. Ripeness

In addition to challenging Washtech's standing to contest the 2016 OPT Program Rule, the Government contends that this "case is not fit for review because it requires too much conjecture and speculation by the Court given [Washtech's] sparse and unconvincing allegations concerning injury that fail to allege any cognizable harm." Gov't's Mem. at 33. The Government

also asserts that Washtech's "challenge 'depends on future events that may never come to pass, or that may not occur in the form forecasted,'" Gov't's Reply at 6 n.5, and therefore, Washtech's "challenge is not ripe for adjudication," Gov't's Mem at 32. In response, Washtech argues that its "plead[ed] injuries occur at this very moment and the case is ripe for review" because

> the 2016 OPT [Program] Rule . . . has been *allowing* competitors into Washtech's market since, May 10, 2016. . . . Furthermore, the 2016 OPT [Program] Rule explicitly authorizes aliens working prior to that date under the 2008 OPT [Program] Rule's [seventeen]-month extension to continue to work under the 2016 OPT [Program] Rule and to extend the work period to [twenty-four] months.

Washtech's Opp'n at 22.

The ripeness doctrine, which "generally deals with when a federal court can or should decide a case," *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386, 401 U.S. App. D.C. 248 (D.C. Cir. 2012), is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties,'" *Chlorine Inst., Inc.*, 718 F.3d at 927 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)). "Part of the doctrine is subsumed into the Article III

requirement of standing, which requires a petitioner to allege *inter alia* an injury-in-fact that is 'imminent' or 'certainly impending.'" *Am. Petroleum Inst.*, 683 F.3d at 386 (citations omitted*); see also Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427, 322 U.S. App. D.C. 135 (D.C. Cir. 1996) ("Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending."). "Even if a case is 'constitutionally ripe,' though, there may also be 'prudential reasons for refusing to exercise jurisdiction.'" *Am. Petroleum Inst.*, 683 F.3d at 386 (quoting *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808). Moreover, "[d]etermining whether administrative action is ripe for judicial review requires [courts] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

Here, Washtech has demonstrated an "injury to its members of sufficient immediacy and ripeness to warrant judicial intervention." *Seldin*, 422 U.S. at 516. Having found that Washtech's alleged injury of increased competition in the STEM labor market is not "conjectural" or "speculative," but rather "actual and imminent," *see supra* Part III.A.2.v (noting the White House Press Report that acknowledged the significant number of extensions that have already been granted pursuant to the 2008 OPT Program Rule and DHS's estimation of continued increased growth of foreign labor based on the extensions granted under the 2016

OPT Program Rule), the Court focuses its present analysis on the prudential aspects of the ripeness doctrine.[10] From this perspective, Washtech's challenge to the 2016 OPT Program Rule will not "benefit from a more concrete setting . . . [as] the agency's action is sufficiently final," *Delta Air Lines, Inc. v. Export-Import Bank of United States*, 85 F. Supp. 3d 250, 269 (D.D.C. 2015) (quoting *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284, 355 U.S. App. D.C. 381 (D.C. Cir. 2003)), as the 2016 OPT Program Rule is a final agency action, the "effects [of which are being] felt in a concrete way by [Washtech and its named members]," *Abbott Labs.*, 387 U.S. at 148.

Although the Government argues that "reviewing the 2016 [OPT Program] Rule's validity based on [Washtech's] non-existent record and speculative assertions would be tantamount to expending 'resources on what amounts to shadow boxing,'" Gov't's Mem. at 34 (quoting *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425, 377 U.S. App. D.C. 122 (D.C. Cir. 2007)), the evidence the Government seeks to have Washtech produce is not required at the motion to dismiss stage, *see id.* ("The record is devoid of any allegations or evidence concerning job applications, employers, or STEM OPT employees under the [2016 OPT

[10] The parties do not dispute the second element of the prudential ripeness doctrine, i.e., whether the parties will experience any hardship if the Court withheld consideration of Washtech's challenge to the 2016 OPT Program Rule. *See* Gov't's Mem. at 32-34 (addressing only whether Washtech's challenge is judicially fit and ultimately ripe for review); *see also* Washtech's Opp'n at 22 (responding only to the Government's argument that its challenge was not ripe for judicial review).

Program] Rule, that, even now, months after the rule went into effect, [Washtech's] members have had to engage in or refrain from any conduct, including competing with beneficiaries of the STEM OPT extension."). Washtech's allegations in its Complaint are therefore sufficient to demonstrate that its named members are injured in a manner that render judicial review appropriate at this time. Accordingly, the Court concludes that Washtech's challenge to the 2016 OPT Program Rule is both fit and ripe for judicial review.

D. Washtech's Claims under Rule 12(b)(6)

Having concluded that Washtech has standing to pursue its challenges to the 2016 OPT Program Rule, i.e., Counts II-IV of the Complaint, the Court now considers whether Washtech has pleaded sufficient facts that plausibly demonstrate entitlement to the relief requested. The Government contends that Washtech has not satisfied its pleading burden to "satisfy[ ] Rule 12(b)(6)'s plausibility standard as to [its] APA claims," and therefore, dismissal of its APA claims is warranted. Gov't's Mem. at 2. The Court will address the Government's arguments regarding the alleged procedural APA violations first, and then turn to an analysis of the Government's arguments with respect to the alleged substantive APA violations.

1. Washtech's Procedural Violations Claims

Count III of Washtech's Complaint asserts that the 2016 OPT Program Rule was promulgated without complying with the requirement of the Congressional

Review Act ("CRA") for proper notice and comment as to "whether aliens should be allowed to work beyond one year under the OPT program." Compl. ¶ 66. Additionally, Washtech alleges that "DHS failed to comply with the incorporation by reference requirements of 1 C.F.R. part 51," Compl. ¶ 80, when it incorporated into the rule "an external list"[11] published on its website, Compl. ¶ 73. The Government argues that "the CRA explicitly bars any claim or relief premised on a 'determination, finding, action, or omission' of any CRA requirement, and flatly bars any 'judicial review' of such issues." Gov't's Mem. at 42 (citing 5 U.S.C. § 805). The Government also contends that Washtech's allegation that DHS "failed to subject the question of whether the OPT program should be expanded beyond a year to actual notice and comment as part of the 2016 [OPT Program] Rule is facially absurd [because] DHS explicitly sought notice and comment on this issue, and responded to comments on it." *Id.* (internal quotation marks and citations omitted). Lastly, with respect to Washtech's allegation that the 2016 OPT Program Rule does not comport with the incorporation by reference requirements, the Government argues that this claim must fail because Washtech's Complaint does not allege that "(1) the STEM list is required to be published in full in the Federal Register (which it is not), (2) Washtech lacked actual and timely notice of the STEM list (which it

[11] This external list is "the STEM Designated Degree Program List, which [is] a complete list of qualifying degree program categories, published on the Student and Exchange Visitor Program Web site at http://www.ice.gov/sevis ." Compl. ¶ 71.

had), or (3) *how* Washtech's members have been adversely affected by DHS's inserting a weblink into its Rule." *Id.* at 43 (footnote and citation omitted).

Despite the extensive arguments the Government advanced in its motion to dismiss, Washtech failed to substantively address any of these arguments in its opposition and its responses to the Government's arguments are woefully inadequate to avoid dismissal pursuant to Rule 12(b)(6). *See generally* Washtech's Opp'n at 43-44. Thus, the Court may treat the Government's position with respect to Count III as conceded. *See Hopkins*, 284 F. Supp. 2d at 25 ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citations omitted)).[12] In any event, Washtech's Count III procedural allegations fail to state a claim sufficient to demonstrate entitlement to relief. First, the CRA "denies courts the power to void rules on the basis of agency noncompliance with the [CRA as t]he language of [section] 805 is unequivocal and precludes review of [such] claim." *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229, 386 U.S. App. D.C. 193 (D.C. Cir. 2009). Also, as the Court previously noted, DHS did subject the question of whether the OPT program should be expanded beyond a year to actual notice and comment. *See supra* Part III.A.2.a. Lastly, with respect to the alleged incorporation by reference violations, Washtech has not

[12] As previously noted, this Court's prior decision in *Hopkins* was affirmed by the Circuit. *See Hopkins*, 98 F. App'x at 8.

alleged that the list was required to be published in the Federal Register, that it did not receive actual or timely notice of the list, or that it was "adversely affected" by the inclusion of the weblink to the list in the 2016 OPT Program Rule. *See* § 552(a)(1); *see also Am. Soc'y for Testing & Materials v. Public.Resource.org, Inc.*, No. 13-cv-1215 (TSC), 14-cv-0857 (TSC), 2017 U.S. Dist. LEXIS 14623, *10, 2017 WL 473822, at *1 (D.D.C. Feb. 2, 2017) (discussing the procedures for incorporation by reference requirements and their correlation with § 552(a)(1)). Accordingly, because Washtech failed to address the Government's challenges to the alleged APA procedural violations asserted in Count III of its Complaint, and because Washtech's allegations do not allow the Court to draw a reasonable inference that DHS is liable for the alleged misconduct, the Court must dismiss Count III of Washtech's Complaint.

2. Washtech's Substantive APA Claims

Through Count II of its Complaint, Washtech asserts that the 2016 OPT Program Rule exceeds DHS's authority. The Government argues that Washtech's "single, conclusory sentence in paragraph [sixty-three] asserting [that] the Final Rule exceeds DHS's statutory authority (Count II) without more is facially implausible given the absence of any alleged facts supporting this conclusory legal claim." Gov't's Mem. at 45. Washtech failed to address the Government's arguments regarding Count II in its opposition. *See generally* Washtech's Opp'n. Therefore, as previously indicated, the Court may treat the Government's position

regarding Count II as conceded, *see supra* Part III.2.D.1, which it deems appropriate to do.

In regards to Count IV of its Complaint, Washtech contends that the 2016 OPT Program Rule was implemented arbitrarily and capriciously because it "requires employers to provide foreign-guest workers OPT mentoring without requiring that such program be provided to American workers" and "singles out STEM occupations for an increase in foreign labor through longer work periods with no justification." Compl. ¶¶ 82-83. The Government argues that Washtech's disagreement "with DHS's policy choices, without more, does not make those choices inconsistent with the discretion vested in it by law, let alone actionable under the APA." Gov't's Mem. at 44 (citation omitted). In addition, the Government asserts that Washtech has not "provide[d] some notice of *why* a court might find it arbitrary and capricious for DHS to require F-1 students to plan, document, and engage in training as a condition of receiving a benefit, without guaranteeing the same training to the entire [United States] worker population." *Id.* at 44-45; *see also id.* at 45 ("[Washtech's] failure to allege a single 'justification' that is somehow unreasonable renders this claim implausible on its face . . . ."). In response, Washtech argues that its Complaint includes the allegation that the "2016 OPT [Program] Rule singles out STEM occupations for an increase in foreign labor through longer worker periods with no justification," Washtech's Opp'n at 43 (citing Compl. ¶ 83), and that it "has not yet received a copy of the full administrative record necessary to determine the full extent of arbitrary and capricious action," *id.* at 44.

Washtech's conclusory allegations do not meet the pleading standard required under *Iqbal*, and therefore, it has not alleged a claim of entitlement to relief. To demonstrate that it has proffered sufficient allegations to support its proposition that the 2016 OPT Program Rule is arbitrary and capricious, Washtech cites only one allegation it its Complaint. *See id.* at 43 (noting that the Complaint alleges that "[t]he 2016 OPT [Program] Rule singles out STEM occupations for an increase in foreign labor through longer worker periods with no justification"). But, this response is of no avail to Washtech because this allegation does not provide the Court with the ability to reasonably infer that the 2016 OPT Program Rule is somehow arbitrary and capricious; this allegation simply states that DHS provided no justification for implementing the 2016 OPT Rule. Thus, despite the extensive explanations provided in the 2016 OPT Program Rule, including the explanations provided in the notice of proposed rulemaking on which Washtech publicly commented, Washtech has not alleged any facts from which the Court can plausibly conclude that the 2016 OPT Program Rule is arbitrary and capricious. And, although Washtech claims that it has yet to receive the full administrative record, it has not identified, nor has the Court been able to identify, any legal authority that relaxes a plaintiff's pleading burden due to the fact that the plaintiff has not received the complete administrative record. Accordingly, because Washtech's threadbare legal conclusions are not sufficient "to permit the [C]ourt to infer more than the mere possibility of misconduct," *Iqbal*, 556 U.S. at 679, the Court must dismiss Washtech's APA claims.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that it must grant in part and deny in part the Government's motion to dismiss Washtech's claims. Specifically, the Court must grant the Government's motion to dismiss pursuant to Rule 12(b)(1) with respect to Count I of Washtech's Complaint for lack of standing to challenge the 1992 OPT Program Rule, but it must deny the Government's motion to dismiss pursuant to Rule 12(b)(1) in all other respects because Washtech has demonstrated that it has standing to challenge the 2016 OPT Program Rule, and because the Court has concluded that Washtech's challenge is ripe for judicial review. However, because Washtech has not alleged facts sufficient to survive the Government's Rule 12(b)(6) motion to dismiss, the Court must grant the Government's motion due to Washtech's failure to plausibly state claims that are entitled to relief.

SO ORDERED this 19th day of April, 2017.[13]

REGGIE WALTON
United States District Judge

ORDER

In accordance with the Memorandum Opinion issued on this same date, it is hereby

ORDERED that the Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) is **DENIED IN PART** and **GRANTED IN PART**. Specifically, with respect to dismissing the plaintiff's Complaint pursuant to

[13] An Order consistent with this Memorandum Opinion is issued simultaneously with this opinion.

Federal Rule of Civil Procedure 12(b)(1), the defendants' motion is **GRANTED** regarding Count I of Washtech's Complaint for lack of standing to challenge the 1992 OPT Program Rule, but **DENIED** in all other aspects concerning dismissal for lack of standing. Additionally, with respect to dismissing the plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), the defendants' motion is **GRANTED**. It is further

ORDERED that this case is **DISMISSED**. It is further

ORDERED that this case is **CLOSED**.

SO ORDERED this 19th day of April, 2017.

REGGIE B. WALTON

United States District Judge

APPENDIX E

No. 15-5239

United States Court of Appeals
for the
District of Columbia Circuit

Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 50 F.4th 164 (D.C. Cir. 2022)

[Filed] May 13, 2016

Before: KAVANAUGH, MILLETT, and WILKINS, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and ADJUDGED that the appeal be DISMISSED.

The challenges to the 2008 Rule raised by plaintiff on appeal – including the argument that the 2008 Rule reopened the 1992 Rule – are moot because the 2008 Rule is no longer in effect. We therefore dismiss the appeal and vacate the judgment of the District Court.

See United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950); *Humane Society of the United States v. Kempthorne*, 527 F.3d 181, 184-88 (D.C. Cir. 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Ken Meadows Deputy Clerk

APPENDIX F

No. 14-CV-529

United States District Court
for the District of Columbia

Wash. All. of Tech. Workers v. *United States Dep't of Homeland Sec.*, 156 F. Supp. 3d 123 (D.D.C. 2015)

[Filed: August 12, 2015]

Memorandum Opinion and Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment

Plaintiff Washington Alliance of Technology Workers, a collective-bargaining organization that represents science, technology, engineering, and mathematics ("STEM") workers, has sued the U.S. Department of Homeland Security ("DHS"). Plaintiff challenges an interim final rule promulgated by defendant DHS in April 2008 extending, for eligible STEM students, the duration of optional practical training ("OPT"), which allows nonimmigrant foreign nationals on an F-1 student visa to engage in employment during and after completing a course of study at a U.S. educational institution. *See* 8 C.F.R. § 214.2(f)(10)(ii). Before this Court are the parties' cross motions for summary judgment. (Pl.'s Cross Mot. for Summ. Judgment or Judgment on the Administrative Record [ECF No. 25] ("Pl.'s Mot.")); Def.'s Mot. for Summ. Judgment [ECF

No. 27] ("Def.'s Mot.").) For the following reasons, both motions will be granted in part and denied in part.

BACKGROUND

The Immigration and Nationality Act ("INA") creates several classes of nonimmigrants who are permitted to enter the United States for a limited time and for a specific purpose. 8 U.S.C. § 1101(a)(15). This case involves two such classes. First, F-1 visas provide entry for individuals who qualify as

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established . . . academic institution . . . .

Id. § 1101(a)(15)(F)(i). Second, H-1B visas cover individuals who fall into the following category:

> an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1) . . . .

Id. § 1101(a)(15)(H)(i)(b). A "specialty occupation" requires the attainment of a bachelor's degree. *Id.* § 1184(i)(1). An alien may not obtain an H-1B visa

unless his employer has certified, among other things, that the alien will be paid at least "the prevailing wage level for the occupational classification in the area of employment." *Id.* § 1182(t)(1). The total number of H-1B visas is currently capped by Congress at 65,000 per year. *Id.* § 1184(g).

The INA gives the Executive Branch authority to issue regulations governing the admission of nonimmigrants. *See id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . ."). For almost 70 years, DHS and its predecessor, the Immigration and Naturalization Service ("INS"), have interpreted the immigration laws to allow students to engage in employment for practical training purposes. *See* 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) ("In 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 . . . ."). At present, students may engage in OPT "[a]fter completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree." 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). The employment must be "directly related to the student's major area of study." *Id.* § 214.2(f)(10)(ii)(A). Before 2008, a student could only be authorized for 12 months of practical training, which had to be completed within a 14-month window following the student's completion of his course of study. *See id.* § 214.2(f)(10) (2007).

In April 2008, DHS issued an interim final rule with request for comments that extended the period of OPT by 17 months for F-1 nonimmigrants with a qualifying STEM degree. 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 (Apr. 8, 2008) ("2008 Rule"). As such, STEM students can now engage in a maximum of 29 months of OPT. *See* 8 C.F.R. § 214.2(f)(10)(ii)(C). In describing the purpose of the 2008 Rule, DHS explained that "the H-1B category is greatly oversubscribed," with visa applications reaching the 65,000-person cap progressively earlier every year since 2004. 2008 Rule at 18,946. In 2007, the cap was reached on April 2, the first business day for filing. *Id.* As a consequence,

> OPT employees often are unable to obtain H-1B status within their authorized period of stay in F-1 status, including the 12-month OPT period, and thus are forced to leave the country. The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

Id. DHS concluded that the 2008 Rule would alleviate the "competitive disadvantage faced by U.S. high-tech industries" and would "quickly ameliorate some of the

adverse impacts on the U.S. economy" by potentially adding "tens of thousands of OPT workers . . . in STEM occupations in the U.S. economy." *Id.* at 18,947-50. DHS noted that the 2008 Rule was issued without notice and public comment "[t]o avoid a loss of skilled students through the next round of H-1B filings in April 2008." *Id.* at 18,950. Since promulgating this interim rule, DHS has on several occasions modified, without notice and comment, the list of disciplines that qualify for the STEM extension via updates to their website. (*See* Pl.'s Mot., App. A [ECF No. 25-2] at 34-35.)

Plaintiff filed suit on March 28, 2014. In Counts I-III, plaintiff alleges that the OPT program exceeds DHS's statutory authority and conflicts with other statutory requirements, including the labor certifications related to H-1B visas. In Count IV, plaintiff argues that DHS acted arbitrarily and capriciously in promulgating the 2008 Rule. In Count V, plaintiff argues that DHS lacked good cause to waive the notice and comment requirement in promulgating the rule. In Count VI, plaintiff contends that DHS's reference to an external website to list the STEM courses of study violates the relevant rules on incorporation by reference. In Counts VII-VIII, plaintiff claims that DHS improperly failed to allow for notice and comment before issuing the 2011 and 2012 modifications of the list of STEM disciplines. And in Count IX, plaintiff argues that the 2008 Rule and the subsequent 2011 and 2012 modifications exceeded DHS's statutory authority.

On November 21, 2014, this Court granted in part and denied in part defendant's motion to dismiss.

Wash. Alliance of Tech. Workers v. DHS, No. 14-cv-529, 74 F. Supp. 3d 247, 2014 U.S. Dist. LEXIS 163285 (D.D.C. Nov. 21, 2014). First, the Court dismissed Counts I-III on the ground that "the Complaint does not identify a single WashTech member who has suffered an injury as a result of the twelve-month OPT program." *Id.* at *9. In the alternative, this Court held that Counts I-III were barred by APA's six-year statute of limitations. *See id.* at *10 n.3. The Court found, however, that the complaint did allege sufficient facts to confer onto plaintiff standing to challenge the 2008 Rule and the 2011 and 2012 modifications. *See id.* at *15. Plaintiff filed an Amended Complaint on December 15, 2014. (*See* First Am. Compl. for Declaratory and Injunctive Relief [ECF No. 20] ("Compl.").)

The parties have now filed cross motions for summary judgment.

ANALYSIS

I. STANDING

This Court has already held that "plaintiff's Complaint . . . is sufficient to establish Article III standing." *Wash. Alliance*, 74 F. Supp. 3d 247, 2014 U.S. Dist. LEXIS 163285, at *15. The Court found that the complaint alleged that plaintiff's "named members, who have technology-related degrees in the computer programming field and have applied for STEM employment during the relevant time period, were in direct and current competition with OPT students on a STEM extension" and that "[t]his competition resulted in a concrete and particularized injury." *Id.*

Nevertheless, defendant now argues that "[b]ecause Plaintiff has failed to provide the required specific, particularized evidence necessary to demonstrate that its three members are in direct and current competition for jobs with OPT students on STEM extensions, its members lack competitor standing and consequently, Plaintiff lacks associational standing to proceed." (*See* Def.'s Mem. of Law. in Opp. to Pl.'s Cross Mot. for Summ. Judgment [ECF No. 36] ("Def.'s Opp.") at 2.)

To establish constitutional standing, plaintiff must demonstrate that (1) it has suffered an injury-in-fact, (2) the injury is fairly traceable to defendant's challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "'The party invoking federal jurisdiction bears the burden of establishing' standing — and, at the summary judgment stage, such a party 'can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148-49, 185 L. Ed. 2d 264 (2013) (quoting *Lujan*, 504 U.S. at 561). Because plaintiff is an association seeking to establish standing to sue on behalf of its members, it must show that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Chamber of Commerce v. EPA*, 642 F.3d 192, 199, 395 U.S. App. D.C. 193 (D.C. Cir. 2011) (quoting

Sierra Club v. EPA, 292 F.3d 895, 898, 352 U.S. App. D.C. 191 (D.C. Cir. 2002)). Only the first element of this test is at issue here. *See Wash. Alliance*, 74 F. Supp. 3d 247, 2014 U.S. Dist. LEXIS 163285, at *8.

Plaintiff argues that its members have been injured by DHS's OPT program because that program "increase[s] the number of economic competitors" and "expose[s] Washtech members to unfair competition by allowing aliens to work under rules in which they are inherently less expensive to employ." (Pl.'s Mot. at 12.) "The competitor standing doctrine recognizes 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Mendoza v. Perez*, 754 F.3d 1002, 1011, 410 U.S. App. D.C. 210 (D.C. Cir. 2014) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367, 329 U.S. App. D.C. 400, 329 U.S. App. D.C. 401 (D.C. Cir. 1998)). "A party seeking to establish standing on the basis of the competitor standing doctrine 'must demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action.'" *Id.* at 1013 (quoting *KERM, Inc. v. FCC*, 353 F.3d 57, 60, 359 U.S. App. D.C. 200 (D.C. Cir. 2004)). In the competitor sales context, the D.C. Circuit has held that "petitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate *potential* to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." *La. Energy & Power Auth.*, 141 F.3d at 367 (quoting *Associated Gas Distribs. v.*

FERC, 899 F.2d 1250, 1259, 283 U.S. App. D.C. 265 (D.C. Cir. 1990)).

Plaintiff has submitted substantial evidence to support its standing, including affidavits from its president and three of its members. (*See* Aff. of Douglas J. Blatt [ECF No. 25-1] ("Blatt Aff."); Aff. of Rennie Sawade [ECF No. 25-1] ("Sawade Aff."); Aff. of Michael Schendel [ECF No. 25-1] ("Schendel Aff."); Aff. of Ceasar Smith [ECF No. 25-1] ("Smith Aff.").) Douglas Blatt states that he is "employed currently as a computer programmer" and lists twelve programming jobs that he applied for between 2010 and 2012. (*See* Blatt Aff. ¶¶ 7-18.) Rennie Sawade states that he is "employed currently as a temporary programmer" working "on a contract basis" and that he applied for programming jobs at numerous software companies between 2010 and 2014, including Microsoft, Amazon, and Facebook. (Sawade Aff. ¶¶ 6-37.) Ceasar Smith states that he is a "temporary computer systems and network administrator" and that he applied for computer technician and computer system administrator positions at multiple companies between 2008 and 2014. (Smith Aff. ¶¶ 5-43.) Michael Schendel, plaintiff's president, notes that "[m]any employers openly solicit OPT participants for jobs to the exclusion of WashTech members," and he includes with his affidavit one such solicitation seeking a software engineering in Redmond, Washington, the location of Microsoft. (Schendel Aff. ¶ 12.) In addition to these affidavits, plaintiff has submitted dozens of job listings seeking individuals with computer programming experience. (*See* Pl.'s Mot., App. B [ECF No. 25-3].) Many of these job advertisements are limited to, or at least

targeted at, OPT candidates. (*E.g., id.* at 7, 17, 35, 53.) Others state that OPT status is "preferred" or list OPT as one of several acceptable statuses. (*E.g., id.* at 9, 11, 24, 40, 93.)

This evidence is more than sufficient to support plaintiff's constitutional standing. The affidavits from Blatt, Sawade, and Smith demonstrate that they are "part of the computer programming labor market, a subset of the STEM market." *Wash. Alliance*, 74 F. Supp. 3d 247, 2014 U.S. Dist. LEXIS 163285, at *14. The affidavits also show that those individuals "have sought out a wide variety of STEM positions with numerous employers, but have failed to obtain these positions following the promulgation of the OPT STEM extension in 2008." *Id.* The 2008 Rule was explicitly intended to increase the number of foreign nationals competing for jobs in the STEM labor market. *See* 2008 Rule at 18,953 ("This rule will . . . add[] an estimated 12,000 OPT students to the STEM-related workforce. . . . [T]his number represents a significant expansion of the available pool of skilled workers."). These facts alone suffice to show that the regulation "ha[s] the clear and immediate *potential"* to expose plaintiff's members to increased workforce competition. *La. Energy & Power Auth.*, 141 F.3d at 367 (quoting *Associated Gas Distribs.*, 899 F.2d at 1259). The dozens of job advertisements submitted by plaintiff — many of which express a preference for OPT computer programmers — suggest that the potential for increased competition has indeed come to pass.

Defendant lodges multiple objections, most of which this Court addressed in its previous Memorandum Opinion. Defendant argues that plaintiff must

demonstrate that its members "work in the *same* job category, that they are willing to work the *same* jobs going to STEM-OPT students, and that they are qualified to do so." (Def.'s Opp. at 6.) In a similar vein, defendant insists that "Plaintiff must demonstrate with specific facts that the jobs Messrs. Sawade, Blatt, and Smith attest to applying to in their affidavits were jobs that [they] *and* OPT students were applying to." (*Id.* at 10.) Defendant demands too much. Plaintiff has demonstrated that its members work in the computer programming field, which is among the disciplines encompassed by DHS's STEM regulations. *See STEM-Designated Degree Program List: 2012 Revised List*, http://www.ice.gov/sites/default/files/documents/Document/2014/stem-list.pdf (last visited Aug. 5, 2015). Defendant has failed to cite any D.C. Circuit case that requires a greater degree of specificity. In *Mendoza*, for example, the Department of Labor had issued regulations easing the rules for employing alien sheepherders and goatherders. *See Mendoza*, 754 F.3d at 1008-09. The D.C. Circuit held that "individuals competing in the herder labor market have standing" to challenge the regulations. *Id.* at 1013. Notwithstanding the fact that the plaintiffs had "not worked as herders since 2011 and may not have applied for specific herder jobs since that time," the Circuit found that the *Mendoza* plaintiffs had standing because they were "experienced and qualified herders" who "continue[d] to monitor the herder job market." *Id.* at 1013-14. Nowhere in *Mendoza* did the Circuit suggest that the plaintiffs needed to be willing to accept precisely the same jobs as the hypothetical aliens who were affected by the agency's regulations. The *Mendoza* Court

certainly did not require affidavits stating that the plaintiffs had applied to the same jobs as the affected aliens. Rather, it was sufficient that "plaintiffs' affidavits . . . demonstrate[d] their informal involvement in the labor market." *Id.* at 1014. Plaintiff in the present case has proven substantially more than the *Mendoza* plaintiffs. Its members are active participants in the computer programming labor market, and they have applied to numerous programming jobs since DHS promulgated the 2008 Rule. That is sufficient to confer competitor standing.

Defendant also argues that plaintiff's members are not part of the computer programming market because they are presently employed. (Def.'s Opp. at 8-9.) This argument is meritless. A worker does not exit his job market simply because he currently has a job. An influx of OPT computer programmers would increase the labor supply, which is likely to depress plaintiff's members' wages and threaten their job security, even if they remain employed. Moreover, being presently employed does not eliminate plaintiff's members' incentive to continue looking for jobs. For example, one of plaintiff's members "work[s] on software projects on a contract basis rather than as an employee." (Sawade Aff. ¶ 6.) He explains that "[c]ompanies can end temporary jobs without notice" and states that, "[s]ince 2003, [he has] had to find a new programming job twelve times when [his] temporary jobs have ended." (*Id.* ¶ 7.) In light of this evidence, the Court concludes that plaintiff has sufficiently demonstrated that the competition its members face as a result of the 2008 Rule constitutes an "'injury in fact' that is 'actual or imminent.'" *Sherley v. Sebelius*, 610 F.3d 69,

72, 391 U.S. App. D.C. 258 (D.C. Cir. 2010) (quoting *Lujan*, 504 U.S. at 560); *see also KERM*, 353 F.3d at 60-61 (to establish competitor standing, plaintiff must prove that he is "likely to suffer financial injury as a result of the challenged action"); *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195, 346 U.S. App. D.C. 6 (D.C. Cir. 2001) (in the competitor standing context, a plaintiff must merely show that there is a "substantial . . . probability of injury," and "there is no need to wait for injury from specific transactions" (internal quotation marks omitted)) .

Finally, defendant contends that plaintiff's complaint constitutes a generalized grievance "akin to 'taxpayer standing'" because the group of STEM job applicants is "a vague and generalized category that includes over 150 categories of separate jobs." (Def.'s Opp. at 14 (citing *United States v. Richardson*, 418 U.S. 166, 94 S. Ct. 2940, 41 L. Ed. 2d 678 (1974)).) As plaintiff correctly points out, however, "DHS confuses *widespread injury* with a *generalized grievance*." (Reply in Supp. of Pl.'s Mot. for Summ. Judgment [ECF No. 41] ("Pl.'s Reply") at 5.) "Although injuries that are shared *and* generalized - such as the right to have the government act in accordance with the law - are not sufficient to support standing, 'where a harm is concrete, though widely shared, the Court has found injury in fact.'" *Seegars v. Ashcroft*, 396 F.3d 1248, 1253, 364 U.S. App. D.C. 512 (D.C. Cir. 2005) (citation omitted) (quoting *FEC v. Akins*, 524 U.S. 11, 24, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998)). The 2008 Rule cannot escape review simply because it encompasses a large number of disciplines.

In short, plaintiff has amply demonstrated that its members are direct and current competitors of the aliens benefited by the 2008 Rule. *See Mendoza*, 754 F.3d at 1013. Plaintiff therefore has standing to sue.

II. ZONE OF INTERESTS

Defendant argues that plaintiff "cannot establish that it falls within the zone of interest of the statutory provision that forms the crux of its complaint." (Def.'s Mem. of Law on the Lack of Zone-of-Interest Standing [ECF No. 22] ("Def.'s ZOI Mem.") at 1.) Defendant contends that "the F-1 statute's text . . . does not indicate that Congress was concerned with protecting the domestic labor market in providing for a foreign student program" and that plaintiff cannot "rely[] on the general labor protections under the H-1B nonimmigrant category" to prove that its complaint is proper.[1] (*Id.* at 5, 8.)

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[1] Defendant did not raise this objection in its motion to dismiss. (*See* Def.'s Mot. to Dismiss for Lack of Subject-Matter Jurisdiction [ECF No. 10].) Concerned about its jurisdiction, this Court issued an Order on December 4, 2014, asking the parties to submit memoranda of law. Notwithstanding the Court's error, the zone-of-interests argument has now been briefed. Contrary to plaintiff's assertion, defendant did not waive this argument by failing to address it in its motion to dismiss. *See* Fed. R. Civ. P. 12(h)(2) (explaining that Rule 12(b)(6) arguments can be made in pleadings, by motion under Rule 12(c), or at trial). This Court will therefore address the zone-of-interests question, even though it was not raised by defendant, as it should have been, via Rule 12(b)(6).

To bring suit under the APA, "[t]he interest [plaintiff] asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)). To make this determination, the Court must "apply traditional principles of statutory interpretation"to assess "whether [plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88, 188 L. Ed. 2d 392 (2014). The zone-of-interests test "is not meant to be especially demanding." *Patchak*, 132 S. Ct. at 2210 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)). "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

Broadly stated, plaintiff is asserting that defendant used the F-1 nonimmigrant category to circumvent the restrictions Congress placed on H-1B visas. In so doing, plaintiff argues that defendant violated a number of statutes. The complaint alleges that the 2008 Rule "is in direct conflict with the statutory requirements of 8 U.S.C. § 1101(a)(15)(F)(i) that aliens on student visa[s] be *bona fide* students."[2] (Compl. ¶ 164.) It also

[2] This quote, and several that follow, are from Counts I-III, which this Court previously dismissed. But they apply with equal

alleges that the 2008 Rule violates 8 U.S.C. § 1184(a), a general directive that, according to plaintiff, "requires DHS to ensure aliens on student visas leave the country when they are no longer students." (*Id.* ¶ 174.) Finally, the complaint alleges that the "OPT regulations are in conflict with the statutory requirements for foreign labor under 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), [and] 1184(g)" because they "deliberately circumvent the statutory caps on H-1B visas" and "authorize aliens to perform labor without complying with and in violation of the labor certification and prevailing wage requirements of the H-1B program." (*Id.* ¶¶ 179-80.)

In light of these allegations, the Court disagrees with defendant's assertion that plaintiff's complaint is limited solely to violations of F-1. Rather, plaintiff objects more broadly that defendant's interpretation of F-1 indirectly violates other limitations set forth by Congress, notably those related to H-1B visas. As such, it is proper to examine the zone of interests protected by H-1B, as well as F-1. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 804, 245 U.S. App. D.C. 395 (D.C. Cir. 1985) (looking to zone of interests protected by § 1101(a)(15)(H) when plaintiff alleged that INS had attempted to circumvent that provision by issuing visas pursuant to § 1101(a)(15)(B)). And, plaintiff is clearly within the zone of interests of H-1B and its related statutes, which include many provisions designed to protect American labor. *See* 8 U.S.C. § 1182(n) (requiring

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force to Count IX, which incorporates by reference all previous allegations. (*See* Compl. ¶ 279.)

employer certification that the H-1B nonimmigrant will be paid prevailing market wages, that the employer will provide working conditions for the nonimmigrant employee that will not adversely affect working conditions for the other workers, and that there is not a strike at the place of employment); *id.* § 1184(g) (setting caps on H-1B visas).

Defendant, citing the non-precedential Third Circuit decision in *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009), objects that this Court should not consider H-1B and related statutes in its zone-of-interest inquiry "because these statutes are not integrally related to the statute under which the agency acted in allegedly violating the law." (Def.'s ZOI Mem. at 7.) The D.C. Circuit has explained that, "[i]n determining whether a petitioner falls within the 'zone of interests' to be protected by a statute, 'we do not look at the specific provision said to have been violated in complete isolation[,]' but rather in combination with other provisions to which it bears an 'integral relationship.'" *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147, 351 U.S. App. D.C. 127 (D.C. Cir. 2002) (per curiam) (alteration in original) (quoting *Fed'n for Am. Immigration Reform, Inc. v. Reno* (*FAIR)*, 93 F.3d 897, 903, 320 U.S. App. D.C. 234 (D.C. Cir. 1996)). As explained above, plaintiff alleges direct violations of H-1B. Beyond that, however, the Court concludes that F-1 and H-1B are integrally related. The provisions are part of the same statute; indeed, they are contained within a single subsection of the statute. *See* 8 U.S.C. § 1101(a)(15). Even more important than the statute's codification scheme, though, is the substantive relationship between the

provisions. F-1 is directed at students studying at an American academic institution, including colleges and universities. *See id.* § 1101(a)(15)(F)(i). H-1B is limited to individuals who have completed their bachelor's degree. *See id.* § 1184(i)(1). As such, 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. The 2008 Rule supports this interpretation. As DHS explained,

> [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. If the student is maintaining his or her F-1 nonimmigrant status, the employer may also include a request to have the student's nonimmigrant status changed to H-1B.

2008 Rule at 18,496.

In fact, DHS identified the problem with transitioning individuals from F-1 to H-1B as the "cap gap," which occurs when an F-1 student is the beneficiary of an approved H-1B visa, but whose period of authorized stay expires before their designated H-1B employment start date. *See id.* at 18,497. To remedy the cap gap, the 2008 Rule "extends the authorized period of stay, as well as work authorization, of any F-1 student who is the beneficiary of a timely-filed H-1B petition that has been granted by, or remains pending with, USCIS." *Id.; see* 8 C.F.R. § 214.2(f)(5)(vi). In light of this tight connection between F-1 and H-1B, the Court concludes that the provisions are integrally related

and that it is appropriate to consider H-1B when measuring the relevant zone of interests.[3]

Defendant argues that finding an integral relationship between F-1 and H-1B "could potentially provide standing to challenge almost every agency decision relating to the admission of nonimmigrants, which would deprive the zone-of-interest requirement of all meaning." (Def.'s ZOI Mem. at 9 (citing *FAIR*, 93 F.3d at 903-04).) Not so. As this Court has explained, F-1 and H-1B constitute a complementary statutory mechanism for attracting foreign students and retaining those students after they complete their studies. The relationship between these provisions is starkly evident from the 2008 Rule itself, which, while promulgated pursuant to F-1, is concerned entirely with compensating for the deficiencies in H-1B. The Court doubts that such a relationship exists between H-1B and many of the other nonimmigrant categories. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(A)(i) (nonimmigrant status for diplomats); *id.* § 1101(a)(15)(I) (representatives of foreign press); id. § 1101(a)(15)(T) (victims of human

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[3] The portion of the 2008 Rule at issue in this lawsuit further buttresses the notion that the two provisions are integrally related. Defendant argues at length that Congress has acquiesced in DHS's interpretation that F-1 can cover students post-completion. As explained in Section III.C *infra*, the Court agrees with this argument. Consequently, F-1 and H-1B apply to overlapping populations of nonimmigrants. A point that defendant appears to endorse. (*See* Def.'s ZOI Mem. at 9 ("The INA establishes a comprehensive scheme defining various nonimmigrant categories, and many of these categories overlap in point of the subject matter regulated." (citationomitted)).) This overlap further establishes the integral relationship between F-1 and H-1B.

trafficking). As such, this Court's limited holding of a relationship between F-1 and H-1B does not implicate the concerns raised in *FAIR*. *See* 93 F.3d at 904 ("Of course every immigration provision is in a broad sense part of the framework of every other provision. But if that were enough, then every provision constraining the admission of anyone under any circumstances . . . would be pertinent in applying the zone-of-interests test to *any* provision.").

Finally, even if this Court were to consider F-1 in isolation, it would find that plaintiff falls within that statute's zone of interests. First and foremost, the Court finds significant the use of the word "solely" in the F-1 subsection. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (requiring that the alien "seek[] to enter the United States temporarily and solely for the purpose of pursuing such a course of study"). The Court reads this limitation as an attempt by Congress to restrict F-1 student employment and to prevent aliens from using F-1 as a means to come to the United States to work. Indeed, this view was espoused by the Commissioner of INS in his testimony before Congress in 1975. *See Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 21 (1975) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of INS) ("I emphasize the word 'solely' . . . as to emphasize that the effect of the law is that the student must come here solely to pursue his education. That does not imply that he can come here with the expectation and intention of working."). Second, in 1990, Congress established a three-year pilot program to permit F-1 students in good academic standing to work off-

campus "in a position unrelated to the alien's field of study" for less than 20 hours a week. Immigration Act of 1990, Pub. L. No. 101-649, § 221, 104 Stat. 4978, 5027. Congress required employers to attest that the alien and other similarly situated workers were being paid prevailing wages. *Id.* Congress also mandated that, by 1994, the Commissioner of INS submit a report on the program, including its "impact . . . on prevailing wages of workers." *Id.* The agency issued the report and ultimately recommended against extending the program. (*See* Pl.'s Mem. of Law in Supp. of Prudential Standing [ECF No. 21] ("Pl.'s ZOI Mem."), App. at 9.) Among its concerns, the agency noted that "[t]here is the potential for job competition between foreign students and local youth." (*Id.* at 4.) It also speculated that U.S. workers might be "clos[ed]" out of "selected occupations and jobs" by "[n]etwork-based hiring" of foreign students. (*Id.* at 5.) Ultimately, the report concluded that the "off-campus F-1 pilot program can have adverse consequences for some American workers." (*Id.* at 6.) Congress followed the report's recommendation and let the program lapse. This pilot program—and Congress' decision to cancel it—makes clear that Congress is aware of and concerned about the impact of F-1 student employment on the U.S. labor market. This conclusion is unsurprising given that "[a] primary purpose in restricting immigration is to preserve jobs for American workers."[4] *Sure-Tan, Inc.*

[4] While it is true that the zone-of-interests test is concerned with the "particular provision of law upon which the plaintiff relies," *see Bennett v. Spear*, 520 U.S. 154, 175-176, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997), the Supreme Court's recent *Lexmark*

v. NLRB, 467 U.S. 883, 893, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984). The individuals in plaintiff's organization are therefore "arguably within the zone of interests to be protected" by F-1. *Patchak*, 132 S. Ct. at 2210 (internal quotation marks omitted).

III. STATUTORY AUTHORITY

A. STANDARD OF REVIEW

Plaintiff's principal argument is that DHS exceeded its statutory authority by issuing the 2008 Rule. (*See* Pl.'s Mot. at 16-22.) As an initial matter, however, the parties disagree as to the level of deference this Court should accord the agency's actions. Plaintiff argues that "DHS forfeited deference under Chevron because it failed to provide notice and comment for any of the actions at issue" and urges this Court to apply the standard of review articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). (Pl.'s Mot. at 11.) Defendant counters that *Chevron* applies because Congress delegated to DHS the "authority to speak with the force of law through rulemaking." (*See* Def.'s Opp. at 17.)

"*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Mayo*

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decision suggests that courts should consider the overall purpose of the statute when interpreting the zone of interests for particular provisions. *See Permapost Prods. v. McHugh*, 55 F. Supp. 3d 14, 26 n.6 (D.D.C. 2014).

Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)). Contrary to plaintiff's argument, the Supreme Court in *Mead* held that, while notice and comment is "significant . . . in pointing to *Chevron* authority, the want of that procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." 533 U.S. at 230-31; *accord Barnhart v. Walton*, 535 U.S. 212, 221, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." (citation omitted)).

Congress has delegated substantial authority to DHS to issue immigration regulations. This delegation includes broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens . . . ."); *id.* § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."); *id.* § 1184(a)(1) ("The admission to the United States of

any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, . . . such alien will depart from the United States.").

The 2008 Rule was promulgated as an exercise of this delegated authority. The subject matter of the 2008 Rule falls squarely within the ambit of § 1184(a)(1), and the Rule invokes that statute in listing its sources of authority. *See* 2008 Rule at 18,954. The Rule was published in the Federal Register, and the agency provided the public with a post-publication comment period. *Id.* at 18,945; *see Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467, 377 U.S. App. D.C. 161 (D.C. Cir. 2007) ("Although publication in the federal register is not in itself sufficient to constitute an agency's intent that its pronouncement have the force of law, where, as here, that publication reflects a deliberating agency's self-binding choice, as well as a declaration of policy, it is further evidence of a *Chevron*-worthy interpretation." (citation omitted)). Unlike the Customs ruling letter in *Mead*, which was not binding as to third parties, the 2008 Rule was clearly issued "with a lawmaking pretense in mind" and was intended to have "the force of law." 533 U.S. at 233. As such, the Court concludes that *Chevron* deference is appropriate.

B. *CHEVRON* STEP ONE

Under *Chevron* step one, this Court must determine whether "Congress has 'directly addressed the precise question at issue.'" *Mayo Found.*, 562 U.S. at 52 (quoting *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Plaintiff argues that "[t]he term *student* is not ambiguous." (Pl.'s Mot. at 17.) Citing several dictionary definitions, plaintiff contends that F-1 nonimmigrants engaging in post-completion OPT cannot be considered students because "[t]hey are not attending schools." (*Id.)* Plaintiff further contends that other parts of the F-1 statute, such as the requirement that the student "enter the United States . . . solely for the purpose of pursuing such a course of study," demonstrate that the statute "unambiguously define[s] a *student* as one who attends specific, approved schools." (*Id.* at 18.) In response, defendant argues that the statute is ambiguous in that it does not define the terms "student" or "course of study," and contends that this congressional silence leaves "an ambiguity for the agency to resolve." (Def.'s Mot. at 17.) Defendant also points out that "the agency has long interpreted the foreign student provision to allow for employment of students during practical training." (*Id.* at 21.)

The Court agrees that the statute's lack of a definition for the term "student" creates ambiguity. As the Supreme Court said in *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue,

the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. And, in the context of a tax statute, the Supreme Court recently held that the word "student" was ambiguous with respect to medical residents because "[t]he statute does not define the term 'student,' and does not otherwise attend to the precise question whether medical residents are subject to FICA."[5] *Mayo Found.*, 562 U.S. at 52.

This Court is not persuaded by plaintiff's argument that the statutory context clarifies the word "student." To be sure, F-1 defines a nonimmigrant as a student "who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at" an approved academic institution. 8 U.S.C. § 1101(a)(15)(F)(i). However, as argued by defendant, this clause could sensibly be read as an *entry requirement*. (Def.'s Opp. at 21 ("[T]he INA definition of 'student' is only the definition of what is required to be proved at the time of admission to obtain a student visa.").) This reading is bolstered by Congress' delegation of the power to prescribe regulations related to a

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[5] *Mayo* is not dispositive of the present case because the medical residents were still participating in "a formal and structured educational program," even though the bulk of their time was spent caring for patients. *Mayo Found.*, 562 U.S. at 48. Interestingly, however, the statute at issue in *Mayo* contained an additional qualification: the students were exempt from FICA taxes only if they were "enrolled and regularly attending classes at [a] school, college, or university." *Id.* at 49 (quoting 26 § 3121(b)(10) (2006 ed.)) [sic]. The absence of such a qualifier in F-1 highlights the ambiguous scope of the word "student" in § 1101(a)(15)(F)(i).

nonimmigrant's duration of stay. *See* 8 U.S.C. § 1184(a)(1).

Moreover, several pieces of evidence indicate that Congress understood F-1 to permit at least some period of employment. For example, as discussed in Section II *supra*, in 1990, Congress implemented a pilot program that allowed F-1 students to work up to 20 hours per week in a job unrelated to their field of study. *See* Immigration Act of 1990 § 221. And F-1 nonimmigrants are explicitly exempted from several wage taxes. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). These statutory provisions lend credence to defendant's argument that the clause in F-1 — "solely for the purpose of pursuing such a course of study" — does not foreclose employment. Since F-1 does not bar *all* foreign student employment, it is not clear what employment the statute *does* permit. As such, the statute's text is ambiguous as to whether such employment may extend for a period of time after they complete their studies.

Dictionary definitions are similarly unhelpful in clarifying this statutory ambiguity. To be sure, some definitions of the word "student" require school attendance. *E.g., Student, Ballentine's Law Dictionary* (3d ed. 2010) ("A person in attendance at a college or university. One receiving instruction in a public or private school."). Most, however, include broader notions of studying and learning. *E.g., Student, Merriam Webster's Collegiate Dictionary* (10th ed. 1997) ("SCHOLAR, LEARNER, especially: one who attends a school . . . . One who studies: an attentive and systematic observer."); *Student, Oxford English Dictionary* ("A person who is engaged in or addicted to

study. . . . A person who is undergoing a course of study and instruction at a university or other place of higher education or technical training."), http://www.oed.com (last visited Aug. 5, 2015). These definitions are unhelpful not only because they are competing, but because they do not address the fundamental ambiguity presented by this case. No one disputes that all F-1 aliens enter the United States as "students" under any conceivable definition, since they must enroll at a qualifying academic institution. The ambiguity is whether the scope of F-1 encompasses post-completion practical training related to the student's field of study. Neither dictionary definitions nor statutory context resolves this issue. The Court concludes that the statute is ambiguous.[6]

C. *CHEVRON* STEP TWO

The second step of *Chevron* asks whether the 2008 Rule "is a 'reasonable interpretation' of the enacted text." *Mayo Found.*, 562 U.S. at 58 (quoting *Chevron*, 467 U.S. at 844). This Court must uphold the Rule unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *see also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 71, 342 U.S. App. D.C. 61 (D.C. Cir. 2000) ("Under *Chevron*, we are bound to uphold agency interpretations as long as they are reasonable — 'regardless whether there may be other reasonable, or even more reasonable, views.'" (quoting *Serono Labs., Inc. v.*

[6] This Court's conclusion that F-1 is ambiguous is reinforced by Congress' longstanding acquiescence in DHS's interpretation, discussed in Section III.C *infra*.

Shalala, 158 F.3d 1313, 1321, 332 U.S. App. D.C. 407 (D.C. Cir. 1998))).

Defendant argues that Congress' "longstanding acquiescence" in its interpretation suggests its reasonableness. (Def.'s Mot. at 31.) In particular, it contends that federal agencies have interpreted F-1 to allow for post-completion practical training for over 60 years, and that Congress has never abrogated that interpretation despite amending the statute multiple times. (*See id.* at 21.) Plaintiff responds that Congress could not have acquiesced in DHS's interpretation of F-1 because that interpretation has frequently changed, and there is insufficient evidence to establish that Congress was actually aware of the agency's interpretation. (*See* Resp. Br. in Supp. of Pl.'s Cross Mot. for Summ. Judgment or Judgment on the Administrative Record [ECF No. 35] ("Pl.'s Opp.") at 5-9.)

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, 539 F.3d 492, 500, 383 U.S. App. D.C. 175 (D.C. Cir. 2008) (alteration in original) (quoting *Doris Day Animal League v. Veneman*, 315 F.3d 297, 300, 354 U.S. App. D.C. 216 (D.C. Cir. 2003)); *see also Barnhart*, 535 U.S. at 220 ("Court[s] will normally accord particular deference to an agency interpretation of longstanding duration." (internal quotation marks omitted)); *Lindahl v. OPM*, 470 U.S. 768, 782 n.15, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985) ("Congress is presumed to be aware of an administrative or judicial

interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." (internal quotation marks omitted)). The D.C. Circuit has cautioned, however, that the so-called "legislative reenactment" doctrine is of "little assistance" when Congress has "simply enacted a series of isolated amendments to other provisions." *Public Citizen, Inc. v. HHS*, 332 F.3d 654, 668, 357 U.S. App. D.C. 1 (D.C. Cir. 2003). Moreover, there must be "some evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue." *Id.* at 669.

Since at least 1947, INS and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes. *See* 12 Fed. Reg. at 5357 ("In 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 . . . ."). In 1952, Congress overhauled the immigration laws with the Immigration and Nationality Act, which created the modern category of student nonimmigrants. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952). INS continued to interpret the law to permit foreign students to engage in practical training.[7] *See, e.g.*, Special Requirements for

[7] While the 1947 and 1973 regulations do not explicitly authorize post-completion practical training, several pieces of evidence strongly suggest that these provisions allowed alien students to engage in full-time, post-completion employment without simultaneously attending classes. First, both the 1947 and 1973

regulations, in addition to permitting students to engage in practical training, allowed students to work out of financial necessity, but only if the employment would not interfere with the student's ongoing course of study. *See* 12 Fed. Reg. at 5357; 38 Fed. Reg. at 35,426. The practical training subsections included no similar limitation. Second, contemporary documents demonstrate an understanding that those practical training regulations allowed full-time, post-completion employment. For example, in *Matter of T-*, 7 I. & N. Dec. 682 (B.I.A. 1958), the Board of Immigration Appeals noted 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 that only in "unusual circumstances" would "practical training . . . be authorized before the beginning of or during a period of formal study." *Id.* at 684; *see also Matter of Yau*, 13 I. & N. Dec. 75, 75 (B.I.A. 1968) (noting that an alien student had been granted permission to engage in practical training after graduating); *Matter of Ibarra*, 13 I. & N. Dec. 277, 277-78 (B.I.A. 1968) (same); *Matter of Alberga*, 10 I. & N. Dec. 764, 765 (B.I.A. 1964) (same). Moreover, a 1950 Report by the Senate Committee on the Judiciary, in describing foreign student employment, stated that "practical training has been authorized for 6 months after completion of the student's regular course of study." S. Rep. No. 81-1515, at 503 (1950). The Report also noted a "suggestion that the laws . . . be liberalized to permit foreign students to take practical training before completing their formal studies." *Id.* at 505. Similarly, a House Report from 1961 disclosed that, on April 24, 1959, the Department of State, acting in concert with INS, issued a notice to its officers that "[s]tudents whom the sponsoring schools recommend for practical training should be permitted to remain for such purposes up to 18 months after receiving their degrees or certificates." H.R. Rep. No. 87-721, at 15 (1961). Finally, in a 1975 statement to Congress on the subject of foreign students, the Commissioner of INS noted that, although there "is no express provision in the law for an F-1 student to engage in employment," such a student could engage in practical training on a full-time basis for up to eighteen months. *Review of Immigration Problems:*

Admission, Extension, and Maintenance of Status, 38 Fed. Reg. 35,425, 35,426 (Dec. 28, 1973) (allowing foreign students to secure employment "in order to obtain practical training . . . in his field of study," if such training "would not be available to the student in the country of his foreign residence," for a maximum of 18 months). And, at least as early as 1983, INS explicitly authorized post-completion practical training.[8] Nonimmigrant Classes; Change of Nonimmigrant Classification; Revision in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing students to engage in practical training "[a]fter completion of the course of study"); Retention and Reporting Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256, 76,274 (Dec. 11, 2002) (same).

Since 1952, Congress has amended the provisions governing nonimmigrant students on several

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Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary, 94th Cong. 21, 23 (1975) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of INS).

[8] To be sure, plaintiff is correct that the details of the practical training regulations have changed over the decades. (Pl.'s Opp. at 6.) Notwithstanding these changes, however, INS and DHS have, since 1947, consistently interpreted the immigration laws to permit post-completion practical training. *See supra* note 7. Congress' acquiescence in this longstanding interpretation undercuts plaintiff's argument that the word "student" unambiguously requires F-1 nonimmigrants to maintain ongoing enrollment in a school or university.

occasions. *See* Pub. L. No. 87-256, § 109(a), 75 Stat. 527, 534 (Sept. 21, 1961) (allowing an F-1 nonimmigrant's alien spouse and minor children to accompany him); Immigration Act of 1990 § 221(a) (permitting F-1 nonimmigrants to engage in limited employment unrelated to their field of study); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 3009-699 (adding limitations related to F-1 nonimmigrants at public schools); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (implementing monitoring requirements for foreign students); Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (Dec. 14, 2010) (amending F-1 with respect to language training programs). During that time, Congress has also imposed various labor protections for domestic workers. *E.g.*, Immigration Act of 1990 § 205 (requiring a labor condition certification for H-1B nonimmigrants from the employer attesting that the alien will be paid the prevailing wage and that the alien's employment will not adversely affect working conditions); *id.* § 221 (requiring a similar certification for F-1 nonimmigrants working in a position unrelated to their field of study); American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 412, 112 Stat. 2681-641, 2681-642 (requiring employers of H-1B nonimmigrants to certify that they "did not displace and will not displace a United States worker"). Notwithstanding this legislative activity, Congress has never repudiated INS or DHS's interpretation permitting foreign students to engage in post-completion practical training.

This legislative history leads the Court to two conclusions. First, DHS's interpretation of F-1—inasmuch as it permits employment for training purposes without requiring ongoing school enrollment—is "longstanding" and entitled to deference. *See Barnhart*, 535 U.S. at 220. Second, Congress has repeatedly and substantially amended the relevant statutes without disturbing this interpretation. These amendments have not been "isolated." *Public Citizen*, 332 F.3d at 668. The Immigration and Nationality Act of 1952, in particular, radically changed the country's immigration system. And, the Immigration Act of 1990 imposed a host of new protections for domestic workers and explicitly authorized F-1 students to engage in certain forms of employment. By leaving the agency's interpretation of F-1 undisturbed for almost years, notwithstanding these significant overhauls, Congress has strongly signaled that it finds DHS's interpretation to be reasonable.

Plaintiff objects that there is insufficient evidence to prove that Congress was aware of DHS's interpretation. (*See* Pl.'s Opp. at 7-9.) The Court disagrees. As an initial matter, as explained above, DHS's interpretation of F-1 clearly dates back to 1983, and likely to 1947. *See supra* note 7. Congressional obliviousness of such an old interpretation of such a frequently amended statute strikes this Court as unlikely. In any case, ample evidence indicates congressional awareness. Congress' 1990 amendment of the INA included a three-year pilot program authorizing F-1 student employment for positions that were "unrelated to the alien's field of study." Immigration Act of 1990 § 221(a). Considered in isolation, this provision is

perplexing — why would Congress only authorize foreign students to do work *unrelated* to their schooling? The answer, of course, is that INS's regulations already authorized student employment related to the student's field of study, and these regulations were explicit in permitting post-completion employment. *See* 8 C.F.R. § 214.2(f)(10) (1989) (authorizing F-1 students to engage in "[p]ractical training prior to completion of studies" or "after completion of studies" upon certification that "the proposed employment . . . is related to the student's course of study"). Moreover, in recommending against the continuation of the pilot program, the Commissioner of INS specifically referenced post-completion practical training. (Pl.'s ZOI Mem., App. at 10.)

Several other pieces of legislative history suggest that Congress was aware of the practical training program. The program was described at length in a 1950 Senate Report, a 1961 House Report, and 1975 congressional testimony by the Commissioner of INS. *See supra* note 7. In addition, the practical training program has been discussed during multiple congressional hearings. *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 Assocation); *Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary on S. 358 and S. 448*, 101st Cong. 485-86 (1989) (statement of Frank D. Kittredge, President, National Foreign Trade Council); *Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on*

Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary on H.R. 1510, 98th Cong. 687, 695, 698 (1983) (statement of Billy E. Reed, Director, American Engineering Association); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. 265-66 (1971) (statement of Sam Bernsen, Assistant Comm'r, INS). The Court finds this evidence more than sufficient to demonstrate "congressional familiarity with the administrative interpretation at issue." *See Public Citizen*, 332 F.3d at 669.

Plaintiff makes several other arguments in an attempt to demonstrate that DHS's interpretation is unreasonable. First, it contends that DHS has "circumvent[ed] [H-1B's] statutory restrictions that rightfully should be applied" to college-educated labor. (Pl.'s Mot. at 20.) But H-1B — which applies to aliens seeking to work in a "specialty occupation," 8 U.S.C. § 1101(a)(15)(H)(i)(b) — is far broader than the employment permitted by the OPT program. DHS's interpretation of the word "student" does not render any portion of H-1B, or its related restrictions, surplusage. Congress has tolerated practical training of alien students for almost 70 years, and it did nothing to prevent a potential overlap between F-1 and H-1B when it created the modern H-1B category in 1990. *See* Immigration Act of 1990 § 205(c). As such, the Court does not believe that DHS's interpretation is unreasonable merely because of its limited overlap with H-1B.

Plaintiff also contends that "[t]here is not a scintilla of a statutory authorization for DHS to use student visas to remedy labor shortages." (Pl.'s Mot. at 22.) The Court disagrees. DHS has been broadly delegated the

authority to regulate the terms and conditions of a nonimmigrant's stay, include its duration. *See* 8 U.S.C. § 1103(a); *id.* § 1184(a)(1). 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." 6 U.S.C. § 111(b)(1)(F). Moreover, a significant purpose of immigration policy is to balance the productivity gains that aliens provide to our nation against the potential threat to the domestic labor market. *Compare In re Griffiths*, 413 U.S. 717, 719, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (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*, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers . . . ."). Indeed, in its zone-of-interests memorandum, plaintiff argues that "the interest of safeguarding American workers is inextricably intertwined with employment on F-1 student visas." (Pl.'s ZOI Mem. at 9.) The Court concurs. DHS's consideration of the economic impact of extending the OPT program does not render its interpretation unreasonable.[9]

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[9] To be clear, at this stage the Court is only considering whether the agency's interpretation of the statute is unreasonable, not whether the agency's regulation is substantively deficient under 5 U.S.C. § 706. *See Council for Urological Interests v. Burwell*, 790 F.3d 212, 2015 U.S. App. LEXIS 9867, at *25 (D.C. Cir.

In light of Congress' broad delegation of authority to DHS to regulate the duration of a nonimmigrant's stay and Congress' acquiescence in DHS's longstanding reading of F-1, the Court concludes that the agency's interpretation is not unreasonable.

IV. EMERGENCY RULEMAKING

DHS promulgated the 2008 Rule without notice and comment. In justifying this decision, the agency cited 5 U.S.C. § 553(b), which allows 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 thereon are impracticable, unnecessary, or contrary to the public interest." 2008 Rule at 18,950. The agency explained that 30,205 F-1 students were on OPT status that would expire between April 1 and July 31, 2008, that those students "will need to leave the United States unless they are able to obtain an H-1B visa for FY09 or otherwise maintain their lawful nonimmigrant status," and that the 17-month extension "has the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy." *Id.* The agency

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June 12, 2015) ("[A]lthough *Chevron*'s second step sounds closely akin to plain vanilla arbitrary-and-capricious style review, interpreting a statute is quite a different enterprise than policy-making." (internal quotation marks omitted)). In light of the holding in Section IV *infra*, the Court withholds judgment on the issue of whether the agency has marshaled sufficient evidence to support its rule.

concluded that it had good cause to issue the rule without notice and comment because

[t]he ability of U.S. high-tech employers to retain skilled technical workers . . . would be seriously damaged if the extension of the maximum OPT period to twenty-nine months for F-1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F-1 students complete their studies and, without this rule in place and effective, would be required to leave the United States.

Id. Plaintiff disputes this conclusion, contending that none of the § 553(b) exemptions applies to the 2008 Rule. (*See* Pl.'s Mot. at 23-27.)

This Court reviews an agency's good-cause determination without deference. *See Sorenson Communs. Inc. v. FCC*, 755 F.3d 702, 706, 410 U.S. App. D.C. 278 (D.C. Cir. 2014). The D.C. Circuit has "repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'" *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93, 401 U.S. App. D.C. 194 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754, 344 U.S. App. D.C. 382 (D.C. Cir. 2001)). Determining whether notice and comment is impracticable "is an 'inevitably fact-or-context dependent' inquiry."[10]

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[10] Defendant does not explicitly state that it was relying on the "impracticability" prong of § 553(b), but nowhere does it suggest that notice and comment would have been "unnecessary" or "contrary to the public interest." 5 U.S.C. § 553(b). All of its arguments revolve around the purported urgency it faced in issuing the rule, which this Court takes to mean that the delay inherent

Sorenson, 755 F.3d at 706 (quoting *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1132, 262 U.S. App. D.C. 61 (D.C. Cir. 1987)). In the past, the D.C. Circuit has "approved an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property." *Id.; see also Jifry v. FAA*, 370 F.3d 1174, 1179, 361 U.S. App. D.C. 450 (D.C. Cir. 2004) (finding good cause when rule was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States").

The Circuit has recently considered whether an economic crisis could sustain a good-cause determination under § 553(b). In *Sorenson*, the Federal Communications Commission bypassed notice and comment in promulgating rules imposing certification requirements on hearing-impaired individuals receiving telephones with captioning capability. 755 F.3d at 704-05. The rules were precipitated by the plaintiff distributing free captioning-enabled phones, which in turn greatly increased the demand for captioning services that are subsidized by a government-organized fund. *Id.* Although the D.C. Circuit would "not exclude the possibility that a fiscal calamity could conceivably justify bypassing the notice-and-comment requirement," it found that the record before it was "simply too scant to establish a fiscal emergency." *Id.* at 707. The Circuit noted that the administrative record did "not reveal when the Fund was expected to run out of money, whether the Fund would have run out of money before a notice-and-comment period could elapse, or whether

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in giving notice and soliciting comment would have been impracticable.

there were reasonable alternatives available to the Commission." *Id.*

To demonstrate the urgency of the situation it faced in issuing the 2008 Rule, DHS relied principally on three sources: a 2008 report by the National Science Foundation titled *Science and Engineering Indicators, 2008* ("*Indicators*") (Joint Appendix: Administrative Record Excerpts [ECF No. 26] ("JA") at 135-536[11] a 2005 report by the National Academy of Sciences titled *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future* ("*Gathering Storm*") (JA at 1366-1803); and a collection of submissions from Members of Congress and stakeholders in the technology industry.[12] (JA at 97-134.)

The Court has reviewed these materials and finds that they fail to demonstrate that the 2008 Rule was necessary to forestall a "fiscal emergency." *See Sorenson*, 755 F.3d at 707. The first problem is that the record does not establish the economic consequences of failing to immediately issue the rule. The reports cited by the agency speak only in very general terms about the importance of STEM workers to the U.S. economy. (*See, e.g., Indicators* at 158 ("Indicators of the shift toward knowledge-intensive economic

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[11] The Court will use the administrative record's numbering when citing the joint appendix.

[12] DHS cited one additional study that does not appear in the joint appendix, which the Court has also reviewed. Task Force on the Future of American Innovation, *Measuring the Moment: Innovation, National Security, and Economic Competitiveness* (Nov. 2006), http://www.innovationtaskforce.org/docs/Benchmarks%20-%202006.pdf.

activity abound. . . . Countries are investing heavily in expansion and quality improvements of their higher education systems, easing access to them, and often directing sizable portions of this investment to training in science, engineering, and related S&T fields."); *id.* at 172 ("The progressive shift toward more knowledge-intensive economies around the world is dependent upon the availability and continued inflow of individuals with postsecondary training to the workforce."); *id.* at 338 ("Migration of skilled S&E workers across borders is increasingly seen as a major determinant of the quality and flexibility of the labor force in most industrialized countries. . . . The United States has benefited, and continues to benefit, from this international flow of knowledge and personnel . . ."); *Gathering Storm* at 1552 ("The biggest concern is that our competitive advantage, our success in global markets, our economic growth, and our standard of living all depends on maintaining a leading position in science, technology, and innovation. As that lead shrinks, we risk losing the advantages on which our economy depends."); *id.* at 1553 ("This nation's science and technology policy must account for the new reality and embrace strategies for success in a world where talent and capital can easily choose to go elsewhere.")) To be sure, these quotations highlight the importance of science and technology to the U.S. economy as a general matter. But nowhere do the reports contemplate the role of recent graduates with F-1 visas in sustaining the pace of innovation. And, they certainly do not consider the economic impact of delaying the rule for however long it would have taken to solicit broader feedback via notice and comment.

Defendant's contention that notice and comment would have been impracticable is further undercut by the fact that H-1B oversubscription is old hat. As defendant concedes, "[f]rom the time the visa numbers allocated for the H-1B program were reduced . . . from 195,000 to 65,000 in fiscal year 2004, the H-1B program has been consistently oversubscribed." (Def.'s Mot. at 43 (citation omitted); *see also* 2008 Rule at 18,946 (noting that the H-1B limit has been reached progressively earlier every year since 2004).) Presumably, at least some F-1 students had been unable to obtain an H-1B visa and were forced to leave the country for each of the four years prior to the issuance of the 2008 Rule, but defendant gives no evidence that these exits contributed to an economic crisis.[13] Moreover, the consistent H-1B oversubscription should have made the economic consequences identified by defendant entirely predictable. Indeed, much of the evidence

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[13] The only items in the record that speak to the impact of the H-1B cap on economic competitiveness are letters from interested stakeholders. For example, in a letter dated November 15, 2007, Microsoft lamented the difficulty of obtaining H-1B visas for its employees, noting that "[t]o compete globally . . . Microsoft . . . must have access to the talent it needs." (JA at 121.) Even these letters, however, do not articulate the immediate impact of failing to extend OPT. Moreover, by failing to engage in notice-and-comment rulemaking, the record is largely one-sided, with input only from technology companies that stand to benefit from additional F-1 student employees, who are exempted from various wage taxes. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). Indeed, the 17-month duration of the STEM extension appears to have been adopted directly from the unanimous suggestions by Microsoft and similar industry groups. (*See* JA 115, 121, 125, 126.)

before the agency had long been available to DHS. Bill Gates testified before Congress on March 7, 2007 — 13 months before DHS issued the 2008 Rule — about the shortage of H-1B visas. (JA at 106.) And the report relied on by DHS describing the dangers to American competitiveness of losing STEM workers was published in 2005. (*Id.* at 1367.)

Defendant does not explain why it waited to initiate proceedings on this issue, and it has not pointed to any changed circumstances that made the OPT extension suddenly urgent. The Court therefore finds that DHS's self-imposed deadline of April 2008 lacks support in the record. DHS has thus failed to carry its burden to show that it faced an "emergency situation[]," *Jifry*, 370 F.3d at 1179, that exempted it from subjecting the 2008 Rule to notice and comment.

V. REMEDY

Plaintiff contends that "[t]he procedural defects of the OPT Rules are so great that vacatur is the appropriate remedy." (Pl.'s Reply at 8.) Defendant responds that, "because of the emergency situation invalidation would cause, the appropriate course of action would be an order that holds any *vacatur* in temporary abeyance." (Def.'s Opp. at 43.)

The "decision whether to vacate depends on the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Comcast Corp. v. FCC*, 579 F.3d 1, 8, 388 U.S. App. D.C. 102 (D.C. Cir. 2009) (alteration in original) (quoting *Allied-Signal, Inc. v.*

Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51, 300 U.S. App. D.C. 198 (D.C. Cir. 1993)). "When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198, 386 U.S. App. D.C. 10 (D.C. Cir. 2009). In contrast, "[f]ailure to provide the required notice and to invite public comment — in contrast to the agency's failure . . . adequately to explain why it chose one approach rather than another for one aspect of an otherwise permissible rule — is a fundamental flaw that 'normally' requires vacatur of the rule." *Id.* at 199. With respect to the second *Allied-Signal* factor, "[w]here the proverbial 'egg has been scrambled and there is no apparent way to restore the status quo ante,' the Court may remand without vacating." *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 118 (D.D.C. 2011) (quoting *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 97-98, 351 U.S. App. D.C. 214 (D.C. Cir. 2002)). A middle ground embraced by several courts in this Circuit is to vacate the challenged rule but to stay the vacatur for a period of time. *E.g., Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 909, 370 U.S. App. D.C. 249 (D.C. Cir. 2006) ("The Commission is in a better position than the court to assess the disruptive effect of vacating the Rule's two conditions. . . . Therefore, the court will . . . withhold the issuance of its mandate . . . for ninety days."); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855, 258 U.S. App. D.C. 6 (D.C. Cir. 1987) ("In this case, we vacate the rule because the Secretary's omissions are quite serious . . . . Yet we exercise our power to withhold issuance of our mandate [for six months],

to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade."); *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 52 (D.D.C. 2010) ("Because remand without vacatur is inappropriate, . . . the Court will vacate the challenged [rules], but will stay vacatur."); *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12-13 (D.D.C. 2003).

The first *Allied-Signal* factor weighs heavily in favor of vacatur. Failure to provide notice and invite public comment is a serious procedural deficiency that counsels against remand without vacatur. *Heartland*, 566 F.3d at 199; *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110, 409 U.S. App. D.C. 133 (D.C. Cir. 2014) ("[D]eficient notice is a 'fundamental flaw' that almost always requires vacatur." (quoting *Heartland*, 566 F.3d at 199)). Indeed, defendant does not even suggest such a remedy. (*See* Def.'s Opp. at 43-45.) However, the Court concludes that immediate vacatur of the 2008 Rule would be seriously disruptive. In 2008, DHS estimated that there were approximately 70,000 F-1 students on OPT and that one-third had earned degrees in a STEM field. 2008 Rule at 18,950. While DHS has not disclosed the number of aliens currently taking advantage of the OPT STEM extension, the Court has no doubt that vacating the 2008 Rule would force "thousands of foreign students with work authorizations . . . to scramble to depart the United States." (Def.'s Opp. at 44.) Vacating the 2008 Rule could also impose a costly burden on the U.S. tech sector if thousands of young workers had to leave their jobs in short order. The Court sees no way of

immediately restoring the pre-2008 status quo without causing substantial hardship for foreign students and a major labor disruption for the technology sector. As such, the Court will order that the 2008 Rule — and its subsequent amendments — be vacated, but it will order that the vacatur be stayed.[14] The stay will last until February 12, 2016, during which time DHS can submit the 2008 Rule for proper notice and comment.

CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part both plaintiff's motion for summary judgment [ECF No. 25] and defendant's motion for summary judgment [ECF No. 27]. The Court will vacate the 17-month STEM extension described in the 2008 Rule, 73 Fed. Reg. 18,944 (Apr. 8, 2008), staying the vacatur until February 12, 2016, and will remand to DHS for further proceedings consistent with this Memorandum Opinion. An Order consistent with this Memorandum Opinion will be issued on this day.

/s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge
Date: August 12, 2015

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[14] In light of this holding, the Court need not address plaintiff's arguments that DHS acted arbitrarily and capricious in promulgating the 2008 Rule and that DHS failed to follow the correct procedure in amending the list of STEM disciplines. (*See* Pl.'s Mot. at 28-38.)

ORDER

For the reasons stated in the accompanying Memorandum Opinion [ECF No. 43], it is hereby

ORDERED that plaintiff's motion for summary judgment [ECF No. 25] is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that defendant's motion for summary judgment [ECF No. 27] is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that the 17-month STEM extension described at 73 Fed. Reg. 18,944 (Apr. 8, 2008), is **VACATED** but that the vacatur is **STAYED** until February 12, 2016; and it is further

ORDERED that the above-captioned case is remanded to DHS for further proceedings consistent with the Court's Memorandum Opinion.

SO ORDERED.

/s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge
Date: August 12, 2015

APPENDIX G

No. 21-5028

United States Court of Appeals
for the
District of Columbia Circuit

Washington Alliance of Technology Workers,
Appellant
v.
U.S Department of Homeland Security, *et al.*,
Appellees [Filed] February 1, 2023

Before: SRINIVASAN, *Chief Judge*; HENDERSON**, MILLETT, PILLARD, WILKINS, KATSAS*, RAO***, WALKER, CHILDS, and PAN*, *Circuit Judges*.

ORDER

Appellant's petition for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Daniel J. Reidy Deputy Clerk

* Circuit Judges Katsas and Pan did not participate in this matter.

