IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202 232 5590
202 464 3590 (fax)



November 18, 2015

Katherine Westerlund
Policy Chief (Acting)
Student and Exchange Visitor Program
U.S. Immigration and Customs Enforcement
500 W. 12th Street N.W.
Washington, DC 20536

**REF: DHS Docket No. ICEB-2015-0002, Notice of Proposed Rulemaking: Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students**

**Public Comment of Immigration Reform Law Institute, Inc.**

Dear Chief Westerlund:

The Immigration Reform Law Institute, Inc. ("IRLI") submits the following comments to the U.S. Department of Homeland Security ("DHS") in opposition to the subject Notice of Proposed Rulemaking ("NPRM"), as published in the Federal Register on October 15, 2015. *See* 80 F.R. 66376-63404.

IRLI is a non-profit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public. IRLI is the only entity of its kind in the U.S. which focuses exclusively on the interests of U.S. citizens and their communities in the development of sound immigration policy and law.

Upon review, IRLI has concluded that the proposed rule is unlawful, because

(1) Congress delegated authority to define periods of employment for F-1 nonimmigrants to the Treasury Department, not DHS;

*IRLI is a nonprofit public interest law firm working to end unlawful immigration and to set levels of legal immigration that are consistent with the national interest.*

*IRLI is a supporting organization of the Federation for American Immigration Reform.*

(2) Immigration and Nationality Act ("INA") § 214(a)(1) does not delegate unlimited agency authority over conditions of admission for nonimmigrants to DHS;

(3) DHS cannot claim discretionary authority over post-completion student employment from INA § 101(a)(15)(F) or § 274A(h)(3), alone or in combination;

(4) the NPRM is procedurally and substantively arbitrary and capricious; and

(5) the Optional Practical Training ("OPT") program described in the NPRM would impermissibly facilitate prohibited employment-related discrimination on the basis of alienage and national origin.

Our comments focus on the lack of a basis in law for the agency's claims of "broad authority" to implement the proposed rule, *see* 80 FR 63379-63381. NPRM ICEEB-2015-0002 is infected throughout with unlawful proposals. IRLI also endorses and adopts the policy-focused objections to the NPRM in public comments submitted by the Federation for American Immigration Reform (FAIR) and John Miano, Esquire.

## (1) Congress delegated authority to define periods of employment for F-1 nonimmigrants to the Treasury Department, not DHS.

DHS claims in the NPRM summary that since 1947, Congress has "acquiesced" to its evolving interpretation of whether an alien student was authorized under the terms of an F-1 visa to be employed full-time by a third party after graduation from a full-time course of study. 80 F.R. 63379-80.

DHS is wrong. Congress "has directly addressed the precise question at issue." *Mayo Fdn. for Medical Educ. & Research v. U.S.*, 562 U.S. 44, 53 (2011). The NPRM never mentions or references the detailed applicable laws governing the Federal Insurance Contributions Act ("FICA"), Federal Unemployment Tax Act ("FUTA"), or Social Security withholding. These statutory requirements in Title 26 (and Title 42) constitute a comprehensive congressional scheme to which DHS must defer when implementing practical training regulations for F-1 nonimmigrants.

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. By unilaterally expanding the definition of a "student" to include both recent and former nonimmigrant college graduates employed full-time by any entity other than the sponsoring academic institution, the DHS NPRM would unlawfully exempt both the

alien and the employer out from payment of payroll taxes—thus directly penalizing the Social Security and Medicare trust funds.

First, FICA requires covered employees and employers to pay taxes on all "wages" employees receive, 26 U.S.C. §§ 3101(a), 3111(a), and defines "wages" to include "all remuneration for employment," § 3121(a). FICA then defines "employment" as "any service . . . performed . . . by an employee for the person employing him," 26 U.S.C. § 3121(b). FICA then excludes from taxation any "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at [the school]." 26 U.S.C. § 3121(b)(10). Since 1951, the Treasury Department has construed the student exception to exempt from taxation students who work for their schools "as an incident to and for the purpose of pursuing a course of study." 16 Fed. Reg. 12474.

Second, the Social Security Act, which governs workers' eligibility for benefits, contains a corresponding student exception materially identical to § 3121(b)(10). *See* 42 U.S.C. § 410(a)(10).

Third, in 2004 the Treasury Department "determined that it was necessary to provide additional clarification of the term "student" as used in § 3121(b)(10), particularly with respect to individuals who perform "services that are in the nature of on the job training." 69 Fed. Reg. 8605 (2004). Pursuant to its statutory authority over the definition of employment and the classification of employees, the Treasury Department issued regulations providing that "[t]he services of a full-time employee"—which includes an employee normally scheduled to work 40 hours or more per week—"are not incident to and for the purpose of pursuing a course of study." 26 CFR § 31.3121(b)(10)-2(d)(3)(iii). The Department explained that this analysis "is not affected by the fact that the services . . . may have an educational, instructional, or training aspect." *Id.* The rule offers as an example a medical resident whose normal schedule requires him to perform services 40 or more hours per week, and concludes that the resident is *not* a student. This interpretation was reviewed and upheld by the Supreme Court. *See Mayo Foundation v. U.S.*, 566 U.S. 44, 49 (2011).

Fourth, not only does the IRC govern and regulate the classification of employment by students in general, it also expressly governs and regulates service performed by an F-1 status nonimmigrant. 26 U.S.C. § 3121 (19).[1] Subparagraph (19) excludes "service" by a foreign student—*i.e.*, a nonimmigrant alien in F-1 status—from the definition of "employment," but only if the service "is

[1] "service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be;"

performed to carry out the purpose specified in subparagraph (F)…." Section 3306(c)(19) of Title 26 (the IRC), relating to exemption for FUTA, contains a similar exemption provision for aliens in a *bona fide* F-1 status.

Fifth, the legislative history of these exemption provisions is integrally linked to the legislative history of the F, J and M visas as codified under 8 U.S.C. § 1101(a)(15) of the INA. The immigration, employment and tax status of such aliens were systematically amended by Congress under the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (1961). The Senate Joint Committee report on the Act unequivocally states that service subsequent to completion of a course of study is to be deemed employment, for which FICA, Social Security and FUTA withholding on such compensation paid to F-1 visa-holders would henceforth be required:

> Section 110 (e) [of the Mutual Educational and Cultural Exchange Act of 1961] amends section 3121 (b) of the Internal Revenue Code-relating to the definition of employment for purposes of the Federal Insurance Contributions Act (FICA)-and section 210 (a) of the Social Security Act. Nonresident aliens are now subject to the 3-percent FICA, or social security tax. Since they are temporarily in the United States, they scarcely have any expectation of realizing benefits from such a tax payment. Section 110 (e) exempts foreign students and exchange visitors from payment of FICA tax <u>on amounts earned in performing services to carry out the purposes for which they were admitted, such as studying, teaching, or conducting research</u>. <u>*If they are employed for other purposes, consequent payments would not be exempt*</u>. (This latter provision represents a modification of the similar sec. 110 (b) in the un-amended version of S. 1154.) Finally, the Social Security Act is amended specifically to deny social security benefits to those individuals, <u>*except insofar as they have contributed consequent to employment for purposes other than those governing their admission to the United States*</u>.
>
> "Section 110 (f) amends section 3306 (c) of the code, relating to the definition of employment for purposes of the Federal Unemployment Tax Act. This amendment would relieve employers of the obligation to pay Federal unemployment taxes <u>*on the same services that are exempted from FICA tax*</u> *by the preceding section 110 (e).*"

S. Rep. No. 372, 87th Cong., 1st Sess. 22 (1961), *see also* 1961-2 C.B. 395, 410 (I.R.S. 1961) (emphasis added).

Read together, 26 U.S.C. § 3121(b)(10), 26 U.S.C. § 3121(b)(19), 26 U.S.C. § 3306(c)(19), 26 U.S.C. § 3306(q), and 42 U.S.C. § 410(a)(10) long ago displaced the extra-statutory "authority" now capriciously claimed by DHS in the NPRM to authorize graduates to engage in "employment" on F-1 visas "following completion of studies." While 8 U.S.C. § 1372 delegates operation of the SEVIS information-collection program to DHS, s*ee* 80 F.R. 63380-81, no provision of SEVIS conflicts with or supersedes the controlling authority of the Internal Revenue Service ("IRS") to define the conditions under which tax-exempt "service" related to practical training performed by an alien in F-1 status becomes taxable "employment."[2]

To the extent that the proposed rule authorizes full-time post-completion employment for an employer other than the sponsoring academic institution, while permitting the employer to exempt the alien from withholding obligations otherwise mandated by Congress, the proposed rule would constitute unlawful government action under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A).

