

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WASHINGTON ALLIANCE OF)
 TECHNOLOGY WORKERS,)
)
Plaintiff,)
)
 v.)
)
 U.S. DEPARTMENT OF)
 HOMELAND SECURITY, *et al,*)
)
Defendants.)
)
 and)
)
 NATIONAL ASSOCIATION OF)
 MANUFACTURERS, *et al,*)
)
Intervenor-Defendants.)

Civil Action No. 1: 16-cv-01170-RBW

**BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT BY CENTER FOR IMMIGRATION STUDIES**

/s/ Julie Axelrod
 JULIE AXELROD (D.C. Bar no. 1001557)
 1629 K Street, NW, Suite 600
 Washington, DC 20006
 Tel: (703) 888-2442
jba@cis.org

INTEREST OF AMICUS CURIAE

The Center for Immigration Studies (CIS) is a 34-year-old, independent, nonprofit, nonpartisan research organization that has been recognized by the Internal Revenue Service as a tax-exempt educational organization. The mission of CIS is to provide to immigration policymakers, the academic community, news media and concerned citizens with reliable information about the social, economic, environmental, security and fiscal consequences of all kinds of international migration, temporary and permanent, legal and illegal. On more than 130 occasions, CIS has been invited by Congressional Committees to provide expert testimony on a wide variety of immigration policy matters, including those pertaining to foreign worker programs.

CIS's policy experts on foreign worker programs include David North, who has been working with such matters on and off for sixty years, and whose policy expertise CIS offers in this amicus brief in order to inform the court of the policy context of the Optional Practical Training (OPT) Program at issue in this case. This brief will particularly emphasize the negative effects of the OPT program on American workers as well as the fiscal health of the nation's Social Security, Medicare, and Unemployment Trust Funds. Mr. North has worked full-time with CIS for the last ten years, and prior to that had worked both as a civil servant and as a political appointee on these subjects with the White House, the U.S. Departments of Labor and Interior, and the State of New Jersey. He has also consulted for the governments of Australia and Haiti, primarily on foreign worker issues, particularly the OPT program.¹ Mr. North has also

¹ Mr. North's first migration study, supported by the U.S. Labor Department and published by

conducted research on migration related issues for the Ford, Sloan, and Rockefeller Foundations, and for the U.S. Departments of State, Justice, Labor, Agriculture, and Health and Human Services. David North and others at CIS have regularly published data on the OPT program in order to show the public how the program permits the subsidized shouldering aside of hundreds of thousands of U.S. college graduates by foreign nationals each year. In many cases the OPT program also leads its beneficiaries to continued temporary employment and often permanent residence in this country, which CIS has also researched and documented. This information is not widely available nor easily obtainable from government statistics. CIS wishes to share the information it has taken many years to gather and publish on the true nature of the OPT program with the Court as it weighs the merits of this case.

CIS has a continuing interest preventing the labor markets from being flooded with workers, displacing U.S. workers, needlessly loosening the labor supply-demand equation, and lowering wages for legal, permanent U.S. residents, which the outcome of this case will influence.

the long-since disbanded Senate Subcommittee on Migratory Labor of the U.S. Senate Committee on Labor and Public Welfare was entitled “The Border Crossers: People who live in Mexico and work in the United States”, came out in 1970. See [<https://eric.ed.gov/?id=ED051362>]. Dozens of other reports by Mr. North followed.

BACKGROUND

In practice, though it is not usually labeled as a foreign worker program at all, the OPT Program is most likely the second largest foreign worker program in the United States, second only to the H-1B program for high-tech workers. Not only is it a very large scale foreign worker program, it operates without the labor standards seen in other foreign worker programs. In addition, unlike most of the others, the OPT program is unrelated directly to the labor market needs of any individual employer. Any foreign graduate of any American college – ranging from the most to least selective – can receive permission to work in the American economy from one to three years. The Department of Homeland Security (DHS) gives One-year Employment Authorization Documents (EADs) to those with non-STEM degrees, and three-year permits to those with degrees in the STEM fields (science, technology, engineering and math). If an OPT worker runs out of his or her time in the program, he or she can return to college, secure another degree (usually a master's, usually while working) and start the process anew.

