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OPPORTUNITY KNOCKS IN DISAPPOINTING DECISION VACATING STEM OPTIONAL PRACTICAL TRAINING RULE FOR FOREIGN STUDENTS

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Adversity is the mother of progress

Mahatma Gandhi

I was at first greatly disappointed to find out that a federal district court judge vacated the 2008 STEM Optional Practical Training rule that extended practical training to F-1 students by an additional 17 months. However, if one reads *Washington Alliance of Technology Workers (WashTech) v. DHS* closely, the decision does not look so bad and provides an opportunity for the Obama administration to further expand STEM practical training, as promised in the November 20, 2015 executive actions for skilled workers.

Foreign students can receive up to 12 months of OPT upon graduation. In 2008, the Department of Homeland Security under President Bush's administration 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. Plaintiffs WashTech challenged both the 12 month OPT and the STEM OPT. The challenge to the original 12 month OPT rule was dismissed, but on August 12, 2015, U.S. District Judge Ellen Segal Huvelle vacated the rule that extended OPT by 17 months for a total period of 29 months for STEM graduates. The 2008 rule was published without notice and comment, and the court agreeing with the plaintiffs ruled that the DHS had not shown that it faced a true emergency situation that allowed the agency to issue the rule without notice and comment.

It is disappointing that Judge Huvelle granted plaintiffs standing in the first place on the flimsy ground that they were currently employed as computer

programmers, who were a subset of the STEM market. Although the plaintiffs in *WashTech* were not unemployed, Judge Huvelle speculated that "n influx of OPT computer programmers would increase the labor supply, which is likely to depress plaintiffs' members' wages and threaten their job security, even if they remained employed." It is also somewhat amusing that the judge found the F-1 and H-1B interrelated in order to justify that plaintiffs also had standing under the "zone of interests" doctrine. Without considering that the F-1 visa requires a non-immigrant intent while the H-1B allows for dual intent, the judge held that "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."

While this is the bad part of *WashTech*, the good news is that Judge Huvelle left intact the legal basis for the OPT rule on the ground that the DHS is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837 (1984). Pursuant to 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.

Judge Huvelle in *WashTech* agreed that under Step 1 of *Chevron,* the provision pertaining to F-1 students at INA 101(a)(15)(F)(i) is ambiguous and that Congress has not clarified the word "student". 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. Under Step 2 on *Chevron*, the 2008 rule was held to be a reasonable interpretation of the ambiguous statutory provision. For over 50 years, Judge Huvelle acknowledged, the government has allowed students to engage in practical training relating to their field of studies, which Congress has never altered. Indeed, in the Immigration Act of 1990, Congress included a three-year pilot program authorizing F-1 student employment for positions that were

"unrelated to their field of study." Congress would only do this, Judge Huvelle reasoned, because Congress recognized that practical training regulations long existed that allowed students to engage in employment in fields related to their studies. The decision goes into fascinating detail describing the history of practical training from at least 1947. Even after Congress overhauled the law in 1952, practical training continued, and still continued even after the Immigration Act of 1990 overhauled the H-1B visa by setting a numerical limit and imposing various labor protections. The decision also cites old Board of Immigration Appeals decisions recognizing practical training such as *Matter of T-*, 1 I&N Dec. 682 (BIA 1958), which 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 only in "unusual circumstances" would "practical training…be authorized before the beginning of or during a period of formal study."

Judge Huvelle finally and unfortunately, agreeing with the plaintiffs, held that there was no emergency to justify the promulgation of the 2008 rule without notice and comment. H-1B oversubscription as a reason for the emergency in 2008 was "old hat" as the government conceded that the H-1B program has been consistently oversubscribed since 2004. Fortunately, Judge Huvelle sensibly realized that vacating the rule immediately would force "thousands of foreign students with work authorizations…to scramble to depart the United States." Hence, the court stayed vacatur till February 12, 2016 during which time the DHS can submit the 2008 rule for proper notice and comment. In the meantime, foreign students in STEM OPT have some respite, and those who are eligible for STEM OPT should be able to apply for a 17 month extension so long as they do so before February 12, 2016, although we need some affirmative guidance from the USCIS on this.

The DHS now has a golden opportunity to expand practical training through notice and comment even beyond a total of 29 months, and must do so on or before February 12, 2016 in compliance with the *WashTech* decision. Despite the protestations of Senator Grassley, who like WashTecstridently opposes the notion of foreign student practical training, Judge Huvelle's decision has blessed the legal authority of the DHS to implement practical training under *Chevron*deference. As discussed in my prior blog, Senator Grassley in his angry missive to the DHS had leaked that the DHS was moving on new regulations to allow foreign students with degrees in STEM fields to receive up to a 24 month

extension beyond the original 12 month OPT period even prior to the final *Washtech* decision. If a student obtains a new degree, he or she can again seek a 24 month extension after the original 12 month OPT period. The proposed regulations would further authorize foreign graduates of non-STEM 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).

While this will put tremendous pressure on the DHS to propose a rule for notice and comment before February 12, 2016, it would be well worth it before all talented foreign students who would otherwise benefit the United States are forced to leave. As a result of the H-1B cap, it is the STEM OPT that has allowed foreign students to be employed in the United States. The prospect of no STEM OPT combined with the limited number of H-1B visas annually would be devastating not only for the tech sector, but for American universities, foreign students and for the overall competitiveness of the United States. WashTech may have successfully been able to obtain a vacatur of the 2008 rule effective February 12, 2016, but theirs is only a Pyrrhic victory since the court has essentially endorsed the legality of both the 12 month practical training periods and any extensions beyond that.