** Circuit Judge Henderson would grant the petition for rehearing en banc. A statement by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

*** Circuit Judge Rao would grant the petition for rehearing en banc. A statement by Circuit Judge Rao, joined by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting from the denial of rehearing en banc: For the reasons explained in my panel dissent, which is hereby incorporated by reference thereto, *Wash. All. of Tech. Workers v. DHS ("Washtech")*, 50 F.4th 164, 194–206 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part), I dissent from the denial of rehearing en banc.

RAO, *Circuit Judge*, with whom Circuit Judge HENDERSON joins, dissenting from the denial of rehearing en banc: For the reasons thoughtfully explained in Judge Henderson's dissent, the panel's interpretation of the F-1 student visa provision cannot be reconciled with the text and structure of the Immigration and Nationality Act ("INA"). Rehearing en banc is warranted because the panel decision has serious ramifications for the enforcement of immigration law. In holding that the nonimmigrant visa requirements are merely conditions of entry, the court grants the Department of Homeland Security ("DHS") virtually unchecked authority to extend the terms of an alien's stay in the United States. This decision concerns not only the large number of F-1 visa recipients, but explicitly applies to all nonimmigrant visas and therefore has tremendous practical consequences for who may stay and work in the United States. By replacing Congress's careful distinctions with unrestricted Executive Branch discretion, the panel muddles our immigration law and opens up a split with our sister circuits. This is a question of exceptional importance, and I respectfully dissent from the decision not to rehear it as a full court.

* * *

This case involves a challenge to a DHS regulation that allows F-1 student visa holders to remain in the country after they graduate and to work in fields related to their area of study for up to 36 months. 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, 13,087 (Mar. 11, 2016). Under the INA, the F-1 designation requires an alien to be a "bona fide student qualified to pursue a full course of study" who "seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study." Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(F)(i)). Despite the requirements that an F-1 visa go to a person who is a "bona fide student" seeking "solely" to pursue a course of study in the United States, the majority concludes that DHS has general authority to extend an F-1 visa for any "reasonably related" purpose. *See Wash. All. of Tech. Workers v. DHS* ("*Washtech*"), 50 F.4th 164, 178 (D.C. Cir. 2022). On the majority's reading, the highly specific requirements of the F-1 provision define only requirements of entry, rather than ongoing conditions for an alien to remain in the United States. The majority explicitly recognizes that its reasoning and analysis applies to all nonimmigrant categories. *See id.* at 169, 189.

The panel opinion turns Congress's carefully calibrated scheme on its head. The INA enumerates 22 categories of "nonimmigrants" who may be eligible for visas to come to the country temporarily, with many categories further divided into specific subcategories. *See* 8 U.S.C. § 1101(a)(15)(A)–(V). The nonimmigrant categories are precisely delineated, reflecting Congress's judgments as to which aliens may be admitted into the country and for what reason. For instance, an E-3 visa is available to an alien seeking "to perform services in a specialty occupation in the

United States" but only "if the alien is a national of the Commonwealth of Australia." *Id.* § 1101(a)(15)(E)(iii). An H-2A visa is available to an alien seeking to perform "agricultural labor," but only such labor as explicitly "defined in section 3121(g) of title 26," "as defined in section 203(f) of title 29," or "the pressing of apples for cider on a farm." *Id.* § 1101(a)(15)(H)(ii)(a).

These provisions exemplify Congress's detailed attention to the very specific conditions that attach to each nonimmigrant visa. Nonetheless, the panel concludes such statutory requirements apply only at the moment of entry. DHS therefore may "regulate how long and under what conditions nonimmigrants may stay in the country." *Washtech*, 50 F.4th at 170. Although Congress has set out the conditions for *entry*, the panel draws the surprising conclusion that DHS may prescribe different criteria for *staying* in the United States.

Under the majority's approach, DHS is left with wide discretion to determine which aliens may remain in the country even after the grounds for their visa have lapsed. The only constraint identified by the panel is that an extended stay must be "reasonably related" to the particular visa category. *See id.* at 178–79. This capacious standard could distort other nonimmigrant categories, allowing, for instance, an agricultural worker admitted under an H-2A visa to remain in the country even if he abandons his agricultural work and opts instead to pursue a degree in agricultural sciences. Glossing over Congress's delineation of dozens of discrete categories, the majority's interpretation effectively erases the INA's very specific

requirements the moment an alien enters the United States.[1]

The panel's holding that DHS has general discretion to permit lengthy work stays for nonimmigrants is similarly difficult to square with the detailed statutory requirements for work visas. Congress has enumerated specific pathways for aliens to work. Some, such as the H-1B visa for skilled workers and the H-2B visa for nonagricultural workers, are subject to annual numerical limits. *See* 8 U.S.C. § 1184(g)(1). Allowing F-1 students to work does an end run around these numerical limits for skilled workers because they are often interchangeable. *See Washtech*, 50 F.4th at 203 (Henderson, J., concurring in part and dissenting in part) (observing that F-1 visa holders working after completion of their studies have "surpassed the H-1B visa program as the greatest source of highly skilled guest workers").

The INA's provisions for work visas reflect political judgments balancing the competing interests of employers and American workers. Such detailed legislation is incompatible with assuming a broad delegation to DHS to confer additional work visas through regulation. As the Supreme Court recently emphasized, "extraordinary grants of regulatory authority" require

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[1] The fact that DHS has long granted some extensions of the F-1 visa does not change the question of whether the agency has authority to do so. Agencies may exercise only the authority granted by Congress and such authority cannot be conferred by silence. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

not "a merely plausible textual basis for the agency action" but "clear congressional authorization." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up). Here, as Judge Henderson explained, there is not even a plausible textual basis for DHS to allow student visa holders to remain in the country and work long after their student status has lapsed. *See Washtech*, 50 F.4th at 198–204 (Henderson, J., concurring in part and dissenting in part).

The majority's argument to the contrary rests on a fundamental misreading of the statute. The central claim for DHS's broad authority is that the INA contemplates a two-step process: nonimmigrant categories specify "entry conditions," while the "post-arrival" requirements are "spelled out pursuant to section 1184(a)(1)." *Id.* at 169–70 (majority opinion). Section 1184(a)(1), however, is not about post-arrival requirements. Rather, it provides that "[t]he *admission* to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe." 8 U.S.C. § 1184(a)(1) (emphasis added). DHS's regulatory authority to set time and conditions applies only to "admission." If there were any doubt about the plain meaning of the term, "admission" is explicitly defined as "the lawful *entry* of the alien into the United States." 8 U.S.C. § 1101(a)(13)(A) (emphasis added).

It is therefore quite clear that section 1184(a)(1) allows DHS to prescribe regulations that govern aliens' entry into the country, but does not provide independent authority for expanding "post-arrival" stays and work authorization. If the nonimmigrant categories define only the terms of "entry," as the majority holds,

then DHS's regulatory authority over "admission" is similarly limited to the terms of entry.

The interpretation most consistent with the text and structure of the INA is that the criteria that apply at admission continue to govern a nonimmigrant's stay in the country after entry. DHS has authority to fill in the details of these statutory requirements by promulgating regulations under section 1184(a)(1). For instance, DHS has permitted F-1 students a short period of time to remain in the country after they graduate, because students are not expected to depart the moment their studies end. *See* 8 C.F.R. § 214.2(f)(5)(iv). Providing such details is reasonably within the authority to set the time and conditions of admission.

Section 1184(a)(1), however, does not provide authority for DHS to allow F-1 visa holders to stay and work in the United States for years after they are no longer students. Such valuable benefits are entirely distinct from the time and conditions of admission. This plain meaning is consistent with binding circuit precedent, in which we have held the F-1 visa provision imposes ongoing conditions. *See Anwo v. INS*, 607 F.2d 435, 437 (D.C. Cir. 1979) (per curiam) (holding that if an F-1 student visa holder "did intend to make the United States his permanent home and domicile, then he violated the conditions of his student visa and was not here 'lawfully'"). The panel majority, however, fails even to cite this binding circuit precedent.[2]

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[2] The majority primarily relies on a nearly fifty-year old Third Circuit decision. *See Rogers v. Larson*, 563 F.2d 617 (3d Cir. 1977). But that opinion merely stated a particular nonimmigrant visa provision was "silent as to any controls to which … aliens

In light of the clear statutory directives, it is unsurprising that no court of appeals has adopted the approach taken by the panel majority. In fact, the Supreme Court and other circuits have consistently held nonimmigrant visa holders must satisfy the statutory criteria both at entry and during their presence in the United States. *See, e.g.*, *Elkins v. Moreno*, 435 U.S. 647, 666–67 (1978) ("Of course, should a G-4 alien terminate his employment with an international treaty organization, both he and his family would lose their G-4 status."); *Khano v. INS*, 999 F.2d 1203, 1207 & n.2 (7th Cir. 1993) (stating the immigration authorities may deport "those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States"); *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993) (holding that if an alien on a temporary worker visa planned "to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful"); *Castillo-Felix v. INS*, 601 F.2d 459, 464 (9th Cir. 1979) (holding that aliens who "are here for a temporary purpose" yet intend to remain in the country "violate the terms of their admission and are no longer here lawfully").

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will be subject after they arrive in this country." *Id.* at 622–23. The opinion nowhere stated the nonimmigrant requirements apply only at entry, and the Third Circuit has subsequently interpreted a nonimmigrant visa provision as imposing ongoing conditions during an alien's presence in the United States. *Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993).

Inconsistent with the text and the structure of the INA, the panel's decision has also created a lopsided circuit split.

* * *

The program at issue here may be longstanding; it may even be good policy for retaining high-skilled graduates who will further innovation and economic development. But irrespective of the benefits of DHS's regulations, neither the agency nor this court is authorized to rewrite the immigration laws established by Congress. The panel decision is inconsistent with the detailed nonimmigrant visa program, which precisely specifies who may enter and for what purposes. And the panel's reasoning applies not just to F-1 visa holders, but extends DHS's authority to confer valuable benefits to all nonimmigrant visa holders. Because the legal questions are weighty and have important consequences for the enforcement of immigration law, I would grant rehearing en banc.

APPENDIX H

8 U.S.C. § 1101. Definitions

* * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * *

(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national

of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico

8 U.S.C. § 1184 - Admission of nonimmigrants

(a) Regulations

(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States. No alien admitted to Guam or the Commonwealth of the Northern Mariana Islands without a visa pursuant to section 1182(l) of this title may be authorized to enter or stay in the United States other than in Guam or the Commonwealth of the Northern Mariana Islands or to remain in Guam or the Commonwealth of the Northern Mariana Islands for a period exceeding 45 days from date of admission to Guam or the Commonwealth of the

Northern Mariana Islands. No alien admitted to the United States without a visa pursuant to section 1187 of this title may be authorized to remain in the United States as a nonimmigrant visitor for a period exceeding 90 days from the date of admission.

8 U.S.C. § 1324a. Unlawful employment of aliens

* * *

(h) Miscellaneous provisions

* * *

(3) Definition of unauthorized alien

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

APPENDIX I

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 (Mar. 11, 2016)

AGENCY:
Department of Homeland Security.

ACTION:
Final rule.

SUMMARY:
The Department of Homeland Security (DHS) is amending its F-1 nonimmigrant student visa regulations on optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. Specifically, the final rule allows such F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months (STEM OPT extension). This 24-month extension effectively replaces the 17-month STEM OPT extension previously available to certain STEM students. The rule also improves and increases oversight over STEM OPT extensions by, among other things, requiring the implementation of formal training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students

with degrees from accredited schools. As with the prior 17-month STEM OPT extension, the rule authorizes STEM OPT extensions only for students employed by employers who participate in E-Verify. The rule also includes the "Cap-Gap" relief 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.

DATES:

This rule is effective May 10, 2016, except the addition of 8 CFR 214.16, which is effective from May 10, 2016, through May 10, 2019.

FOR FURTHER INFORMATION CONTACT:

Katherine Westerlund, Policy Chief (Acting), Student and Exchange Visitor Program, U.S. Immigration and Customs Enforcement, 500 12th Street SW., Washington, DC 20536; telephone (703) 603-3400;
email SEVP@ice.dhs.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

II. Executive Summary

A. Purpose of the Regulatory Action

This final rule affects certain F-1 nonimmigrant students who seek to obtain an extension of optional practical training (OPT) based on study at a U.S.

institution of higher education in a science, technology, engineering or mathematics (STEM) field, as well as certain F-1 nonimmigrant students who seek so-called Cap-Gap relief. The F-1 nonimmigrant classification is available to individuals seeking temporary admission to the United States as students at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program.[1] To obtain F-1 nonimmigrant classification, the student must be enrolled in a full course of study at a qualifying institution and have sufficient funds for self-support during the entire proposed course of study. Such course of study must occur at a school authorized by the U.S. government to accept international students.

OPT is a form of temporary employment available to F-1 students (except those in English language training programs) that directly relates to a student's major area of study in the United States. A student can apply to engage in OPT during his or her academic program ("pre-completion OPT") or after completing the academic program ("post-completion OPT"). A student can apply for 12 months of OPT at each education level (*e.g.,* one 12-month OPT period at the bachelor's level and another 12-month period at the master's level). While school is in session, the student may work up to 20 hours per week pursuant to OPT.

This final rule provides for an extension of the OPT period for certain F-1 students who have earned certain STEM degrees and participate in practical training opportunities with employers that meet certain requirements. The Department of Homeland Security

(DHS) first introduced an extension of OPT for STEM graduates in a 2008 interim final rule (2008 IFR). *See* 73 FR 18944 (Apr. 8, 2008). Under the 2008 IFR, an F-1 student with a STEM degree from a U.S. institution of higher education could apply for an additional 17 months of OPT (17-Month STEM OPT extension), provided that the employer from which the student sought employment was enrolled in and remained in good standing in the E-Verify electronic employment eligibility verification program (E-Verify), as determined by U.S. Citizenship and Immigration Services (USCIS). As discussed in further detail below, on August 12, 2015, the U.S. District Court for the District of Columbia ordered the *vacatur* of the 2008 IFR on procedural grounds and remanded the issue to DHS. The court stayed the vacatur until February 12, 2016 to give DHS the opportunity to issue a new rule related to STEM OPT extensions through notice-and-comment rulemaking.

On October 19, 2015, DHS published a notice of proposed rulemaking (NPRM) in the Federal Register to reinstate the STEM OPT extension, with changes intended to enhance the educational benefit afforded by the extension and to increase program oversight, including safeguards to protect U.S. workers. *See* 80 FR 63376. On January 23, 2016, the Court further stayed its vacatur until May 10, 2016, to provide DHS additional time to complete the rulemaking following review of public comments received during the comment period and to allow the Department to publish the rule with a 60-day delayed effective date to provide sufficient time for efficient transition to the new rule's requirements.

B. Summary of the Major Provisions of the Final Rule

1. Summary of Final Rule

This rule finalizes the NPRM, with certain changes made following review and consideration of the public comments received by DHS. Under this rule, a qualifying F-1 student with a STEM degree who has been granted 12 months of practical training pursuant to the general OPT program may apply to DHS for a 24-month extension of his or her period of practical training (STEM OPT extension).

The core purpose of the STEM OPT extension is to allow participating students to supplement their academic knowledge with valuable practical STEM experience. Accordingly, as is the case with practical training generally, a student's practical training pursuant to the STEM OPT extension must be directly related to the student's major area of study. The student's STEM degree must be awarded by an accredited U.S. college or university and be in a field recognized as a STEM field by DHS. The student may base the extension on the student's most recent academic degree, or may (subject to a number of requirements described in more detail below) base the extension on a STEM degree that the student earned earlier in his or her academic career in the United States. Under this rule, a student may be eligible for up to two, separate STEM OPT extensions over the course of his or her academic career, upon completing two qualifying STEM degrees at different educational levels.

This rule includes a number of measures intended to better ensure the educational benefit, integrity, and

security of the STEM OPT extension. For instance, the rule requires each STEM OPT student to prepare and execute with their prospective employer a formal training plan that identifies learning objectives and a plan for achieving those objectives. The STEM OPT student and his or her employer must work together to finalize that plan. The rule also prohibits students from basing a STEM OPT extension on a degree from an unaccredited educational institution. Moreover, to ensure compliance with program requirements, the rule provides for DHS site visits to employer locations in which STEM OPT students are employed. Although DHS will generally give notice of such site visits, DHS may conduct an unannounced site visit if it is triggered by a complaint or other evidence of noncompliance with the regulations.

The rule also includes a number of requirements intended to help DHS track STEM OPT students and further enhance the integrity of the STEM OPT extension. Most prominent among these are reporting requirements, which the rule imposes primarily upon students and designated school officials (DSOs). The rule includes four main reporting requirements, as follows. First, the rule imposes a six-month validation requirement, under which a STEM OPT student and his or her school must work together to confirm the validity of certain biographical, residential, and employment information concerning the student, including the student's legal name, the student's address, the employer's name and address, and current employment status. Second, the rule imposes an annual self-evaluation requirement, under which the student must report to the DSO on his or her progress with the

practical training. The student's employer must sign the self-evaluation prior to its submission to the DSO. Third, the rule requires that the student and employer report changes in employment status, including the student's termination or departure from the employer. Fourth, both the student and the employer are obligated to report to the DSO material changes to, or material deviations from, the student's formal training plan.

Finally, this rule includes a number of specific obligations for STEM OPT employers. These obligations are intended to ensure the integrity of the program and provide safeguards for U.S. workers in STEM fields. Among other things, the employer must be enrolled in and remain in good standing with E-Verify; assist with the aforementioned reporting and training plan requirements; and attest that (1) it has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity helps the student attain his or her training objectives.

We describe each of these provisions in more detail below.

2. Comparison to the 2008 IFR

As noted above, this rule contains a number of changes in comparison to the 2008 IFR, while retaining other provisions of the 2008 IFR. Changes made by this rule in comparison to the 2008 IFR include:

- *Lengthened STEM OPT Extension Period.* The rule increases the OPT extension period for STEM OPT

students from the 2008 IFR's 17 months to 24 months. The final rule also makes F-1 students who subsequently enroll in a new academic program and earn another qualifying STEM degree at a higher educational level eligible for one additional 24-month STEM OPT extension.

- *STEM Definition and CIP Categories for STEM OPT Extension.* The rule defines which fields of study (more specifically, which Department of Education Classification of Instructional Program (CIP) categories) may serve as the basis for a STEM OPT extension. The rule also sets forth a process for public notification in the Federal Register when DHS updates the list of eligible STEM fields on the Student and Exchange Visitor Program's (SEVP's) Web site.

- *Training Plan for STEM OPT Students.* To improve the educational benefit of the STEM OPT extension, the rule requires employers to implement formal training programs to augment students' academic learning through practical experience. This requirement is intended to equip students with a more comprehensive understanding of their selected area of study and broader functionality within that field.

- *Previously Obtained STEM Degrees.* The rule permits an F-1 student participating in a 12-month period of post-completion OPT based on a non-STEM degree to use a prior eligible STEM degree from a U.S. institution of higher education as a basis to apply for a STEM OPT extension, as long as both degrees were received from currently accredited educational

institutions. The practical training opportunity must be directly related to the previously obtained STEM degree.

- *Safeguards for U.S. Workers in Related Fields.* To guard against adverse impacts on U.S. workers, the rule requires terms and conditions of a STEM practical training opportunity (including duties, hours, and compensation) to be commensurate with those applicable to similarly situated U.S. workers. As part of completing the Form I-983, Training Plan for STEM OPT Students, an employer must attest that: (1) It has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity; (2) the student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity will help the student attain his or her training objectives.

- *School Accreditation, Employer Site Visits, and Employer Reporting.* To improve the integrity of the STEM OPT extension, the rule: (1) Generally limits eligibility for such extensions to students with degrees from schools accredited by an accrediting agency recognized by the Department of Education; (2) clarifies DHS discretion to conduct employer site visits at worksites to verify whether employers are meeting program requirements, including that they possess and maintain the ability and resources to provide structured and guided work-based learning experiences; and (3) institutes new employer reporting requirements.

- *Compliance Requirements and Unemployment Limitation.* In addition to reinstating the 2008 IFR's reporting and compliance requirements, the rule revises the number of days an F-1 student may remain unemployed during the practical training period. The program in effect before this final rule allowed a student to be unemployed up to 90 days during his or her initial period of post-completion OPT, and up to an additional 30 days (for a total of 120 days) for a student who received a 17-month STEM OPT extension. This rule retains the 90-day maximum period of unemployment during the initial period of post-completion OPT but allows an additional 60 days (for a total of 150 days) for a student who obtains a 24-month STEM OPT extension.

  The rule retains other provisions of the 2008 IFR, as follows:

- *E-Verify and Reporting Requirements for STEM OPT Employers.* The rule requires STEM OPT employers to be enrolled in and remain in good standing with E-Verify, as determined by USCIS, and to report changes in the STEM OPT student's employment to the DSO within five business days.

- *Reporting Requirements for STEM OPT Students.* The rule requires STEM OPT students to report to their DSOs any name or address changes, as well as any changes to their employers' names or addresses. Students also must verify the accuracy of this reporting information periodically.

- *Cap-Gap Extension for F-1 Students with Timely Filed H-1B Petitions and Requests for Change of Status.* With a minor revision to improve readability, the rule includes the 2008 IFR's Cap-Gap extension provision, under which DHS temporarily extends an F-1 student's duration of status and any current employment authorization if the student is the beneficiary of a timely filed H-1B petition and change-of-status request pending with or approved by USCIS. The Cap-Gap extension extends the OPT period until the beginning of the new fiscal year (*i.e.,* October 1 of the fiscal year for which the H-1B status is being requested).

3. Summary of Changes From the Notice of Proposed Rulemaking

Following careful consideration of public comments received, DHS also has made several modifications to the regulatory text proposed in the NPRM. Those changes include the following:

- *Time of Accreditation.* For a STEM OPT extension based on a previously obtained STEM degree, the student must have obtained that degree from an educational institution that is accredited at the time of the student's application for the extension.

- *SEVP Certification Required for Prior Degrees.* For a STEM OPT extension based on a previously obtained STEM degree, the degree also must have been issued by an educational institution that is SEVP-certified at the time of application for the extension. Overseas

campuses of U.S. educational institutions are not eligible for SEVP certification.

- *Site Visit Notifications.* DHS will provide notice to the employer 48 hours before any site visit unless a complaint or other evidence of noncompliance with the STEM OPT extension regulations triggers the visit, in which case DHS may conduct the visit without notice.

- *Focus on Training.* DHS has modified the proposed rule's Mentoring and Training Plan to increase the focus on training. The information collection instrument for this plan is now titled Form I-983, Training Plan for STEM OPT Students.

- *Existing Employer Training Programs.* This rule streamlines and clarifies the regulatory text and Training Plan for STEM OPT Students to clarify that employers may use existing training programs to satisfy certain regulatory requirements for evaluating the progress of STEM OPT students.

- *Employer Attestation.* The rule revises the employer attestation to require that the employer attest that the student will not replace a full- or part-time, temporary or permanent U.S. worker.

- *Evaluation of Student Progress.* The rule revises the evaluation requirement to require that the student and an appropriate individual in the employer's organization sign the evaluation on an annual basis, with a mid-point evaluation during the first 12-

month interval and a final evaluation completed prior to the conclusion of the STEM OPT extension.

DHS also has clarified its interpretation of the rule in a number of ways, as explained more fully below.

C. Costs and Benefits

The anticipated costs of compliance with the rule, as well as the benefits, are discussed at length in the section below, entitled "Statutory and Regulatory Requirements—Executive Orders 12866 and 13563." A combined Regulatory Impact Analysis and a Final Regulatory Flexibility Analysis are available in the docket for this rulemaking. A summary of the analysis follows.

DHS estimates that the costs imposed by the implementation of this rule will be approximately $737.6 million over the 10-year analysis time period, discounted at 3 percent, or $588.5 million, discounted at 7 percent. This amounts to $86.5 million per year when annualized at a 3 percent discount rate, or $83.8 million per year when annualized at a 7 percent discount rate. The Summary Table at the end of this section presents the cost estimates in more detail.

With respect to benefits, making the STEM OPT extension available to additional students and lengthening the 17-month extension to 24 months will enhance certain students' ability to achieve the objectives of their courses of study by allowing them to gain valuable knowledge and skills through on-the-job training that may be unavailable in their home countries. The changes will also benefit the U.S. educational system, U.S. employers, and the broader U.S. economy. The

rule will benefit the U.S. educational system by helping to ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields. U.S. employers will benefit from the increased ability to rely on skilled U.S.-educated STEM OPT students, as well as their knowledge of markets in their home countries. The nation also will benefit from the increased retention of such students in the United States, including through increased research, innovation, and other forms of productivity that enhance the nation's economic, scientific, and technological competitiveness.

Furthermore, strengthening the STEM OPT extension by implementing requirements for training, tracking objectives, reporting on program compliance, and accreditation of participating schools will further prevent abuse of the limited on-the-job training opportunities provided by OPT in STEM fields. These and other elements of the rule also will improve program oversight, strengthen the requirements for program participation, and better ensure that U.S. workers are protected.

The Summary Table below presents a summary of the benefits and costs of the rule. The costs are discounted at 7 percent. Students will incur costs for completing application forms and paying application fees; reporting to DSOs; preparing (with their employers) the Training Plan for STEM OPT Students required by this rule; and periodically submitting updates to employers and DSOs. DSOs will incur costs for reviewing information and forms submitted by students, inputting required information into the Student and Exchange Visitor Information System (SEVIS), and

complying with other oversight requirements related to prospective and participating STEM OPT students. Employers of STEM OPT students will incur burdens for preparing the Training Plan with students, confirming students' evaluations, enrolling in (if not previously enrolled) and using E-Verify to verify employment eligibility for all new hires, and complying with additional requirements related to E-Verify.

Summary Table—Estimated Costs and Benefits of Final Rule [in millions of 2014 dollars]

	STEM OPT	E-Verify	Total
10-Year Cost Annualized at 7 Percent Discount Rate	$79.8	$4.0	$83.8
10-Year Cost Annualized at 3 Percent Discount Rate	$82.3	$4.2	$86.5
Qualitative Costs	• Cost to students and schools resulting from accreditation requirement; • Cost to employers from the requirement to provide STEM OPT students commensurate compensation to similarly situated U.S. workers; and • Decreased practical training opportunities for students no longer eligible for the program due to improvements to the STEM OPT extension.		
Monetized Benefits	N/A	N/A	N/A
Non-monetized Benefits	• Increased ability of students to gain valuable knowledge and skills through on-the-job training in their field;		

	STEM OPT	E-Verify	Total
	• Increased global attractiveness of U.S. colleges and universities; and • Increased program oversight, strengthened requirements for program participation, and new protections for U.S. workers.		
Net Benefits	N/A	N/A	N/A

Finally, in response to public comments, DHS revised the regulatory impact analysis (RIA) published with the NPRM to reflect the changes made in the final rule and include new data that has become available since the publication of the NPRM, such as updated compensation rates. DHS's major changes to the RIA from the NPRM are summarized in the table below.

Table 1—Changes From Initial RIA to Final RIA

Variables	NPRM and final rule comparison			Description of changes
	NPRM	Final rule	Difference	
Population of Affected Parties				
Number of Students due to Increased CIP List Eligibility as a percent of New STEM OPT Extension Students	10%	5%	−5%	• The final rule's changes to the CIP list are not expected to result in the same expansion of eligibility as DHS anticipated in the proposed rule.
Number of Transitional Students	18,210	17,610	−600	• Revised the estimate of transitional students based on the effective date of final rule.

Wages				
STEM Students' Weighted Average Wage Rate (unloaded)	$23.81	$26.06	$2.25	• New FLC Data Center Online Wage Library data for 2014-2015 was published. • Revised STEM occupations list to more closely reflect the STEM OPT extension degrees.
Training Plan Form for STEM OPT Students—Initially Completing Training Plan Form				
Student Burden	$58.05	$82.44	$24.39	• Time burden increased from 1.67 hours to 2.17 hours in response to public comments.
Employer Burden	$123.47	$280.8	$157.34	• Training Plan form revisions require up to two employer officials contributing to the initial completion of the Training Plan form. • Time burden increased from 2 hours to 4 hours in response to public comments.

DSO Burden	$13.09	$52.31	$39.22	• Time burden revised from 0.33 hours to 1.33 hours to reflect public comments.
Training Plan Form for STEM OPT Students—12-Month Evaluations				
Student Burden	[2]$58.05	$82.44	$24.39	• Time burden increased from 1.67 hours to 2.17 hours in response to public comments.
Employer Burden	$123.47	$280.81	$157.34	• Training Plan form revisions require up to two employer officials contributing to the initial completion of the Training Plan form. • Time burden increased from 2 hours to 4 hours in response to public comments.
DSO Burden	[3]$13.09	$52.31	$39.22	• Time burden revised from 0.33 hours to 1.33 hours to reflect public comments.

Training Plan Form for STEM OPT Students—12-Month Evaluations				
Student Burden	$139.04	$114.15	−$24.89	• Frequency of evaluations changed from six to 12 months. • Updated STEM student wage rate. • Time burden increased from 1.17 hours to 1.5 hours in response to public comments.
Employer Burden	$78.96	$118.44	$39.48	• Frequency of evaluations changed from six to 12 months. • Time burden increased from 0.25 to 0.75 hours in response to public comments.
DSO Burden	$26.74	$78.66	$51.92	• Frequency of evaluations changed from six to 12 months. • Time burden increased from 0.33 hours to 1 hour in response to public comments.

Additional Implementation Costs				
Evaluations	[4]$10.57	$5.29	−$5.28	• Frequency of evaluations changed from six to 12 months.
Reporting Requirements				
Student Opportunity Cost for Updating Information Reports	$12.94	$0	$12.94	• The student Reporting Requirements in the Final Rule do not represent a change from the baseline.
E-Verify Requirements for STEM OPT Extension Employers				
Total Enrolled Employers Who Would Discontinue E-Verify without Final Rule over 10 years	70,025	8,753	−61,272	• Updated based on further research.
Total 10-year Cost (Undiscounted)	$759.3M	$886.1M	$126.8M	

III. Background

A. Statutory and Regulatory Authority and History

The Secretary of Homeland Security (Secretary) has broad authority to administer and enforce the nation's immigration laws. See generally 6 U.S.C. 202; Immigration and Nationality Act of 1952, as amended (INA), Sec. 103, 8 U.S.C. 1103. Section 101(a)(15)(F)(i) of the INA establishes the F-1 nonimmigrant classification for individuals who wish to come to the United States temporarily to enroll in a full course of study at an academic or language training school certified by U.S. Immigration and Customs Enforcement's (ICE's) SEVP. 8 U.S.C. 1101(a)(15)(F)(i). The INA provides the Secretary with broad authority to determine the time and conditions under which nonimmigrants, including F-1 students, may be admitted to the United States. See INA Sec. 214(a)(1), 8 U.S.C. 1184(a)(1). The Secretary also has broad authority to determine which individuals are authorized for employment in the United States. See, e.g., INA Sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3).

- Federal agencies dealing with immigration have long interpreted Sec. 101(a)(15)(F)(i) of the INA and related authorities to encompass on-the-job training that supplements classroom training. See, e.g., 12 FR 355, 5357 (Aug. 7, 1947) (authorizing employment for practical training under certain conditions, pursuant to statutory authority substantially similar to current INA Sec. 101(a)(15)(F)(i)); 38 FR 35425, 35426 (Dec. 28, 1973) (also authorizing,

pursuant to the INA, employment for practical training under certain conditions).[5]

- ICE manages and oversees significant elements of the F-1 student process, including the certification of schools and institutions in the United States that enroll F-1 students. In overseeing these institutions, ICE uses SEVIS to track and monitor international students and communicate with the schools that enroll them while they are in the United States and participating in educational opportunities. Additional statutory and other authority requires and supports this tracking and monitoring.[6]

1. OPT Background

A student in F-1 status may remain in the United States for the duration of his or her education if otherwise meeting the requirements for the maintenance of status. 8 CFR 214.2(f)(5)(i). Once an F-1 student has completed his or her academic program and any subsequent period of OPT, the student must generally leave the United States unless he or she enrolls in another academic program, either at the same school or at another SEVP-certified school; changes to a different nonimmigrant status; or otherwise legally extends his or her period of authorized stay in the United States. As noted, DHS regulations have long defined an F-1 student's duration of status to include the student's practical training. See, e.g., , 14583 (Apr. 5, 1983).[7] Additionally, an F-1 student is allowed a 60-day "grace period" after the completion of the academic program or OPT to prepare for departure from the United States. 8 CFR 214.2(f)(5)(iv).

Unless an F-1 student meets certain limited exceptions, he or she may not be employed in the United States during the term of his or her F-1 status. DHS permits an F-1 student who has been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by SEVP, and who has otherwise maintained his or her status, to apply for practical training to work for a U.S. employer in a job directly related to his or her major area of study. 8 CFR 214.2(f)(10).

An F-1 student may seek employment through OPT either during his or her academic program (pre-completion OPT) or immediately after graduation (post-completion OPT). The student remains in F-1 nonimmigrant status throughout the OPT period. Thus, an F-1 student in post-completion OPT does not have to leave the United States within 60 days after graduation, but instead has authorization to remain for the entire post-completion OPT period. 8 CFR 214.2(f)(5)(i). This initial post-completion OPT period (i.e., a period of practical training immediately following completion of an academic program) can be up to 12 months, except in certain circumstances involving students who engaged in either pre-completion OPT or curricular practical training (CPT).[8]

2. Regulatory History

On April 8, 2008, DHS published an interim final rule in the Federal Register (73 FR 18944) that, in part, extended the maximum period of OPT from 12 to 29 months (through a 17-month "STEM OPT extension") for an F-1 student who DSO obtained a degree in a designated STEM field from a U.S. institution of

higher education and who was engaged in practical training with an employer that enrolled in and remained in good standing with E-Verify, as determined by USCIS. As a result of that rule, F-1 students granted STEM OPT extensions were required to report to their DSOs any changes in their names or addresses, as well as any changes in their employer's information (including name or address), and periodically validate the accuracy of this information. The rule further required employers of such students to report to the relevant within two business days if a student was terminated from or otherwise left employment prior to the end of the authorized period of OPT. The rule allowed an F-1 student to apply for post-completion OPT within the 60-day grace period at the conclusion of his or her academic program. The rule also limited the total period in which students on initial post-completion OPT could be unemployed to 90 days. Students granted 17-month STEM OPT extensions were provided an additional 30 days in which they could be unemployed, for an aggregate period of 120 days.

The 2008 IFR also addressed the so-called Cap-Gap problem, which results when an F-1 student's F-1 status and OPT-based employment authorization expires before the start date of an approved H-1B petition and change-of-status request filed on his or her behalf ("H-1B change-of-status petition"). Specifically, F-1 students on initial post-completion OPT frequently complete their period of authorized practical training in June or July of the year following graduation. Before the 2008 IFR, if such a student was a beneficiary of an H-1B petition that was pending with or approved by

USCIS and requested a change of status to H-1B classification commencing in the following fiscal year (*i.e.,* beginning on October 1), the student would be unable to obtain H-1B status before his or her OPT period expired. Such students were often required to leave the United States for a few months until they were able to obtain their H-1B status on October 1. The 2008 IFR addressed this problem through a Cap-Gap provision that briefly extended the F-1 student's duration of status and employment authorization to enable the student to remain in the United States until he or she could change to H-1B status.

DHS received over 900 comments in response to the 2008 IFR. Public comments received on the 2008 IFR and other records may be reviewed at the docket for that rulemaking, No. ICEB-2008-0002, available at www.regulations.gov.

Washington Alliance Litigation Regarding the 2008 IFR

On August 12, 2015, the U.S. District Court for the District of Columbia issued an order in the case of Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security, — F. Supp. 3d —, 2015 WL 9810109, (D.D.C. Aug. 12, 2015) (slip op.). Although the court held that the 2008 IFR rested upon a reasonable interpretation of the INA,[9] the court also held that DHS violated the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553, by promulgating the 2008 IFR without advance notice and opportunity for public comment. In its order, the court invalidated the 2008 IFR as procedurally deficient, and remanded the issue to DHS.

Although the court vacated the 2008 IFR, the court stayed the *vacatur* until February 12, 2016, to provide time for DHS to correct the procedural deficiency through notice-and-comment rulemaking. Id. at *37.[10] The court specifically explained that the stay was necessary to avoid "substantial hardship for foreign students and a major labor disruption for the technology sector" and that immediate *vacatur* of the STEM OPT extension would be "seriously disruptive." *Id.* at *36. On January 23, 2016, the Court further stayed its vacatur by 90 days until May 10, 2016. *Washington Alliance of Tech. Workers* v. *U.S. Dep't of Homeland Security,* No. 1:14-cv-00529, (D.D.C. Jan. 23, 2016) (slip op.). The court further stayed the vacatur to provide DHS an additional 30 days to complete the rulemaking and to allow the Department to publish the rule with a 60-day delayed effective date. *Id.*

Litigation in this matter is ongoing, as the plaintiff has appealed a portion of the court's August 12, 2015, decision. Thus the final disposition of the case remains to be determined. Nevertheless, it is clear that DHS must issue a final rule that will take effect before the court's stay expires on May 10, 2016, or a significant number of students will be unable to pursue valuable training opportunities that would otherwise be available to them.

B. The 2015 NPRM

After the court's ruling, DHS acted quickly to address the imminent *vacatur* of the 2008 IFR and the significant uncertainty surrounding the status of thousands of students in the United States. As of September 16,

2015, over 34,000 students were in the United States on a STEM OPT extension. In addition, hundreds of thousands of international students, most of whom are in F-1 status, already have chosen to enroll in U.S. educational institutions and are currently pursuing courses of study in fields that may provide eligibility for this program. Some of those students may have considered the opportunities offered by the STEM OPT extension when deciding whether to pursue their degree in the United States. DHS therefore acted swiftly to mitigate the uncertainty surrounding the 2008 IFR. Prompt action is particularly appropriate with respect to those students who have already committed to study in the United States, in part based on the possibility of furthering their education through an extended period of practical training in the world's leading STEM economy.[11]

Accordingly, on October 19, 2015, DHS published an NPRM in the Federal Register, proposing to reinstate the STEM OPT extension along with changes intended to improve the integrity and academic benefit of the extension and to better protect U.S. workers.[12] 80 FR 63376.[13] During the public comment period, approximately 50,500 comments were submitted on the NPRM and related forms.[14] Comments were submitted by a range of entities and individuals, including U.S. and international students, U.S. workers, schools and universities, professional associations, labor organizations, advocacy groups, businesses, two members of Congress, and other interested persons. DHS thanks the public for its helpful input and engagement during the public comment period.[15]

This final rule builds upon the NPRM and the public comments received. DHS intends for this rule to further strengthen the integrity and educational benefit of STEM OPT extensions, as well as better protect U.S. workers.

C. Basis and Purpose of Regulatory Action

In finalizing this rule, DHS recognizes the substantial economic, scientific, technological, and cultural benefits provided by the F-1 nonimmigrant program generally, and STEM OPT extensions in particular.

1. Benefits of International Students in the United States

International students have historically made significant contributions to the United States, both through the payment of tuition and other expenditures in the U.S. economy, as well as by significantly enhancing academic discourse and cultural exchange on campuses throughout the United States. In addition to these general benefits, STEM students further contribute through research, innovation, and the provision of knowledge and skills that help maintain and grow increasingly important sectors of the U.S. economy.

International students, for example, regularly contribute a significant amount of money into the U.S. economy. According to statistics compiled by NAFSA: Association of International Educators (NAFSA), international students made a net contribution of $26.8 billion to the U.S. economy in the 2013-2014 academic year.[16] This contribution included tuition ($19.8 billion) and living expenses for self and family ($16.7 billion), after adjusting for U.S. financial support ($9.7

billion).[17] Public colleges and universities particularly benefit from the payment of tuition by international students, especially in comparison to the tuition paid by in-state students.[18]

International students also increase the benefits of academic exchange, while reinforcing ties with other countries and fostering increased understanding of American society.[19] International students, for example, "enrich U.S. universities and communities with unique perspectives and experiences that expand the horizons of American students and [make] U.S. institutions more competitive in the global economy."[20] At the same time, "the international community in American colleges and universities has implications regarding global relationships, whether [those are] between nation-states, or global business and economic communities."[21] International education and exchange at the post-secondary level in the United States builds relationships that "promote cultural understanding and dialogue" and bring a global dimension to higher education through the "diversity in culture, politics, religions, ethnicity, and worldview" brought by international students.[22]

Accordingly, international students provide substantial benefits to their U.S. colleges and universities, including beneficial economic and cultural impacts. A study by Duke University in 2013 analyzing 5,676 alumni surveys showed that "substantial international interaction was positively correlated with U.S. students' perceived skill development in a wide range of areas across three cohorts."[23] Current research also suggests that international students contribute to the overall economy by building global

connections between their hometowns and U.S. host cities.[24] Evidence links skilled migration to transnational business creation, trade, and direct investment between the United States and a migrant's country of origin.[25]

International STEM students contribute to the United States in all the ways mentioned above. They also contribute more specifically to a number of advanced and innovative fields that are critical to national prosperity and security. By conducting scientific research, developing new technologies, advancing existing technologies, and creating new products and industries, for example, STEM workers diversify our nation's economy and drive economic growth while also producing increased employment opportunities and higher wages for all U.S. workers.[26] Economic research supports the premise that scientists, technology professionals, engineers, and mathematicians (STEM workers) are fundamental components in scientific innovation and technological adoption, and critical drivers of productivity growth in the United States.[27] For example, research has shown that international students who earn a degree and remain in the United States are more likely than native-born workers to engage in activities, such as patenting and the commercialization of patents, that increase U.S. labor productivity.[28] Similarly, other research has found that a 1 percentage point increase in immigrant college graduates' population share increases patents per capita by 9 to 18 percent.[29] Research also has shown that foreign-born workers are particularly innovative, especially in research and development, and that they have positive spillover effects on native-born

workers.[30] One paper, for example, shows that foreign-born workers patent at twice the rate of U.S.-born workers, and that U.S.-born workers patent at greater rates in areas with more immigration.[31] The quality of the nation's STEM workforce in particular has played a central role in ensuring national prosperity over the last century and helps bolster the nation's economic future.[32] This, in turn, has helped to enhance national security, which is dependent on the nation's ability to maintain a growing and innovative economy.[33] Innovation is crucial for economic growth, which is vital to continued funding for defense and security.[34]

2. Increased Competition for International Students

DHS recognizes that the United States has long been a global leader in international education. The number of international students affiliated with U.S. colleges and universities grew by 72 percent between 1999 and 2013 to a total of 886,052.[35] However, although the overall number of international students increased over that period, the nation's share of such students decreased. In 2001, the United States received 28 percent of international students; by 2011 that share had decreased to 19 percent.[36] Countries such as Canada, the United Kingdom, New Zealand, Australia, Malaysia, Taiwan, and China are actively instituting new strategies to attract international students.[37]

For example, Canada also recognizes that educational institutions need international students to compete in the "global race for research talent." [38] In

April, 2008, Canada modified its Post-Graduation Work Permit Program to allow international students who have graduated from a recognized Canadian post-secondary institution to stay and gain valuable post-graduate work experience for a period equal to the length of the student's study program, up to a maximum of three years, with no restrictions on type of employment.[39] This change resulted in a steady increase between 2003 and 2007 in the number of post-graduation work permits issued to international students, followed by a sharp increase of 64 percent from 2007 to 2008.[40] By 2014, the number of international students in the program was more than double its 2008 total.[41] In addition, Canada aims to double the number of international students in the country from 211,949 in 2014 to 450,000 by 2022.[42]

In light of the United States' decreasing share of international students, and increased global efforts to attract them, DHS concludes that the United States must take additional steps to improve these students' educational experience (both academic and practical) to ensure that we do not continue to lose ground. This is particularly true for international STEM students, who have comprised a significant portion of students in STEM degree programs in the United States, particularly at the graduate degree level.

The difference is particularly notable at the doctoral level, where international students earned 56.9 percent of all doctoral degrees in engineering; 52.5 percent of doctoral degrees in computer and information sciences; and approximately half the doctoral degrees in mathematics and statistics in the 2012-2013 academic year.[43] Recognizing that the international

education programs for these students are increasingly competitive, DHS is committed to helping U.S. educational institutions contend with the expanded and diverse global opportunities for international study.

3. The Need To Improve the Existing STEM OPT Extension

With this rule, DHS also recognizes the need to strengthen the existing STEM OPT extension to enhance the integrity and educational benefit of the program in order to help maintain the nation's economic, scientific, and technological competitiveness. DHS is working to find new and innovative ways to encourage international STEM students to choose the United States as the destination for their studies. This rule, in addition to including a modified version of the STEM OPT extension from the 2008 IFR, increases the maximum training time period for STEM students, requires a formal training plan for each STEM OPT extension, and strengthens protections for U.S. workers. Providing an on-the-job educational experience through a U.S. employer qualified to develop and enhance skills through practical application has been DHS's primary guiding objective in crafting this rule.

Many of the elements of the 2015 NPRM were based on public comments on the 2008 IFR, which contained input from a range of stakeholders, including students and the broader academic community. The NPRM also incorporated recommendations from the Homeland Security Academic Advisory Committee.[44] DHS continues to find that the changes proposed by this rule to the existing STEM OPT extension would benefit

both F-1 students and international study programs in the United States, while adding important protections.

The changes will allow F-1 STEM students to gain valuable on-the-job training from qualified employers. Maintaining and enhancing practical training for STEM students improves their ability to absorb a full range of project-based skills and knowledge directly related to their study. The changes will also help the nation's colleges and universities remain globally competitive, including by improving their ability to attract international STEM students to study in the United States. As noted above, these students enrich the academic and cultural life of college and university campuses throughout the United States and make important contributions to the U.S. economy and academic sector. The changes will help strengthen the overall F-1 program in the face of growing international competition for the world's most promising international students.

Additionally, safeguards such as employer attestations, requiring employers to enroll in and remain in good standing with E-Verify, providing for DHS site visits, and requiring that STEM training opportunities provide commensurate terms and conditions to those provided to U.S. workers will help protect both such workers and STEM OPT students. Implementing the changes in this rule thus will more effectively help STEM OPT students achieve the objectives of their courses of study while also benefiting U.S. academic institutions and guarding against adverse impacts on U.S. workers.

IV. Discussion of Comments and Final Rule

As noted above, during the public comment period, 50,500 comments were submitted on the NPRM and related forms. Comments were submitted by a range of entities and individuals, including U.S. and international students, U.S. workers, schools and universities, professional associations, labor organizations, advocacy groups, businesses, and other interested persons. Many commenters provided concrete suggestions that DHS has evaluated and responded to in order to build upon the proposed rule and to better explain its provisions. Overall,[45] comments were primarily positive, but there were many criticisms as well.

A number of commenters expressed general opposition to the NPRM. For instance, some stated that the proposed rule would not serve the national interest because it would harm U.S. workers, especially recent graduates with STEM degrees. Commenters also suggested that there was insufficient demand for STEM workers in the U.S. labor market to accommodate STEM OPT students. Other commenters were concerned that STEM OPT students would send their wages back to their home countries. Based on these and other concerns, various commenters requested that DHS place a moratorium on practical training and related programs until, for instance, every qualified U.S. citizen has a job. Another commenter requested that STEM OPT be phased out entirely after the current participants finish their training.

On the whole, however, commenters largely expressed support for the proposed rule. Commenters stated that the NPRM would "make[] a number of

important, thoughtful changes to improve and enhance the opportunities available to F-1 students with STEM degrees"; that the proposed rule struck a reasonable balance by distributing requirements among all who participate in STEM OPT, including international students, institutions of higher education, and employers; and that the proposed Mentoring and Training Plan requirement would improve the STEM OPT extension by clearly identifying the students' learning objectives and the employer's commitments.

DHS thanks the public for its extensive input during this process. In the discussion below, DHS summarizes and responds to all comments that were timely submitted on the NPRM.

A. Including a STEM OPT Extension Within the OPT Program

1. Description of Final Rule and Changes From NPRM

Consistent with the NPRM, this final rule provides for STEM OPT extensions as part of the OPT program under the F-1 nonimmigrant classification. This action will better ensure, among other important national interests, that the U.S. academic sector can remain globally competitive. Enabling extended practical training for qualifying students with experience in STEM fields is consistent with DHS's "Study in the States" initiative, announced after the 2008 IFR in September 2011, to encourage international students to study in the United States. That initiative particularly has focused on enhancing our nation's economic, scientific and technological competitiveness by finding new ways to encourage talented international students to

become involved in expanded post-graduate opportunities in the United States. The initiative has taken various steps to improve the Nation's nonimmigrant student programs.[46]

The final rule enhances the ability of F-1 students to achieve the objectives of their courses of study while also benefiting the U.S. economy. More students will return home confident in their training and ready to begin a career in their field of study; others may seek to change status to other nonimmigrant classifications consistent with section 248 of the INA, 8 U.S.C. 1258, following a STEM OPT extension, thus furthering economic growth and cultural exchange in the United States.

Before discussing and responding to public input on the substantive terms of the STEM OPT extension program proposed in the 2015 NPRM, DHS first addresses comments providing input on whether STEM OPT extensions should be authorized at all. As discussed below, the STEM OPT extension rule is grounded in the long-standing recognition by DHS and its predecessor agency that (1) experiential learning and practical training are valuable parts of any post-secondary educational experience and (2) attracting and retaining international students is in the short- and long-term economic, cultural, and security interests of the United States. Thousands of comments expressed an opinion on one or both of these two points, either challenging or supporting the proposal to include a STEM OPT extension within the OPT program. A significant number of commenters discussed the taxation rules applicable to F-1 students; some asserted that no STEM OPT extension was appropriate

as long as certain F-1 students remained exempt from certain payroll or employment taxes. Lastly, some commenters questioned the Department's legal authority to include a STEM OPT extension within the OPT program, while others maintained that a solid legal basis exists for such extensions. The final rule retains STEM OPT extensions as part of the OPT program and explains in detail the underpinnings of this policy by responding in full to the many policy-related comments received from the public.

2. Public Comments and Responses

i. Experiential Learning as Part of Completing a Full Course of Study

Numerous commenters submitted views regarding the proposition that experiential learning opportunities such as practical training can significantly enhance the knowledge and skills obtained by students during academic study, thus furthering their courses of study in the United States.

Comment. DHS received hundreds of comments, mostly from students and universities, stating that experiential learning and practical training are key parts of university education. DHS also received comments challenging this premise. One commenter, for example, strongly disagreed "that the objective of the students' course of study includes the acquisition of knowledge through on-the-job `training.' " Instead, this commenter stated that "the sole objective of the F-1 student's course of study is to obtain the desired degree and nothing more." According to the commenter, "[o]nce that objective has been achieved, the purpose

of the F-1 status has been fulfilled and the status should terminate."

Many universities and higher education associations, however, made statements to the contrary. Twelve higher education associations—representing land-grant universities, research universities, human resource professionals at colleges and universities, registrars, graduate schools, international student advisors, and religious colleges and universities, among others—jointly filed a comment stating that "experiential learning is a key component of the educational experience." These higher education associations stated that:

OPT allows students to take what they have learned in the classroom and apply "real world" experience to enhance learning and creativity while helping fuel the innovation that occurs both on and off campus. . . . Learning through experience is distinct from learning that takes place in the classroom. Experiential learning opportunities have become an integral part of U.S. higher education.

Universities individually made similar points, emphasizing the value of experiential learning. DHS received comments on this point from a range of public and private institutions of higher education. For example, one university stated that experiential learning opportunities are particularly critical in "STEM fields where hands on work supplements classroom education." Another university stated that "experiential learning fosters the capacity for critical thinking and application of knowledge in complex or ambiguous situations." Other university commenters stated that

experiential learning "is a necessary component of a 21st century education, especially in the STEM fields."

A national organization of graduate and professional students stated that offering a STEM OPT extension after bachelor's level studies allowed individuals to "identify research interests and develop skills" that they later can expand upon in their graduate studies when they focus on solving concrete problems. An organization representing international educators stated that the OPT program appropriately focuses on the critical part of an education that occurs in partnership with employers.

An organization that serves U.S. institutions engaged in international educational and cultural exchange stated that "extended OPT eligibility creates space for more meaningful interactions between international OPT participants and their U.S. host employers." Other comments stated that a recent membership survey found that 89 percent of responding employers found that OPT participants "work in conjunction with U.S. workers in a way that promotes career development for everyone involved." A business association stated that "practical training allows foreign students in technical fields to maximize the return on their investment in education."

Response. The Department agrees with the many U.S. universities and educational- and international-exchange organizations that provided comments stating that STEM OPT extensions would enhance the educational benefit provided to eligible students through practical training. DHS agrees that practical training is an accepted and important part of international post-secondary education.

Comment. One commenter asserted that OPT had "limited (if any) education[al] value" while noting that he "was unable to find any comment where someone described how the OPT program is related to a course of study or is a means to achieve specific educational goals." Many comments, however, described how practical training is related to a course of study and serves as a means to achieve educational goals. In addition to the comments described above from academic associations and educational institutions, the Department received many comments from F-1 students describing the educational benefits that the OPT program provides both to students and to academic programs. Examples of such comments include the following:

- "OPT allows international students the opportunity to engage in practical application of skills learned in academic programs."

- "[A]s an extension of college education, OPT extension is a great way to apply what's learnt in class to our real industry."

- "This experiential learning will allow me to integrate knowledge and theory learned in the classroom with practical application and skills development in a professional setting."

- "The proposal to reinstitute the STEM extension will provide valuable hands-on, educational experience in which STEM graduates gain real-world immersion into a chosen industry."

- "The new rule will allow me to meet my planned learning goals and allow for active reflection on [what] I am accomplishing throughout the experience."

Response. Consistent with many of the comments received from academic associations, educational institutions, and F-1 students, DHS agrees that the OPT program enriches and augments a student's educational experience by providing the ability for students to apply in professional settings the theoretical principles they learned in academic settings. By promoting the ability of students to experience first-hand the connection between theory in a course of study and practical application, including by applying abstract concepts in attempts to solve real-world problems, the OPT program enhances their educational experiences. A well-developed capacity to work with such conceptualizations in the use of advanced technology, for example, is critical in science-based professions. Practical training programs related to STEM fields also build competence in active problem solving and experimentation, critical complements to academic learning in STEM fields. As many commenters attested, practical training is an important avenue for enhancing one's educational experience, particularly for STEM students.

Comment. A research organization contested the educational basis for providing two-year STEM OPT extensions in part by noting that the ACT testing organization (previously known as American College Testing) has published a "world of work map" stating that "a bachelor's degree is sufficient for electrical

engineering jobs" without discussing any extended period of practical training. The commenter also pointed out that the Department of Labor's Occupational Outlook Handbook states that in order to become an electrical engineer one "must have a bachelor's degree" and that "[e]mployers also value practical experience, so participation in cooperative engineering programs, in which students earn academic credit for structured work experience, is valuable as well." According to the commenter, the standard OPT duration of 12 months is more than sufficient to become a fully trained engineer, as that is the duration of typical cooperative engineering programs.

Response. DHS rejects the notion that ACT's "world of work map," a career planning tool for high school students, attempts to describe anything other than the educational degree level typically required for entry into an occupation. The ACT's career planning map takes no position on whether and to what extent on-the-job training and experiences help launch a career, enhance an educational program, or help facilitate mastery of material learned in the classroom. The Occupational Outlook Handbook of the Department of Labor similarly does not assess the relevancy of experiential learning theory or the extent to which on-the-job training complements classroom learning as part of post-secondary education. Instead, the Occupational Outlook Handbook identifies the typical level of degree or education that most workers need to enter the electrical engineering occupation and the extent to which additional training is needed (post-employment) to attain competency in the skills needed in the occupation.[47] The fact that cooperative education

programs in engineering may typically focus on the equivalent of one year of employment experience for academic credit is not determinative with regard to the type or length of experiential learning that can be considered part of a full course of study. Cooperative education is one type of experiential learning, but not the only type used by the nation's higher education community.[48]

Comment. A commenter stated that DHS had not "provided any evidence . . . indicating that" nonimmigrant students lack access to similar opportunities in their home countries.

Response. The United States hosts F-1 students from all over the world. Although DHS acknowledges that some students will have access to similar training opportunities in their home countries, DHS believes it is self-evident that many will not. In any case, the purpose of the rule is not simply to address a gap in training opportunities for F-1 students in their home countries but to help students develop their knowledge and skills through practical application, and to ensure that our nation's colleges and universities remain globally competitive in attracting international STEM students to study and lawfully remain in the United States.

Comment. Some commenters asked DHS to reconsider the requirement that students be engaged in STEM OPT solely related to their fields of study.

Response. The Department has historically required the OPT experience to be directly related to the student's major fields of study because, at its core, such work-based learning is a continuation of the student's program of study. Indeed, the purpose of OPT is to

better position students to begin careers in their fields of study by providing ways for them to supplement and enhance the knowledge they gained in their academic studies through application of that knowledge in work settings. Allowing such students to engage in OPT in areas unrelated to their fields of study would be inconsistent with the purpose of OPT.

OPT's required nexus to the field of study also minimizes potential abuse or exploitation of international students by those seeking to impermissibly employ them in unskilled labor or other unauthorized work in the United States. Moreover, this requirement is consistent with current regulations applicable to OPT more broadly; under these regulations, OPT must be directly related to the student's major area of study. *See* 8 CFR 214.2(f)(10)(ii)(A). For these reasons, DHS has determined that it will not permit a student to engage in STEM OPT in an area not related to his or her field of study.

ii. International Students and the National Interest

A variety of comments addressed whether the STEM OPT extension benefited STEM OPT students, U.S. institutions of higher education, and the overall national interest. Some commenters stated that the STEM OPT extension would provide such benefits and supported the proposed rule for these or related reasons; others stated that the proposed rule would negatively impact the employment options of U.S. STEM graduates and workers. The Department had carefully considered these issues in developing the NPRM, and has further evaluated these issues as raised in the

public comments. The Department's consideration of these issues is reflected in the discussion that immediately follows and throughout this preamble.

Comment. One commenter stated that a recent study "shows that American students who actively interact with their international classmates are more likely to enhance their own self-confidence, leadership and quantitative skills." [49] Another commenter, however, stated that in explaining the STEM OPT extension DHS had cited "no evidence of a measurable `academic benefit' other than increased income for U.S. institutions of higher education." This commenter stated that any such increased income would be "irrelevant to the OPT program, where F-1 students do NOT pay tuition, at premium or standard rates, to the academic institution from which they received a STEM degree." The commenter also stated that STEM OPT employment does not and cannot provide "enhance[ed] academic discourse and cultural exchange on campuses," and that there is an internal conflict in the dual goal of bringing "knowledge and skills" to the U.S. economy through the STEM OPT extension, and helping STEM OPT students acquire knowledge and skills.

A university commenter, however, suggested that DHS should consider it a priority to finalize the STEM OPT extension rule in a way that ensures universities remain internationally competitive. Representative of many comments from higher education, another university commenter strongly supported the STEM OPT extension within the OPT program. The commenter stated that "if the United States is to maintain our economic, educational, and scientific competitiveness then it must continue to make itself attractive to the

best talent worldwide." Another commenter, who identified as an F-1 student, noted that many people from his home country have degrees earned abroad, and that a "U.S.-university degree alone is not valued as [highly] as it was 10 or 20 years ago." This commenter stated that "experience on a complete project" will provide him an advantage over students who studied in countries that don't provide similar kinds of training opportunities.

Response. The STEM OPT extension program is designed to address the very point raised by the final commenter, *i.e.,*that the program will improve and expand the educational and training opportunities available to international students and maintain and improve the competitiveness of American institutions of higher education. As explained in the NPRM, see 80 FR 63383-84, there is increasing international competition for attracting top international students, and other countries, including Canada and Australia, currently have programs similar to the STEM OPT extension. The STEM OPT extension serves to maintain the United States' global competitiveness in these rapidly evolving fields. As discussed in the NPRM, *see, e.g.*, 80 FR 63382-84, this provides benefits to the U.S. economy that are independent of any need (or lack thereof) of STEM workers in the United States.

As noted in the NPRM, in light of increased global efforts to recruit international students, DHS believes that the United States must take additional steps to improve available educational experiences (both academic and practical) to ensure that the United States remains competitive for such students. Such steps benefit the U.S. academic sector by contributing to its

economic support and increasing academic diversity. This is particularly true with regard to international STEM students, who have comprised a significant portion of students in STEM degree programs in the United States, particularly at the graduate degree level. While it is of course true that, as a commenter noted, OPT students do not pay tuition during their practical training, it is reasonable to assume the increased attractiveness of U.S. colleges and universities due to the availability of OPT will benefit the U.S. academic sector. DHS's conclusions about the benefit of the STEM OPT extension to the F-1 student program and U.S. educational institutions found broad support in the comments submitted by educational institutions themselves.

Comment. A significant number of commenters discussed whether STEM OPT participants positively or negatively impacted U.S. workers and U.S. students, with differing views on whether nonimmigrant STEM professionals complemented or replaced U.S. STEM professionals. Some commenters cited their personal experience as STEM workers, or the experience of others they know, to demonstrate the existence of either a labor surplus or a labor shortage. Many others cited and attached reports and studies to show there was either a labor surplus or a labor shortage.

A number of commenters stated that allowing employers to hire F-1 students on a STEM OPT extension would disadvantage U.S. citizens and lawful permanent residents. Some of these commenters, as well as other commenters, provided facts and figures suggesting there was not a labor shortage of STEM workers. For example, some commenters stated that wages

have not increased, as would be expected during a shortage, and some of these commenters cited to a report from the Economic Policy Institute that found that wages in the information technology sector "have remained flat, with real wages hovering around their late 1990s levels." [50] Some commenters provided data that contradicted these claims. For example, one commenter stated that STEM workers receive a persistent wage premium and that wages for engineers are rising relative to other occupations.

Commenters cited data and reports on both sides of the question of whether there were sufficient numbers of qualified U.S. workers available to fill open STEM jobs in the U.S. economy. One commenter stated that there were over 102,000 unemployed engineers. Another commenter stated that there were two million unemployed Americans with STEM degrees. A number of commenters, however, stated that even with millions of unemployed Americans, "the manufacturing sector cannot find people with the skills to take nearly 600,000 unfilled jobs, according to a study last fall by the Manufacturing Institute and Deloitte." [51] One commenter stated that "unemployment rates in key STEM occupations are dramatically lower" than the overall unemployment rate in the United States, citing to 2.8 percent unemployment in "computer and mathematical occupations" and 2.2 percent unemployment in "architecture and engineering occupations," among others.

Response. DHS recognizes, as explained by the National Science Foundation (NSF), that close study reveals that there is no straightforward answer on

whether the United States has a surplus or shortage of STEM workers.[52] As the NSF summarizes:

Some analysts contend that the United States has or will soon face a shortage of STEM workers. Some point to labor market signals such as high wages and the fact that STEM vacancies are advertised for more than twice the median number of days compared to non-STEM jobs. Other analysts note that the shortage of STEM workers is a byproduct of the ability of STEM-capable workers to "divert" into other high-skill occupations that offer better working conditions or pay. Relatedly, some say even if the supply were to increase, the United States might still have a STEM worker shortage because an abundance of high-skill workers helps drive innovation and competitiveness and this might create its own demand.

Those analysts who contend the United States does not have a shortage of STEM workers see a different picture. They suggest that the total number of STEM degree holders in the United States exceeds the number of STEM jobs, and that market signals that would indicate a shortage, such as wage increases, have not systematically materialized. Analysts also raise concerns about labor market dynamics in academia—where a decreasing share of doctoral degree holders employed in the academic sector are tenured—and in industry—where there are reports that newly-minted degree holders and foreign "guestworkers" on temporary visas (*e.g.*, H-1B, L-1) are displacing incumbent workers. A few of these analysts go as far as to argue that firms claim shortages and mismatches in the hope of lowering compensation and training costs.

Close study of the surplus-shortage question reveals that there is no straightforward "yes" or "no" answer to whether the United States has a surplus or shortage of STEM workers. The answer is always "it depends." It depends on which segment of the workforce is being discussed (*e.g.,* sub-baccalaureates, Ph.D.s, biomedical scientists, computer programmers, petroleum engineers) and where (*e.g.,* rural, metropolitan, "high-technology corridors"). It also depends on whether "enough" or "not enough STEM workers" is being understood in terms of the quantity of workers; the quality of workers in terms of education or job training; racial, ethnic or gender diversity, or some combination of these considerations.[53]

DHS credits NSF's views on this matter. Although DHS acknowledges that commenters submitted a range of data related to the current state of the overall U.S. STEM labor market (and DHS discusses much of this data in more detail below), DHS does not rely on this data to finalize the rule. Instead, this rule is based on the widely accepted proposition that educational and cultural exchange, a strong post-secondary education system, and a focus on STEM innovation are, on the whole, positive contributors to the U.S. economy and U.S. workers and in the overall national interest. As noted above, these principles, combined with the labor market protections and other measures included in this rule, generally provide the basis for the Department's action.

Comment. Many commenters stated that data released by the U.S. Census Bureau in 2014 showed that three-quarters of American STEM graduates were not working in STEM fields. The implication was that

such data indicated no need for the STEM OPT extension program and that such a program would not benefit the national interest.

Response. The 2014 Census Bureau data cited by commenters did identify that only about one-quarter of bachelor's level graduates with STEM degrees are employed in STEM fields.[54] The Census Bureau, however, made no accounting of STEM graduates that use the technical skills developed in their STEM courses in high-skilled jobs in medicine, law, business, academia, or management. For example, for purposes of the Census Bureau study, an individual with a chemistry degree who becomes a physician is considered a STEM graduate not employed in a STEM field.[55] The cited 2014 Census Bureau figures are skewed in this regard. A 2013 analysis from the Census Bureau found that more than one out of five U.S. STEM graduates who were not employed in a core STEM field were working in a managerial or business position utilizing quantitative skills developed through their STEM studies and often directly related to their degree; that more than one in eight STEM graduates were working in healthcare (including 594,000 who were working as physicians); and that another 522,000 were considered outside of STEM, but working in U.S. colleges and universities, where they were teaching in the field of their STEM major and educating the next generation of STEM workers.[56] In short, as pointed out by the U.S. Congress Joint Economic Committee, "differences in definitions across sources can complicate comparisons or analyses of trends in STEM." [57]

DHS disagrees that the U.S. Census data point to an across-the-board shortage of degree-related employment opportunities for U.S. STEM graduates as the disparate definitions make that conclusion unlikely. DHS believes that many of the concerns identified about the proposed rule are overstated or incomplete because of the nature of available data and reporting.

Comment. A few commenters stated that DHS failed to consider the full range of research related to the proposed rule's underlying policies. One such commenter directed the Department's attention to two bibliographies publicly available on the Internet, and which were attached to the comment, because the commenter believed the sources cited in the NPRM were "funded by employers of cheap alien workers to justify the rule." One of these bibliographies identified 19 books, articles, and reports, most of which discuss the H-1B and L-1 visa programs. The second was an annotated bibliography assembled by a professor providing an assessment and criticism of four of the professor's articles and 23 other sources, principally related to H-1B work visas and employer-sponsored green cards.

Response. DHS did not rely on sources of information funded by employers of "cheap" foreign labor to develop or justify the proposed rule. Among other sources, DHS cited the following sources: the National Bureau of Economic Research, NSF, the Journal of Labor Economics, the Congressional Research Service, the Brookings Institution, the American Economic Journal, the Pew Research Center, the Journal of International Students, the Organization for Economic Co-operation and Development, University World

News, Citizenship and Immigration Canada (a Canadian government agency), the Department of Immigration and Border Protection of Australia (an Australian government agency), and the Homeland Security Academic Advisory Committee (a discretionary committee of the U.S. government established under the Federal Advisory Committee Act).

Moreover, the commenter did not identify any specific findings in the sources cited in the bibliographies that would support a change to the Department's proposal. Many of the sources cited in the bibliography involved the H-1B and L-1 nonimmigrant visa programs, as well as employment-sponsored immigrant visa programs, rather than OPT. Significantly, although the organization that prepared the H-1B and L-1 bibliography cited by the commenter also submitted a separate, detailed comment on the NPRM, the organization did not cite its bibliography or most of the sources contained therein as part of its submission. And in the course of reviewing the extensive bibliographies presented, the Department noted that at least one of the sources, which addressed permanent immigration and not OPT, concluded that "international students studying in host country postsecondary institutions are particularly valued because they improve higher education, subsidize domestic students, contribute to national economies and, if they qualify, make valuable permanent residents because of their youth, occupational qualifications, language skills, and familiarity with host country customs and institutions." [58]

Comment. One commenter stated that the NPRM's references to U.S. patent rates for foreign-born

individuals could not support the proposed rule because "no nationality data for inventors is associated with patents, so studies linking rates of patenting to immigration policy are inherently bogus." Another commenter stated that although the NPRM cites publications by economist Dr. Jennifer Hunt for several assertions about higher rates of patenting and innovation by foreign-born researchers in the United States, the NPRM did not mention a report published by the Economic Policy Institute (EPI) (a research organization) "directly challenging [those] findings." The commenter questioned sources cited in the NPRM regarding patent rates for foreign-born workers in the United States.

Response. DHS disagrees with the statement that "no nationality data on inventors is associated with patents." One data source for citizenship and nationality data for U.S. patents is the Patent Application Information Retrieval Web site maintained by the U.S. Patent and Trademark Office.[59] When applying for a patent, each listed inventor submits an oath or power of attorney form on which they must indicate citizenship. Other researchers have analyzed data from the Census Bureau, including the National Survey of College Graduates and the Integrated Public Use Microdata Series for the United States, in concert with patent information from the U.S. Patent and Trademark Office, to source citizenship and nationality figures for U.S. patents.[60]

With respect to the studies by Dr. Hunt, DHS notes that the NPRM cited those studies in support of the general proposition that STEM workers "are fundamental inputs in scientific innovation and

technological adoption, critical drivers of productivity growth in the United States." 80 FR 63383. The EPI study did not question this proposition. Rather, the EPI study examined a narrow band of STEM fields to show that "immigrant workers, especially those who first came to the United States as international students, are in general of no higher talent than the Americans, as measured by salary, patent filings, dissertation awards, and quality of academic program." [61] Specifically, the EPI finding is focused on whether foreign-born students who earned computer science and electrical engineering degrees in the United States file patent applications at higher levels than U.S.-born students earning the same degrees. For electrical engineering, the analysis showed that patenting activity of U.S. and foreign-born students was about the same, while for computer science the analysis showed that foreign-born computer science students apply for somewhat fewer patents than do their American peers.

The EPI paper, however, acknowledges that the Hunt studies cited in the NPRM cast a much broader net, encompassing a myriad of science and engineering fields. The Hunt papers considered the impact of foreign-born workers employed in the United States in myriad visa classifications and fields of study, and was not focused solely on F-1 students or STEM OPT students (nor to just Computer Science and Electrical Engineering research activity). As explained in the Hunt papers, there is support for the proposition that foreign-born scientists and engineers achieve higher rates of U.S. patent filings. The Department continues to believe such patent rates support the conclusion

that the STEM OPT extension is in the national interest.

Comment. Some commenters stated that the best interests of U.S. workers and students were not being considered by DHS. Some of these commenters, as well as others, also stated that the STEM OPT extension should exist only if there was a documented STEM labor shortage. Some commenters stated that the proposed STEM OPT extension would be harmful to U.S. workers and students.

A commenting employer stated that while it prioritized U.S. worker hiring, it also hired foreign-born students that it recruited on U.S. campuses "given the talent pool graduating from U.S. Ph.D. and M.S. STEM programs." The employer also stated: "we spend millions of dollars annually above and beyond what we have to pay to hire U.S. workers, merely to employ the talent required to successfully run our business." Another commenter stated that "it makes no sense for the United States to educate and train foreign students in the STEM fields and then drive them away with obsolete immigration policies."

Response. The number of international STEM graduates in the United States on STEM OPT extensions, as of September 16, 2015, was approximately 34,000, which, according to estimates of the overall U.S. STEM labor market from the U.S. Department of Commerce and the U.S. Bureau of Labor Statistics (BLS), represents a possible range of 0.19 percent [62] to 0.45 percent of the overall U.S. STEM job market.[63] For that reason, and in light of the worker protections included in this rule, the Department sees no reason to eliminate the STEM OPT extension

altogether in response to concerns about impacts on U.S. workers. DHS instead seeks to balance the interests of stakeholders by both ensuring the availability of a STEM OPT extension program while strengthening program oversight and worker protections. The rule strengthens the integrity of the STEM OPT extension by requiring participants in the extension to carefully consider and document the relationship between the STEM OPT opportunity and the academic degree. The rule also adds requirements relating to supervision and direction of STEM OPT students in such jobs to better ensure the goals of the program are met. The rule also adds wage and other protections for STEM OPT students and U.S. workers.

Comment. Numerous commenters repeated certain selected statements or figures on job creation or job loss related to international students in the United States. Hundreds of comments stated that 340,000 U.S. jobs are created or supported each year by international students studying in the United States, citing figures from an international student economic value tool developed by NAFSA. A few hundred comments instead posited that 430,000 U.S. workers lost jobs over a recent five-year period because of international students, as suggested by an analysis by one group. More than a dozen comments repeated the finding from an economist's study published by the American Enterprise Institute, in conjunction with the Partnership for New American Economy, that about 2.6 jobs for Americans are created for each foreign-born student who earns an advanced degree in the United States and then works in a STEM field.

Response. This rule neither asserts nor relies on a quantified, direct relationship between job creation and the STEM OPT extension. At what rate such job creation occurs is unsettled in the peer-reviewed literature. To the Department's awareness, job loss rates tied solely to STEM OPT students have not been documented in peer-reviewed literature. The figures cited in the comments summarized above also do not relate solely to STEM OPT students.

Comment. A commenter stated that although the proposed rule discussed the economic benefits of international students at length, DHS had not cited any estimate of the number of U.S. workers who were unable to obtain employment because a position was filled by a STEM OPT student or the number of U.S. workers otherwise adversely affected by the proposed rule.

Response. DHS acknowledges that this rule includes neither a quantified estimate of potential negative impacts to individual U.S. workers nor a quantified estimate of specific benefits to U.S. educational institutions or the overall economy. Instead, the rule is based on the widely accepted proposition that educational and cultural exchange, a strong and competitive postsecondary education system, and a focus on STEM innovation are on the whole positive contributors to the U.S. economy and U.S. workers, and are in the national interest. A significant number of comments agreed; many observed that STEM students have contributed significantly to the U.S. economy. As noted above, these principles, combined with the labor market protections and other measures included in this rule, generally provide the basis for the Department's action.

Comment. Some commenters stated that DHS had only considered studies supporting its conclusions and did not sufficiently review information that contradicted the sources cited by DHS. One commenter suggested that DHS "go back to the drawing board and review the full range of related information," including the book "Falling Behind," which questions whether the United States is falling behind in the global race for scientific and engineering talent.