**(2) <u>INA § 214(a)(1) does not delegate unlimited agency authority over conditions of admission for nonimmigrants to DHS.</u>**

The NPRM summary claims that 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. 8 U.S.C. 1184(a)(1), INA section 214(a)(1)."

80 FR 63379. DHS's evocation of § 214(a), as authority for the claim that DHS can administratively bestow employment authorization on F-1 student visa holders despite the statutory requirement that such aliens may only be admitted for so long as they are engaged in a full-time course of study, cannot be supported by reference to the "broad authority [delegated by Congress] to administer and enforce the nation's immigration laws." *See id*.

---

[2] To the extent it purports to authorize "in status" classification to <u>all</u> aliens in F-1 status who are "engaging in authorized practical training following completion of studies," 8 C.F.R. § 214.2 (f)(5)(i) conflicts with the statutory language of 26 U.S.C. § 3121(b)(10), 26 U.S.C. § 3121(b)(19), 26 U.S.C. § 3306(c)(19), 26 U.S.C. § 3306(q), and 42 U.S.C. § 410(a)(10) and is thus unlawfully in excess of DHS agency authority, as are the proposed amendments to 8 C.F.R. § 214.2 in the current NPRM.

A constitutional delegation of powers requires that Congress state a policy or objective for the President to execute and also that it establish a standard or "intelligible principle" that makes clear when action is proper. *Star-Kist Foods, Inc., v. United States*, 275 F.2d 472, 480 (C.C.P.A. 1959); *Mast Indus. v. Regan*, 8 C.I.T. 214, 222 (Ct. Int'l Trade 1984). In this case, while INA section 214(a) "authorizes" the Attorney General (now DHS Secretary) to condition admission to the United States of an alien "for such time and under such regulations as the Attorney General may prescribe," it also mandates that all such regulations must "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." 8 U.S.C. § 1184(a)(1) (emphasis added). DHS regulatory authority over non-immigrant admissions under section 1184(a) is thus by no means purely discretionary, as incorrectly claimed in the NPRM, *see* 80 F.R. 63379. By its express terms the Secretary's regulatory authority may be exercised only to *augment* statutory conditions of admission, in order to "insure" that the alien will leave the United States once the terms of temporary admission have been completed. INA § 214(a) thus constitutes a congressional *restriction* of its delegation to DHS under 8 U.S.C. § 1103(a)(3) of generic discretionary authority to issue immigration regulations. INA § 214(a) cannot be interpreted to delegate to the Secretary the power to waive, bypass or weaken this statutory standard in order to further a *non*-statutory policy objective, such as the goal of facilitating the marketing of U.S. university degree programs to foreign students announced in the subject NPRM.

Similarly, the DHS claim of "broad authority to administer and enforce the nation's immigration laws" under 6 U.S.C. § 202, *see* 80 F.R. 63379, has twice been rejected by the Fifth Circuit, the only federal circuit court to assess § 202, and as a general principle by the Supreme Court. *Texas v. United States*, 787 F.3d 733, 760-761 (5th Cir. 2015) ("we do not construe the broad grants of authority in 6 U.S.C. § 202(5),[3] 8 U.S.C. § 1103(a)(3), or § 1103(g)(2) as assigning unreviewable "decisions of vast 'economic and political significance' to an agency."); *id.*, fn 90 (citing *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" *Brown & Williamson*, 529 U.S. at 159, 120 S. Ct. 1291, 146 L. Ed. 2d 121, "we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 160.)

The Fifth Circuit's recent decision affirming a preliminary injunction against implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program

[3] "The Secretary . . . shall be responsible for . . . [e]stablishing national immigration enforcement policies and priorities."

collects extensive authority on the limits of the general authority of DHS, beyond which DHS affirmative action is arbitrary. *See, e.g., Texas v. U.S.*, No. 15-40238 (5th Cir. Nov. 9, 2015), at 38-39 ("The mere fact that a statute grants broad discretion to an agency does not render the agency's decisions completely unreviewable under the 'committed to agency review by law' exception unless the statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Perales v. Castillo*, 903 F.2d 1043, 1047 (5th Cir. 1990)); at 61-62 (reaffirming the applicability of *Utility Air Regulatory Group*, 134 S.Ct. at 2444 and *Brown & Williamson Tobacco Corp*., 529, U.S. at 123)).

**(3) <u>DHS cannot claim discretionary authority over post-completion student employment from INA § 101(a)(15)(F) or § 274A(h)(3), either alone or in combination.</u>**

The NPRM summary asserts, "Federal agencies dealing with immigration have long interpreted section 101(a)(15)(F)(i) of the INA and related authorities to encompass on-the-job-training that supplements classroom training." 80 F.R. 63379 (citing 12 F.R. 5355, 5357 (Aug. 7, 1947) and 38 F.R. 35425, 35426 (Dec. 28, 1973)).

This assertion is capriciously overbroad. Nowhere does the statutory definition of a *student* in the INA authorize or even suggest that it includes full-time employment for three years after completion of a course of study. 8 U.S.C. § 1101(a)(15)(f)(i). DHS is authorized to admit aliens as students subject to the following conditions: (1) The aliens must have a residence in a foreign country that they have no intention of abandoning; (2) they must be *bona fide* students; (3) they must be entering the United States temporarily; (4) they must be entering solely to pursue a course of study; and (5) that course of study must take place at an approved academic institution that will report when the alien terminates attendance. 8 U.S.C. § 1101(a)(15)(F)(i). These provisions unambiguously define a *student* as one who attends a specific, approved school. *Id*.

In 1981, amendments to INA § 101(a)(15)(F) restricted the locations in which aliens admitted in F-1 status could pursue "a full course of study." Section 2(a)(1) of the INA Amendments of 1981 amended former section 101(a)(15)(F) of the Immigration Act by striking out the existing phrase "a course of study at an established institution of learning or other recognized place of study in the United States," and substituting the phrase, "such a course of study at a college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program." Pub. L. No. 97-116, 95 Stat. 1611 (1981). Congress thus statutorily restricted agency authority to approve F-1-based service at an "other recognized place of study" that was *not* an "academic institution," at least a decade before the extra-statutory agency expansions of the OPT programs that followed the Immigration Act of 1990.

The restriction of eligibility for F-1 classification to alien students who are enrolled in a full course of study at a recognized academic institution is consistent with statutes in other U.S. Code titles. *Compare,* 5 U.S.C. § 8101(17), 20 U.S.C. § 1070a-1(c), 26 U.S.C. § 3306(q), 30 U.S.C. § 902(g)(2)(C), 33 U.S.C. § 902(18), 42 U.S.C. § 402(d)(7), 42 U.S.C. § 12511(46) (all defining a *student* as one who attends a school)[4] *with* 8 C.F.R. § 214.2(f )(5)(i) (DHS regulatory definition of F-1 student status adding the alternative "or engaging in authorized practical training following completion of studies" to the statutory definition of *student*).[5]

By authorizing non-student aliens to remain in the United States on student visas to work under a post-completion OPT program, the subject NPRM would exceed the agency's statutory authority to admit foreign students. § 1101(a)(15)(F)(i).

The NPRM summary further claims, "The Secretary also has broad authority to determine which individuals are "authorized" for employment in the United States. 8 U.S.C. 1324a(h)(3)."
80 FR 63379. But DHS not only lacks the authority to allow aliens in F-1 status to remain in the United States absent a change or adjustment in status, it also has not been delegated the authority to authorize graduates to engage in "employment" on F-1 visas "following completion of studies."
In general, 8 U.S.C. § 1324a does not confer on DHS any authority to allow aliens to work. It merely prohibits *employers* from hiring unauthorized aliens. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011) (holding that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending.").

The exclusion of those "authorized to be employed by … the Attorney General" from the statutory definition of "unauthorized alien" simply makes the section work rationally with the rest of the

---

[4] The only statutory definition of *student* that IRLI has found which could be interpreted to extend to the post-completion period is 20 U.S.C. § 1232g(a)(6) (Family educational and privacy rights). This definition applies provisions governing privacy of student records to graduates as well as current students. However, 8 U.S.C. § 1372(c)(2) expressly exempts SEVIS records of aliens in F, J and M status from FERPA privacy protections.