Furthermore, because these foreign national alumni are still considered “students,” despite their graduation, both they and their employers are excused from paying payroll taxes. Hiring OPT beneficiaries therefore involves a substantial subsidy that is not granted to citizen alumni of the same schools. At any given time, approximately 300,000 foreign national graduates are employed through the program, reducing the jobs available to citizen graduates commensurately. Not only does this program therefore hurt young American alumni competing for entry level positions, it also deprives our Social Security, Medicare, and Federal Unemployment Insurance Trust Funds of much needed funding.¹ The moneys *not* paid into the

¹ These are also known as FICA (Federal Insurance Contributions Act) for Social Security and

Social Security, Medicare, and Federal Unemployment Insurance Trust Funds as a result, came to an estimated 2.4 billion in FY 2017 and has risen significantly since that time. The OPT program is therefore a subsidy to foreign workers and those employers who hire them from many from the nation's ailing, elderly and unemployed.

ARGUMENT

I. The OPT Program is a regressive income transfer program, which takes from Congressionally-mandated Social Security, Medicare, and Federal Unemployment Insurance Trust Funds for the elderly, the ailing, and the unemployed, and gives it to corporations that discriminate against American citizen graduates.

By defining foreign national alumni of American colleges as “students,” who are exempt from payroll taxes, the OPT program gives both the employers and the OPT beneficiary a tax break designed by Congress to benefit *genuine* students *and their employers*. Usually income transfer programs take money from the more prosperous and give it, under certain conditions, to the less prosperous. There are usually certain benign requirements of these programs; for example, those receiving unemployment insurance payments are expected to be available and able to work; most food stamp recipients are supposed to be working or related to a worker. In OPT the money flows from the less prosperous (the nation's ailing, elderly, and unemployed) to prosperous corporations. Not all corporations benefit, only those that hire *alien* graduates of America's colleges and universities (usually healthy young persons) rather than *citizen* or permanent resident graduates. In short, benign requirements of the unemployment insurance program are reversed in OPT; an employer must *discriminate against citizen workers* to qualify

Medicare and the FUTA (the Federal Unemployment Tax Act) for the federal portion of the unemployment insurance program. See “Student Exception to FICA Tax”. Internal Revenue Service, March 26, 2019 [<https://www.irs.gov/charities-non-profits/student-exception-to-fica-tax>]

for OPT benefits.

A corporation hiring an OPT beneficiary at the average wage of a new college graduate in 2019, approximated at \$51,000 a year, receives a tax break of more than \$12,530 for hiring a foreign national with a STEM degree in the course of three years; if the foreign national is paid more than the average, or gets a raise of two of those years, the tax break increases proportionately. The OPT worker gets a roughly similar tax break as his or her employer.

II. The OPT Program eliminates jobs for Americans and permanent residents.

Approximately 300,000 OPT beneficiaries hold jobs at any given time, which means that the OPT program amounts to the elimination of approximately 300,000 entry level positions available to citizen and permanent resident college graduates. For every OPT beneficiary who is directly favored by the subsidy program, one U.S. worker is pushed aside. In addition to the one-on-one displacement of individual workers, the OPT program adds 300,000 new (temporarily) legal workers to the labor market. This program therefore needlessly swells the labor force, and creates a looser labor market, which suppresses wages for everyone, but particularly for new college graduates. The subsidy inherent in the employers' exemption from paying payroll taxes from hiring these workers means that the downward pressure on wages is more than merely increased supply for the same demand. The OPT program therefore has a more pernicious effect on labor than other, Congressionally mandated programs. There are a variety of foreign worker programs, most of which are not accompanied by a payroll-tax exception. For instance, the H-1B, the H-2B (unskilled, non-ag workers) and the H-4 (spouses of H workers) programs all require the payment of payroll taxes. In addition, in other programs, the employer at least has to claim that there is a labor shortage, offering at least some opportunity to protect American

workers, but there are no such worker protections at all in the OPT program.