By contrast, one commenter stated that "any change in quality of living is dependent on highly skilled STEM workers who are fundamental inputs in scientific innovation and technological adoption." Other commenters stated that "STEM students have contributed immensely to the U.S. economy with their skills and innovation" and that because "the U.S. STEM industry is at the forefront of technology in the world, international students come here to get the exposure and learn."

Some commenters flagged disagreement among economists with some of the findings included in a study published by the National Bureau of Economic Research (NBER) that extrapolates from the fundamental point for which it was cited by DHS.[64] With respect to that study, some commenters criticized its conclusions, and some criticized the fact that it had not been peer-reviewed. Because the study had received some criticism, commenters asked DHS to defend its citation to it.

Response. DHS has carefully examined all of the commenters' views regarding the reasons provided for the proposed rule and the sources relied upon by DHS, and the Department believes adequate data and

information has been provided in support of the rule. As noted throughout this preamble, DHS has reviewed studies submitted by commenters and finds that the basic approach in this rule appropriately balances the goals of protecting American workers and promoting American academic and economic competitiveness by attracting top quality international STEM students.

With regard to the citation to the NBER study, the reference in the 2015 NPRM was for the general proposition that STEM workers are fundamental inputs in scientific innovation and technological adoption, and therefore critical drivers of productivity growth in the United States.[65] The NSF, among many others, has reached the same conclusion. Created by Congress in 1950, the NSF began publishing an annual report in 1955 regarding the condition of the science and engineering workforce, long before the term "STEM" was coined. According to the 2015 annual report, "[t]his workforce is of particular interest to the Nation because of its central role in fostering innovation, economic competitiveness, and national security." [66]

Comment. A commenter requested that DHS annually publish data showing trends related to the impact of F-1 nonimmigrant students on labor markets in the United States. Another commenter stated that in order to improve oversight and understanding of our legal immigration system, relevant agencies should publish timely online information for each nonimmigrant visa category and subcategory, including for F-1 nonimmigrant students with OPT. This commenter stated that the public disclosure should include the underlying raw data gathered from the proposed Mentoring and Training Plan and other relevant forms as

to the gender, age, country of origin, level of training, field of training, institution(s) of higher education, job title, wages, employer, and work location for "all OPT visa holders." According to the commenter, this disclosure would be a "critical tool to empower advocates to ensure fair treatment and high standards within these visa programs." Multiple commenters stated that although they lacked full information, the collection and release of data on all nonimmigrant visa categories was needed as a tool to help curtail fraud and abuse in employment visa categories.

Response. To the extent permissible under existing law (including under the Privacy Act and related authority), relevant information related to the STEM OPT extension program may be available through the Freedom of Information Act (FOIA) process. A DHS effort to provide data and a program evaluation of all nonimmigrant visa categories is not within the scope of the proposed rule and is not required by any current statute or regulation.

Comment. One commenter stated that "[t]he NPRM is procedurally and substantively arbitrary and capricious" because "DHS has entirely failed to provide a reasoned explanation of why its published policy rationale for the proposed rule has so fundamentally changed from that provided for the 2008 [IFR] that it now replaces." The commenter stated that DHS justified the 2008 IFR by asserting the need to provide labor to U.S. employers to remedy a critical labor shortage, but has justified the proposed rule by the need to continue and further enhance the educational benefit of the STEM OPT extension, while protecting STEM OPT students and U.S. workers. 80 FR 63381.

Response. DHS does not agree with the proposition that an agency's decision to state new or revised reasons for its policy renders the agency's policy arbitrary and capricious. This rule is grounded in DHS's seven years of experience with the STEM OPT extension. In the 2015 NPRM, DHS proposed that, independent of the labor market concerns that DHS expressed in the 2008 IFR, the STEM OPT extension offers significant educational benefits to students and educational institutions, as well as important economic and cultural benefits. It is not arbitrary or capricious for DHS to consider its experience with this program or to account for present-day realities when determining whether and how to retain and improve the program in a new rulemaking.

The commenter further requested that DHS explain "why its published policy rationale has changed" since 2008. In short, the policy rationale and, importantly, the substance of the rules governing the program, have changed based on a range of factors. As discussed at length in the NPRM, these factors include the public comments received on the 2008 IFR and DHS's assessment of the benefits provided by the 17-month STEM OPT extension. *See, e.g.,* 80 FR 63379-63384. This assessment is informed by enduring national priorities, such as strengthening the U.S. educational system by helping to ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields and enhancing the United States' economic, scientific, and technological sectors. DHS believes that it has appropriately considered the evidence in determining

whether and how to retain and improve the STEM OPT extension.

iii. Relationship Between Taxation Rules and the Authority of the Secretary of Homeland Security Regarding Employment of F-1 Nonimmigrants

Comment. DHS received a significant number of comments that discussed whether existing Federal tax law creates an incentive for employers to hire F-1 nonimmigrants for practical training, rather than U.S. workers, and whether DHS should make changes to Federal tax law before or as part of finalizing a rule allowing a STEM OPT extension with the OPT program. The tax law provision primarily at issue in these comments is 26 U.S.C. 3121(b)(19), which exempts certain services from Federal Insurance Contributions Act (FICA) taxation when they are performed by F-1 nonimmigrants (among other nonimmigrant classifications) who are nonresidents for Federal tax purposes.[67] Many comments suggested that this exemption creates an incentive for employers to hire F-1 nonimmigrants instead of U.S. workers, and that this rule would therefore disadvantage U.S. workers. Other comments suggested that employers are not influenced by tax exemptions when making hiring decisions.

A number of commenters, for example, stated that employers save money by not incurring FICA payroll taxes when they hire F-1 nonimmigrants instead of U.S. workers and that these savings induce employers to prefer F-1 nonimmigrants over U.S. workers. A few hundred comments labeled the Department's

proposed rulemaking as "corporate welfare." One commenter stated that it is "unethical" for F-1 nonimmigrants to be exempt from "paying taxes" since those nonimmigrants who are working under H-1B visas are not exempt. One commenter suggested that the tax treatment of F-1 nonimmigrants has the effect of discouraging Americans from pursuing study in STEM fields.

Another commenter stated that excusing OPT participants from payroll taxes was not the result of congressionally created tax policy but instead a decision by "the administration" to "simply defin[e] recent alumni as foreign `students'" and thus "allow[] employers to avoid payroll taxes." One commenter criticized DHS because the Department "offered nothing in the proposed rule to deal with the wage savings enjoyed by the employers of OPT workers from not having to pay FICA payroll taxes for OPT workers." This commenter stated that "the Department clearly believes it has the authority to impose wage-related conditions on OPT employers, but it's unclear why the Department wouldn't also address the FICA issue which some suggest is one of the biggest sources of unfairness to U.S. workers competing with OPT workers."

Several comments that referenced tax issues cited analysis by a research organization stating that "OPT removed $4 billion from the Social Security and Medicare trust funds" over five years. Others cited the same analysis to state that the OPT program "costs Social Security about $1 billion dollars a year" or "about $10,000 annually for each OPT" participant.

However, many other commenters who discussed taxation stated that because individuals in F-1

nonimmigrant status are ineligible to collect Social Security or Medicare benefits and may never qualify in the future for such benefits, contributions to those programs should not be required for services rendered by F-1 nonimmigrants. Also, some commenters who identified as F-1 students stated that payroll taxes may be affected by tax treaties between the United States and other nations. A number of F-1 students noted that they pay city, state, and federal income taxes, as well as sales tax.

A few commenters submitted ideas on how DHS could revise or address the payroll tax provisions. One commenter suggested that the Department's proposed regulation could be changed to remove any financial incentive to hire non-U.S. citizens by exempting employers "from FICA for two years when they hire a new grad STEM U.S. worker, and [charging] a 10% penalty for displacing an American STEM graduate when an OPT is hired." A labor union proposed that "DHS should require employers of STEM workers to pay an amount equal to payroll taxes into a fund to encourage employment of U.S. STEM workers." A research organization proposed in the alternative that the amount of such payroll taxes could be paid to the U.S. Treasury.

One commenter stated that "Congress delegated authority to define periods of employment for F-1 nonimmigrants to the Treasury Department, not DHS." This commenter criticized the proposed rulemaking on the grounds that it "never mentions or references the detailed applicable laws governing the FICA, Federal Unemployment Tax Act (FUTA), or Social Security withholding." The commenter also stated that "the

proposed agency policy authorizing graduates on F-1 visas to work full-time while exempt for FICA withholding directly conflicts with the Internal Revenue Code (IRC), the Social Security Act (SSA), and Supreme Court precedent."

Response. Matters related to Federal taxation are controlled by Congress through the IRC, and by the Department of the Treasury (Treasury) through regulations promulgated thereunder, not DHS. Although Congress may revise, eliminate, or create new obligations or conditions based on the payroll tax exemptions in the IRC for F-1 nonimmigrants, DHS may not do so. Similarly, although Treasury may issue regulations interpreting and implementing federal tax laws, DHS may not. DHS is thus unable to amend the rule to accommodate reforms related to payroll taxation or to take other measures affecting federal tax policy or rules.

Under current tax laws, when F-1 nonimmigrants are exempt from payroll taxes, the employer saves an amount equal to 6.2 percent of the F-1 nonimmigrant's salary up to the taxable wage base ($118,500 in 2016) and an additional 1.45 percent of the total salary that, in the aggregate, would have been the employer contribution to the Social Security and Medicare trust funds. The F-1 nonimmigrant similarly saves a deduction from his or her salary in the same amount that would have been the employee contribution. The FICA chapter of the IRC, which governs the payroll tax owed by employers and employees to fund the Social Security and Medicare programs,[68] provides that no payroll taxes are to be withheld for services performed by a nonresident alien who is an F-1 nonimmigrant [69] as

long as the services are "performed to carry out a purpose for which the individual was admitted." [70]

The IRC provides that aliens temporarily in the United States are resident aliens, rather than nonresident aliens, for Federal tax purposes, when they satisfy a substantial presence test based on physical presence in the United States.[71] However, an individual temporarily present in the United States as an F-1 nonimmigrant who substantially complies with the requirements of the visa classification is an "exempt individual" [72] who does not count days physically present in the United States as an F-1 nonimmigrant for five calendar years toward the substantial presence test.[73] Thus, an F-1 nonimmigrant who is an "exempt individual" (for any part of five calendar years) is not a resident alien for taxation under the IRC, and as a nonresident alien is not subject to payroll taxes for Social Security and Medicare contributions (for those five calendar years). Similarly, the FUTA chapter of the IRC, which governs payroll taxes for unemployment compensation,[74] exempts from unemployment taxes those services performed by a nonresident alien who is an F-1 nonimmigrant.[75] In short, an individual who is an F-1 nonimmigrant generally is exempt from FICA and FUTA payroll taxes during the first five calendar years in which the individual holds F-1 nonimmigrant status.

These provisions, although of course relevant to F-1 students and employers for purposes of determining FICA and FUTA tax liability, neither displace, nor authorize Treasury to displace, the Secretary's broad authority to administer and enforce the nation's immigration laws. *See, e.g.*, 6 U.S.C. 202; INA Sec.

103, 8 U.S.C. 1103. Whether with respect to F-1 students or any other category of nonimmigrants, the IRC does not dictate the terms and conditions relating to nonimmigrant status. As Treasury explains in its U.S. Tax Guide for Aliens (IRS Publication 519): "[An alien is] considered to have substantially complied with the visa requirements if [he or she has] not engaged in activities that are prohibited by U.S. immigration laws and could result in the loss of [his or her] visa status." In sum, DHS, not Treasury, is charged with determining whether an individual is maintaining F-1 nonimmigrant status, and Treasury, not DHS, must determine when and how payroll tax obligations accrue and are calculated. *See, e.g., id;* INA Sec. 101(a)(15), 8 U.S.C. 1101(a)(15); INA Sec. 214, 8 U.S.C. 214.

Accordingly, the assertion by a commenter that Treasury controls when F-1 nonimmigrants are authorized for employment is incorrect. This mistaken theory seems to be grounded in a misreading of select provisions of the IRC referenced by the comment concerning work performed as an employee of a school, college, or university. Such work is exempt from both FICA and FUTA under the IRC when Treasury determines that the worker is both taking classes at and working for a qualifying institution and should be considered an exempt student.[76] Although Treasury has further defined these provisions administratively, neither the IRC nor Treasury's regulations relate to when F-1 nonimmigrants are authorized to work. Rather, they relate to when certain employed students (whether F-1 nonimmigrants or U.S. citizens) who are enrolled in and regularly attending classes are exempt

from payroll taxes. In other words, these provisions do not limit when an F-1 nonimmigrant can work, but instead control whether FICA and FUTA taxes apply to services provided by certain individuals to certain institutions.[77] DHS thus rejects the suggestion that Treasury controls when F-1 nonimmigrants are authorized for employment.

Additionally, following consultation with Treasury, DHS has determined that it would be incorrect to conclude that the payroll tax exemption for F-1 nonimmigrants "removes" any monies from the Social Security or Medicare program trust funds, despite many comments to this effect. At most, the statutory tax exemption has the (intended) effect of not generating FICA and FUTA payroll tax revenue when certain F-1 nonimmigrant students are employed.

Moreover, the amount of revenue affected by these payroll tax exemptions does not approach the $4 billion over five years (*i.e.,* just under $1 billion annually, or approximately $10,000 annually per STEM OPT participant) cited by certain commenters. Other commenters noted that the research organization that calculated these figures did not take into account that (1) employers incur other costs if they choose to hire an individual who is an F-1 nonimmigrant, and (2) many F-1 nonimmigrants are not tax exempt.

With respect to the first point, some commenters noted that any employer savings related to tax laws are at least in part offset by administrative costs, legal fees, and staff time related to securing the authority under U.S. immigration law to employ the foreign-born worker.[78] With respect to the second point, other commenters emphasized that not all F-1

nonimmigrants are exempt from payroll taxes under these specific FICA and FUTA rules. Instead, some may be exempt because of tax treaty provisions, while many others, including F-1 nonimmigrants eligible for STEM OPT extensions, may not be exempt because they have already been in the United States for parts of five calendar years. In regards to the tax treaty provisions, it should be noted that U.S. citizens would receive tax treatment while working abroad that is commensurate with the treatment received by nationals of our treaty partners while they work in the United States. In addition, it is not clear to DHS that compliant employers would typically perceive an incentive to hire F-1 nonimmigrants due to a payroll tax exemption, as it is not clear how employers would definitively know a particular nonimmigrant's tax treatment prior to hiring.[79] Based on these factors, other provisions in this rule that safeguard the interests in U.S. workers, and DHS's long experience administering and enforcing the nation's immigration laws, DHS concludes that commenters' concerns about the incentives created by the statutory tax exemptions are overstated.

DHS also observes that there are a number of other deficiencies in the figures suggested for the fiscal impact of the payroll tax exemptions for F-1 nonimmigrants. For instance, the figures assume incorrectly that every F-1 nonimmigrant on a STEM OPT extension has displaced a U.S. worker who would otherwise be subject to payroll taxes, and that every STEM OPT student ultimately draws down on the funds generated by payroll taxes. The figures also appear to be based on calculations related to the total number of

students engaged in OPT, not just those on STEM OPT extensions. In addition to the reasons discussed above, DHS declines to make changes to a successful international student program based on speculative assertions about the impact of certain statutory tax exemptions on the programs funded by the FICA and FUTA taxes. Furthermore, if those tax exemptions are in fact problematic, they must be addressed by Congress.

iv. Legal Authority

Comment. DHS received many comments concerning the legal authority underpinning the OPT program. Some commenters challenged the Department's authority to maintain an OPT program at all, in part because there is no express statutory authority establishing such a program. A commenter with this view cited a 1977 regulation from the legacy Immigration and Naturalization Service (INS) in which the INS had stated that there was no express authority in the INA establishing OPT employment for F-1 students. Other commenters objected to the STEM OPT extension on the grounds that it is inconsistent with other provisions of the INA regulating visa classifications that expressly provide employment authorization. These commenters took the position that the only permissible objective of an F-1 student's course of study is to obtain a degree. According to those commenters, once that objective has been achieved, the purpose of the F-1 status has been fulfilled and the student's status should terminate. Other commenters contested the Department's authority to provide STEM OPT extensions because such extensions were inconsistent

with one of the "INA's primary purpose[s]," which they characterized as restricting immigration "to preserve jobs for [U.S.] workers."

One commenter specifically argued that the statutory authority for OPT was undermined by certain congressional action in 1990 to create an OPT-related pilot program, followed by the failure in 1994 to extend that program:

The only clear statutory authority that has ever existed for an OPT-like program was a three-year pilot program created by section 221 of the 1990 Immigration and Nationality Act [sic] that allowed foreign graduates to work in fields unrelated to their degree. . . . However Congress did not allow the program to exist for more than a few years after its creation, in part because an INS and DOL evaluation found that it "may have adverse consequences for some U.S. workers."

The implication is that because Congress had authorized that specific OPT program by statute and then allowed it to expire, other forms of OPT that are not specifically authorized in statute are not legally justifiable.

Other commenters, however, submitted comments recognizing the legal justifications for the OPT program. A number of commenters, for example, recounted the history of post-completion OPT in support of the proposed rule. Those commenters noted that OPT employment had been provided by INS and DHS since at least 1947, and they concluded that DHS was on sound legal footing in including a STEM OPT extension within the OPT program. Some commenters stated that DHS was utilizing broad authority

granted by Congress to enforce and administer the immigration laws. Those commenters generally considered persuasive the fact that Congress had amended the INA numerous times in ways that indicated its knowledge of, and acquiescence to, the existence of a significant period of post-graduation OPT.

One commenter that recognized the Department's legal authority in issuing this rule addressed the significance of Congress' actions in 1990 to create a pilot program in which F-1 students could receive employment authorization for practical training *unrelated* to the their fields of study. Although Congress later allowed the pilot program to expire in 1994, the commenter explained that the program's creation supported the Department's authority to permit OPT employment *related* to students' fields of study:

In the Immigration Act of 1990, Congress authorized the creation of a pilot program which allowed F-1 student employment in positions that were unrelated to the alien's field of study. The creation of this program bolsters the argument that DHS's interpretation is reasonable. . . . The logical conclusion to draw here is that Congress only acted explicitly to authorize F-1 students to receive post-completion training in fields unrelated to their studies because the law already allowed post-completion training in fields related to the student's studies.

This commenter, along with many others, expressed support for the proposed rule as a reasonable construction of the authorities provided to the Department by the immigration laws.

Response. The Homeland Security Act and the INA provide DHS with broad authority to administer the

INA and regulate conditions for admission under nonimmigrant categories, including the F-1 student classification. *See, e.g.,* 6 U.S.C. 202; 8 U.S.C. 1103(a)(1) and (3); 8 U.S.C. 1184(a)(1). As the U.S. District Court for the District of Columbia recently observed:

Congress has delegated substantial authority to DHS to issue immigration regulations. This delegation includes broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants. *See* 8 U.S.C. 1103(a)(1) . . .; *id.* § 1103(a)(3) ("The Secretary of Homeland Security shall establish such regulations [inter alia,] as he deems necessary for carrying out his authority under the provisions of the INA."); *id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe. . . .").

Washington Alliance, No. 1:14-cv-00529, slip op. at 18-19. In addition to explicitly authorizing the Secretary to admit international students to the United States temporarily to pursue a course of study, *see* 8 U.S.C. 1101(a)(15)(F)(i), the INA endows the Secretary with broad discretion to promulgate regulations establishing the time and conditions under which such aliens may be admitted, *see* 8 U.S.C. 1103(a)(3), 1184(a)(1), 8 U.S.C.
1101(a)(15)(F)(i), 1103(a) and 1184(a)(1). The Secretary also has broad authority to determine which individuals are "authorized" for employment in the United States. *See* 8 U.S.C. 1324a, 8 CFR part 274a.

To the extent that comments challenging DHS's legal authority concerned the OPT program generally,

such comments are outside the scope of this rulemaking, which relates specifically to the availability of STEM OPT extensions. DHS did not propose to modify the general post-completion OPT program in the proposed rule. Moreover, to the extent that such comments can be construed as challenging DHS's authority to implement a STEM OPT extension in particular, DHS finds the comments unpersuasive.

Federal agencies charged with administration of the immigration laws have long interpreted the statutory authorities cited above to encompass on-the-job training that supplements classroom training for international students. *See Washington Alliance,* No. 1:14-cv-00529, slip op. at 24; *Programmers Guild, Inc.* v. *Chertoff,* 338 F. App'x 239, 244 (3d Cir. 2009) (unpublished). For example, in 1947, legacy INS promulgated a rule authorizing international students to work after graduation based upon statutory authority that is similar in relevant respects to current statutory authority governing the admission of international students. The 1947 rule provided that "in 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." *See* 12 FR 5355, 5357 (Aug. 7, 1947). Again in 1973, legacy INS promulgated regulations authorizing, pursuant to the INA, employment for international students for practical training under certain conditions. See 38 FR 35425, 35426 (Dec. 28, 1973). For decades, INS and DHS regulations have defined an international student's duration of status, in pertinent part, as "the

period during which the student is pursuing a full course of study in one educational program . . . *and any period or periods of authorized practical training,* plus [a grace period] *following completion of the course of study or authorized practical training* within which to depart from the United States." 48 FR 14575, 14583-14584 (Apr. 5, 1983) (emphases added). *See also* 8 CFR 214.2(f)(5)(i).

Moreover, during this period, Congress has had occasion to amend the INA in general, and F-1 nonimmigrant provisions in particular, on numerous occasions. Despite these numerous amendments, Congress has left completely undisturbed the longstanding interpretation that international students are authorized to work in practical training. *See e.g.,* Pub. L. 87-256, § 109(a), 75 Stat. 527, 534 (Sept. 21, 1961) (allowing an F-1 nonimmigrant's alien spouse and minor children to accompany the F-1 nonimmigrant to the United States); Immigration Act of 1990 § 221(a) (permitting F-1 nonimmigrants to engage in limited employment unrelated to their field of study); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 625, 110 Stat. 3009-546, 3009-699 (adding limitations related to F-1 nonimmigrants at public schools); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (implementing monitoring requirements for international students); Pub. L. 111-306, § 1, 124 Stat. 3280, 3280 (Dec. 14, 2010) (amending F-1 with respect to language training programs). "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to

revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodities Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 275 (1974)).

In light of the long regulatory history for the OPT program, including the Department's longstanding interpretation of the INA and the longstanding congressional recognition of that interpretation, DHS is confident that this rulemaking is consistent with statutory authority. As explained by the recent decision in the *Washington Alliance* litigation:

DHS's interpretation of F-1—inasmuch as it permits employment for training purposes without requiring ongoing school enrollment—is "longstanding" and entitled to deference. *See Barnhart [* v. *Walton],* 535 U.S. [212,] 220 [(2002)]. Second, Congress has repeatedly and substantially amended the relevant statutes without disturbing this interpretation. These amendments have not been "isolated." *Public Citizen [v. U.S. Dep't of Health and Human Services],* 332 F.3d [654,] 668 [(D.C. Cir. 2003)]. The Immigration and Nationality Act of 1952, in particular, radically changed the country's immigration system. And, the Immigration Act of 1990 imposed a host of new protections for domestic workers and explicitly authorized F-1 students to engage in certain forms of employment. By leaving the agency's interpretation of F-1 undisturbed for almost 70 years, notwithstanding these significant overhauls, Congress has strongly signaled that it finds DHS's interpretation to be reasonable.

Washington Alliance, No. 1:14-cv-00529, slip op. at 26-27.

With respect to one commenter's reliance on the 1977 INS rulemaking, DHS recognizes that legacy INS previously noted the lack of specific statutory provisions expressly authorizing OPT. DHS agrees that the INA contains no direct and explicit provision creating a post-completion training program for F-1 students. But this does not mean that the Department lacks the authority to implement such a program. Indeed, as the 1977 Rule recognized, "section 103 of the Immigration and Nationality Act (8 U.S.C. 1103) . . . provides the Attorney General and the Commissioner of the Immigration and Naturalization Service certain powers and duties, including the establishment of regulations." 42 FR at 26411. And it was pursuant to that authority that in the very 1977 rulemaking in which the INS made the statement cited by the commenter, the INS amended the regulations that authorized "a nonimmigrant alien student to engage in practical training" and continued to authorize OPT. *Id.* As noted above, Congress's actions over several decades make clear that Congress understood the F-1 statutory provisions to permit "at least some period of employment" and that "the clause in F-1—`solely for the purpose of pursuing such a course of study'—does not foreclose employment." *Washington Alliance,*No. 1:14-cv-00529, slip op. at 21.

Further, the fact that Congress has recognized and approved of OPT is further supported, rather than undermined, by its creation of an OPT-related pilot program in 1990. First, the legislative history indicates that Congress understood the new pilot program,

which authorized temporary employment unrelated to a student's field of study, as an expansion of off-campus employment authorization for F-1 nonimmigrants. *See* H.R. Rep. No. 101-723, pt. 1, 1990 WL 200418, *6746 (recognizing that the legislation "expands the current authority of students to work off-campus"). Second, as recognized by other commenters, the fact that Congress chose to create a pilot program specifically authorizing employment *unrelated* to a student's field of study is itself proof that Congress understood that employment *related* to such a field of study already had been appropriately authorized by the INS. The fact that Congress, acting against the backdrop of the longstanding OPT program, sought to expand students' employment opportunities, without curtailing the existing OPT program, indicates that Congress did not perceive OPT to be in contravention of Department authority. Indeed, the fact that Congress understood that F-1 nonimmigrants were regularly employed is reflected in the fact that, as early as 1961, Congress acted to exempt such students from certain payroll taxes. If F-1 nonimmigrants could not be employed, there would be no reason for Congress to recognize in the tax code that employment could be related to the purpose specified in 8 U.S.C. 1101(a)(15)(F) or to exempt such employment from payroll taxes.[80]

Finally, DHS disagrees with the suggestion that the rule's objectives conflict with one of the "INA's primary purpose[s]" of restricting immigration "to preserve jobs for [U.S.] workers." The final rule, as with the proposed rule, contains important safeguards specifically designed to guard against such effects, while

also furthering crucial benefits stemming from academic and cultural exchange, innovation, and economic growth. Accordingly, this rule maintains the U.S. Government's longstanding legal and policy positions on this matter; practical training is an important and recognized element of a student's educational experience and full course of study.

Comment. A number of commenters took issue with the duration of STEM OPT extensions as proposed in the 2015 NPRM, asserting that a two-year extension was contrary to DHS's statutory authority. A commenter stated that authorizing post-completion employment for an "extended period of time" is unlawful and quoted the above-referenced 1977 final rule, in which legacy INS reduced the maximum OPT period from 18 months to one year. See 42 FR 26411(May 24, 1977). The commenter asserted that legacy INS issued the 1977 rule based on a finding that an extended duration of OPT could cause injury to U.S. workers because OPT students could work for less than prevailing wages during their training period. The commenter asked whether DHS had considered this 1977 INS finding when developing the present rulemaking, and whether DHS "now rejects the earlier finding of the INS" that "[t]here is no indication that the Congress intended that [a foreign student] remain and work in the U.S. for an extended period after completion of his course of study and until he becomes fully experienced in his occupational skill." 42 FR at 26412.

Response. DHS acknowledges that approximately 40 years ago, legacy INS limited the maximum overall period of practical training for all degree programs from 18 months to 12 months. The INS, however,

made this change for policy reasons and not legal reasons. At no point did the INS conclude that statutory authority required it to reduce the 18-month maximum period for OPT. Moreover, INS apparently made the statement about legislative intent in the course of rejecting a request to provide an across-the-board maximum of two years for practical training in all fields of study. This statement did not define the scope of INS' legal authority. And as part of this rule, DHS neither considered nor proposed an across-the-board increase in the duration of OPT for all students, but instead only proposed the extension for on-the-job training in STEM fields.

With respect to policy, DHS also acknowledges that legacy INS recognized in the same 1977 rulemaking that "[i]t may be that foreign students will be less likely to find employment, and perhaps fewer aliens would enter the U.S. to obtain their education here." *See* 42 FR at 26412. DHS, however, does not believe that it should be constrained to the factual and policy determinations that legacy INS made approximately 40 years ago with respect to the effect of the overall OPT program on the 1977 U.S. labor market. The world has changed a great deal since that time, and DHS believes it appropriate to shape policy accordingly.

As noted previously, the enhancements made by this rule are supported by data generally suggesting that international students contribute to the overall U.S. economy by building global connections between their hometowns and U.S. host cities. Evidence links skilled migration to transnational business creation, trade, and direct investment between the United States and

a migrant's country of origin. International STEM students also contribute more specifically to a number of advanced and innovative fields that are critical to national prosperity and security. By conducting scientific research, developing new technologies, advancing existing technologies, and creating new products and industries, for example, STEM workers diversify the economy and drive economic growth, while also producing increased employment opportunities and higher wages for U.S. workers. The rule also reflects DHS's consideration of potential impacts on the U.S. labor market and includes important safeguards for U.S. workers in STEM fields.

Comment. Some commenters made arguments based on comparisons between the STEM OPT program and the H-1B program, suggesting that DHS should infer from the H-1B category implicit limits on DHS's legal authority to allow F-1 students to engage in practical training as part of completing their full course of study. Some commenters asserted that DHS had no legal authority for a STEM OPT extension because it "circumvents" the statutory requirements of the H-1B visa classification. Relatedly, one commenter suggested that granting employment authorization through the OPT program permits F-1 students to sidestep restrictions on employment of foreign nationals enacted by Congress through establishment of a limited number of employment-authorized visa categories. In support of this contention, the commenter cited the decision by the U.S. District Court for the Northern District of California in *Int'l Union of Bricklayers & Allied Craftsman* v. *Meese,* 616 F. Supp. 1387 (N.D. Cal. 1985).

Response. DHS disagrees that the STEM OPT extension is an attempt to circumvent the requirements of the H-1B visa program, including the cap on H-1B visas. The H-1B nonimmigrant classification is a unique program designed to meet different policy objectives than those of the F-1 visa program or OPT. While this rule enhances the ability of F-1 students in STEM fields to implement and test educational concepts learned in the classroom in the context of on-the-job training, the rule does nothing to modify the congressionally established annual H-1B visa cap nor to modify the longstanding policy objectives of the H-1B program that generally allow U.S. employers to temporarily fill job openings in specialty occupations by employing workers who possess at least a bachelor's degree. Unlike the H-1B visa program where an employer must petition for an H-1B visa for a foreign worker to fill a job opening, in the F-1 visa program, it is F-1 students, including those affected by this final rule, who seek to participate in OPT in order to further their education attained through course work in the United States. Unlike an H-1B specialty occupation worker, a student will participate in STEM OPT as a way to complement his or her academic experience in the United States pursuant to an individualized Training Plan that helps ensure that the STEM OPT experience furthers the student's course of study.

DHS thus agrees with the U.S. District Court for the District of Columbia, which explained the relationship between the F-1 and H-1B visa classifications in its recent decision in *Washington Alliance.* In that decision, in which the court upheld the Department's legal

authority to include a STEM OPT extension within the general OPT program, the court stated:

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. . . . But H-1B—which applies to aliens seeking to work in a "specialty occupation"—is far broader than the employment permitted by the OPT program. DHS's interpretation of the word "student" does not render any portion of H-1B, or its related restrictions, surplusage. Congress has tolerated practical training of alien students for almost 70 years, and it did nothing to prevent a potential overlap between F-1 and H-1B when it created the modern H-1B category in 1990. As such, the Court does not believe that DHS's interpretation is unreasonable merely because of its limited overlap with H-1B.

Washington Alliance, No. 1:14-cv-00529, slip op. at 14, 28 (internal citations omitted).

As for a commenter's reference to the *Int'l Union of Bricklayers* case, DHS finds that decision of little relevance to this rulemaking. In the cited case, the district court's holding was grounded in its finding that the admission of certain individuals as B-1 nonimmigrant visitors for particular construction work purposes was inconsistent with section 101(a)(15)(B) of the INA, 8 U.S.C. 1101(a)(15)(B), which expressly precludes admission in B nonimmigrant status of an alien "coming for the purpose . . . of performing skilled or unskilled labor." This case has no clear application to the STEM OPT extension, where there is no express statutory bar similar to section 101(a)(15)(B) of the

INA, 8 U.S.C. 1101(a)(15)(B).[81] More critically, the overlap between the STEM OPT extension and the H-1B visa program does not invalidate DHS's interpretation of the controlling statutory authorities. For that reason, the court in *Washington Alliance* rejected arguments similar to those made by commenters that DHS had "circumvented the statutory restrictions that rightfully should be applied" to college-educated labor.[82]

Comment. A number of commenters similarly asserted that the proposed Cap-Gap provision, which further extends F-1 status for students who are beneficiaries of H-1B petitions, undermined the authority for this rulemaking. One commenter, for example, wrote that there is a fundamental conflict between the purpose of the student visa program and STEM OPT extensions in that student visas are not to be used as a means of immigrating to the United States. The commenter cited to comments from individuals who supported the proposed rule, including the Cap-Gap provision, as evidence that the rule would facilitate longer-term immigration to the United States. The commenter expressed that the rule would transform the statutory basis for the admission of foreign students—admission "solely for the purpose of pursuing . . . a course of study"—into admission "for pursuing a course of study or hanging around long enough to get an H-1B visa." The commenter stated that the Cap-Gap provision serves no purpose other than to assist F-1 students to remain in United States in violation of the terms of their admission.

Response. DHS does not agree with the commenter's views related to the Cap-Gap provision. First, both the

STEM OPT extension and the Cap-Gap extension are of limited duration, and neither provides anything other than short-term temporary status. Second, as discussed above, practical training for international students has been authorized for many decades, and Congress has long recognized the Department's interpretation of the student visa and related sections of the INA. Congress also created the H-1B nonimmigrant classification specifically for specialty occupation workers with bachelors' degrees or higher. *See* INA Sec. 101(a)(15)(H)(i)(B) and 214(i)(l), 8 U.S.C. 1101(a)(15)(H)(i)(B) and 1184(i)(1). As noted in the recent *Washington Alliance* decision, the fact that F-1 students on OPT share certain similarities with H-1B nonimmigrant workers does not render the OPT program invalid. *See Washington Alliance,* No. 1:14-cv-00529, slip op. at 14, 28. Third, Congress also created provisions expressly allowing individuals with one nonimmigrant classification to change status to a different nonimmigrant classification. *See* INA Sec. 248, 8 U.S.C. 1258. There is thus nothing problematic about the fact that F-1 students in a period of OPT may seek to remain in the United States in H-1B nonimmigrant status. The immigration laws are specifically designed to facilitate such shifts. *See id.* And, as noted earlier, nothing about the Cap-Gap provision affects eligibility for H-1B status or visas, changes the number of such visas, or otherwise increases the ability of students to obtain classification as an H-1B nonimmigrant.

To the contrary, the Cap-Gap provision simply provides a temporary bridge between two lawfully available periods of nonimmigrant status. As noted above,

the problem rectified by the Cap-Gap provision is the result of the misalignment between the academic year and the fiscal year. Because of this misalignment, F-1 students who were the beneficiaries of H-1B petitions often saw their F-1 status expire before they could effect the change to H-1B status, which required them to leave the United States and subsequently reenter on an H-1B visa. The Cap-Gap provision would simply remove the need to depart and subsequently reenter by extending the student's F-1 status for a limited number of months until his or her H-1B status commenced. The Cap-Gap provision is thus nothing more than a common-sense administrative measure that helps these students maintain legal status and avoids inconvenience to them and their employers. It is also fully consistent with existing legal authorities and the underlying purpose of the practical training program.

B. Enforcement, Monitoring, and Oversight

1. Description of Final Rule and Changes From NPRM

The final rule includes a number of requirements related to enforcement and oversight of the STEM OPT extension program. To better ensure its integrity, this rule prohibits STEM OPT extensions based on degrees from unaccredited institutions; provides for DHS site visits at STEM OPT employment sites; sets an overall limit for the amount of time a student may be unemployed during a STEM OPT extension; requires validation reports from students, as well as reporting from both students and employers, on the student's employment status; requires students to provide annual evaluation reports; and requires both students and

employers to report material changes to training plans. The proposed rule included these provisions; DHS has retained the provisions in the final rule, with changes and clarifications in response to public comments. We summarize these provisions and changes below.

i. University Accreditation

To qualify for a STEM OPT extension, a student's STEM degree must be received from a U.S. educational institution accredited by an accrediting agency recognized by the Department of Education.[83] As noted in the proposed rule, the goal of accreditation is to ensure the quality of educational institutions and programs. Specifically, the accreditation process involves the periodic review of institutions and programs to determine whether they meet established standards in the profession and are achieving their stated educational objectives.[84]

DHS retains the accreditation requirements from the proposed rule, with only one change in response to public comments received. In cases where a student uses a previously obtained STEM degree to apply for the STEM OPT extension, the institution from which the qualifying degree was obtained must be accredited by an accrediting agency recognized by the Department of Education at the time of the student's application for the STEM OPT extension. This is a change from the proposed rule's requirement that the institution be accredited at the time the degree was conferred. This change will make the provision easier to administer by eliminating the need for DSOs to verify

the historical accreditation status of other institutions.

ii. Site Visits

DHS may, at its discretion, conduct site visits to ensure that employers and students meet program requirements, including that they are complying with assurances and that they possess the ability and resources to provide structured and guided work-based learning experiences in accordance with individualized Training Plans. The combination of requiring school accreditation and conducting discretionary DHS site visits of employers will reduce the potential for fraudulent use of F-1 student status during the period of STEM OPT training.

DHS retains the site visit provisions from the proposed rule, with one change to accommodate concerns about the potential disruption associated with unannounced site visits. DHS is including in this rule a requirement that DHS will provide notice to the employer 48 hours in advance of any site visit, unless the visit is triggered by a complaint or other evidence of noncompliance with the STEM OPT extension regulations, in which case DHS reserves the right to conduct a site visit without notice.

iii. Unemployment Limits

Under this rule, a student may be unemployed for no more than 90 days during his or her initial period of post-completion OPT, and for no more than a total of 150 days for students whose OPT includes a 24-month STEM OPT extension. This provision is finalized as proposed, with minor changes for clarity.[85]

iv. Employment Status and Validation Reporting

Under this rule, the employer must report to the relevant DSO when anF-1 student on a STEM OPT extension terminates or otherwise leaves his or her employment before the end of the authorized period of OPT and must do so no later than five business days after the student leaves employment. Employers must report this information to the DSO. The contact information for the DSO is on the student's Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status ("Form I-20 Certificate of Eligibility"), and on the student's Form I-983, Training Plan for STEM OPT Students. DHS will extend OPT only for STEM students employed by employers that agree in the Training Plan to report this information. This requirement is identical to that in the proposed rule, except that in response to public comments, DHS determined to extend the report period from 48 hours to five business days. As noted below, DHS believes that this timeframe is more realistic and more likely to result in consistent efforts to comply.

The rule also enhances the ability to track F-1 students by requiring validation reporting every six months for such students on STEM OPT extensions. This additional requirement is important in fulfilling the goals of the STEM OPT extension and in timely and accurately tracking students, who are often away from their school's campus. Specifically, this rule requires students who are granted STEM OPT extensions to report to their DSOs every six months. As part of such reporting, students must confirm the validity of their SEVIS information, including legal name,

address, employer name and address, and the status of current employment. This provision is largely finalized as proposed, but with some minor edits for clarity. The text has been reorganized to clearly state the types of events that require a validation report and to clearly state that the requirement to submit such reports starts on the date the STEM OPT extension begins and ends when the student's F-1 status expires or the 24-month OPT extension concludes, whichever occurs first.

v. Periodic Student Evaluations

As compared to the proposed rule, and in response to public comments received, the final rule makes a number of changes and clarifications to the student evaluation requirement. First, DHS has changed the frequency of the evaluation requirement. DHS proposed requiring an evaluation every six months, but is reducing the frequency to every 12 months. This change is intended to better reflect employer practices where annual reviews are standard, allowing students and employers to better align the evaluations required under this rule with current evaluation cycles. Second, DHS is providing additional flexibility for employer participation in the evaluation process. Although the NPRM would have required the student's immediate supervisor to sign the evaluation, the final rule allows any appropriate individual in the employer's organization with signatory authority to sign the evaluations that the student will submit to the DSO. Third, DHS clarifies that this evaluation is not meant to replace or duplicate an employer's general performance appraisal process. Instead, the student evaluation is

intended to confirm that the student is making progress toward his or her training objectives. These evaluations will help document the student's progress toward the agreed-upon training goals and thus better ensure that such goals are being met.

vi. Reporting of Material Changes to or Deviations From the Training Plan

This final rule also provides that if there are material modifications to or deviations from the Training Plan during the STEM OPT extension period, the student and employer must sign a modified Training Plan reflecting the material changes, and the student must file this modified Training Plan with the DSO at the earliest available opportunity. Material changes relating to training for the purposes of the STEM OPT extension include, but are not limited to, any change of Employer Identification Number (EIN) resulting from a corporate restructuring;[86] any reduction in compensation from the amount previously submitted on the Training Plan that is not the result of a reduction in hours worked; and any significant decrease in the hours per week that a student will engage in the STEM training opportunity, including a decrease below the 20-hour minimum employment level per week that would violate the requirements of the STEM OPT extension.

This aspect of the final rule represents a clarification of a proposed provision in the NPRM. Commenters on the proposed rule requested additional clarity with respect to what types of changes to or deviations from the training plan would be considered "material" and would therefore require the submission of a

modified plan to the DSO. As discussed in further detail below, DHS is departing from the proposal in response to public comments.

DHS further notes that ICE is working toward technology that would allow students to update their basic information in SEVIS without gaining access to restricted areas of the system where student access would be inappropriate. Once ICE implements this technology, students will have an increased ability to maintain their own records. This would also decrease the workload on DSOs, who would no longer be required to update student information while students are participating in OPT.

2. Public Comments and Responses

i. University Accreditation

Comment. A number of commenters suggested additional restrictions on the types of educational institutions that should be allowed to participate in the STEM OPT extension program. Several commenters asserted, for example, that STEM OPT extensions should be limited only to students from the "top 50-100" universities in the United States. One commenter proposed that "academic programs that have been fined, reached a settlement, or are under investigation by federal or state law enforcement agencies should be barred from accessing OPT visas, as should any institutions that are subject to heightened cash monitoring."

Other commenters recommended further restrictions. Some commenters suggested that accreditation alone was insufficient to ensure the quality of degree programs and that additional quality

standards should be adopted for STEM OPT extensions. Other commenters stated that students should be ineligible for STEM OPT extensions based on STEM degrees earned at for-profit institutions. One commenter stated that for-profit institutions had been abusing the OPT system and should no longer be able to place students in OPT positions. Another commenter asserted that prohibiting for-profit institutions from participating would eliminate the incentive of such institutions to recruit F-1 students under false pretenses. One commenter stated that the Administration is seeking to curb abuses by for-profit institutions in other areas, and that such schools should be precluded from placing students in OPT, or, at a minimum, should be subject to heightened oversight.

Response. DHS declines to adopt the suggested restrictions. DHS, for example, does not believe it fair or appropriate to limit participation to an arbitrary number of accredited institutions and their students. Although DHS has chosen to set limits on participating institutions and degree programs by requiring accreditation, accreditation determinations are made by accrediting entities that are recognized by the Department of Education as having expertise in this area. DHS itself does not have the expertise to look behind the quality of assessments made by such entities, nor does it have the expertise necessary to further compare degree programs among accredited institutions. Notably, the commenters that recommended limiting the extension to students at "top" universities did not specify how DHS would determine which institutions would be in the "top" 50 or 100. Nor did the commenters explain how to address smaller institutions that

may provide excellent STEM instruction but are not large enough to make more generalized lists of "top" schools. DHS believes it would be inappropriate to adopt such an ambiguous and subjective standard for distinguishing between educational institutions and their students in this rulemaking.

DHS also does not agree that a settlement or an open federal or state law enforcement investigation, without more, should bar an institution and its students from participating in the STEM OPT extension program. A settlement or investigation is not, itself, a finding of wrongdoing, and a settlement, investigation, or fine may be totally unrelated to matters impacting the STEM practical training opportunity. Barring participation based on nothing more than the existence of an investigation would be fair neither to the relevant institution nor its students.

DHS further declines to limit participation only to public and not-for-profit institutions, as there are accredited for-profit institutions that operate in a lawful manner and offer a quality education. As noted above, DHS has chosen to rely on the determinations of accrediting entities with respect to the quality of participating institutions and their degree programs. Schools meeting the accreditation requirement are subjected to significant oversight, including periodic review of the institution's programs to determine whether it is meeting the established standards in the profession and achieving its stated educational objectives. These checks, in addition to the protections built into the rule, represent a comprehensive mechanism for detecting and avoiding fraud. In addition, DHS is unaware of any special risk of fraud presented by

accredited for-profit institutions, and the commenter did not identify any data showing that such institutions commit fraud at a higher rate than other institutions. Requiring F-1 students to attend public or not-for-profit institutions is an unnecessary limitation that would reduce the program's adaptability and potential.

Comment. Some commenters stated that the definition of "accreditation" is too vague and may be abused by employers, schools, and students.

Response. DHS disagrees with these comments. As noted above, to be eligible for a STEM OPT extension, a student's degree must be received from an educational institution accredited by an accrediting agency recognized by the U.S. Department of Education. An accrediting agency is a private educational association of regional or national scope that develops evaluation criteria and conducts peer evaluations of educational institutions and academic programs. *See* U.S. Department of Education Office of Postsecondary Education, "The Database of Accredited Postsecondary Schools and Programs," available at http://ope.ed.gov/accreditation/. Because there is an objective list of accrediting entities recognized by the Department of Education that is publicly available, it is straightforward to confirm whether a school is appropriately accredited under the rule. For that reason, DHS disagrees that the term "accreditation" is vague.

Comment. DHS also received a number of comments regarding the use of STEM degrees earned abroad. Some commenters, for example, requested that the rule allow students to use STEM degrees previously obtained from foreign institutions as a basis for STEM

OPT extensions. One commenter disagreed with a statement in the proposed rule discussing the difficulty of determining the equivalency of foreign degrees, and stated that such equivalency is sometimes determined for other immigration programs. That commenter referenced the Council for Higher Education Accreditation as a resource that lists international accrediting agencies. Other commenters requested that, as an alternative to allowing foreign degrees, DHS should allow students to obtain STEM OPT extensions based on previously obtained degrees earned at the accredited overseas campuses of U.S. institutions. To that end, a commenter recommended that DHS clarify the term "accredited U.S. educational institution" to include accredited U.S. institutions located abroad as well as programs offered by accredited U.S. institutions at international branch campuses or other overseas locations, so long as the location or program located outside the United States falls under the school's institutional accreditation. This commenter also suggested that DHS consistently use the term "accredited U.S. educational institution" throughout the rule to reduce ambiguity.

Response. DHS does not believe it is appropriate to allow the use of degrees earned abroad as a basis for obtaining STEM OPT extensions. First, such extensions are part of the F-1 student visa program, and providing such extensions based on degrees previously earned abroad would be inconsistent with the Department's duty to administer the F-1 program. Second, although DHS allows individuals to establish the equivalency of foreign degrees for other immigration programs, the need to assess such degrees presents

particularly difficult complications in the OPT program. Among other things, assessing foreign degrees and making equivalency determinations are often difficult and time-consuming tasks. Finally, DHS believes that limiting qualifying degrees to those from accredited and SEVP-certified U.S. institutions will help preserve the integrity of the STEM OPT extension program, because the U.S. accreditation process helps to ensure the quality of educational institutions and programs.

Accordingly, this rule only permits a STEM OPT extension where the degree that is the basis of the extension is conferred by a domestic campus of a U.S. educational institution accredited by an entity recognized by the Department of Education and certified by SEVP at the time of application. Because SEVP certifies educational institutions at the campus level, the overseas campuses of U.S. educational institutions are not eligible for SEVP certification. A degree granted by an overseas campus of a U.S. educational institution will not qualify an F-1 student for a STEM OPT extension. This clarification is consistent with the basis for this rulemaking, which includes maintaining attractive conditions for international students to choose to study in the United States.

ii. Site Visits

Comment. Some commenters inquired about the employer site-visit provision in the proposed rule, and specifically asked for clarification about the component within DHS that would conduct such site visits. In addition, a labor union opined that the Department of Labor would be the more appropriate agency to

conduct site visits to ensure employer compliance with program requirements because "protection of labor standards is the central role of the [Department of Labor] and the agency must have an oversight role in a program with the size and scope of the OPT visa and its STEM extension."

Response. DHS anticipates that ICE, a component of DHS, will be the agency responsible for conducting site visits related to the STEM OPT extension program, though DHS may consult with DOL as appropriate based upon their expertise. These visits will be conducted by the appropriate component to ensure compliance with the requirements of this rule. DHS does not intend to use these visits for other enforcement purposes; however, if evidence of a violation of other requirements is discovered during a site visit, such potential violation will be addressed appropriately.

DHS's authority to administer and enforce the immigration laws, track and monitor students, and, relatedly, to conduct site visits, has strong statutory support. For example, federal law requires DHS to establish an electronic means to monitor and verify, among other things, the admission of international students into the United States, their enrollment and registration at approved institutions, and any other relevant acts by international students. *See* 8 U.S.C. 1372 and 1762.

Relatedly, these statutes also obligate DHS to collect information concerning whether each nonimmigrant student is maintaining his or her status, any change in an international student's program participation as the result of being convicted of a crime, each

international student's degree program and field of study, and the date of each nonimmigrant student's termination of enrollment in a program (including graduation, disciplinary action or other dismissal, and failure to re-enroll), among other things. *Id.* Significantly, the Enhanced Border Security and Visa Entry Reform Act of 2002, which clarified and augmented the requirements for international student data collection, also requires DHS to ensure that information concerning such students is timely reported and that all records are being kept in accordance with federal law. *See* 8 U.S.C. 1762.

Additionally, Homeland Security Presidential Directive No. 2 (HSPD-2) (2001), which directed legacy INS to implement measures to end the abuse of student visas, requires DHS to track the status of international students (to include the proposed major course of study, the individual's status as a full-time student, the classes in which the student enrolls, and the student's source of financial support) and to develop guidelines that may include control mechanisms, such as limited-duration student immigration status. HSPD-2 also provides that DHS may implement strict criteria for renewing student immigration status. The rule's provisions regarding employer site visits are consistent with the foregoing authorities, which require DHS to monitor students pursuing STEM OPT training programs. The site visits reduce the potential for abuse and ensure that STEM OPT students receive structured and guided work-based learning experiences.

Finally, DHS agrees that the Department of Labor (among other Federal, state, and local agencies) has

significant expertise in worksite investigations, and may consult with the Department of Labor and other agencies as appropriate. Also, where appropriate, DHS will refer matters to the Department of Labor and other agencies should a site visit suggest that such a referral is warranted.

Comment. Some commenters requested additional information about the procedures and scope of employer site visits under the proposed rule. For example, one commenter stated that "the Proposed Rule does not clearly define the scope of a STEM OPT site visit, nor what information DHS could appropriately elicit during a site visit." Other commenters stated that the scope of any site visits should be limited to ensuring that the F-1 student remains employed at the STEM OPT employer sponsor identified in SEVIS, that the student is being compensated consistent with the information listed in SEVIS, and that the employer can confirm that the STEM degree is related to the practical training opportunity. They stated that site visits should not become a *de facto* "gateway" to other DHS audits, such as I-9 audits. They also stated that to the extent the scope of the site visit permits DHS to inquire into whether the duties and compensation of STEM OPT students are commensurate with that of U.S. workers, enforcement officers should be provided with very specific guidance to assure that STEM OPT investigations are not used as an additional mechanism to conduct I-9 audits. Another commenter specifically called for site visits to include documentation vetting and employee interviews for the purpose of ensuring that no U.S. workers are negatively impacted by a STEM OPT extension.

Response. As indicated above, the purpose of the employer site visit is for DHS to ensure that information in SEVIS concerning the STEM OPT extension is accurate (*i.e.,* that students and employers are engaged in work-based learning experiences that are consistent with the student's Form I-983, Training Plan for STEM OPT Students). As part of a site visit, DHS may confirm that the employer has sufficient resources and supervisory personnel to effectively maintain the program. In addition, DHS may ask employers to provide the evidence they used to assess wages of similarly situated U.S. workers. DHS will train the officials who conduct these visits so they understand what information DHS expects from employers. Site visits will be limited to checking information related to student STEM OPT employment, including the attestations made by the employer on the approved Training Plan. Additionally, site visits based upon complaints or evidence of noncompliance may be tailored to the concerns asserted. Site visits will not be used for other enforcement purposes unless evidence of a violation is discovered during such visits.

Comment. Some commenters stated that DHS should provide advance notice for all site visits. Some stated that consistent with similar government audits, three business days of advance notice should be provided to the student and employer prior to site visits, while another commenter suggested that companies be provided with 72 hours' notice prior to the site visit in the absence of a complaint. One commenter stated that DHS should do unannounced site visits only when it has a reason to believe a violation has occurred based on specific, credible information from

a known source that likely has knowledge of the employer's practices, employment conditions, or regulatory compliance.

Response. DHS understands the commenters' concerns and has made changes in the final rule that balance concerns about employer burden against the need to ensure compliance with the rule. Under this final rule, DHS will provide 48 hours' advance notice for any site visit unless the visit is triggered by a complaint or other evidence of noncompliance with these regulations, in which case DHS may conduct a site visit without notice.

Comment. One commenter stated that STEM OPT site visits should be conducted only by experienced and well-trained ICE officers, rather than by contractors. According to the commenter, DHS has previously recognized that the use of contractors to perform site visits on behalf of USCIS' Fraud Detection and National Security Directorate was inefficient and often problematic and thus eliminated their use in that context. Other commenters questioned the expertise of ICE officers to make judgments about employer training programs. One of these commenters stated that the proposed Mentoring and Training Plan requirement was so vague and devoid of standards that no meaningful review was possible, and no training plan would be deemed insufficient.

Response. ICE currently intends to use federal employees for site visits under this rule. There may be times when contractors accompany federal employees, but ICE currently intends that federal employees will be in charge of such visits. DHS disagrees with the commenter's assessment that the Training Plan

requirements are overly vague and unenforceable. The program requires employers to provide detailed information regarding the nature of the training to be provided and the measures to be used to ensure that the goals of such training are met. Form I-983, Training Plan for STEM OPT Students, which will be used to keep track of this information, requires employers to provide the information necessary to verify compliance.

Comment. Several commenters requested that DHS further specify requirements and procedures related to site visits. Such commenters expressed concern with the fact that the regulation does not specify: The manner in which a site visit would be conducted; the manner in which information gained in the course of a site visit would be stored, shared, or relied upon by the government; the manner in which a company or individual could correct or update information gained through a site visit; or the manner in which confidential business and personal information will be protected during a site visit.

Response. DHS clarifies that site visits will be conducted in a manner that balances the burden to the employer with the need to ensure compliance with the program. This means that while ICE will physically inspect some sites, it also may request information concerning compliance through email or by phone. The information obtained during a site visit will be stored and maintained by ICE. DHS will notify an employer 48 hours before conducting a site visit unless DHS has received a complaint about the employer or has other evidence of non-compliance, in which case DHS reserves the right to conduct a site visit without notice.

If as a result of a site visit ICE determines that an employer or student needs to submit updated or corrected information, ICE will generally request the information in writing, with specific instructions on how the employer or student must submit the information. Federal law imposes protections on information obtained by DHS in connection with site visits, and the Department will comply with those requirements. Applicable federal laws include, but are not limited to, the Privacy Act, the Freedom of Information Act, and the Federal Information Security Management Act.

Comment. Some commenters stated that ICE, prior to initiating a site visit, should attempt to verify program compliance requirements by communicating with the student and employer via telephone and email, as these means of communication are "less intrusive" than site visits. The commenters suggested that if the information could be verified through these other means, there would then be no need to conduct a time-consuming site visit.

Response. DHS expects that it will use all available mechanisms to ensure compliance with STEM OPT extensions, including contacting employers, students, or DSOs by phone or email to verify or obtain information. The Department, however, reserves the right to conduct site visits of employers or schools to ensure full compliance with program requirements. The Department believes that the possibility that such site visits may be conducted to ensure compliance, including on an unannounced basis, will further incentivize compliance with the requirements of this rule.

iii. Unemployment Limits

Comment. Commenters asked DHS to reconsider and adjust the amount of time a student may be unemployed over the course of their STEM OPT extension. Others asked that DHS not allow for any unemployment while a student is on a STEM OPT extension. One commenter suggested that an unemployment period is inconsistent with student status and with the training program component of OPT. The commenter stated that unemployment would be an unsupervised period inconsistent with DHS' security duties and would run contrary to protections in place for U.S. workers.

By contrast, another commenter recommended that DHS allow unlimited unemployment during the STEM OPT extension period. The commenter stated that limiting the unemployment period will have the effect of tying students more closely to one employer and limiting their ability to change jobs. The commenter was concerned this would increase the opportunity for student exploitation. A different commenter suggested that DHS allow STEM OPT students to leave their initial employer during the 24-month extension, so as to allow students greater mobility and avoid potential exploitation. One commenter stated that the lack of mobility and other protections for individuals participating in OPT could lead those students who are worried about going out of status to "collude" with exploitative employers to cover up violations of the safeguards for U.S. workers.

Response. DHS respectfully disagrees with commenters' suggestions that the amount of time a student may be unemployed under this rule is too long, or

that the allowance for a short period of unemployment should be eliminated altogether. DHS continues to believe that authorizing a limited period for possible unemployment during a student's STEM OPT extension is both fair and reasonable, and consistent with the stated aims and objectives of the STEM OPT extension. Moreover, the reporting requirement, with which a student must comply during any period of unemployment, effectively addresses security-related concerns by ensuring that DHS remains apprised of the student's location and status.

DHS also believes that limiting unemployment during the STEM OPT extension period is necessary to support the program's purpose and integrity. The rationale for the program is to extend status to facilitate practical training. Allowing an unlimited period of unemployment would thus undermine the purpose for the extension and increase the opportunity for fraud and abuse. Moreover, the limited period of unemployment does not preclude a student who is unhappy with his or her current employer (for whatever reason) from effectively searching for a new practical training opportunity. Under this rule, the student may seek such a new opportunity either while still employed with his or her current employer or in the period of unemployment provided by this rule. Nothing in the rule prevents students from switching employers or from being unemployed for a temporary period, as long as they complete and submit a new training plan and comply with all reporting requirements.

Finally, students who believe they are being exploited or abused by their employers in any manner have several mechanisms to address their concerns,

including reporting the conduct to their DSO or the SEVP Response Center, or seeking legal redress in appropriate cases. DHS also provides information about studying in the United States on the DHS Study in the States Web site, which links to State Department information for nonimmigrants, including a "Rights, Protections and Resources" pamphlet.[87] DHS encourages all students to seek appropriate redress and emphasizes that such action will not impact their F-1 status.

Comment. Some commenters stated that students should not be penalized for becoming unemployed for an extended period of time because their employers failed to provide appropriate training.

Response. The rule provides for a limited period of authorized unemployment precisely because DHS is aware that there may be situations where students may have their employment terminated for reasons that are beyond their control. The rule's limited period of authorized unemployment is intended to provide students who find themselves in such a situation with sufficient time to seek and obtain alternative practical training opportunities directly related to their STEM fields of study.

Comment. A DSO and a university requested clarification as to whether the proposed rule's authorized 90- and 150-day periods of unemployment are available at each educational level. They sought clarification, for instance, with respect to a student who had previously used his or her authorized periods of unemployment while engaged in post-completion OPT and a STEM OPT extension after completing an undergraduate degree. The commenters asked whether such a student

would be eligible for the proposed rule's authorized periods of unemployment if the student subsequently engaged in post-completion OPT and a STEM OPT extension after completing a graduate degree.

Response. Similar to the provisions in the 2008 IFR, a separate 90- or 150-day unemployment limit will apply to each post-completion OPT period. A post-completion OPT period for these purposes means an initial period of up to 12 months of OPT, as well as the related 24-month STEM OPT extension. If a student completes one period of OPT (including a STEM OPT extension), and then pursues a second period of OPT on the basis of having earned a second degree at a higher educational level, the student will be able to benefit from the rule's authorized 90- and 150-day periods of unemployment (as appropriate) at both educational levels. DHS has revised the regulatory text to make this clear.

iv. Employment Status and Validation Reporting

Comment. Some commenters requested that DHS eliminate the requirement for the employer to timely report the termination of a STEM OPT student or, alternatively, extend the proposed 48-hour notification requirement. Commenters suggested timeframes of 10 days or 21 days to better correspond with other reporting requirements in the rule. Other commenters suggested alternative reporting periods of three business days or five business days. With respect to the 48-hour notification requirement, one commenter stated that "it can be administratively difficult to comply within such a short timeframe given the amount of

administrative work that accompanies a termination." In addition, a commenter stated that having both the employer and the STEM OPT student report loss of employment is duplicative.

Response. After reviewing these comments, DHS has agreed to extend the period for complying with the reporting requirement from 48 hours to 5 business days. DHS believes such a timeframe is more realistic and more likely to result in consistent compliance, while at the same time ensuring that DHS obtains timely information with respect to international students. DHS has been directed by Congress to monitor and track students, and obtaining current information is important to ensure that DHS continues to meet its responsibilities.

DHS recognizes that the rule requires reporting from both employers and students. While such dual reporting requirements may seem duplicative, DHS believes they are critical to ensuring compliance with program requirements. Employer reporting, for example, would be prudent in a situation involving a student who fails to report his or her termination so as to remain in the United States in violation of his or her status. Employers are also likely to have additional resources in comparison to individual employees, especially those who recently became unemployed. Moreover, DHS believes the burden imposed by the reporting requirements is minimal. Employers and students can satisfy these requirements with a simple email to the DSO indicating that the student was terminated or has otherwise departed, as well as the applicable date of such termination or departure.

Comment. Several educational institutions expressed opposition to the requirement that DSOs be informed whenever a student on a STEM OPT extension leaves the employment before the end of the extension period. These commenters expressed concern about the DSOs' role in such situations, especially because many students on STEM OPT extensions have left campus and are often removed from their university ties. A few universities stated that DHS should require employers to report this information directly to DHS, instead of to the DSO. One commenter argued that the reporting requirement would be an additional administrative burden on DSOs, who would now be responsible for data that that they do not "own." Another commenter expressed concern that the DSO could be held responsible for not having this information if the employer fails to report it to them in a timely manner, or that the student could also be held responsible.

Response. While DHS understands the commenters' logistical concerns regarding students potentially not located on or near the DSO's campus, the compliance measure discussed in this section is not novel. Rather, it has been in place since implementation of the 2008 IFR. Moreover, DHS has sought to balance the burden that this requirement places on DSOs with the need for adequate oversight of the STEM OPT extension. Because DSOs, unlike STEM OPT students or employers, have access to SEVIS, DHS continues to believe the program is best served by requiring employers and students to report these changes to DSOs so that such information can be uploaded into SEVIS on a timely basis.

Additionally, with the changes in this final rule, an employer is now required to report the termination or departure of a STEM OPT student within five business days of the termination or departure, if the termination or departure is prior to the end of the authorized period of OPT. DHS believes this requirement, placed upon the entity with the closest connection to the student at the time of the termination or departure, is an effective mechanism for tracking students. The provision reflects DHS' belief that the responsibility to report should initially rest with the student or employer, as appropriate, and that DSOs should continue serving in the same role they had before—helping DHS track students and providing timely access to reported information. This system also reflects DHS' view that if an educational institution wishes to gain the benefits of F-1 students' enrollment with their school, including through the attraction of such students based upon the potential to participate in an extended period of practical training via the STEM OPT extension, the institution will be willing to undertake the associated reporting requirements as well. Finally, DHS is currently working on ways to allow other program participants to input information directly into SEVIS. Until that occurs, however, DHS believes the current reporting protocol should remain in place.

Comment. Many DSOs submitted comments stating that students should be responsible for updating their information directly into SEVIS and that SEVIS should send automatic reminders to students about upcoming deadlines, such as deadlines for reporting termination of OPT.

Response. As noted above, DHS recognizes that requiring DSOs to provide STEM OPT student information may, at times, be burdensome. To aid in reducing this burden, DHS is developing a portal in SEVIS which, once fully deployed, will allow STEM OPT students to directly input information into SEVIS for DSO review. DHS plans to have the first stages of this portal, designed specifically to allow OPT students to submit information on their own behalf, operational by the beginning of 2017.

Comment. One employer stated that the requirement to notify DSOs in cases of termination or departure should be triggered only when STEM OPT students have actually abandoned their jobs, rather than for all absences of five consecutive days. The commenter noted that there may be legitimate reasons why an employee may be absent from work for a five-day period without the consent of the employer. The commenter suggested that employers should be allowed to follow their normal HR guidelines when determining whether the employment has been "abandoned" before reporting an employee's absence to the DSO, which may be either shorter or longer than the NPRM's five-day requirement.

Response. As noted above, STEM OPT is a cooperative undertaking between the student and employer, and both voluntarily commit to participating in the program. DHS therefore maintains that it is the employer's responsibility to notify the student's DSO if, for whatever reason, the student ceases to participate. While DHS understands that there may be instances where an employee may be absent from work for five consecutive days without the consent of the employer

(such as a medical emergency requiring prolonged hospitalization where the employee is unable to notify the employer), any absence where the employee is unable to notify the employer and obtain consent remains material to the student's participation in the STEM OPT extension. DHS therefore is maintaining the requirement that an employer must notify the STEM OPT student's DSO if the student has been absent from work for five consecutive business days without the consent of the employer.

v. Periodic Student Evaluations

Comment. Some commenters requested clarification concerning the student and employer's respective roles in completing the student evaluation. For instance, some commenters noted that the proposed form referred to self-assessment by the student, but was entitled "Six-Month Evaluation/Feedback on Student Progress." Similarly, a commenter stated that the evaluation should involve input from both the student and a supervisor, and the form should be structured in a way that allows for a supervisor's comments. One commenter requested that the evaluation consist solely of self-evaluations by the student, noting the burdens on employers of evaluations every six months.

A commenter expressed concern about being required to use the proposed Mentoring and Training Plan to evaluate STEM OPT students, explaining that the proposed rule's requirements "will not add value and will merely add redundant bureaucratic requirements for employers, who are already following their own internal processes for these employees." The

commenter stated that its company already "provides an annual review of individual employee performance and compensation" and that its review process "is the culmination of year round performance management activities in which employees receive a formal review of their performance, development goals for the upcoming year, and a compensation review." One commenter stated that the proposed process for completing the evaluation (which entails the student preparing it, the employer signing off on it, and the DSO retaining a copy) is redundant to the Training Plan.

Response. DHS appreciates the commenters' concerns and clarifies that student evaluations are a shared responsibility of both the student and the employer to ensure that the student's practical training goals are being satisfactorily met. The student is responsible for conducting a self-evaluation based on his or her own progress. The employer must review and sign the self-evaluation to attest to its accuracy. By requiring employers to review the self-evaluations, DHS better ensures that employers and students will continue working together to help the student achieve his or her training goals. DHS believes that this requirement is integral to the success of the STEM OPT extension.

DHS has changed the title of the evaluation section to "Evaluation on Student Progress." DHS has not modified the evaluation to include a separate space for an employer to provide comments, because many employers expressed concern about the burden involved in reviewing the Training Plan, and DHS determined that an additional requirement was unnecessary. However, nothing in the rule prevents an employer

from attaching and submitting such an appraisal of a STEM OPT student.

DHS disagrees that the student evaluation provision duplicates or displaces existing employer processes for evaluating employee performance. The evaluation does not require employers to evaluate how well a STEM OPT student is performing his or her core duties at a job. Instead, the evaluation section of the form is a mechanism for the student to document his or her progress towards meeting specific training goals, as those goals are described in the Training Plan. DHS also disagrees that the student evaluation provision duplicates or is redundant to the Training Plan. In contrast to the Training Plan, which helps the student set his or her training objectives and ensures that the student's training conforms to the requirements of this rule, the 12-month evaluation confirms that the student is making progress toward his or her training objectives.

Comment. DHS received a number of comments from employers about the frequency of the proposed six-month student evaluation requirement. Some commenters stated that requiring students and employers to participate in such an evaluation every six months would be "overly burdensome" and would represent an "unprecedented level of additional reporting without commensurate improvement in compliance outcomes." Some commenters indicated that they perform employee reviews every six months; however, given the timing of student graduations and STEM OPT start dates, the time of the year when these reviews occur might not coincide precisely with the schedule that is being mandated by DHS. Some commenters stated

that DHS should require only annual evaluations to reduce an employer's time and paperwork burdens. Another commenter asked for 180 days to allow companies to adjust their processes if DHS insists on requiring evaluations every six months.

Response. DHS acknowledges the concerns expressed by some employers about the ability to implement the evaluation requirement every six months as proposed in the NPRM. While any burden associated with the evaluation is expected to rest in part on the student (who is responsible for drafting the self-assessment portion of his or her evaluation and ultimately submitting the evaluation to the DSO), DHS recognizes that the employer plays an important role in the student's evaluation by providing feedback to the student and confirming the accuracy of the evaluation. Because of the concerns raised by commenters, DHS has decided to eliminate the six-month requirement and instead require annual evaluations: One evaluation after the first 12 months and a final evaluation when the student completes his or her practical training. DHS believes that annual reporting is a reasonable requirement when balanced against DHS's obligation to oversee the program and monitor students.

As finalized in this rule, a student on a 24-month STEM OPT extension must submit his or her first evaluation to the DSO within one year and 10 days of the first day of the validity period reflected on the Employment Authorization Document (EAD). Similarly, the STEM OPT student will be required to submit the final evaluation within 10 days of the conclusion of his or her practical training opportunity. DHS generally

expects employers and students to be able to complete all reporting in a timely manner.

Comment. Commenters requested that DHS clarify when STEM OPT students must submit their periodic evaluations to their DSOs. Commenters stated that the proposed rule did not describe the reporting timeframe clearly. A commenter stated that it would be too burdensome to require students to submit each six-month evaluation within 10 business days of the conclusion of the evaluation period. The commenter suggested that DHS allow students to submit the evaluation either 15 or 30 days on either side of the reporting date. Similarly, a number of DSOs asked whether there would be SEVIS functionality for students who do not present Training Plans and whether there would be penalties for students who submit them late, and if so, what these penalties are. One commenter requested that, if the DSO is required to collect students' training plans for the six-month "reporting obligations," DHS provide lead time of at least 30 days between the "alert" and the deadline for submission.

Response. DHS clarifies that under the proposed rule, STEM OPT students would have been required to submit each six-month evaluation prior to the conclusion of each six-month period. As noted above, DHS has changed the evaluation period from six months to 12 months. This change should make the requirements on students and DSOs less burdensome. DHS also agrees with the commenters that suggested additional flexibility and clarity for the submission of student evaluations. Accordingly, this final rule also revises the proposal by providing that a student must submit the 12-month and final evaluations no later

than 10 days following the conclusion of the applicable reporting period.

In response to the questions from DSOs, DHS notes that the deadlines for submitting the required training plan and evaluations are firm. In order to maintain F-1 status, the STEM OPT student must submit the required materials to the DSO on a timely basis. As noted above, updates to SEVIS are being developed to make it easier for students to meet these submission requirements. DHS does note, however, that for the annual evaluation requirement, a full Training Plan form need not be submitted. Rather, the student would need to timely provide the evaluation section of the form to the DSO. DHS believes the associated timeline provides sufficient flexibility for all parties to comply with these requirements.

vi. Reporting of Material Changes to or Deviations From the Training Plan

Comment. Some commenters submitted comments related to the attestation included in the proposed Mentoring and Training Plan that would have required the student and employer to notify the DSO at the earliest available opportunity regarding any material changes to, or material deviations from, the training plan ("material changes"). The proposed plan indicated that such a material change would include a change in supervisor. A commenter objected to this requirement and posited that requiring the reporting of material changes would not advance the policies underlying the training plan requirement. Some commenters requested that DHS clarify the meaning of the term "material" in this context. Commenters stated that such

clarification was necessary to minimize instances of over-reporting of immaterial changes to the Training Plan. One commenter stated that a mere change of supervisor should explicitly be considered an immaterial change to the STEM OPT opportunity.

Finally, a commenter recommended placing the responsibility for reporting material changes with the F-1 student, not the employer. The commenter reasoned that shifting this particular reporting obligation to students is consistent with students' other reporting obligations under the proposed rule, including "reporting changes of employer."

Response. DHS believes that the Training Plan requirement would be seriously undermined if DHS allowed students and employers to make material changes or deviations without creating a record of such changes and reporting those changes to the DSO. The reporting requirement keeps students and employers accountable to the original Training Plan, and ensures that the DSO and DHS have access to accurate information about STEM OPT students. DHS therefore declines the suggestion to eliminate the requirement to report material changes.

DHS agrees, however, that further clarification is warranted. Accordingly, DHS has revised the final regulatory text to make clear that the STEM OPT student and employer are jointly required to report material changes. The regulatory text also clarifies that material changes may include, but are not limited to, any change of Employer Identification Number resulting from a corporate restructuring; any reduction in compensation from the amount previously submitted on the Training Plan that is not a result of a reduction

in hours worked; any significant decrease in hours per week that a student engages in the STEM training opportunity; and any decrease in hours below the 20-hours-per-week minimum required under this rule. If these or other material changes occur, the student and employer must sign a modified Training Plan reflecting the material changes or deviations, and they must ensure that the plan is submitted to the student's DSO at the earliest available opportunity.

DHS agrees with the comment stating that a change of supervisor does not, by itself, meet the level of a material change or deviation that would require submitting a modified Training Plan. Similarly, it is not necessarily a material change if a STEM OPT student rotates among different projects, positions, or departments, or there is a change in the F-1 student's assigned division or research focus. Such changes are not material unless they render inaccurate the information in the F-1 student's original Training Plan related to the nature, purpose, oversight, or assessment of the student's practical training opportunity.

In response to commenters' concerns, DHS has revised the regulatory text to make this clear. Under this final rule, a material change is a change that DHS has specifically identified as "material" by regulation, renders an employer attestation inaccurate, or renders inaccurate the information in the Training Plan on the nature, purpose, oversight, or assessment of the student's practical training opportunity. Thus, for example, a change in supervisor that results in such inaccuracy would be a material change, but a change in supervisor standing alone is not material.

Because DHS expects that not all changes in supervisor would be material, DHS has revised the Training Plan form to replace the reference to a student's supervisor with a reference to the "Official Representing the Employer." Along with the changes discussed above, this change aims to produce flexibility for employers in completing the requisite sections of the form and further clarifies that the Training Plan would not require updating solely because the student is assigned new project supervision.

Finally, DHS declines to adopt the recommendation to make the student solely responsible for reporting material changes, as the employer should be accountable for the Training Plan that it helped prepare. This joint employer-student requirement strengthens DHS's ability to track F-1 nonimmigrants and is essential to monitoring employer compliance, maintaining strong U.S. worker safeguards, and ensuring continuing employer-accountability.

Comment. A university stated that material changes or deviations to the original Training Plan will be self-reported events and that the DSO will have no other way of knowing if or when they occur. The commenter suggested that if the Department simply seeks to have this information on file, and there is no role for the DSO other than to collect the information, then such information should be submitted directly to DHS by the employer or student. The commenter further stated that the proposed rule was silent regarding DSO responsibilities over modified Training Plans, and that there appear to be no "teeth" for addressing a student's failure to report these changes.