[5] In its summary of the pending "Washtech" litigation, DHS incorrectly insinuates that the U.S. district court did *not* rule on "whether the agency's regulation is substantively deficient under 5 U.S.C. § 706." 80 FR 63381; *see also Wash. Alliance of Tech. Workers v. United States Dep't of Homeland Sec.*, 2015 U.S. Dist. LEXIS 105602 *47-48 (D.D.C. Aug. 12, 2015). In fact, the only judicial ruling to date is that the DHS interpretation was "not unreasonable." *Id.* The District Court "withholds judgment on the issue of whether the agency has marshaled sufficient evidence to support its [2008] rule." *Id.* at *46.

Immigration Reform and Control Act of 1986 ("IRCA"). 8 U.S.C. § 1324a(h)(3)(B). Other sections of IRCA contain seven specific mandatory directives for the Attorney General to authorize aliens without visas, but who are in the legalization process, to engage in employment. *See* IRCA § 201 ("Legalization") 100 Stat. 3397, 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. 3418, 3421 (two), 3428. In the absence of the clause "or by the Attorney General" in § 1324a(h)(3)(B), such aliens would have been authorized to work but it would be illegal for employers to hire them. *See*, S. Rep. 99-132, p. 43 ("An alien employed as a transitional worker and in possession of a properly endorsed such work permit or other documentation shall, for purpose of INA section 247A, be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation."). Nothing in the legislative history of IRCA or subsequent federal legislation regarding the employment of aliens supports DHS' proposed novel interpretation of § 1324a.

In the *Washtech v. DHS*, Civil No. 14-cv-00529 (D.D.C.) litigation, DHS has cited a Ninth Circuit opinion, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014) in support of its interpretation. However, the Ninth Circuit *Arizona Dream Act* is directly contradicted on that point by another opinion, *Guevara v. Holder*, cited above. In *Guevara*, the Ninth Circuit held that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending." *Id.* at 1095.

Finally, the Fifth Circuit has just rejected—in emphatic terms—the use of the "miscellaneous definitional provision expressly limited to § 1324a" by the Secretary to construe § 1324a(h)(3), as we also see in the NPRM, as a legal mechanism to allow him to grant lawful presence and work authorization to any illegal alien in the United States—an untenable position in the light of the INS's "intricate system of immigration classifications and employment eligibility." *Texas v. U.S.*, No. 15-40238, at 62. Similarly, the attempt in the NPRM to justify the extension of "duration of status" for F-1 students at 8 U.S.C. §1101(a)(15)(F)(i) to include three years of post-completion full-time employment, by resort to this now-discredited agency interpretation of §1324a(h)(3), would be unlawful agency action in excess of statutory jurisdiction under the APA. 5 U.S.C. §706(2)(C).

**(4) <u>The NPRM is procedurally and substantively arbitrary and capricious.</u>**

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 NPRM that it now replaces.

An agency must show on the record that it has satisfied its obligation to supply a reasoned analysis when it departs from past policy. *Comité de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 187 (3d Cir. 2014) (citing 5 U.S.C. § 706(2)(D)). Without such analysis in the record, a reviewing court may conclude that an agency has taken action without complying with procedures required by law. *Id.* When making a shift in policy, an 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.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)). Federal courts will set aside an agency's action as "arbitrary and capricious" if the agency does not provide a "reasoned explanation" for its change in course. *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that "unexplained inconsistency" in agency practice is a reason for holding a policy reversal "arbitrary and capricious" under the APA, unless "the agency adequately explains the reasons for a reversal of policy"); *see State Farm*, 463 U.S. at 42-43.; *see also CBS Corp. v. FCC.*, 663 F.3d 122, 145 (3d Cir. 2011).

DHS justified the 2008 OPT Rule by asserting the need to provide labor to United States employers to remedy an alleged "critical shortage" of labor. 73 F.R. 18944, 18947 (Apr. 8, 2008). DHS then used this illegitimate rationale to issue the 2008 OPT Rule in violation of the APA, as an "interim final rule," on the now discredited ground that "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" that "would be seriously damaged" if "not implemented early this spring [of 2008]." Id., at 18950. That rationale remains arbitrary because the NPRM fails to identify even a scintilla of evidence that the U.S. has since lost skilled technical workers to foreign business to the extent that any "important economic interest" has been "seriously damaged."

The current NPRM provides a completely different but equally arbitrary justification for the proposed rule: "[T]he revisions proposed by this rule are intended to continue and further enhance the academic benefit of the STEM OPT extension, while protecting STEM OPT students and U.S. workers." 80 F.R. 63381. "DHS recognizes the substantial … benefits provided by the F-1 nonimmigrant program generally, and the STEM OPT extension in particular… 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…. 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... important sectors of the U.S. economy." *Id.*

The NPRM summary provides no evidence of a measurable "academic benefit" other than increased income for U.S. institutions of higher education. However this benefit is 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. Similarly, STEM OPT employment by definition does not and cannot, as proposed, provide "enhance[ed] academic discourse and cultural exchange on campuses." In the NPRM DHS also fails to cite to any scientifically valid research documenting any research innovation that was actually achieved by any F-1 alien while in OPT STEM status. And finally but strikingly, the brazen bad faith of the agency regulators is on display in its claim that the OPT STEM program provides "knowledge and skills" to the U.S. economy, when the stated purpose of the current NPRM is purportedly to allow F-1 aliens the opportunity to acquire knowledge, skills, and experience, notably through occupational training pathways that are not open to similarly situated U.S. citizen STEM graduates. *See* 80 F.R. 63393 (the proposed regulation "will enhance… the objectives of their courses of study … through on-the-job-training that is often not available in their home countries.").

The objectives of the NPRM conflict not only with the claimed objectives in the 2008 rule—now vacated by the district court in *Washtech*, *see* 80 F.R. 63381—but with the carefully balanced employment authorization scheme in the INA. The most important statutory goal with which the NPRM conflicts is to "protect against the displacement of workers in the United States," *INS v. Nat'l Ctr. For Immigrants' Rights*, 502 U.S.183, 194 (1991).

A second is the INA's "primary purpose in restricting immigration is to preserve jobs for American workers." *Id.* INA § 212(a)(5)(A), designates as inadmissible "any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor—not DHS—has "determined and certified" that such employment will not adversely affect the employment, wages or working conditions of "workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A). The statute unambiguously links performance of labor by aliens with employment of U.S. workers. Nonimmigrant aliens who have already been admitted in F-1 status were exempted from labor certification only because, under the IRC and SSA provisions discussed above in Part (1), they were not admitted to perform such labor. F-1 status aliens who engage in post-completion OPT employment have thus "failed to maintain the nonimmigrant status in which the alien was admitted," making these aliens deportable. 8 U.S.C. § 1227(a)(1)(C)(i).

The NPRM is also substantively arbitrary because the agency has failed to consider essential and relevant factors in the explanation provided in the NPRM summary, in violation of 5 U.S.C. § 706(2)(A) (an agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). An agency acts arbitrarily and capriciously if it "has relied

on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43; *see also FEC v. Rose*, 806 F.2d 1081, 1088 (D. C. Cir. 1986); *Nazareth Hosp. v. Sec'y of HHS*, 747 F.3d 172, 179 (3d Cir. 2014) ("Agency action is arbitrary and capricious if the agency offers insufficient reasons for treating similar situations differently.").

The summary of the Executive Order 12866/13563 cost-benefit analysis asserts that OPT workers to be covered by the NPRM "will enhance… the objectives of their courses of study … through on-the-job-training that is often not available in their home countries." 80 F.R. 63393. However, nowhere in the NPRM has DHS provided any evidence or reference to expert authority indicating that such training is *not* available overseas, nor does it identify any mechanism in existing 8 C.F.R. § 214 or in the proposed amendments to 8 C.F.R. § 214.2(f) or (g), to establish that the availability of home country practical training has even the slightest relevance to approval of a STEM OPT approval application by a Designated School Official ("DSO") or oversight and review of such employment by DHS. There is a similar complete lack of evidence or reference to expert authority in the NPRM for the claim that the duration of the proposed OPT extension period for STEM degree holders should be 24 months rather than a shorter period "due to the complexity and typical durations of research, development, testing and other projects commonly undertaken in STEM fields." *See* 80 F.R. 63385. These two sweeping unsupported generalizations, applied uncritically across all nations world-wide in the first instance and all degree levels and the very diverse set of STEM occupational fields and entities employing STEM-qualified personnel in the second, are a paradigm of capricious justification in federal rulemaking.[6]

The clearly arbitrary character of the agency's justification for the current STEM OPT extension regulations is due in significant part to the failure of the agency to diligently consider the full range

[6] The NPRM insinuates that the "general duration of projects to be pursued by students on STEM OPT extensions" justifies the proposed rule, and points to work "often involving a grant or fellowship application, management of grant money, focused research—and publication of a report." 80 F.R. 63385. However, these projects utilizing research associates are more appropriately classified as "curricular practical training" ("CPT") because they are in almost all cases a direct extension of the STEM curriculum in which the F-1 alien obtained his qualifying degree. *See* 8 C.F.R. § 214.2(f)(100(i) (defining CPT as ""alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school."). IRLI does not object to CPT or its current regulatory scheme.

of contemporary research on the employment of F-1 status aliens and its relation to the employment of H-1B alien specialty workers. This omission is particularly notable given the failure of DHS to adequately document a looming emergent loss of alien STEM workers in its NPRM issued in connection with the now-vacated 2008 OPT Rule. Had DHS consulted in advance with the American citizens adversely affected by the OPT program, as well as its alien beneficiaries, the agency could have avoided the problem of relying solely on sources funded by employers of cheap alien workers to justify the Rule.