Should Congress want to authorize a program allowing some foreign grads to work in the US temporarily after college, particularly if its object were to prevent the most promising students from leaving the country, it could set out to create such a program without a subsidy that strains our social programs. For instance, Congress might, to lessen the competitive burden on new citizen graduates, limit the program by a numerical ceiling, or it could simply say that only those student visa holders graduating in the top quarter of their class in the top 100 universities could qualify. If the last provision were accepted supporters of the program would have a basis to claim that it was preventing “best and the brightest” from leaving the United States. As the OPT program current is constituted, however, merit is irrelevant.

III. The Optional Practical “Training” Program is a misnomer: there is virtually no training involved.

An employer hiring one or more OPT workers is supposed to create a “training program” for these workers, but the “training” involved is nominal at best, merely a fig-leaf to cover OPT’s true nature as a foreign worker program. When the program was introduced some years ago, creating an image of post-graduate “training” to support the definition of these alumni as “students” was essential. Yet CIS has encountered internet ads offering work to OPT beneficiaries as construction laborers, a job that does not require a college degree at all, and does not involve any educational training.³ The lack of training is not surprising, given the very

³ See “OPT Program Provides Laborers to Contractors at 8.25% Discount” by David North, Center for Immigration Studies, April 17, 2018 [<https://cis.org/North/OPT-Program-Provides-Laborers-Contractors-825-Discount>]

minimal supervision over the “training” programs to ensure any training, optional, practical, or otherwise.

The Student and Exchange Visitor Program (SEVP), is nominally in charge but it has delegated the supervision of OPT to thousands of colleges and universities, none of which have the capacity to supervise the program. SEVP, a subset of Immigration and Customs Enforcement (ICE), (a sub-agency within DHS), has an extremely small field staff, and therefore in practice relies on the universities to supervise the program. To illustrate the difficulties of any meaningful supervision, suppose a prototypical university, for instance, the University of Alaska had 100 OPT graduates per year, scattered across 20 different states and 85 different employers. If an OPT beneficiary of the University of Alaska gets a job in Maine, how likely is the University to make sure that the alumnus’ employer is really providing training in the field of his or her studies?

SEVP in 2019 announced that it has –finally – started a program to visit some of the OPT employers.² It will be interesting to see if they find any problems.

IV. The OPT program lacks transparency, with both government and media concealing its true costs both to the treasury and on American wages.

The OPT program would likely face more popular resistance if it were honestly described. The government and the media rarely are upfront over its subsidized status: the subsidies are never mentioned in the semi-annual reports of SEVP. While the media sometimes writes about this program it virtually always does so from the employers’ or the foreign students’

² See <https://studyinthestates.dhs.gov/employer-site-visits>

point of view. There has been rarely, to the knowledge of those at CIS, been widespread discussion of the U.S. workers being displaced by OPT. Nor is the basic role in funding the program by the nation's ailing, elderly and unemployed mentioned in press reports.⁴ While DHS issues (or used to issue) half-yearly reports on the larger student visa program entitled "SEVIS [Student and Exchange Visitor Information System] by the Numbers," these reports do not mention the OPT program at all.⁵ (The latest available report dates to May 2018).

CIS has concluded, after a thorough data search, that while SEVP will respond to FOIA requests for statistical data on the program, it does not routinely publish statistics on the size of the program, or has not done so since the spring of 2018; this is not the case with other immigration programs. Further, DHS publishes data on the number of work permits issued rather than the size of the population; since a portion of the permits are for two years, not one, the total of permits issued in a year is always smaller than that of the population.