Response. DHS understands that DSOs have a limited role with respect to receiving and storing material changes to, or deviations from, submitted Training Plans. DHS is developing a portal in SEVIS to allow students to provide their own information, including confirmation of modified Training Plans. At this time, however, the DSO's role in this regard remains essential to the effective administration of the STEM OPT extension. Consequently, the DSO at the student's school of most recent enrollment remains responsible for providing SEVP with access to the relevant information described in this section. This rule also makes clear that it is the student's responsibility to provide changes in information to his or her DSO, and that a failure to do so would constitute a violation of the student's F-1 status.

Comment. One commenter recommended that DHS require that changes in compensation be reported only when a student's salary has been lowered. The commenter stated that if this change were adopted, it would eliminate a significant burden on students and DSOs by eliminating the need to report when a student receives an annual cost-of-living increase as part of the employer's overall compensation program. The commenter stated that this would also avoid confusion over whether to report every time the student receives a raise or stock options, or when other forms of non-cash compensation are added to the student's compensation package.

Response. DHS understands the commenter's concern that the proposed rule lacked clarity on when compensation changes were required to be submitted through the Training Plan for STEM OPT Students.

To avoid any confusion, the final rule clearly states that employers are responsible for reporting only material changes to the Training Plan, which will include changes to the compensation reporting field of the form, and are required to do so at the earliest available opportunity. However, a compensation change qualifies as material only when it is a reduction in compensation from the amount previously submitted on the Training Plan that is not the result of a reduction in hours worked. An increase in compensation, on its own, does not constitute a material change that must be reported. But such an increase may constitute a material change in the totality of the circumstances, such as when the increase is not commensurate with an increase in compensation afforded to the employer's similarly situated U.S. workers.

vii. General Comments on DHS Enforcement, Monitoring, and Oversight

Comment. DHS received a number of comments related to the Department's ability to track F-1 students on STEM OPT extensions. One commenter, for example, cited a February 2014 report from the Government Accountability Office (GAO) that highlighted difficulties experienced by the Department in tracking F-1 students engaging in practical training.[88] The commenter expressed concern over the ability of nonimmigrants to overstay their authorized periods of stay, and suggested that making schools responsible for former students would be unrealistic and would create a national security issue. Another commenter asked how DHS would keep track of all students participating in STEM OPT. Some commenters suggested that

DHS adopt and publish a public list of program violators, identifying those companies and universities found to be abusing the STEM OPT extension or otherwise failing to comply with program requirements. One commenter requested information regarding actions DHS has taken to address problems identified by the February 2014 GAO report on the OPT program.

Response. DHS believes it has made important improvements to the oversight of the STEM OPT extension with this rule. In addition to maintaining the validation reporting requirement, this rule establishes an interlocking set of requirements that facilitate DHS enforcement (site visits), permit DHS to better monitor students on STEM OPT (evaluations, notification of material changes, and required notice if a student leaves an employer or fails to show up for five consecutive business days without the employer's consent), and protect the integrity of the program (accreditation requirements and unemployment limits). These requirements are intended to help DHS track F-1 nonimmigrants and better ensure their departure. See, e.g., 8 U.S.C. 1103, 1184, 1372. All of these are discussed in detail above.

DHS believes that the enforcement, monitoring, and oversight provisions of this rule provide the necessary tracking resources and mechanisms to appropriately monitor compliance and to enforce the law against violators. For these reasons, the Department declines to adopt the suggestion to publish a list of program violators.

With regard to the 2014 GAO Report, DHS first notes that the report and its conclusions concerned individuals beyond the limited population of STEM OPT

students, who represent a small subset of the total F-1 population engaging in authorized employment in the United States.[89] The report is thus much broader in scope than are the regulatory changes DHS has considered with this rulemaking. Nonetheless, DHS believes it has adequately addressed many aspects of the GAO report impacting STEM OPT extensions. DHS has taken measures or is finalizing action regarding seven recommendations included in the report. For example, DHS has completed or is in the process of finalizing the following:

- Identifying and addressing risks in the OPT program through interagency coordination, including using relevant information from ICE's Counterterrorism and Criminal Exploitation Unit and field offices;

- Requiring that F-1 OPT students, both still in school and who have completed their education, provide DSOs with employer information, including their employer's name and address, so that DSOs can record that information in SEVIS;

- Developing and distributing guidance to DSOs for determining whether a practical training opportunity relates to a student's area of study, and requiring that DSOs provide information in SEVIS to help ensure that the regulatory requirement is met;

- Requiring that students report to DSOs, and that DSOs record in SEVIS, students' initial date of employment and any period of unemployment;

- Developing and implementing a process for SEVP to inform USCIS when students approved for OPT have transferred schools;

- Developing guidance to DSOs and USCIS regarding the definition of a full academic year for the purposes of recommending and authorizing OPT; and

- Developing and implementing a mechanism to monitor available information in SEVIS to determine if international students are accruing more OPT than allowed by DHS regulation.

Although DHS is always interested in ways to improve the security and efficacy of its programs, the Department believes that the above-referenced enforcement measures, as well as those described in this final rule, are thorough and sufficient to address the concerns discussed in the GAO report that relate to STEM OPT extensions.

Comment. Commenters expressed concern that many F-1 students on STEM OPT extensions work in fields unrelated to their areas of study and falsify work experience. Some commenters stated that many employers fabricate work documents in an attempt to show that a work experience relates to a student's field of study. Some commenters requested that DHS take additional steps to ensure that F-1 students do not work in unrelated fields, such as in restaurants, motels, gas stations or similar places of employment.

Other commenters expressed concerns about consulting firms that may seek to exploit F-1 students by underpaying them during their STEM OPT extension.

One commenter asked DHS to implement background checks for all STEM OPT students before they accept employment opportunities. Similarly, another commenter suggested that DHS include annual in-person reissuance of identification cards with photos and fingerprints among measures required for "all OPT students."

Response. As noted above, this rule includes multiple requirements to ensure strong program oversight. DHS closely monitors the STEM OPT extension program, including F-1 students and schools certified to enroll such students. DHS takes claims of fraud and abuse very seriously and encourages all individuals to contact DHS if they have information regarding any individual or employer that he or she believes is engaging in fraud or abuse. Individuals possessing such information are encouraged to submit it online at https://www.ice.gov/webform/hsi-tip-form. Moreover, the rule requires employers to sign the Training Plan and comply with all reporting requirements, while providing for site visits to independently verify compliance. These additional requirements will mitigate the potential for fraud and abuse of the F-1 visa program and STEM OPT extension.

Regarding the request for DHS to implement background checks on STEM OPT students, DHS confirms that this process is already in place. USCIS conducts background checks on all STEM OPT students before rendering a final decision on their Form I-765, Application for Employment Authorization. DHS does not believe the commenters' suggested additional security measures (such as an annual ID card reissuance

requirement) are necessary or appropriate at this time.[90]

Comment. Some commenters stated that the proposed rule was silent on the types of penalties that students and employers may face for non-compliance with reporting requirements. Other commenters expressed concern that DSOs may be held responsible if students and employers fail to comply with those requirements. One commenter described the reporting requirements as "self-reporting events," noting that DSOs will have no way of monitoring students or knowing about violations if they are not reported to the DSOs. That commenter suggested that "[t]here should be no repercussions to the school or the DSO for not getting these data from the student or employer." Similarly, another commenter voiced concerns about whether there will be consequences for DSOs if employers or students fail to meet their reporting obligations under the proposed rule, how DHS will monitor employers' and students' compliance with the proposed rule's reporting requirements, and whether students will face consequences if employers fail to timely report required information.

Response. DHS respectfully disagrees with the commenters' statements concerning available consequences for non-compliant students or employers. The rule reflects ICE's procedures for monitoring nonimmigrant students and provides for investigating employers' compliance with the rule's requirements, including all reporting and recordkeeping obligations, in accordance with SEVP's authority to track and monitor students. Moreover, the rule clarifies that employers will be monitored consistent with the site visit

provisions, and that DHS has the ability to deny STEM OPT extensions with employers that DHS determines have failed to comply with the regulations. With regard to STEM OPT students, the rule also provides for serious consequences in instances of noncompliance. For example, the rule specifies that compliance with reporting requirements is required to maintain F-1 status. *See* 8 CFR 214.2(f)(12)(i)-(ii). Accordingly, a student's failure to comply with reporting obligations will result in a loss of F-1 status. Furthermore, although DHS expects certified schools and DSOs to meet their regulatory obligations, including updating a student's record to reflect reported changes for the duration of OPT, DHS does not intend to pursue enforcement actions against schools or their officials for the reporting failures of third parties.

C. Qualifying F-1 Nonimmigrants

1. Description of Final Rule and Changes From NPRM

This rule allows only certain F-1 nonimmigrants to receive STEM OPT extensions. The rule requires the student's STEM OPT opportunity to be directly related to the student's STEM degree; defines which fields DHS considers to be "STEM fields" for purposes of the extension; and allows students to use a previously obtained STEM degree as a basis for a STEM OPT extension. The rule effectively prohibits students from using the STEM OPT extension to work in a volunteer capacity, among other requirements to ensure appropriate oversight and training in connection with the extension. Finally, this rule clarifies that a student may qualify for a STEM OPT extension

notwithstanding that the student has yet to complete a thesis requirement or equivalent, so long as the thesis requirement or equivalent is the only degree requirement still outstanding at the time of application (although this is not an available option when using a previously obtained STEM degree). The proposed rule included most of these provisions; the final rule makes changes and clarifications in response to public comments. We summarize these provisions and changes below.

i. Relationship of STEM OPT Opportunity to the Student's Degree

As noted above, under this final rule, the student's proposed STEM OPT opportunity must be directly related to the student's STEM degree. Like OPT generally, a STEM OPT extension is at its core a continuation of the student's program of study in a work environment. This provision is finalized without change.

ii. Limitation to STEM Degrees Only

This final rule limits eligibility for the STEM OPT extension to those qualifying students who have completed a degree in a STEM field. The degree that serves as the basis for the STEM OPT extension must be a bachelor's, master's, or doctoral degree. Under this rule, a "STEM field" is a field included in the Department of Education's CIP taxonomy within the 2-digit series containing engineering, biological sciences, mathematics, and physical sciences, or a related field. In general, related fields will include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical,

biological, and agricultural sciences). This definition is drawn in part from a definition developed by the Department of Education's National Center for Education Statistics (NCES).[91] DHS added the definition of "related fields" in response to comments about the clarity of the proposed definition.

DHS will maintain a complete list of fields that DHS has determined fall within the regulatory definition of "STEM field." This list is known as the STEM Designated Degree Program List ("STEM list"). DHS may publish updates to the STEM list in the Federal Register. A clear definition of the types of degree fields that DHS considers "STEM fields" for purposes of the STEM OPT extension will more effectively facilitate the process for altering categories contained within the STEM list.

In the proposed rule, DHS advised commenters that it was considering future revisions of the STEM list to include certain degrees listed within the two-digit series for Agriculture, Agriculture Operations, and Related Sciences; Computer and Information Sciences and Support Services; Engineering; Engineering Technologies and Engineering-Related Fields; Biological and Biomedical Sciences; Mathematics and Statistics; and Physical Sciences. As noted in the comment summary below, DHS received a number of recommendations for fields to add to the STEM list and one recommendation to remove a field from the list. As discussed below DHS has revised the list in response to the comments received; the final list is available in the docket for this rulemaking. Consistent with past practice, DHS will continue to accept for consideration suggested changes to the STEM list at SEVP@ice.dhs.gov.

iii. Prior STEM Degrees

The rule allows students to use a previously obtained and directly related STEM degree from an accredited school as a basis to apply for a STEM OPT extension. This provision makes the STEM OPT extension available to students who have significant prior background in STEM but who are currently engaging in practical training that has been authorized based on their study towards a non-STEM degree. The extension is available only to those students who seek to develop and utilize STEM skills from their prior STEM degree during the STEM OPT extension. A DSO at the student's school of most recent enrollment is responsible for certifying a prior STEM degree, which must have been obtained in the ten years prior to the DSO recommendation. In addition, the regulatory text clarifies that the practical training opportunity that is the basis for the 24-month STEM OPT extension must directly relate to the degree that qualifies the student for such extension, including a previously obtained STEM degree.

iv. Prior STEM Degrees—Additional Eligibility Requirements

This final rule includes a number of requirements intended to ensure the educational benefit of a STEM OPT extension based on a previously obtained STEM degree. First, for a student relying on a previously obtained degree, the student's most recent degree must also be from an accredited institution, and the student's practical training opportunity must be directly related to the previously obtained STEM degree. Second, for a previously obtained degree to qualify as the

basis for a STEM OPT extension, the degree must have been received within the 10 years preceding the student's STEM OPT application date.

As previously noted, the final rule clarifies that the prior degree cannot have been conferred via an overseas campus. The institution that conferred the prior degree must be accredited and SEVP certified at the time the DSO recommends the student for the STEM OPT application.[92]

v. Volunteering and Bona Fide Employer-Employee Relationships

The final rule clarifies issues relating to various types of practical training scenarios and whether such scenarios qualify an F-1 student for a STEM OPT extension. The rule specifically clarifies that a student may not receive a STEM OPT extension for a volunteer opportunity. The rule also requires that a student must have a bona fide employer-employee relationship with an employer to obtain a STEM OPT extension. In response to comments received, DHS clarifies that students may be employed by start-up businesses, but all regulatory requirements must be met and the student may not provide employer attestations on his or her own behalf.

vi. Thesis Requirement

The final rule clarifies that F-1 students who have completed all other course requirements for their STEM degree may be eligible for a STEM OPT extension notwithstanding the continuing need to complete the thesis requirement or equivalent for their STEM degree. DHS believes that this flexibility is consistent with DHS's historical interpretation of the regulatory

provisions governing STEM OPT extensions. This exception, however, does not apply with respect to a previously earned STEM degree if the student seeks to base the STEM extension on such a degree.

2. Public Comments and Responses

i. Relationship of STEM OPT Opportunity to the Student's Degree

Comment. DHS received a number of comments regarding the proposed relationship between students' degrees and their practical training opportunities. Several commenters agreed with DHS that the rule should require a direct relationship between the student's qualifying STEM degree and the practical training opportunity. One commenter indicated that the Department needed to be flexible in evaluating such relationships, particularly because of rapid changes in certain STEM fields. Specifically, the commenter stated that "[i]n assessing whether a STEM degree relates to a particular position, it is important for DHS to be open to employers' explanations regarding the nexus between the STEM degree field and the employment opportunity." Other commenters suggested that STEM OPT students should work only in the exact fields in which they earned their degrees, rather than in other related fields where their skills may be valued by employers. One commenter opposed the requirement that work be directly related to the degree, especially in regard to prior STEM degrees. The commenter suggested that eliminating the nexus requirement would create greater opportunities for STEM OPT students.

Response. DHS does not believe further changes to the "directly related" standard are necessary or appropriate. DHS disagrees, on the one hand, with comments recommending that STEM OPT extensions only be allowed where the practical training will be in the exact field in which the F-1 student earned his or her degree. DHS also disagrees, on the other hand, with comments recommending the elimination of any connection between the degree and the practical training opportunity. DHS believes that the rule strikes the right balance between these two positions.

The requirement that the practical training opportunity be directly related to the student's degree ensures that the opportunity is an extension of the student's academic studies and enhances the knowledge acquired during those studies. The purpose of the rule is not to give students unlimited employment opportunities. At the same time, the "directly related" standard allows sufficient flexibility to give F-1 students a range of options when choosing how to apply and enhance their acquired knowledge in work settings. DHS recognizes that the knowledge acquired when earning a STEM degree typically can be applied in a range of related fields, and the Department does not seek to narrow such options for students; rather, this rule requires that the practical training opportunity be directly related to the F-1 student's field of study. Limiting opportunities to the exact field of study as named on the degree would create an unnecessary and artificial distinction, resulting in fewer opportunities for STEM OPT students.

DHS notes that the Training Plan required for a STEM OPT extension under this rule includes an

entry for articulating how the practical training opportunity is directly related to the student's field of study. DHS will carefully consider this explanation, among other relevant evidence, when evaluating the relationship between the practical training opportunity and the student's degree.

Comment. One commenter stated that STEM OPT extensions should be granted based on the needs of U.S. industries. Specifically, the commenter recommended that DHS make extensions available to F-1 students who have earned degrees in fields that have a demonstrated need for workers, rather than to all fields on the STEM list.

Response. The primary purpose of this rule is to expand upon the academic learning of F-1 students in STEM fields through practical training, not to supply STEM workers or address labor shortages. Moreover, as noted previously, the NSF has reviewed the body of research in this area and concluded that there is no straightforward answer on whether there is a surplus or shortage of STEM workers.[93] Although it appears axiomatic that at any given time one industry may need workers more than another, the NSF has also found that labor needs in STEM fields are determined by factors other than industry, including level of education, training, and geographic location.[94] Due to the complex set of factors that combine to affect the supply and demand of STEM workers, and the fact that labor needs are in constant flux, DHS has concluded that it would not be administratively feasible to limit STEM OPT extensions based on industry-specific needs that would be complex and difficult to ascertain objectively.

DHS declines to adopt the suggestion by the commenter.

Comment. Another comment suggested that because the DHS-approved STEM list is actually a list of major areas (*i.e.,*fields) of study, DHS should amend the proposed definition for the type of STEM degree that would qualify a student for a STEM OPT extension to refer to "program categories" instead of "degree programs." The commenter added that the reference to "program categories" would be more consistent with other parts of the regulation that also use that term.

Response. DHS agrees that the proposed definition could be confusing and has amended the regulatory text accordingly. The final rule now provides that the degree that is the basis for the STEM OPT extension must be a bachelor's, master's, or doctoral degree in "a field" determined by the Secretary, or his or her designee, to qualify within a science, technology, engineering, or mathematics field.

Comment. Several commenters requested that the STEM OPT extension program be broadened to include non-STEM degrees. For example, one commenter remarked that it "sometimes encounters individuals with excellent technical credentials whose decision to obtain an MBA or other non-STEM advanced degrees precludes them from continuing employment in the United States due to an inability to access STEM-OPT." Other commenters similarly suggested that STEM OPT extensions be available to students with non-STEM degrees by citing to the changing nature of higher education and the need for increased experiential learning in other fields. One commenter suggested that DHS should create a process for

expanding practical training opportunities for foreign students in non-STEM fields.

Response. An expansion of practical training to non-STEM degrees would be outside the scope of this rulemaking. In 2015, there were more than 1.2 million international students studying in the United States, but only approximately 34,000 students on STEM OPT extensions. DHS did not propose to authorize an extension of OPT for the entire international student population, and will not authorize such an extension in this rule.

Moreover, as noted in the proposed rule, DHS received similar comments in response to the 2008 IFR creating the 17-month extension for STEM graduates. DHS has taken these concerns into consideration in crafting this rule, and the Department determined that extending OPT is particularly appropriate for STEM students because of the specific nature of their studies and fields and the increasing need for enhancement of STEM skill application outside of the classroom. DHS also found, as noted previously, that unlike post-degree training in many non-STEM fields, training in STEM fields often involves multi-year research projects [95] as well as multi-year grants from institutions such as the NSF. Although DHS recognizes that there may be some non-STEM fields in which a student could benefit from increased practical training, the Department believes the current 12-month post-completion OPT period is generally sufficient for such fields. For these reasons, DHS is limiting the STEM OPT extension to STEM fields at this time.

Finally, DHS also notes that the rule does expand the availability of STEM OPT extensions to certain STEM students with advanced degrees in non-STEM fields. Under the rule, a student who earns a STEM degree and then goes on to earn a non-STEM advanced degree, such as a Master of Business Administration (MBA), may apply for a STEM OPT extension following the MBA so long as the practical training opportunity is directly related to the prior STEM degree.

ii. Definition of "STEM Field" and the STEM List

Comment. Many commenters supported DHS's proposal to designate CIP codes in the STEM list at the two-digit level for the summary groups (or series) containing mathematics, natural sciences (including physical sciences and biological/agricultural sciences), engineering/engineering technologies, and computer/information sciences. Commenters stated that this approach would provide important clarity to the public, as well as flexibility as STEM fields change.

Many commenters emphasized the importance of also allowing STEM OPT extensions for certain students who studied in fields that are not classified within the proposed definition of "STEM field." Some commenters stated that DHS should not base its definition of the term on the NCES definition alone.[96] Commenters stated that the Department of Education originally developed this definition in order to define the scope of a study of educational trends related to students who pursue and complete STEM degrees. One commenter argued that repurposing this categorization for the STEM OPT extension would

produce an unnecessarily narrow definition of "STEM field" for the STEM OPT extension.

Similarly, another commenter advised that the NCES description of STEM fields "is too narrow to capture graduate level STEM fields, especially those being pursued by students who obtained their baccalaureate-level education outside the United States, and who have come here for more specialized STEM education." Another commenter stated that the proposed rule's definition would "create[] a static definition of STEM fields that fails to provide the flexibility to adapt to the latest innovations and discoveries in STEM." The commenter suggested that DHS clarify that it may add new CIP codes to the list beyond the summary groups specifically identified in the proposed regulatory text.[97]

Another commenter stated that DHS's definition of "STEM field" differs from the NCES definition of the term in that DHS has included "related fields" in its definition. The commenter believed that DHS's expanded definition would lead to requests for DHS to include in the new STEM list a number of fields that DHS had included in prior versions of the STEM list, but that did not fall within the summary groups that DHS identified in the NPRM (mathematics, natural sciences (including physical sciences and biological/agricultural sciences), engineering/engineering technologies, and computer/information sciences). To address this concern, the commenter suggested that DHS include an innovation or competitiveness-related criterion as a factor in selecting STEM fields for inclusion on the list.

Response. DHS believes the NCES definition for "STEM field" provides a sound starting point for the definition of that term in this rule. First, the NCES definition draws on the Department of Education's expertise in the area of higher education. Second, the NCES definition identifies STEM fields using CIP terminology, which is widely used by U.S. institutions of higher education and provides a straightforward and objective measure by which DSOs and adjudicators can identify STEM fields of study. Consistent with the proposed rule, DHS has determined that four areas are core STEM fields and will list these four areas at the two-digit CIP code level. As a result, any new additions to those areas will automatically be included on the STEM list. These four areas are: Engineering (CIP code 14), Biological and Biomedical Sciences (CIP code 26), Mathematics and Statistics (CIP code 27), and Physical Sciences (CIP code 40).

DHS also recognizes that some STEM fields of study may fall outside the summary groups (or series) identified in the NCES definition. As many commenters noted, the proposed rule defined "STEM field" to also include fields of study *related to* mathematics, natural sciences (including physical sciences, biological, and agricultural sciences), engineering and engineering technologies, and computer and information sciences. The "related fields" language in the STEM definition means that DHS may consider a degree to be in a STEM field even if not within the CIP two-digit series cited in the rule, and it authorizes DHS to designate CIP codes meeting the definition at the two-, four-, or six-digit level. DHS believes that the clarification provided here, coupled with the STEM list itself, are

sufficient to address any concern about qualifying STEM degrees and therefore declines to amend the regulatory text.

DHS agrees, however, with comments suggesting that the "related fields" criterion alone may provide insufficient guidance and predictability to adjudicators and the public. Consistent with these commenters' suggestions and the basis of the STEM OPT extension, DHS has revised the regulatory text to clarify that in general, related fields will include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical, biological, and agricultural sciences). DHS intends to list any such "related fields" at the 6-digit level.

Comment. DHS received a number of comments related to the process for updating the STEM list. One commenter recommended that DHS publish a list and provide for notice and comment regarding any fields DHS intends to add or remove. Other commenters proposed that, in order to retain flexibility to adapt the definition of eligible STEM fields to an innovative economy, DHS should make additions to the list through publication of updates in the Federal Register but without providing for notice and comment. Another commenter asked DHS "to create a system whereby applications to add fields to the STEM list can be made and acted upon quickly" but that "DHS provide a notice and comment period before eliminating specific fields from the STEM list."

Response. DHS agrees that the STEM list should be flexible and envisions making periodic updates to the STEM list in response to changes in STEM fields,

academic programs, or technological trends. DHS will review recommendations from the public concerning potential additions or deletions to the list, and may announce changes through publication in the Federal Register. DHS intends to use a single procedure for amending the list and therefore disagrees with the commenter who recommended two different procedures for additions and deletions. Additionally, notice and comment publication for every change to the STEM list would hinder DHS's ability to be flexible and responsive to changes in STEM fields. DHS notes, however, that changes to the STEM list would be based on the regulatory definition of "STEM field," which was subjected to notice and comment. In addition, DHS has provided a mechanism for continuous feedback on the degrees included on the list and encourages interested parties to suggest changes by sending their recommendations to SEVP@ice.dhs.gov. DHS believes this language and the process described provide sufficient clarity for the continued regulatory implementation of the STEM list.

Comment. Many commenters requested that DHS include additional broad categories of degrees on the STEM list. For instance, some commenters requested that DHS include all science degrees. Others requested that DHS include "certain essential fields in the health care and business sectors," without specifically identifying the specific fields they considered "essential." A commenter recommended adding to the STEM list programs with CIP codes within the summary groups (or series) for Business Management, Marketing, and Related Support Services (CIP code 52) and Homeland Security, Law Enforcement,

Firefighting and Related Protective Services (CIP code 43). Other commenters recommended specific degrees for DHS to include in the STEM OPT extension. These proposed fields of study covered a wide range of subjects including patient-care fields such as nursing and dental sciences, business administration, exercise sciences, neuroscience, pharmaceuticals, economics, accounting, and geography. Some commenters stated that "financial engineering" and "quantitative finance" (fields that are potentially encompassed within the CIP code for Financial Mathematics) should not be on the list of qualifying fields as many of those students work for financial institutions, and some degree programs in those fields might not focus heavily on quantitative skills.

Response. DHS cannot fully respond to requests to include broad groups of degrees—such as degrees in certain "essential" health care and business fields—without an indication of the specific fields that are being suggested or a detailed explanation as to why those fields should be included on the list. Nevertheless, DHS declines to define "STEM field" to generally include patient care and business fields of study. As noted above, these fields do not generally fall within the rubric of "STEM fields." For similar reasons, DHS declines to add all CIP codes that begin with 52 and 43. DHS notes, however, that the final STEM list that DHS is adopting with this rulemaking includes four CIP codes beginning with 52: Management Science; Business Statistics; Actuarial Science; and Management Science and Quantitative Methods, Other. The final STEM list also includes two CIP codes beginning

with 43: Forensic Science and Technology, and Cyber/Computer Forensics and Counterterrorism.

DHS notes that a number of the additional fields that commenters recommended for inclusion on the STEM list are included in the final list DHS is adopting with this rulemaking. These include Medical Technology (CIP code 51.1005), Health/Medical Physics (CIP code 51.2205), Econometrics and Quantitative Economics (CIP code 45.0603), Exercise Physiology (CIP code 26.0908), Neuroscience (CIP code 26.1501), Pharmacoeconomics/Pharmaceutical Economics (CIP code 51.2007), Industrial and Physical Pharmacy and Cosmetic Sciences (CIP code 51.2009), Pharmaceutical Sciences (CIP code 51.2010),[98] and Geographic Information Science and Cartography (CIP code 45.0702).

With respect to suggestions to include certain accounting degree programs, DHS notes that accounting is not generally recognized as a STEM field and does not involve research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical, biological, and agricultural sciences). DHS is thus not generally including accounting degrees on the STEM List. DHS also disagrees with the suggestion to prohibit eligibility based on "financial engineering" and "quantitative finance" degrees. Financial Mathematics is a very specialized field that involves utilizing traditional research methods and applying scientific principles and rigorous mathematical concepts (such as stochastic calculus). These underlying principles, and not the end employer, dictate the bases for including this field on the STEM list.

Comment. Many commenters requested that DHS classify STEM CIP codes at the two-digit level to allow for more majors to qualify as bases for STEM OPT extensions. A commenter recommended that DHS consider identifying eligible CIP codes by the two-digit series of the CIP taxonomy, and that in cases where such series is too broad, DHS consider using the four-digit series, which "represent intermediate groupings of programs that have comparable content and objectives."

Some commenters requested that DHS include additional categories of degrees on the STEM list. One commenter recommended that DHS designate at the two-digit level a number of potentially "related fields," including Psychology (CIP code 42), Health professions and Related Programs (CIP code 51), Military Science, Leadership and Operational Art (CIP code 28), Military Technologies and Applied Sciences (CIP code 29), and Agriculture, Agriculture Operations, and Related Sciences (CIP code 1). The comment further recommended that DHS designate at the four-digit level "relevant 4-digit codes" from Architecture and Related Services (CIP code 04), Library Science (CIP code 25), Multi/Interdisciplinary Studies (CIP code 30), Homeland Security, Law Enforcement, Firefighting and Related Protective Services (CIP code 43), and Business, Management, Marketing, and Related Support Services (CIP code 52). The commenter stated that these changes would account for "the increasingly multidisciplinary nature of education, the needs of the STEM pipeline and STEM industry infrastructure, and other technically-based areas of national interest."

Response. DHS believes that outside of the categories for which DHS proposed moving to a two-digit designation, designation at the two- or four-digit level may result in overbroad eligibility. DHS reviewed the additional groups of CIP codes that were recommended for designation at the two- and four-digit level, and found that significant additional research would be necessary to determine whether all of the covered fields are appropriately characterized as STEM fields for purposes of this rule. DHS welcomes further input on these designations and others within the standard process for providing input on the STEM list.

Comment. DHS received a number of comments requesting that DHS explain whether the rule would effectively eliminate certain fields from the STEM list. Specifically, commenters were concerned that the following fields would be removed from the list: Architectural and Building Sciences/Technology (CIP code 4.0902), Digital Communication and Media/Multimedia (CIP code 9.0702), Animation, Interactive Technology, Video Graphics and Special Effects (CIP code 10.0304), Management Science (CIP code 52.1301), Business Statistics (CIP code 52.1302), Actuarial Science (CIP code 52.1304), Management Science and Quantitative Methods, Other (CIP code 52.1399), Archaeology (CIP code 45.0301), Econometrics and Quantitative Economics (CIP code 45.0603), Geographic Information Science and Cartography (CIP code 45.0702), and Aeronautics/Aviation/Aerospace Science and Technology, General (CIP code 49.0101).

Response. DHS has retained these fields in the final version of the list. These fields continue to fit within DHS's criteria for covered degrees.

iii. Prior STEM Degrees—Application Process

Comment. DHS received a substantial number of comments pertaining to provisions allowing students to use previously earned degrees to apply for STEM OPT extensions. Many commenters, particularly DSOs, supported the inclusion of previously earned degrees. Other DSOs submitted comments requesting clarification regarding the process for DSOs to nominate students for STEM OPT extensions based on such degrees. Some comments expressed concern about the increased responsibilities these provisions would place on DSOs. To reduce DSO recordkeeping burdens, a few commenters recommended that a previously earned degree be allowed to suffice for nomination only if the student obtained the degree at his or her current school. Other commenters asked DHS to clarify how DSOs would verify the accreditation of other institutions, while other commenters questioned how DSOs would verify previously earned degrees from other institutions.

Some commenters stated that DSOs need clear guidance on how to determine whether a previously earned degree qualifies as a STEM degree sufficient to support a STEM OPT extension. Some commenters also stated that DSOs may have trouble verifying that a practical training opportunity is closely related to the student's prior field of study. Some commenters asked DHS to clarify whether the DSO at the school from which the student received his or her most recent

degree would be the DSO responsible for verifying the Department of Education CIP codes used to classify the student's previously earned degree. Many commenters noted that for students with double majors or dual degrees, only the primary major's CIP code is visible on the Form I-20 Certificate of Eligibility. Some commenters expressed an interest in displaying a CIP code history (*i.e.,* a complete list of the student's earned degrees) in SEVIS for ease of reference and verification for students who are applying based on previously earned STEM degrees.

Response. In response to commenters' concerns, DHS clarifies several requirements related to the use of previously earned degrees. First, a STEM OPT extension may be granted based on a previously earned degree if that degree is on the STEM list at the time of application for the STEM OPT extension, rather than at the time that the student received the degree. Second, the DSO at the school from which the student received his or her most recent degree (*i.e.,* the DSO who recommended the student's current period of post-completion OPT) is the DSO responsible for verifying the CIP code(s) used to classify the student's previously earned degree. Finally, the institution that conferred the prior degree must be accredited and SEVP-certified at the time the DSO recommends the student for the STEM OPT extension.

Thus, prior to approving a student's STEM OPT extension based on a previously earned degree, the DSO must ensure that the student is eligible for the extension based on the degree, which includes verifying that the degree is on the current STEM list, that the degree directly relates to the practical training opportunity,

and that the degree was issued by an institution that is currently accredited and SEVP-certified. DHS acknowledges that such verification may place an additional burden on DSOs. But DHS expects this burden will be minimal, as the required information should be readily accessible in most cases.

With respect to verifying previously earned degrees, DHS notes that many institutions already require information about such degrees from incoming students. As such, the certification required by this rule is consistent with an academic institution's normal review of its students' prior accomplishments. Additionally, for the majority of degrees granted in the past 10 years, recent and upcoming improvements to SEVIS may provide additional assistance to DSOs. CIP codes began appearing in SEVIS in 2008 and on Form I-20 Certificates of Eligibility in 2009, and in the December 2015 SEVIS upgrade, SEVP improved the student history section for DSO reference.[99] DHS is working toward an even more robust student history section. Based on these improvements, a significant amount of information related to previously earned degrees will be included in the SEVIS system and immediately available to DSOs. The Department also commits to providing additional training through SEVP to facilitate DSOs' ability to perform this work in an efficient manner.

With respect to determining whether a previously earned degree is in a STEM field, DHS notes that DSOs will only be required to determine whether the degree is on the current STEM list (*i.e.,* the list in effect at the time of the application for a STEM OPT extension), not the list in effect at the time that the

degree was conferred. DSOs will not be required to review historical STEM lists. As such, DHS expects that verification of a previously earned degree in this regard will be no more burdensome than that required of a recently-earned STEM degree.

Similarly, with respect to the institution that conferred the prior degree, the rule does not require the DSO to verify whether the institution was accredited or SEVP-certified at the time the degree was conferred. The rule requires the DSO to determine only whether that institution is currently accredited and SEVP-certified. Regarding the accreditation requirement, the DSO may simply consult the Department of Education's Database of Accredited Postsecondary Institutions and Programs, or any other reasonable resource used by DSOs, to verify the institution's accreditation. Regarding SEVP-certification, the DSO may search the Certified Schools list available at https://studyinthestates.dhs.gov/school-search, to see if a student's educational institution is on the list at the time the DSO determines whether to make the recommendation.

Additionally, DHS understands the concerns raised by DSOs regarding students with double majors or dual degrees. DHS clarifies that in scenarios where a student has simultaneously earned a degree with a double major, or more than one degree, the DSO should first attempt to confirm eligibility through SEVIS data. If the DSO is unable to do so, the DSO may then consult the student's academic file at the DSO's own institution to review whether the qualifying STEM degree was listed on the student's application for admission. The DSO's educational institution

either would already have access to that information or could request documentation from the student. For further clarity, DHS has amended the regulatory text at 8 CFR 214.2(f)(10)(ii)(C) in this final rule to include a specific reference to dual degrees.

Finally, although DHS shares commenters' goals of minimizing administrative burdens on DSOs and their institutions, the Department disagrees with the recommendation to allow STEM OPT extensions based on previously earned degrees only if such degrees are obtained from the students' current educational institutions. This restriction would severely limit educational options for F-1 students, as it would effectively require those who may wish to engage in extended practical training to pursue advanced degrees at the same institutions in which they had earned their prior degree(s). Indeed, the limitation may even create disincentives to attend smaller colleges or other institutions that may not provide as many degree programs as larger universities. And it would disqualify students based on nothing more than their decision to switch institutions. Curtailing F-1 students' options with respect to educational institutions in the United States is inconsistent with the rule's objectives. Furthermore, as noted previously, DHS has considered the suggestion to shift the rule's recordkeeping and reporting obligations to students and employers and is currently developing technological capabilities aimed at reducing administrative burdens on DSOs, employers, and students.

Comment. DHS received comments seeking clarification on the specific types of information needed by DSOs to approve STEM OPT extensions based on

previously earned STEM degrees. One commenter, for example, asked whether DSOs would need to provide SEVIS printouts when the necessary CIP codes do not appear on the Form I-20 Certificate of Eligibility but are found in SEVIS. The commenter also asked for information regarding the types of "authoritative evidence . . . regarding changes in CIP codes" that DSOs from prior institutions may provide "so that the STEM OPT-granting DSO has confidence that they are appropriately authorizing STEM OPT."

Response. DHS continues to upgrade the SEVIS system to bring clear, specific, and easily-accessible information to users. As the system evolves, DHS expects to update guidance concerning methods for acquiring and confirming CIP codes, and to provide specific training and guidance relating to these questions. DHS clarifies, however, that the Department will not generally require DSOs to provide SEVIS printouts, as SEVIS information is already available to DHS. For previously earned degrees, DSOs should provide, if it is available, the CIP code applicable at the time the degree was conferred. CIP codes are currently republished every ten years, and immediately prior versions remain available electronically through the National Center for Education Statistics Web site, with a crosswalk that connects any changes between current and prior versions.[100] DHS will take all circumstances into account when adjudicating the application and may ask for additional information as needed.

iv. Previously Earned STEM Degrees—Eligibility Requirements

Comment. DHS received a number of comments applauding DHS's proposal to allow students to qualify for STEM OPT extensions based on previously earned STEM degrees. Some employers stated that this change will be especially helpful in retaining scientists who obtain higher-level degrees in public health fields, as well as engineers and scientists who pursue MBA and other advanced business degrees after receiving a STEM degree. Other commenters, however, expressed concern with the proposal. One commenter, for example, asserted that students who have "abandoned" their previous STEM degrees to study in another non-STEM field should not be allowed to obtain STEM OPT extensions. Another commenter stated that it was not clear from the regulatory text that an extension would be allowed "only to such students who seek to develop and utilize STEM skills from their prior STEM degree during the extended OPT period."

Response. DHS agrees with comments stating that the provision related to prior STEM degrees provides important educational and training benefits to accomplished students with STEM backgrounds. DHS acknowledges the benefits of combining STEM and non-STEM disciplines, as recognized by the majority of commenters who commented on this specific issue. DHS also disagrees with the notion that STEM students who subsequently pursue non-STEM degrees have "abandoned" their STEM degrees. It is not uncommon for STEM degrees to provide a foundation for career advancement in fields where multi-disciplinary backgrounds can be advantageous.[101] Moreover, as

stated previously, the rule requires that any practical training during the STEM OPT extension period must be "directly related" to the STEM degree. This requirement applies with equal force to any such practical training based on a prior STEM degree.

Comment. One commenter requested clarification on when the 10-year "clock" starts for determining eligibility for STEM OPT extensions based on previously earned STEM degrees. The commenter requested that the final rule should clarify whether the 10-year period begins on the date of graduation listed on the diploma or the date on which all degree requirements were completed. Additionally, the commenter requested that DHS clarify the meaning of the term "application date" with respect to applications for STEM OPT extensions.

Response. DHS clarifies that the 10-year eligibility period for previously earned STEM degrees is determined from the date the degree was conferred, which would be the date on which the degree was earned or finalized, as reflected on the official transcript. For purposes of this rule, the application date is the date on which the DSO recommends the STEM OPT extension in SEVIS.

Comment. Commenters also submitted comments requesting that the proposed 10-year period for accepting previously earned STEM degrees be shortened. Such commenters asserted that the 10-year period is too long for various reasons, including because degree programs, as well as the STEM list, change over time. Some commenters also stated that students with older degrees would not be knowledgeable on current topics and research methods and would thus have

to spend a greater portion of the STEM OPT extension learning new information rather than applying previously obtained knowledge.

Response. DHS agrees with commenters that a previously earned STEM degree should not be a basis for a STEM OPT extension if the degree was awarded in the distant past. DHS, however, believes that 10 years is a reasonable period for recognizing prior STEM degrees under this rule. DHS disagrees that students who earned STEM degrees in the last 10 years are necessarily behind peers who have earned their degrees more recently. A student in a STEM field that has changed since the student received his or her degree may very well have kept up with the state of knowledge in his or her field through employment, training, or other means.

Moreover, DHS notes that employers are likely to provide practical training opportunities to candidates who are qualified based upon their individual degrees and knowledge. As noted previously, this rule provides that when a STEM OPT extension is based on a previously earned STEM degree, the practical training opportunity must be directly related to that previous degree. Based in part on this requirement, DHS expects that an employer will accept an F-1 student that the employer believes is qualified and prepared to engage in the offered position. While the pool of qualified STEM OPT candidates based on prior STEM degrees earned in the United States up to 10 years ago may be small, DHS believes the provision is an important feature of the final rule.

Comment. Commenters stated that the proposed rule did not address whether an F-1 student who

earned a prior STEM degree in the United States while in another nonimmigrant status would qualify for STEM OPT extensions under this rule. In some cases, the commenters specifically recommended that DHS clarify that a current F-1 student who obtained a prior STEM degree in the United States while in H-4, L-2, or another nonimmigrant status would be eligible for a STEM OPT extension.

Response. DHS generally agrees with these comments and clarifies here that a current F-1 student who earned a prior STEM degree from a qualifying educational institution, regardless of whether he or she earned that prior degree as an F-1 student, may qualify for a STEM OPT extension so long as the degree otherwise meets the requirements for previously earned STEM degrees set out in this rule.

Comment. A number of commenters requested that the regulations explicitly provide that a student who completes a double major or obtains dual degrees—with one major or degree in a STEM field and the other not in a STEM field—would be eligible for a STEM OPT extension.

Response. DHS supports allowing students who previously graduated with dual degrees to participate in the STEM OPT extension so long as one of the prior degrees is an eligible STEM degree. In response to the comments received on this issue, DHS has made changes to the proposed regulatory text. The final rule now includes a specific reference to dual degrees in the regulatory text at 8 CFR 214.2(f)(10)(ii)(C).

Comment. One commenter requested certain clarifications to the proposal to allow students to use a previously earned STEM degree as a basis for a STEM

OPT extension. Specifically, the commenter requested that DHS clarify that the proposal would allow STEM OPT extensions for the following students:

1. A student who completes a STEM degree and then subsequently completes a non-STEM degree;

2. A student who earns a non-STEM degree after previously completing a double major or receiving dual degrees, where one major or degree was in a STEM field and the other was not; and

3. A student who, while on post-completion OPT for a non-STEM degree, completes a STEM degree (*e.g.,* the student was concurrently enrolled in two degree programs, and finishes the non-STEM program first, obtains post-completion OPT on the completed non-STEM program, then subsequently completes the STEM program while on OPT).

To further clarify this proposal, the commenter suggested that DHS delete the words "previously" and "previous" in proposed 8 CFR 214.2(f)(10)(ii)(C)(3), amend the section with suggested language, and issue guidance to assist DSOs responsible for facilitating STEM OPT extensions on the basis of degrees from other institutions.

Response. DHS clarifies that the students in the first two scenarios described above would be able to request and obtain STEM OPT extensions if they are in compliance with all other OPT requirements, including that the practical training opportunity is directly related to the STEM degree. For the student in the third scenario, however, eligibility may depend upon the degree level of the student's STEM degree. In the commenter's description, the STEM degree was earned after the initiation of the student's current

OPT period. Because the rule limits eligibility for STEM OPT extensions in this context to those degrees obtained "previous to the degree that provided the [12-month OPT period]," the subsequently earned degree would not qualify the student for an extension of his or her current OPT period. While the student would be unable to directly request a STEM OPT extension based on the new STEM degree, such a student may be able to start a new 12-month period of OPT based on that degree if the degree is of a more advanced level than the non-STEM degree. If the commenter's scenario, however, involved a student receiving two degrees at the same level (*e.g.,* both degrees are bachelor's degrees), the student could not start a new 12-month period of OPT based on the STEM degree.

DHS considered making adjustments to the rule to allow STEM OPT extensions for all students described in the third scenario, but the Department decided against making such changes after weighing several factors. First, DHS does not believe that the situation described in the third scenario is very common. Second, future students who find themselves in that scenario can preserve eligibility for STEM OPT extensions simply by waiting to request post-completion OPT until after completing the coursework toward their STEM degrees. Based on the small number of students impacted and the relative ease with which such students can retain STEM OPT eligibility, DHS concluded that the benefit to such students was outweighed by the administrative complexity presented in allowing STEM OPT extensions based on subsequently earned STEM degrees awarded at the same degree level. For these reasons, DHS has not agreed to

make the changes recommended by the commenter. DHS will address any remaining confusion through training and guidance.

v. Volunteering, Employer-Employee Relationships, and Related Matters

DHS received several comments concerning various types of practical training scenarios and whether they qualify under the STEM OPT extension provisions of this rule. For the reasons described below, DHS has determined that as a result of the rule's general requirements, a student seeking a STEM OPT extension will not be allowed to use a volunteer opportunity as a basis for a STEM OPT extension. In addition, a STEM OPT extension must involve a bona fide employer-employee relationship. Finally, DHS clarifies that under this final rule students may seek practical training opportunities with start-up businesses, so long as all regulatory requirements are met. Such students may not provide employer attestations on their own behalf.

Comment. Some commenters requested that F-1 students be allowed to gain practical training as volunteers during their STEM OPT extensions. Relatedly, a commenter asked DHS "to carve out a limited exception to allow volunteering at the student's academic institution to qualify as `employment' for purposes of maintaining F-1 status."

Response. DHS carefully considered whether to allow volunteer positions to qualify under the STEM OPT extension program but has decided against permitting such arrangements. Among other things, DHS is concerned that allowing volunteering would increase the potential for abuse on the part of

international students who may accept volunteer positions for no reason other than a desire to extend their time in the United States. DHS is also concerned that allowing volunteering positions could undermine the protections for U.S. workers contained in the rule, including the requirement that F-1 students on STEM OPT extensions receive compensation commensurate to that provided to similarly situated U.S. workers. Similarly, disallowing volunteering avoids potentially negative impacts on U.S. students who may otherwise be denied paying research opportunities because universities, professors, or other employers would be able to retain F-1 student(s) for extended periods as volunteers. Requiring commensurate compensation for F-1 students—which does not include no compensation—protects both international and domestic students and ensures that the qualifying STEM positions are substantive opportunities that will equip students with a more comprehensive understanding of their selected areas of study and provide broader functionality within their chosen fields.

Comment. DHS received several comments concerning various types of employment relationships and whether F-1 students could request STEM OPT extensions based on such relationships. For example, commenters suggested that an F-1 student be allowed to obtain a STEM OPT extension based on a business established and staffed solely by the student. Commenters stated that such a change would allow students to remain in the United States to start their own companies, while also improving their ability to directly benefit from their own innovations. Other commenters suggested that DHS allow STEM OPT students to

engage in employment with more than two employers and be employed through a temporary agency or a consulting firm arrangement that provides labor for hire. A commenter asked DHS to clarify its position relating to placement agencies, asserting that there may be some legitimate situations in which a staffing company that supervises STEM students should not be prohibited from participating in the STEM OPT extension. In addition, a commenter suggested that DHS expand the definition of "supervisor" to include advisory board members of venture capital firms, faculty advisors, and "start-up mentors." The commenter stated that many start-up companies are not able to offer salaries before they become profitable (instead offering compensation plans that might include stock options or alternative benefits), and recommended that DHS allow STEM OPT students to work for such companies.

Response. There are several aspects of the STEM OPT extension that do not make it apt for certain types of arrangements, including multiple employer arrangements, sole proprietorships, employment through "temp" agencies, employment through consulting firm arrangements that provide labor for hire, and other relationships that do not constitute a bona fide employer-employee relationship. One concern arises from the difficulty individuals employed through such arrangements would face in complying with, among other things, the training plan requirements of this rule. Another concern is the potential for visa fraud arising from such arrangements. Furthermore, evaluating the merits of such arrangements would be difficult and create additional burdens for

DSOs. Accordingly, DHS clarifies that students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Training Plan, and the employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience. DHS recognizes that this outcome is a departure from SEVP's April 23, 2010 Policy Guidance (1004-03).

DHS, moreover, anticipates that it will be very unusual, though not expressly prohibited, for students to work with more than two employers at the same time during the STEM OPT extension period, given that each employer must fully comply with the requirements of this rule and employ the student for no less than 20 hours per week.

DHS also clarifies that F-1 students seeking STEM OPT extensions may be employed by new "start-up" businesses so long as all regulatory requirements are met, including that the employer adheres to the training plan requirements, remains in good standing with E-Verify, will provide compensation to the STEM OPT student commensurate to that provided to similarly situated U.S. workers, and has the resources to comply with the proposed training plan. For instance, alternative compensation may be allowed during a STEM OPT extension as long as the F-1 student can show that he or she is a bona fide employee and that his or her compensation, including any ownership interest in the employer entity (such as stock options), is commensurate with the compensation provided to other similarly situated U.S. workers.

vi. Thesis Requirement

Comment. One commenter asked for clarification about a possible contradiction between USCIS and SEVP policies. Specifically, the commenter stated that on October 6, 2013, USCIS issued an interim policy memorandum (PM 602-0090) that clarified that an F-1 student engaging in post-completion OPT is eligible for a STEM OPT extension if the student has completed all course requirements, except for the thesis, dissertation, or equivalent requirement, when applying for the extension.[102] The commenter noted that SEVP had not yet provided a written update consistent with this USCIS policy memorandum, but instead had previously issued guidance indicating that before a DSO could recommend a STEM OPT extension, the DSO needed to ensure that the student had already finished his or her thesis. Another commenter asked DHS to clarify whether the completion of a STEM degree is a requirement before a student can apply for a STEM OPT extension, as the proposed rule referenced the "completion" of a degree.

Response. DHS clarifies that an F-1 student engaging in a 12-month period of post-completion OPT based on the completion of coursework toward a STEM degree is eligible for a STEM OPT extension based on that same degree if the only outstanding requirement for obtaining the degree at the time of application is the completion of a thesis (or equivalent). As USCIS noted in the cited policy memorandum, because the STEM OPT extension is an extension of a previously granted period of post-completion OPT, it is logical to conclude that students who are applying for the STEM OPT extension need not necessarily have completed

their STEM degree thesis requirement (or equivalent) in order to be eligible for the extension. DHS believes that this policy serves the nation's interest in attracting and retaining talented STEM students from around the world.

This option, however, is not applicable to a request for a STEM OPT extension based on a previously obtained STEM degree; in such a case, the prior STEM degree must be fully conferred. The provision on previously obtained degrees requires that the student must have received the degree itself within 10 years preceding his or her STEM OPT application date. In order to have received the degree, the student would have needed to complete his or her thesis (or equivalent), if such a requirement pertains to the degree. Moreover, DHS does not believe it would be necessary or appropriate to excuse the thesis requirement for previously earned STEM degrees. Importantly, the option to use a previously earned STEM degree as the basis for a STEM OPT extension is for students who are participating in a 12-month period of OPT based on the completion of coursework toward a non-STEM degree at a higher educational level. Because such students have been admitted to degree programs at a higher educational level, DHS anticipates that such students would have already received their lower-level STEM degrees. Moreover, because the rule allows previously earned STEM degrees to qualify if they were conferred up to 10 years ago, DHS believes the need for conferral of the degree would further ensure the integrity of the program and reduce the possibility of fraud.

Finally, DHS does not agree that there are contradictions between the USCIS policy memorandum and the ICE guidance cited in the comments. The USCIS policy memorandum is consistent with the position taken by SEVP in the ICE Policy Guidance (1004-03) with respect to the completion of a thesis (or equivalent). For example, section 6.7 of the ICE policy guidance states that a student in a graduate-level program who has completed all course requirements except for completion of the thesis (or equivalent) may apply for either pre-completion or post-completion OPT while completing the thesis. A student in this situation who applies for and receives post-completion OPT may work full-time in a field related to his or her degree; may apply for the STEM OPT extension if otherwise eligible; and would be eligible for the Cap-Gap extension.[103] As noted above, however, such a student would be eligible for a STEM OPT extension only if that extension is based on the same STEM degree that is the basis for the student's current 12-month period of OPT. A student who is on a 12-month period of OPT based on a non-STEM degree and who seeks a STEM OPT extension based on a previously earned STEM degree must have completed all requirements for conferral of the STEM degree—including any applicable thesis requirement (or equivalent).

D. Qualifying Employers

1. Description of Final Rule and Changes From NPRM

The final rule imposes certain additional requirements on employers as a condition of employing STEM OPT students. This rule requires all such employers

to participate in E-Verify and to make a number of attestations intended to better ensure the educational benefit of STEM OPT extensions and the protection of U.S. workers. The proposed rule included these provisions, and the final rule retains them with certain changes and clarifications in response to public comments. We summarize these provisions and changes below.

i. Employer Enrollment in E-Verify Required

This final rule requires all employers training STEM OPT students to participate in E-Verify, as has been required since 2008. E-Verify electronically compares information contained on Form I-9, Employment Eligibility Verification, with records contained in government databases to help employers confirm the identity and employment eligibility of newly-hired employees. DHS includes this requirement because E-Verify is a well-established and important measure that complements other oversight elements in the rule, and because it represents an efficient means for employers to determine the employment eligibility of new hires, including students who have received STEM OPT extensions.

ii. Use of E-Verify Company ID Number

DHS adopts the regulation as proposed with regard to E-Verify, but has modified Form I-983, Training Plan for STEM OPT Students, so that it will not require the insertion of an employer's E-Verify Company Identification number (E-Verify ID number). DHS makes this change in response to comments that raised concerns regarding the potential for fraud that may arise from

requiring this number on a form accessible by other program participants, including students and DSOs.

iii. Employer Attestations

As noted in further detail below (*see* section IV.F. of this preamble, Training Plan for F-1 Nonimmigrants on a STEM OPT Extension), the rule requires the student and employer to complete Form I-983, Training Plan for STEM OPT Students. Given DHS' recognition of the need to protect U.S. workers from possible employer abuses of the STEM OPT extension, the Training Plan contains terms and conditions for employer participation aimed at providing such protection. For instance, under the rule, any employer wishing to hire a student participating in the STEM OPT extension must attest that, among other things: (1) The employer has sufficient resources and personnel available to provide appropriate training in connection with the specified opportunity; (2) the STEM OPT student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity assists the student in attaining his or her training goals. As described below, DHS has revised the second of these attestations in response to public comments. DHS believes that the revised language is clearer and better protects U.S. workers.

Finally, consistent with the proposed rule, the final rule requires that the terms and conditions of an employer's STEM practical training opportunity—including duties, hours and compensation—be commensurate with those provided to the employer's similarly situated U.S. workers. Work duties must be designed to assist the student with continued learning and be

set at a minimum of 20 hours per week. If the employer does not employ and has not recently employed more than two similarly situated U.S. workers, the employer must instead ensure that the terms and conditions of a STEM practical training opportunity are commensurate with those for similarly situated U.S. workers employed by other employers of analogous size and industry and in the same geographic area of employment. The term "similarly situated U.S. workers" includes U.S. workers performing similar duties and with similar educational backgrounds, employment experience, levels of responsibility, and skill sets as the STEM OPT student. The student's compensation must be reported on the Training Plan, and the student and employer will be responsible for reporting any change in compensation to help the Department monitor whether STEM OPT students are being compensated fairly. The employer must affirm that all attestations contained in the Training Plan are true and correct to the best of the employer's knowledge, information and belief.

2. Public Comments and Responses

i. Employer Enrollment in E-Verify Required

Comment. Many commenters expressed support for requiring employers of F-1 students with STEM OPT extensions to participate in E-Verify as proposed. Several commenters stated that the E-Verify requirement is an effective way to protect against employment of unauthorized individuals. They observed that E-Verify provides the best means available for employers to confirm employment eligibility of new hires and, in some cases, existing employees. Comments also

reported that E-Verify is easy to use and clearly lays out the consequences of violations, while helping avoid hiring abuses.

Some commenters noted that employers would be less likely to use E-Verify unless such use was required. Other commenters stated that the extra burden and expense placed on employers by the E-Verify requirement helps protect U.S. workers by providing an incentive for employers to hire U.S. citizens over international students. Other commenters criticized the E-Verify requirement on the grounds that it also created a burden for students by limiting where they could receive work-based training. Some commenters noted that employers are willing to incur E-Verify-related burdens because they believe that an F-1 student may be their only candidate for the specific job.

Response. DHS agrees with commenters that support the E-Verify enrollment requirement, including because E-Verify contains important protections for U.S. and other workers. Before an employer can participate in E-Verify, the employer must enter into a Memorandum of Understanding (MOU) with DHS. This MOU requires that employers follow required procedures in the E-Verify process to ensure maximum reliability and ease of use with the system, while preventing unauthorized disclosure of personal information and unlawful discriminatory practices based on national origin or citizenship status. In particular, the employer agrees not to use E-Verify for pre-employment screening of job applicants or in support of any unlawful employment practice.[104] The employer further agrees to comply with Title VII of the Civil Rights Act of 1964 and section 274B of the INA, 8

U.S.C. 1324b, by not discriminating unlawfully against any individual in hiring, firing, employment eligibility verification, or recruitment or referral practices because of his or her national origin or citizenship status, or by committing discriminatory documentary practices. Illegal practices can include selective verification, improper use of E-Verify, or discharging or refusing to hire employees because they appear or sound "foreign" or have received tentative nonconfirmations.

The MOU also makes clear that USCIS may suspend or terminate an employer's access to E-Verify if the employer violates Title VII or section 274B of the INA, 8 U.S.C. 1324b, fails to follow required verification procedures, or otherwise fails to comply with E-Verify requirements. Any employer who violates the immigration-related unfair employment practices provisions in section 274B of the INA could face civil penalties, including back pay awards. Employers who violate Title VII face potential back pay awards, as well as compensatory and punitive damages. Under the MOU, employers who violate either section 274B of the INA or Title VII may have their participation in E-Verify terminated. DHS may also immediately suspend or terminate the MOU, and thereby the employer's participation in E-Verify, if DHS or the Social Security Administration determines that the employer failed to comply with established E-Verify procedures or requirements.

DHS disagrees with comments asserting that E-Verify will impose significant burdens or costs on employers or students.[105] First, E-Verify does not require a fee for its use. Second, the E-Verify requirement

remains unchanged since it was first established in the 2008 IFR, and DHS is not aware of significant burdens or costs on employers that have participated in the STEM OPT extension program since that time. In fact, while in 2008 there were just over 88,000 employers enrolled in E-Verify, there are now more than 602,000 enrolled employers.[106] Third, E-Verify is fast and accurate, with 98.8 percent of employees automatically confirmed as authorized to work either instantly or within 24 hours.[107] Finally, E-Verify is one of the federal government's highest-rated services for customer satisfaction as measured by employer surveys,[108] and DHS continually looks for ways to improve and enhance the system.

Comment. Commenters also supported the E-Verify requirement because its increased use further maximizes the reliability and ease of use of the system, while preventing the unauthorized disclosure of personal information and unlawful discriminatory practices based on national origin or citizenship status. Many commenters stated that when using E-Verify pursuant to program requirements, an applicant's citizenship is less likely to be disclosed to employers, and E-Verify employers are more likely to provide the same job opportunities, wages, and benefits to employees. Some commenters stated that E-Verify helps ensure that employers will recruit applicants to meet their needs without negatively affecting the employment of U.S. workers. They added that these requirements thus ensure the integrity of the STEM OPT extension.[109]

Response. DHS agrees with comments supporting the E-Verify requirement, including because E-Verify

protects against the unauthorized disclosure of personal information. E-Verify has implemented an extensive set of technical, operational and physical security controls to ensure the confidentiality of an individual's information. Those controls include user-specific accounts and complex passwords that must be changed often to access the system; user accounts that are locked after several failed attempts to log on; active session timeouts within the E-Verify interface; data encryption during all data transmissions between the employer's workstation and the system; and procedures for reporting and responding to breaches of information. DHS continues to incorporate privacy principles and security measures into all E-Verify processes, and any changes to E-Verify will include the highest level of privacy protections possible.[110]

Comment. A number of commenters stated their belief that E-Verify's non-discrimination provisions will ensure that all employees will receive the same wages and benefits.

Response. DHS clarifies that the non-discrimination provisions in the E-Verify MOU prohibit only discrimination based on national origin or citizenship (or immigration) status in violation of section 274B of the INA, 8 U.S.C. 1324b, or Title VII. The language is not intended to ensure that all employees will receive the same wages and benefits, except where any differential is based on national origin status. DHS notes, however, that the STEM OPT extension program contains separate provisions to prevent adverse impacts on U.S. workers. Among other things, the Training Plan established by this rule requires employers to

attest to various wage and other protections for U.S. workers and STEM OPT students.

Comment. One commenter stated that employers and the academic community are not familiar with E-Verify and suggested that DHS promote and explain it to stakeholders.

Response. DHS agrees that it is important to promote and explain E-Verify to stakeholders, and the Department continues to focus on such outreach. Additionally, the USCIS Web site contains an informative portal (http://www.uscis.gov/e-verify) with a number of resources regarding E-Verify, including but not limited to E-Verify manuals and guides; various memoranda of understanding; E-Verify brochures, fliers and presentations (in English and various other languages); presentations specially designed for employers, workers, federal contractors, and state workforce agencies; and the E-Verify monthly newsletter.

Comment. One commenter suggested that DHS either apply the E-Verify participation requirement to the entire OPT program or waive it as a requirement for STEM OPT extensions.

Response. DHS disagrees with the commenter's recommendation that the E-Verify requirement either be applied to the entire OPT program or waived as a requirement for STEM OPT extensions. The focus of this rule is to amend regulations related to STEM OPT extensions. There are, of course, many cases in which DHS could condition receipt of a benefit on the use of E-Verify, but the Department has chosen to take a measured and incremental approach by thus far applying the E-Verify requirement to employers of STEM OPT workers. DHS notes that this approach

has so far been highly successful. DHS may consider requiring the use of E-Verify with respect to other benefits granted by the Department in future rulemakings.

Comment. Several commenters recommended eliminating the E-Verify requirement. These commenters cited several concerns, including that E-Verify may increase burdens and expenses on both employers and employees; unfairly limit job options and career opportunities for STEM OPT students, because many companies are not willing to participate in E-Verify; and create an unnecessary barrier to the hiring of qualified F-1 students. Some commenters stated that the E-Verify requirement is redundant for students in compliance with STEM OPT rules and instead simply works against the interest of those students.

Response. E-Verify is not new for employers of STEM OPT students. Since 2008, every employer that has employed F-1 students on STEM OPT extensions has been required to enroll the relevant hiring site or work location in E-Verify. Because E-Verify is fast and easy to use (as discussed above) and STEM OPT employers have experience with the system, DHS does not believe the requirement would be particularly burdensome to potential employers affected by this rule. Relatedly, DHS also disagrees that the E-Verify requirement will substantially change the volume of STEM OPT employers or unfairly limit job options for STEM OPT students.

Comment. One commenter provided anecdotal information suggesting that a specific Federal agency does not currently participate in E-Verify. According to that commenter, if a federal agency is unwilling to

register for E-Verify, "what hope is there that non-governmental employers will utilize the system?" Another commenter stated that companies with federal employment contracts do not have policies reflecting E-Verify's prohibitions against unlawful discriminatory practices based on national origin or citizenship status.

Response. DHS supports the premise that the Federal Government should lead by example, and notes that the Office of Management and Budget (OMB) requires all Executive Branch agencies to participate in E-Verify. The Federal Government also requires covered federal contractors to participate in E-Verify as a condition of federal contracting. Even if a federal contractor that uses E-Verify does not have its own policies reflecting E-Verify's prohibitions against unlawful discriminatory practices based on national origin or citizenship status, that federal contractor is bound to the same prohibitions, as articulated in the E-Verify Memorandum of Understanding, regarding violation of Title VII and the anti-discrimination provision of the INA (INA sec. 274B, 8 U.S.C. 1324b) applicable to all E-Verify users.

Comment. One commenter suggested that the E-Verify requirement should depend on the size of the employer's workforce or on the employer's specific industry.

Response. DHS disagrees with the commenter's recommended change because of the inequities such a change would introduce into E-Verify. Requiring all STEM OPT extension employers to enroll in E-Verify, without exception, supports a consistent and transparent program that treats all participants the same

and helps protect both STEM OPT students and U.S. workers. Further, E-Verify's robust public outreach materials and frequent technological enhancements reduce burdens on all employers, large and small. Finally, when E-Verify employers sign the required Memorandum of Understanding, they agree to train their users on proper employment verification procedures. This is in addition to the obligation to avoid unlawful discriminatory practices based on national origin or citizenship status. Waiving the E-Verify requirement for certain employers would thus undermine the safeguards of the rule.

Comment. Several commenters supported mandatory E-Verify participation for all employers, with resulting fines for any program violations, and recommended that DHS require all employers to use E-Verify. Another commenter requested more government regulation of E-Verify. Another commenter suggested additional regulation of E-Verify, but did not specify what such regulation would entail. Additionally, a commenter suggested that the E-Verify parameters should include "better screening [mechanisms] to weed out" participation by what the commenter described as dishonest consulting companies that exploit students.

Response. With respect to requiring all employers to use E-Verify, DHS notes both (1) that this request is outside the scope of this rulemaking and (2) that because participation requirements are set by federal statute, congressional action would be required to make any such changes. With respect to the other suggestions noted above, DHS notes that the E-Verify MOU already prescribes E-Verify enrollment and use,

and broadly prohibits unlawful or improper use of E-Verify. USCIS also maintains an E-Verify Hotline and a Monitoring and Compliance Division that investigates and responds to complaints regarding E-Verify-related exploitation. The Department does not agree that additional mechanisms are necessary, and to the extent that the comments are directed at the E-Verify program generally, they are outside the scope of this rulemaking.

Accordingly, DHS is finalizing the proposed E-Verify requirement without change. DHS invites employers and employees to learn more about E-Verify. Tutorials, guidance, and other informative resources are available at http://uscis.gov/e-verify. Information about employer obligations and employee rights under the anti-discrimination provision of the INA (INA sec. 274B, 8 U.S.C. 1324b) is available on the following Web site: www.justice.gov/crt/about/osc.

ii. Use of E-Verify Company ID Number

Comment. Several commenters recommended eliminating the requirement that the employer's E-Verify ID number be listed on Form I-983, Training Plan for STEM OPT Students, because having this information visible to the student and DSO could lead to fraudulent use of such numbers. According to two commenters, some employers currently refuse to provide their E-Verify ID number to students or universities due to fraud concerns and have adopted processes to avoid revealing this sensitive information, such as filing the students' STEM OPT extensions themselves.

One commenter cited anecdotal reports of E-Verify ID numbers being posted online and F-1 students

fraudulently using those numbers to apply for STEM OPT extensions. According to the commenter, there is no follow-up or investigation as to whether the student actually works for the employer whose number is listed on Form I-765, Application for Employment Authorization, so students can freely pass these numbers around, and have reportedly done so. The commenter also asked DHS to bolster E-Verify anti-fraud measures by allowing the employer to file the application instead of the prospective employee. Similarly, another commenter asked DHS to give employers a list of F-1 students who have used their E-Verify ID numbers as a security measure.

Response. DHS is concerned about the possible abuse of the E-Verify program and potential fraud from the unauthorized publication of E-Verify ID numbers. In addressing this issue, DHS had considered that employers often provide their E-Verify ID numbers to potential employees in order to apply for work authorization from USCIS by filing Applications for Employment Authorization.[111] In addition, some employers and universities make their E-Verify ID numbers available on the internet. For that reason, DHS believed that releasing such numbers to a limited group of students would not represent a significant fraud risk.

DHS understands, however, that some employers take significant steps to protect their E-Verify ID numbers from publication, including mailing Applications for Employment Authorization directly to USCIS on their employees' behalf in order to avoid revealing the number to such employees. Some employers believe that the unauthorized release or publication of

an employer's E-Verify ID number could result in significant fraud that might be difficult to redress. Accordingly, in response to these concerns, DHS has decided to remove the E-Verify ID number from the Training Plan for STEM OPT Students. DHS notes that it will continue to receive such employers' E-Verify ID numbers through the submission of Applications for Employment Authorization.

DHS declines to adopt the suggestion to change the current STEM OPT application process so that the employer (rather than the student) would be required to file the Application for Employment Authorization on the student's behalf. This change, in which the employer would effectively become the applicant for employment authorization, would represent a significant policy shift and could produce broad and unwanted repercussions. Among other things, such a change would largely and improperly exclude the STEM OPT student from the application process, and further make the student dependent on the employer for maintaining the student's status. DHS believes such a change to its longstanding policy would be disproportionate to the relatively few alleged cases of fraud. Finally, DHS declines to adopt the recommendation to provide employers with lists of F-1 students, due to privacy considerations and the administrative burdens related to issuing such lists.

iii. Non-Replacement Attestation

Comment. Several commenters voiced concern about the breadth of some of the language in the Employer Certification section (Section 4) of the proposed Mentoring and Training Plan, stating that such language

could create litigation risks or interfere with employers' business judgments. Specifically, several employers and business associations took issue with proposed certification 4(d), which would require the employer to attest that "the Student's practical training opportunity will not result in the termination, laying off, or furloughing of any full- or part-time, temporary or permanent U.S. workers."

Those commenters stated that the proposed attestation was overly broad and problematic. One commenter stated that this language could restrict the employer's ability to terminate a U.S. worker for cause. As an example, the commenter added that "if an employee's work performance was deficient enough to warrant termination for cause, but the employee's work group also had employees working pursuant to STEM OPT, one could argue that the termination could not proceed." Another commenter stated that "if an employee working pursuant to STEM OPT reported another employee for egregious misconduct, and the allegations were substantiated, an employer would be unable to proceed with a termination of the individual."

To alleviate these concerns, commenters alternatively requested that DHS entirely eliminate the attestation requirement, delete the word "terminate" from the attestation, or change the language to read as follows: "The employer is not providing the practical training opportunity for the purpose of and with the intent to directly terminate, lay off, or furlough, any full- or part-time, temporary or permanent U.S. workers." Additionally, a commenter recommended amending the proposed rule to include a "presumption of non-

violation for any employment decisions" that are supported by bona fide business reasons or reasons unrelated to replacing U.S. workers with STEM OPT students. Finally, another commenter proposed that DHS consult protections provided to U.S. workers pursuant to provisions in the H-1B regulations.

Response. DHS believes many of the recommendations described above would undermine the protections the attestation is meant to provide to the U.S. workers of participating employers. In this rulemaking, the Department has sought to balance the benefit that STEM OPT students derive from practical training opportunities; the benefit that the U.S. economy, U.S. employers, and U.S. institutions of higher education receive from the continued presence of STEM OPT students in the United States; and the protection of U.S. workers, including those employed by STEM OPT employers. The attestation related to U.S. employees is essential to achieving this balance, and the Department thus declines to eliminate it or to weaken its protections by introducing elements of intent or including a presumption of non-violation.

DHS, however, has made changes to the attestation in the final rule in response to comments expressing concern that the proposed attestation, including its reference to "terminating," could be understood to prohibit STEM OPT employers from terminating U.S. workers for cause. In instituting this policy, the Department intends that employers be prohibited from using STEM OPT students to replace full- or part-time, temporary or permanent U.S. workers. DHS has revised certification 4(d) on the Training Plan, and the associated regulatory text, to say exactly

that. *See* Section 4 of Form I-983, Training Plan for STEM OPT Students; 8 CFR 214.2(f)(10)(ii)(C)(10)(ii). This modification is meant to address employers' claims about potential litigation risks and interference with their business judgments. DHS also notes that the word "terminating" has been removed entirely from the attestation, as the Department believes its inclusion is unnecessary to make certain that STEM OPT extensions are not used as a mechanism to replace U.S. workers.

DHS further clarifies that hiring a STEM OPT student and signing certification 4(d) does not bar an employer from discharging an employee for cause, including inadequate performance or violation of workplace rules. DHS will look at the totality of the circumstances to assess compliance with the non-replacement certification. For example, evidence that an employer hired a STEM OPT student and at the same time discharged a U.S. worker who was employed in a different division, worked on materially different project assignments, or possessed substantially different skills, would tend to suggest that the U.S. worker was not replaced by the STEM OPT student. Conversely, evidence that an employer sought to obscure the nexus between a STEM OPT student's hire and the termination of a U.S. worker by delaying or otherwise manipulating the timing of the termination would tend to suggest that the U.S. worker was replaced by the STEM OPT student. In any event, the barred "replacement" of U.S. workers refers to the loss of existing or prior employment.

With respect to the comment suggesting that DHS consult the protections for U.S. workers found in the

H-1B statute, DHS notes that it considered those protections and other similar provisions in the INA. DHS relied on many of these provisions as informative guideposts for this rulemaking, but the Department was also required to weigh the specific and different goals of the STEM OPT extension program and other factors specific to this rulemaking. The Department believes it has found the right balance with revised certification 4(d). This revised certification makes the Department's policy clear and thus provides protection for U.S. workers while addressing the legitimate business concerns raised by commenters.

Comment. Some commenters requested that DHS amend certification 4(d) to further protect U.S. workers. These commenters asked that the certification: (1) More broadly prohibit an employer from employing a STEM OPT student when the employer has laid off any U.S. worker employed in the occupation and field of the intended practical training within the 120-day period immediately preceding the date the student is to begin his or her practical training with that employer; and (2) during the term of such practical training, require the employer to lay off any F-1 student before laying off any U.S. worker engaged in similar employment. The commenters further proposed that the relevant section of the proposed regulation be amended to prohibit an employer from providing practical training when there is a strike or lockout at any of the employer's worksites within the intended field of the OPT.

Response. DHS agrees that STEM OPT employment should be subject to strike or lockout protections. DHS notes, however, that current DHS regulations already

provide such protections with regard to the employment of all F-1 students, not just those on STEM OPT extensions. The Department's regulations at 8 CFR 214.2(f)(14) automatically suspend any employment authorization granted to an F-1 student when the Secretary of Labor or designee certifies to DHS that there is a strike or other labor dispute involving work stoppage in the student's occupation at his or her place of employment. That regulation will remain in effect.

DHS has also considered the suggestion to establish a timeframe, such as the 120-day period suggested by commenters, for prohibiting layoffs of U.S. workers related to the employment of STEM OPT students. DHS believes, however, that its approach in the final rule, which contains no such timeframe, provides reasonable protections for U.S. workers while also balancing the legitimate business needs expressed by employer commenters. Under the final rule, an employer cannot replace a U.S. worker with a STEM OPT student, regardless of the timeline. DHS therefore declines to implement new attestations on this subject at this time, but will remain attentive to the effects of the attestations and the aforementioned balance produced by this rule, and may consider revising or supplementing the employer attestations at a future date.

iv. Commensurate Compensation Attestation

Comment. DHS received a number of comments on the requirement that employers provide STEM OPT students with compensation commensurate with that provided to similarly situated U.S. workers. Some commenters supported the proposed "commensurate compensation" requirement, "applaud[ing] DHS's

adoption of a standard that draws upon real world practices that employers already utilize in their hiring practices." One commenter stated that the evidentiary requirements related to the commensurate compensation provision should not be so burdensome as to deter the participation of small employers or employers new to the OPT program.