IRLI respectfully directs the agency's attention to two easily available annotated research bibliographies that are easily accessible on the internet: (1) AFL-CIO, Department for Professional Employees, *Annotated H-1B and L-1 Visa Bibliography* (October 2013), and (2) Norman Matloff, University of California Davis Department of Computer Science, *Annotated Research Bibliography: H-1B/Green Card/STEM Labor Shortage Issues* (October 15, 2014). The bibliographies are attached as Exhibits A and B for the convenience of the agency, which has repeatedly stated that it lacks the resources to fully perform its statutory mandates. However, such claims of institutional penury cannot exempt the agency from its rulemaking obligations under the APA.

**(5) <u>The OPT program described in the NPRM would impermissibly facilitate prohibited employment-related discrimination on the basis of alienage and national origin by academic institutions and employers.</u>**

DHS has requested comments on the feasibility and effectiveness of proposals summarized in Part G of the NPRM summary: *Safeguarding U.S. Workers Through Measures Consistent With Labor Market Protections*. 80 F.R. 63388-90.

By allowing F-1 visa holders in post-completion academic status—but not similarly situated United States citizens—to work for up to three years while exempt from withholding of FICA, FUTA and Social Security taxes, and also providing such aliens—but not United States citizens—eligibility for federally-mandated "mentoring" agreements as a required pathway to employment, any academic institution authorized by DHS to administer the proposed post-completion OPT programs would intentionally violate civil rights law prohibiting discrimination in the making of contracts, employment, and on-the-job training. 42 U.S.C. § 1981(a); 42 U.S.C. § 1983; 42 U.S.C. § 2000e-2(a),(d); 8 U.S.C. § 1324b(a)(1)(A) and (B). Even if DHS had absolute discretionary authority over the classification of employees who are in F-1 status, and had undertaken a balanced and complete review of relevant factors, the proposed rule would still be unlawful under the APA because it would constitute an abuse of discretion, not in accordance with law, in excess of statutory jurisdiction and short of statutory right. *See* 5 U.S.C. § 706(2)(A), (C).

First, as explained in Part (1), a United States citizen who has completed a STEM degree recognized by the proposed rule is barred by law from eligibility for the exemptions from payroll taxation available by law to a an alien whose duration of F-1 status is defined and extended pursuant to the proposed 8 C.F.R. § 214.2(f)(5)(vi). Second, that United States citizen is also ineligible per the NPRM to apply to STEM employers for practical training employment under a Mentoring or Training Plan. Proposed 8 C.F.R. § 214.2(f)(10)(ii)(C) expressly requires that an agreement in the form of a contract be executed on Form I-910 (Mentoring and Training Plan) by (1) an F-1 alien applying for OPT STEM employment, (2) the proposed employer, and (3) the DSO, on behalf of the academic institution. *See* § 214.2(f)(10)(ii)(C)(4)-(7).

Per its plain text, the § 1981 prohibition on discrimination in making contracts applies to "all persons," which necessarily includes both citizens and non-citizens. 42 U.S.C. § 1981(a); *see also Graham v. Richardson*, 403 U.S. 365, 375, (1971). Supreme Court and circuit court precedent hold that § 1981 (1) protects "all persons" against discrimination, (2) applies to U.S. citizens, and (3) protects against so-called "reverse discrimination." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274, 285 (1976); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948); *Sagana v. Tenorio*, 384 F.3d 731, 738 (9th Cir. 2004).

Section 1981 does not include the term "alien." But courts recognizing prohibited discrimination have used the terms "alienage" and "citizenship" interchangeably. *See, e.g.*, *Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1985-86 (D. Ariz. 2010); *Martinez v. Partch*, 2008 U.S. Dist. LEXIS 4162, 2008 WL 113907, at *2 (D. Colo. Jan. 9, 2008) (using "citizenship discrimination" and "alienage discrimination" interchangeably); *Chacko v. Tex. A&M Univ.*, 960 F. Supp. 1180, 1191 (S.D. Tex. 1997) ("section 1981 must be construed to prohibit private discrimination on the basis of citizenship."); *Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 913 F. Supp. 248, 251 (S.D.N.Y. 1996) ("The Supreme Court has held that section 1981 also prohibits states from enacting laws which discriminate on the basis of citizenship.").

Where the OPT employer would be a state agency or entity, such as a public research or higher education institution, employment of a STEM graduate in F-1 status would be barred by 8 U.S.C. § 1983, which provides United States citizen students and employers who must pay payroll taxes on STEM graduates who are not in F-1 status with a remedy for a violation of §1981 liability. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989).

Other features of the proposed rule that are indicative of discriminatory intent are the Cap-Gap rule changes, which repeat the proposal under the 2008 NPRM to allow "benching" of F-1 OPT

beneficiaries who are awaiting approval for a change of status to H-1B, *see* 80 F.R. 63391, and the proposal to expand OPT eligibility to former graduates who have not left the United States, *see* 80 F.R. 63388.

The hiring scheme for F-1 aliens with STEM degrees proposed in the NPRM would also constitute immigration-related employment discrimination under 8 U.S.C. § 1324b(a)(1)(A) and (B). Per proposed 8 C.F.R. §§ 214.2(f)(10)(ii)(C)(4)-(7), the Form I-910 applicant and the entire proposed hiring process and conditions for employment for F-1 status STEM graduates would exclude United States citizens and aliens admitted for lawful permanent residence. The 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.

In conclusion, this public comment warns the agency that the proposed OPT extension rule, in its present form, cannot possibly be found to comply with controlling federal law.

Respectfully Submitted,

Immigration Reform Law Institute, Inc.

*=//Michael Hethmon//=*

Michael M. Hethmon
IRLI Senior Counsel

Dale L.Wilcox
IRLI Executive Director and General Counsel

**IRLI EXHIBIT A**

# Annotated Research Bibliography: H-1B/Green Card/STEM Labor Shortage Issues

Norman Matloff *

Department of Computer Science
University of California, Davis
http://heather.cs.ucdavis.edu/matloff.html

October 15, 2014

This document summarizes what I regard as the major research papers on the issues of the H-1B work visa, employer-sponsored green cards and claims of a STEM labor shortage. Here I use the word *major* to mean either that the paper is widely cited or has important findings, not necessarily that I find the analysis to be valid.

Some points to keep in mind:

- **Funding of a research project matters.** Some of the research projects listed below are sponsored by organizations with industry financial ties.[1]
- **Peer review matters.** Generally speaking, research that has been vetted by peer review in a professional journal has much more validity than do unpublished working papers. However, journal papers can be flawed too, and working papers often have valuable, if yet unconfirmed, insights.

The bibliography follows.

1. **Bound (2006):** J. Bound, S. Turner and P. Walsh, Internationalization of U.S. Doctorate Education, in *Science and Engineering Careers in the United States: An Analysis of Markets and Employment*, R. Freeman and D. Goroff (eds.), University of Chigao Press, 2006.

   Found that the foreign students doing STEM graduate work at U.S. universities tend to attend weaker, less prestigious institutions:

   > In physics, biochemistry, and chemistry much of the expansion [from the mid-1980s to mid-90s] in doctorate receipt to foreign students occurs at unranked programs or those ranked outside the top 50; the growth in foreign students in engineering is distributed more evenly among programs. Among students from China, Taiwan, and South Korea growth has been particularly concentrated outside the most highly ranked institutions.

2. **Brown (1998, 2009).** Clair Brown *et al*, 1998, *The Perceived Shorage of High-Tech Workers*, unpublished working paper, 1998, and Clair Brown and Greg Linden, *Chips and Change*, MIT Press, 2009.

