CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

EXTENSION OF STEM OPTIONAL PRACTICAL TRAINING FOR FOREIGN STUDENTS UNDER PRESIDENT OBAMA'S EXECUTIVE ACTIONS?

Posted on June 16, 2015 by Cyrus Mehta

Senator Grassley's latest angry missive to the DHS protests the proposed increase of F-1 student Optional Practical Training (OPT), which was part of President Obama's executive actions of November 20, 2014. While the Senator's rant against any beneficial immigration proposal is nothing unusual, it reveals for the first time DHS plans to unveil an OPT extension regulation relating to its promise to retain skilled foreign talent. It is also refreshing that the Obama Administration is endeavoring to implement a key executive action, especially after a noted immigration blogger justifiably began to wonder whether the Obama Administration was fulfilling its promise or not.

According to Senator Grassley's letter dated June 8, 2015, the DHS is moving forward with new regulations on OPT

– allowing foreign students with degrees in STEM fields to receive up to two 24-month extensions beyond the original 12-month period provided under OPT regulations, for a total of up to six years of post-graduation employment in student status; and

– authorizing foreign graduates of non-STEM U.S. degree programs to receive the 24-month extension of the OPT period, even if the STEM degree upon which the extension is based is an earlier degree and not for the program from which the student is currently graduating (e.g. student has a bachelor's in chemistry and is graduating from an M.B.A. program).

Presently, students can receive up to 12 months of OPT upon graduation. In 2008, the DHS published regulations authorizing an additional 17-months extension of the OPT period for foreign students who graduated in STEM

(Science, Technology, Engineering and Mathematical) fields. The Senator's letter also seems to suggest that the agency is considering that employers will certify that they have not displaced US workers. The STEM OPT extension is presently subject to a legal challenge by the Washington Alliance of Technology Workers (Washtech). *See Washington Alliance of Technology Workers v. DHS*, Civil Action No. 1:14-cv-529. Plaintiffs have alleged that the OPT STEM extension period is a deliberate circumvention of the H-1B visa cap in violation of Congressional intent, and have also been granted competitor standing, which recognizes that a party suffers injury when a government agency lifts regulatory restrictions on competitors or allows increased competition.

Notwithstanding Senator Grassley's protest and the lawsuit, this is good news for foreign students, especially those who were not selected in the H-1B visa lottery for FY2016. While the current lawsuit could potentially thwart the efforts of the administration to extend STEM OPT especially in the face of mounting law suits, we can also take comfort in an earlier failed legal challenge against STEM OPT.

Soon after the DHS extended OPT from twelve months to twenty-nine months for STEM students, the Programmers Guild sued DHS. in *Programmers Guild v. Chertoff*, 08-cv-2666 (D.N.J. 2008), challenging the regulation, and initially seeking an injunction, on the ground that DHS. had invented its own guest worker program without Congressional authorization. The court dismissed the suit for injunction on the ground that DHS was entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (1984). Under the oft quoted *Chevron*doctrine, courts will pay deference to the regulatory interpretation of the agency charged with executing the laws of the United States when there is ambiguity in the statute. The courts will step in only when the agency's interpretation is irrational or in error. The *Chevron* doctrine has two parts: Step 1 requires an examination of whether Congress has directly spoken to the precise question at issue. If Congress had clearly spoken, then that is the end of the matter and the agency and the court must give effect to the unambiguous intent of the statute. Step 2 applies when Congress has not clearly spoken, then the agency's interpretation is given deference if it is based on a permissible construction of the statute, and the court will defer to this interpretation even if it does not agree with it. Similarly, the Supreme Court in *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), while affirming *Chevron*, held that if there is an ambiguous statute requiring agency

deference under *Chevron* Step 2, the agency's interpretation will also trump a judicial decision interpreting the same statute. *Brand X*involved a judicial review of an FCC ruling exempting broadband Internet carrier from mandatory regulation under a statute. The Supreme Court observed that the Commission's interpretation involved a "subject matter that is technical, complex, and dynamic;" therefore, the Court concluded that the Commission is in a far better position to address these questions than the Court because nothing in the Communications Act or the Administrative Procedure Act, according to the Court, made unlawful the Commission's use of its expert policy judgment to resolve these difficult questions.

The District Court in dismissing the Programmers Guild lawsuit discussed the rulings in *Chevron* and *Brand X* to uphold the DHS's ability to extend the student F-1 OPT regulation. Programmers Guild appealed and the Third Circuit also dismissed the lawsuit based on the fact that the Plaintiffs did not have standing. *Programmers Guild, Inc. v. Chertoff*, 338 Fed. Appx. 239 (3rd Cir. 2009), *petition for cert. filed*, (U.S. Nov. 13, 2009) (No. 09-590). While the Third Circuit did not address *Chevron*or *Brand X* – there was no need to – it interestingly cited *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), which held that Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts its statutes without change. Here, the F-1 practical training regulation was devoid of any reference to the displacement of domestic labor, and Congress chose not to enact any such reference, which is why the Programmers Guild lacked standing.

So, why is Washtech again challenging the STEM OPT extension after another challenger had previously failed? This is because the DC Circuit is a favorable court to get standing, which it has already been granted. Even if plaintiffs ultimately prevail on their competitor standing theory, which requires them to show that they are direct and current competitors to F-1 students, plaintiffs still have an uphill task. The plaintiffs rely on *International Bricklayers Union v. Meese* (another reason why they have commenced legal action in the DC Circuit), which struck down an INS Operating Instruction that allowed foreign laborers to come to the US on B-1 visas to install equipment or machinery after it had been purchased from an overseas seller. The court in *International Bricklayers* agreed with the plaintiffs that the laborers were not properly in the United States on a B-1 business visa, which under INA 101(a)(15)(B) precluded one from "performing skilled or unskilled labor." In fact, Congress had enacted the

H-2B visa for this sort of labor pursuant to INA 101(a)(15)(H)(ii)(b).

On the other hand, the provision pertaining to F-1 students at INA 101(a)(15)(F)(i) is more ambiguous. It prescribes the eligibility criterion for a student to enter the United States, but does not indicate what a student may do after he or she has completed the educational program. For over 50 years, the government has allowed students to engage in practical training after the completion of their studies, which Congress has never altered. Thus, a court should be more inclined to give deference to the Administration's interpretation of INA 101(a)(15)(F)(i) under *Chevron* and *Brand X* even if it expanded STEM OPT beyond the maximum available period of 29 months. From a policy perspective, the Administration should be given room to expand STEM OPT in order to retain skilled talent in the United States. Global competition for STEM students has increased dramatically, and many countries have reformed their immigration systems to attract such students. American innovation will fall behind global competitors if we cannot find ways to attract foreign talent especially after they have been educated at American universities.

Senator Grassley's misgivings about extending STEM OPT are misplaced, and it is fervently hoped that the Administration will not pay heed to his letter and cynically scrap the program after putting up a show that it had tried it's best. If extended STEM OPT is implemented, it will provide the impetus for the implementation of other key executive actions such as allowing entrepreneurs to be paroled into the United States and permitting beneficiaries of approved I-140 petitions to work and enjoy job mobilityeven if their priority dates have not become current. Each and every action will surely get challenged, but the Administration should fight on and prevail, like it did when the motion to preliminarily enjoin the granting of work authorization to H-4 dependent spouses failed.