Other commenters opposed the proposed requirement, suggesting that the proposal was unworkable because DHS had not defined the commensurate compensation standard in the proposed regulatory text. One commenter stated that the proposed rule lacked necessary guidance on how to ensure that compensation offered to STEM OPT students is commensurate with compensation levels offered to U.S. workers. Another commenter stated that the requirements for commensurate compensation were too stringent because STEM OPT should include students who are performing unpaid work or are awarded grants or nonmonetary remuneration. A significant number of comments, from universities and higher education associations, stated that STEM OPT students and U.S. students perform research for colleges and universities under a variety of grant and stipend programs without necessarily receiving taxable wages, and requested clarification that such participation was still contemplated for STEM OPT participants. In contrast, another commenter urged that students doing unpaid work, or receiving only a "stipend," be explicitly ineligible for OPT status. Another commenter stated that the proposed additional protections for American workers would prove to be "meaningless" due to a variety of purported deficiencies in the proposed

regulation, including participation by employers who hire only foreign workers. One commenter recommended that employers be allowed to factor in the effect of training time on productivity when setting compensation. One commenter suggested that employers be required to pay the Level Three wage from the Online Wage Library provided by the Department of Labor's Office of Foreign Labor Certification.

Response. The final rule includes specific requirements to address the potential for adverse impact on U.S. workers. For instance, any employer wishing to hire a student on a STEM OPT extension would, as part of the newly required Training Plan, be required to sign a sworn attestation affirming that, among other things: (1) The employer has sufficient resources and personnel available and is prepared to provide appropriate training in connection with the specified opportunity; (2) the student will not replace a full- or part-time, temporary or permanent U.S. worker; and (3) the opportunity assists the student in attaining his or her training objectives. Moreover, the final rule requires that the terms and conditions of an employer's STEM practical training opportunity—including duties, hours and compensation—be commensurate with those provided to the employer's similarly situated U.S. workers.

Along the same lines, work duties must be designed to assist the student with continued learning and satisfy existing ICE guidelines for work hours when participating in post-completion OPT. To help gauge compliance, employers are required to provide DHS with student compensation rate information, which will help the Department monitor whether STEM OPT

students are being compensated fairly. Additionally, the rule authorizes a recurrent evaluation process and mandates notification of material changes to the Training Plan, including material changes to STEM OPT student compensation, to allow ICE to monitor student progress during the OPT period. The evaluations will ensure continuous focus on the student's development throughout the student's training period. Finally, the rule clarifies the Department's authority to conduct site visits to ensure compliance with the above requirements.

The above provisions protect against adverse consequences on the U.S. labor market, including consequences that may result from exploitation of STEM OPT students. DHS believes that the assurances regarding the practical training opportunity, the attestation of non-replacement of existing employees, the requirement for commensurate compensation, and other related requirements, provide adequate safeguards to protect U.S. worker interests. DHS expects this will still be the case even if a participating employer employs many non-U.S. workers. If such an employer does not employ and has not recently employed more than two similarly situated U.S. workers in the area of employment, the employer nevertheless remains obligated to attest that the terms and conditions of a STEM practical training opportunity are commensurate with the terms and conditions of employment for other similarly situated U.S. workers in the area of employment.

DHS expects that STEM OPT students will be engaging in productive employment. DHS also expects the commensurate compensation of similarly situated

U.S. workers would account for any effects of training time on productivity. While it is required for participating students and employers to explain the goals, objectives, supervision, and evaluation of a STEM OPT period, the fact that the employer is providing a work-based learning opportunity is not a sufficient reason to reduce the F-1 student's compensation. Furthermore, such a discounted compensation also runs the risk of having a negative impact on similarly situated U.S. workers. A commenter's suggestion to this effect is thus rejected.

DHS also disagrees with comments stating that the proposed rule lacked adequate guidance on the issue of commensurate pay and suggesting further definition in the regulatory text. These commenters did not explain which aspects of DHS's guidance on this topic were ambiguous; nevertheless, DHS now further clarifies the commensurate compensation requirement. Commensurate compensation refers to direct compensation provided to the student (pre-tax compensation). This compensation must be commensurate to that provided to similarly situated U.S. workers. "Similarly situated U.S. workers" means those U.S. workers who perform similar duties and have similar educational backgrounds, experience, levels of responsibility, and skill sets. The employer must review how it compensates such U.S. workers and compensate STEM OPT students in a reasonably equivalent manner. If an employer, for example, hires recent graduates for certain positions, the compensation provided to a STEM OPT student in such a position must be in accordance with the same system and scale as that provided to such similarly situated U.S. workers.

If the employer, however, does not employ or has not recently employed at least two other U.S. workers who are performing similar duties, then the employer is obligated to obtain information about other employers offering similar employment in the same geographic area. Helpful information can be obtained, for example, from the Department of Labor, which provides wage information based on data from the Occupational Employment Statistics survey through its Office of Foreign Labor Certification's Online Wage Library, available at http://flcdatacenter.com/OesWizardStart.aspx. Whether relying on information from the Department of Labor, wage surveys, or other reasonable sources, the wage data must relate to the same area of employment as the work location of the STEM OPT student and the same occupation. In general, it is DHS's expectation that employers have legitimate, market-based reasons for setting compensation levels. This rule requires that an employer hiring a STEM OPT student be prepared to explain those reasons and show that such F-1 students receive compensation reasonably equivalent to similarly situated U.S. workers.

In addition to these detailed requirements, DHS noted in the preamble of the proposed rule, and reiterates here, that DHS interprets the compensation element to encompass wages and other forms of remuneration, including housing, stipends, or other provisions typically provided to employees. While positions without compensation may not form the basis of a STEM OPT extension, the compensation may include items beyond wages so long as total compensation is commensurate with that typically provided to U.S.

workers whose skills, experience, and duties would otherwise render them similarly situated. Any deductions from salary must be consistent with the Department of Labor's Fair Labor Standards Act regulations at 29 CFR part 531 regarding reasonable deductions from workers' pay. The combination of all the information here provides a sufficient basis for compliance with the rule's commensurate compensation provision.

In short, DHS believes that the protections provided in this rule are sufficient, but the Department will continue to monitor the program and may consider revising or supplementing program requirements at a future date.

Comment. A commenter stated that the proposed rule lacks an enforcement mechanism to ensure compliance with the provisions included to protect American workers. The commenter stated that the proposed rule provides no process to report and adjudicate suspected violations of the protections for U.S. workers, and fails to include any penalties for doing so. The commenter also stated that if the STEM OPT student is "contract[ed] out" by the employer, DHS's ability to enforce the attestations will be significantly circumscribed.

Response. There are a number of enforcement and oversight mechanisms built into the rule that will facilitate compliance, as detailed above (see section IV.B. of this preamble). These include reporting requirements, site visits, periodic evaluation of a student's training, and required notification of any material changes to or deviations from the Training Plan. In addition, individuals may contact the Student and

Exchange Visitor Program at ICE by following the instructions at https://www.ice.gov/sevis/contact. Finally, violations of the regulation may also be reported through the form accessible at https://www.ice.gov/webform/hsi-tip-form. For the reasons previously stated, DHS believes that the new protections for U.S. workers in this rule—which are unprecedented in the 70-year history of the overall OPT program—provide a reasonable and sufficient safeguard.

Comment. The same commenter wrote that the rule should include more protections for U.S. workers; the commenter suggested that the rule should (1) require an approval process for employers similar to the process for approving schools that admit nonimmigrant students and (2) explain what constitutes sufficient resources and personnel in the employer attestation statement. Finally, the commenter suggested that the rule should also address discriminatory hiring advertisements that seek to recruit only OPT students, including by providing a remedy for Americans who are replaced by OPT students.

Response. For the reasons previously stated, DHS believes that the protections for U.S. workers in this rule provide a reasonable and sufficient safeguard. With respect to the specific alternatives proposed by the commenter: Item (1) would be extremely burdensome and resource intensive for DHS, and item (2) requests clarification for language that DHS believes is either self-explanatory or sufficiently addressed elsewhere in this preamble. Of course, DHS stands ready to provide further clarification through guidance as needed.

Finally, DHS does not anticipate that the application of this rule will result in discriminatory hiring. The rule in no way requires or encourages employers to target students based on national origin or citizenship, particularly through any type of hiring advertisements. Rather, the rule protects against employment discrimination by requiring that an employer make and adhere to an assurance that the student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker. Furthermore, existing federal and state employment discrimination laws and regulations provide appropriate authorities for addressing and remedying employment discrimination. In particular, employers that generally prefer to hire F-1 students over U.S. workers (including U.S. citizens), or that post job advertisements expressing a preference for F-1 students over U.S. workers, may violate section 274B of the INA, 8 U.S.C. 1324b, which is enforced by the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices. This anti-discrimination provision provides for civil penalties and backpay, among other remedies, for employers found to have violated the law. Such authorities clearly fall within certification 4(e) on the Form I-983, Training Plan for STEM OPT Students, which establishes a commitment by the employer that the training conducted under STEM OPT "complies with all applicable Federal and State requirements relating to employment."

Comment. Some commenters stated that because STEM OPT participants are students, they would not

be comparable to similarly situated U.S. workers, who are not students.

Response. DHS disagrees that STEM OPT students cannot be compared to other members of the labor force. Conditions experienced by an F-1 student participating in the STEM OPT extension should be the same as those experienced by U.S. workers performing similar duties and with similar educational backgrounds, employment experience, levels of responsibility, and skill sets. If a university, for example, hires individuals who have just completed courses of study for certain positions, the university cannot use a different scale or system to determine the compensation of a STEM OPT student. The STEM OPT student must be compensated commensurate with the compensation provided to such similarly situated U.S. workers.

Comment. One commenter suggested that employers should be required to provide compensation figures for all of their employees, not just STEM OPT employees.

Response. The employer is required to identify the compensation provided to each STEM OPT student, as part of the Training Plan the employer signs. DHS also reserves the right to ask employers to provide the evidence they used in assessing the compensation of similarly situated U.S. workers. This may include compensation figures for similarly situated employees who are U.S. workers. Requiring employers to report compensation figures for all U.S. worker employees, however, would not necessarily provide meaningful data. STEM OPT students will use their knowledge and skills to perform duties and assume

responsibilities that are not similar to those, for instance, of corporate management or mailroom employees.

iv. Other Comments on Attestations and Restrictions

Comment. DHS received a number of comments suggesting that additional attestations or other restrictions, including recruitment requirements, be added to further protect U.S. workers. A number of commenters stated that companies should be unable to hire anyone but a U.S. citizen until U.S. citizens are all employed, whether in on-the-job training positions or regular staff positions. One commenter stated that "[o]nly when a position cannot be filled by a U.S. worker should an international worker be considered; this is especially true for entry level positions since many international students have the benefit of experience or additional education in their home country before beginning their OPT qualifying degree program and are not truly `entry level' employees." One commenter proposed additional provisions to safeguard U.S. workers, including requiring companies to look for U.S. citizen workers before hiring international students and having the U.S. Department of Labor fine companies that did not comply with the proposed labor protections. Another comment referenced opinions of a professor that STEM OPT contributes to employers hiring younger workers who may replace more-experienced U.S. workers, and suggested that recruitment requirements favoring experienced U.S. workers be added to the rule.

One commenter also suggested that DHS amend the rule consistent with section 212(a)(5)(A) of the INA, 8 U.S.C. 1182(a)(5)(A), which designates as inadmissible any foreign national "seeking to enter the United States for the purpose of performing skilled or unskilled labor" absent a certification from the Department of Labor that such employment will not adversely affect similarly employed U.S. workers. According to the commenter, this provision required DHS to include a recruitment requirement for STEM OPT employers and a role for the Department of Labor. Some commenters similarly stated that the Department of Labor should review all employer submissions with respect to hours and wages. Another commenter suggested that DHS add a labor condition application requirement and petition process similar to those used for seeking H-1B visas.

Response. DHS carefully considered the suggestions to include recruitment requirements in the STEM OPT extension program but has determined not to include such requirements at this time. DHS notes that it has implemented a number of new protections for U.S. workers and STEM OPT students in this rule, including the requirement to pay commensurate compensation, the prohibition against replacing U.S. workers, various reporting requirements, and clarifying the agency's authority to conduct site visits. Balanced within the broader goals of this rule, DHS has determined that these protections are sufficient. The Department, however, will continue to evaluate these protections and may choose to include new attestations or other requirements in future rulemakings.

With regard to the suggestion that DHS is not in compliance with section 212(a)(5) of the INA, this provision is limited, by definition, to certain individuals seeking permanent immigrant status. *See* INA sec. 212(a)(5)(D), 8 U.S.C. 1182(a)(5)(D). The provision does not apply to students in F-1 nonimmigrant status or to any other nonimmigrant seeking employment in the United States.

With regard to suggestions to provide a greater role for the Department of Labor, DHS appreciates that the Department of Labor's long experience with foreign labor certification might assist DHS in its ongoing administration of the STEM OPT extension. Accordingly, where it may prove valuable and as appropriate, DHS may consult with the Department of Labor to benefit from that agency's expertise.

E. STEM OPT Extension Validity Period

1. Description of Final Rule and Changes from NPRM

This final rule sets the duration of the STEM OPT extension at 24 months. Following seven years of experience with the 17-month STEM OPT extension implemented in the 2008 IFR, DHS re-evaluated the length of the extension, primarily in light of the educational benefits such training provides to F-1 students and the benefits such students provide to the U.S. economy and other national interests. Consistent with the proposed rule, this final rule increases the STEM OPT extension period to 24 months for students meeting the qualifying requirements. The 24-month extension, when combined with the 12 months of initial post-

completion OPT, allows qualifying STEM students up to 36 months of practical training.

Also consistent with the proposed rule, the final rule provides, for students who subsequently attain another STEM degree at a higher educational level, the ability to participate in an additional 24-month extension of any post-completion OPT based upon that second STEM degree. In particular, the rule would allow a student who had completed a STEM OPT extension pursuant to previous study in the United States and who subsequently obtained another qualifying degree at a higher degree level (or has a qualifying prior degree, as discussed in more detail below), to qualify for a second 24-month STEM OPT extension upon the expiration of the general period of OPT based on that additional degree.

This aspect of the rule is finalized as proposed.

2. Public Comments and Responses

i. Length of STEM OPT Extension Period

Comment. Many commenters expressed support for the proposed 24-month STEM OPT extension period. One commenter stated that this length, in combination with the 12-month post-completion OPT period, aligns well with the typical training period for doctoral students, as well as the three-year grants often provided by the NSF to such students. A commenter commended the three-year total insofar as it "mirrors a cycle of research and training that is more in line with real-world, practical applications." Another commenter, who self-identified as an F-1 student in Electrical Engineering, suggested that the 24-month period for a STEM OPT extension would dovetail with

many research and development projects and was an appropriate time period because it would further encourage employers to allow STEM OPT students to gain practical experience related to their fields of study. The student explained that a summer internship on a power generation project could lead to a post-completion training opportunity with the same company if the STEM OPT extension was finalized for a 24-month period.

Another commenter stated that "most development projects are done on a yearly basis," and that by lengthening the STEM OPT extension period to 24 months, students would be eligible to participate in STEM OPT for multiple project cycles. One commenter welcomed the proposed 24-month extension because it provided "added flexibility" for workforce planning needs. That commenter explained that this change could improve innovation and development of new products and services, and it could help STEM students gain necessary experience for their own career growth.

A commenter added that the extension period would allow students to gain more "hands-on practical experience" by working on new products and initiatives that are more complex and that have a longer development cycle. One commenter suggested that the 24-month extension would greatly benefit research activities. This commenter opined that such extensions would help students by providing a period of stay consistent with the research needs in the commenter's field, which would also benefit the commenter's future job prospects in the commenter's home country.

Some commenters recommended a longer STEM OPT extension, most commonly 36 months, thus increasing practical training to a total of 48 months for STEM students. Other commenters suggested a total STEM OPT period as long as six years. Some commenters sought longer extensions so as to allow students additional attempts at applying for and obtaining H-1B visas.

Response. Currently, DHS views a 24-month extension as being sufficient to attract international STEM students to study in the United States, and to offer a significant opportunity for such students to develop their knowledge and skills through practical application. Moreover, as stated elsewhere, the 24-month period—in combination with the 12-month post-completion OPT period—is based on the complexity and typical duration of research, development, testing, and other projects commonly undertaken in STEM fields. Such projects frequently require applications for grants and fellowships, grant money management, focused research, and publications. As such, they usually require several years to complete. For instance, NSF typically funds projects through grants that last for up to three years.[112] As the NSF is the major source of federal funding for grants and projects in many STEM fields, including mathematics and computer science, DHS believes the standard duration of an NSF grant served as a reasonable benchmark for determining the maximum duration of OPT for STEM students. DHS reiterates that the focus of this rule is to enhance educational objectives, not to allow certain graduates more opportunities to apply for or obtain H-1B visas.

Comment. Some commenters viewed the 24-month extension as too lengthy, stating that a promising individual does not need an additional 24 months to prove his or her worth in a position. One comment quoted a university professor as stating that "[i]t's an over-reach to claim that someone who completes a master's degree in as little as 12 months needs three years interning—at low or no pay in many cases—to get further training." The commenter stated that few STEM OPT graduates will work on an NSF grant-funded project and that "[v]irtually all of the STEM graduates will work in the private sector on applied projects and tasks where lengths are typically 6 months or less." The commenter did not provide a basis for these factual assertions.

Response. The purpose of the 24-month extended practical training period is to provide the student an opportunity to receive work-based guided learning and generally enhance the academic benefit provided by STEM OPT extensions. The purpose is not to have the student prove his or her worth. DHS disagrees with the implication that the extension will not effectively enhance and supplement the individual's study through training. Consistent with many comments received from higher education associations and universities, DHS believes that allowing students an additional two years to receive training in their field of study would significantly enhance the knowledge and skills such students obtained in the academic setting, benefitting the students, U.S. educational institutions, and U.S. national interests.

Moreover, while DHS agrees it is possible that some STEM OPT students may not "need" the extension,

DHS expects that many qualifying students (including master's students) will receive significant educational benefits from the extension. Based on the public comments received, DHS expects that some students in some fields and degree programs in fact would benefit from more than three years of practical training. DHS concludes, however, that conditioning the period of employment authorization on case-by-case demonstrations of need would significantly increase burdens on the Department and potentially yield inefficient and inconsistent adjudications. DHS also disagrees with the notion that the STEM OPT extension allows internships at little or no pay; this rule specifically prohibits that kind of activity. Based on the above, DHS considers 24-month STEM OPT extensions, combined with the other features of this rule, sufficient to serve the purpose of this rule while appropriately protecting U.S. worker interests.

Comment. Some commenters stated that DHS did not base the proposed 24-month duration on sufficient information. One commenter stated that his first post-college software development project took one year, and that "[t]he average time a new graduate stays at a first job is only 18 months." The commenter did not cite the source of this information or state whether the 18-month figure applies to STEM graduates only.

Response. The anecdotal information provided by the commenter about the commenter's first software development project contradicts many other comments in the record stating that the proposed extension length was consistent with their experience in STEM fields generally. The commenter's general statement about the average time a graduate stays at

a first job is unsupported; DHS has no basis to determine whether this figure relates to STEM students specifically, or what the relationship might be between this figure and the appropriate period of time for practical training.

Comment. Several commenters suggested differentiating STEM OPT extension periods by grade or degree level. One commenter recommended that doctoral students should obtain longer OPT periods than others.

Response. DHS has decided to extend OPT periods based on field of study—specifically, for students completing requirements for their degrees that are in STEM fields—rather than based upon education level. As noted above, this rule recognizes the need to strengthen the existing STEM OPT extension, in significant part, to enhance the integrity and educational benefit of the program in order to help maintain the nation's economic, scientific, and technological competitiveness. Additionally, a primary basis for extending OPT to 24 months for STEM students is, as stated above, the complexity and typical duration of research, development, testing, and other projects commonly undertaken in STEM fields. This policy is also consistent with DHS practice, which has traditionally not extended the length of the OPT period based upon level of degree. For all these reasons, DHS declines to incorporate the commenter's request to extend the validity period of the extension based upon degree level.

Comment. A commenter suggested a total post-completion OPT period of three to four months. The commenter stated that a shorter OPT period was necessary to prevent wages from declining and to avoid "pit[ting] foreign students against [U.S.-based

workers] in [the] job market." Another commenter stated that "[p]erhaps if the program is short enough, employers will treat it as mutually beneficial training rather than a more long-term employment prospect."

Response. To the extent the commenters seek a change in the overall OPT program, the comment is outside the scope of the rulemaking. And for the reasons stated above, DHS has determined that an OPT extension of three to four months would be insufficient for students in the STEM fields to further the objectives of their courses of study by gaining knowledge and skills through on-the-job training. Additionally, this rule includes safeguards for the interests of U.S. workers.

ii. Availability of a Second STEM OPT Extension

Comment. One commenter requested that DHS provide further explanation as to "why a foreign student would need a *second* 2-year extension period after receiving an advanced STEM degree, when the student has already enjoyed a full 3 years of OPT after the initial STEM degree." The commenter stated that, at a minimum, DHS should require a student who seeks a second STEM OPT extension to show that the advanced degree is in a field completely different from the undergraduate degree field. A commenter similarly requested that DHS limit the extension to once per lifetime, stating that the increased duration "has the potential to blur the line between a student visa and an employment visa."

Response. DHS disagrees with the commenter's suggestion that a second two-year STEM OPT extension be contingent upon obtaining an advanced degree in a completely different field. Such a requirement could

stifle a student's effort to specialize and build substantial expertise in a selected field of interest, whereas affording a second two-year STEM OPT extension could encourage the student to invest further in his or her education to develop greater expertise or specialization within the STEM field. In addition, an enormous range of practical training opportunities may exist within a given field. For example, a student could initially graduate with a bachelor's degree in microbiology, physics, or engineering and conduct academic research during the first STEM OPT extension. Then, the student could return to school to obtain a masters or doctoral degree in the same field and use a second STEM OPT extension to obtain practical training in a more specialized or industrial capacity. Allowing only one lifetime STEM OPT extension may unnecessarily disincentivize specialization in these important and innovative fields.

iii. Other Comments Related to Multiple Extensions

Comment. One commenter sought clarification on whether the proposed rule would allow a student to obtain two consecutive STEM OPT extensions, with one directly following the other. Another commenter stated that a footnote in the preamble to the proposed regulation suggested that an international student who earns successive qualifying STEM degrees "will be unable to link this extension with his or her first extension." The commenter recommended that DHS clarify that an international student who qualifies for two OPT extensions may complete them without any

disruption in his or her practical training, provided all other requirements are met.

Response. DHS clarifies that the final rule, as with the proposed rule, does not allow students to obtain back-to-back STEM OPT extensions. A STEM OPT extension can only be granted as an extension of a regular OPT period, and not as a freestanding period of practical training. A student who has already participated in a STEM OPT extension would need to engage in a new course of study and subsequently complete a new initial post-completion practical training period before applying for a second STEM OPT extension based on a new STEM degree or a previously obtained degree (other than a degree that had already been the basis for a STEM OPT extension). The new or previously obtained STEM degree would need to be at a higher level than the STEM degree that formed the basis of the first STEM OPT extension. For program integrity reasons, DHS believes that it would be inappropriate to allow a student to obtain two consecutive STEM OPT extensions without an intervening degree and period of post-completion OPT.

Comment. Some commenters recommended that DHS consider allowing a third extension for students, thereby allowing one grant per higher education degree level (*i.e.,* bachelor's, master's, and Ph.D.). One such commenter noted that "[l]imiting the number of lifetime grants to two STEM periods would negatively impact Ph.D. graduates who do not already have an H-1B or qualify for another classification of employment authorization."

Response. More often than not, nonimmigrant students do not take extended breaks after graduating

from a master's program before pursuing a doctoral degree.[113] For that reason, it would be rare for a Ph.D. student to use one STEM OPT extension for the master's portion of the degree, and another STEM OPT extension for the Ph.D. portion of the degree. Most doctoral degrees are combined into a single program which grants both master's degrees and doctoral degrees. DHS believes that the two extensions provided by this rule are consistent with typical education patterns and sufficient to provide the educational, economic, and cultural benefits intended by the rule.

Comment. Commenters requested that a student be allowed multiple extensions for multiple degrees earned at the same educational level.

Response. DHS has considered these comments. Longstanding administration of the F-1 visa classification and the OPT program, see 8 CFR 214.2(f)(10), has required students to move to higher education levels before qualifying for additional periods of OPT, so that practical experience is more likely to be progressive in quality and scope. DHS has determined that limiting additional periods of OPT, including a second STEM OPT extension, to a new educational level continues to be a legitimate construct to protect program integrity and better ensure work-based learning for F-1 students is progressive.

This higher degree requirement has long attached to 12-month post-completion OPT. Because 24-month STEM OPT extensions only are available to individuals completing their 12-month post-completion OPT period, individuals by definition can only obtain a STEM OPT extension after completing a higher

education level. The policy in this final rule merely recognizes that longstanding policy.

F. Training Plan for F-1 Nonimmigrants on a STEM OPT Extension

1. Description of Final Rule and Changes from NPRM

Central to the STEM OPT extension is a new training plan requirement to formalize the relationship between the F-1 student's on-the-job experience and the student's field of study and academic learning. The rule requires the submission of Form I-983, Training Plan for STEM OPT Students (Training Plan), jointly executed by the F-1 student and the employer, but permits an employer to utilize certain training programs already in place. The proposed rule included this provision; DHS has retained the provision in the final rule, with changes and clarifications in response to public comments. We summarize these provisions and changes below.

i. General Training Plan Requirement and Submission Requirements

The rule requires a formal training program for STEM OPT students in order to enhance and better ensure the educational benefit of STEM OPT extensions. The employer must agree to take responsibility for the student's training and skill enhancement related to the student's field of academic study. The student must prepare a formalized Training Plan with the employer and submit the plan to the DSO before the DSO may recommend a STEM OPT extension in the student's SEVIS record. If the student intends to request an

extension based on a previously-obtained STEM degree, the plan must be submitted to the institution that provided the student's most recent degree (*i.e.,* the institution whose official is certifying, based on SEVIS or official transcripts, that a prior STEM degree enables the student to continue his or her eligibility for practical training through a STEM OPT extension).

As noted in the proposed rule, DHS expects to incorporate the submission of the Training Plan into SEVIS at a later date. Until that time DHS may require the submission of the Training Plan to ICE or USCIS when the student seeks certain benefits from USCIS, such as when the student files an Application for Employment Authorization during a STEM OPT extension. Under 8 CFR 103.2(b)(8)(iii), for example, USCIS may request additional evidence of eligibility for a benefit if the evidence submitted in support of an application does not establish eligibility. Accordingly, USCIS may request a copy of the Training Plan, in addition to other documentation that may be in the possession of the student, the employer, or the student's DSO.

DSOs may not recommend a student for a STEM OPT extension if (1) the employer has not provided the attestations for that student required by the rule or (2) the Training Plan does not otherwise reflect compliance with the relevant reporting, evaluation and other requirements of the rule. DHS may deny STEM OPT extensions with employers that the Department determines have failed to comply with the regulatory requirements, including the required attestations. As noted above, ICE may investigate an employer's

compliance with these attestations, based on a complaint or otherwise, consistent with the employer site-visit provisions of the rule.

As compared to the proposed rule, and in response to public comments received, DHS has made two changes to the general training plan requirement. First, DHS modified the regulatory text and Training Plan form to clarify that employers may use their existing training programs for STEM OPT students, so long as the existing training program meets this rule's requirements. Second, DHS has modified the form to focus on training and has thus removed the word "mentoring" from the form. The information collection instrument for this plan is now titled "Training Plan for STEM OPT Students," and not "STEM OPT Mentoring and Training Plan" as DHS had originally proposed.[114]

ii. Standard of Review for Training Plan

Under this final rule, once the student and the employer complete and sign the Training Plan, the student must submit the plan to the DSO. DSOs must review the Training Plan to ensure that it is completed and signed, and that it addresses all program requirements. USCIS maintains the discretion to request and review all documentation for eligibility concerns. A number of commenters requested additional information about the standards under which the DSO and DHS will review Training Plans. DHS clarifies the standard below.

iii. Form Fields, Form Number, Form Instructions

A number of commenters provided specific suggestions regarding the proposed form and instructions. For instance, commenters recommended that DHS relabel certain fields, use a different form number than the Form I-910 that DHS had initially proposed, and otherwise improve the form. DHS has made a number of changes in response to these comments, including relabeling certain fields and changing the form number. DHS explains these changes below.

iv. Training Plan Obligations and Non-Discrimination Requirements

A number of commenters stated or implied that U.S. employers do *not* have training programs, or related policies, and that any requirement that such programs be offered to F-1 students would thus benefit such students and not U.S. workers. Others stated that the program was intended to benefit students from particular countries or backgrounds, to the disadvantage of others. Some of these commenters raised concerns about various non-discrimination laws that they believed would be violated as a result of the training plan requirements. DHS carefully considered these concerns, and we summarize the comments and DHS's response below.

2. Public Comments and Responses

i. General Training Plan Requirement and Submission Requirements

DHS received a number of comments raising general concerns with the proposed Mentoring and Training

Plan, as well as related requirements. Such comments concerned the timelines proposed for training plan submission and review, as well as requirements related to reporting changes of employer.

Comment. DHS received many comments related to the training programs and policies that many employers already have in place. These comments expressed a range of positions, from offering strong support for the proposed Mentoring and Training Plan to suggesting more flexible training plan requirements to suggesting the elimination of training plan requirements altogether. Some commenters stated that the requirements for the proposed Mentoring and Training Plan were burdensome and unrealistic, that the proposed rule contained confusing references to the F-1 student's role in "the training program," and that the rule contained complex training requirements that seemed unrelated to the anticipated experiences of F-1 students seeking a STEM OPT extension. Some commenters were concerned that small and medium-sized businesses may not have the resources to dedicate to fulfilling the proposed training plan requirements. In addition, some stated that these requirements could deter both school officials and employers from authorizing and participating in the STEM OPT extension program. One commenter stated that the proposed requirements were not mandated by the court decision in *Washington Alliance*. The commenter stated that the court decision only compels DHS to allow for notice-and-comment on the STEM OPT extension itself, and "does not compel DHS to adopt new and more stringent requirements like the [Training Plan]."

Many commenters supported the requirement of a proposed Mentoring and Training Plan but requested the ability to utilize training programs and associated policies already in place in many businesses. For example, one commenter stated that the requirement "validates DHS's efforts to preserve the academic component inherent in STEM OPT" but recommended that "DHS create a flexible framework that allows these controls to exist within the parameters of an employer's existing Human Resources policies." Another commenter noted its broad experience in this area, stating that as a large employer, it "has achieved widespread recognition for the steps that it takes to develop and train employees." The commenter added that in 2014, it "was inducted into the Training `Top 10 Hall of Fame' and was ranked seventh for learning and development by the Association for Talent Development." As such, the commenter stated that it should be able to utilize its existing training policies.

Another commenter stated that its STEM OPT student trainees already participate in "company training programs and develop ongoing mentoring relationships with senior team members in the natural course of employment." This commenter proposed that DHS provide more flexibility to employers by allowing them to meet the training plan requirements "by providing . . . any documentation evidencing [a current training program] that is currently operated by the company" and amending the proposed Mentoring and Training Plan to only ask for general objectives at the beginning of practical training.

Response. DHS believes that the burdens that students and employers may experience in seeking to

comply with training plan requirements are outweighed by the benefits the STEM OPT extension will afford to students, employers, schools, and the U.S. economy as a whole. The Training Plan will help ensure the integrity of the program by holding employers and students jointly responsible for monitoring the students' progress and continued learning, while also better protecting U.S. workers.

DHS recognizes that many employers have existing training programs and related policies that enhance the learning and capabilities of their employees. DHS does not intend to require duplicative training programs or to necessarily require the creation of new programs or policies solely for STEM OPT students. Nor does DHS intend to require training elements that are unnecessary or overly burdensome for F-1 students seeking to engage in work-based learning. However, employer-specific training programs and policies may not always align with the rule's primary policy goals. For example, some businesses may focus more on managing a workload or maximizing individual output, whereas DHS's primary concern is the student's continued learning and the relationship between the work-based learning experience and the student's studies.

Accordingly, DHS clarifies that employers may rely on an existing training program or policy to meet certain training plan requirements under this rule, so long as the existing training program or policy meets certain specifications. In addition, DHS has modified the Training Plan to make it easier for employers to refer to existing training programs when completing the Training Plan. For example, instead of requiring

specific information about the individual supervisor's qualifications to provide supervision or training, the final Training Plan prompts the employer to explain how it provides oversight and supervision of individuals in the F-1 student's position. DHS also revised the Training Plan to replace the reference to a student's supervisor with a reference to the "Official Representing the Employer." Finally, DHS also modified the regulatory text to clarify that for companies that have a training program or policy in place that controls performance evaluation and supervision, such a program or policy, if described with specificity, may suffice.

DHS expects that in many cases, employers will find that existing training programs align well with the fields on the final Training Plan. For instance, it should be straightforward for employers with existing programs to describe what qualifications the employer requires of its trainers or supervisors, and how the employer will measure an employee's training progress. DHS emphasizes, however, that most fields in the Training Plan must be customized for the individual student. For instance, every Training Plan must describe the direct relationship between the STEM OPT opportunity and the student's qualifying STEM degree, as well as the relationship between the STEM OPT opportunity and the student's goals and objectives for work-based learning.

In addition, the Training Plan will document essential facts, including student and employer information, qualifying degrees, student and employer certifications, and program evaluations. This data is important to DHS for tracking students as well as for evaluating compliance with STEM OPT extension

regulations. DHS is concerned that an employer's existing training program would not normally contain this information. DHS believes these portions of the Training Plan should take a relatively short period of time to complete.

Comment. Several commenters expressed concern that the proposed Mentoring and Training Plan would reduce flexibility within the STEM OPT extension program, and some of these commenters proposed alternatives to address these concerns. Some commenters stated that requiring a training plan that ties the on-the-job training to the field of academic study would "limit [the participating F-1 student] to a specific department or reporting relationship." Commenters suggested that in order for STEM OPT extensions to reflect real world practices, STEM OPT students need to be able "to participate in project rotations that give them a broader skill set relating to their chosen academic field" and to accommodate already existing rotational programs and dynamic business environments. Some commenters stated that requiring employers to list specific information about a supervisor's qualifications and the evaluation process for STEM OPT students would add an unnecessary and burdensome level of bureaucracy to the application process.

Commenters also indicated that they want to maintain the ability to easily and quickly shift STEM OPT students among positions, projects, or departments, and thus recommended the elimination of new training plan filings following each project, position, or department rotation or change. For example, several commenters stated that even in currently existing, long-established in-house mentoring and training

programs, flexibility is built-in because there are many things that can change for an employer over a two-year period. As examples of events necessitating such flexibility, commenters cited gaining and losing customers to competitors and changing focus from one product line to another. A commenter stated that business plans are confidential in nature and employers may not be comfortable releasing detailed information to external sources, which will likely lead to the creation of training plans that are limited to generic, high level job descriptions. The commenter suggested instead that the employer provide a "job profile document detailing employee roles and responsibilities and an organization structure chart," which would be updated in light of "any significant changes in job profile or positions during the course of OPT."

Another commenter stated that instead of requiring a training plan, DHS should send periodic SEVIS reports to employers and require the employers to verify that they still employ the listed students. The commenter suggested that DHS also consider creating an employer portal to allow STEM OPT employers to verify and update information as required. Another commenter recommended that DHS replace the proposed written Mentoring and Training Plan with an additional employer attestation that training will be provided consistent with similarly situated new hires, with the proviso that the training will relate directly to the STEM field. One commenter recommended that all training plan requirements be better streamlined with already existing requirements contained on the Form I-20 Certificate of Eligibility.

One commenter stated that it was "impractical" to impose the proposed Mentoring and Training Plan requirements on "more seasoned trainees" who have completed one year of OPT and who are seeking a STEM OPT extension under the proposed rule. This commenter suggested exempting students who plan to use their STEM OPT extension to continue their 12-month post-completion OPT with the same employer. The commenter recommended that DHS look to H-1B regulations as an example of a regulatory scheme that exempts certain individuals with advanced degrees from certain requirements and obligations.

Response. DHS disagrees that employers' standard training practices are always sufficient for ensuring that the training needs of STEM OPT students are met. The STEM OPT extension program, including its training plan requirement, is designed to be a work-based learning opportunity that meets specific long-term goals related to the student's course of study. Existing training practices may or may not ensure that such goals are met, and thus the fact that an employer has training practices is insufficient on its own to demonstrate that a practical training opportunity will support the central purpose of this rule.

For this reason, DHS rejects the alternative suggestions by commenters to replace the training plan requirement with an attestation related to employers' existing training practices, the submission of periodic SEVIS reports, or a revised Form I-20 Certificate of Eligibility. As discussed, the main objective of the training plan requirement is to ensure that the work that the STEM OPT student undertakes is "directly related" to his or her STEM degree and is continuing

his or her training in that field. Providing generic job descriptions or periodically verifying that the student remains employed would not provide sufficient focus on the student's training. The training plan requirement aims to elicit the level of detail needed to ensure appropriate oversight of the STEM OPT extension. Additionally, requiring all participants to use a uniform form ensures that minimum requirements are met and makes it easier to evaluate the eligibility of an applicant without requiring agency adjudicators to familiarize themselves with the peculiarities of different employers' records and standards.

However, in response to commenters' concerns, DHS has modified the regulatory text to further ensure that employers may rely on their existing training programs to meet certain training plan requirements under this rule, so long as such training programs otherwise meet the rule's training plan requirements. Under the final rule, the Training Plan must, among other things: (1) Identify the goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student; (2) explain how those goals will be achieved through the work-based learning opportunity with the employer; (3) describe a performance evaluation process; and (4) describe methods of oversight and supervision. The rule additionally provides that employers may rely on their otherwise existing training programs or policies to satisfy the requirements relating to factors (3) and (4) (performance evaluation and oversight and supervision of the STEM OPT student), as applicable. These provisions are intended to make it easier for employers to refer to

existing training programs or policies when completing the Training Plan, as can be seen in Section 5 of the Training Plan form.

DHS has also made a number of changes to the Training Plan form for the same reason. For example, instead of requiring specific information about the individual supervisor's qualifications to provide supervision or training, the final Training Plan prompts the employer to explain how it provides oversight and supervision of individuals in the STEM OPT student's position. DHS also revised the form to replace the reference to a student's supervisor with a reference to the "Official with Signatory Authority." Such an official need not be the student's supervisor. These modifications are intended to address specific comments indicating that the proposed Mentoring and Training plan would prevent employers from assigning such students to project rotations and "limit them to a single department or reporting relationship." DHS made these modifications to provide employers with additional flexibility in complying with the rule's training plan requirements.

Moreover, as revised, DHS does not envision anything required in the final Training Plan as unnecessarily inhibiting flexibility for employers or STEM OPT students. Instead, the standards set forth in the rule are intended to ensure that employers meet the STEM OPT extension requirements, including demonstrating compliance with the attestations, and ensuring that employers possess the ability and resources to provide structured and guided work-based learning experiences for the duration of the extension. Nothing in the rule prohibits employers from incorporating

into the Training Plan provisions for project, position, or department rotations that directly relate to STEM students' fields of study, provided there will be appropriate supervision during each rotation and the employer otherwise meets all relevant requirements. To the extent new circumstances arise and such a change was not contemplated in the initial Training Plan, the employer may, working with the student, prepare and submit a modified Training Plan to the student's DSO. Additionally, with regard to concerns relating to an employer sharing sensitive information, DHS does not anticipate that Training Plans would need to contain a level of detail that would reveal business plans.

Finally, DHS respectfully disagrees with the notion that students who have completed one year of OPT are "seasoned trainees" who should not be subject to the training plan requirements when seeking an extension under the rule. DHS also disagrees that students pursuing a STEM OPT extension with the same employer should be exempt from the reporting obligations of the rule, including all training plan requirements. As discussed, the purpose of the STEM OPT extension is to provide practical training to STEM students so they may pursue focused research and meaningful projects that contribute to a more complete understanding of their fields of study and help develop skills. The requirements of the Training Plan are designed to assist students and employers in their pursuit of the aforementioned goals.

Comment. Some commenters stated concerns about the "mentoring" requirements described in the proposed Mentoring and Training Plan. For example, a commenter expressed concern that formalizing

mentoring and training requirements could hinder students' ability to naturally develop mentorships and mentoring relationships, and suggested eliminating the proposed Mentoring and Training Plan requirement or, at least, aligning the proposed Mentoring and Training Plan requirement with current employer practices to minimize compliance burdens. Some employers stated that the references to mentoring were so problematic that the proposed Mentoring and Training Plan be dropped altogether. One commenter stated that many technology companies lack expertise in establishing the kind of mentoring program contemplated in the proposed rule. The commenter stated further that, because of this, some technology companies will likely submit whatever paperwork is necessary to demonstrate compliance with the mentoring requirement, without doing more. Another commenter suggested eliminating the reference to mentoring and instead focusing on "the relevance of the proposed employment to the individual's STEM-related course of study."

A number of employers stated that they had long established practices concerning mentoring, some formal and some not. Most of these comments suggested that what DHS proposed regarding mentoring was difficult to understand in the context of existing business practices. For example, one company that said it was strongly committed to "the importance and benefits of well-designed mentoring programs," asserted that the proposed rule failed to define mentoring. The commenter explained that:

some mentoring relationships are highly structured in content and regularity of interactions, while others

are more ad hoc and organic in nature. In many circumstances, it is the mentee who takes responsibility for leading the interactions; in others, it is the mentor or the organization who structures the engagement.

This commenter believed it would not be feasible for DHS to provide sufficient certainty to employers about their mentoring responsibilities and obligations. A comment co-signed by ten associations representing a variety of industries, as well as small, medium, and large businesses and professionals, stated that the proposed Mentoring and Training Plan would "in many cases force companies to make drastic changes to their current mentoring programs."

Response. In light of the commenters' concerns, DHS has removed reference to, and the requirements related to, mentoring in the final rule and associated Training Plan. For instance, DHS has removed the reference to "mentoring" in Form I-983 and re-designated it as the "Training Plan for STEM OPT Students." The Training Plan, however, continues to serve the core goal of the practical training program: to augment a student's learning and functionality in his or her chosen field of interest.

DHS disagrees with the suggestion that technology companies do not have robust training capabilities or a commitment to training and skill development. This comment is directly contradicted by the many comments filed by employers asking that company policies on training, mentoring, and evaluation already in place be permitted as an alternative to the training plan requirements in the proposed rule.

Comment. A few commenters suggested that DSOs should not be required to issue a new STEM OPT

recommendation in SEVIS before a student can change employers during the STEM OPT extension period. A university recommended that it should be sufficient for the student to submit the new Training Plan to the DSO, along with an update to the employer address information in SEVIS, as specified under current SEVIS reporting requirements. Similarly, a school official asked whether an update in STEM employment information, rather than a recommendation, would suffice for such purposes. The commenter stated that a recommendation should be required only if the DSO is expected to review the content of the Training Plan, which the commenter suggested should be outside the DSO's duties. The commenter stated that the requirement for a new DSO recommendation each time the student changes employers "implies" that the STEM extension is employer specific. The commenter suggested that STEM OPT should not be tied to a specific employer, but should be tied solely to the student's field of study. Another commenter stated that the requirement for DSOs to issue a new STEM OPT recommendation served no particular purpose, and that the requirement could increase the likelihood that an employer might choose to hire a STEM OPT student over a U.S. worker. According to the commenter, such a STEM OPT student would be less likely to change employers during the STEM OPT period, which could lead to exploitation of the student by the employer.

Response. To ensure proper oversight and promote the continued integrity of the STEM OPT extension program, DHS declines to make the changes requested. When a student changes employers, the

requirement to submit a new Training Plan to the DSO and have the DSO update SEVIS with a new recommendation is necessary for ensuring that DHS has the most up-to-date information on F-1 students. The requirement also ensures that STEM OPT students are receiving the appropriate training and compensation, which in turn helps to protect such students and U.S. workers. As noted previously, SEVIS is the real-time database through which the Department tracks F-1 student activity in the United States. Timely review by the DSO of the new Training Plan and timely updating of SEVIS with certain information from that form substantially assists DHS with meeting its statutory requirements related to F-1 students.

DHS also does not agree that the requirements related to changing employers, including obtaining a new DSO recommendation, are so burdensome that they would cause a STEM OPT student to stay with an employer that is exploiting him or her. Among other things, this rule provides a substantial amount of time for students to find new practical training opportunities. And DHS anticipates that in most cases, DSOs will be able to review a newly submitted Training Plan and issue a new recommendation for a STEM OPT extension in a matter of days. For this reason, when a student changes employers, the rule requires a new Training Plan, new DSO recommendation, and update to SEVIS. DHS acknowledges that the potential exists for a student to begin a new practical training opportunity with a new employer less than 10 days after leaving the student's prior employer; in such a case, the student must fulfill his or her reporting obligations by submitting a new Training Plan, but can

begin the new practical training opportunity only after submitting the new plan.

Comment. Some commenters expressed concern that various requirements and timeframes provided in the rule were inconsistent with each other. A university, for example, submitted a comment referencing a provision in the proposed rule that required STEM OPT students who changed employers to submit, within 10 days of beginning their new practical training opportunities, a new Mentoring and Training Plan to their DSOs, and subsequently obtain new DSO recommendations. The commenter believed this timeline contradicted the reporting obligation contained in another provision, which required such students to report changes in certain biographic and employment information to their DSOs "within 10 days" of the change in employer. The commenter said the former requirement implied that STEM OPT students must receive a new DSO recommendation before beginning new employment, while ignoring the fact that DSOs are given 21 days in which to report any such change of employer. The commenter further noted that DSOs depend on this 21-day reporting window to complete administrative tasks, and the commenter urged DHS to amend the proposed regulations to fix the above inconsistencies.

Response. DHS does not see a conflict between (1) the requirement that a STEM OPT student must submit a new Training Plan to the DSO within 10 days of starting a new practical training opportunity with a new employer and (2) the separate, general requirement that a STEM OPT student report to the DSO within 10 days certain changes in biographic and

employment information. Nor does DHS see a conflict between these requirements and the DSO's reporting period for inputting some of this information into SEVIS.

The two student reporting requirements cited by the commenter will frequently apply in different circumstances, and serve different purposes. The requirement to submit a new training plan applies only when the student begins a new practical training opportunity with a new employer, and is intended to ensure that each STEM OPT extension will be accompanied by an accurate, up-to-date Training Plan. The 10-day period for the requirement balances the burden of completing the Training Plan on a timely basis against the important benefits derived from the preparation and submission of such plans. In contrast, the general student reporting requirement (which also existed in the 2008 IFR) applies whenever a STEM OPT student experiences a loss of employment, as well as a change in the student or employer's name or address.

Where a student begins a new practical training opportunity with a new employer less than 10 days after leaving the student's prior employer, the student may fulfill both reporting obligations by submitting a new Training Plan. In cases where the period of time between employers is longer than 10 days, the student must first report the loss of employment to the DSO, and later submit a new Training Plan. In either case, the DSO's SEVIS obligations will begin after the DSO receives the information from the student. Again, these two student reporting requirements serve different purposes; both reports will serve important functions at the time they are made.

Comment. One commenter suggested that requiring both the student and the employer to attest that the job offer is directly related to the student's STEM degree is redundant, and that the employer's attestation should be sufficient for this purpose. Another commenter suggested that the student and employer's attestation together should be sufficient, and that as a result, DSO review would be superfluous. Some commenters implied that because the proposed rule required that training plans be completed by STEM OPT students and their employers, those plans would concern work-related training and not training of an academic nature.

Response. DHS believes that it is appropriate to document that both the student and the employer agree that the practical training opportunity is directly related to the student's degree. The need for employer and student attestations helps ensure compliance by both relevant parties. And such attestations are not overly burdensome on either the student or the employer.

With respect to comments about the academic nature of the required Training Plans, DHS agrees that such plans will relate to practical training experiences, rather than academic coursework. But that is the intent of the rule: to allow students to apply their academic knowledge in practical, work-based settings. The Training Plan in this final rule helps ensure that the purpose of the rule is met, by clarifying the direct connection between the student's STEM degree and the practical training opportunity.

Comment. DHS received a number of comments concerning the proposed rule's document retention

requirements. Some commenters suggested that in order to reduce the administrative and paperwork burdens on employers, DHS should allow employers to use electronic signatures, as well as electronic storage methods to maintain required records. Commenters noted that allowing such options would be consistent with I-9 completion and retention requirements. Some commenters requested that employers and DSOs specifically be allowed to electronically submit and retain the training plans required by the proposed rule,

DHS also received comments on the duration of the proposed rule's retention requirements. One commenter stated that a 1-year retention requirement, rather than a 3-year requirement, would be more feasible. Another commenter recommended that, to mitigate the substantial investment of time required of schools with many STEM students, no electronic form of the proposed Mentoring and Training Plan should be required until the form is provided electronically through the SEVIS system with batch functionality. The commenter also requested that enough time be given to third-party software providers so that they may develop an equivalent upgrade to allow batch uploads of the forms to SEVIS.

One commenter also stated that if the student's school must maintain the training plan, the school then becomes responsible for maintaining sensitive information about the employer. The commenter did not describe which data elements it considered particularly sensitive. The commenter stated that the requirement to maintain this information constituted an "undue burden" for the school and a liability for both the employer and the school "in an age when data

hacking and data breaches" are common occurrences. The commenter also noted that DSOs would be "holding" training plans during a student's STEM OPT period, which, in some cases, would be unrelated to any similar degree conferred by the DSO's school.

Response. DHS clarifies that the STEM OPT student's educational institution may retain the Training Plan using either paper or electronic means. DHS acknowledges the burdens inherent with requiring DSOs to retain information on students who may have already graduated. Because DSOs must already meet 3-year retention requirements for other documents concerning F-1 students, this requirement is already a common standard with which DSOs have experience. Under 8 CFR 214.3(g)(1), institutions that educate F-1 students must keep records indicating compliance with reporting requirements for at least three years after such students are no longer pursuing a full course of study.

DHS understands the commenter's concern about the potential sensitivity of certain information contained in training plan documents. However, DHS has made efforts to ensure that the final Training Plan requires only information necessary for the Department to carry out the STEM OPT extension program. DHS notes that it is developing a portal that, once fully deployed, will allow students to directly input training plans into SEVIS for DSO review, thus reducing burdens and potential liability on the part of DSOs and their institutions. DHS plans to have the first stages of this portal operational by the beginning of 2017. In the interim, DHS does not anticipate a significant increase in data storage costs for employers as a result

of this rule, and the Department remains open to implementing additional technology improvements to reduce administrative processing and paperwork.

Under this final rule, the student's educational institution associated with his or her latest OPT period must ensure that SEVP has access to the student's Training Plan and associated student evaluations. Such documents may be retained in either electronic or hard copy for three years following the completion of the student's practical training opportunity and must be accessible within 30 days of submission to the DSO.

ii. DHS and DSO Review of the Training Plan

Comment. DHS received a number of comments concerning the need to review training plans and the respective roles that DHS and DSOs would play in such review. Some commenters stated that DSOs are best positioned to evaluate the connection between a practical training opportunity and a student's field of study, and requested confirmation that DHS does not intend to second-guess routine approvals of training plans by DSOs. Some commenters requested that DHS clarify the relevant criteria and standards that USCIS and DSOs should apply when reviewing such plans. Some commenters expressed uncertainty about how a qualitative review of training plans would or should be conducted. Such commenters indicated that unless additional standards and instructions are given, DSO review of such plans would simply consist of making sure each field on the form is completed. A commenter stated that DSOs should not be expected to become experts with respect to each individual

student, nor should they be burdened with the weighty responsibility of fraud detection.

One commenter stated that it was unclear how a DSO would know, prior to the commencement of the STEM OPT extension, whether the employer had failed to meet the program's regulatory requirements. The commenter recommended that DHS clarify the applicable standards for DSO review of training plans and ensure that such standards are appropriate for DSOs, given that they are experts neither in each area of STEM education nor in detecting fraud. The commenter recommended that the level of review be similar to that required for Labor Condition Applications submitted to the Department of Labor. According to the commenter, such applications require review only for completeness and obvious errors or inaccuracies.

A commenter stated that the proposed rule did not include standards for determining whether a STEM OPT student is being "trained," rather than simply working. According to the commenter, this would result in every training plan being approved whether or not a bona fide educational experience is being achieved. This commenter was also concerned that DSOs have an inherent conflict of interest in this regard. According to the commenter, DSOs "have every incentive, and likely pressure from their administrations, to approve all work permits." The commenter concluded that the proposed rule's focus on "training" and "educational experience" will not prevent participants from seeing OPT as a work permit and treating it as such.

Some commenters requested that USCIS adjudicators make the final assessment as to the sufficiency of

training plans, including because such plans are central to qualifying for STEM OPT extensions and employment authorization. Other commenters asked for clear guidance and coordination with respect to USCIS's review of training plans. Commenters expressed concern that in the absence of clear standards, USCIS adjudicators may issue erroneous Requests for Evidence (RFEs) or deny applications without appropriate due process. Some commenters expressed concerns about the effect of the training plan requirement on USCIS processing times. Another commenter stated that USCIS review of training plans would be insufficient, because "DHS employees have no expertise in evaluating what is, and is not, practical training."

Response. DHS agrees with the commenters' suggestions to issue clear guidance for DSOs and USCIS adjudicators with respect to the adjudication of Training Plans. As noted above, DHS has revised for clarity the regulatory text describing the requirements governing Training Plans, and has also revised the form itself. DHS is aware that the new requirements will also require training and outreach to ensure that all affected parties understand their role in the process.

DHS also clarifies that DSO approval of a request for a STEM OPT extension means that the DSO has determined that the Training Plan is completed and signed, and that it addresses all program requirements. DHS anticipates that such review will be fairly straightforward. The Department does not expect DSOs to possess technical knowledge of STEM fields of study. When reviewing the Training Plan for completeness, the DSO should confirm that it (1) explains

how the training is directly related to the student's qualifying STEM degree; (2) identifies goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student, and explains how those goals will be achieved through the work-based learning opportunity with the employer; (3) describes a performance evaluation process to be utilized in evaluating the OPT STEM student; and (4) describes methods of oversight and supervision that generally apply to the OPT STEM student. The DSO should also ensure that all form fields are properly completed. So long as the Training Plan meets these requirements, the DSO has met his or her obligation under the rule.

DHS also understands commenters' concerns on the ability of DSOs to determine whether an employer had failed to meet regulatory requirements prior to the commencement of a STEM OPT extension. DHS clarifies that DSOs are not required to conduct additional outside research into a particular employer prior to making a STEM OPT recommendation. In making such a recommendation, DSOs should use their knowledge of and familiarity with the F-1 regulations, including the STEM OPT requirements finalized in this rule. DHS notes that a student often may be requesting to extend a training opportunity already underway with an employer for which he or she will have already received training, which the DSO will have previously recommended and of which he or she will already have some record. Where this is not the case, the DSO can still rely, as he or she can in all cases, upon the information provided on the Training Plan and any other information the DSO believes to be

pertinent to his or her recommendation decision, at the time he or she makes the recommendation.

DHS also disagrees with comments suggesting that DSOs have conflicts of interest with respect to reviewing training plans. Based on decades of experience with OPT, DHS has no reason to question the integrity of DSOs or their ability to fulfill their obligations effectively and maintain the integrity of the STEM OPT extension program. The role of DSOs under this program is similar to the role they have historically played in the F-1 program.

DHS also notes that it may, at its discretion, withdraw a previous submission by a school of any individual who serves as a DSO. *See* 8 CFR 214.3(1)(2). Additionally, under longstanding statutes and regulations, SEVP may withdraw on notice any school's participation in the F-1 student program (or deny such a school recertification) for any valid and substantive reason. *See* 8 CFR 214.4(a)(2). For instance, SEVP may withdraw certification or deny recertification if SEVP determines that a DSO willfully issued a false statement, including wrongful certification of a statement by signature, in connection with a student's application for employment or practical training. *See id.* SEVP may take the same action if it determines that a DSO engaged in conduct that does not comply with DHS regulations. *Id.*

With respect to comments about USCIS's role in the process, DHS clarifies that USCIS maintains the discretion to request and review all documentation when determining eligibility for benefits. *See* 8 CFR 103.2(b)(8)(iii). Accordingly, USCIS may request a copy of the Training Plan (if it is not otherwise

available) or other documentation when such documentation is necessary to determine an applicant's eligibility for the benefit, including instances when there is suspected fraud in the application.[115] DHS further clarifies that USCIS would deny an Application for Employment Authorization if it finds that any of the regulatory standards are not met. DHS believes that the regulatory standards are articulated at a sufficient level of particularity for this purpose.

Beyond the clarifications provided above, DHS does not believe it is necessary or appropriate to issue significant additional guidance in this final rule. Given the many different practical training opportunities available to students, it would be cumbersome for DHS to define with more particularity the full range of student-employer interactions or guided-learning opportunities that may meet the rule's requirements. DHS believes that it would be more appropriate to issue any necessary guidance separately, as needed. Issuing guidance in this manner will allow DHS to promote consistent adjudications while allowing for flexibility as issues develop. As such, DHS confirms that ICE and USCIS will finalize guidance and provide training to ensure that all entities are ready to process requests for STEM OPT extensions as soon as possible.

Comment. Some commenters suggested that employers and students, rather than DSOs or DHS, are best positioned to explain how a student's STEM degree is related to a practical training opportunity.

Response. DHS agrees that employers and students must identify the relationship between the student's STEM degree and the practical training opportunity.

This final rule requires the student and employer to complete and submit to the DSO a Training Plan that describes this relationship (among other things). DHS does not agree, however, that students and employers should be solely responsible for determining whether a student's STEM degree is directly related to the practical training opportunity being offered, as doing so would result in a true conflict of interest and lack of accountability.

Comment. One commenter expressed concern that DSOs will be required to check wages through the Department of Labor Foreign Labor Certification Data Center's Online Wage Library to ensure that the employee is being paid fairly. The commenter stated that such a requirement would add additional time to approval of training plans and could expose schools to legal action from employers and students who submitted plans that were not accepted by the school. The commenter also said DSOs would be required to function as de facto USCIS adjudicators when approving or denying training plans, and as de facto ICE agents when trying to locate a student who has not completed his or her 6-month validation report.

Response. As noted above, the DSO's role with respect to the Training Plan for STEM OPT Students is limited. DSOs are not expected to conduct independent research to determine whether an employer attestation or other information in the Training Plan, including wage information, is accurate. Thus, DSOs are not expected to assess the wage information. With respect to validation reports, such reports have served since 2008 as important confirmations that critical student information in SEVIS is current and accurate.

When a student fails to submit a validation report on a timely basis, however, there is no requirement for further action on the part of the DSO. All necessary data for determining when a student has failed to submit a validation report is contained in SEVIS, and no further action is necessary to alert DHS of the student's failure.

iii. Form Fields, Form Number, Form Instructions

Comment. Some commenters stated that USCIS already has a form designated as Form I-910, Application for Civil Surgeon Designation, and requested that ICE assign a different form number to the Training Plan form. Another commenter suggested that DHS use a form number other than I-910 to avoid confusion with the current Form I-901, which all F-1 students use to pay their SEVIS fees.

Response. In response to these comments, DHS has revised the number for the Training Plan for STEM OPT Students associated with this final rule to "Form I-983." This change should prevent confusion among F-1 students and other stakeholders.

Comment. As proposed, the Mentoring and Training Plan would have required the student to attest that he or she will notify the DSO "at the earliest possible opportunity if I believe that my employer or supervisor . . . is not providing appropriate mentorship and training as delineated on this Plan." Some commenters recommended that the student attestation on the Training Plan form be revised to eliminate the words "if I believe" and "appropriate" because they are confusing and ask students to make subjective assessments

regarding the required training and mentoring. Commenters suggested that the student should only be required to notify the DSO if the student believes that "a gross deviation" from the training plan has occurred. Another commenter stated that this notification requirement was not necessary because students are already required to report any interruption of employment.

Response. DHS believes that the student's subjective assessment matters. If a student believes that the employer is not providing the practical training opportunity described in the Training Plan, the student should report the matter to his or her DSO. DHS considers students in this program to be capable of self-reporting in a responsible manner. DHS believes that relying upon students' reasonable judgment in the student attestation will best protect the well-being of students and the integrity of the STEM OPT extension. Additionally, DHS clarifies that this attestation element does not reference, and is not intended to apply to, interruptions of employment. Students and employers that are concerned about the risk of frequent reporting of the student's assessment may be able to avoid potential issues by clearly setting forth mutual expectations in the Training Plan.

Comment. As proposed, the Mentoring and Training Plan included an attestation by the student that he or she understands that DHS may deny, revoke, or terminate a student's STEM OPT extension if DHS determines the student is not engaging in OPT in compliance with law, including if DHS determines that the student or his or her employer is not complying with the Training Plan. One commenter suggested

removing this attestation because, according to the commenter, it is vague and overly harsh and holds the student accountable for the employer's noncompliance. The commenter also stated that because the proposed rule allowed for 150 days of authorized unemployment, "there should be no further immigration repercussion to the student if they need to interrupt STEM OPT due to lack of appropriate mentorship."

Response. DHS disagrees with the commenter. The attestation serves as an important reminder to the student that failure to comply with the regulatory requirements related to the STEM OPT extension may result in a loss of status. Moreover, contrary to the commenter's understanding, the attestation does not state or imply that DHS would take action against students who become unemployed, including because an employer has failed to comply with program requirements. A period of unemployment, on its own, will not affect the STEM OPT student's status so long as the student reports changes in employment status and adheres to the overall unemployment limits.

Comment. One commenter recommended that the phrase "SEVIS ID No." on the first page of the form (Section 1) should read "Student SEVIS ID No." for clarity.

Response. DHS agrees that the suggested change increases clarity and has made this change to the Training Plan for STEM OPT Students.

Comment. The same commenter stated that the "School Name and Campus Name" section should be reorganized for additional clarity. Specifically, the commenter stated that the form should include a section for "School that Recommended Current OPT" and

a separate section for "School Where Qualifying Degree was Earned" in order to cover students who are using previously obtained STEM degrees as the basis for a STEM OPT extension.

Response. DHS agrees and the form has been updated to clarify information for previously obtained STEM degrees.

Comment. A commenter requested that DHS clarify the question in Section 3 of the proposed Mentoring and Training Plan, which requests the number of full-time employees that work for the employer. The commenter also suggested that DHS add the Web site address for North American Industry Classification System (NAICS) codes (http://www.census.gov/eos/www/naics) to the instructions for the relevant question on NAICS codes in Section 3.

Response. DHS agrees with both of these suggestions. To increase clarity, DHS has revised the question concerning full-time employees to read, "Number of full-time employees in the U.S." DHS also has amended the form instructions to Section 3 to add the Web site for NAICS codes.

Comment. Commenters suggested eliminating the "Training Field" box in Section 5 of the proposed Mentoring and Training Plan. According to the commenters, a detailed description of the training opportunity was already required in other fields and it was not clear what the "Training Field" box added given that there was also a separate box for "Qualifying Major."

Response. DHS agrees with the commenter and has removed the field from the final version of the Training Plan.

Comment. One commenter sought clarification on whether all fields in the Mentoring and Training Plan were mandatory. The commenter also sought clarification on what an employer should do if one or more fields were not applicable to that employer.

Response. DHS clarifies that employer information should be filled in as applicable. If an employer does not have a Web site, for example, "N/A" will suffice in the field requesting the employer Web site.

Comment. One commenter stated that the form requirements should be included in the regulatory text. The commenter noted that certain sections of the proposed Mentoring and Training Plan required parties to certify that they would make notifications "at the earliest available opportunity," but that such a requirement was not included in the regulatory text itself.

Response. In response to this comment, DHS has amended the final regulatory text to more clearly reflect the responsibilities of participating parties. The Department believes these requirements are now sufficiently clear.

iv. Training Plan Obligations and Non-Discrimination Requirements

Comment. One comment stated that "[t]he proposed OPT STEM hiring and extension process would also constitute national origin discrimination, as the program is clearly intended to benefit aliens whose nationality is among one of the nations for which employment based immigrant visas are continuously oversubscribed, in particular nationals of India and China."

Response. DHS rejects the suggestion that the STEM OPT extension program will benefit individuals based on their national origin or nationality. The program is equally available to all F-1 students with a qualifying STEM degree and has neither quotas nor caps for nationals of any given country or region. The comment also offers no evidence to support the statement that the rule "is clearly intended to benefit" individuals based on nationality.

Comment. Some commenters stated that the proposed rule would "induce" employers and universities to discriminate against U.S. workers in violation of 8 U.S.C. 1324b and would "impermissibly facilitate prohibited employment-related discrimination on the basis of alienage and national origin." These commenters cited to various statutory provisions (42 U.S.C. 1981(a); 42 U.S.C. 2000e-2(a), (d); and 8 U.S.C. 1324b(a)(1)(A) and (B)) and suggested that the Department's proposed Mentoring and Training Form would violate these Federal anti-discrimination laws. Commenters stated that the rule would discriminate against U.S. citizen and lawful permanent resident students because it would not require employers to offer an identical "program" to such students. One commenter also likened the proposed Mentoring and Training Plan to the execution of a contract in violation of 42 U.S.C. 1981(a), which prohibits discrimination in making contracts. The comment cited to case law purporting to support the commenter's argument, but did not explain how the plan violated the statute.

Response. As a preliminary matter, the Training Plan for STEM OPT Students requires an employer to certify that the training conducted pursuant to the

plan complies with all applicable Federal and State requirements relating to employment. This broad certification encompasses compliance with all of the laws the commenters referenced.

DHS also disagrees with the apparent premise behind the commenters' arguments. That premise appears to be that the rule will require or inappropriately induce U.S. employers to provide benefits to F-1 students that are not provided to its other employees, including U.S. workers. Neither the rule nor the Training Plan, however, requires or encourages employers to exclude any of their employees from participating in training programs. And insofar as an employer may decide to offer training required by the regulation only to STEM OPT students, doing so does not relieve that employer of any culpability for violations of section 274B of the INA, 8 U.S.C. 1324b, or any other federal or state law related to employment.

Moreover, the training plan requirement is not motivated by any intention on the part of DHS to encourage employers to treat STEM OPT students preferentially. Rather, DHS is requiring the Training Plan to obtain sufficient information to ensure that any extension of F-1 student status under this rule is intended to augment the student's academic learning through practical experience and equip the student with a broader understanding of the selected area of study and functionality within that field. The Training Plan also serves other critical functions, including, but not limited to, improving oversight of the STEM OPT extension program, limiting abuse of on-the-job training opportunities, strengthening the requirements for STEM OPT extension participation, and enhancing

the protection of U.S. workers. By documenting the student's participation in a training program with the employer, the Training Plan provides information necessary for oversight, verification, tracking, and other purposes.

The training plan requirement does not discriminate against U.S. students or anyone else, or create a discriminatory contract (even assuming that it creates a contractual obligation at all). In pertinent part, 42 U.S.C. 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts." The commenter that raised concerns related to this provision did not identify any feature of the proposed rule that would deny or otherwise impair any person's rights "to make and enforce contracts" or any other rights described in the statute. The statute has no bearing on the training plan requirement in this rule.

G. Application Procedures for STEM OPT Extension

1. Description of Final Rule and Changes From NPRM

Under the rule, a student seeking an extension must properly file a Form I-765, Application for Employment Authorization, with USCIS within 60 days of the date the DSO enters the recommendation for the STEM OPT extension into the SEVIS record. The 2008 IFR had previously established a time period of 30 days after the DSO recommendation for the filing of the Application for Employment Authorization. As proposed in the NPRM, DHS believes the longer 60-

day application period will, among other things, reduce the number of USCIS denials of such applications that result from expired Form I-20 Certificates of Eligibility, the number of associated data corrections needed in SEVIS, and the number of students who would need to ask DSOs for updated Certificates of Eligibility to replace those that have expired. Under this rule, the "time of application" for a STEM OPT extension refers to the date that the Application for Employment Authorization is properly filed at USCIS.

2. Public Comments and Responses

Comment. Several commenters agreed with DHS's assessment in the proposed rule that no changes to Form I-765, Application for Employment Authorization, are needed. These commenters thought that the application form is clear and that any minor changes or clarifications (such as the regulatory cite included on the form) should be incorporated into the instructions to the application rather than into the application itself. Many commenters also agreed with DHS's proposal to extend the period of time to file the Application for Employment Authorization from 30 to 60 days from the date that the DSO enters the STEM OPT extension recommendation in SEVIS. Some of these commenters stated that it can be challenging for DSOs and students to meet the current 30-day deadline, as STEM OPT students are already working at the time of application and may no longer be as close in proximity or contact with their DSOs as they were prior to starting practical training. Commenters also stated that the 60-day filing deadline would provide greater flexibility for students and likely reduce the workload

of DSOs, who would otherwise need to reissue Form I-20 Certificates of Eligibility to students whose forms have expired, as well as reduce the number of Applications for Employment Authorization that need to be filed. Some commenters so strongly supported the 60-day deadline that they requested it apply to all students requesting OPT in any academic field, noting that having two different application filing windows serves no useful purpose and also has the potential to confuse both students and adjudicators.

Response. DHS agrees that no revisions to the Application for Employment Authorization are needed and that any minor revisions should be incorporated into the form instructions. DHS also appreciates commenters' support for the proposed 60-day filing period for students to file their Application for Employment Authorization after the DSO enters the STEM OPT extension recommendation in SEVIS. This final rule includes this proposal. As noted in the proposed rule, the longer filing window addresses problems that resulted from expiration of Form I-20 Certificates of Eligibility and reduces the need for data corrections in SEVIS. DHS also clarifies that this change only applies to STEM OPT extensions. Changing the 30-day filing period for students seeking a 12-month period of post-completion OPT is outside the scope of this rulemaking.

Comment. One commenter advocated for students to be able to file only one Application for Employment Authorization to cover the entire OPT period, including the 12-month post completion period and the 24-month STEM OPT extension period. In support of this suggestion, the commenter noted that the application

form already requires the applicant to reveal all previously filed Applications for Employment Authorization and provides an opportunity to request a STEM OPT extension. The commenter also suggested that such form should be available to request a second STEM OPT extension. Another commenter requested that the $380 fee for filing Applications for Employment Authorization not apply to students seeking STEM OPT extensions. The commenter characterized the fee as generally a "heavy burden" for students, and as an "unreasonable" burden for those students who failed to meet the eligibility requirements for reasons beyond their control.

Response. DHS believes that it would be unwieldy and potentially confusing to allow a student to apply for a STEM OPT extension as part of the student's application for initial post-completion OPT. The requirement for a separate application allows the student to engage in an initial period of post-completion OPT without requiring a student and employer to complete a full Training Plan a year in advance of the student's STEM OPT extension. The requirement for a separate application also allows DHS to consider program eligibility closer in time to the start of the student's STEM OPT extension.

In regard to the fee for the associated Application for Employment Authorization, DHS declines to exempt certain students from the filing fee, which generally applies to all such applications filed by F-1 students. As noted above, each application for STEM OPT requires DHS to consider the student's eligibility under the applicable regulations at the time of application.

Comment. Some commenters expressed concern that USCIS officers adjudicating Applications for Employment Authorization from STEM OPT students would not have sufficient training on the contents or veracity of the proposed Mentoring and Training Plan to determine whether and how it should affect the student's eligibility for a STEM OPT extension and attendant employment authorization. These commenters questioned whether the proposed plan was necessary for the adjudication of Applications for Employment Authorization, particularly because USCIS officers are not trained career counselors. In contrast, some commenters requested that USCIS officers expand the scope of the adjudication of such applications. Such requests included having USCIS officers make evaluations of a prior institution's accreditation status and the student's proposed Mentoring and Training Plan, as such information is not related to the student's current academic program and is not widely available.

Response. DHS appreciates commenters' concerns about appropriate training for USCIS officers and assures the public that USCIS will provide appropriate guidance and training resources for its adjudicators. Adjudicators will be equipped with guidance that address, among other issues, whether the submitted evidence is sufficient to establish eligibility for employment authorization; what to do when the applicant has not provided sufficient evidence; and what information should be requested in an RFE or Notice of Intent to Deny. Finally, in this final rule, USCIS confirms that adjudicators have the discretion to request a copy of the Training Plan, in addition to other

documentation, when such documentation is necessary to determine an applicant's eligibility for the STEM OPT extension, including instances where there is suspected fraud in the application.

Comment. An advocacy organization recommended that DHS publicly disclose raw data gathered from Applications for Employment Authorization. The commenter argued that this disclosure would improve transparency and enhance the ability of policymakers and advocates to ensure fair treatment and compliance with these programs.

Response. To the extent the commenter is seeking data from all filed Applications for Employment Authorization, and not just from STEM OPT students, the request is well outside the scope of this rulemaking. With respect to applications filed by STEM OPT students, even assuming such a request is within the scope of this rule, DHS declines to affirmatively publish all raw data gathered from such applications. Among other things, the application contains sensitive personally identifiable information, and blanket public disclosure would violate applicable privacy laws and policies. Relevant information related to the STEM OPT extension program may be available through the FOIA process. The USCIS centralized FOIA office receives, tracks, and processes all USCIS FOIA requests to ensure transparency within the agency. Instructions on how to submit a FOIA request to USCIS are available on-line at https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/uscis-freedom-information-act-and-privacy-act.

Comment. One commenter sought clarification on whether relevant changes to the Application for Employment Authorization and SEVIS will be completed by the date that this rule goes into effect. The commenter also asked whether these changes would affect the SEVIS releases scheduled for November 2015 and spring 2016.

Response. DHS is not making any changes, as a result of this rulemaking, to the Application for Employment Authorization; rather, minor changes have been included in the form instructions. The Application for Employment Authorization and its instructions are available on USCIS' Web site (http://www.uscis.gov/i-765), where users can also find information about filing locations and filing fees. SEVIS, including planned releases, will not be affected by the minor changes to the form instructions.

Comment. An individual commenter requested a change to the proposed rule's provision allowing F-1 students to file for a STEM OPT extension prior to the end of their initial 12-month period of post-completion OPT. The commenter suggested that DHS also allow students to apply for a STEM OPT extension up to 60 days following the end of the initial OPT period. The commenter stated that this change would align the provision with the application period for initial post-completion OPT, in which a student can file an application up to 60 days following graduation.

Response. DHS declines to adopt the commenter's recommendation. The current requirement to properly file the request for a STEM OPT extension prior to the end of the initial period of post-completion OPT allows sufficient time for the F-1 student to apply for the

extension and is administratively convenient as it ensures continuing employment authorization during the transition from the initial OPT period to the STEM OPT extension period. The requirement thus helps prevent disruption in the student's employment authorization as the student transitions from his or her initial post-completion OPT period to the STEM OPT extension period.