   This paper explained the link between the foreign student influx in engineering and the stagnant engineering wages. The 2009 book noted, as did the 1989 NSF document (see Weinstein (1998) below), that this is especially true at the graduate level, and that employers welcome the chance to pay lower wages at that level.

*Interested readers should read my short synopsis of H-1B issues, at http://heather.cs.ucdavis.edu/h1b10min.html, and my collection of quotes of industry people and others on this topic, at http://heather.cs.ucdavis.edu/h1bquotes.html.

[1] I have not sought, nor have I received, funding for any of my H-1B research papers.

3. **Costa (2012):** Daniel Costa., *STEM Labor Shortages? Microsoft Report Distorts Reality on Computer Occupations*, EPI, 2012.[2]

   Excellent exposure of Microsoft PR claims on H-1B.

4. **Freeman (2005):**. Richard Freeman, *Does Globalization of the Scientific/Engineering Workforce Threaten U.S. Leadership?*, unpublished NBER Working Paper No. 11457, June, 2005.

   Finds that STEM professionals lost ground in the 1990s relative to those in the law and medicine, due to the foreign STEM influx.

5. **Hanson (2014):** Gordon Hanson and Matthew Slaughter. *Facts and Fallacies about High-Skilled Immigration and the American Economy*, CompeteAmerica report, 2014.

   This research is funded by an industry consortium, CompeteAmerica. It has the usual flaws, such as not accounting for skill sets (see Lofstrom (2012) below).

   The authors concede the point made by Salzman *et al* (see Salzman (2013) below) that STEM wages have been flat, thus contradicting the claim of a labor shortage. But they contend that the reason wages are flat is that some work is done by foreign workers, abroad or in the U.S. If that were truly the case (I disagree), then why do the authors say we need more H-1Bs? Flat wages would say we have enough already, if not too many.

   The authors also state that although STEM wages have remained flat, non-STEM wages have fallen. This is obfuscating the issue; lack of rising wages means lack of a shortage, period.

6. **Hart (2009):** David M. Hart, Zoltan J. Acs, and Spencer L. Tracy, Jr., *High-tech Immigrant Entrepreneurship in the United States*, SBA report, 2009.

   Finds a lower rate of immigrant tech entrepreneurship than do other researchers.

   Most interesting is the breakdown by national origin. Even though 64% of the tech H-1Bs are from India, only 16% of the important immigrant tech entrepreneurs have come from India. I am not advocating that the H-1B program favor workers from certain countries, but Hart's findings do suggest that current H-1B policy is not generally selecting the most promising workers. This meshes with my own findings (see Matloff ( 2013b) below).

7. **Hira (2007):** Ronil Hira, *Outsourcing America's Technology and Knowledge Jobs: High-Skills Guest Worker Visas Are Currently Hurting Rather Than Helping Keep Jobs at Home*, EPI, 2007.

   Showed that, contrary to the industry threat, "If we can't hire enough H-1Bs, we'll be forced to ship the work abroad," the H-1B and L-1 programs are often used to facilitate sending work abroad.

   (I would add, though, that whether a job is sent overseas or a worker is brought here from abroad, that is one fewer job available to Americans. H-1B is not "better" than offshoring in terms of tech jobs for Americans.)

8. **Hunt (2009, 2011)** Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial?*, Working Paper 14920, 2009. Cambridge, Mass.: National Bureau of Economic Research, 2009, and same title, *Journal of Labor Economics*, Vol. 29, No. 3, pp. 417457, 2011.

   The working paper is the more informative version, as the author was asked to remove H-1Bs from the analysis in the final published version.

   The author found that, relative to comparable Americans, the H-1Bs are paid less, and they file fewer patent applications per capita.[3] In the case of patents, the result also is true when restricted to the former foreign students, the industry's prized group.

[2]Several papers listed here are published by the Economic Policy Institute (EPI), a labor-oriented organization. EPI does not generally fund research other than its own internal projects. As far as I know, none of the works here had EPI funding.

EPI is an interesting special case in another sense. Though EPI does not have a journal, its published papers are peer-reviewed. My own EPI paper, Matloff (2013b), underwent the most rigorous scrutiny I've ever experienced in all my years in academia.

[3]The author published an earlier paper on patenting that was more favorable to H-1Bs, but this was not on a per-capita basis.

9. **ITAA (1997):** Stuart Anderson,[4] *Help Wanted: The IT Workforce Gap At the Dawn of a New Century*, Information Technology Association of American, 1997.

   This report by an industry lobbying organization played a key role in Congress' near-doubling of the H-1B cap in 1998. As such, one passage is especially revealing:

   > Training employees in IT would seem to be a win-win for both worker and employer. And often that is the case. However, extensive training creates other issues. "You take a $45,000 asset, spend some time and money training him, and suddenly he's turned into an $80,000 asset," says Mary Kay Cosmetics CIO Trey Bradley. That can lead to another problem. New graduates trained in cutting edge technologies become highly marketable individuals and, therefore, are attractive to other employers.

   It is clear that Bradley is not willing to pay the salaries paid by other firms. The ITAA was claiming at the time that qualified IT workers were in short supply, and training in new skills took too long, so that the industry had to resort to hiring H-1Bs. Yet Bradley's remark shows that the main issue is money, not available workers and not time to learn a new tech skill. Note that Matloff (2003) discusses the issue of skill-learning time in depth, showing it is not an important issue with quality workers.

10. **Kerr (2010:** William Kerr and William Lincoln, 2010, The Supply Side of Innovation: H-1B and Ethnic Innovation, *Journal of Labor Economics*, Vol. 28, No. 3.

    Finds that the more Chinese and Indian H-1Bs come to the U.S., the larger the number of patent applications filed by ethnic Chinese and Indians. This says little, almost a tautology. The authors also find some evidence of a possible small crowding-in effect on Americans.

11. **Kerr (2014):** Sari Pekkala Kerr, William R. Kerr, and William F. Lincoln, Skilled Immigration and the Employment Structures of U.S. Firms. *Journal of Labor Economics* (forthcoming, 2014).

    Takes a firm-level point of view, exploring relations between the numbers of immigrant skilled workers at a firm and various other job numbers at the firm.

    From the paper's Conclusion section: "We find consistent evidence linking the hiring of young skilled immigrants to greater employment of skilled workers by the firm, a greater share of the firm's workforce being skilled, a higher share of skilled workers being immigrants, and a lower share of skilled workers being over the age of 40...there is limited evidence connecting actual departures of workers to the hiring of young skilled immigrants...[the analysis here] suggests that departure rates for older STEM occupations may be higher."

    Note that this stops short of the "H-1Bs create new jobs" claims made by the industry. And while it does mildly support my own findings that one of the primary uses of the H-1B program is to avoid hiring older Americans, I am very hesitant to embrace this paper.

    First, much of the analysis relies on a controversial statistical technique known as *instrumental variables*, which even proponents of the method concede can be difficult to do properly. Second, the analysis concerns only workers who are already at a firm, rather than who is hired from the applicant pool in the first place, and thus is unable to address the question of whether H-1Bs are hired instead of Americans. Third, while it examines the impact of hiring skilled immigrant workers, it does not look at the impact of hiring skilled American workers; my EPI paper on the quality of H-1Bs would suggest that the American impact would be greater than the immigrant impact.

12. **Lofstrom (2012):** Magnus Lofstrom and Joseph Hayes, 2012, *H-1Bs: How Do They Stack Up to U.S. Workers?*, IZA Discussion Paper 6259, December.

    Research funded by an industry-related think tank PPIC,[5] presented in a pro-immigration forum (IZA).

    Many factual errors, e.g. a statement that employers must give hiring priority to Americans over H-1Bs.

    Finds that the H-1Bs are paid at least as much as the Americans, and possibly slightly more.

[4] The report is shown without naming an author, but Anderson's authorship was later reported in the press.

[5] PPIC is funded by the Packard Foundation, which in turn is funded by Hewlett=Packard stock

Major flaws: (a) Does not systematically take geography into account, which matters as wages vary widely by region. (b) Does not take tech skill sets into account; this matters, as the industry claims to hire H-1Bs for their rare skill sets, which typically command around a 20% wage premium. In other words, this paper's wage figures are off by about 20%. (c) They look only at wages at the time of hire, thus failing to sample the H-1Bs at times during which they are most underpaid, since H-1Bs receive smaller raises than comparable Americans.

13. **Matloff (2003):** Norman Matloff, On the Need for Reform of the H-1B Non-immigrant Work Visa in Computer-Related Occupations (invited paper), *University of Michigan Journal of Law Reform*, Fall 2003, Vol. 36, Issue 4, 815-914.