Therefore, government data is not published promptly, if at all, and when it is published it understates the size of the population, and thus, the true size of the jobs lost by citizens and funds lost by the trust funds is obscured from the public. Furthermore, the government *never* publishes data on the estimated losses to the Social Security, Medicare, and Federal Unemployment Trust Funds at all.

⁴ See "NY Times Fails to Mention the Corporate Subsidies in OPT -Again" by David North, Center for Immigration Studies, September 6, 2019 [<https://cis.org/North/NY-Times-Fails-Mention-Corporate-Subsidies-OPT-Again>].

⁵ See "SEVIS by the Numbers", Student and Exchange Visitor Program, ICE, May 2018 [<https://studyinthestates.dhs.gov/2018/05/check-out-the-latest-sevis-by-the-numbers-report>].

V. CIS estimates that the OPT program has cost at least \$2.4 billion since FY 2017, and costs will continue to rise.

CIS’s estimate is that in FY 2017 the three trust funds lost nearly \$2.4 billion collectively because of OPT, and our assumption is that that figure has risen substantially since that time, because of greater use of OPT and because of slowly rising salaries for college grads. The details follow:

There are three variables to consider: the payroll taxes rates, the average salary paid to the alien workers, and the number of alien workers excused from the payroll taxes.

The payroll tax rates. There are three separate taxes here, all three for the employer, only two for the worker. Approximated at an average salary of \$50,000, they are:

| | | |
|-----------------|-------|--|
| Social Security | 6.2% | Employer and worker each |
| Medicare | 1.45% | “ ” |
| Unemployment | .84% | Employer only (@ \$50,000 a year) ⁶ |

Therefore, the employer pays 8.19%, the worker, 7.65%; and the trust funds, collectively, lose 15.84% when a \$50,000 worker and his or her employer is excused from the system, as OPT workers are.

The average wage. The average starting salary, in FY 2017, for college grads, including both liberal arts and technical skills, aliens and citizens, was about \$50,000 that year,⁷ This is a

⁶ This relates to the federal unemployment insurance system, which pays for the operation of the state unemployment insurance and employment service offices; UI benefits are funded by state tax systems.

⁷ The average, according to one estimate, is \$49,785 which we have rounded up to \$50, 000,

conservative figure because some, perhaps most, of the OPT workers will get a raise before their OPT time is up.

The Number of OPT Workers. The government does not publish an estimate regarding the total population of OPT workers, though it has published estimates, over the years, on the size of the illegal alien population. What it does do, from time to time, is to issue workload data on the number of work permits issued, in a given year, to OPT workers. This is helpful, but not conclusive, as a substantial portion of the beneficiaries get permits for two years, not one, and a presumably small minority of those receiving work permits do not work the full year, or full three years, as they drop out of the program.

The OPT beneficiaries receive, initially, a one-year work permit; then those who have STEM degrees, in separate actions, get two-year extensions. Therefore, at all times, a majority of the OPT population is working on a permit that is less than one-year old, while a minority are in the second year of their STEM extensions. Therefore, how many of these work permits are issued annually? The most recent data CIS has found is for FY 2017, and was obtained by the Pew Foundation through an FOIA request ⁸; the total number of OPT permits issued was 276,500 for FY 2017. CIS assumes that these were for all the one-year OPT workers, and for half of the

because there is a higher proportion of STEM workers among the alien grads. See “Starting Salaries for 2017 College Grads Hit All-time high,” by Stephen Miller, CEBS, SHRM [https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/2017-college-grads-salaries.aspx].

⁸ See “Number of foreign college graduates staying in U.S. to work climbed again in 2017, but growth has slowed” by Neil G. Ruiz and Abby Budiman,” Pew Research Center. July, 2018, [https://www.pewresearch.org/fact-tank/2018/07/25/number-of-foreign-college-graduates-staying-in-u-s-to-work-climbed-again-in-2017-but-growth-has-slowed/]

two-year extension STEM workers. Fortunately, from another FOIA request, this by CIS itself, CIS is able to establish the number of issuances for STEM extensions for the prior year, 2016, at 45,184.⁹ Adding these two together produces a sum of 321,184, which is have rounded down to 300,000 to take into account departures from the program into other visa categories, such as H-1B, a few deaths, some conversions into illegal status, and exits from the country.