Comment. One commenter requested clarification on whether a student who violates his or her F-1 status during a STEM OPT extension period may apply for reinstatement to F-1 status under 8 CFR 214.2(f)(16) if the status violation resulted from circumstances beyond the student's control. The commenter also asked whether such a student would be able to continue working while the reinstatement application is pending.

Response. A student who violates his or her F-1 status during the STEM OPT extension period may be granted reinstatement to valid F-1 status if he or she meets the regulatory requirements. See 8 CFR 214.2(f)(16). Importantly, in the STEM OPT context, the student will need to establish that the status violation resulted from circumstances beyond the student's control. The student, however, will not be able to continue working during the pendency of the reinstatement application; such employment would be considered unlawful. Moreover, if the student's reinstatement application is approved, the student will need to file a new Form I-765, Application for Employment Authorization. If the Application for Employment Authorization is approved, the period of time the

student spent out of status will be deducted from his or her 24-month STEM OPT extension period.

Comment. One commenter recommended that the rule increase the time period during which a student with a pending STEM OPT application is allowed to remain employed. The proposed rule provided an automatic extension of employment authorization of up to 180 days upon the timely filing of the application for a STEM OPT extension. The commenter suggested amending the rule to provide a 240-day period, which the commenter believed would be consistent with a similar provision for other nonimmigrants who timely file applications for extensions of stay.[116] According to the commenter, employers are familiar with the 240-day period provided in other contexts and using a common timeframe for STEM OPT applications would help employers more efficiently maintain their obligations to verify the eligibility of employees to work in the United States through the Form I-9 Employment Eligibility Verification process. The commenter also noted that the 240-day period would better accommodate lengthy USCIS processing times.

Response. DHS has determined that the current period of up to 180 days is appropriate and will not adopt the commenters' suggestion to lengthen this period. DHS did not propose any changes to this 180-day period, which has been in existence since 2008. Employers who hire individuals on STEM OPT extensions should thus already be familiar with this timeframe. Moreover, given that USCIS' average EAD processing time is typically at about the 90-day mark,[117] the 180-day timeframe provides sufficient flexibility in case of

unexpected delays. Therefore, a longer auto-extension period for EADs is unnecessary.

H. Travel and Employment Authorization Documentation of Certain F-1 Nonimmigrants Changing Status in the United States or on a STEM OPT Extension

1. Description of Final Rule and Changes From NPRM

This final rule includes the 2008 IFR's Cap-Gap provision, which allows for automatic extension of status and employment authorization for any F-1 student with a timely filed H-1B petition and request for change of status, if the student's petition has an employment start date of October 1 of the following fiscal year. The measure avoids inconvenience to some F-1 students and U.S. employers through a common-sense administrative mechanism to bridge two periods of authorized legal status. As noted previously, the so-called Cap Gap is a result of the misalignment of the academic year with the fiscal year.

This final rule also clarifies that an EAD that appears to have expired on its face but that has been automatically extended under 8 CFR 274a.12(c)(3)(i)(B) is considered unexpired for the period beginning on the expiration date listed on the Employment Authorization Document and ending on the date of USCIS' written decision on the current employment authorization request, but not to exceed 180 days, when combined with a Form I-20 Certificate of Eligibility endorsed by the DSO recommending the Cap-Gap extension. Otherwise, DHS is finalizing the Cap-Gap provision as proposed, but provides clarification and

explanation below in response to public comments regarding status, travel, and employment authorization during a Cap-Gap period or a STEM OPT extension.

Lastly, the final rule clarifies that if a petitioning employer withdraws an H-1B petition upon which a student's Cap-Gap period is based, the student's Cap-Gap period will automatically terminate. In other words, if an employer withdraws the H-1B petition before it is approved, the student's automatic extension of the student's duration of status and employment authorization under the Cap-Gap provision will automatically end, and the student will enter the 60-day grace period to prepare for departure from the United States. 8 CFR 214.2(f)(5)(iv).

2. Public Comments and Responses

i. Inclusion of Cap-Gap Relief and End Date of Cap-Gap Authorization

Comment. Many commenters supported the Cap-Gap provision as proposed, noting that it would help the United States attract talented international students and bolster the economy. Some stated that Cap-Gap relief was an important part of the 2008 IFR and requested that it be retained because the H-1B visa program is a common mechanism for F-1 students to transition to long-term employment in the United States. According to the commenters, Cap-Gap relief is essential to avoid gaps in work authorization between the April filing window for H-1B visas and the October 1 start date for most new H-1B beneficiaries who are subject to the H-1B cap.

Some commenters supported Cap-Gap relief for certain F-1 students based on the notion that these

students have been following immigration laws and helping to maintain the United States' position as the world's leader in technology and innovation. Other supporters asserted that Cap-Gap relief will boost productivity and entrepreneurship and thus provide the United States with a competitive advantage in the global market. Several commenters stated that the Cap-Gap extension is helpful to employers as it avoids disruptions in the workplace caused by the students' departure from the United States solely due to a temporary gap in status.

Response. DHS agrees with commenters that the Cap-Gap provision is a common-sense administrative measure to avoid gaps in status fully consistent with the underlying purpose of the practical training program. The Cap-Gap provision is needed to address the inherent misalignment of the academic year with the fiscal year. This relief measure avoids inconvenience to some F-1 students and U.S. employers by bridging short gaps in status for students who are the beneficiaries of H-1B petitions.

Comment. Under the 2008 IFR and as proposed, the Cap-Gap provision automatically extends a qualifying student's status and employment authorization based on the filing of an H-1B petition and request for change of status until the first day of the new fiscal year (October 1). Some commenters requested that DHS revise the Cap-Gap provision so as to automatically extend status and employment authorization "until adjudication of such H-1B petition is complete." Commenters stated that an extension until October 1 may have been appropriate in the past, when H-1B petitions were adjudicated well before that date, but

current USCIS workload issues and RFE responses can delay such adjudications beyond October 1. The result, according to one commenter, is that the beneficiary of an H-1B petition that remains pending beyond October 1 must stop working on that date and wait for a decision. By amending the regulations to provide extensions until the date that the H-1B petition is finally adjudicated, the commenter noted, a beneficiary could avoid any such gaps in status.

In addition, one commenter requested that DHS clarify the date on which the automatic extension of status ends. The commenter stated that September 30 would be a more appropriate end date than October 1, as the beneficiary's H-1B status would generally become effective on October 1.

Response. DHS recognizes that some cap-subject H-1B petitions remain pending on or after October 1; however, in light of the importance that DHS places on international students, USCIS prioritizes petitions seeking a change of status from F-1 to H-1B. This prioritization normally results in the timely adjudication of these requests, so the vast majority of F-1 students changing status to H-1B do not experience any gap in status.

The general presumption is that when a nonimmigrant's period of authorized stay has expired, he or she must depart the United States. However, the Cap-Gap provision provides a special accommodation to F-1 students who are seeking to change to H-1B status, based on the understanding that the academic year of most colleges and universities does not align with the fiscal year cycle upon which the H-1B program is based. The Cap-Gap provision is based in part on the premise that

students who seek to benefit from the provision actually qualify for H-1B status. USCIS is thus concerned that extending the Cap-Gap employment authorization beyond October 1, a date by which virtually all approvable change-of-status petitions for F-1 students are adjudicated by USCIS, would reward potentially frivolous filings. The October 1 cut-off thus serves to prevent possible abuse of the Cap-Gap extension. USCIS will continue to make every effort to complete adjudications on all petitions seeking H-1B status for Cap-Gap beneficiaries prior to October 1, including by timely issuing RFEs in cases requiring further documentation. DHS therefore declines to allow students whose H-1B petitions remain pending beyond October 1 to continue to benefit from the Gap-Gap extension, primarily because doing so would enable students who may ultimately be found not to qualify for H-1B status to continue to benefit from the Cap-Gap extension.

Finally, DHS clarifies that F-1 status for a Cap-Gap beneficiary under this provision expires on October 1, consistent with the regulatory text at 8 CFR 214.2(f)(5)(A)(vi). However, an individual with a timely-filed, non-frivolous H-1B change-of-status petition will be considered to be in a period of authorized stay during the pendency of the petition. An individual may remain in the United States during this time, but is not authorized to work. If an H-1B change-of-status petition requesting a start date of October 1 has been approved, the F-1 status will expire on the same day as the H-1B status begins.

Comment. Some commenters requested that DHS clarify that OPT students whose employment authorization has been extended pursuant to the Cap-Gap

provision are permitted to change employers. Commenters expressed confusion because under the 2008 IFR, and as proposed, the regulatory provision authorizing employment for Cap-Gap beneficiaries is included in a list of nonimmigrant classifications that are authorized for employment "with a specific employer incident to status." *See* 8 CFR 274a.12(b) and (b)(6)(v). Commenters recommended that DHS revise the title of the list to eliminate confusion and clarify that an F-1 student can change employers between the filing of an H-1B petition (generally in April) and the date on which a cap-subject H-1B petition takes effect (generally on October 1). One of these commenters recommended that DHS include Cap-Gap beneficiaries under 8 CFR 274a.12(a), which lists categories of aliens who are authorized for employment "incident to status," in order to make such beneficiaries employment authorized without employer-specific restrictions.

Response. DHS clarifies that there is generally no prohibition against an F-1 student's changing of employers during a Cap-Gap period. However, F-1 students may only engage in employment that is directly related to their major area of study. Moreover, because the list of nonimmigrant classifications at 8 CFR 274a.12(b) covers a broad range of nonimmigrant classes, DHS believes deletion of the phrase "with a specific employer" from the regulatory provision would lead to confusion. DHS thus declines to adopt this suggestion. Additionally, given that the vast majority of commenters supported the Cap-Gap provision as proposed, DHS has determined that the provision is sufficiently clear and therefore declines to further amend

8 CFR 274a.12(b)(6)(v) or to place the regulatory provision under 8 CFR 274a.12(a). Again, an F-1 student may change employers during a Cap-Gap period, but must do so in accordance with the OPT regulations (*e.g.,* by finding a position directly related to his or her major area of study, among other requirements).

Comment. Some commenters requested clarification about whether the Cap-Gap provisions apply to H-1B petitions that are cap-exempt (*i.e.,* not subject to the annual numerical cap on H-1B visas). According to these commenters, proposed 8 CFR 214.2(f)(5)(vi) appeared to state that a STEM OPT student who was the beneficiary of a cap-exempt H-1B petition could also extend his or her duration of status and possibly employment authorization under the provision, provided the H-1B petition was timely filed and requested an employment start date of October 1.

Response. DHS clarifies that the Cap-Gap provision applies only to the beneficiaries of H-1B petitions that are subject to the annual numerical cap. The purpose of the Cap-Gap provision is to avoid situations where F-1 students are required to leave the country or terminate employment at the end of their authorized period of stay, even though they have an approved H-1B petition that would again provide status to the student in a few months' time. Due to the realities associated with the H-1B filing season, employers filing H-1B petitions for *cap-subject* F-1 students are effectively required to file petitions with start dates of October 1, which allows such employers to file the change-of-status petitions with USCIS at the beginning of the H-1B filing window (generally April 1 of the preceding fiscal year).[118] A petitioner filing an H-1B petition for a cap-

subject beneficiary that does not file at the beginning of the filing window risks not being able to file at all if the window closes due to high demand for H-1B visas.

In contrast, employers filing H-1B petitions on behalf of *cap-exempt* beneficiaries may request an employment start date based on the petitioners' actual need rather than on the H-1B filing season. As such, cap-exempt beneficiaries do not share the same need as cap-subject beneficiaries to bridge status until the next fiscal year. For these reasons, the Cap-Gap provision benefits only those beneficiaries who are subject to the H-1B cap. DHS maintains its long-standing interpretation that 8 CFR 214.2(f)(5)(vi) is limited to cap-subject H-1B beneficiaries, but has revised the regulatory text to clarify this practice.

Comment. One commenter asked DHS to clarify the deadline for filing applications for STEM OPT extensions by F-1 students in a Cap-Gap period. According to the commenter, the relevant section in the proposed rule indicated that students are required to file "prior to the expiration date of the student's current OPT employment authorization." The commenter asked DHS to clarify the meaning of this provision with respect to F-1 students with an approved Cap-Gap extension. Specifically, the commenter asked whether "the expiration date of the student's current OPT employment authorization" refers to the date on which the student's EAD expires or the end date of the student's approved Cap-Gap extension.

Response. A student may file for a STEM OPT extension only if the student is in a valid period of post-completion OPT at the time of filing. A student whose post-completion OPT period has been extended under

Cap-Gap is in a valid period of post-completion OPT, and may therefore apply for a STEM OPT extension during the Cap-Gap period if he or she meets the STEM OPT extension requirements.[119] Please note, however, that if the H-1B petition upon which the student's Cap-Gap period is based has been approved and is not withdrawn prior to October 1, the student's change to H-1B status will take effect on October 1, and the student will no longer be eligible for a STEM OPT extension.

ii. Travel During Cap-Gap and While on STEM OPT Extension

Comment. Several commenters requested that DHS allow students to travel abroad during the Cap-Gap period. Some of these commenters requested that F-1 students in OPT be allowed to travel overseas if they have a pending or approved request to change status to that of an H-1B nonimmigrant during the Cap-Gap period. One commenter asked DHS to harmonize policies with the Department of State regarding travel and reentry to the United States in Cap-Gap scenarios. The commenter opined that the two Departments' policies on this issue have been inconsistent, recommending this rulemaking as an appropriate opportunity to clarify when an F-1 student in a Cap-Gap period may travel. Another commenter suggested that the guidance in the Department of State Foreign Affairs Manual (9 FAM 41.61 N13.5-2 Cap Gap Extensions of F-1 Status and OPT) could serve as the basis for a unified policy among the two departments that allows travel and reentry during the Cap-Gap period.[120] One commenter also asked DHS to allow a

Cap-Gap beneficiary to return to the United States in F-1 status without having a valid visa.

Response. DHS clarifies that an F-1 student may generally travel abroad and seek readmission to the United States in F-1 status during a Cap-Gap period if: (1) The student's H-1B petition and request for change of status has been approved; (2) the student seeks readmission before his or her H-1B employment begins (normally at the beginning of the fiscal year, *i.e.,* October 1); and (3) the student is otherwise admissible. However, as with any other instance in which an individual seeks admission to the United States, admissibility is determined at the time the individual applies for admission at a port of entry. U.S. Customs and Border Protection (CBP) makes such determinations after examining the applicant for admission. Students should refer to CBP's Web site (http://www.cbp.gov/travel/international-visitors/study-exchange/exchange-arrivals) for a list of the appropriate documentary evidence required to confirm eligibility for the relevant classification. Moreover, DHS believes that the guidance provided in this response is fully consistent with the Department of State's Cap-Gap policy as outlined in its Foreign Affairs Manual.[121]

DHS also notes that if an F-1 student travels abroad before his or her H-1B change-of-status petition has been approved, USCIS will deem the petition abandoned. Consequently, such a student no longer would be authorized for F-1 status during the Cap-Gap period based on the H-1B change-of-status petition and thus would be unable to rely on the Cap-Gap provision's extension of duration of status for purposes of

seeking readmission as an F-1 student. This has been the legacy INS and USCIS interpretation of its change-of-status authority under the INA for decades, applicable to all changes from one nonimmigrant status to another, not just those involving F-1 nonimmigrants.[122] As such, DHS declines to adopt the suggestion to allow travel for Cap-Gap students while a change-of-status petition is pending.[123]

Comment. Some commenters stated that certain documentary requirements in DHS regulations unnecessarily hampered a student's mobility. Such commenters specifically cited 8 CFR 214.2(f)(13)(ii), which allows an otherwise admissible F-1 student with an unexpired EAD issued for post-completion practical training to return to the United States to resume employment after a period of temporary absence. Under this provision, the EAD must be used in combination with an I-20 Certificate of Eligibility endorsed for reentry by the DSO within the last six months. Some commenters claimed that this requirement resulted in DHS officers rejecting facially expired EADs at port of entries—despite the presentation of other documents indicating valid employment authorization—and denying entry to the applicants.

Response. The Department acknowledges that it has previously cited 8 CFR 214.2(f)(13)(ii) in connection with travel during the Cap-Gap period. That regulatory provision addresses the validity period of EADs. Following careful review, DHS has determined that 8 CFR 214.2(f)(13)(ii), which expressly addresses the effects of departure from the United States by individuals with *unexpired* EADs, does not apply to Cap-Gap beneficiaries, who by definition have *expired* EADs.

Therefore, 8 CFR 214.2(f)(13)(ii) does not apply to F-1 students who depart the United States during a Cap-Gap period.

Comment. Several commenters requested that DHS allow students to travel abroad during the STEM OPT extension period or during the pendency of an application for such an extension. One commenter stated that although the F-1 visa is a multiple entry visa, the Form I-20 Certificate of Eligibility states that a STEM OPT student's EAD is not valid for reentry into the United States. The commenter requested that DHS allow STEM OPT students to make multiple entries based on their status. The commenter noted that this would allow such students to visit their home countries at least once during the up-to-three-year period of practical training.

Similarly, some commenters requested that DHS permit F-1 students to travel during the pendency of a request for a STEM OPT extension and to reenter after a period of temporary absence. Another commenter recommended that students with pending applications for STEM OPT extensions be permitted to travel outside the United States because many employers require their employees to engage in international travel as part of their jobs. The commenter noted that the proposed rule prohibits such students from fulfilling such job requirements.

Response. Students on STEM OPT extensions (including those whose application for a STEM OPT extension is pending) may travel abroad and seek reentry to the United States in F-1 status during the STEM OPT extension period if they have a valid F-1 visa that permits multiple entries [124] and a current

Form I-20 Certificate of Eligibility endorsed for reentry by the DSO within the last six months. The student's status is determined by CBP upon admission to the United States or through a USCIS adjudication of a change-of-status petition.

Comment. Several commenters raised the issue of whether F-1 nonimmigrants may have "dual intent" (*i.e.,* whether such students, as F-1 nonimmigrants, may simultaneously seek lawful permanent residence or otherwise have the intent to immigrate permanently to the United States). Commenters that supported dual intent for F-1 students stated that such a policy would help attract and retain talented F-1 students in the United States. Certain commenters that opposed dual intent for students stated that this rule should be limited to maintaining F-1 status in order to allow students to gain post-graduate practical experience and training in their fields of study. Other such commenters asserted that dual intent for students would violate Congressional intent and run counter to the F-1 visa classification provisions in the INA. *See* INA 101(a)(15)(F)(i).

Response. These comments, which concern dual intent for F-1 students generally, are beyond the scope of this rulemaking. The changes in this rule affect only those F-1 students applying for STEM OPT extensions or Cap-Gap extensions, not the entire F-1 student population. Moreover, none of the changes in this rule relate to individuals seeking lawful permanent resident status or their ability to hold immigrant intent while holding nonimmigrant status.

iii. Terms and Conditions of Employment Authorization Documents

Comment. A few commenters requested that DHS include written restrictions on the face of the EADs provided to STEM OPT students. Commenters stated that all EADs, including STEM OPT EADs, appear on their face to be valid for unrestricted employment. Commenters were concerned that if a job candidate presents an EAD to complete the Form I-9 process, an employer will not know whether the underlying employment authorization is actually limited to employment with an E-Verify employer in a field related to the student's STEM degree. Because of this confusion, commenters believed it was possible that an employer could hire a STEM OPT student whose employment authorization was in fact linked in SEVIS to a different employer. These commenters requested that DHS address this issue by adding a written restriction on the EAD itself.

Response. DHS already places written restrictions on the face of the EADs provided to STEM OPT students (under the "Terms and Conditions" section). Such EADs currently contain the following notation: "Stu: 17-Mnth Stem Ext." In response to the potential confusion described in the above comments, however, DHS has decided to update the notation to provide a stronger indication of the limitations of such EADs. Such EADs will now contain the following notation: "STU: STEM OPT ONLY." DHS believes this new notation will better alert employers that the cardholder's employment authorization is subject to certain conditions.

Comment. Another commenter requested that DHS issue new EADs to OPT students with expired EADs who either are in a Cap-Gap period or have a pending application for a STEM OPT extension. The commenter stated that these new EADs would allow such students to renew their driver's licenses and thus facilitate their work commute. In the alternative, the commenter requested that USCIS issue these students formal documents that would allow them to renew their driver's licenses.

Response. Under current processes, USCIS cannot issue new EADs to F-1 students with pending applications without adversely affecting fee revenues and overall EAD processing times. Under current guidance in the Handbook for Employers (M-274), the combination of the student's expired EAD and his or her Form I-20 Certificate of Eligibility endorsed by the designated school official is acceptable proof of identity and employment authorization for purposes of Form I-9 requirements. In response to the above comments, however, DHS has decided to clearly articulate this policy by updating the regulation at 8 CFR 274a.12(b)(6)(iv) to indicate that this combination of documents is considered an unexpired EAD for purposes of complying with Form I-9 requirements. DHS believes the regulatory change clearly articulates that students with the appropriate documents remain in F-1 status and are authorized for employment.

Comment. One commenter recommended that DHS clarify whether EADs would be revoked if the Mentoring and Training Plan described in the proposed rule were to require modification or the insertion of

additional information subsequent to the commencement of the STEM OPT student's employment.

Response. As noted in section IV.B. of this preamble, if any material change to or deviation from the Training Plan occurs, the student and employer must sign a modified Training Plan reflecting the material changes or deviations, and must ensure that the modified plan is submitted to the student's DSO at the earliest available opportunity. So long as the student and employer meet the regulatory requirements, and the modified Training Plan meets the requirements under this rule, the student's employment authorization will not cease based on a change to the plan.

I. Transition Procedures

1. Description of Final Rule and Changes From NPRM

The 17-month STEM OPT regulations remain in force through May 9, 2016. This rule is effective beginning on May 10, 2016. This rule includes procedures to allow for a smooth transition between the old rule and the new rule, as discussed below.

i. STEM OPT Applications for Employment Authorization Pending on May 10, 2016

DHS will continue to accept and adjudicate applications for 17-month STEM OPT extensions under the 2008 IFR through May 9, 2016. The Department, however, has modified the transition procedures in the proposed rule for adjudicating those applications that remain pending when the final rule takes effect on May 10, 2016. In the NPRM, DHS had proposed that USCIS would adjudicate pending applications using

the regulations that existed at the time the applications were submitted. As discussed further below, DHS has reconsidered its original proposal in light of comments received, and will instead apply the requirements of this rule to such pending cases. Beginning on May 10, 2016, USCIS will issue RFEs to students whose applications are still pending on that date. *See* 8 CFR 214.16(a). The RFEs will allow these students to effectively amend their application to demonstrate eligibility for 24-month extensions without incurring an additional fee or having to refile the Application for Employment Authorization.

Specifically, USCIS will issue RFEs requesting documentation that will establish that the student is eligible for a 24-month STEM OPT extension, including a Form I-20 Certificate of Eligibility endorsed on or after May 10, 2016, indicating that the DSO recommends the student for a 24-month STEM OPT extension. To obtain the necessary DSO endorsement in the Form I-20 showing that the student meets the requirements of this rule, the Training Plan has to be submitted to the DSO. Generally, under 8 CFR 214.2(f)(11)(i), a student must initiate the OPT application process by requesting a recommendation for OPT by his or her DSO. Thus, a DSO's recommendation for OPT on a Form I-20 Certificate of Eligibility is generally not recognized as valid if such endorsement is issued after the Application for Employment Authorization is filed with USCIS. DHS, however, will consider the submission of the Form I-20 Certificate of Eligibility as valid if the form is submitted in response to the RFE that has been issued under the transition procedures described in 8 CFR 214.16.

DHS recognizes that following this rule's effective date, some students may prefer to withdraw their pending application for a 17-month STEM OPT extension and instead file a new application for a 24-month STEM OPT extension. Before a student decides to do so, however, the student should understand the applicable filing deadlines and ensure that he or she does not lose F-1 status. Importantly, a student may file for a STEM OPT extension only if the student is in a valid period of post-completion OPT at the time of filing. Thus if a student withdraws an application for a STEM OPT extension after his or her period of post-completion OPT has ended, the student will no longer be eligible to file for a STEM OPT extension.

ii. Applications for 24-Month STEM OPT

DHS will begin accepting applications for STEM OPT extensions under this rule on May 10, 2016. Beginning on that date, DHS will process all Applications for Employment Authorization seeking 24-month STEM OPT extensions in accordance with the requirements of this rule. In other words, the final rule's new requirements will apply to all STEM OPT students whose applications are pending or approved on or after the final rule is effective.

Thus, a student whose Application for Employment Authorization is filed and approved prior to May 10, 2016 will be issued an EAD that is valid for 17 months (even if he or she erroneously requested a 24-month STEM OPT extension). As indicated above, a student whose application is pending on May 10, 2016 will be issued an RFE requesting documentation establishing that the student is eligible for a 24-month STEM OPT

extension. As described more fully below, this documentation must include, among other things, a Form I-20 Certificate of Eligibility endorsed on or after May 10, 2016, indicating that the requirements for a 24-month STEM OPT extension have been met.

iii. Students With Valid, Unexpired 17-Month STEM OPT Employment Authorization on May 10, 2016

Any 17-month STEM OPT EAD that is issued before May 10, 2016 will remain valid until the EAD expires or is terminated or revoked. *See* 8 CFR 214.16(c)(1).[125] As a transitional measure, starting on May 10, 2016, certain students with such EADs will have a limited window in which to apply for an additional 7 months of OPT, effectively enabling them to benefit from a 24-month period of STEM OPT. *See* 8 CFR 214.16(c)(2). To qualify for the 7-month extension, the student must satisfy the following requirements:

- The STEM OPT student must properly file an Application for Employment Authorization with USCIS, along with applicable fees and supporting documentation, on or before August 8, 2016, and within 60 days of the date the DSO enters the recommendation for the 24-month STEM OPT extension into the student's SEVIS record. *See* 8 CFR 214.16(c)(2)(i). DHS believes that the 90-day window for filing such applications provides sufficient time for students to submit a required Training Plan, obtain the necessary Form I-20 Certificate of Eligibility and

recommendation from the student's DSO, and fulfill other requirements for the 24-month extension.

- The student must have at least 150 calendar days [126] remaining prior to the expiration of the 17-month STEM OPT EAD at the time the Application for Employment Authorization is filed. See 8 CFR 214.16(c)(2)(ii). This 150-day period guarantees that a student who obtains an additional 7-month extension will have at least 1 year of practical training under the enhancements introduced in this rule, including site visits, reporting requirements, and statement and evaluation of goals and objectives. For students who choose to seek an additional 7-month extension, the new enhancements apply upon the proper filing of the Application for Employment Authorization requesting the 7- month extension. See 8 CFR 214.16(c)(3).

- The student must meet all the requirements for the 24-month STEM OPT extension as described in 8 CFR 214.2(f)(10)(ii)(C), including but not limited to submission of the Training Plan to the DSO. *See* 8 CFR 214.16(c)(2)(iii). STEM OPT students applying for this additional 7-month extension must be in a valid period of OPT, but are not required to be in a valid period of 12-month post-completion OPT authorized under 8 CFR 274a.12(c)(3)(i)(B) as would normally be required for a STEM OPT extension request.

DHS believes that these requirements are necessary to ensure that those who receive the additional

7-month extension are covered by this rule's improved compliance, reporting, and oversight measures.

Moreover, unless and until a student with a 17-month STEM OPT extension properly files the application for the 7-month extension under the transition procedures of 8 CFR 214.16, the student, and the student's employer and DSO, must continue to follow all the terms and conditions that were in effect when the 17-month STEM OPT employment authorization was granted. *See* 8 CFR 214.16(c)(1). Upon the proper filing of the application for the additional 7-month STEM OPT period, the student, and the student's employer and DSO, will be subject to all but one of the requirements of the 24-month STEM OPT extension period. The only exception concerns the period of unemployment available to such a student. Under the rule, the 150-day unemployment limit described in 8 CFR 214.2(f)(10)(ii)(E) will apply to a student seeking a 7-month extension only upon approval of that extension. Thus, while the application for the additional 7-month extension is pending, the student may not accrue an aggregate of more than 120 days of unemployment during the entire post-completion OPT period. If the application for the 7-month extension is approved, the student may accrue up to 150 days of unemployment during the entire OPT period.

If an application for a 7-month extension is approved, USCIS will issue an EAD with a validity period that starts on the day after the expiration date stated in the 17-month STEM OPT EAD. If an application for a 7-month extension is denied, the student, and the student's employer and DSO, must, subsequent to denial, abide by all the terms and conditions

that were in effect when the 17-month STEM OPT EAD was issued, including reporting requirements. *See* 8 CFR 214.16(c)(3). They must abide by such terms throughout the remaining validity period of the 17-month STEM OPT extension.

DHS recommends that students who choose to request the additional 7-month extension obtain the necessary DSO recommendation and file their application as early as possible in advance of the August 8, 2016, application deadline. USCIS's current processing times are available at https://egov.uscis.gov/cris/processTimesDisplayInit.do.

2. Public Comments and Responses

i. STEM OPT Applications for Employment Authorization Pending on May 10, 2016

Comment. DHS received comments requesting clarification on the procedures that would apply to F-1 students whose applications for STEM OPT extensions are pending at the time of the implementation of the final rule.

Response. As noted above, USCIS will issue RFEs to students whose applications for employment authorization requesting a 17-month STEM OPT extension are pending on the effective date of this rule. By responding to the RFE, students will have the opportunity to demonstrate that they are eligible for a 24-month STEM OPT extension without incurring an additional fee, or having to refile the Application for Employment Authorization.

Comment. Several commenters expressed concern about the proposed USCIS adjudicative process for 17-month STEM OPT applications that remain pending

on the effective date of the final rule. For example, one commenter noted that the proposed rule indicated that DHS intended to adjudicate STEM OPT applications "consistent with the regulations that existed at the time the application was submitted." The commenter was concerned with the potential confusion that would arise if a DSO issued a 17-month STEM OPT recommendation before the new rule's effective date but the student filed the Application for Employment Authorization after that date. In such a case, the commenter added, the student's Application for Employment Authorization would not meet the applicable requirements at the time of filing. The commenter recommended that DHS instead use the date of the DSO recommendation as the determinative factor as to which regulatory requirements to apply.

Response. DHS appreciates commenters' concerns about the possibility for confusion. To clarify, 17-month STEM OPT applications that are filed prior to, and remain pending on, May 10, 2016 will be processed in accordance with the requirements of this rule. As described above, USCIS will issue RFEs to students with such pending applications. The RFE will request documentation showing that the student meets the requirements of the 24-month STEM OPT extension. The documentation must include a Form I-20 Certificate of Eligibility endorsed on or after May 10, 2016, indicating that the DSO recommends the student for a 24-month STEM OPT extension. Submission of the Form I-20 in response to the RFE will be regarded as fulfillment of the requirement, contained in 214.2(f)(11)(i) of this section, that a student must initiate the OPT application process by

requesting a recommendation for OPT by his or her DSO. *See* 8 CFR 214.16(a)(1).

Moreover, DHS will deem 17-month STEM OPT applications that remain pending on May 10, 2016, to be covered by 8 CFR 214.2(f)(11)(i)(C) and 8 CFR 274a.12(b)(6)(iv) of this rule. These provisions state that if a student's post-completion OPT expires while his or her timely filed STEM OPT application is pending, the student will receive an automatic extension of employment authorization of up to 180 days upon the expiration of his or her current employment authorization.[127] *See* 8 CFR 214.16(a)(2).

ii. New Applications for STEM OPT Under This Rule

Comment. Some commenters sought clarification on whether a student in the 60-day grace period following an initial 12-month period of post-completion OPT would be given the opportunity to apply for a STEM OPT extension if the new rule takes effect during the student's 60-day grace period. Some commenters asked whether there will be an additional grace period allowing students to come into compliance with the final rule once it is published.

Response. This rule, like the 2008 IFR, does not allow students to apply for STEM OPT extensions during the 60-day grace period following an initial 12-month period of post-completion OPT. The current requirement to properly file the request for a STEM OPT extension prior to the end of the initial OPT period allows sufficient time for the F-1 student to apply for the extension and is administratively convenient as it ensures continuing employment authorization during

the transition from the initial OPT period to the STEM OPT period. Accordingly, if a student anticipates that he or she will enter the 60-day grace period before May 10, 2016, the student should not wait to apply. Such a student should apply for the 17-month STEM OPT extension before his or her initial OPT period expires.

iii. Students with Valid, Unexpired 17-Month STEM OPT Employment Authorization on May 10, 2016.

Comment. Some commenters stated that a failure to promulgate a new rule prior to the vacatur of the 2008 IFR would result in negative impacts to students currently on 17-month STEM OPT extensions, as well as U.S. employers and the U.S. economy. Commenters stated that a regulatory gap would result in negative financial impacts for a great number of employers as well as several thousand students who will be at a risk of losing their status.

Response. DHS has endeavored to have a final rule in place before the vacatur takes effect. DHS understands the commenters' concerns, but believes that such concerns are now moot.

Comment. Some commenters also asked whether, following the final rule's effective date, students currently on 17-month STEM OPT extensions would be allowed to apply for a 24-month STEM OPT extension. One commenter requested that existing 17-month extensions automatically be extended to a 24-month period to reduce workload for both students and USCIS. Other commenters stated that students who received 17-month STEM OPT EADs should receive a waiver of application fees for a revised 24-month EAD.

According to these commenters, students had not caused the program requirements to change, and they should not be punished for it.

Response. As noted above, after the effective date of this final rule, certain students with 17-month STEM OPT extensions may apply for an additional 7-month extension to effectively obtain the balance of the new 24-month STEM OPT extension. To qualify for the 7 month extension, such students must have at least 150 days remaining before the end of the student's 17-month OPT period, and they must otherwise meet all requirements of the final rule governing the 24-month STEM OPT extension. DHS considered commenters' suggestions, but ultimately determined that automatically converting 17-month extensions into 24-month extensions would be inconsistent with many parts of the rule, including the requirements related to Training Plans, employer attestations, and reporting requirements. For these reasons, students with 17-month extensions who seek to benefit from the 24-month extension must apply for the balance of the 24-month extension consistent with this rule's requirements.

Comment. DHS received a number of comments seeking clarification on the categories of students who would be affected by the new requirements for obtaining STEM OPT extensions. Several commenters asked DHS to clarify whether the new requirements would apply to students on 17-month STEM OPT extensions on the date the final rule becomes effective. One commenter asked whether students currently on 17-month STEM OPT extensions would be permitted to complete their period of authorized STEM OPT.

Response. As noted above, the new requirements apply only to STEM OPT applications that are pending on the effective date of the final rule or that are submitted after that date. The new requirements do not affect current 17-month STEM OPT beneficiaries, except to the extent that such beneficiaries seek to avail themselves of the additional 7-month OPT period available to them under the transition provisions of the final rule. Students currently on 17-month STEM OPT extensions who do not seek 7-month extensions will be permitted to complete their authorized 17-month STEM OPT period, barring termination or revocation of their EAD under 8 CFR 274a.14. During this time, the student, and the student's employer and DSO, must continue to abide by all the terms and conditions that were in effect when that EAD was issued.

J. Comments on the Initial Regulatory Impact Analysis

Comment. Some commenters were generally supportive of the proposed rule, but stated that DHS severely underestimated the time-burden and costs to DSOs for complying with requirements concerning the submission of training plans and periodic evaluations. Commenters believed that DHS estimates related to these requirements—including 30 minutes for review of training plans and 15 minutes for review of periodic evaluations—were unrealistic. Specifically, one university representative explained that DSOs would need to spend 50 to 60 minutes reviewing and storing each training plan. The commenter explained that DSOs would need 30 minutes to review training plans for completeness and follow up with students as

necessary, and an additional 20 to 30 minutes to upload the document into SEVIS. Other commenters stated that it would take an employer 90 to 120 minutes to complete the proposed Mentoring and Training Plan.

Response. In response to comments, DHS revised the time estimated to initially complete the Training Plan form. DHS added an hour to the estimate of DSO's time to initially complete the Training Plan form, and 50 minutes to the estimate of DSO's time for the coordination and completion of each evaluation. DHS added two hours to the estimate of employer's time to initially complete the Training Plan form, and 30 minutes to the estimate of employer's time for the coordination and completion of each evaluation. DHS added 30 minutes to the estimate of student's time for the coordination to initially complete the Training Plan form, and 30 minutes for the coordination and completion of each evaluation.

As noted above, this final rule includes a number of provisions intended to minimize burden on employers while ensuring that the Training Plan for STEM OPT Students serves its stated purposes. For instance, DHS has revised the regulatory text and the Training Plan form to clarify that employers may rely on existing training programs for STEM OPT students, so long as those programs satisfy this rule's requirements. Also in response to comments, DHS has clarified the form instructions and various fields on the form. Among other things, DHS has removed the reference to "mentoring," which many commenters stated would comprise a significant part of the

expected time to both complete and review the proposed form.

With regard to the commenter's estimate of the approximate time required to upload the training plan into SEVIS, DHS clarifies that the rule does not require the Training Plan for STEM OPT Students to be uploaded into that database at this time, but instead only requires that DSOs properly store it. Once SEVIS functionality is upgraded to permit the Training Plan to be uploaded, the form must be uploaded into SEVIS for each F-1 student participating in a STEM OPT extension. DHS anticipates, however, that the new student portal will allow F-1 students to upload certain information, including the Training Plan, directly into SEVIS. This means that DSOs ultimately will not be required to spend any time uploading the form into SEVIS and that their burdens will otherwise be reduced due to the student portal.

Comment. Another commenter suggested that DHS "is neglecting its duty under federal guidance to discuss crucial economic considerations, such as how many OPT workers will be hired instead of American workers; how many STEM grads have given up finding work in the STEM field; how the new rule will affect tech-worker wages and American STEM-grad employment."

Response. DHS disagrees that it neglected to consider the economic impact of the proposed rule, much of which was described in the Initial Regulatory Impact Analysis. DHS carefully considered the potential direct costs and benefits of the proposed rule, and has carefully considered the potential direct costs and benefits of the final rule.

Comment. Some commenters suggested that DHS shift costs away from students and universities. For instance, some commenters supported the rule, but suggested fees to employers or students that would cover government costs or costs for universities, including the training of DSOs on how to administer and review the proposed Mentoring and Training Plan.

One DSO recommended that DHS establish a minimum personnel full-time equivalent (FTE) requirement for "SEVP regulatory advising and SEVIS reporting requirement[s]," which would be based on the number of F-1 students enrolled and whether the school uses SEVIS Real-time Interactive web processing or batch processing. The same DSO also suggested that this FTE figure be a SEVIS reporting requirement as part of a school's recertification. Some commenters said that DHS' estimation of the time required for reviewing the proposed Mentoring and Training Plan was too low in light of DSOs' current work duties.

Response. DHS views the Training Plan as primarily the student's responsibility to create and submit, but has made a number of changes in this rule that will reduce the implementation costs for schools. For example, DHS has decided to require only an annual evaluation, and the Department has also clarified a DSO's review responsibilities in section IV.F. of this preamble. In addition, SEVIS will soon be updated to include a portal allowing students to update their own information. DHS believes the rule offers benefits to U.S. institutions of higher education that outweigh administrative implementation costs.

With respect to the commenters' specific proposals, DHS notes that there are currently no plans to add a surcharge to employers to defray additional costs to schools or students. DHS does not expect that this rule would require new hiring by the school; nevertheless, in 2015 DHS lifted the prior cap of 10 DSOs per campus, allowing schools to better allocate personnel to suit their F-1 student population needs. *See* 8 CFR 214.3(l)(1)(iii); Final Rule: Adjustments to Limitations on Designated School Official Assignment and Study by F-2 and M-2 Nonimmigrants, 80 FR 23680 (Apr. 29, 2015). DHS will continue to seek feedback and proposals from school officials on ways to increase clarity and minimize burden.

Comment. Some DSOs stated that their workloads would increase if they were obligated to follow up with students who miss their Training Plan deadlines and reporting requirements.

Response. If a student does not submit his or her evaluation on time, the DSO should report that fact to DHS. After such reporting is completed, the DSO would have no further responsibility related to student non-compliance aside from any potential case-by-case DHS request for documentation regarding the student.

Comment. One commenter sought clarification on which persons would be responsible for advising U.S. employers of their reporting obligations under 8 CFR 214.2(f)(10)(ii)(C)(6). The commenter, a school, stated that this would be another burden that would fall on schools as they would end up educating employers about their obligations.

Response. The employer, as an active participant in the STEM OPT extension program, is responsible for reporting any changes in student employment and monitoring students' progress and work via the Training Plan. DHS will make initial guidance available to all parties—DSOs, employers, and students—regarding the responsibilities of each, as soon as feasible. These guides will be posted at http://www.ice.gov and http://studyinthestates.dhs.gov.

Comment. The Initial Regulatory Impact Analysis estimated that it would take approximately three hours for the employer to complete the proposed Mentoring and Training Plan, including 2 hours for employers to initially complete the plan and an additional hour for employers to help complete the required evaluations.[128] Some commenters stated that DHS' initial estimate of the time burden for employers to complete the proposed Mentoring and Training Plan and conduct the required evaluation every six months was too low. One commenter cited a survey of employers in which four out of five employers responded that "the government's estimate regarding time and cost to comply with the program requirements is too low." Another commenter observed that DHS' initial time estimate did not account for time necessary for communication between the student, the DSO, and the employer in order to complete Section 1 of the form.

Response. DHS recognizes the concerns of students and employers with regard to complying with the Training Plan requirements. As noted above, DHS has incorporated significant flexibilities and clarifications into the Training Plan requirement, including by reducing the frequency of evaluations. DHS has also

revised the burden estimates upwards, including to account for time for necessary communication between the student, DSO, and employer.

Comment. Some commenters stated that any government costs incurred to implement the rule should be used instead to help train and prepare U.S. students and graduates.

Response. The STEM OPT extension is a program implemented by SEVP, which is entirely funded by fees paid by students and schools. The program does not receive appropriated funds from Congress, and the program is not implemented at taxpayers' expense. Thus, any elimination of the STEM OPT extension would not result in increased budget flexibility to address training of U.S. citizen students and workers.

K. Other Comments

1. Introduction

DHS received a number of comments related to matters falling outside the topics discussed above. The comments are addressed below.

2. Public Comments and Responses

i. Procedural Aspects of the Rulemaking

Comment. Several commenters asserted that foreign nationals (including students and non-U.S. workers) should not be allowed to comment on the proposed rule.

Response. Such an approach would be inconsistent with the statutory requirements established by Congress in the APA's notice-and-comment provision, which do not include a citizenship or nationality requirement and places a priority on allowing all

interested persons to participate in a rulemaking proceeding.

Comment. One commenter stated that the use of a 30-day comment period instead of a 60-day comment period suggested an "executive power grab." The commenter added that the 30-day comment period was intentionally designed to allow the rule to go into effect on February 13, 2016, when the 2008 STEM OPT extension was originally scheduled to be vacated. The commenter stated that a February 13 effective date would allow DHS to avoid a hiatus in processing applications. Another commenter stated that the 30-day comment period has the potential to expose the Department and this rule to unneeded scrutiny and possible delay. The commenter suggested that DHS consider withdrawing the current proposal and re-release a new proposed rule with a timeline that is consistent with Executive Order 13563.

Response. DHS recognizes that Executive Order 13563 recommends a 60-day comment period. However, the Administrative Procedure Act makes no reference to that time period. See 5 U.S.C. 553. For many years courts have recognized that 30 days provides a meaningful opportunity for public input into rulemaking. See, e.g., Conference of State Bank Sup'rs v. Office of Thrift Supervision, 792 F. Supp. 837, 844 (D.D.C. 1992). DHS notes that the fact that it received over 50,500 comments on the proposed rule suggests that the 30-day period provided an adequate opportunity for public input. Especially in light of the need for swift action to address impending vacatur of the 2008 IFR, DHS believes that the 30-day comment period was reasonable.

Comment. One commenter expressed doubts that DHS would consider comments regarding this regulation rather than "just dismiss[ing]" them because, according to the commenter, "the Department seemingly didn't think the `over 900' comments it got in response to the 2008 IFR were worth any response at all." The commenter suggested that the final rule should explain why the first STEM OPT regulation was never finalized and why it was not a "violation of the spirit or the letter of the APA to not finalize the 2008 IFR."

Response. DHS disagrees with the commenter. DHS has considered all comments submitted in regard to this rulemaking, as reflected in the extensive discussion in this preamble. In any case, notwithstanding that DHS was under no legal obligation to do so, DHS relied on the comments to the 2008 IFR when developing the 2015 NPRM. *See, e.g.*, 80 FR 66380-82, 63384, 63386-91 (Oct. 19, 2015).

ii. Impact of STEM OPT on the H-1B Program

Comment. A number of commenters expressed concern about the impact that this rulemaking will have on the H-1B visa program. One commenter stated that the proposed rule would make it harder for individuals to obtain H-1B visas. The commenter explained that the extended OPT period effectively will give F-1 students multiple opportunities to apply for H-1B visas, and that without a commensurate increase in the number of H-1B visas, the rule would increase competition and make it harder to obtain such visas. Some commenters stated that only students who are not granted H-1B visas should be granted STEM OPT

extensions, apparently believing the two programs are best considered as alternatives.

Another commenter stated that "DHS predicts the number of [individuals] working on student visas will be greater than the H-1B quotas." Another commenter expressed that STEM OPT graduates are advantaged over H-1B workers, because they have the liberty of changing employers more frequently and with more ease than H-1B workers. However, another commenter stated that students participating in the STEM OPT extension lack mobility and described them as "indentured laborers" that do not have rights "like being able . . . to change jobs."

Response. DHS acknowledges that some employers may choose to sponsor F-1 students on STEM OPT extensions for H-1B visas. However, DHS expects that employers will invest in retaining only those STEM OPT students who have demonstrated through their performance during OPT that they are likely to make valuable contributions in a position related to their STEM field of study. Employers would make such decisions using the same business judgments they currently rely on to competitively recruit and retain talent and, in some cases, sponsor foreign nationals for H-1B visas.

DHS does not believe sufficient data has been presented to make a determination one way or the other regarding the suggestion that the rule will make it harder for individuals to obtain H-1B visas but believes that any impact will be minimal. DHS notes that there is no limit on the total number of H-1B petitions that an employer may submit in any given year, and no requirement that the individual be in the

United States when a petition is submitted on his or her behalf. As compared to the total number of people in the world who may be eligible for H-1B visas, the total number of STEM OPT extension participants in any given year will be quite small. And to the extent that an increase in interest in the H-1B program from STEM OPT students may result in increased competition for scarce H-1B visas, the appropriate remedy for increasing the statutory limits imposed by Congress on H-1B visas would require legislative action.

Additionally, as noted above, the fundamental purpose of the STEM OPT extension is not to provide students with another chance at the H-1B lottery while in the United States. Instead, as explained in detail in the above discussions regarding experiential learning and important U.S. national interests, DHS believes the STEM OPT extension will promote what DHS believes to be the worthy goals of expanding the educational and training opportunities of certain international students, improving the competitiveness of U.S. academic institutions, and ensuring the continued substantial economic, scientific, technological, and cultural benefits that F-1 students bring to the United States generally.

DHS considered comments expressing concerns that STEM OPT students would add to the number of workers competing for jobs in the U.S. labor market beyond those Congress authorized in other employment-based nonimmigrant visa programs, and that they would potentially displace more-experienced U.S. workers. DHS considered potential impacts of student training in the employment context and has included specific labor market safeguards in this final rule.

Specifically, any employer providing a training opportunity to a STEM OPT student must attest that the student will not replace a full- or part-time, temporary or permanent U.S. worker. The rule also includes protections to deter use of the STEM OPT extension to undercut U.S. workers' compensation, or sidestep other terms and conditions of employment that the employer would typically provide to U.S. workers. Specifically, the rule requires that the terms and conditions of a STEM practical training opportunity (including duties, hours, and compensation) be commensurate with those applicable to similarly situated U.S. workers. As stated previously, OPT is a part of the educational experience that individuals come to the United States to obtain, and the presence of these individuals in U.S. colleges and universities, as well as in workplaces, exposes U.S. students and workers to their intellectual and cultural perspectives, which ultimately provides significant cultural and economic benefits.

In response to the comment asserting that STEM OPT students can change jobs more easily and frequently than H-1B nonimmigrants, DHS first notes that commenters expressed varying views on whether the STEM OPT extension would result in such an impact. Additionally, unlike the H-1B program's objective to temporarily satisfy a sponsoring employer's need for labor, the STEM OPT extension's objective is to ensure adequate training appropriate to the major area of study for the student. DHS determined that in order to meet that objective, the employer must comply with the requirements of this final rule, which include providing training conditions consistent with

the established Training Plan. Therefore, F-1 students may change employers during a STEM OPT extension, but only in accordance with the STEM OPT regulations and in order to further their practical education in a position directly related to their major area of study. Outside of such a situation, STEM OPT students who leave their employers risk a loss of immigration status and the opportunity to further develop their skills through practical training.

iii. Miscellaneous Other Comments

Comment. A university applauded the clarification in a footnote that "OPT can be full-time even while a student is attending school that is in session," but requested that the statement be affirmed via regulatory text.

Response. DHS declines to make this change because it would impact not only STEM OPT extensions but also the general OPT program, which would be outside the scope of this rulemaking.

Comment. A commenter asked whether a student can choose to end his or her post-completion OPT before the end of the eligibility period, so that the student may preserve some OPT eligibility time for another degree the student plans to pursue at the same educational level.

Response. The time that a student may spend on OPT is not "bankable" between two different degrees. This concept remains applicable to the STEM OPT extension as well as to all pre- or post-completion OPT. If a student does not use the full period of time eligible for one degree, the extra time cannot be used for OPT based on a different degree.

Comment. DHS received several comments regarding potential environmental costs resulting from an increased population, both in the United States generally, and in Silicon Valley, California specifically, where many STEM jobs are located. Some also noted that California has been struggling with an ongoing drought.

Response. Upon review, DHS remains convinced that our review pursuant to the National Environmental Policy Act is in compliance with the law and with our Directive and Instruction.

V. Statutory and Regulatory Requirements

DHS developed this final rule after considering numerous statutes and executive orders related to rulemaking. The below sections summarize our analyses based on a number of these statutes and executive orders.

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, as well as distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. DHS has prepared an analysis of the potential costs and benefits associated with this final rule. The analysis can be found in the docket for this rulemaking and is briefly summarized here. This rule

has been designated a "significant regulatory action" that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

1. Summary

DHS is amending nonimmigrant student visa regulations on OPT for students with degrees in STEM from U.S. accredited institutions of higher education. The final rule includes a 24-month STEM OPT extension. The rule also seeks to strengthen the STEM OPT program by requiring formal training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, allowing extensions only to students with degrees from accredited schools, and requiring employers to enroll and remain in good standing with E-Verify. The rule also provides Cap-Gap relief for any F-1 student with a timely filed H-1B petition and request for change of status.

The rule provides a formal mechanism for updating the STEM Designated Degree Program list, and permits a student participating in post-completion OPT to use a prior eligible STEM degree from a U.S. institution of higher education as a basis to apply for an extension, provided the most recent degree was also received from a currently accredited institution. The rule implements compliance and reporting requirements that focus on formal training programs to augment academic learning through practical experience, in order to equip students with a more comprehensive understanding of their selected area of study and broader functionality within their chosen field. These changes also help ensure that the nation's colleges and

universities remain globally competitive in attracting international STEM students to study and lawfully remain in the United States.

2. Summary of Affected Population

DHS has identified five categories of students who will be eligible for STEM OPT extensions under the final rule: (1) Those currently eligible based on a recently obtained STEM degree; (2) those eligible based upon a STEM degree earned prior to their most recent degree; (3) those eligible for a second STEM OPT extension; (4) those eligible based on potential changes to the current STEM list; and (5) those eligible to increase a currently authorized STEM OPT extension period from 17 to 24 months.

DHS estimates the total number of affected students across the five categories to be almost 50,000 in year one and grow to approximately 92,000 in year 10. This estimation is based on the growth rate of the overall proportion of students with an eligible STEM degree who participate in the post-completion OPT program. DHS utilized a 15 percent growth rate that levelled off to 11 percent to achieve a long run stabilized participation rate in six years. Based on slightly lower and higher growth rates, DHS calculated low and high estimates; for year 1 the low and high figures are about the same as the primary estimate, but by year 10 the low estimate is about 80,000 and the high estimate is approximately 112,000.

DHS conducted a statistically valid sample analysis to estimate the number of STEM OPT employers and schools that would be considered small entities. To identify the entities that would be considered "small,"

DHS used the Small Business Administration's (SBA) guidelines on small business size standards applied by NAICS code. This analysis indicated that 48 percent of schools are small entities. Based on 1,109 approved and accredited schools participating in STEM OPT extensions, about 532 could reasonably be expected to be small entities impacted by this rule. A sample of 26,260 entities that employed STEM OPT students under the 2008 IFR revealed that about 69 percent were small. Hence, this rule could affect about 18,000 employers that are small entities.

3. Estimated Costs of Final Rule

DHS estimates that the direct costs imposed by the implementation of this rule will be approximately $886.1 million over a 10-year analysis time period. At a 7 percent discount rate, the rule will cost $588.5 million over the same period, which amounts to $83.8 million per year when annualized at a 7 percent discount rate. At a 3 percent discount rate, the rule will cost $737.6 million over the same period, which amounts to $86.5 million per year when annualized at a 3 percent discount rate. These costs include the direct and monetized opportunity costs to the three types of entities primarily affected by this rule: students, schools, and employers. Students will incur costs completing application forms and paying application fees; reporting to DSOs; preparing, with their employers, the Training Plan; and periodically submitting updates to employers and DSOs. DSOs will incur costs reviewing information and forms submitted by students, inputting required information into the SEVIS, and complying with other oversight requirements related to

prospective and participating STEM OPT students. Employers will incur costs preparing the Training Plan with students, confirming students' evaluations, undergoing site visits, researching the compensation of similarly situated U.S. workers, enrolling in (if not previously enrolled) and using E-Verify to verify employment eligibility for all new hires, and complying with additional requirements related to E-Verify. The following table shows a summary of the total costs for a 10-year period of analysis.

Table 2—Summary of the Total Costs of the Final Rule, 2016-2025 [$ millions]

Year	STEM OPT extension cost	E-Verify cost	Total cost
	a	b	c = a + b
1	$65.5	$1.8	$67.3
2	50.1	2.1	52.2
3	57.7	2.5	60.2
4	66.3	3.0	69.3
5	76.2	3.5	79.7
6	84.6	4.2	88.8
7	93.9	5.0	98.9
8	104.2	6.0	110.2
9	115.7	7.1	122.8
10	128.4	8.4	136.8
Total	842.5	43.6	886.1
Total (7%)	560.6	27.9	588.5
Total (3%)	701.6	35.6	737.6
Annual (7%)	79.8	4.0	83.7
Annual (3%)	82.3	4.2	86.5

*** Estimates may not sum to total due to rounding.**

DHS estimates the following distribution of costs per STEM OPT extension under the final rule at: $767 per student, $239 per university DSO, $1,268 per employer (with E-Verify), and $1,549 per employers new to STEM OPT (new to E-Verify).

In addition to the quantified costs summarized above, there could be unquantified direct costs associated with this rule. Such costs could include costs to

students and schools resulting from the final accreditation requirement; costs to employers from the final requirement to provide STEM OPT students with compensation commensurate to similarly situated U.S. workers; and decreased practical training opportunities for students no longer eligible for the program due to revisions to the STEM OPT program. DHS does not have adequate data to estimate the monetary value of these possible costs.

4. Estimated Benefits of Final Rule

Making the STEM OPT extension available to additional students and extending its length will enhance students' ability to achieve the objectives of their courses of study by allowing them to gain valuable knowledge and skills through on-the-job training that may be unavailable in their home countries. The changes will also benefit the U.S. educational system, U.S. employers, and the U.S. economy. The rule will benefit the U.S. educational system by helping ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields. U.S. employers will benefit from the increased ability to rely on the skills acquired by STEM OPT students while studying in the United States, as well as their knowledge of markets in their home countries. The U.S. economy as a whole will benefit from the increased retention of STEM students in the United States, including through increased research, innovation, and other forms of productivity that enhance the nation's scientific and technological competitiveness.

Furthermore, strengthening the STEM OPT extension by implementing requirements for training, tracking objectives, reporting on program compliance, and requiring the accreditation of participating schools will further prevent abuse of the limited on-the-job training opportunities provided by this program. These and other elements of the rule will also improve program oversight, strengthen the requirements for program participation, and better protect against adverse consequences on U.S. workers, as well as consequences that may result from exploitation of students.

DHS has not attempted to quantify the potential benefits of the rule because such benefits are difficult to measure. These benefits encompass a number of dynamic characteristics and explanatory variables that are very difficult to measure and estimate. Quantifying these variables would require specific analyses to develop reasonable and accurate estimates from survey methods that are not within the scope of this regulatory analysis.

5. Alternatives

For purposes of this analysis, DHS considered three principal alternatives to the final rule. The first alternative was to take no regulatory action, in which case STEM OPT students would no longer be allowed to work or reside in the United States past their 12-month post-completion OPT period, unless they were able to convert to another employment-authorized visa classification or complete another academic program. DHS believes the benefits that accrue from allowing the F-1 STEM OPT extension for students and

educational institutions would not be realized under this alternative and that in many cases these students would have to leave the United States. DHS rejects this alternative because it would deter future international students from applying to STEM degree programs at U.S. educational institutions and reduce the attractiveness of U.S. educational institutions compared to educational systems in other countries that have more flexible postgraduate training programs.

The second alternative considered was to keep the maximum length of the STEM OPT extension at 17 months, while implementing all other aspects of the final rule. For students seeking a STEM OPT extension based on a second or previously earned STEM degree, the alternative would be similar to the final rule, except with respect to the duration of the OPT period. The 10-year total of this alternative is $29 million less than the final rule, discounted at 7 percent. After evaluation of DHS's experience with the STEM OPT extension, DHS has rejected this alternative so as to ensure that the practical training opportunity is long enough to complement the student's academic experience and allow for a meaningful educational experience, particularly given the complex nature of many STEM projects.

The third alternative to the final rule was to include a six-month evaluation as part of the Training Plan. This alternative was considered in the NRPM. After considering an employer's typical schedule of annual evaluations for all employees, including STEM OPT extension students, DHS has rejected this alternative in favor of an annual evaluation.

The results of this comparison of alternatives are summarized in the following table.

Table 3—Total Costs for Regulatory Alternatives Considered [$ millions]

Year	Alternative 1 no action	Alternative 2 no change in STEM OPT length	Alternative 3 6 month evaluations	Improving and extending STEM OPT (final rule)
1	$0.0	$44.8	$81.0	$67.3
2	0.0	51.6	64.2	52.2
3	0.0	59.3	73.8	60.2
4	0.0	68.2	85.0	69.3
5	0.0	78.5	97.8	79.7
6	0.0	87.4	108.9	88.8
7	0.0	97.3	121.2	98.9
8	0.0	108.4	134.9	110.2
9	0.0	120.8	150.2	122.8
10	0.0	134.6	167.3	136.8
Total	0.0	851.1	1,084.4	886.1
Total (7%)	0.0	559.5	720.0	588.1
Total (3%)	0.0	705.5	902.5	737.6

* Estimates may not sum to total due to rounding.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

1. A Statement of the Need for, and Objectives of, the Rule

The final rule improves the STEM OPT extension by increasing oversight and strengthening requirements for participation. The changes to the STEM OPT extension regulations are intended to enhance the educational benefit of the STEM OPT extension, create a formal process for updating the list of STEM degree programs that are eligible for the STEM OPT extension, and incorporate new measures to better ensure that STEM OPT extensions do not adversely affect U.S. workers. DHS objectives and legal authority for this final rule are further discussed elsewhere in this preamble.

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Rule as a Result of Such Comments

Comment. Many universities and employers specifically stated that the rule would improve overall U.S. economic competitiveness. However, commenters stated that the burden of the proposed Mentoring and Training Plan would be felt more acutely by small- to medium-sized businesses that use this program. Commenters stated that managers of such businesses have many daily responsibilities—they are responsible for payroll, managing the Human Resources department, and personally working with their customers or clients, among other responsibilities. Commenters stated that DHS underestimated the increased administrative burdens that will be borne by small businesses, and noted that this time cannot be spent on the core competencies of the firm. Many of these same concerns are shared by larger companies as well. Commenters identifying as large participants in the OPT program stated concerns that the individualized training plan must be tracked by a supervisory employee at the firm for each worker.

Commenters stated that many firms already have workable mentoring and training programs in place at their firms, and some expressed concerns that the training plan requirement, in many cases, would force companies to make major changes to their current mentoring programs while imposing an unreasonable cost burden. Other commenters expressed

concern that DHS severely underestimated the time to fill out the form. Finally, in the initial regulatory flexibility analysis, DHS presented the costs to schools as a percentage of annual revenue. A university commenter stated that comparing costs against revenue is not appropriate because schools do not generate revenue from their graduates directly, and universities do not fund their international student offices based on student population.

Response. DHS recognizes the concerns of employers with regard to complying with the training plan requirements. As noted in sections IV.B. and IV.F. of this preamble, DHS has revised the NPRM to allow for additional flexibilities for employers. For instance, DHS has changed the frequency of the evaluation requirement. DHS proposed requiring an evaluation every six months, but is reducing the frequency to every 12 months. This change is intended to better reflect employer practices where annual reviews are standard, allowing students and employers to better align the evaluations required under this rule with current evaluation cycles. In addition, DHS has modified the regulatory text to further ensure that employers may rely on their existing training programs to meet certain training plan requirements under this rule, so long as such training programs otherwise meet the rule's training plan requirements. Finally, in response to comments received, DHS has updated the estimate of time to complete the Training Plan for STEM OPT Students form to 7.5 hours.

While employers may need to make adjustments due to the training plan requirement, DHS views the educational and program integrity benefits as

outweighing any costs associated with the Training Plan and supporting documentation. In addition, it is primarily the student's responsibility to complete the Training Plan with the employer and submit it to the DSO.

Finally, DHS disagrees with the comment concerning school revenue. DHS presents the costs to schools as a percentage of estimated annual revenue in order to assess the impact of universities' costs in the context of their overall revenue.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Changes Made to the Proposed Rule in the Final Rule as a Result of the Comments

DHS did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate Is Available

DHS conducted a statistically valid sample analysis to estimate the number of STEM OPT employers and schools that would be considered small entities. To identify the entities that would be considered "small," DHS used the SBA guidelines on small business size standards applied by NAICS code. This analysis indicated that 48 percent of schools are small entities. Based on 1,109 approved and accredited schools

participating in STEM OPT extensions, about 532 could reasonably be expected to be small entities impacted by the rule. Analysis of a sample of 26,260 entities that employed students who had obtained STEM OPT extensions revealed that about 69 percent were small. Hence, about 18,000 employers that are small entities could be affected by the rule.

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirements and the Types of Professional Skills Necessary for Preparation of the Report or Record

The final rule requires assurance that STEM OPT students develop, with their employers, a training plan. When completed, students submit the Training Plan for STEM OPT Students form to their DSOs when requesting the 24-month STEM OPT extension. The DSO must retain a copy of the form. The student and employer must ensure that any modified Training Plan is submitted to the student's DSO (at the earliest available opportunity). The student and employer must sign the modified Training Plan reflecting the material change(s) or deviation(s). Additionally, students will be required to update the form every 12 months to include a progress report on accomplishments and skills or knowledge obtained. Employers must meet with the student and sign the 12-month evaluation, and DSOs will check to ensure the evaluation has been completed and retain a copy.

Schools

Under the final rule, students must provide the completed Training Plan for STEM OPT Students forms to their DSOs to request STEM OPT extensions. DHS's analysis includes an opportunity cost of time for reviewing the form to ensure its proper completion and filing the record either electronically or in a paper folder.

Schools will incur costs providing oversight, reporting STEM OPT students' information, and reviewing required documentation. DSOs will be required to ensure the form has been properly completed and signed prior to making a recommendation in SEVIS. Schools will be required to ensure that SEVP has access to student evaluations (electronic or hard copy) for a period of at least three years following the completion of each STEM practical training opportunity. This rule, like the 2008 IFR, requires six-month student validation check-ins with DSOs. While the DSO will be in communication with the student during a six-month validation check-in, the final rule adds an additional requirement that DSOs also check to ensure the 12-month evaluation has been properly completed and retain a copy. The final rule maintains the 2008 IFR requirements for periodic information reporting requirements on students, which results in a burden for DSOs. Table 3 summarizes the school costs from the final rule, as described in the Costs section of the separate Regulatory Impact Analysis.

Table 4—Schools—Cost of Compliance per STEM OPT Opportunity

Final provision	Calculation of school cost per student	Cost in year 1 per student	Cost in year 2 per student
Initially Reviewing and Filing Training Plan Form [1]	(1.33 hours × $39.33)	$52.31	$0.00
12-Month Evaluation [2]	(1 hour × 1 eval × $39.33)	39.33	39.33
6-Month Validation Check-Ins [2]	(0.17 hours × 2 validation check-ins × $39.33)	13.37	13.37
Additional Implementation [2]	0.10 × (Training Plan Initial + eval + validation check-ins costs)	10.83	5.27
Periodic Reports to DSO	0.17 hours × 2 reports × $39.33	13.37	13.37
Total		128.88	71.34

[1] Training Plan initial costs are only in year 1 per STEM OPT student.

[2] Estimated based on 12-month-period.

DHS estimates the annual impact to schools based on the school cost of compliance as a percentage of annual revenue. Second-year costs account for new additional STEM OPT extension students. For not-for-profit schools, DHS multiplied full-time first-year student tuition by total number of students to estimate school revenue.[129] While tuition revenue may underestimate actual school revenue, this is the best information available to DHS, and certainly the largest source of income for most schools. DHS's analysis shows that the first-year annual impact for the sampled small-entity schools with sufficient data would be less than 1 percent, with the average annual impact being 0.005 percent. All sampled small-entity schools with sufficient data had second-year annual impacts of less than 1 percent, with the average annual impact being 0.009 percent.

Table 5—Schools—Annual Impact in Year 1

Revenue impact range	Number of for-profit entities with data	Number of non-profit small entities with data	Percent of small entity schools
0% < Impact ≤ 1%	4	137	100%
Total	141		100

Table 6—Schools—Annual Impact in Year 2

Revenue impact range	Number of for-profit entities with data	Number of non-profit small entities with data	Percent of small entity schools
0% < Impact ≤ 1%	4	137	100%
Total	141	100	

Finally, schools not accredited by a Department of Education-recognized accrediting agency may incur unquantified costs from the final rule's prohibition on participation in the STEM OPT extension by students attending unaccredited schools. A few schools may choose to seek accreditation, or may potentially lose future international students and associated revenue.

Employers

Employers will be required to provide information for certain fields in the Training Plan for STEM OPT Students form, review the completed form, and attest to the certifications on the form. The final rule also prohibits using STEM OPT extension students as volunteers. The rule additionally requires that students work at least 20 hours per week while on their STEM OPT extension, and that they receive commensurate compensation. DHS does not have data on the number of STEM OPT students who do not currently receive compensation. Nor does DHS have data on the number of STEM OPT students who do not currently receive wages or other qualifying compensation that would be considered commensurate under the final rule. To the extent that employers are not currently compensating STEM OPT students in accordance with the final rule, this rulemaking creates additional costs to these employers. In the quantified costs, DHS does account for the possible additional burden of reviewing the employment terms of similarly situated U.S. workers in order to compare the terms and conditions of their employment to those of the STEM OPT student's practical training opportunity.

The final rule indicates that DHS, at its discretion, may conduct a site visit of an employer. The employer site visit is intended to ensure that each employer meets program requirements, including that they are complying with their attestations and that they possess the ability and resources to provide structured and guided work-based learning experiences outlined in students' Training Plans. Site visits will be performed at the discretion of DHS either randomly or when DHS determines that such an action is needed. The length and scope of such a visit would be determined on a case-by-case basis. For law enforcement reasons, DHS does not include an estimate of the basis for initiating a site visit and is unable to estimate the number of site visits that may be conducted, and thus is unable to provide a total annual estimated cost for such potential occurrences. However, based on previous on-site-reviews to schools, DHS estimates that an employer site visit may include review of records and questions for the supervisor, and will take five hours per employer. Therefore, DHS estimates that if an employer were to receive such a site visit, it would cost the employer approximately $394.80 (5 hours × $78.96).[130]

Table 7—Employers—Cost of Compliance

Final provision	Calculation of costs	Cost in year 1	Cost in year 2
Initially Completing Training Plan Form [1]	(3 hours × $78.96) + (1 hour × $43.93)	$280.81	$0.00
12-Month Evaluations [2]	(0.75 hours × 1 eval × $78.96)	59.22	59.22
Additional Implementation	0.1 × (Training Plan Initial + evals costs)	34.00	5.92
Employer STEM OPT Costs per Student =	Total	374.03	65.14
Cost for E-Verify per New Hire Case	(0.16 hours × $43.93)	7.03	7.03
E-Verify Enrollment & Setup	(2.26 hours × $80.12) + $100	281.07	0.00
E-Verify Annual Training & Maintenance	(1 hour × $43.93) + $398	441.93	441.93
Compliance Site Visit	([5 hours × $78.96] + [5 hours × $43.93])	0.00	614.45
E-Verify and Site Visit Employer Costs =	Total	723.00	1,056.38

[1] Training Plan initial costs are only in year 1 per STEM OPT student.
[2] Estimated based on 12-month-period.

DHS estimates the annual impact to employers based on the employer cost of compliance as a percentage of annual revenue. Second-year costs include initial submission of Training Plans for new STEM OPT students who will be hired in the second year. For not-for-profit school employers without revenue data, DHS multiplied the tuition per full-time first-year student with total enrollment numbers to estimate their revenue. DHS's analysis shows that the first- and second-year annual impact for 99 percent of the sampled small entities with sufficient data would be less than 1 percent, with the average first-year annual revenue impact being 0.11 percent and second-year annual revenue impact being 0.13 percent. Additionally, the cost impact per employer included a compliance site visit in year 2; therefore, costs could be less for employers that do not receive a site visit.

Table 8—Employers—Annual Impact in Year 1

Revenue impact range	Number of for-profit small entities with data	Number of non-profit small entities with data	Percent of small entity employers
0% < Impact ≤ 1%	240	7	99%
1% < Impact ≤ 3%	2	0	1
Total	249		100.0

Table 9—Employers—Annual Impact in Year 2

Revenue impact range	Number of for-profit small entities with data	Number of non-profit small entities with data	Percent of small entity employers
0% < Impact ≤ 1%	239	7	99%
1% < Impact ≤ 3%	3	0	1
Total	249		100.0

Current Employers That Do Not Continue to Participate

Due to additional employer requirements that must be met in order to receive the benefit of a STEM OPT extension opportunity, some employers (such as temporary employment agencies) will no longer be allowed to participate in STEM OPT extensions. DHS has not attempted to quantify costs associated with this possible impact on employers due to lack of available information on employers that would fall under this category and the associated economic impacts.

6. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule, and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected

DHS recognizes that the final rule will increase requirements on schools and employers of STEM OPT students. DHS has tried to minimize, to the extent possible, the small entity economic impacts of the final rule by structuring the program such that students are largely responsible for meeting its requirements. This not only minimizes the burden of the final program on schools and employers but also helps to ensure that students, who are the most direct beneficiaries of the practical training opportunities, bear an equitable amount of responsibility.

DHS has tried to minimize additional DSO responsibilities while balancing the need for oversight. For example, Training Plan evaluations will be conducted and submitted annually, rather than semi-annually, as DHS had initially proposed.

DHS has tried to provide flexibility for small entities in methods they can use to meet the commensurate duties, hours, and compensation requirements for STEM OPT students. The final rule allows employers to perform an analysis that uses their own wage and compensation data to determine how to compensate their STEM OPT employee in a comparable manner to their similarly situated U.S. workers. This provides small entities flexibility rather than applying a prescriptive national, state, or metropolitan data requirement. And because small entities may not have similarly situated U.S. workers, the rule provides alternative options, discussed in the preamble, for compliance with the requirement to provide commensurate compensation. Finally, the rule allows employers to meet some of the Training Plan requirements using existing training programs.

DHS will engage in further stakeholder outreach activities and provide clarifying information as appropriate. DHS envisions that this outreach will reduce the burden that may result from small entities' uncertainty in how to comply with the requirements.

As explained in greater detail in Chapter 8 of the RIA, DHS examined three alternative options that could have reduced the burden of the rule on small entities. The alternatives considered were (1) no regulatory action, (2) no change in the duration of the STEM OPT extension, and (3) requiring a six month

evaluation. DHS rejected these alternatives. First, without regulatory action, OPT students would no longer be allowed to work or reside in the United States past their 12-month post-completion OPT period. This would deter future international students who would pursue STEM degrees from applying to U.S. educational institutions, and reduce the attractiveness of U.S. educational institutions compared to educational systems in other countries that have more flexible student work programs. Second, without increasing the duration of the STEM OPT extension, students' practical training opportunities would not be long enough to complement the student's academic experience and allow for a meaningful educational experience, particularly given the complex nature of STEM projects. After weighing the advantages and disadvantages of each alternative, DHS elected to improve and extend the STEM OPT program in order to increase students' ability to gain valuable knowledge and skills through on-the-job training in their field that may be unavailable in their home countries, increase global attractiveness of U.S. colleges and universities, increase program oversight and strengthen requirements for program participation, and institute new protections for U.S. workers.

C. Small Business Regulatory Enforcement Fairness Act of 1996

Pursuant to Sec. 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, DHS wants to assist small entities in understanding this rule. If the rule would affect your small business, organization, or

governmental jurisdiction and you have questions concerning its provisions, please consult DHS using the contact information provided in the FOR FURTHER INFORMATION CONTACT section above. DHS will not retaliate against small entities that question or complain about this rule or about any DHS policy or action related to this rule.

D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government in the aggregate, or by the private sector, of $100,000,000 (adjusted for inflation) or more in any year. Although this rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

E. Congressional Review Act

DHS has sent this final rule to the Congress and to Comptroller General under the Congressional Review Act, 5 U.S.C. 801 et seq. This rule is a "major rule" within the meaning of the Congressional Review Act.

F. Collection of Information

Federal agencies are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, as amended, 44 U.S.C. 3501-3520. Under the Paperwork Reduction Act, an agency

may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

DHS has submitted the following information collection request to the OMB for review and approval in accordance with the review procedures of the Paperwork Reduction Act. The information collection requirements are outlined in this rule. The rule maintains the 2008 IFR revisions to previously approved information collections. The 2008 IFR impacted information collections for Form I-765, Application for Employment Authorization (OMB Control No. 1615-0040); SEVIS and Form I-20, Certificate of Eligibility for Nonimmigrant Student Status (both OMB Control No. 1653-0038); and E-Verify (OMB Control No. 1615-0092). These four approved information collections corresponding to the 2008 IFR include the number of respondents, responses and burden hours resulting from the 2008 IFR requirements, which remain in this final rule. Therefore DHS is not revising the burden estimates for these four information collections. Additional responses tied to new changes to STEM OPT eligibility will minimally increase the number of responses and burden for Form I-765 and E-Verify information collections, as the two collections cover a significantly broader population of respondents and responses than those impacted by the rule and already account for growth in the number of responses in their respective published information collection notices burden estimates.