    The most extensive peer-reviewed, published general research paper on H-1B and related issues to date (99 pages, 300+ footnotes).

    Extensive material on job vacancy rates, tech skill sets, age discrimination in tech, underpayment of H-1Bs, etc.

14. **Matloff (2006):** Norman Matloff, On the Adverse Impact of Work Visa Programs on Older U.S. Engineers and Programmers (invited paper), *California Labor and Employment Law Review* (a publication of the California State Bar Association), August 2006.

    Demonstrates how the influx of H-1Bs, who are overwhelmingly young, fuel the rampant age discrimination in the tech fields, starting at the "old" age of 35.

    An important facet is specialized skill sets, say Android programming. The industry acknowledges that there are many older programmers available for work, but that they have not updated their skill sets. This paper of mine (and the University of Michigan one cited above, Matloff (2003)) shows this to be a red herring.

    Most programmers love learning new technologies, and do so constantly. Of course there are countless different technologies, so no one knows them all, but most older programmers have had the experience of applying for a job for which they have an exact skills match, but then be quickly rejected, wtihout even a phone call. As former CEO (and current promoter of foreign-worker programs) Vivek Wadhwa has stated, "...even if the [older] $120,000 programmer gets the right skills, companies would rather hire the younger workers. That's really what's behind this."

    Again, the training issue is a red herring. Competent programmers can learn a new technology quickly, on the job, without formal training. The industry has always claimed that it can't afford this, as it needs to hire people who can "hit the ground running." Yet this was belied by the *BusinessWeek* report ("Vancouver, the New Tech Hub," May 22, 2014) that Microsoft, Facebook and so on are training foreign programmers who they hire but temporarily "park" in Vancouver, BC while waiting for U.S. visas; see also ITAA (1997) above on this point.

15. **Matloff (2013a):** Norman Matloff, 2013, Immigration and the Tech Industry: As a Labour Shortage Remedy, for Innovation, or for Cost Savings?, *Migration Letters*.

    Using a multi-pronged approach, demonstrates that tech industry H-1Bs are on average underpaid relatively to their actual market value.

    Note that this underpayment is in almost all cases done in full compliance with the law, exploiting gaping loopholes. See my University of Michigan paper above, Matloff (2003), for details, but I would note here that even Rep. Zoe Lofgren, a strident advocate of expanding the H-1B program, recognizes the problem, as noted in *Computerworld*, March 31, 2011: "Lofgren said that the average wage for computer systems analysts in her district is $92,000, but the U.S. government prevailing wage rate for H-1B workers in the same job currently stands at $52,000, or $40,000 less. 'Small wonder there's a problem here,' said Lofgren. 'We can't have people coming in and undercutting the American educated workforce'." Unfortunately, none of Lofgren's bills regarding H-1B would even come close to fixing the problem.

    Shows the flaws in widely-cited studies that claim the H-1Bs are not underpaid.

    Shows that, to many employers, the immobile nature of H-1Bs is even more attractive than saving on salary. See also Mukhopadhyay (2013) below.

Explains how the U.S. tech workers, and the economy in general, are harmed by the H-1B and related programs. This is particularly true for American workers over age 35.

For this reason, proposals in Congress that would grant automatic green cards to new foreign graduates of U.S. universities would be harmful, as the vast majority of the foreign grads would be young, exacerbating the age discrimination problem.

Note carefully that the analysis here excluded the IT outsourcing firms. Thus it showed that the U.S. mainstream firms, i.e. the Intels and the Microsofts, do abuse the H-1B program too, albeit on a higher class of worker. This is important, since the industry claims that the main abuse of H-1B occurs with the outsourcing firms; on the contrary, the abuse occurs throughout the industry. See my Bloomberg View op-ed, "Stop Blaming Indian Companies for Visa Abuse," `http://www.bloombergview.com/articles/2013-08-26/stop-blaming-indian-companies-for-visa-abuse` for more on this crucial point.

16. **Matloff (2013b):** Norman Matloff, *Are Foreign Students the Best and Brightest? Data and Implications for Immigration Policy* (invited paper), EPI, 2013.

    Analysis of the tech industry's most prized category of H-1Bs—foreign students who graduated from U.S. universities and who then joined the U.S. workforce, in the fields of computer science and electrical engineering.

    Contrary to the industry's claim (that they never offer statistical evidence to support) that these H-1Bs are "the best and the brightest," this paper demonstrates that in the computer science field, the H-1Bs are significantly weaker than the Americans, in terms of patenting, research and development work, quality of graduate institution and so on. In the case of electrical engineering, the foreign students are not superior to the Americans in any category, and are weaker in some categories.

    Cites other research with similar findings, notably Bound (2000) above and D. Goroff, eds., *The Science and Engineering Workforce in the United States*. Chicago, Ill.: National Bureau of Economic Research/University of Chicago Press, and the work of J. Hunt cited earlier in this document.

    As with my *Migration Letters* paper above, Matloff (2013a) the analysis here excluded the IT outsourcing firms.

17. **Mithas (2010):** S. Mithas, and H. Lucas, Are Foreign IT Workers Cheaper? United States Visa Policies and Compensation of Information Technology Professionals, *Management Science*, May, 2010.

    Severely handicapped by the nature of its data set, mainly managers, marketers and the like, not mainstream engineers.

    The paper finds that H-1Bs are paid 2.6% more than Americans, which the authors ascribe to the H-1Bs having rare skill sets. But those skills command a premium of about 20% on the open market, so that the Mithas and Lucas findings actually show that the H-1Bs are underpaid.

    The authors note, correctly, that due to lack of mobility, H-1Bs[6] are underpaid relative to their true market value (consistent with the above), getting much larger salaries after attaining green cards. Attempts to quantify the difference.

18. **Mukhopadhyay (2013):** S. Mukhopadhyay and D. Oxborrow, The Value of an Employment-Based Green Card, *Demography*, February. 2013.

    Attempts to measure the underpayment to H-1Bs due to their immobility while waiting for a green card. Some possible methodological issues.

19. **NRC (2001):** National Research Council, *Building a Workforce for the Information Economy*, Washington, D.C.: National Academies Press, 2001.

    This study was commissioned by Congress.

    In a direct survey of a broad variety of employers, found that they admitted to paying H-1Bs less than comparable Americans. The paper found no evidence of an IT labor shortage, and it found that older workers in IT face major obstacles in the labor market.

[6] The ones being sponsored for green cards, i.e. those hired by the mainstream U.S. firms such as Intel and Microsoft.

20. **Peri (2008):** Giovanni Peri and Chad Sparber, Highly-Educated Immigrants and Native Occupational Choice, working paper, 2008, and Giovanni Peri, Immigration, Labor Markets and Productivity (essay), Giovanni Peri, *Cato Journal* (libertarian), Winter 2012.

    Unlike later papers by Peri and coauthors that were favorable to the H-1B program and others like it, these two are rather negative. The first paper finds that STEM immigrants displace Americans from the field, in that the STEM immigration results in fewer U.S. natives in STEM:

    > ...we assess whether native-born workers with graduate degrees respond to an increased presence of highly-educated foreign-born workers by choosing new occupations with different skill content.
    > ...we add to evidence from past studies by showing that [U.S.] native occupational adjustment in response to immigration occurs among highly-educated workers and occurs for those already employed.
    > As the foreign-born share of highly-educated employment rises, native-born employees respond by moving to jobs with less quantitative and more interactive content.
    > The wage consequences of immigration were not estimated in this paper...If the evidence from the labor market for less-educated workers is an indication, the occupational skill response among highly-educated natives is likely to mitigate their potential wage loss from highly-educated immigration.

    In that last paragraph, the authors seem to believe that the natives suffer at least some wage loss due to the displacement. This is consistent with the second paper listed above, in which Peri states that the immigrants make less than natives in the same jobs, and pitches this as a boon to employers. He devotes an entire section of the paper to this point, titled "Lower Wages of Immigrants: an Opportunity for Cost Cutting and Job Creation":

    > One common empirical finding in the literature is that immigrants are paid less than natives with similar characteristics and skills. This is in part due to the fact that many immigrants, because of less attractive outside options (such as having to go back to their home country), have lower bargaining power with the firm. In this case firms pay immigrants less than their marginal productivity, increasing the firms' profits.

21. **Peri (2014):** Giovanni Peri *et al*, 2014a, *STEM Workers, H1B Visas and Productivity in U.S. Cities*, working paper, and 2014, *Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, Partnership for a New American Economy.