Multiplying 300,000 by \$50,000 produces a total estimated payroll for the fiscal year of \$15,000,000,000; applying the 15.84% payroll tax means that the three trust funds are losing approximately \$2,376,000,000 each year, and these totals keep rising.

Meanwhile, if contribution rates are not raised, the Medicare Trust Fund is expected to run out of money in 2026 –merely seven years from now – and the Social Security Trust Fund will do the same thing in 2035.¹⁰ Were the OPT program to be terminated, or substantially reduced in size, those deadlines would move a little into the future, a development that would benefit all citizens and legal permanent residents, particularly those receiving services and benefits from these funds.

⁹ See “Feds Provide Almost \$2 Billion in Subsidies to Hire Alien Grads Rather than U.S. Grads” David North, February 27, 2018, CIS [<https://cis.org/North/Feds-Provide-Almost-2-Billion-Subsidies-Hire-Alien-Grads-Rather-US-Grads>]. New information, see text, suggests that our earlier estimate was an understatement.

¹⁰ See “Policy Futures: Medicare is ‘Not Bankrupt’” Paul N. Van De Water, Center on Budget and Policy Priorities, May 1, 2019 [<https://www.cbpp.org/research/health/medicare-is-not-bankrupt>], and “Social Security Trust Fund Will Run Out of Money by 2035” Daren Fonda, April 22, 2019, *Barrons* [<https://www.barrons.com/articles/social-security-deficit-reserves-check-benefits-payroll-tax-51555958282>].

VI. The abuses in this program were made possible because the very creation of the program was a violation of the democratic process.

In American democracy, Congress passes laws which are signed by the President to establish public policy. Within that framework, the Executive, by regulation, spells out the specific details to implement the thrust of the Congressionally-enacted, and the Presidentially-approved policy. Not only is this the only legal way to create a program rather than by executive fiat, but it also the only way to promote sound public policy. Creating law is a public process: the new policy is the subject to hearings on the Hill, votes in Committee, votes on the Floor of both houses for all to see, and then a decision by the President to accept the new law, or allow it to become law without his signature, or to veto it. Later regulations are provided to define the details of the new policy.

The OPT program contains so many failures to protect American workers as well as the public treasury, at least in part because it was not created through the appropriate statutory process. It was created behind closed doors by the second Bush Administration as a means of obtaining more foreign workers when the public process was not amenable to doing so.

The decision to allow approximately 300,000 foreign workers is properly a matter for Congress to decide, and Congress should certainly be the one deciding if a particular foreign worker program ought to be subsidized. The lack of limits on this program, or protections to workers are unsurprising in a program that was borne out of regulatory fiat rather than the proper statutory process. When Congress passes a bill creating a new foreign worker program, every representative goes on record, and his or her constituents have the opportunity to voice their approval or disapproval. When the Bush Administration creatively expanded the definition of

college students to include those who had graduated, it skipped a process that allowed any public input, or allowed for public rejection. What DHS came up with was a system that was easy to game: OPT workers, who have exhausted their one or three-year terms, may return to university to secure another degree, usually a master's, and then the one-or-three-year subsidy resumes again. CIS, in its experience, has heard of aliens getting three or four successive master's degrees for this reason. The result is not just a program that is illegal, it is bad public policy.

CONCLUSION

For the reasons stated above the Center for Immigration Studies supports the Plaintiff's motion for summary judgment asking the court to set aside the 2016 OPT Rule pursuant to the Administrative Procedures Act.

Dated: November 8, 2019

Respectfully submitted,

/s/ Julie Axelrod
JULIE AXELROD (D.C. Bar no. 1001557)
1629 K Street, NW, Suite 600
Washington, DC 20006
Tel: (703) 888-2442
jba@cis.org