As part of this rule, DHS is creating a new information collection instrument for the Training Plan for STEM OPT Students, which is now available

at https://studyinthestates.dhs.gov/. This information collection is necessary to enable reporting and attesting to specified information relating to STEM OPT extensions, to be executed by STEM OPT students and their employers. Such reporting will include goals and objectives, progress, hours, and compensation. Attestations will ensure proper training opportunities for students and safeguard interests of U.S. workers in related fields.

Additionally, DHS is making minor non-substantive changes to the instructions to Form I-765 to reflect changes to the F-1 regulations that lengthen the STEM OPT extension and allow applicants to file Form I-765 with USCIS within 60 days (rather than 30 days) from the date the DSO endorses the STEM OPT extension. Accordingly, USCIS submitted an OMB 83-C, Correction Worksheet, to OMB, which reviewed and approved the minor edits to the Form I-765 instructions.

Overview of New Information Collection- Training Plan for STEM OPT Students

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Training Plan for STEM OPT Students.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* Immigration and Customs Enforcement Form I-983;

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

- *Primary:* Students with F-1 nonimmigrant status, state governments, local governments, educational

institutions, businesses, and other for-profit and not-for-profit organizations.

- *Other:* None.

- *Abstract:* DHS is publishing a final rule that makes certain changes to the STEM OPT extension first introduced by the 2008 IFR. The rule lengthens the duration of the STEM OPT extension to 24 months; requires a Training Plan executed by STEM OPT students and their employers; requires that the plan include assurances to safeguard students and the interests of U.S. workers in related fields; and requires that the plan include objective-tracking and reporting requirements. The rule requires students and employers (through an appropriate signatory official) to report on the Training Plan certain specified information relating to STEM OPT extensions. For instance, the Training Plan explains how the practical training is directly related to the student's qualifying STEM degree; explains the specific goals of the STEM practical training opportunity and how those goals will be achieved through the work-based learning opportunity with the employer, including details of the knowledge, skills, or techniques to be imparted to the student; identifies the performance evaluation process; and describes the methods of oversight and supervision. The Training Plan also includes a number of employer attestations intended to ensure the educational benefit of the practical training experience, protect STEM OPT students, and protect against appreciable adverse consequences on U.S. workers. The rule also requires schools to collect and

retain this information for a period of three years following the completion of each STEM practical training opportunity.

5. An estimate of the total annual average number of respondents, annual average number of responses, and the total amount of time estimated for respondents in an average year to collect, provide information, and keep the required records is:

- 42,092 STEM OPT student respondents; 1,109 accredited schools endorsing STEM OPT students; and 16,891 employers of STEM OPT students.

- 42,092 average responses annually at 7.5 hours per initial Training Plan response.

- 70,153 average responses annually at 3.66 hours per 12-month evaluation response by STEM OPT students, DSOs, and employers.

6. An estimate of the total public burden (in hours) associated with the collection: 566,698 hours.

The recordkeeping requirements set forth by this rule are new requirements that require a new OMB Control Number.

During the NPRM, DHS sought comment on these proposed requirements. DHS received a number of comments on the burden potentially imposed by the proposed rule. The comments, and DHS's responses to those comments, can be found in the discussion of public comments regarding Form I-983 in section IV of

this preamble. The final form and instructions are available in the docket for this rulemaking.

G. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

I. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

J. Environment

The U.S. Department of Homeland Security Management Directive (MD) 023-01 Rev. 01 establishes procedures that DHS and its components use to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4375, and the Council on Environmental Quality (CEQ) regulations for

implementing NEPA, 40 CFR parts 1500-1508. CEQ regulations allow federal agencies to establish categories of actions, which do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1508.4. The MD 023-01 Rev. 01 lists the Categorical Exclusions that DHS has found to have no such effect. MD 023-01 Rev. 01 Appendix A Table 1.

For an action to be categorically excluded, MD 023-01 Rev. 01 requires the action to satisfy each of the following three conditions:

(1) The entire action clearly fits within one or more of the Categorical Exclusions.

(2) The action is not a piece of a larger action.

(3) No extraordinary circumstances exist that create the potential for a significant environmental effect. MD 023-01 Rev. 01 section V.B(1)-(3).

Where it may be unclear whether the action meets these conditions, MD 023-01 Rev. 01 requires the administrative record to reflect consideration of these conditions. MD 023-01 Rev. 01 section V.B.

DHS has analyzed this rule under MD 023-01 Rev. 01. DHS has determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule clearly fits within the Categorical Exclusion found in MD 023-01 Rev. 01, Appendix A, Table 1, number A3(a): "Promulgation of rules . . . of a strictly administrative or procedural nature;" and A3(d): "Promulgation of rules . . . that interpret or amend an existing regulation without changing its environmental effect." This rule is not part of a larger

action. This rule presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this rule is categorically excluded from further NEPA review.

K. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

L. Taking of Private Property

This rule would not cause a taking of private property or otherwise have takings implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

M. Protection of Children

DHS has analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule would not create an environmental risk to health or risk to safety that might disproportionately affect children.

N. Technical Standards

The National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through

the OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impracticable. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

List of Subjects

8 CFR Part 214

- Administrative practice and procedure
- Aliens
- Employment
- Foreign officials
- Health professions
- Reporting and recordkeeping requirements
- Students

8 CFR Part 274a

- Administrative practice and procedure
- Aliens

- Employment
- Penalties
- Reporting and recordkeeping requirements

The Amendments

For the reasons set forth in the preamble, the Department of Homeland Security amends parts 214 and 274a of Chapter 1 of Title 8 of the Code of Federal Regulations as follows:

PART 214—NONIMMIGRANT CLASSES

1. Revise the authority citation for part 214 to read as follows:

Authority: 6 U.S.C. 111 and 202; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305, 1324a, 1372 and 1762; Sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; Pub. L. 107-173, 116 Stat. 543; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Amend § 214.2 by revising paragraphs (f)(5)(vi), (f)(10)(ii)(A)(*3*), (f)(10)(ii)(C), (D), and (E), and (f)(11) and (12) to read as follows:

§ 214.2

Special requirements for admission, extension, and maintenance of status**.**

*** * * * ***

(f) * * *

**(5) * * *

(vi)** ***Extension of duration of status and grant of employment authorization.*** **(A) The duration of status, and any** employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), of an F-1 student who is the beneficiary of an H-1B petition subject to section 214(g)(1)(A) of the Act (8 U.S.C. 1184(g)(1)(A)) and request for change of status shall be automatically extended until October 1 of the fiscal year for which such H-1B status is being requested where such petition:

(1) Has been timely filed; and

(2) Requests an H-1B employment start date of October 1 of the following fiscal year.

(B) The automatic extension of an F-1 student's duration of status and employment authorization under paragraph (f)(5)(vi)(A) of this section shall automatically terminate upon the rejection, denial, revocation, or withdrawal of the H-1B petition filed on such F-1 student's behalf or upon the denial or withdrawal of the request for change of nonimmigrant status, even if the H-1B petition filed on the F-1 student's behalf is approved for consular processing.

(C) In order to obtain the automatic extension of stay and employment authorization under paragraph (f)(5)(vi)(A) of this section, the F-1 student, consistent with 8 CFR part 248, must not have violated the terms or conditions of his or her nonimmigrant status.

(D) An automatic extension of an F-1 student's duration of status under paragraph (f)(5)(vi)(A) of this section also applies to the duration of status of any F-2 dependent aliens.

* * * * *

(10) * * *

(ii) * * *

(A) * * *

(3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent). Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training. A student must complete all practical training within a 14-month period following the completion of study, except that a 24-month extension pursuant to paragraph (f)(10)(ii)(C) of this section does not need to be completed within such 14-month period.

*** * * * ***

(C) 24-month extension of post-completion OPT for a science, technology, engineering, or mathematics (STEM) degree. Consistent with paragraph (f)(11)(i)(C) of this section, a qualified student may apply for an extension of OPT while in a valid period of post-completion OPT authorized under 8 CFR 274a.12(c)(3)(i)(B). An extension will be for 24 months for the first qualifying degree for which the student has completed all course requirements (excluding thesis or equivalent), including any qualifying degree as part of a dual degree program, subject to the requirement in paragraph (f)(10)(ii)(C)(3) of this section that previously obtained degrees must have been conferred. 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-completion OPT authorized under 8 CFR 274a.12(c)(3)(i)(B). In no event may a student be authorized for more than two lifetime STEM OPT extensions. A student who was granted a 17-month OPT extension under the rule issued at 73 FR 18944, whether or not such student requests an additional 7-month period of STEM OPT under 8 CFR 214.16, is considered to have been authorized for one STEM OPT extension, and may be eligible for only one more STEM OPT extension. Any subsequent application for an additional 24-month OPT extension under this paragraph (f)(10)(ii)(C) must be based on a degree at a higher degree level than the degree that was the basis for the student's first OPT extension. In order to qualify for an extension of post-completion OPT based upon a STEM degree, all of the following requirements must be met.

(1) Accreditation. The degree that is the basis for the 24-month OPT extension is from a U.S. educational institution accredited by an accrediting agency recognized by the Department of Education at the time of application.

(2) DHS-approved degree. The degree that is the basis for the 24-month OPT extension is a bachelor's, master's, or doctoral degree in a field determined by the Secretary, or his or her designee, to qualify within a science, technology, engineering, or mathematics field.

(i) The term "science, technology, engineering or mathematics field" means a field included in the Department of Education's Classification of Instructional Programs taxonomy within the two-digit series or successor series containing engineering, biological

sciences, mathematics, and physical sciences, or a related field. In general, related fields will include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical, biological, and agricultural sciences).

(ii) The Secretary, or his or her designee, will maintain the STEM Designated Degree Program List, which will be a complete list of qualifying degree program categories, published on the Student and Exchange Visitor Program Web site at http://www.ice.gov/sevis. Changes that are made to the Designated Degree Program List may also be published in a notice in the Federal Register. All program categories included on the list must be consistent with the definition set forth in paragraph (f)(10)(ii)(C)(2)(i) of this section.

(iii) At the time the DSO recommends a 24-month OPT extension under this paragraph (f)(10)(ii)(C) in SEVIS, the degree that is the basis for the application for the OPT extension must be contained within a category on the STEM Designated Degree Program List.

(3) Previously obtained STEM degree(s). The degree that is the basis for the 24-month OPT extension under this paragraph (f)(10)(ii)(C) may be, but is not required to be, the degree that is the basis for the post-completion OPT period authorized under 8 CFR 274a.12(c)(3)(i)(B). If an application for a 24-month OPT extension under this paragraph (f)(10)(ii)(C) is based upon a degree obtained previous to the degree that provided the basis for the period of post-completion OPT authorized under 8 CFR 274a.12(c)(3)(i)(B), that previously obtained degree must have been

conferred from a U.S. educational institution that is accredited and SEVP-certified at the time the student's DSO recommends the student for the 24-month OPT extension and must be in a degree program category included on the current STEM Designated Degree Program List at the time of the DSO recommendation. That previously obtained degree must have been conferred within the 10 years preceding the date the DSO recommends the student for the 24-month OPT extension.

(4) Eligible practical training opportunity. The STEM practical training opportunity that is the basis for the 24-month OPT extension under this paragraph (f)(10)(ii)(C) must be directly related to the degree that qualifies the student for such extension, which may be the previously obtained degree described in paragraph (f)(10)(ii)(C)(3) of this section.

(5) Employer qualification. The student's employer is enrolled in E-Verify, as evidenced by either a valid E-Verify Company Identification number or, if the employer is using an employer agent to create its E-Verify cases, a valid E-Verify Client Company Identification number, and the employer remains a participant in good standing with E-Verify, as determined by USCIS. An employer must also have an employer identification number (EIN) used for tax purposes.

(*6*) *Employer reporting*. A student may not be authorized for employment with an employer pursuant to paragraph (f)(10)(ii)(C)(*2*) of this section unless the employer agrees, by signing the Training Plan for STEM OPT Students, Form I-983 or successor form, to report the termination or departure of an OPT student to the DSO at the student's school, if the termination

or departure is prior to the end of the authorized period of OPT. Such reporting must be made within five business days of the termination or departure. An employer shall consider a student to have departed when the employer knows the student has left the practical training opportunity, or if the student has not reported for his or her practical training for a period of five consecutive business days without the consent of the employer, whichever occurs earlier.

(7) Training Plan for STEM OPT Students, Form I-983 or successor form. (i) A student must fully complete an individualized Form I-983 or successor form and obtain requisite signatures from an appropriate individual in the employer's organization on the form, consistent with form instructions, before the DSO may recommend a 24-month OPT extension under paragraph (f)(10)(ii)(C)(2) of this section in SEVIS. A student must submit the Form I-983 or successor form, which includes a certification of adherence to the training plan completed by an appropriate individual in the employer's organization who has signatory authority for the employer, to the student's DSO, prior to the new DSO recommendation. A student must present his or her signed and completed Form I-983 or successor form to a DSO at the educational institution of his or her most recent enrollment. A student, while in F-1 student status, may also be required to submit the Form I-983 or successor form to ICE and/or USCIS upon request or in accordance with form instructions.

(*ii*) The training plan described in the Form I-983 or successor form must identify goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted

to the student, and explain how those goals will be achieved through the work-based learning opportunity with the employer; describe a performance evaluation process; and describe methods of oversight and supervision. Employers may rely on their otherwise existing training programs or policies to satisfy the requirements relating to performance evaluation and oversight and supervision, as applicable.

(*iii*) The training plan described in the Form I-983 or successor form must explain how the training is directly related to the student's qualifying STEM degree.

(*iv*) If a student initiates a new practical training opportunity with a new employer during his or her 24-month OPT extension, the student must submit, within 10 days of beginning the new practical training opportunity, a new Form I-983 or successor form to the student's DSO, and subsequently obtain a new DSO recommendation.

(*8*) *Duties, hours, and compensation for training*. The terms and conditions of a STEM practical training opportunity during the period of the 24-month OPT extension, including duties, hours, and compensation, must be commensurate with terms and conditions applicable to the employer's similarly situated U.S. workers in the area of employment. A student may not engage in practical training for less than 20 hours per week, excluding time off taken consistent with leave-related policies applicable to the employer's similarly situated U.S. workers in the area of employment. If the employer does not employ and has not recently employed more than two similarly situated U.S. workers in the area of employment, the employer

nevertheless remains obligated to attest that the terms and conditions of a STEM practical training opportunity are commensurate with the terms and conditions of employment for other similarly situated U.S. workers in the area of employment. "Similarly situated U.S. workers" includes U.S. workers performing similar duties subject to similar supervision and with similar educational backgrounds, industry expertise, employment experience, levels of responsibility, and skill sets as the student. The duties, hours, and compensation of such students are "commensurate" with those offered to U.S. workers employed by the employer in the same area of employment when the employer can show that the duties, hours, and compensation are consistent with the range of such terms and conditions the employer has offered or would offer to similarly situated U.S. employees. The student must disclose his or her compensation, including any adjustments, as agreed to with the employer, on the Form I-983 or successor form.

(*9*) *Evaluation requirements and Training Plan modifications.* (*i*) A student may not be authorized for employment with an employer pursuant to paragraph (f)(10)(ii)(C)(*2*) of this section unless the student submits a self-evaluation of the student's progress toward the training goals described in the Form I-983 or successor form. All required evaluations must be completed prior to the conclusion of a STEM practical training opportunity, and the student and an appropriate individual in the employer's organization must sign each evaluation to attest to its accuracy. All STEM practical training opportunities require an initial evaluation within 12 months of the approved

starting date on the employment authorization document granted pursuant to the student's 24-month OPT extension application, and a concluding evaluation. The student is responsible for ensuring the DSO receives his or her 12-month evaluation and final evaluation no later than 10 days following the conclusion of the reporting period or conclusion of his or her practical training opportunity, respectively.

(ii) If any material change to or deviation from the training plan described in the Form I-983 or successor form occurs, the student and employer must sign a modified Form I-983 or successor form reflecting the material change(s) or deviation(s). Material changes and deviations relating to training may include, but are not limited to, any change of Employer Identification Number resulting from a corporate restructuring, any reduction in compensation from the amount previously submitted on the Form I-983 or successor form that is not tied to a reduction in hours worked, any significant decrease in hours per week that a student engages in a STEM training opportunity, and any decrease in hours worked below the minimum hours for the 24-month extension as described in paragraph (f)(10)(ii)(C)(*8*) of this section. Material changes and deviations also include any change or deviation that renders an employer attestation inaccurate, or renders inaccurate the information in the Form I-983 or successor form on the nature, purpose, oversight, or assessment of the student's practical training opportunity. The student and employer must ensure that the modified Form I-983 or successor form is submitted to the student's DSO at the earliest available opportunity.

(iii) The educational institution whose DSO is responsible for duties associated with the student's latest OPT extension under paragraph (f)(10)(ii)(C)(*2*) of this section is responsible for ensuring the Student and Exchange Visitor Program has access to each individualized Form I-983 or successor form and associated student evaluations (electronic or hard copy), including through SEVIS if technologically available, beginning within 30 days after the document is submitted to the DSO and continuing for a period of three years following the completion of each STEM practical training opportunity.

(*10*) *Additional STEM opportunity obligations.* A student may only participate in a STEM practical training opportunity in which the employer attests, including by signing the Form I-983 or successor form, that:

(i) The employer has sufficient resources and personnel available and is prepared to provide appropriate training in connection with the specified opportunity at the location(s) specified in the Form I-983 or successor form;

(ii) The student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker; and

(iii) The student's opportunity assists the student in reaching his or her training goals.

(11) *Site visits.* DHS, at its discretion, may conduct a site visit of any employer. The purpose of the site visit is for DHS to ensure that each employer possesses and maintains the ability and resources to provide structured and guided work-based learning experiences consistent with any Form I-983 or successor

form completed and signed by the employer. DHS will provide notice to the employer 48 hours in advance of any site visit, except notice may not be provided if the visit is triggered by a complaint or other evidence of noncompliance with the regulations in this paragraph (f)(10)(ii)(C).

(D) Duration of status while on post-completion OPT. For a student with approved post-completion OPT, the duration of status is defined as the period beginning on the date that the student's application for OPT was properly filed and pending approval, including the authorized period of post-completion OPT, and ending 60 days after the OPT employment authorization expires.

(E) Periods of unemployment during post-completion OPT. During post-completion OPT, F-1 status is dependent upon employment. Students may not accrue an aggregate of more than 90 days of unemployment during any post-completion OPT period described in 8 CFR 274a.12(c)(3)(i)(B). Students granted a 24-month OPT extension under paragraph (f)(10)(ii)(C)(2) of this section may not accrue an aggregate of more than 150 days of unemployment during a total OPT period, including any post-completion OPT period described in 8 CFR 274a.12(c)(3)(i)(B) and any subsequent 24-month extension period.

(11) *OPT application and approval process—(i) Student responsibilities.* A student must initiate the OPT application process by requesting a recommendation for OPT from his or her DSO. Upon making the recommendation, the DSO will provide the student a signed Form I-20 indicating that recommendation.

(A) *Applications for employment authorization.* The student must properly file an Application for Employment Authorization, Form I-765 or successor form, with USCIS, accompanied by the required fee, and the supporting documents, as described in the form's instructions.

(B) *Applications and filing deadlines for pre-completion OPT and post-completion OPT*— (*1*) *Pre-completion OPT.* For pre-completion OPT, the student may properly file his or her Form I-765 or successor form up to 90 days before being enrolled for one full academic year, provided that the period of employment will not start prior to the completion of the full academic year.

(2) *Post-completion OPT.* For post-completion OPT, not including a 24-month OPT extension under paragraph (f)(10)(ii)(C)(*2*) of this section, the student may properly file his or her Form I-765 or successor form up to 90 days prior to his or her program end date and no later than 60 days after his or her program end date. The student must also file his or her Form I-765 or successor form with USCIS within 30 days of the date the DSO enters the recommendation for OPT into his or her SEVIS record.

(C) *Applications and filing deadlines for 24-month OPT extension.* A student meeting the eligibility requirements for a 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section may request an extension of employment authorization by filing Form I-765 or successor form, with the required fee and supporting documents, up to 90 days prior to the expiration date of the student's current OPT employment authorization. The student seeking such 24-month OPT

extension must properly file his or her Form I-765 or successor form with USCIS within 60 days of the date the DSO enters the recommendation for the OPT extension into his or her SEVIS record. If a student timely and properly files an application for such 24-month OPT extension and timely and properly requests a DSO recommendation, including by submitting the fully executed Form I-983 or successor form to his or her DSO, but the Employment Authorization Document, Form I-766 or successor form, currently in the student's possession expires prior to the decision on the student's application for the OPT extension, the student's Form I-766 or successor form is extended automatically pursuant to the terms and conditions specified in 8 CFR 274a.12(b)(6)(iv).

(D) *Start of OPT employment.* A student may not begin OPT employment prior to the approved start date on his or her Employment Authorization Document, Form I-766 or successor form, except as described in paragraph (f)(11)(i)(C) of this section. A student may not request a start date that is more than 60 days after the student's program end date. Employment authorization will begin on the date requested or the date the employment authorization is adjudicated, whichever is later.

(ii) *Additional DSO responsibilities.* A student must have a recommendation from his or her DSO in order to apply for OPT. When a DSO recommends a student for OPT, the school assumes the added responsibility for maintaining the SEVIS record of that student for the entire period of authorized OPT, consistent with paragraph (f)(12) of this section.

(A) Prior to making a recommendation, the DSO at the educational institution of the student's most recent enrollment must ensure that the student is eligible for the given type and period of OPT and that the student is aware of the student's responsibilities for maintaining status while on OPT. Prior to recommending a 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section, the DSO at the educational institution of the student's most recent enrollment must certify that the student's degree being used to qualify that student for the 24-month OPT extension, as shown in SEVIS or official transcripts, is a bachelor's, master's, or doctorate degree with a degree code that is contained within a category on the current STEM Designated Degree Program List at the time the recommendation is made. A DSO may recommend a student for a 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section only if the Form I-983 or successor form described in paragraph (f)(10)(ii)(C)(7) of this section has been properly completed and executed by the student and prospective employer. A DSO may not recommend a student for an OPT extension under paragraph (f)(10)(ii)(C) of this section if the practical training would be conducted by an employer who has failed to meet the requirements under paragraphs (f)(10)(ii)(C)(*5*) through (*9*) of this section or has failed to provide the required assurances of paragraph (f)(10)(ii)(C)(*10*) of this section.

(B) The DSO must update the student's SEVIS record with the DSO's recommendation for OPT before the student can apply to USCIS for employment authorization. The DSO will indicate in SEVIS whether the OPT employment is to be full-time or part-time, or

for a student seeking a recommendation for a 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section whether the OPT employment meets the minimum hours requirements described in paragraph (f)(10)(ii)(C)(*8*) of this section, and note in SEVIS the OPT start and end dates.

(C) The DSO must provide the student with a signed, dated Form I-20 or successor form indicating that OPT has been recommended.

(iii) *Decision on application for OPT employment authorization.* USCIS will adjudicate a student's Form I-765 or successor form on the basis of the DSO's recommendation and other eligibility considerations.

(A) If granted, the employment authorization period for post-completion OPT begins on the requested date of commencement or the date the Form I-765 or successor form is approved, whichever is later, and ends at the conclusion of the remaining time period of post-completion OPT eligibility. The employment authorization period for a 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section begins on the day after the expiration of the initial post-completion OPT employment authorization and ends 24 months thereafter, regardless of the date the actual extension is approved.

(B) USCIS will notify the applicant of the decision on the Form I-765 or successor form in writing, and, if the application is denied, of the reason or reasons for the denial.

(C) The applicant may not appeal the decision.

(12) *Reporting while on optional practical training*—(i) *General.* An F-1 student who is granted employment authorization by USCIS to engage in optional

practical training is required to report any change of name or address, or interruption of such employment to the DSO for the duration of the optional practical training. A DSO who recommends a student for OPT is responsible for updating the student's record to reflect these reported changes for the duration of the time that training is authorized.

(ii) *Additional reporting obligations for students with an approved 24-month OPT extension.* Students with an approved 24-month OPT extension under paragraph (f)(10)(ii)(C) of this section have additional reporting obligations. Compliance with these reporting requirements is required to maintain F-1 status. The reporting obligations are:

(A) Within 10 days of the change, the student must report to the student's DSO a change of legal name, residential or mailing address, employer name, employer address, and/or loss of employment.

(B) The student must complete a validation report, confirming that the information required by paragraph (f)(12)(ii)(A) of this section has not changed, every six months. The requirement for validation reporting starts on the date the 24-month OPT extension begins and ends when the student's F-1 status expires or the 24-month OPT extension concludes, whichever is first. The validation report is due to the student's DSO within 10 business days of each reporting date.

* * * * *

3. In § 214.3, revise paragraph (g)(2)(ii)(F) to read as follows:

§ 214.3

Approval of schools for enrollment of F and M nonimmigrants.

* * * * *

(g) * * *

(2) * * *

(ii) * * *

(F) For F-1 students authorized by USCIS to engage in a 24-month extension of OPT under 8 CFR 214.2(f)(10)(ii)(C):

(1) Any change that the student reports to the school concerning legal name, residential or mailing address, employer name, or employer address; and

(2) The end date of the student's employment reported by a former employer in accordance with 8 CFR 214.2(f)(10)(ii)(C)(6).

* * * * *

4. Section § 214.16 is added, effective May 10, 2016 through May 10, 2019, to read as follows:

§ 214.16

Transition Procedures for OPT Applications for Employment Authorization

(a) *STEM OPT Applications for Employment Authorization that are filed prior to, and remain pending on May 10, 2016.* (1) On or after May 10, 2016, USCIS will issue Requests for Evidence (RFEs) to students whose applications for a 17-month OPT extension under the rule issued at 73 FR 18944 are still pending. The RFEs will request documentation that will establish that the student is eligible for a 24-month OPT extension under 8 CFR 214.2(f)(10)(ii)(C), including a Form I-20 endorsed on or after May 10, 2016, indicating that the Designated School Official (DSO) recommends the student for a 24-month OPT extension and

that the requirements for such an extension have been met. Submission of the Form I-20 in response to an RFE issued under 8 CFR 214.16(a) will be regarded as fulfilling the requirement in 8 CFR 214.2(f)(11)(i) that a student must initiate the OPT application process by requesting a recommendation for OPT by his or her DSO.

(2) Forms I-765 that are filed prior to, and remain pending on, May 10, 2016, will be regarded as being covered by 8 CFR 214.2(f)(11)(i)(C) and 8 CFR 274a.12(b)(6)(iv).

(b) *STEM OPT Applications for Employment Authorization that are filed and approved before May 10, 2016.* A student whose Form I-765 is filed and approved prior to May 10, 2016 will be issued an Employment Authorization Document, Form I-766, that is valid for 17 months even if the student requested a 24-month OPT extension.

(c) *Students with 17-Month STEM OPT employment authorization.* (1) Subject to paragraph (c)(3) of this section, any Employment Authorization Document, Form I-766, indicating a 17-month OPT extension under the rule issued at 73 FR 18944 that has been issued and is valid prior to May 10, 2016 remains valid until such Form I-766 expires or is terminated or revoked under 8 CFR 274a.14, and the student, the student's employer, and the student's DSO must continue to abide by all the terms and conditions that were in effect when the Form I-766 was issued.

(2) Subject to the requirements in paragraphs (c)(2)(i) through (iii) of this section, F-1 students with a 17-month OPT extension under the rule issued at 73 FR 18944 are eligible to apply for an additional 7-

month period of OPT. The F-1 student applying for the additional 7-month period of OPT must:

(i) Properly file a Form I-765, with USCIS on or after May 10, 2016 and on or before August 8, 2016, and within 60 days of the date the DSO enters the recommendation for the 24-month OPT extension into the student's SEVIS record, with applicable fees and supporting documentation, as described in the form instructions;

(ii) Have at least 150 calendar days remaining prior to the end of his or her 17-month OPT extension at the time the Form I-765, is properly filed; and

(iii) Meet all the requirements for the 24-month OPT extension as described in 8 CFR 214.2(f)(10)(ii)(C), except the requirement that the student must be in a valid period of post-completion OPT authorized under 8 CFR 274a.12(c)(3)(i)(B).

(3) Students on a 17-month OPT extension who apply for and are granted an additional 7-month period of OPT shall be considered to be in a period of 24-month OPT extension, as authorized under 8 CFR 214.2(f)(10)(ii)(C). Upon proper filing of the application for the additional 7-month OPT extension, the student, the student's employer as identified in the student's completed Form I-983 and the student's DSO are subject to all requirements of the 24-month OPT extension period, except for the 150-day unemployment limit described in 8 CFR 214.2(f)(10)(ii)(E), which applies to students only upon approval of the additional 7-month OPT extension. Subsequent to any denial of the application for the additional 7-month extension, the student, the student's employer, and the student's DSO must abide by all the terms and

conditions that were in effect when the 17-month OPT extension was issued throughout the remaining validity period of the 17-month OPT extension.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

Subpart B—Employment Authorization

6. In § 274a.12, revise paragraph (b)(6)(iv) and (v) and (c)(3)(i) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(6) * * *

(iv) An Employment Authorization Document, Form I-766 or successor form, under paragraph (c)(3)(i)(C) of this section based on a STEM Optional Practical Training extension, and whose timely filed Form I-765 or successor form is pending and employment authorization and accompanying Form I-766 or successor form issued under paragraph (c)(3)(i)(B) of this section have expired. Employment is authorized beginning on the expiration date of the Form I-766 or successor form issued under paragraph (c)(3)(i)(B) of this section and ending on the date of USCIS' written decision on the current Form I-765 or successor form, but not to exceed 180 days. For this same period, such Form I-766 or successor form is automatically extended and is

considered unexpired when combined with a Certificate of Eligibility for Nonimmigrant (F-1/M-1) Students, Form I-20 or successor form, endorsed by the Designated School Official recommending such an extension; or

(v) Pursuant to 8 CFR 214.2(h) is seeking H-1B nonimmigrant status and whose duration of status and employment authorization have been extended pursuant to 8 CFR 214.2(f)(5)(vi).

* * * * *

(c) * * *

(3) * * *

(i)(A) I s seeking pre-completion practical training pursuant to 8 CFR 214.2(f)(10)(ii)(A)(1) and (2);

(B) Is seeking authorization to engage in up to 12 months of post-completion Optional Practical Training (OPT) pursuant to 8 CFR 214.2(f)(10)(ii)(A)(3); or

(C) Is seeking a 24-month OPT extension pursuant to 8 CFR 214.2(f)(10)(ii)(C);

* * * * *

Jeh Charles Johnson,

Secretary of Homeland Security.

Footnotes

1. For purposes of 8 CFR 214.2(f), a "college or university" is an institution of higher learning that awards recognized bachelor's, master's, doctoral or professional degrees. See 8 CFR 214.3(a)(2)(A). A career or technical institution may therefore be categorized as a "college or university" if it awards such degrees.

2. In the NPRM, DHS presented a combined total student burden for six-month evaluations and validation check-ins (1.17 hours). Note that the NPRM cost estimate only included 1 hour for the student to complete the evaluation. The NPRM cost estimate did not include a separate estimate of 0.17 hours for associated with the six-month validation report requirement from the IFR. Hence, this value, $139.04 (= 2 evaluations × 1 hour × $34.76/hour), differs from that presented in the NPRM, $162.68 (= 4 evaluations × 1.17 hours × $34.76/hour).

3. In the NPRM, DHS presented the combined total DSO burden for six-month evaluations and validation check-ins. Note that the NPRM estimate only included the 0.17 hours for the DSO to file each evaluation and did not include the 0.17 hours for the DSO to make a six-month validation report to SEVIS. Hence, this value, $26.74 (= 2 evaluations × 0.17 hours × $39.33/hour), differs from that presented in the NPRM, $52.39 (= 4 evaluations and validation check-ins × 0.333 hours × $39.33/hour).

4. In the NPRM, DHS presented the combined total implementation cost for six-month evaluations and validation check-ins. Note that the NPRM estimate only included the costs associated with the six-month evaluations. Hence, this value, $10.57 ((= $78.96 + 26.74) × 10%), differs from that presented in the NPRM, $13.09 ((= $78.96 + $52.39) × 10%).

5. During a brief period following the Immigration Act of 1990, Congress expanded employment authorization for foreign students (referred to throughout this preamble as "international students") by allowing for a three-year pilot program in which students could be

employed off-campus in positions *unrelated* to the student's field of study. Pub. L. 101-649, Sec. 221(a), 104 Stat. 4978, 5027 (Nov. 29, 1990). In general, however, practical training has historically been limited to the student's field of study.

6. DHS derives its authority to manage these programs from several sources, including, in addition to the authorities cited above, section 641 of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546, 3009-704 (Sep. 30, 1996) (codified as amended at 8 U.S.C. 1372), which authorizes the creation of a program to collect current and ongoing information provided by schools and exchange visitor programs regarding F and other nonimmigrants during the course of their stays in the United States, using electronic reporting technology where practicable. Consistent with this statutory authority, DHS manages these programs pursuant to Homeland Security Presidential Directive—2 (HSPD—2), Combating Terrorism Through Immigration Policies (Oct. 29, 2001), as amended, http://www.gpo.gov/fdsys/pkg/CPRT-110HPRT39618/pdf/CPRT-110HPRT39618.pdf); and Section 502 of the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, 116 Stat. 543, 563 (May 14, 2002). HSPD-2 requires the Secretary of Homeland Security to conduct periodic, ongoing reviews of institutions certified to accept F nonimmigrants, and to include checks for compliance with recordkeeping and reporting requirements. See Weekly Comp. Pres. Docs., 37 WCPD 1570, http://www.gpo.gov/fdsys/granule/WCPD-2001-11-05/WCPD-2001-11-05-Pg1570/content-detail.html .

Section 502 of the Enhanced Border Security and Visa Entry Reform Act of 2002 directs the Secretary to review the compliance with recordkeeping and reporting requirements under 8 U.S.C. 1101(a)(15)(F) and 1372 of all schools approved for attendance by F students within two years of enactment, and every two years thereafter. Moreover, the programs discussed in this rule, as is the case with all DHS programs, are carried out in keeping with DHS's primary mission, which includes the responsibility to "ensure that the overall economic security of the United States is not diminished by the efforts, activities, and programs aimed at securing the homeland." 6 U.S.C. 111(b)(1)(F).

7. See *Washington Alliance of Tech. Workers* v. *U.S. Dep't of Homeland Security,* No. 1:14-cv-00529, slip op. at 25-26 (D.D.C. Aug. 12, 2015) (finding that DHS's interpretation permitting "employment for training purposes without requiring school enrollment" is "'longstanding' and entitled to [judicial] deference").

8. CPT provides a specially-designed program through which students can participate in an internship, alternative study, cooperative education, or similar programs. 52 FR 13223 (Apr. 22, 1987). Defined to also include practicums, CPT allows sponsoring employers to train F-1 students as part of the students' established curriculum within their schools. 8 CFR 214.2(f)(10)(i). CPT must relate to and be integral to a student's program of study. Unlike OPT and other training or employment, however, CPT can be full-time even while a student is attending school that is in session. Schools have oversight of CPT through their DSOs, who are responsible for authorizing CPT that is directly related to the student's major area of

study and reporting certain information, including the employer and location, the start and end dates, and whether the training is full-time or part time. 8 CFR 214.2(f)(10)(i)(B).

9. With respect to DHS's interpretation of the F-1 student visa provisions in the INA, the court found ample support for DHS's longstanding practice of "permit[ting F-1 student] employment for training purposes without requiring ongoing school enrollment." *Washington Alliance*, No. 1:14-cv-00529, slip op. at 26-27. The court recognized the Secretary's broad authority under the INA "to regulate the terms and conditions of a nonimmigrant's stay, including its duration." Id.at *29 (citing 8 U.S.C. 1103(a), 1184(a)(1)). The court also recognized the Secretary's authority to consider the potential economic contributions and labor market impacts that may result from particular regulatory decisions. Id. (citing 6 U.S.C. 111(b)(1)(F)).

10. In an earlier preliminary ruling in the case regarding plaintiff's challenge to DHS's general OPT and STEM OPT extension programs, the court held that plaintiff did not have standing to challenge the general OPT program on behalf of its members because it had not identified a member of its association who suffered any harm from the general OPT program. *See Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security,* 74 F. Supp. 3d 247, 252 & n.3 (D.D.C. 2014). The court held in the alternative that the challenge to the general OPT program was barred by the applicable statute of limitations.

11. The National Science Foundation reports that the United States performs more science and engineering Research and Development (R&D) than any other nation, accounting for just under 30% of the global total. See Science and Engineering Indicators 2014 (NSF) at Chapter 4 (International Comparisons), at 4-17, available at http://www.nsf.gov/statistics/seind14/index.cfm/chapter-4. According to NSF, the United States expends $429 billion of the estimated $1.435 trillion in global science and engineering R&D (p. 4-17), and business, government, higher education, and non-profits in the United States expend more than double that of any other country (Table 4-5).

12. These proposed changes were consistent with the direction provided in the Secretary of Homeland Security's November 20, 2014 memorandum entitled, "Policies Supporting U.S. High Skilled Businesses and Workers." DHS recognized the nation's need to evaluate, strengthen, and improve practical training as part of an overall strategy to enhance our nation's economic, scientific, and technological competitiveness. Highly skilled persons educated in the United States contribute significantly to the U.S. economy, including through advances in entrepreneurial and research and development endeavors, which correlate highly with overall economic growth and job creation.

13. DHS hereby incorporates all background material included in the NPRM in this final rule.

14. Comments can be viewed in the online docket for this rulemaking a t http://www.regulations.gov. Enter "ICEB-2015-0002" into the search bar to find the docket.

15. One commenter requested a public meeting on the NPRM, "[g]iven the major impact that the rules will have on the educational and labor markets, and the lack of attention in the rule to the adverse impacts the program's insufficient regulations and worker protections can have on U.S. workers and students." DHS has determined that a public meeting would not be in the public interest, in light of the impending *vacatur* date and the extensive discussion of these issues in the NPRM, the public comments, and this final rule.

16. NAFSA: Association of International Educators, "The Economic Benefits of International Students: Economic Analysis for Academic Year 2013-2014," available at http://www.nafsa.org/_/File/_/eis2014/USA.pdf ; see also NAFSA, International Student Economic Value Tool, available at http://www.nafsa.org/economicvalue .

17. *Id.*

18. Washington Post, "College Group Targets Incentive Payments for International Student Recruiters" (June 2, 2011), available at http://www.washingtonpost.com/local/education/college-group-targets-incentive-payments-for-international-student-recruiters/2011/05/31/AGvl5aHH_story.html.

19. *See* The White House, National Security Strategy 29 (May 2010), available at https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

20. U.S. Department of State, "Why Internationalize," available at https://educationusa.state.gov/us-higher-education-professionals/why-internationalize.

[21.] Pamela Leong, "Coming to America: Assessing the Patterns of Acculturation, Friendship Formation, and the Academic Experiences of International Students at a U.S. College," *Journal of International Students* Vol. 5 (4): 459-474 (2015) at p. 459.

[22.] Hugo Garcia and Maria de Lourdes Villareal, "The "Redirecting" of International Students: American Higher Education Policy Hindrances and Implications," *Journal of International Students* Vol. 4 (2): 126-136 (2014) at p. 132.

[23.] Jiali Luo and David Jamieson-Drake, "Examining the Educational Benefits of Interacting with International Students" at 96 (June 2013), *available at* https://jistudents.files.wordpress.com/2013/05/2013-volume-3-number-3-journal-of-international-students-published-in-june-1-2013.pdf. The authors noted that U.S. educational institutions play an important role in ensuring U.S. students benefit as much as possible from this interaction.

[24.] Brookings Institution, "The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations" (August 29, 2014), available at http://www.brookings.edu/research/interactives/2014/geography-of-foreign-students#/M10420.

[25.] Sonia Plaza, "Diaspora resources and policies," in International Handbook on the Economics of Migration, 505-529 (Amelie F. Constant and Klaus F. Zimmermann, eds., 2013).

[26.] *See* Michael Greenstone and Adam Looney, "A Dozen Economic Facts About Innovation" 2-3, available at http://www.brookings.edu/~/media/research/files/papers/2011/8/innovation-greenstone-

looney/08_innovation_greenstone_looney.pdf *[hereinafter Greenstone and Looney];* Bureau of Labor Statistics 2014 data show that employment in occupations related to STEM has been projected to grow more than nine million, or 13 percent, during the period between 2012 and 2022, 2 percent faster than the rate of growth projected for all occupations. Bureau of Labor Statistics, Occupational Outlook Quarterly, Spring 2014, "STEM 101: Intro to Tomorrow's Jobs" 6, available at http://www.stemedcoalition.org/wp-content/uploads/2010/05/BLS-STEM-Jobs-report-spring-2014.pdf . *See also* Australian Government, Strategic Review of the Student Visa Program 2011 Report, ix, 1 (June 30, 2011), available at http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/2011-knight-review.pdf#search=knight%20review *(concluding that the economic benefit of international master's and doctoral research students includes third-party job creation).*

27. *See, e.g.,* Economics and Statistics Administration, Department of Commerce, "STEM: Good Jobs Now and For the Future" 5 (July 2011), available at http://www.esa.doc.gov/Reports/stem-good-jobs-now-and-future ("Science, technology, engineering and mathematics (STEM) workers drive our nation's innovation and competitiveness by generating new ideas, new companies and new industries."); Giovanni Peri, Kevin Shih, Chad Sparber, "Foreign STEM Workers and Native Wages and Employment in U.S. Cities" 1 (National Bureau of Economic Research, May 2014) Available at http://www.nber.org/papers/w20093 (observing that "Scientists, Technology professionals,

Engineers, and Mathematicians (STEM workers) are fundamental inputs in scientific innovation and technological adoption, the main drivers of productivity growth in the U.S.").

28. Jennifer Hunt, "Which Immigrants are Most Innovative and Entrepreneurial? Distinctions by Entry Visa," *Journal of Labor Economics* Vol 29 (3): 417-457 (2011).

29. Jennifer Hunt and Marjolaine Gauthier-Loiselle, "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics* 2: 31-56 (2010).

30. *Id.*

31. *Id.*

32. Greenstone and Looney, *supra* note 26, at 2-3.

33. *See* Congressional Research Service, Economics and National Security: Issues and Implications for U.S. Policy 28, available at https://www.fas.org/sgp/crs/natsec/R41589.pdf [hereinafter Economics and National Security]; see also The White House, National Security Strategy 16 (Feb. 2015), available at https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf ("Scientific discovery and technological innovation empower American leadership with a competitive edge that secures our military advantage, propels our economy, and improves the human condition.") [hereinafter 2015 National Security Strategy]; The White House, National Security Strategy 29 (May 2010), available at https://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

("America's long-term leadership depends on educating and producing future scientists and innovators.").

34. The 2015 National Security Strategy concludes that "the American economy is an engine for global growth and a source of stability for the international system. In addition to being a key measure of power and influence in its own right, it underwrites our military strength and diplomatic influence. A strong economy, combined with a prominent U.S. presence in the global financial system, creates opportunities to advance our security." 2015 National Security Strategy, *supra* note 33, at 15.

35. Pew Research Center, "Growth from Asia Drives Surge in U.S. Foreign Students" (June 18, 2015), available at http://www.pewresearch.org/fact-tank/2015/06/18/growth-from-asia-drives-surge-in-u-s-foreign-students/ (citing Institute for International Education, Open Doors Data: International Students: Enrollment Trends, available athttp://www.iie.org/Research-and-Publications/Open-Doors/Data/International-Students/Enrollment-Trends/1948-2014.

36. Organization for Economic Co-operation and Development (OECD) 2014, "Education at a Glance 2014: OECD Indicators," OECD Publishing at http://dx.doi.org/10.1787/eag-2014-en or http://www.oecd.org/edu/eag.htm.

37. University World News Global Edition Issue 376, "Schools are the New Battleground for Foreign Students" (July 15, 2015), available at http://www.universityworldnews.com/article.php?story=201507150915156.

[38.] Citizenship and Immigration Canada, "Evaluation of the International Student Program" 14 (July 2010) available at http://www.cic.gc.ca/english/pdf/research-stats/2010-eval-isp-e.pdf (citing Association of Universities and Colleges of Canada, Momentum: The 2008 report on university research and knowledge mobilization: A Primer: Driver 2: Global race for research talent, 3 (2008) [hereinafter Evaluation of the Int'l Student Program].

[39.] Citizenship and Immigration Canada, Study permits: Post Graduation Work Permit Program, available at http://www.cic.gc.ca/english/resources/tools/temp/students/post-grad.asp [hereinafter Canadian Study permits]. Similarly, Australia, now offers international students who graduate with a higher education degree from an Australian education provider, regardless of their field of study, a post-study work visa for up to four years, depending on the student's qualification. Students who complete a bachelor's degree may receive a two-year post study work visa, research graduates with a master's degree are eligible for a three-year work visa, and doctoral graduates are eligible for a four-year work visa. *See* Australian Department of Immigration and Border Protection, Application for a Temporary Graduate visa, available at http://www.border.gov.au/FormsAndDocuments/Documents/1409.pdf [hereinafter Australian Temporary Grad. visa].

[40.] Evaluation of the Int'l Student Program, *supra* note 38, at 9.

[41.] Citizenship and Immigration Canada, Quarterly Administrative Data Release, available

at http://www.cic.gc.ca/english/resources/statistics/data-release/2014-Q4/index.asp.

42. *See* Government of Canada, Quarterly Administrative Data Release (July 20, 2015), available at http://www.cic.gc.ca/english/resources/statistics/data-release/2014-Q4/index.asp; University World News Global Edition, *Schools are the New Battleground for Foreign Students,* July 15, 2015, Issue 376, available at http://www.universityworldnews.com/article.php?story=201507150915156.

43. Pew Research Center, "Growth from Asia Drives Surge in U.S. Foreign Students" (June 18, 2015), available at http://www.pewresearch.org/fact-tank/2015/06/18/growth-from-asia-drives-surge-in-u-s-foreign-students/.

44. The Homeland Security Academic Advisory Council provides advice and recommendations to the Secretary and senior leadership on matters related to homeland security and the academic community, including: student and recent graduate recruitment, international students, academic research and faculty exchanges, campus resilience, homeland security academic programs, and cybersecurity. *See* U.S. Department of Homeland Security, Homeland Security Academic Advisory Council Charter, available at http://www.dhs.gov/publication/hsaac-charter.

45. In addition, DHS also received a number of comments that were outside the scope of the rulemaking. For instance, some commenters stated that DHS should not allow any foreign nationals to work in the United States. Other commenters recommended that DHS make changes to the H-1B visa classification. Another commenter stated that the United States should

"send green cards to [STEM] Ph.D.s right away." Other commenters recommended that DHS apply the proposed rule's requirements to F-1 nonimmigrant students engaged in pre-completion OPT or the initial 12-month period of post-completion OPT. Additionally, one commenter requested that DHS extend the period during which students may apply for post-completion OPT and related employment authorization. DHS did not propose any of these changes in the NPRM, and readers of the NPRM could not reasonably have anticipated that DHS would make such changes in this final rule. Accordingly, DHS has deemed these and similar comments outside the scope of this rulemaking, and has not discussed them further in this preamble.

46. *See* DHS, "Study in the States," http://studyinthestates.dhs.gov.

47. BLS, Occupational Outlook Handbook, at "Occupation Finder" (Dec. 17, 2015), available at http://www.bls.gov/ooh/occupation-finder.htm?pay=&education=&training=&newjobs=&growth=&submit=GO (see information defining "entry-level education" and "on-the-job training" for the Occupation Finder).

48. The commenter questioning the educational basis of the STEM OPT extension referred to the co-op program at the Rochester Institute of Technology (RIT) as a useful example, since it is one of the nation's largest. RIT itself, though, recognizes that co-ops are just one type of experiential learning. *See generally* RIT, Cooperative Education and Experiential Learning, https://www.rit.edu/overview/cooperative-education-and-experiential-learning.

49. *See generally* Jiali Luo and David Jamieson-Drake, "Examining the Educational Benefits of Interacting with International Students" at 96 (June 2013), *available at* https://jistudents.files.wordpress.com/2013/05/2013-volume-3-number-3-journal-of-international-students-published-in-june-1-2013.pdf.

50. Hal Salzman, Daniel Kuehn, Lindsay Lowell, Guestworkers in the High-Skill U.S. Labor Market: An Analysis of Supply, Employment, and Wages 2 (Economic Policy Institute, Apr. 2013) available at http://www.epi.org/publication/bp359-guestworkers-high-skill-labor-market-analysis/.

51. See generally Manufacturing Institute et al, "The Skills Gap in Manufacturing: 2015 and Beyond" (Mar. 2015), available at http://www.themanufacturinginstitute.org/Research/Skills-Gap-in-Manufacturing/Skills-Gap-in-Manufacturing.aspx.

52. NSF, Revisiting the STEM Workforce: A Companion to Science and Engineering Indicators 2014, 9 (Feb. 4, 2015), available at http://www.nsf.gov/pubs/2015/nsb201510/nsb201510.pdf.

53. *Id.*

54. U.S. Census Bureau, "Where do College Graduates Work: A Special Focus on Science, Technology, Engineering and Math" (July 2014), available at http://www.census.gov/dataviz/visualizations/stem/stem-html/.

55. The practice of medicine commonly is not considered to be a STEM field. NSF, for example, considers as its mission the support of all fields of science and engineering except for the medical sciences. See NSF

Mission Statement, available at http://www.nsf.gov/about/what.jsp. *See also, e.g.,* U.S. Congress Joint Economic Committee, STEM Education: Preparing for the Jobs of the Future 1 (April 2012) (explaining that the medical sciences are not a STEM field), available at http://www.jec.senate.gov/public/index.cfm/democrats/2012/4/stem-education-preparing-jobs-of-the-future.

56. Liana Christin Landivar, U.S. Census Bureau, The Relationship between Science and Engineering Education and Employment in STEM Occupations (Sept. 2013), available at http://www.census.gov/prod/2013pubs/acs-23.pdf?cssp=SERP.

57. *See* U.S. Congress Joint Economic Committee, STEM Education: Preparing for the Jobs of the Future 1 (April 2012) (explaining that the medical sciences are not a STEM field), available at http://www.jec.senate.gov/public/index.cfm/democrats/2012/4/stem-education-preparing-jobs-of-the-future; *see also* David A. Koonce, Jie Zhou, Cynthia D. Anderson, American Society for Engineering Education, "What is STEM?" (2011) available at http://www.asee.org/public/conferences/1/papers/289/download (explaining that "research institutes, government organizations and occupational groups, as well as different groups involved in STEM, use different definitions of STEM, based on their perspectives").

58. Ray Marshall, Value-Added Immigration 187 (Economic Policy Institute, 2011).

59. U.S. Patent and Trademark Office, Patent Application Information Retrieval http://portal.uspto.gov/pair/PublicPair . *See also, e.g.,* Partnership for a New American Economy "Patent Pending:

How Immigrants are Reinventing the American Economy" at 23 n. 2 (June 2012).

60. *See, e.g.,* Jennifer Hunt et al, *supra* notes 28-29, in the appendices of the cited articles.

61. Norman Matloff, "Are Foreign Students the `Best and Brightest'?" 17 (Economic Policy Institute, Feb 2013), available at http://epi.org/publication/bp356-foreign-students-best-brightest-immigration-policy/.

62. U.S. Bureau of Labor Statistics Detailed 2010 Standard Occupation Classification (SOC) occupations in STEM from an August 2012 SOC Policy Committee recommendation to OMB, http://www.bls.gov/soc/Attachment_C_STEM.pdf. There are 184 occupations in STEM included in this list. When matched to the corresponding employment data in the BLS Occupational Employment and Wages, May 2014, the total employment of STEM occupations is approximately 17 million.

63. U.S. Department of Commerce, Economic and Statistics Administration, David Langdon et al., "STEM: Good Jobs Now and for the Future" (1), July 2011, available at http://www.esa.doc.gov/sites/default/files/stemfinalyjuly14_1.pdf ("In 2010, there were 7.6 million STEM workers in the United States."). This STEM employment estimate is based on a narrower range of occupations.

64. Giovanni Peri, Kevin Shih, Chad Sparber, National Bureau of Economic Research, Foreign STEM Workers and Native Wages and Employment in U.S. Cities (May 2014), available at http://www.nber.org/papers/w20093.

65. *Id.* The article starts by observing that "Scientists, Technology professionals, Engineers, and Mathematicians (STEM workers) are fundamental inputs in scientific innovation and technological adoption, the main drivers of productivity growth in the U.S." and was cited as a recent example of this premise in footnote 24 in the NPRM. 80 FR at 63383.

66. NSF, Revisiting the STEM Workforce: A Companion to Science and Engineering Indicators 2014, 5 (Feb. 4, 2015), available at http://www.nsf.gov/pubs/2015/nsb201510/nsb201510.pdf.

67. See generally 26 CFR 31.3121(b)(19)-1.

68. 26 U.S.C. 3101, et seq.

69. 26 U.S.C. 3121(b)(19).

70. 26 CFR 31.3121(b)(19)-1(a)(1).

71. 26 U.S.C. 7701(b).

72. 26 U.S.C. 7701(b)(5)(D)(i)(I).

73. An individual present in the United States for any part of a calendar year as an F-1 nonimmigrant must count that year toward the five year cap on being considered an "exempt individual." 26 CFR 301.7701(b)-3(b)(4), (7)(iii).

74. 26 U.S.C. 3301, et seq.

75. 26 U.S.C. 3306(c)(19); see also 26 CFR 31.3306(c)(18)-1(a)(1).

76. 26 U.S.C. 3121(b)(10) (FICA) and 3306(c)(10)(B) (FUTA); see also 26 CFR 31.3121(b)(10)-2 (FICA) and 31.3306(c)(10)-2 (FUTA).

77. Among other workers, these provisions are inapplicable to medical students in their capacity as hospital residents. *Mayo Found. For Med. Educ. & Research* v. *U.S.,* 562 U.S. 44 (2011). The *Mayo* case, cited by a commenter, is not controlling as to whether

STEM OPT extensions are permitted for F-1 nonimmigrants. Although the Supreme Court concluded that the FICA and FUTA exemptions for students are not available to medical residents working at hospitals, *id.,* that decision (and Treasury's position on the circumstances in which employed students working for the institution where they take classes are exempt from payroll taxes) does not address the availability of work authorization to F-1 nonimmigrants more broadly.

78. Below, DHS estimates some of the direct costs that this rule imposes upon employers of F-1 nonimmigrant students on STEM OPT extensions. In addition to this rule's direct costs, the incentive cited by the commenters is offset by the fact that STEM OPT students are in the United States temporarily, and are therefore, to many employers, inherently less valuable than U.S. workers. For instance, a commenter noted that there are significant costs and uncertainty associated with retaining an F-1 nonimmigrant beyond the STEM OPT extension period.

79. Employers, for example, may not know whether an individual is in F-1 nonimmigrant status or whether he or she has been in such status in the United States for less than five years. DHS notes that employers do not necessarily have access during the recruitment process to specific documentation confirming such information. And DOJ cautions against requesting such information as it may cause the perception of discriminatory conduct. *See* Office of Special Counsel, *Technical Assistance Letter on Pre-employment Inquiries Related to Immigration*

Status, at http://www.justice.gov/sites/default/files/crt/legacy/2013/09/11/171.pdf.

80. Congress added 26 U.S.C. secs. 3121(b)(19) and 3306(c)(19) to the Internal Revenue Code in 1961. *See* P.L. 87-256, Sections 110(b), 110(f)(3) (1961). These provisions exempt from payroll taxes certain F-1 nonimmigrants who have not been present in the United States in F-1 status for parts of five calendar years, as discussed supra in part IV.A.3 of this preamble.

81. Similarly, one commenter cited *Texas* v. *United States,* 787 F.3d 733, 760-61 (5th Cir. 2015) as authority for the commenter's disagreement with DHS's statement of authority in the NPRM for the STEM OPT extension. That case is also inapposite here, as it did not address the Secretary's authority to grant work authorization for purposes of practical training.

82. *Washington Alliance,* No. 1:14-cv-00529, slip op. at 28.

83. An accrediting agency is a private educational association of regional or national scope that develops evaluation criteria and conducts peer evaluations of educational institutions and academic programs. U.S. Department of Education Office of Postsecondary Education, "The Database of Accredited Postsecondary Schools and Programs," available at http://ope.ed.gov/accreditation.

84. U.S. *Department of Education Office of Postsecondary Accreditation, "FAQs about Accreditation," available at http://ope.ed.gov/accreditation/FAQAccr.aspx.*

85. The 90-day aggregate period during initial post-completion OPT was proposed to remain at the level

proposed in the 2008 IFR. DHS proposed to revise the aggregate maximum allowed period of unemployment to 150 days for an F-1 student having an approved STEM OPT extension consistent with the lengthened 24-month period for such an extension.

86. Changes of employers or EINs that are not simply a consequence of a corporate restructuring require filing of a new, rather than a modified, Training Plan by the new employer. See 8 CFR 214.2(f)(10)(ii)(C)(7)(iv).

87. *See* DHS, Study in the States, available at https://studyinthestates.dhs.gov/what-is-a-commission-based-recruiter; U.S. Department of State, Rights, Protections and Resources Pamphlet (Dec. 22, 2014), available at http://1.usa.gov/1G0Nt5X.

88. The commenter referred to GAO, "Student and Exchange Visitor Program: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization," Feb. 2014, available at http://www.gao.gov/assets/670/661192.pdf.

89. As of September 16, 2015, over 34,000 students were in the United States on a STEM OPT extension, as compared to more than 1.2 million international students studying in the United States.

90. DHS notes that several commenters suggested that DHS implement new requirements for "all OPT students." DHS believes these comments go beyond the scope of regulatory changes DHS has considered with this rulemaking. However, DHS understands and appreciates the commenters' concerns. As stated previously, the rule implements significant measures to strengthen program oversight and to mitigate fraud in the STEM OPT extension. DHS may consider

extending these measures more broadly in a future rulemaking.

91. U.S. Department of Education, NCES, Institute of Education Sciences, "Stats in Brief" (July 2009), available at http://nces.ed.gov/pubs2009/2009161.pdf.

92. This final rule also clarifies that a qualifying, previously obtained degree provides eligibility for the STEM OPT extension so long as the educational institution that conferred the degree is accredited at the time of the student's application for the extension. As discussed more fully below, DHS does not have full access to historical information on accreditation for all U.S. schools. An organization's current status as accredited nonetheless serves as a signal of the quality of the education that the organization offers.

93. *See supra* note 52.

94. *Id.*

95. Many STEM OPT practical training opportunities are research related, as indicated by the fact that the employer that retains the most STEM OPT students is the University of California system and that two other universities are among the top six of such employers (Johns Hopkins University and Harvard University).

96. The NCES definition of "STEM fields" includes "mathematics; natural sciences (including physical sciences and biological/agricultural sciences); engineering/engineering technologies; and computer/information sciences." U.S. Department of Education, NCES, Institute of Education Sciences, "Stats in Brief" 2 (July 2009), available at http://nces.ed.gov/pubs2009/2009161.pdf.

97. One comment suggested that DHS clarify how it will map CIP codes to each of the listed summary groups if it retains these summary groups because, according to the commenter, neither the NPRM nor the Department of Education document provide enough detail to compare the proposed list to the current list, or to provide feedback on the scope of the proposed change. Another commenter asked whether DHS intended to retain fields on the list if they fell outside of the summary groups for mathematics, natural sciences, engineering/engineering technologies, and computer/information sciences. As noted above, as part of the 2015 NPRM, DHS offered for public comment the then-current STEM Designated Degree Program List, and specifically identified which codes it was considering designating at the two-digit level.

98. DHS believes that those pharmacy-related CIP codes currently listed on the STEM list are in line with the STEM definition, whereas the recommendation of "Pharmacy" is too vague, and the other two recommendations, "Pharmacy Administration" and "Pharmacy Policy and Regulatory Affairs," fall outside the STEM definition.

99. DHS will provide specific training and guidance related to this and other issues following publication of this rule and further SEVIS upgrades.

100. *See* U.S. Department of Education, National Center for Education Statistics, Classification of Instructional Programs (CIP) 2010, available at http://nces.ed.gov/ipeds/cipcode/crosswalk.aspx?y=55.

101. As the National Science Foundation explained in its 2015 report entitled, "Revisiting The STEM

Workforce: A Companion to Science and Engineering Indicators 2014," the education-to-occupation pathways in STEM fields are not always linear, and individuals who earn multiple degrees, such as a "STEM-educated lawyer or an individual with both a STEM degree and a Master of Business Administration degree can add unique value in a number of work settings." National Science Foundation, Revisiting the STEM Workforce: A Companion to Science and Engineering Indicators 2014 at 12 (Feb. 4, 2015), http://www.nsf.gov/nsb/publications/2015/nsb201510.pdf.

102. USCIS Policy Memorandum PM-602-0090, 17-Month Extension of Post-Completion Optional Practical Training (OPT) for F-1 Students Enrolled in Science, Technology, Engineering, and Mathematics (STEM) Degree Programs, available at http://www.uscis.gov/sites/default/files/files/native-documents/OPT_STEM.pdf.

103. *See* www.ice.gov/doclib/sevis/pdf/opt_policy_guidance_042010.pdf.

104. *See* U.S. Citizenship and Immigration Services, The E-Verify Memorandum of Understanding for Employers, available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.

105. When DHS studied E-Verify costs, 76% of responding employers stated that the cost of using E-Verify was zero ($0). *See* Westat study evaluating E-Verify, "Findings of the E-Verify Program Evaluation" at 184 (Dec. 2009). Available at http://www.uscis.gov/sites/default/files/USCIS/E-

Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

106. USCIS, History and Milestones, https://www.uscis.gov/e-verify/about-program/history-and-milestones.

107. USCIS, E-Verify Program Statistics: Performance, http://www.uscis.gov/e-verify/about-program/performance.

108. Since 2011, USCIS has collected information through E-Verify surveys, which reflect high rates of customer satisfaction by employers. For example, the employer 2014 Customer Satisfaction Index of USCIS E-Verify rose one point from 2013 for a score 87 (on a scale from 1-100) for all and existing users, and 86 for new enrollees. Moreover, since 2010, employer users have been highly satisfied with E-Verify and the E-Verify CSI number has never scored below the low 80s. See The E-Verify Customer Satisfaction Survey, July 2015 available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/E-Verify_Annual_Customer_Satisfaction_Survey_2015.pdf.

109. Additionally, one commenter supported the regulation generally, but expressed a misunderstanding about the process and the E-Verify program, writing that the "Government will check that if the company really need [sic] those F1 students or not and decide to give them E-verify or not." DHS notes that a need-based check is not part of the E-Verify enrollment or participation process.

110. *See* U.S. Citizenship and Immigration Services, "Our Commitment to Privacy," available

at http://www.uscis.gov/e-verify/about-program/our-commitment-privacy.

111. *See* item #17 on Form I-765, available at http://www.uscis.gov/sites/default/files/files/form/i-765.pdf.

112. National Science Foundation, *Grant Proposal Guide*. sec. II.c.2.a.(4)(b), available at http://www.nsf.gov/pubs/policydocs/pappguide/nsf15001/gpg_index.jsp ("The proposed duration for which support is requested must be consistent with the nature and complexity of the proposed activity. Grants are normally awarded for up to three years but may be awarded for periods of up to five years."). For instance, NSF funding rate data show that in fiscal years 2012-2014, grant awards for biology were provided for an average duration of 2.87, 2.88, and 2.81 years, respectively.

113. SEVIS data as of January 28, 2016, shows that approximately 88 percent of students who had been at a master's education level and subsequently enrolled in a program at the doctoral level did so within one year of the end of their master's course of study.

114. DHS has also finalized the form with a new number in response to public comments, as explained below in the discussion of comments below regarding the form fields, number, and instructions. As noted throughout the rule, the form is now designated as Form I-983, Training Plan for STEM OPT students.

115. When Training Plans are available through SEVIS, USCIS will have real-time access to each plan without needing to issue an RFE.

116. 8 CFR 274a.12(b)(6)(iv) authorizes employment for students seeking a STEM OPT extension if they

timely file an Application for Employment Authorization and such application remains pending. Employment is authorized beginning on the expiration date of the student's OPT-related EAD and ending on the date of USCIS' written decision on the Application for Employment Authorization, but not to exceed 180 days. In contrast, 8 CFR 274a.12(b)(20) allows certain nonimmigrants (not including F-1 students) whose statuses have expired but who have timely filed applications for an extension of stay to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay.

117. For updated processing times, please see "USCIS Processing Time Information," available at https://egov.uscis.gov/cris/processTimesDisplay.do.

118. Employers may not file, and USCIS may not accept, H-1B petitions submitted more than six months in advance of the date of actual need for the beneficiary's services or training. However, because demand for H-1B visas far exceeds supply in most years, employers generally rush to file at the first available opportunity. As H-1B visas are authorized by fiscal year, and thus may begin to authorize employment as early as the first date of the fiscal year (October 1), the filing window for cap-subject H-1B petitions opens (and generally closes) six months earlier (April 1 of the preceding fiscal year).

119. A student in Cap-Gap who meets the eligibility requirements for a 24-month STEM OPT extension may file his or her Application for Employment Authorization, with the required fee and supporting

documents, up to 90 days prior to the expiration of the Cap-Gap period on October 1. 8 CFR 214.2(f)(11)(i)(C).

120. 9 FAM 402.5-5(N)(6)(f) (previously 9 FAM 41.61 N13.5-2) provides that if an F-1 student is the beneficiary of a timely filed petition for a cap-subject H-1B visa, with a start date of October 1, the F-1 status and any OPT authorization held on the eligibility date is automatically extended to dates determined by USCIS allowing for receipt or approval of the petition, up to September 30. The Cap-Gap OPT extension is automatic, and USCIS will not provide the student with a renewed EAD. However, F-1 students in this situation can request an updated Form I-20 Certificate of Eligibility from the DSO, annotated for the Cap-Gap OPT extension, as well as proof that the Form I-129, Petition for a Nonimmigrant Worker, was filed in a timely manner. Consular officers must verify that the electronic SEVIS record has also been updated before issuing a visa. *See* 9 FAM 402.5-5(N)(6)(f), available at https://fam.state.gov/FAM/09FAM/09FAM040205.html.

121. *See* 9 FAM 402.5-5(N)(6)(f), available at https://fam.state.gov/FAM/09FAM/09FAM040205.html.

122. *See* INA Sec. 248(a), 8 U.S.C. 1258(a) (providing that USCIS, in its discretion, may authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status). *See also* INS memo HQ 70/6.2.9 (June 18, 2001 memo noting that it has long been Service policy deny a request for change of status where an alien travels outside of

the United States while a request for a change of status is pending); Letter from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Adjudications, INS, CO 248-C (Oct. 29, 1993), *reprinted in* 70 Interp. Rel. 1604, 1626 (Dec. 6, 1993).

123. An individual who travels while his or her H-1B petition and request for change of status is pending would be required to apply for an H-1B visa at a consular post abroad (unless visa-exempt) in order to be admitted to the United States in H-1B status, presuming the underlying H-1B petition is approved.

124. Department of State consular officers determine whether an F-1 visa is valid for multiple or single entries, which is generally based on reciprocity.

125. As explained previously, 17-month STEM OPT EADs currently have annotations placed in the Terms and Conditions as follows: "Stu: 17-Mnth Stem Ext."

126. DHS recognizes that it proposed a 120-day period in the NPRM, but has determined for the reasons stated above that the 150-day period is more appropriate.

127. In addition, DHS considers students who apply for and are granted an additional 7-month period of STEM OPT eligible for the Cap-Gap provision described in section IV.H. of this preamble.

128. *See* DHS, Initial Regulatory Impact Analysis, table 7 (Oct. 2015), available at http://www.regulations.gov/#!documentDetail;D=/ICEB-2015=/-0002=/-0206.

129. U.S. Department of Education, National Center for Education Statistics, Institute of Education Sciences, "Academic year prices for full-time, first-time undergraduate students," (Total enrollment,

including Undergraduate and Graduate) 2014-2015, Available at http://nces.ed.gov/globallocator/.

130. DHS estimates that this work will be performed by general management staff at an hourly rate of $54.08 (as published by the May 2014 BLS Occupational Employment and Wage Estimates), which we multiply by 1.46 to account for employee benefits to obtain a total hourly labor cost of $78.96. Calculated 1.46 by dividing total compensation for all workers of $33.13 by wages and salaries for all workers of $22.65 per hour (yields a benefits multiplier of approximately 1.46 × wages). Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, December 2014." Available at: http://www.bls.gov/news.release/archives/ecec_03112015.htm.

APPENDIX J

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. 18944-18956 (April 4, 2008)

AGENCY:
U.S. Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services; DHS.

ACTION:
Interim final rule with request for comments.

SUMMARY:
Currently, foreign students in F-1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by U.S. Immigration and Custom Enforcement's (ICE's) Student and Exchange Visitor Program (SEVP) are eligible for 12 months of optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's major area of study. This interim final rule extends the maximum period of OPT from 12 months to 29 months for F-1 students who have completed a science, technology, engineering, or mathematics (STEM) degree and accept employment with employers enrolled in U.S. Citizenship and Immigration Services' (USCIS') E-Verify employment verification program. This interim rule requires F-1 students with an approved OPT extension to report changes in the

student's name or address and changes in the employer's name or address as well as periodically verify the accuracy of this reporting information. The rule also requires the employers of F-1 students with an extension of post-completion OPT authorization to report to the student's designated school official (DSO) within 48 hours after the OPT student has been terminated from, or otherwise leaves, his or her employment with that employer prior to end of the authorized period of OPT.

This rule also ameliorates the so-called "cap-gap" problem by extending the authorized period of stay for all F-1 students who have a properly filed H-1B petition and change of status request (filed under the cap for the next fiscal year) pending with USCIS. If USCIS approves the H-1B petition, the students will have an extension that enables them to remain in the United States until the requested start date indicated in the H-1B petition takes effect. This interim final rule also implements a programmatic change to allow students to apply for OPT within 60 days of concluding their studies.

DATES:

This interim final rule is effective April 8, 2008. Written comments must be submitted on or before June 9, 2008.

ADDRESSES:

You may submit comments, which must be identified by Department of Homeland Security docket number ICEB-2008-0002, using one of the following methods:

Federal Rulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Office of Policy, U.S. Immigration and Customs Enforcement, Department of Homeland Security, 425 I Street, NW., Room 7257, Washington, DC 20536.

Hand Delivery/Courier: The address for sending comments by hand delivery or courier is the same as that for submitting comments by mail. Contact telephone number is (202) 514-8693.

Facsimile: Comments may be submitted by facsimile at (866) 466-5370.

Viewing Comments: Comments may be viewed online at http://www.regulations.gov or in person at U.S. Immigration and Customs Enforcement, Department of Homeland Security, Chester Arthur Building, 425 I Street, NW., Room 7257, Washington, DC 20536. You must call telephone number (202) 514-8693 in advance to arrange an appointment.

Public Participation

This is an interim final rule with a request for public comment. The most helpful comments reference the specific section of the rule using section number, explain the reason for any recommended change, and include data, information, and the authority that supports the recommended change.

Instructions: All submissions must include the agency name and Department of Homeland Security docket number ICEB-2008-0002. All comments (including any personal information provided) will be posted without change to http://www.regulations.gov.

See ADDRESSES above for methods to submit comments. Mailed submissions may be paper, disk, or CD-ROM.

FOR FURTHER INFORMATION CONTACT:
Louis Farrell, Director, Student and Exchange Visitor Program; U.S. Immigration and Customs Enforcement, Department of Homeland Security; Chester Arthur Building, 425 I Street, NW., Suite 6034, Washington, DC 20536; telephone number (202) 305-2346. This is not a toll-free number. Program information can be found at http://www.ice.gov/sevis/.

SUPPLEMENTARY INFORMATION:

Table of Contents

Table of Abbreviations

APA Administrative Procedure Act
ASC Application Support Center
CEU Compliance Enforcement Unit
CBP U.S. Customs and Border Protection
CFR Code of Federal Regulations
DHS Department of Homeland Security
DSO Designated School Official
EAD Form I-766, Employment Authorization Document
ICE U.S. Immigration and Customs Enforcement
IIRIRA Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA Immigration and Nationality Act of 1952, as amended
INS Immigration and Naturalization Service
OMB Office of Management and Budget
OPT Optional Practical Training
RFA Regulatory Flexibility Act

SEVIS Student and Exchange Visitor Information System
SEVP Student and Exchange Visitor Program
STEM Science, Technology, Engineering, or Math
U.S. United States
USA PATRIOT Act Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
USCIS U.S. Citizenship and Immigration Services

I. Background and Purpose

A. Optional Practical Training and Need To Extend by 17 Months for F-1 Students With STEM Degrees

Section 101(a)(15)(F)(i) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1101(a)(15)(F)(i), establishes the F-1 nonimmigrant classification for individuals who wish to come to the United States temporarily to attend an academic or language training institution certified by the Student and Visitor Exchange Program (SEVP) for U.S. Immigration and Customs Enforcement (ICE). F-1 students may remain in the United States for the duration of their educational programs if they otherwise maintain status. 8 CFR 214.2(f)(5). Once an F-1 student has completed his or her course of study, and any authorized practical training following completion of studies, the student must either transfer to another SEVP-certified school to continue studies, change to a different nonimmigrant status, otherwise legally extend their period of authorized stay in the United States, or leave the United States. 8 CFR 214.2(f)(5)(iv). F-1 students

are allowed 60 days after the completion of such studies and practical training to prepare for departure from the United States. 8 CFR 214.2(f)(5)(iv).

F-1 students generally are not authorized to work in the United States during the term of their educational program, with limited exceptions. Currently, students in F-1 nonimmigrant status who have been enrolled on a full-time basis for at least one full academic year in a college, university, conservatory, or seminary certified by SEVP, and have otherwise maintained status, are eligible to apply for up to 12 months of optional practical training (OPT) to work for a U.S. employer in a job directly related to the student's major area of study. 8 CFR 214.2(f)(10). F-1 students may obtain OPT either during their educational program ("pre-completion OPT") or after the student graduates ("post-completion OPT"). The student remains in F-1 status throughout the OPT period.

An F-1 student in post-completion OPT, therefore, does not have to leave the United States within 60 days after graduation, but is authorized to remain in the United States for the entire post-completion OPT period. If the student has not used any pre-completion OPT, then the student's post-completion OPT period could be up to 12 months. Once the post-completion OPT period has concluded, the student must depart the United States within 60 days, unless he or she changes status or otherwise legally extends his or her stay in the United States (e.g., starts a graduate program).