    Peri's online CV says that he has received $50,000 in research support from Microsoft, and the second paper is published by an industry political group, presumably accompanied by funding for Peri's research. These considerations may explain why there are issues here of lack of balance.

    Among other things, these papers violate fundamental academic principles by not citing any research critical of H-1B. Of the 42 references listed in the first paper's bibliography, there are none whatsoever that are negative about the visa program. One can certainly disagree with contrary findings, but they do have to be cited and explained.

    The 2014a paper is too technical to discuss in detail here, but I will summarize by saying that the paper uses controversial methodology (instrumental variables, as with the Kerr papers) and does not present convincing evidence that that methodology accounts for changing economic conditions. It also makes a number of questionable assumptions.

    The 2014b paper features a clever approach, but is overly simple. It is not detailed enough to account for the dynamics of the IT labor market. For example, suppose H-1Bs are brought in to replace American IT workers in a certain firm. Typically the American managers remain, and since managers generally have higher salaries, the average salary of the Americans at the firm increases—even though none of them individually gets a raise. The departure of the lower-wage Americans results in a higher mean for those who remain, thus incorrectly making it seem like the influx of H-1Bs causes the Americans' to rise.

    At any rate, the findings of both of the Peri papers are starkly at odds with the broad consensus among economists that the H-1B program suppresses wages, by sheer supply-and-demand considerations. That was the conclusion of the Brown, Freeman, NRC and NSF studies cited above. Former Fed chief Alan Greenspan has stated repeatedly that H-1B suppresses IT wages.

22. **Rothwell (2013):** Jonathan Rothwell and Neil G. Ruiz, *H-1B Visas and the STEM Shortage*, Brookings, 2013.

    Brookings has close financial ties to Microsoft and other firms in the industry. According to Brookings' *Annual Report 2013*, they had over $1,000,000 in donations from Microsoft, over $1,000,000 from the Bill and Melinda Gates Foundation, over $1,000,000 from the William and Flora Hewlett Foundation (i.e. HP), over $500,000 from Qualcomm, over $250,000 from Google, etc. Brookings has often included a panelist from Microsoft in almost all of their presentations on H-1B, and their research on H-1B is the most cited work in the statements of the industry lobbyists and their allies.

    The authors make fundamental errors in statistical methodology.[7] But this is rather minor compared to the fundamental flaws, the same as in Lofstrom (2012) above, since they use the same data set: (a) they do not take into account skill sets; (b) they do not account for geography; and (c) they look only at wages at the time of hire, thus failing to sample the H-1Bs at times during which they are most underpaid, since H-1Bs receive smaller raises than comparable Americans.

23. **Salzman (2013):** Hal Salzman, Daniel Kuehn and B. Lindsay Lowell, 2013, *Guestworkers in the High-Skill U.S. Labor Market: an Analysis of Supply, Employment, and Wage Trends*, EPI.

    In-depth analysis. Finds no general STEM labor shortage. Lack of a shortage is shown via flat wages.

24. **Teitelbaum (2014):** Michael Teitelbaum, 2014, *Falling Behind?: Boom, Bust, and the Global Race for Scientific Talent*, Princeton University Press.

    Shows a long history of false claims of STEM labor shortages in the U.S., and analyzes the motivations for such claims.

25. **Wadhwa (2007):** V. Wadhwa *et al*, 2007, *Intellectual Property, the Immigration Backlog, and a Reverse BrainDrain: America's New Immigrant Entrepreneurs, Part III*, Duke University Fuqua School of Business.

    Survey of employers, in which HR departments were asked directly whether they were having difficulty in finding qualified engineers. The answer was that they were not having problems in this regard, and were not having to resort to offering hiring bonuses and so on.

    Wadhwa is an outspoken advocate of foreign worker programs, but even he has publicly stated that the H-1B is widely abused, saying for instance, "I know from my experience as a tech CEO that H-1Bs are cheaper than domestic hires. Technically, these workers are supposed to be paid a 'prevailing wage,' but this mechanism is riddled with loopholes."

26. **Weinstein (1998):** Eric Weinstein, *How and Why Government, Universities, and Industry Create Domestic Labor Shortages of Scientists and High-Tech Workers*, Cambridge, Mass.: National Bureau of Economic Research, 1998.

    This paper is of major importance, analyzing an internal 1989 document in the National Science Foundation, the main science funding agency in the federal government. The NSF actively promoted the establishment of the H-1B program in 1990.

    The NSF document correctly forecast that the large influx of STEM foreign students would suppress wages at the PhD level. It also projected, again correctly, that the stagnant wages would drive American students away from STEM doctoral programs.

    In the latter light, note the more recent statement by Cisco Systems Vice President for Research Douglas Comer, "...a Ph.D. in computer science is probably a financial loser in both the short and long terms" (*Science Careers*, April 11, 2008).

    Note too the October 5, 2011 testimony to the House Subcommittee on Immigration Policy and Enforcement by Darla Whitaker of Texas Instruments. Ms. Whitaker stated that TI has plenty of engineering applicants with Bachelor's degrees, and thus does not hire foreign workers at that level. She stated TI does hire H-1Bs, and sponsors them for green cards, at the Master's and PhD levels, where she says there is a shortage. When asked why the Americans don't go on to graduate school, Whitaker didn't have much to say, but the answer is clear from the above material.

[7] For those who know regression analysis, an example is that they treated their Education variable, coded 5/6/7 for Bachelor's/Master's/PhD, rather than setting up two dummy variables.

The NSF document also advocated giving automatic green cards to new foreign grads at U.S. schools, just as in current proposals in Congress. Since NSF also concedes that this would give American students disincentives to study STEM, the autogreen proposal is clearly ill-advised.

27. **M. Zavodny (2011):** M. Zavodny. *Immigration and American Jobs*, American Enterprise Institute for Public Policy Research and the Partnership for a New American Economy, 2011.

    Research funded by, and published by, industry organizations.

    Does a state-by-state comparison, "In states with more immigrants, are US natives more or less likely to have a job?", especially with respect ot H-1B. This is a highly unreliable approach, as states vary from one another by more than just the numbers of H-1Bs.

# IRLI EXHIBIT B

# Annotated H-1B and L-1 Visa Bibliography

## Introduction

This annotated bibliography compiles recent research and articles that cover H-1B and L-1 guest worker visas. The bibliography touches upon the central areas of controversy, including wages and working conditions, the supply of high-skilled workers, and employer misuse of guest worker visas.

## General

**Department for Professional Employees, AFL-CIO.** *Gaming the System: Guest Worker Programs and Professional and Technical Workers in the U.S.* Washington, DC: Department for Professional Employees, AFL-CIO, 2012.
Comprehensive review of guest worker programs in the United States, including the H-1B, L-1, B, and OPT guest worker programs.

**Marshall, Ray**. *Immigration for Shared Prosperity: A Framework for Comprehensive Reform* Washington, DC: Economic Policy Institute, 2009.
Outlines a framework for comprehensive immigration reform, including the creation of a professional commission that would assess and manage future foreign labor flows.
Ray Marshall is professor emeritus and holder of the Audre and Bernard Rapoport Centennial Chair in Economics and Public Affairs at the LBJ School of Public Affairs, University of Texas at Austin and served as secretary of labor in the Carter administration.

**Marshall, Ray**. *Value-Added Immigration: Lessons for the United States from Canada, Australia, and the United Kingdom*. Washington, DC: Economic Policy Institute, 2011.
Thorough analysis of the immigration systems in Canada, Australia, and the United Kingdom, which serves as a platform to suggest reforms to the U.S. immigration system. Marshall notes that "in highly competitive globalized economies, markets untempered by moderating policies and institutions will produce declining real incomes for many—if not most—workers and unsustainable inequalities in income and wealth." Marshall makes several recommendations for improving the H-1B visa program, including adopting and enforcing a clear standard, raising the wage standard, and increasing the availability of data.

**Thibodeau, Patrick**. "H-1B at 20: How the 'Tech Worker Visa' is Remaking IT in America," *Computerworld*, November 17, 2010.
http://www.computerworld.com/s/article/9196738/H_1B_at_20_How_the_tech_worker_visa_is_remaking_IT_in_America

Outlines some of the effects H-1B visas have had on U.S. tech workers. Article touches upon issues of offshoring, companies whose workforce is largely made up of H-1B visa beneficiaries, and the increased use of the Optional Practical Training program to get around H-1B visa rules and fees.

**U.S. Department of Homeland Security**. U.S. Citizenship and Immigration Services. *Characteristics of H1B Specialty Occupation Workers. Fiscal Year 2009 - 2012 Annual Report to Congress*. http://tinyurl.com/yzje8vg

Report to congress, updated annually. Details a variety of H-1B visa data, including ages, occupation, industry, country of origin, and education level of H-1B beneficiaries.

## Wages and Working Conditions

**Hira, Ron**. *Bridge to Immigration or Cheap Temporary Labor? The H-1B and L-1 Visa Programs are a Source of Both*. Washington, DC: Briefing Paper #257, Economic Policy Institute, February 17, 2010. http://www.epi.org/publication/bp257/

Examines the question of why so few employers sponsor H-1B and L-1 workers for permanent residence in the U.S. Identifies numerous examples of U.S. companies claiming that temporary visa recipients are among the best and brightest workers who must be allowed to work in the U.S., but then failing to take steps to make them permanent residents and thereby giving them more rights in the workplace.

**Hira, Ron**. *The H-1B and L-1 Visa Programs Out of Control*. Washington, DC: Briefing Paper #280, Economic Policy Institute, October 14, 2010. http://www.epi.org/publication/bp280/

Outlines the major flaws in the H-1B and L-1 visa programs, including absence of a labor market test, inadequate wage standards, and insufficient oversight. Employers realize a significant wage savings by utilizing H-1B visas—a practice that substantially harms U.S. workers.

**Matloff, Norman**. "How Widespread Is the Use of the H-1B Visa for Reducing Labor Costs?" Georgetown University Conference on Dynamics of the S&E Labor Market. July 11, 2011. http://heather.cs.ucdavis.edu/SloanDCPaper.pdf

Paper provides detailed analysis of how H-1B beneficiaries are legally underpaid, including not using skill set or education when determining the applicable wage. Employers also save money hiring young H-1B beneficiaries in lieu of U.S. workers over the age of 35 whose experience makes them more expensive. In effect, H-1B visas give employers access to a revolving door of young, cheap workers.

Dr. Matloff is a professor of computer science at the University of California, Davis. He blogs extensively on the issue of guest worker visas. See: http://heather.cs.ucdavis.edu/h1b.html

## Skills Gap/Labor Shortage

**Costa, Daniel**. *STEM Labor Shortage? Microsoft Report Distorts Reality about Computing Occupations*. Washington, DC: Policy Memorandum #195, Economic Policy Institute, November 19, 2012. http://www.epi.org/publication/pm195-stem-labor-shortages-microsoft-report-distorts/

Impeaches a report by Microsoft Corporation that claims an impending tech worker shortage. Costa notes the flaws in the Microsoft report, pointing out the supply of tech workers comes from more than just bachelor's degree programs, the tech-worker unemployment rate was higher than its historical average, and wages in computer occupations for the last 10 years have been largely stagnant.

**Finegold, David**. "The Modern Indentured Servants." Rutgers University, School of Management and Labor Relations Blog, June 22, 2011, http://smlr.rutgers.edu/modern-indentured-servants.

Highlights the exploitive nature of H-1B and L-1 visas, including low wages, lack of portability, and high unemployment of U.S. workers. Finegold suggests a strict test to determine the existence of a labor shortage before a visa is issued, raising the wage standards, and continuing assistance to U.S. workers who have been displaced by foreign trade or offshoring.

David Finegold is the former dean of the Rutgers School of Management and Labor Relations.

**Matloff, Norman**. *Are Foreign Students the 'Best and Brightest'?: Data and implications for immigration policy*. Washington, DC: Briefing Paper #356, Economic Policy Institute, February 28, 2013. http://www.epi.org/publication/bp356-foreign-students-best-brightest-immigration-policy/

Debunks the myth that foreign graduates of U.S. universities are exceptionally talented. Found, through rigorous analysis, that "former foreign students have talent lesser than, or equal to their American peers."

**Salzman, Hal, Daniel Kuehn, and B. Lindsay Lowell.** *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends*. Washington, DC: Briefing Paper #459, Economic Policy Institute, April 24, 2013. http://www.epi.org/publication/bp359-guestworkers-high-skill-labor-market-analysis/

Evaluates the strength of the U.S. science, technology, engineering, and mathematics (STEM) workforce. Found that the U.S. has a sufficient supply of STEM workers. A large influx of guest workers will continue to keep IT wages low which reduces the incentive for U.S. workers to go into the field.

**Toppo, Gregg and Dan Vergano**. "Scientist Shortage? Maybe Not," *USA Today*, July 9, 2009. http://usatoday30.usatoday.com/tech/science/2009-07-08-science-engineer-jobs_N.htm

Questions the argument that the U.S. has a shortage of science, technology, engineering, and mathematics (STEM) professionals. Details unemployment rates, graduation rates, and available funding for research in STEM fields.

**Weissmann, Jordan**. "The Myth of America's Tech-Talent Shortage." *The Atlantic*, April 2013. http://www.theatlantic.com/business/archive/2013/04/the-myth-of-americas-tech-talent-shortage/275319/

Examines the supply and demand for tech labor and finds there is no evidence of worker shortages justifying widespread H-1B visa use. Weissmann notes that in the past he supported increasing the H-1B visa cap. However, upon further research he has reversed his position.

## Government Review of Skilled Worker Visa Programs

**Sherrill, Andrew**. "H-1B Visa Program: Multifaceted Challenges Warrant Re-examination of Key Provisions." Testimony before the Subcommittee on Immigration Policy and Enforcement, Committee on the Judiciary, House of Representatives. March 31, 2011. http://www.gao.gov/products/GAO-11-505T

Government Accountability Office testimony notes several factors that limit the government's ability to fully enforce H-1B laws and regulations, including limited government power to: screen employers, investigate wage and hour violations, and hold staffing companies that displace U.S. workers accountable.

**U.S. Department of Homeland Security, Office of Inspector General**. *Implementation of L-1 Visa Regulations*. Washington, DC: OIG-13-107, August 2013. http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-107_Aug13.pdf

Office of Inspector General (OIG) review of the L-1 visa program that examines the potential for fraud or abuse in the L-1 visa program. OIG identified a number of problems that increase the opportunity for fraud and abuse in the L-1 visa program and made recommendations for improvement.

**United States Government Accountability Office**. *H-1B Visa Program: Reforms Are Needed to minimize the Risks and Costs of Current Program*. Washington, DC: GAO-11-26, January 2011. http://www.gao.gov/products/GAO-11-26

Government Accountability Office (GAO) review of the impact of the H-1B "cap on the ability of domestic companies to innovate, while ensuring that U.S. workers are not disadvantaged." GAO found that demand for new H-1B workers was driven by a small number of employers—mostly India-based companies that specialize in offshoring. GAO also found that "restricted agency oversight and statutory changes weaken protections for U.S. workers."

## Employer Misuse of Guest Worker Visas

**Costa, Daniel**. *Abuses in the L-Visa Program: Undermining the U.S. Labor Market*. Washington, DC: Briefing Paper #275, Economic Policy Institute, August 13, 2010. http://www.epi.org/publication/abuses_in_the_l-visa_program_undermining_the_us_labor_market/

A comprehensive survey of the use and abuse of the L-1 visa. The report details how L-1 visas are used by employers to replace U.S. workers with temporary visa holders, but first requiring U.S. workers to train their foreign replacements. Finally, the report makes recommendations for improvement of the L-1 visa.

**Herbst, Moira and Steve Hamm**. "America's High-Tech Sweatshops," *Bloomberg Businessweek Magazine*, October 1, 2009.
http://www.businessweek.com/magazine/content/09_41/b4150034732629.htm
Provides detailed accounts of H-1B visa fraud, including charging illegal fees to recruited workers, employers not paying promised wages, and not paying visa beneficiaries when they are between projects. The article also outlines egregious abuse of guest workers by body shops—firms that specialize in the supply of labor.

For more information on professional and technical workers, check DPE's website: www.dpeaflcio.org.

*The Department for Professional Employees, AFL-CIO (DPE) comprises 20 AFL-CIO unions representing over four million people working in professional and technical occupations. DPE-affiliated unions represent: teachers, college professors, and school administrators; library workers; nurses, doctors, and other health care professionals; engineers, scientists, and IT workers; journalists and writers, broadcast technicians and communications specialists; performing and visual artists; professional athletes; professional firefighters; psychologists, social workers, and many others. DPE was chartered by the AFL-CIO in 1977 in recognition of the rapidly growing professional and technical occupations.*

Source: DPE Research Department
815 16th Street, N.W., 7th Floor
Washington, DC 20006

Contact: Jennifer Dorning
(202) 638-0320 extension 114
jdorning@dpeaflcio.org

October 2013