During his or her authorized period of stay, a qualified F-1 student may receive a change of nonimmigrant status to H-1B nonimmigrant status if an

employer has timely filed, and USCIS grants, a petition on behalf of that student. The employer must submit a Form I-129, Petition for a Nonimmigrant Worker to USCIS. The Form includes a section for the employer to indicate whether change of status is being requested for the beneficiary (if eligible), or whether the beneficiary will instead apply for a visa outside of the United States at a U.S. consulate. USCIS may grant H-1B status to eligible nonimmigrants employed in or offered a job by the petitioner in a specialty occupation. 8 CFR 214.2(h)(1)(ii)(B). A specialty occupation is one that requires the theoretical and practical application of a body of specialized knowledge and a bachelor's or higher degree in the specific specialty as a minimum qualification. INA Section 214(i).

Congress, however, has prohibited USCIS from granting H-1B status to more than 65,000 nonimmigrant aliens during any fiscal year (referred to as the "cap").[1]

See INA Section 214(g). The H-1B category is greatly oversubscribed. When USCIS determines that the cap will be reached for that fiscal year, based on the number of H-1B petitions received, it announces to the public the final day on which USCIS will accept such petitions for adjudication in that fiscal year. USCIS refers to this day as the "final receipt date." See 8 CFR 214.2(h)(8)(ii)(B). USCIS then randomly selects from among the petitions received on the final receipt date the number of petitions necessary to reach the 65,000 cap. Id. If the final receipt date falls within the first five business days on which petitions subject to the applicable cap may be filed, USCIS will randomly

select the number of petitions necessary to reach the 65,000 cap from among those filed during the acceptance period.

There is a significant amount of competition among employers of highly-skilled workers for the limited number of H-1B visas available each fiscal year. Each year, the cap has been reached earlier in the year. For FY05, the cap was reached on October 1, 2004, the first day of that fiscal year. In FY06, the cap was reached on August 10, 2005; and in FY 07, the cap was reached on May 26, 2006. Last year, the cap was reached on April 2, 2007, the first business day for filing. On that single day, USCIS received more than twice the number of petitions needed to reach the cap for that fiscal year.[2]

Many 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. If the student is maintaining his or her F-1 nonimmigrant status, the employer may also include a request to have the student's nonimmigrant status changed to H-1B. Because the H-1B category is greatly oversubscribed, however, OPT employees often are unable to obtain H-1B status within their authorized period of stay in F-1 status, including the 12-month OPT period, and thus are forced to leave the country. The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H-1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

The National Science Foundation (NSF), in its Science and Engineering Indicators 2008 (SEIND08),[3] took note of these trends. NSF observed that globalization of science and technology has proceeded at a quick pace since the early 1990s. Increased international travel coincided with the development of the Internet as a tool for unfettered worldwide information dissemination and communication. "By the late 1990s," the report continues "many governments had taken note of these developments. They increasingly looked to the development of knowledge-intensive economics for their countries' economic competitiveness and growth." SEIND08 at 0-4. NSF further reports that "twenty-five percent of all college-education science and engineering occupations in 2003 were foreign born, as were [forty percent] of doctorate holders in science and engineering." According to the Task Force on the Future of American Innovation, Measuring the Moment: Innovation, National Security and Economic Competitiveness (November 2006),[4] the proportion of American students in the United States obtaining degrees in STEM fields has fallen from 32% to 27%. Later, the report reveals that since 2000, there have been more foreign graduate students studying engineering and the physical, computer and mathematical sciences in U.S. graduate schools than U.S. citizens and permanent residents.

The NSF goes on to say that "U.S. [Gross Domestic Product] growth is robust but cannot match large, sustained increases in China and other Asian economies." And because of this globalization, the United States, while still the leading producer of scientific knowledge, faces a labor market in which it must

increasingly compete with these countries. The economies of the Organization of Economic Cooperation and Development (OECD) countries, particularly Australia, Canada, and certain European countries, are also providing increased opportunities for STEM scientists. And STEM graduates from the growing economies of China, India, and Russia, for example, have increased employment opportunities in their native countries. Thus, the Task Force on the Future of American Innovation reports "the impact of China and India on global R&D [research and development] is significant and growing rapidly: In 1990, these two countries accounted for 3.4% of foreign R&D staff, which increased to 13.9% by 2004. By the end of 2007, China and India will account for 31% of global R&D staff, up from 19% in 2004." See Measuring the Moment: Innovation, National Security and Economic Competitiveness (November 2006). In short, with their large and growing populations of STEM-graduate scientists, high-tech industries in these three countries and others in the OECD now compete much more effectively against the U.S. high technology industry.

DHS has received communications from a wide range of concerned stakeholders, including companies in the high-tech industry, members of Congress, and U.S. educational institutions, about the adverse impact on the U.S. economy and the ability of U.S. schools to attract talented foreign students for STEM study programs due to the immigration and employment practices in the United States. Representatives of high-tech industries in particular have raised significant concerns that the inability of U.S. companies

to obtain H-1B visas for qualified F-1 students in a timely manner continues to result in the loss of skilled technical workers to countries with more lenient employment visa regimes, such as Canada and Australia. See Testimony of Bill Gates, Chairman, Microsoft Corporation, before the U.S. Senate Committee on Health, Education, Labor & Pensions, "Strengthening American Competitiveness for the 21st Century" (Washington, D.C.; March 7, 2007).[5]

Notably, the European Union recently proposed a "Blue Card" program, similar to the U.S. H-1B visa program, under which skilled workers would be able to obtain a temporary work visa for employment in the European Union. Unlike the H-1B program, the European Union's Blue Card program proposal would not have a cap. The European Union estimates that workers would usually be able to obtain their visas in 90 days or less. If the Blue Card proposal is adopted, U.S. employers could be at a competitive disadvantage to employers in the European Union when recruiting foreign national candidates. U.S. high-tech employers are particularly concerned about the H-1B cap because of the critical shortage of domestic science and engineering talent and the degree to which high-tech employers are as a consequence necessarily far more dependent on foreign workers than other industries. See The National Science Foundation, Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future (2007), pp. 78-83 (describing the critical shortages of science, math, and engineering talent in the United States) .[6]

Many F-1 students who graduated last spring will soon be concluding their 12-month periods of OPT.

Unless employers for those students are able to obtain H-1B visas when the filing period commences on April 1, 2008 for FY09 (October 1, 2008), many of these students will need to leave the United States when their current post-completion OPT period concludes.

This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries, and thus may quickly ameliorate some of the adverse impacts on the U.S. economy. It does this by allowing an F-1 student already in a period of approved post-completion OPT to apply to extend that period by up to 17 months (for a maximum total period of 29 months of OPT) if the student received a STEM degree. As discussed in Section II below, this extension is only available to F-1 students with STEM degrees who have accepted employment with an employer registered and in good standing with USCIS' E-Verify employment verification program. In addition, employers of F-1 students who qualify for this 17-month extension of post-completion OPT must report to the student's school DSO within 48 hours if the student's employment ends prior to the end of the student's authorized OPT employment period.

B. "Cap-Gap" and Need To Expand Relief to All F-1 Students With Pending H-1B Petitions

As discussed above, nonimmigrant F-1 students on post-completion OPT maintain valid F-1 status until the expiration of the OPT period and the subsequent 60-day departure preparation period. Employers of students already working for the employer under OPT often file petitions to change the students' status to H-1B so that these nonimmigrant aliens may continue

working in their current or a similar job. Many times, however, an F-1 student's OPT authorization will expire prior to the student being able to assume the employment specified in the approved H-1B petition.

Currently, an employer may not file, and USCIS may not approve, an H-1B petition submitted earlier than six months before the date of actual need for the beneficiary's services or training. 8 CFR 214.2(h)(9)(i)(B). As a result, the earliest date that an employer can file an H-1B petition for consideration under the next fiscal year cap is April 1, for an October 1 employment start date. If that H-1B petition and the accompanying change of status request are approved, the earliest date that the student may start H-1B employment is October 1. Consequently, F-1 students who are the beneficiaries of approved H-1B petitions, but whose period of authorized stay (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expires before the October 1 H-1B employment start date, would have a gap in authorized stay and employment. This situation is commonly referred to as the "cap-gap."

An F-1 student in a cap-gap situation would have to leave the United States and return at the time his or her H-1B status becomes effective at the beginning of the next fiscal year. This gap creates a hardship to a number of students and provides a disincentive to remaining in the United States for employment. The cap-gap therefore creates a recruiting obstacle for U.S. employers interested in obtaining F-1 students for employment and submitting H-1B petitions on their behalf. Moreover, when the student is already working

for a U.S. company on OPT and has to leave the United States, frequently for several months, during the cap-gap period, the employer suffers a major disruption.

USCIS is already authorized to extend the status of F-1 students caught in a cap-gap between graduation and the start date on his or her approved H-1B petition. 8 CFR 214.2(f)(5)(vi). However, before USCIS can offer students any relief from the cap-gap, it must first determine that the cap has been reached for the current fiscal year, or is likely to be reached prior to the end of the current fiscal year, and then publish a notice in the Federal Register announcing that status is extended for students with pending H-1B petitions. Significantly, the existing regulations do not take into account the fact that the H-1B category is now oversubscribed to such a degree that USCIS' final receipt date for petitions is now announced even before the start of the fiscal year for which the petitions are being submitted and, in the absence of an expansion of the 65,000 cap by Congress, this state of affairs will likely continue indefinitely. The existing regulations, therefore, are not an effective means of addressing the cap-gap problem suffered by student beneficiaries of pending H-1B petitions (and their employers).

This interim rule amends USCIS procedures by eliminating the requirement that USCIS issue a Federal Register notice. Instead, this rule extends the authorized period of stay, as well as work authorization, of any F-1 student who is the beneficiary of a timely-filed H-1B petition that has been granted by, or remains pending with, USCIS. The extension of status and work authorization terminates on October 1 of the fiscal year for which the H-1B visa has been requested.

This amendment better reflects the reality of the current situation, where demand for H-1B visas is so high that USCIS regularly receives enough petitions to reach the cap before the beginning of the fiscal year for which petitions are filed, and offer more substantial cap gap relief to both students and employers.

II. Discussion of This Interim Final Rule

A. 17-Month Extension of Optional Practical Training for F-1 Students Who Have Obtained a STEM Degree

This interim rule will allow F-1 students who have received a degree in a STEM field to obtain an extension of their existing post-completion OPT period for up to 17 months, for a maximum period of post-completion OPT of 29 months. The extension, however, is only available to students who are employed, or will be employed, by an employer enrolled (and determined by USCIS to be in good standing) in USCIS' E-Verify employment verification program at the time the student applies for the 17-month extension. A student seeking an extension must agree to report to a DSO at his or her school the following: Changes to the student's name, the student's residential and mailing address, the student's employer, and the address of the student's employer. The student must also report to a DSO every six months from the date the OPT extension starts to verify this information. In addition, the employer of a student under extended OPT must report to the student's school DSO within 48 hours after the student leaves employment with that employer. The DSO must report all of this information in SEVIS.

1. Requirements for Students Seeking a 17-Month OPT Extension

This interim final rule will allow qualified F-1 students who currently have approved post-completion OPT to apply for a 17-month extension of OPT. The student's degree, as shown is SEVIS, must be a bachelor's, master's, or doctorate degree with a degree code that is on the current STEM Designated Degree Program List.

The STEM Designated Degree Program List is based on the "Classification of Instructional Programs" (CIP) developed by the U.S. Department of Education's National Center for Education Statistics (NCES). See Classification of Instructional Programs—2000: (NCES 2002-165) U.S. Department of Education, National Center for Education Statistics. Washington, DC: U.S. Government Printing Office.[7]

To be eligible for the 17-month OPT extension, a student must have received a degree in the following:

- Actuarial Science. NCES CIP Code 52.1304
- Computer Science: NCES CIP Codes 11.xxxx (except Data Entry/Microcomputer Applications, NCES CIP Codes 11.06xx)
- Engineering: NCES CIP Codes 14.xxxx
- Engineering Technologies: NCES CIP Codes 15.xxxx
- Biological and Biomedical Sciences: NCES CIP Codes 26.xxxx

- Mathematics and Statistics: NCES CIP Codes 27.xxxx
- Military Technologies: NCES CIP Codes 29.xxxx
- Physical Sciences: NCES CIP Codes 40.xxxx
- Science Technologies: NCES CIP Codes 41.xxxx
- Medical Scientist (MS, PhD): NCES CIP Code 51.1401

The approved list is available on SEVP's Web site at http://www.ice.gov/sevis. DHS welcomes comment on the list and any recommendations for additional degrees that the Department should consider for inclusion in the list. DHS will continue to work with interested parties to evaluate the degrees that may be added to this list in the future, and will be reaching out to other agencies in the development of the final rule. The Department, however, must also continue to ensure that the extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled U.S. workers and that is essential to this country's technological innovative competitiveness.

DHS will announce any future changes to the list on this Web site. Note that catch-all NCES CIP codes ending in "99" are not considered STEM designated degrees.

Students who wish to extend OPT must request that their DSO recommend the 17-month OPT extension. DSOs recommending the extension must verify the

student's eligibility, certify that the student's degree is on the STEM Designated Degree Program List, and ensure that the student is aware of his or her responsibilities for maintaining status while on OPT. The DSO must make the recommendation to extend OPT for the student through SEVP's Student and Exchange Visitor Information System (SEVIS), a Web-enabled database for the collection of information related to F, M and J nonimmigrants, certified schools, and State Department approved exchange visitor programs. SEVP will implement an interim update to SEVIS to ensure schools can recommend extending the authorized OPT period for 17 months for qualified students. The changes will be minimal due to the short time for planning and the reduced testing cycle. SEVP is also planning a major SEVIS release in the first part of FY 2009 to more fully support the new regulatory requirements. SEVP will publish interim instructions for the period between the interim update and the major release and provide training opportunities for DSOs. SEVIS help desk personnel will provide assistance with the proper interim procedures.

Once the DSO recommends a student for the extension, the student must submit a Form I-765 and appropriate fees (as indicated in the form instructions) to USCIS. Instructions for filing the Form I-765 can be found at USCIS' Web site at http://www.uscis.gov.

This interim final rule also extends EADs for students with pending requests for extension of post-completion OPT. An F-1 student who has properly filed Form I-765 prior to the end date of his or her post completion OPT is allowed to maintain continuous

employment for up to 180 days while USCIS adjudicates the request for the extension.

To implement the changes discussed in this rulemaking, USCIS is making conforming amendments to Form I-765 to ensure that that the F-1 students seeking a 17-month extension of their post-completion OPT are, in fact, eligible to do so. USCIS is amending this form to add, among other things, a new question #17 asking students to identify the degree they have received, so that USCIS may determine that the student has received a degree in a STEM field. The new Form I-765 also will ask the student seeking the extension to provide the name of their employer (as listed in E-Verify), and their employer's E-Verify Company I.D. number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid E-Verify Client Company I.D. number

2. Requirement for Employers of Students With a 17-Month OPT Extension

a. USCIS E-Verify Employment Verification Program

As discussed above, only students who are employed by employers who have enrolled, and are determined by USCIS to be in good standing, in USCIS' E-Verify program will be eligible for the 17-month extension of post-completion OPT. The E-Verify program is an Internet-based system operated by USCIS, in partnership with the Social Security Administration (SSA). E-Verify is currently free to employers and is available in all 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. E-Verify electronically compares information contained on the

Employment Eligibility Verification Form I-9 (herein Form I-9) with records contained in SSA and DHS databases to help employers verify identity and employment eligibility of newly-hired employees. This program currently is the best means available for employers to determine employment eligibility of new hires and the validity of their Social Security Numbers.

Before an employer can participate in the E-Verify program, the employer must enter into a Memorandum of Understanding (MOU) with DHS and SSA. This memorandum requires employers to agree to abide by current legal hiring procedures and to ensure that no employee will be unfairly discriminated against as a result of the E-Verify program. Violation of the terms of this agreement by the employer is grounds for immediate termination of its participation in the program.

Employers participating in E-Verify must still complete a Form I-9 for each newly hired employee, as required under current law. Following completion of the Form I-9, the employer must enter the newly hired worker's information into the E-Verify Web site, and that information is then checked against information contained in SSA and USCIS databases. E-Verify compares employee information against more than 425 million records in the SSA database and more than 60 million records stored in the DHS database. Currently, 93 percent of all employer queries are instantly verified as work authorized.

It is important to note that, once an employer enrolls in E-Verify, that employer is responsible for verifying all new hires, including newly hired OPT students with 17-month OPT extensions, at the hiring site(s)

identified in the MOU executed by the employer and DHS. New hires must be verified to be authorized to work in the United States through E-Verify within three days of hire. If, however, an employer enrolls in E-Verify to retain the employment of an OPT student, the employer may not verify the employment eligibility of the OPT employee in E-Verify as the MOU prohibits the verification of existing employees. Additional information on enrollment and responsibilities under E-Verify can be found at http://www.uscis.gov/E-Verify.

Employers can register for E-Verify on-line at http://www.uscis.gov/E-Verify. The site provides instructions for completing the MOU needed to officially register for the program.

b. Employer Reporting Requirement

SEVP's ability to track nonimmigrant students in the United States relies on reporting by the students' DSOs. DSOs obtain the needed information from the school's recordkeeping systems and contact with the students. Students on OPT, however, are often away from the academic environment, making it difficult for DSOs to ensure proper and prompt reporting on student status to SEVP. While DHS regulations currently require DSOs to update SEVIS, the current reporting requirements depend entirely on the student's timely compliance. DSOs are not currently required to review and verify information reported by students on a recurring basis. This combination of factors hinders systematic reporting and SEVP's ability to track F-1 students during OPT.

Accordingly, DHS will only extend post-completion OPT for students employed by employers that agree to report when an F-1 student on extended OPT terminates or otherwise leaves his or her employment with the employer prior to end of the authorized period of OPT. The employer must report this information to the DSO of the student's school no later than 48 hours after the student leaves employment. Employers must report this information to the DSO at the student's school unless DHS announces another means to report such information through a Federal Register notice. The contact information for the DSO is on the student's Form I-20. DHS welcomes comments on possible means for directly reporting to DHS, such as through electronic means similar to or associated with the E-Verify platform.

B. Expansion of Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions

Currently, F-1 students who are the beneficiaries of approved H-1B petitions, but whose period of admission (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expires before the H-1B employment start date, have a gap in authorized stay and employment between the end of their F-1 status and the beginning of their H-1B employment. This situation is commonly referred to as the "cap-gap."

USCIS is authorized to extend the status of F-1 students caught in a cap gap between the end of the student's F-1 status and the start date on his or her approved H-1B petition.[8]

8 CFR 214.2(f)(5)(vi). The current regulations, however, do not provide for a commensurate extension of students' employment authorization to cover the gap period. Additionally, the regulations currently provide that USCIS must determine that the H-1B cap will be met prior to the end of the "current" fiscal year before it may authorize an extension of stay for students subject to the cap gap for that fiscal year by means of a notice published in the Federal Register.

This interim rule expands the relief offered by the existing cap gap provision by first eliminating the limitation that cap gap relief be authorized only when the H-1B cap is likely to be reached prior to the end of the current fiscal year. This interim rule also removes the requirement that USCIS issue a notice in the Federal Register to announce the extension of status and instead allows an automatic extension of status and employment authorization for F-1 students with pending H-1B petitions. If USCIS denies a pending H-1B petition, the student will have the standard 60-day period (from notification of the denial or rejection of the petition) before they have to leave the United States.

Unlike the extension of post-completion OPT, which is limited to F-1 students who have obtained STEM degrees, the extension of status for -F-1 students in a cap-gap applies to all -F-1 students with pending H--1B petitions during a fiscal year.

C. Related Changes to the OPT Requirements

1. Changes to Post-Completion OPT

Currently, students must apply for post-completion OPT prior to completing their course requirements. 8 CFR 214.2(f)(10)(ii)(A). This is inconsistent with

other regulatory provisions allowing students to transfer, apply for a new degree program, or change to another nonimmigrant status during their 60-day post-completion departure preparation period. Problems also arise if students fail to complete their program after receiving authorization for post-completion OPT. Therefore, this rule allows students to apply for post-completion OPT during the 60-day departure preparation period.

2. Periods of Unemployment During OPT

DHS regulations currently define the period of an F-1 student's status as the time the student is pursuing a full course of study at an SEVP-certified school or engaging in authorized post-completion OPT. 8 CFR 214.2(f)(5). They do not specify how much time the student may be unemployed, making it difficult to determine when an unemployed student on post-completion OPT violates the requirements for remaining in -F-1 status. As status during OPT is based on the premise that the F-1 student is working, there must be a limit on unemployment, just as the -F-1 student's period in school is based on the premise that he is actually pursuing a full-time course of study, and there are limits on how often the student can reduce his course load. An F-1 student who drops out of school or does not pursue a full-time course of study loses status; an F-1 student with OPT who is unemployed for a significant period should similarly put his status in jeopardy. Therefore, this rule specifies an aggregate maximum allowed period of unemployment of 90 days for students on 12-month OPT. This maximum period increases by

30 days for F-1 students who have an approved 17-month OPT period. In addition to clarifying the student's status, this measure allows time for job searches or a break when switching employers.

III. Regulatory Requirements

A. Administrative Procedure Act

To avoid a loss of skilled students through the next round of H-1B filings in April 2008, DHS is implementing this initiative as an interim final rule without first providing notice and the opportunity for public comment under the "good cause" exception found under the Administrative Procedure Act (APA) at 5 U.S.C. 553(b). The APA provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. 553(b)(B). The exception excuses notice and comment, however, in emergency situations, or where "the delay created by the notice and comment requirements would result in serious damage to important interests." *Woods Psychiatric Institute v. United States*, 20 Cl. Ct. 324, 333 (1990), aff'd 925 F.2d 1454 (Fed. Cir. 1991); see also *National Fed'n of Fed. Employees v. National Treasury Employees Union*, 671 F.2d 607, 611 (D.C. Cir. 1982).

Currently, DHS estimates, through data collected by SEVP's Student and Visitor Exchange Information System (SEVIS), that there are approximately 70,000 F-1 students on OPT in the United States. About one-third have earned a degree in a STEM field. Many of these students currently are in the United States under a valid post-completion OPT period that was

granted immediately prior to the conclusion of their studies last year. Those students soon will be concluding the end of their post-completion OPT and will need to leave the United States unless they are able to obtain an H-1B visa for FY09 or otherwise maintain their lawful nonimmigrant status. DHS estimates that there are 30,205 F-1 students with OPT expiring between April 1 and July 31 of this year. The 17-month extension could more than double the total period of post-completion OPT for F-1 students in STEM fields. Even if only a portion of these students choose to apply for the extension, this extension has the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy.

This interim rule also provides a permanent solution to the "cap-gap" issue by an automatic extension of the duration of status and employment authorization to the beginning of the next fiscal year for F-1 students who have an approved or pending H-1B petition. This provision allows U.S. employers and affected students to avoid the gap in continuous employment and the resulting possible violation of status. This increases the ability of U.S. employers to compete for highly qualified employees and makes the United States more competitive in attracting foreign students. Based on the historical numbers of "cap-gap" students taking advantage of a Federal Register Notice extending F-1 status, ICE estimates that up to 10,000 students will have approved H-1B petitions with FY09 start dates. At the end of their OPT, these students must terminate employment and either depart the United States within 60 days or extend their F-1 status by enrolling

in another course of study. Unless this rule, and the cap gap relief it affords, is implemented this Spring, all these students must interrupt their employment and those who leave the United States will not be allowed to return until the October 1, 2008 start date on their H-1B petitions.

The ability of U.S. high-tech employers to retain skilled technical workers, rather than losing such workers to foreign business, is an important economic interest for the United States. This interest would be seriously damaged if the extension of the maximum OPT period to twenty-nine months for F-1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F-1 students complete their studies and, without this rule in place and effective, would be required to leave the United States.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to issue this rule as an interim final rule. DHS nevertheless invites written comments on this interim rule. Further, because this interim final rule relieves a restriction by extending the maximum current post-completion OPT period for certain students from 12 months to up to 29 months, DHS finds that this rule shall become effective immediately upon publication of this interim final rule in the Federal Register. 5 U.S.C. 553(d).

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBRFA), requires an agency to prepare and make available to the public

a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). RFA analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). DHS has determined that this rule is exempt from notice and comment rulemaking pursuant to 5 U.S.C. 553(b)(B). An RFA analysis, therefore, is not required for this rule.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This is not a major rule, as defined by Section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the United States economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866

This proposed rule has been designated as a "significant regulatory action" under Executive Order 12866. This rule therefore has been submitted to OMB for review. In addition, under section 6(a)(3)(C) of the Executive Order, DHS has prepared an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provided the assessment to OMB for review. This assessment is as follows:

Recent numbers: This rule will have an impact on a small percentage of international students in the United States. According to the DHS Office of

Immigration Statistics, an average of approximately 642,000 F-1 academic students, at all grade levels, have entered the United States per year in fiscal years 2004, 2005, and 2006.[9]

According to the Institute of International Education, approximately 583,000 of these students are college students.[10]

Of those, SEVP records indicate that close to 70,000 students currently participate in OPT and, of those, only about 23,000 are OPT participants who are studying in designated STEM fields. Thus, about 3.6 percent of F-1 students could potentially benefit from this rule. Nonetheless, as shown below, this may be a sufficient number to significantly benefit employers who are in need of workers in STEM-related fields.

OPT extension volume estimate: A reasonable estimate of the number of students who will participate in this new OPT 17-month extension program is difficult for a number of reasons, but DHS estimates that about 12,000 students will apply for an OPT extension after this rule takes effect. Of the 23,000 OPT students, however, about 4,000 have bachelor's degrees, 13,000 have master's degrees, and 6,000 have a doctorate. Anecdotal evidence indicates that foreign students with a master's or bachelor's degrees often continue as students and pursue more advanced degrees. DHS experience indicates that many of these students will be granted H-1B status and will not need an OPT extension, although actual records do not exist on the rates at which F-1 OPT participants actually receive an H-1B position. Additionally, some students will not request an OPT extension because they are returning to their home country, while many students will want to

stay. According to a report from the Oak Ridge Institute for Science and Education, 65 percent of 2000 U.S. science and engineering doctoral degree recipients with temporary visas were still in the United States in 2005, up from a 61 percent 5-year stay rate found in 2003.[11]

This implies that STEM students stay in the U.S. at a relatively high rate. And, finally, the changes made by this rule are expected to increase the attractiveness of the OPT program. Although a precise estimate of the effect is impossible, the OPT application volume is likely to increase at least a slight amount because of the impact of this rule on program flexibility, length of stay, and students' quality of life. Therefore, after considering these factors, DHS estimates that about 12,000 of the 23,000 students who could apply for the OPT extension allowed by this rule, will apply in an average year after this rule takes effect.

Public Costs

Fees. The fee for Form I-765 is $340. 8 CFR 103.7(b)(1). Thus, the new filing fees to be collected by USCIS from students requesting an employment authorization document as a result of this rule will be about $4.1 million.[12]

Paperwork burden. The public reporting burden for completion of the Form I-765 information is estimated at 3 hours and 25 minutes per response, including the time for reviewing instructions, completing and submitting the form. As discussed below in the Paperwork Reduction Act section of this rule, this form is being amended to add a space for STEM students to provide their degree, the name of their employer, and their

employer's E-Verify Company I.D. number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid E-Verify Company Client Company I.D. Number. Therefore, the 12,000 students requesting OPT will expend approximately 3.42 hours per application for a total of 41,040 burden hours per year.[13]

Based on the private industry employer average compensation costs of $28.03 per hour worked,[14] this requirement will result in an estimated total cost of $1.15 million.[15]

New burden. This rule adds to the current regulation's DSO and student reporting requirements. A student with a 17-month extension to post-completion OPT must also make a validation report to the DSO every six months starting from the date of the extension, within 10 business days, and ending when the student's F-1 status ends, if the student changes educational levels at the same school or the student transfers to another school or program. The validation is a confirmation that the student's information in SEVIS is current and accurate. The DSO is responsible for updating the student's record with SEVIS within 21 days. The DSO must also report in SEVIS when the employer of a student with the 17-month OPT extension reports that the student no longer works for that employer.

Also, this rule makes failure to report a basis for terminating the student's status and provides that failure to report can impact the future visa program and OPT eligibility of the school, employer, and student. Further, the school is required by this rule to report to SEVIS whether there have been any changes in the

student's circumstances or not. Although the student is already required to report to the school DSO any changes in their address and their OPT employer's name and address, and the school is then required to report this information to SEVIS, program familiarity and anecdotal evidence indicates that full compliance is lacking. The increased incentives to comply with the reporting requirements provided in this rule will result in about 2.5 additional reports per student per extension period from students to schools and schools to SEVIS. Each report or update will require an estimated 10 minutes. Thus, for the 12,000 students and graduates expected to benefit from this rule, an additional reporting burden of 5,000 hours (12,000 × .42 hours) is estimated to occur for both the student and school for a total of 5,000 additional hours of burden. Based on the private industry employer average compensation costs of $28.03 per hour worked,[16] this requirement will result in an estimated total cost of $140,150 (5,000 hours × $28.03).

DHS has determined that the currently approved information collection burden for SEVIS contains a high enough estimate of that program's paperwork burden on program participants to encompass this rule's requirements because reporting requirements were already imposed, although not with the utmost clarity. Also, current regulations do not impose any penalty on a school or student for failure to report. SEVP will work with schools on the best way to implement this new reporting requirement so as to maximize its benefit while minimizing its burden on participating students and schools. SEVP is making conforming amendments to its approved information collection for

SEVIS and has included the updated burden estimates. Public comments are especially welcome on these changes.

E-Verify Registration. This rule requires employers of F-1 students participating in the 17-month OPT extension to enroll in E-Verify. That will require the employer to register for E-Verify if they wish to hire an employee under the extended OPT. Less than 1 percent of the total number of employers in the United States are currently enrolled in E-Verify and a similar percentage of enrollment in E-Verify would be expected for OPT employers. Thus, DHS anticipates that most employers who would want to employ these students under the 17-month extension would need to register for E-Verify.[17]

The time and cost associated with registering for E-Verify largely depends on the access method a company chooses. The vast majority of companies will sign up for employer access which requires approximately 3 to 4 hours for a person to register online, read and review the Memorandum of Understanding, and take the tutorial. A recent cost analysis for the E-Verify program looked at the associated costs for an organization to undertake the above tasks based on an average salary and the time required. According to this analysis, a company would spend an average of $170 per registration for the Employer Access method. This cost could increase if an employer chose to use a Designated Agent or Web Services as their access method. The Designated Agent costs can vary greatly and would be difficult to estimate as many employers contract with a Designated Agent to perform a variety of human resources related tasks. Web Services would

also likely involve a significant cost and time to the employer as they would need to design their own software to interface with the E-Verify system.

DHS has no record of the numbers or identity of employers hiring students under OPT, no figures on those that hire students and also participate in E-Verify, no data on the average number of employees in such firms, and no data on the average number of employees hired by such firms for which the immigration status will have to be verified. However, since this rule is applicable only to STEM students and recent graduates, it is estimated that the employers and positions will be similar in characteristics to those hiring employees in the H-1B specialty worker program. In that program, USCIS records show that in FY 2007, about 29,000 different employers employed at least one of the 65,000 initial H-1B employees (based on employer identification number) with about 20,000 employing only one H-1B employee. Thus, employers hiring new H-1B employees in FY 2007 hired an average of 2.24 each. If the 12,000 students per year that DHS is estimating will receive an OPT extension are distributed along those same lines, as is expected, they will work for approximately 5,357 employers (12,000/2.24). Since about 1.0 percent of employers are already enrolled in E-Verify already, 5,300 employers are estimated to have to enroll in E-Verify as a result of this rule. At $170 per registration for the Employer Access method, the total initial enrollment costs from this rule would be $901,000.[18]

At the end of registration, the company is required to read and sign a Memorandum of Understanding (MOU) that provides the terms of agreement between

the employer, SSA, and USCIS. It is expected that each company will have a Human Resources manager review the MOU and that many companies will also have a lawyer and or a general manager review the MOU. Using the Bureau of Labor Statistics (BLS) estimates for the average hourly labor rate, plus a multiplier of 1.4 to account for fringe benefits, DHS calculated a labor rate of $48.33 for an HR manager, $60.93 per hour for a general manager, and $76.09 for legal counsel.[19]

Based on the amount of time that company employees are expected to spend reviewing and approving the MOU, DHS estimates this rule will cost the 5,300 establishments that must enroll in E-Verify in order to hire OPT students about $64 each or a total of $339,200 to review, approve, and sign the MOU.

New hire verification. This rule will require the affected employers of students to verify the status of every new employee they hire using E-Verify.[20]

To calculate this annual cost, DHS estimated the number of new employees hired by these employers in an average year. While there is no record of the average size of an employer of OPT students, it is assumed that the average monthly and annual employee hire rate for these employers is consistent with the average. An estimate of the average number of employees may be made based on the average number of employees per firm in industries where STEM employment is prevalent. The 2002 Economic Census [21] indicates that, as of 2002, in industries where STEM employment is most prevalent, 1.7 million firms have 26.5 million employees, or an average of 16 employees per firm.[22]

According to the Bureau of Labor Statistics, the new hires rate (number of hires to the payroll during the month as a percent of total employment) in the industries where STEM employment is believed to be most prevalent was about 2.5 percent in February 2008.[23]

Therefore, for 12 months, newly hired and rehired employees amount to about 30 percent (12 months × 2.5 percent monthly hire rate) of the total number of current employees in the STEM related industries. For an establishment with 16 employees, that hire rate would result in about 5 new hires per year.

To verify new hires, the E-Verify participant company must submit a query before the end of three business days after the new hire's actual start date. Based on the number of queries and case resolutions for the current E-Verify program from January through June of 2007, the time required to enter this information into the computer and submit the query, and the costs incurred by an employee to challenge occurrences of tentative nonconfirmation, DHS has calculated the combined costs incurred by an employer and prospective employee to verify each new hire to be about $6.36 per new hire. Thus, the annual public cost incurred for verification of new hires for the 5,300 employers affected by this rule is around $168,540 (5,300 × 5 × $6.36).

In summary, the total public cost of this rule requiring employers of F-1 students participating in the 17-month OPT extension to enroll in E-Verify will be $1,240,000 ($901,000 + $339,200) up front and $168,540 per year thereafter.

Government Costs

This rule requires no additional outlays of DHS funds. The requirements of this rule and the associated benefits are funded by fees collected from persons requesting these benefits. The fees are deposited into the Immigration Examinations Fee Account. These fees are used to fund the full cost of processing immigration and naturalization benefit applications and petitions and associated support services.

Public Benefit

Improved U.S. competitive position for STEM students and employees. The primary benefits to be derived from allowing the extension of OPT relates to maintaining and improving the United States competitive position in the market. Over the past 20 years, there has been a sustained globalization of the STEM labor force, according to the National Science Board's "Science and Engineering Indicators 2008." Increased globalization has turned the labor market for STEM workers into a worldwide marketplace.[24]

Today, investment crosses borders in search of available talent, talented people cross borders in search of work, and employers recruit internationally. Slowing of the growth of the science and engineering labor force in the United States could affect both technological change and economic growth. As a result, the United States must be successful in the increasing international competition for immigrant and temporary nonimmigrant scientists and engineers. The employment-based immigrant visa ceiling makes it difficult for foreign students to stay in the United States permanently after their studies because long delays in the

immigrant visa process usually makes it impractical to be directly hired with an immigrant visa. Though obtaining a nonimmigrant work visa like an H-1B is a much quicker process, the oversubscription of the H-1B program makes obtaining even temporary work authorization an uncertain prospect. Studies show that the most talented employees worldwide are increasingly unwilling to tolerate the long waits and uncertainty entailed in coming to work temporarily in or immigrating to the United States. Instead, they are going to Europe, Canada, Australia and other countries where knowledge workers face fewer immigration difficulties.[25]

This rule will help ease this difficulty by adding an estimated 12,000 OPT students to the STEM-related workforce. With only 65,000 H-1B visas available annually, this number represents a significant expansion of the available pool of skilled workers.

Student's quality of life. The most significant qualitative improvement made by this rule is the enhancement related to improving the quality of life for participating students by making available an extension of OPT status for up to 17 months for certain students following post-completion OPT. Additionally, the changes to the cap gap provision for F-1 students will allow up to 10,000 students to remain in the United States and work while waiting to become an H-1B worker. These and similar changes made by this rule will significantly enhance the experience of the student who participates in the program by potentially allowing them more time and flexibility while considering employment in the United States. Students should experience much less stress about their need to

comply with tight time frames or risk being out of status. These changes will result an increase in the attractiveness of the program.

Conclusion

This rule will cost students approximately $1.49 million per year in additional information collection burdens, $4,080,000 in fees, and cost employers $1,240,000 to enroll in E-Verify and $168,540 per year thereafter to verify the status of new hires. However, this rule will increase the availability of qualified workers in science, technology, engineering, and mathematical fields; reduce delays that place U.S. employers at a disadvantage when recruiting foreign job candidates; increase the quality of life for participating students, and increase the integrity of the student visa program. Thus, DHS has determined that the benefits of this rule to the public exceed its costs.

E. Executive Order 13132

This rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. To implement the changes discussed in this rulemaking, USCIS is making conforming amendments to Form I-765, Application for Employment Authorization (current OMB Control No. 1615-0040), which is used by students to apply for pre- and post-completion OPT. Specifically, this form is being amended to add a new question #17, asking STEM students to provide their degree, the name of their employer (as listed in E-Verify), and their employer's E-Verify Company identification number or, if the employer is using a Designated Agent to perform the E-Verify queries, a valid E-Verify Client Company identification number. The collection of this information is necessary to ensure that F-1 students seeking a 17-month extension of their post-completion OPT are, in fact, eligible to do so. E-Verify has been approved by OMB under OMB Control No. 1615-0092. USCIS will submit an OMB Correction Worksheet (OMB 83-C), increasing the number of respondents, for both Form I-765 and E-Verify (OMB Control No. 1615-0092).

To implement the changes discussed in this rulemaking, SEVP is making conforming amendments to its information collection for the Student and Exchange Visitor Information System (SEVIS; current OMB Control No. 1653-0038). This authorization encompasses all data collected to meet the requirements of the Student and Exchange Visitor Program (SEVP). This further includes completion of Forms I-20, Certificate of Eligibility for Nonimmigrant Student Status,

which are updated and generated by SEVIS in the recommendation for employment authorization and tracking of activity. The reporting requirements in this rule will impact 3% of the total number of F-1 students, those who are eligible for the 29-month OPT option. Additions to the reporting burden include:

DSO verification of student qualification for OPT and issuance of a Form I-20 recommending the 17-month extension of OPT for STEM students (five minutes per student applicant);

Semiannual verification of student and employment information in SEVIS for all students with an approved 17-month extension of OPT (five minutes for both the student and a DSO per verification); and

Updates to SEVIS records of about 25% of the students with an approved 17-month OPT who report a change in student name, student address, employer name, or employer address (five minutes for both the students and a DSO per verification).

Updates by the DSO to SEVIS based on an estimated 600 reports by an employer that the student's employment has ended (five minutes for the reporting DSO).

The aggregate annual increased burden related to all students on extended OPT is 12.5 minutes per student and 20 minutes per supporting DSO. Accordingly, SEVP has submitted the amended Supporting Statement, along with an OMB Correction Worksheet (OMB 83-C), increasing the number of respondents, the annual reporting burden hours and annual reporting burden cost for submitting.

List of Subjects

8 CFR Part 214

- Administrative practice and procedure
- Aliens
- Employment
- Foreign officials
- Health professions
- Reporting and recordkeeping requirements
- Students

8 CFR Part 274a

- Administrative practice and procedure
- Aliens
- Employment
- Penalties
- Reporting and recordkeeping requirements

For the reasons set forth in the preamble, 8 CFR part 214 is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; section 643, Pub. L. 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

2.

Amend § 214.2(f) by:

a. Revising paragraph (f)(5)(vi); and

b. Revising paragraphs (f)(10)(ii)(A), (C), and (E); and by;

c. Revising paragraphs (f)(11) and (f)(12).

The revisions read as follows:

§ 214.2

Special requirements for admission, extension and maintenance of status.

* * * * *

(f) * * *

(5) * * *

* * * * *

(vi) Extension of duration of status and grant of employment authorization.

(A) The duration of status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) and (C), of an F-1 student who is the beneficiary of an H-1B petition and request for change of status shall be automatically extended until October 1 of the fiscal

year for which such H-1B visa is being requested where such petition:

(1) Has been timely filed; and

(2) States that the employment start date for the F-1 student is October 1 of the following fiscal year.

(B) The automatic extension of an F-1 student's duration of status and employment authorization under paragraph (f)(5)(vi)(A) of this section shall immediately terminate upon the rejection, denial, or revocation of the H-1B petition filed on such F-1 student's behalf.

(C) In order to obtain the automatic extension of stay and employment authorization under paragraph (f)(5)(vi)(A) of this section, the F-1 student, according to 8 CFR part 248, must not have violated the terms or conditions of his or her nonimmigrant status.

(D) An automatic extension of an F-1 student's duration of status under paragraph (f)(5)(vi)(A) of this section also applies to the duration of status of any F-2 dependent aliens.

* * * * *

(10) * * *

(ii) Optional practical training.

(A) General. Consistent with the application and approval process in paragraph (f)(11) of this section, a student may apply to USCIS for authorization for temporary employment for optional practical training directly related to the student's major area of study. The student may not begin optional practical training until the date indicated on his or her employment authorization document, Form I-766. A student may be granted authorization to engage in temporary employment for optional practical training:

(1) During the student's annual vacation and at other times when school is not in session, if the student is currently enrolled, and is eligible for registration and intends to register for the next term or session;

(2) While school is in session, provided that practical training does not exceed 20 hours a week while school is in session; or

(3) After completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree (excluding thesis or equivalent). Continued enrollment, for the school's administrative purposes, after all requirements for the degree have been met does not preclude eligibility for optional practical training. A student must complete all practical training within a 14-month period following the completion of study, except that a 17-month extension pursuant to paragraph (f)(10)(ii)(C) of this section does not need to be completed within such 14-month period.

* * * * *

(C) 17-month extension of post-completion OPT for students with a science, technology, engineering, or mathematics (STEM) degree. Consistent with paragraph (f)(11)(i)(C) of this section, a qualified student may apply for an extension of OPT while in a valid period of post-completion OPT. The extension will be for an additional 17 months, for a maximum of 29 months of OPT, if all of the following requirements are met.

(1) The student has not previously received a 17-month OPT extension after earning a STEM degree.

(2) The degree that was the basis for the student's current period of OPT is a bachelor's, master's, or

doctoral degree in one of the degree programs on the current STEM Designated Degree Program List, published on the SEVP Web site at http://www.ice.gov/sevis.

(3) The student's employer is registered in the E-Verify program, as evidenced by either a valid E-Verify company identification number or, if the employer is using a designated agent to perform the E-Verify queries, a valid E-Verify client company identification number, and the employer is a participant in good standing in the E-Verify program, as determined by USCIS.

(4) The employer agrees to report the termination or departure of an OPT employee to the DSO at the student's school or through any other means or process identified by DHS if the termination or departure is prior to end of the authorized period of OPT. Such reporting must be made within 48 hours of the event. An employer shall consider a worker to have departed when the employer knows the student has left the employment or if the student has not reported for work for a period of 5 consecutive business days without the consent of the employer, whichever occurs earlier.

(D) Duration of status while on post-completion OPT. For a student with approved post-completion OPT, the duration of status is defined as the period beginning when the student's application for OPT was properly filed and pending approval, including the authorized period of post-completion OPT, and ending 60 days after the OPT employment authorization expires (allowing the student to prepare for departure, change educational levels at the same school, or transfer in accordance with paragraph (f)(8) of this section).

(E) Periods of unemployment during post-completion OPT. During post-completion OPT, F-1 status is dependent upon employment. Students may not accrue an aggregate of more than 90 days of unemployment during any post-completion OPT carried out under the initial post-completion OPT authorization. Students granted a 17-month OPT extension may not accrue an aggregate of more than 120 days of unemployment during the total OPT period comprising any post-completion OPT carried out under the initial post-completion OPT authorization and the subsequent 17-month extension period.

(11) OPT application and approval process.

(i) Student responsibilities. A student must initiate the OPT application process by requesting a recommendation for OPT from his or her DSO. Upon making the recommendation, the DSO will provide the student a signed Form I-20 indicating that recommendation.

(A) Application for employment authorization. The student must properly file a Form I-765, Application for Employment Authorization, with USCIS, accompanied by the required fee for the Form I-765, and the supporting documents, as described in the form's instructions.

(B) Filing deadlines for pre-completion OPT and post-completion OPT.

(1) Students may file a Form I-765 for pre-completion OPT up to 90 days before being enrolled for one full academic year, provided that the period of employment will not start prior to the completion of the full academic year.

(2) For post-completion OPT, the student must properly file his or her Form I-765 up to 90 days prior to his or her program end-date and no later than 60 days after his or her program end-date. The student must also file the Form I-765 with USCIS within 30 days of the date the DSO enters the recommendation for OPT into his or her SEVIS record.

(C) Applications for 17-month OPT extension. A student meeting the eligibility requirement in paragraph (f)(10)(ii)(C) of this section may file for a 17-month extension of employment authorization by filing Form I-765, Application for Employment Authorization, with the appropriate fee, prior to the expiration date of the student's current OPT employment authorization. If a student timely and properly files an application for a 17-month OPT extension, but the Form I-66, Employment Authorization Document, currently in the student's possession, expires prior to the decision on the student's application for 17-month OPT extension, the student's Form I-766 is extended automatically pursuant to the terms and conditions specified in 8 CFR 274a.12(b)(6)(iv).

(D) Start of employment. A student may not begin employment prior to the approved starting date on his or her employment authorization except as noted in paragraph (f)(11)(i)(C) of this section. A student may not request a start date that is more than 60 days after the student's program end date. Employment authorization will begin on the date requested or the date the employment authorization is adjudicated, whichever is later.

(ii) DSO responsibilities. A student needs a recommendation from his or her DSO in order to apply for

OPT. When a DSO recommends a student for OPT, the school assumes the added responsibility for maintaining the SEVIS record of that student for the entire period of authorized OPT, consistent with paragraph (f)(12) of this section.

(A) Prior to making a recommendation, the DSO must ensure that the student is eligible for the given type and period of OPT and that the student is aware of his or her responsibilities for maintaining status while on OPT. Prior to recommending a 17-month OPT extension, the DSO must certify that the student's degree, as shown in SEVIS, is a bachelor's, master's, or doctorate degree with a degree code that is on the current STEM Designated Degree Program List.

(B) The DSO must update the student's SEVIS record with the DSO's recommendation for OPT before the student can apply to USCIS for employment authorization. The DSO will indicate in SEVIS whether the employment is to be full-time or part-time, and note in SEVIS the start and end date of employment.

(C) The DSO must provide the student with a signed, dated Form I-20 indicating that OPT has been recommended.

(iii) Decision on application for OPT employment authorization. USCIS will adjudicate the Form I-765 and, if approved, issue an EAD on the basis of the DSO's recommendation and other eligibility considerations.

(A) The employment authorization period for post-completion OPT begins on the date requested or the date the employment authorization application is approved, whichever is later, and ends at the conclusion of the remaining time period of post-completion OPT

eligibility. The employment authorization period for the 17-month OPT extension begins on the day after the expiration of the initial post-completion OPT employment authorization and ends 17 months thereafter, regardless of the date the actual extension is approved.

(B) USCIS will notify the applicant of the decision and, if the application is denied, of the reason or reasons for the denial.

(C) The applicant may not appeal the decision.

(12) Reporting while on optional practical training.

(i) General. An F-1 student who is authorized by USCIS to engage in optional practical training (OPT) employment is required to report any change of name or address, or interruption of such employment to the DSO for the duration of the optional practical training. A DSO who recommends a student for OPT is responsible for updating the student's record to reflect these reported changes for the duration of the time that training is authorized.

(ii) Additional reporting obligations for students with an approved 17-month OPT. Students with an approved 17-month OPT extension have additional reporting obligations. Compliance with these reporting requirements is required to maintain F-1 status. The reporting obligations are:

(A) Within 10 days of the change, the student must report to the student's DSO a change of legal name, residential or mailing address, employer name, employer address, and/or loss of employment.

(B) The student must make a validation report to the DSO every six months starting from the date the extension begins and ending when the student's F-1

status ends, the student changes educational levels at the same school, or the student transfers to another school or program, or the 17-month OPT extension ends, whichever is first. The validation is a confirmation that the student's information in SEVIS for the items in listed in paragraph (f)(12)(ii)(A) of this section is current and accurate. This report is due to the student's DSO within 10 business days of each reporting date.

3. Amend § 214.3 to add paragraph (g)(3)(ii)(F) as follows:

§ 214.3

Approval of schools for enrollment of F and M nonimmigrants.

* * * * *

(g) * * *

(3) * * *

(ii) * * *

(F) For F-1 students authorized by USCIS to engage in a 17-month extension of OPT,

(1) Any change that the student reports to the school concerning legal name, residential or mailing address, employer name, or employer address; and

(2) The end date of the student's employment reported by a former employer in accordance with § 214.2(f)(10)(ii)(C)(4).

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

4. The authority citation for part 274a continues to read as follows:

Authority:

8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 104-134, 110 Stat. 1321.

5. Amend § 274a.12 by:

a. Adding paragraph (b)(6)(iv) and (v); and

b. Revising paragraph (c)(3).

The revisions read as follows:

§ 274a.12

Classes of aliens authorized to accept employment.

(b) * * *

(6) * * *

(iv) A Form I-766, "Employment Authorization Document," under 8 CFR 274a.12(c)(3)(i)(C) based on a 17-month STEM Optional Practical Training extension, and whose timely filed Form I-765, "Application for Employment Authorization," is pending and Form I-766 issued under 8 CFR 274a.12(c)(3)(i)(B) has expired. Employment is authorized beginning on the expiration date of Form I-766 issued under 8 CFR 274a.12(c)(3)(i)(B) and ending on the date of USCIS' written decision on Form I-765, but not to exceed 180 days; or

(v) Or pursuant to 8 CFR 214.2(h) is seeking H-1B nonimmigrant status and whose duration of status and employment authorization have been extended pursuant to 8 CFR 214.2(f)(5)(vi).

* * * * *

(c) * * *

(3) A nonimmigrant (F-1) student who:

(i)(A) Is seeking pre-completion practical training pursuant to 8 CFR 214.2(f)(10)(ii)(A)(1)-(2);

(B) Is seeking authorization to engage in post-completion Optional Practical Training (OPT) pursuant to 8 CFR 214.2(f)(10)(ii)(A)(3); or

(C) Is seeking a 17-month STEM OPT extension pursuant to 8 CFR 214.2(f)(10)(ii)(C);

* * * * *

Dated: April 2, 2008.

Michael Chertoff,

Secretary.

Footnotes

1. The 65,000 person cap does not, however, apply to certain limited classes of aliens, including individuals who are employed by, or have received offers of employment at: (1) An institution of higher education, or a related or affiliated nonprofit entity, or (2) a nonprofit research organization or a governmental research organization. Additionally, there is an exemption from the H-1B cap for up to 20,000 individuals who are advanced degree graduates (master's degree or higher) from U.S. institutions of higher education.

2. See USCIS Update at http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.

3. This publication may be found at http://www.nsf.gov/statistics/seind08.

4. This report may be accessed at http://www.futureofinnovation.org/PDF/BII-FINAL-HighRes-11-14-06_nocover.pdf.

5. A copy of this testimony can be accessed at http://help.senate.gov/hearings/2007_03_07/Gates.pdf.

6. This publication may be found at http://www.nap.edu/catalog.php?record_id=11463.

7. This publication may be found at http://nces.ed.gov/pubs2002/2002165_2.pdf.

8. The current regulations also require that the "Commissioner" issue the notice in the Federal Register. This is a technical error because this regulation has not been updated since the responsibilities of the Commissioner of the former INS were transferred to the Department of Homeland Security in March 2003 under the Homeland Security Act of 2002. Because DHS is removing this provision altogether, there is no need to make the technical correction from "Commissioner" to "Director [of USCIS]" at this time.

9. DHS Office of Immigration Statistics, Temporary Admissions of Nonimmigrants to the United States: 2006, "Nonimmigrant Admissions (I-94 Only) by Class of Admission: Fiscal Years 2004 to 2006." Available on line at http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf.

10. The Institute of International Education, "International Student and Total U.S. Enrollment" Available on line at: http://opendoors.iienetwork.org/?p=113122.

11. Finn, Michael, "Stay Rates of Foreign Doctorate Recipients from U.S. Universities: 2005," Oak Ridge Institute for Science and Education (2007).

12. $340 × 12,000 = $4,080,000.

13. 3.42 hours (25 minutes = .42 hours) × 12,000.

14. Employer Costs for Employee Compensation, All civilian occupations, 3rd Quarter 2007, U.S. Department of Labor, Bureau of Labor Statistics at http://data.bls.gov/cgi-bin/surveymost. No

consideration is given to possibly lower wage rates being applicable for students.

15. 3.42 hours × 12,000 applications = 41,040. 41,040 × 28.03 = $1,150,351 (rounded).

16. Employer Costs for Employee Compensation, All civilian occupations, 3rd Quarter 2007, U.S. Department of Labor, Bureau of Labor Statistics at http://data.bls.gov/cgi-bin/surveymost. No consideration is given to possibly lower wage rates being applicable for students.

17. No allowance is made for the few employers that would choose to no longer hire students under OPT because of this requirement.

18. It is assumed for this analysis that there would be no initial costs for acquiring computers or Internet connections for employers that would hire an OPT student or graduate with an STEM major study area.

19. The 1.4 multiplier used here to adjust base compensation levels to account for private industry compensation costs was taken from the BLS publication "Employer Costs for Employee Compensation—March 2007."

20. There is no requirement that these employers verify the immigration status of their current employees.

21. Available on line at http://www.census.gov/econ/census02/guide/SUBSUMM.HTM.

22. Information: 3,736,061 employees, 137,678 establishments. Professional, Scientific, and Technical Services: 7,243,505 employees, 771,305 establishments. Educational Services: 430,164 employees, 49,319 establishments. Health Care and Social Assistance: 15,052,255 workers, 704,526 establishments.

23. Bureau of Labor Statistics, Job Openings and Labor Turnover Survey. Available on line at http://www.bls.gov/web/ceshighlights.pdf.

24. National Science Foundation, National Science Board, "Science and Engineering Indicators 2008." Available on line at http://www.nsf.gov/statistics/seind08/.

25. E.g. Hansen, Fay, "Green Card Recruiting," Workforce Management, Recruiting and Staffing (Jan. 2007). Available on line at http://www.workforce.com/section/06/feature/24/64/42/index.html.

APPENDIX K

Pre-Completion Interval Training; F-1 Student Work Authorization

57 Fed. Reg. 31,954 (July 20, 1992).

AGENCY:
Immigration and Naturalization Service, Justice.

ACTION:
Interim rule with request for comments.

Summary:
This rulemaking will restore the ability of foreign students to engage in practical training prior to completion of their course of study and will also provide employment authorization for F-1 students based upon severe economic hardship. Pre-completion training is necessary to permit students to accept short-term employment that furthers their academic studies before the students have graduated. It will provide a student with practical training as a part of the student's educational experience within the United States. Providing work authorization based on severe economic hardship is necessary to permit students who suffer unforeseen financial difficulties to remain in status and to continue their education at the school in which they are enrolled.

DATES:
This interim rule is effective July 20,1992. Written comments must be submitted on or before September 18, 1992.

ADDRESSES:
Please submit written comments, in triplicate, to the Records Systems Division, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 4251Street, NW,, room 5304, Washington, DC 20536. To ensure proper handling, please reference INS number 1458-92 on your correspondence.

FOR FURTHER INFORMATION CONTACT:
William R. Tollifson, Senior Immigration Examiner, Immigration and Naturalization Service, Examinations Division, 4251Street, NW., room 7122, Washington, DC 20536 (202) 514-3240.

SUPPLEMENTARY INFORMATION:
The Immigration and Naturalization Service (Service) published a final rule in the Federal Register concerning F-1 student work authorization on October 29,1991, at 56 FR 55608-55617. The final rule attempted to streamline the procedures for employment authorization. While the regulation implemented the Pilot Off- Campus Employment Program and both simplified the paperwork involved in and expanded the definition of on- campus employment it eliminated the separate pre-completion training and economic necessity work authorization provisions.

The Service is restoring pre-completion practical training within the ambit of the standard practical training regulations. Permitting practical training prior to course completion will provide foreign students with more flexibility to engage in employment directly related to their studies. Such practical training will be deducted from the 12 months of practical training generally available.

Authorization for pre-completion practical training will be expedited by the Service for the 1992 summer vacation period. The Service will issue an Employment Authorization Document (EAD) to an eligible walk-in applicant at the Service office having jurisdiction over the applicant's place of residence. Alternatively, if an eligible student elects to mail the Form 1-765, Application for Employment Authorization, to the designated Service office, the Service will make every attempt to schedule an appointment to issue the EAD within *7* days of receipt. With respect to periods after the summer of 1992, the integrity considerations pertaining to the issuance of an EAD to an eligible F-1 student are undergoing further policy review. This issue will be addressed at the time of publication of the final rule.

The Service is also providing for work authorization based upon severe economic hardship. This will enable students who have suffered unexpected financial difficulties, and for whom the Pilot Off-Campus Employment Program is unavailable or insufficient, to continue their education without interruption. It should be noted that work authorization based upon severe economic hardship will differ from the former economic hardship program.

First, the Designated School Official (DSO) will no longer endorse the Form 1-20 Student ID. As is the case with other categories of work authorization for nonimmigrants, F-1 students will have to apply lor an EAD on Form 1-365 at the district «offices having jurisdiction over their place of residence. Form I-538, the DSO certification, should accompany the Form 1-785 application. This new rule also mandates that a

student must make a good faith effort to pursue employment authorization on- campus and under the Pilot Off-Campus Employment Program. The DSO must certify on Form 1-538 that neither the existing Pilot program nor on-campus employment is available or sufficient to meet the student's severe economic hardship. If a student were able to 'find adequate employment on-campus or under the Pilot program, the student would not be able to make a showing of need for work authorization based upon severe economic hardship.

It is the view of the Service that requiring the student to make a good faith effort to find employment through other programs will not impose an onerous burden on the students, die DSOs, or the employers. The Service has provided a suggested approach to complying with this requirement. The student should consult his or her DSO to determine whether there are any employment opportunities under the

Pilot program available in the area. If such opportunities exist, the student should pursue those available opportunities, if employment under the Pilot program is insufficient, the DSO's certification to that effect on Form 1-538 will satisfy the requirements of this section. On the other hand, if the DSO knows that no Pilot program employment exists and on-campus employment is unavailable or insufficient, the DSO's certification to that effect on Form 1-538 will also satisfy the requirements of this section.

Finally, the Service is revising 8 CFR 274a to require feat students who seek employment for purposes of optional practical training or who seek employment

because of severe economic hardship apply for work authorization.

The Service's implementation of this rule as an interim rule, with a provision for post-promulgation public comment, is based upon fee "good cause" exceptions found at 5 U.S.C. 553 (b)(B) and (d)(3). This rulemaking falls under the good cause exception because a notice and comment period would be impracticable and contrary to the public interest. This rulemaking confers a benefit upon eligible students, and does not impose a penalty of any kind. It is imperative that this interim rule become effective upon publication so that those persons who are eligible to apply for work authorization based upon severe economic hardship or for pre-completion practical training may apply for either benefit accordingly.

In accordance with 5 U.S.C. 605(b), fee Commissioner of the Immigration and Naturalization Service Certifies that this rule does not ¡have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a major rule within the meaning of section 1(b) of Executive Order12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order 12612.

The information collection requirements contained in this rule have been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act Clearance numbers for these collections are contained in 8 CFR 299.5 Display of Control Numbers.

List of Subjects

8 CFR Part 214
Administrative practice mid procedure, Aliens, Employment.

8 CFR Part 274a
Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

Accordingly, chapter 1 of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority:
8 U.S.C. 1101,1103,1184,1186a; B CFR .part 2.

2. Section 214.2 is amended by revising paragraph (f)(9)(ii) to read as follows:

(ii) Off-campus work authorization—
(f)* * *
(9) * * *
(A) *General.* An F-1 student may be authorized to work off-campus on a part-time basis in accordance with paragraph (f)(9)(ii) (B) or (C) of this section after having been in F-l status for one ¡full academic year provided that the student is in good academic standing as determined by fee DSO. Part-time off- campus employment authorized under this section is limited to no more than twenty hours a week when school is in session. A student who is granted off-campus employment authorization may work full-time during

holidays or school vacation. The employment authorization is automatically terminated whenever the student lads to maintain status.

(B) Wage-and-labor attestation requirement Except as provided under paragraphs (f)(9)(ii)(C) and (f)(9)(iii) of this section, a student may be authorized to accept off-campus employment only if fee prospective employer has filed a labor-and-wage attestation pursuant to 20 CFR part 855, subparts J and K (requiring fee employer to attest to fee fact that it has actively recruited domestic labor for at least 60 days for the position and will accord the student worker the same wages and working conditions as domestic workers similarly employed.)

(C) Severe economic hardship. If other employment opportunities are not available or are «otherwise insufficient, an eligible F—1 student may request off-campus employment work authorization based upon severe economic hardship caused by unforeseen circumstances beyond the student's control. These circumstances may include loss of financial aid or on-campus employment without fault on fee part of fee student, substantial fluctuations in the value of currency or exchange rale, inordinate increases in tuition and/or living costs, unexpected changes in fee financial condition of fee student's source of support, medical bilk, or other substantial and unexpected expenses.

(D) Procedure for off-campus employment authorization. The student must submit fee application to the DSO on Form 1-538, Certification by Designated School Official. The DSO may recommend fee student

work off-campus for one year intervals by certifying on the Form 1-538 that:

(1) The student has been in F-l status for one full academic year;

(2) The student is in good standing as a student and is carrying a full course of study as defined in paragraph (f)(6) of this section:

(3) The student has demonstrated that acceptance of employment will not interfere wife the student's carrying a full course of study; and

(4) Either: (i) The prospective employer has submitted a labor-and-wage attestation pursuant to paragraph (f)(9)(ii)(B) of this section, or (ii) The student has demonstrated that fee employment is necessary to avoid severe economic hardship due to unforeseen circumstances beyond the student's control pursuant to paragraph (f)(9)(ii)(C) of this section, and has demonstrated that employment under paragraph (f)(9)(i) and (f)(9)(ii)(B) of this section is unavailable or otherwise insufficient to meet the needs that have arisen as a result of the unforeseen circumstances.

(E) *Wage-and-Labor attestation application to the DSO.* An eligible F -l student may make a request for off- campus employment authorization to the DSO on Form 1-538 after the employer has filed the labor-and-wage attestation. By certifying on Form 1-538 that the student is eligible for off-campus employment, and endorsing the student's 1-20 ID, the DSO may authorize off-campus employment in one year intervals for the duration of a valid attestation as determined by the Secretary of Labor. The endorsement on the student's 1-20 ID should read "part-time employment with (name of employer) at (location) authorized from

(date) to (date)." Off-campus employment authorized by the DSO under this provision is incident to the student's status pursuant to 8 CFR 274a.l2(b)(6)(ii) and employer-specific and, therefore, exempt from the EAD requirement. The DSO must notify the Service of each off-campus employment authorization by forwarding to the Service data processing center the completed Form 1-538. The DSO shall return to the student the endorsed 1-20 ID.

(F) *Severe economic hardship application—(1)* The applicant should submit to the Service Form 1-20 ID, Form 1-538, and Form 1-785 along with the fee required by 8 CFR 103.7(b)(1), and any other supporting materials such as affidavits which further detail the unforeseen circumstances that require the student to seek employment authorization and the unavailability or insufficiency of employment under paragraphs (f)(9)(i) and (f)(9)(ii)(B) of this section. The requirement with respect to paragraph (f)(9)(ii)(B) of this section is satisfied if the DSO certifies on Form 1-538 that the student and the DSO are not aware of available employment in the area through the Pilot Off-Campus Employment Program. In areas where there are such Pilot program opportunities, this requirement is satisfied if the DSO certifies on Form I-538 that employment under the Pilot program is insufficient to meet the student's needs. The student must apply for the employment authorization on Form 1-765 with the Service office having jurisdiction over his or her place of residence.

(2) The Service shall adjudicate the application for work authorization based upon severe economic hardship on the basis of Form 1-20 ID, Form I-538, and

Form I-765, and any additional supporting materials. If employment is authorized, the adjudicating officer shall issue an EAD. The Service director shall notify the student of the decision, and, if the application is denied, of the reason or reasons for the denial. No appeal shall lie from a decision to deny a request for employment authorization under this section. The employment authorization may be granted in one year intervals up to the expected date of completion of the student's current course of study. A student has permission to engage in off-campus employment only if the student receives the EAD endorsed to that effect. Off- campus employment authorization may be renewed by the Service only if the student is maintaining status and good academic standing. The employment authorization is automatically terminated whenever the, student fails to maintain status.

*** * * * ***

3. In § 214.2, paragraph (f)(10)(ii) is revised to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(10) * * *

(ii) *Optional practical training*—(A) General. An F-1 student may apply to the Service for authorization for temporary employment for practical training directly related to the student's major area of study. Temporary employment for practical training may be authorized:

(1) During the student's annual vacation and at other times when school is not in session if the student is currently enrolled and eligible, and intends, to register for the next term or session;

(2) While school is in session, provided that practical training does not exceed twenty hours a week while school is in session;

(3) After completion of all course requirements for the degree (excluding thesis or equivalent), if the student is in a bachelor's master's, or doctoral degree program; or

(4) After completion of the course of study. A student must complete all practical training within a 14 month period following the completion of study.

(B) *Termination of practical training*. Authorization to engage in practical training employment is automatically terminated when the student transfers to another school.

(C) Request for authorization for practical training. A request for authorization to accept practical training must be made to the designated school official (DSO) of the school the student is authorized to attend on Form I-538, accompanied by his or her current Form I-20 ID.

(D) Action of the DSO. In making a recommendation for practical training, a designated school official must:

(1) Certify on Form I-538 that the proposed employment is directly related to the student's major area of study and commensurate with the student's educational level;

(2) Endorse and date the student's Form I-20 ID to show that practical training in the student's major

field of study is recommended "full-time (or part-time) from (date) to (date)"; and

(3) Return to the student the Form I-20 ID and send to the Service data processing center the school certification on Form I-538.

* * * * *

4. In § 214.2, paragraph (f)(11) introductory text is amended by adding two sentences at the beginning of the paragraph to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(11) Employment authorization. The total periods of authorization for optional practical training under paragraph (f)(10) of this section shall not exceed a maximum of twelve months. Part-time practical training, 20 hours per week or less, shall be deducted from the available practical training at one-half the full-time rate.* * *

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

5. The authority citation for part 274a continues to read as follows:

Authority:

8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.6. In § 274a.12, paragraph (c)(3) is revised to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(3) A nonimmigrant (F-1) student who:

(i) Is seeking employment for purposes of optional practical training pursuant to 8 CFR 214.2(f), provided the alien will be employed only in an occupation which is directly related to his or her area of studies and that he or she presents an I-20 ID endorsed by the designated school official;

(ii) Has been offered employment under the sponsorship of an international organization within the meaning of the International Organization Immunities Act (59 Stat. 669) and who presents a written certification from the international organization that the proposed employment is within the scope of the organization's sponsorship. The F-1 student must also present an I-20 ID endorsed by the DSO in the last 30 days; or

(iii) Is seeking employment because of severe economic hardship pursuant to 8 CFR 214.2(f)(9)(ii)(C) and has filed the Form I-20, Form I-538 and any other supporting materials such as affidavits which further detail the unforeseen economic circumstances that require the student to seek employment authorization and evidence the fact that the student has attempted to find employment under 8 CFR 214.2(f)(9)(ii)(B);

* * * * *

Dated:
July 14, 1992.

Gene McNary,
Commissioner, Immigration and Naturalization Service.

APPENDIX L

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Microsoft

November 15, 2007

The Honorable Michael Chertoff
Secretary
United States Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff,

I appreciated very much the chance to speak with you recently at the dinner that Ed and Debra Cohen hosted to discuss immigration reform issues, I am writing to follow up in more detail on the suggestion we briefly discussed for action that the Department of Homeland Security can take easily and immediately, as part of its administrative reforms initiative, to help address the H-1B visa shortage. That is, OHS can extend the period of Optional Practical Training ("OPT")—the period of employment that students are permitted in connection with their degree program — beyond its current maximum of one year. Additional suggestions relating to visa programs for the highly skilled follow as well.

Fulfilling a Key Part of DHS 's August 10, 2007 Administrative Reform Initiative

Microsoft believes that it was wise of the Administration, after Congress failed to move forward on

comprehensive immigration reform, to commit to exploring changes it could make to strengthen the immigration system without congressional action. As part of the twenty-six point plan that you announced on August 10, 2007, DHS committed, along with the Department of Labor, to explore "potential administrative reforms to visa programs for the highly skilled." DHS has properly recognized that reforms of visa categories for professionals should be given a high priority, because America's talent crisis has reached emergency levels.

The H-1B Shortage and American Competitiveness

Our high-skilled immigration policies are blocking access to crucial foreign talent. With demand in fields like science, technology, math, and engineering far surpassing the supply of American workers, America's employers find themselves unable to get the people they need on the job. The H-1B program, with its severely insufficient base annual cap of 65,000 visas, is at the center of the problem. This year, on April 2—the very first day that employers could seek an H-1B visa for the coming fiscal year—DHS received about twice as many requests as there were visas available, *for the entire year*. This means that (1) employers stood only a one-in-two chance of getting a visa at all for critical recruits; (2) employers could not even ask for an H-1B visa for students about to graduate the next month from our own universities; (3) employers are now in the midst of a staggering eighteen-month blackout period before they can put a worker on the job with a visa from the following year's supply; and (4) the chances of even getting one of those visas in the

first place will be even worse than this year's throw of the dice.

These restrictive policies are a stark contrast to the policies of many other countries, which are now streamlining their immigration programs to attract highly skilled professionals. Notably, the European Union recently proposed a "Blue Card" program, under which skilled workers would be able to obtain a temporary work visa, similar to an H-1B visa, in just one to three months.

Microsoft has long made it a top-level company priority to center its development work in the United States, and we have devoted a great deal of energy into trying to help shape the policy changes that would permit us to continue to do so. To compete globally, however, Microsoft — like other employers of the highly skilled across America—must have access to the talent it needs.

Now Extending OPT Will Help

True reform of the H-1B program, of course, will require congressional action. Yet the Administration, consistent with its August 10 commitment, can take a simple, immediate step to help address this crisis: extend from twelve to twenty-nine months the period that students can work in their field of study for OPT. Today OPT exists solely by regulation; no statutory change is necessary to make this needed adjustment. The current regulations provide for OPT to last up to twelve months [see 8 C.F.R. 214.2(F)(10)-(11)]. This period of employment is typically a crucial bridge to a more stable position in the American workforce through an H-1B visa. With this year's historic H-1B

cap crisis, however, OPT will expire long before it can bridge the gap to an H-1B. Without corrective action, the same can be expected next year. As a result, U.S. employers will lose recruits to competitors overseas. Soon, by necessity, U.S. jobs will follow. Extending OPT to twenty-nine months would permit U.S. employers to hire those students and keep them in service until longer-term visas become available.

OPT can be extended quickly. It would require no more than the issuance of a regulation to replace the word "twelve" with "twenty-nine" in 8 C.F.R. 214.2(F)(11). This simple extension of a critical existing program would provide tremendous relief in this emergency situation. Immediate action is necessary to initiate and announce this change so that U.S. companies and their recruits can make decisions knowing that relief is coming.

Timing of OPT Extension

A commitment to extend OPT should be announced immediately, and a regulation effectuating the extension should be in place no later than next spring. The regulation must be in place by next spring because OPT must be requested before the completion of the student's academic program. We suggest that an interim regulation and comment period would be fully permissible under the Administrative Procedures Act and would facilitate the regulation being in place on time. The announcement must be made now so both employers and students can plan for the recruitment cycle. An announcement now will give employers the assurance that, if they recruit on campus but lose the H-1B lottery, they will not have to lose their recruits

and can again seek an H-1B for them when the next year's supply becomes available. It will also give highly prized students considering their employment options the knowledge that they will have reliable work authorization for a period sufficient to move into a longer-term immigration status.

Other Administrative Reforms

There are other significant steps the Administration can take to alleviate the talent crisis facing the U.S. These steps would help to address the retention and other problems that result from the extreme waits that face most professionals seeking employment-based green cards.

Multi-year work and travel authorization documents

DHS could issue multi-year employment authorization documents ("EADs") and advance parole documents. These documents are typically issued for only one year and, during the several-year green card wait, must be renewed multiple times. Given its massive adjudications caseload, DHS often is unable to process renewal applications promptly, and often cannot meet the 90-day deadline that its regulations provide for EAD adjudications. This literally means professionals must come off the job, as employers cannot lawfully continue to employ any employees who do not have evidence of employment authorization, even where timely filed renewal applications have not been adjudicated within the regulatory deadline. This problem would be alleviated greatly if DHS were to issue EADs and advance paroles that were valid for two or three years rather than one. DHS has full authority to issue

multi-year documents. It already issues multi-year EADs to certain nonimmigrants, including the spouses of E and L visa holders. There is no statutory or regulatory limit on the validity periods for EADs and advance paroles, and the Secretary of Homeland Security has wide discretion under section 103 of the Immigration and Nationality Act to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act"

Moreover, it is in the strong interest of DHS itself to issue multi-year EADs and advance paroles. By doing so, USCIS would greatly reduce the adjudicative burden it now faces, unnecessarily, as a result of annual renewals. This is especially significant now, when USCIS is struggling with a major front-log and is having difficulty even receipting incoming petitions. In this situation, any elimination of unnecessary adjudication workload should be highly desirable to DHS. In addition to this efficiency incentive, DHS has a financial incentive as well. Under the new USCIS fee regulations that took effect on July 30, 2007, applicants who have paid the fee for Form I-485 to adjust to lawful permanent resident status do not have to pay an additional foe to renew an EAD or advance parole. This means that DHS will collect no additional revenue for all the additional work it performs to renew EADs and advance paroles repeatedly for these applicants.

Pre-certification

DHS also could establish a "pre-certification" process to allow employers who petition USCIS frequently for

visas to submit petitions via an expedited system. Under such a system, USCIS would review an employer's organizational documents to establish certain generic information, such as the employer's ability to pay employees, and would pre-certify the employer. When a pre-certified employer submitted a visa application, it would not mean an automatic approval; USCIS would analyze the particular foreign national's eligibility for the visa. It would simply relieve USCIS of the burden of re-adjudicating, over and over, the criteria that have already been determined through pre-certification. Such a system would reduce the burden on USCIS and allow employers to obtain the visas they need in a more efficient and expeditious manner.

Conclusion

We are very grateful to you for your commitment to administrative reforms of the visa programs for the highly skilled. If there is anything that Microsoft can do to be of assistance to your efforts, please do not hesitate to contact me.

Sincerely,

/s/ Jack Krumholtz
Managing Director of Federal Government Affairs
Associate General Counsel