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A History of the 'Optional Practical Training' Guestworker Program

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Measured by the number of workers per year, the largest guestworker program in the entire immigration system is now student visas through the Optional Practical Training program (OPT). Last year, over 154,000 aliens were approved to work on student visas. By comparison, 114,000 aliens entered the workforce on H-1B guestworker visas.

Because there is no reporting on how long guestworkers stay in the country, we do not know the total number of workers in each category. Nonetheless, the number of approvals for work on student visas has grown by 62 percent over the past four years so their numbers will soon dwarf those on H-1B visas.

The troubling fact is that the OPT program was created entirely through regulation with no authorization from Congress whatsoever. It has been going on for so long that many people assume that Congress authorized OPT, when in fact Congress has explicitly changed the law to prohibit it.

Here is a history of how OPT came about. In reading this history, keep in mind that the regulations described here employ the euphemism "practical training" to refer to work.

In the Beginning

As a starting point, we have to go back to the Immigration and Nationality Act of 1952. That is the only time Congress has considered a comprehensive reform of the immigration system; all subsequent changes, including those in 1965, have been amendments to the 1952 law. That law threw out the jumble that had been created previously and created a new system from scratch. Student visa status was defined in section 101(a)(15) as:

> *(F) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn.*

Note that there is no authorization for aliens on student visas to be employed at all.

On June 19, 1953, the Justice Department promulgated regulations implementing the 1952 Act, 18 Fed. Reg. 3,526. Those regulations authorized aliens to work in student visa status:

> *(b) Whenever employment for practical training is required or recommended by the institution or place of study attended by the applicant, the district director or officer in charge having administrative jurisdiction over the place in which the institution is located may permit such employment of the alien for a six-month period subject to extension for not over two additional six-month periods, but any such extension shall be*

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> *granted only upon certification by the school and the training agency that the practical training cannot be completed in a shorter period of time. [18 Fed. Reg. at 3,529]*

Observe that this employment started out innocently as an internship-type affair that required a training agency and was limited to the period of time required for a training program. From the records of the time, it is not clear whether that work could take place after graduation. If the "practical training" was "required", it obviously had to take place before graduation. If it was "recommended", it conceivably could have taken place after graduation. Some sources claim that, at the time, work was taking place after graduation while others say it was not. In any event, the regulations cited no authority granted by Congress allowing aliens to work in student visa status.

On September 24, 1964, the Justice Department promulgated new regulations without public notice and comment governing "practical training". These provided:

> *If a student requests permission as follows to accept or continue employment in order to obtain practical training, an authorized school official must certify that the employment is recommended for that purpose and will provide the student with practical training in his field of study which would not be available to him in the country of his foreign residence. [29 Fed. Reg. 13,242]*

At this point, there was still no indication in the regulations that the "practical training" could take place after graduation and there was still no citation of authority granting aliens the ability to work in student visa status.

There were minor changes made to student employment in 1965, 1967, 1969, 1971, and 1972.

No Statutory Authorization

On May 24, 1977, the Justice Department made substantial changes to "practical training." (42 Fed. Reg. 26,411) The maximum work period was reduced from 18 months to one year because:

> *[T]he Service [INS] has determined that a maximum period of one year of practical training is sufficient to enable graduates to prepare themselves for entrance level positions in their chosen fields. Also, the Service has been advised by the Department of Labor that employment of nonresident alien students presents unfair competition to U.S. resident workers because some applicants worked for less than prevailing wages during their training period.*

During the notice and comment process for this regulation the question of whether the agency had authority to allow aliens to work at all first appears in the Federal Register. In response to the questioning of authority in public comments, the Justice Department wrote:

> *There is no statute under which employment of nonimmigrant students for practical training is authorized.*

The Justice Department then went on with a song and dance reference to its general authority to promulgate regulations.

For the first time, the 1977 regulations explicitly authorized work after graduation for certain aliens; those graduating from "a school which devotes itself exclusively or primarily to vocational, business, or language instruction." (42 Fed. Reg. at 26,413) However, there is no indication that post-graduation work was available to graduates of universities.

In 1981, Congress created an explicit statutory conflict with "practical training". While it is a stretch, prior to 1991, one could have possibly made the argument that work at a company fell into "other recognized place of study" in the definition of student visa status. However, Pub. L No. 97-116, 95 Stat. 1611 (1981) changed the definition of student visa status to clarify that the education must take place at a school:

> *(F) an alien having a residence in a foreign country which he has no intention of abandoning, who is a* ***bona fide*** *student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established ~~institution of learning or other recognized place of study~~* ***college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program*** *in the United States, particularly designated by him and approved by the Attorney General*

after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn;

The purpose of this change was "to specifically limit [student visa status] to academic students." (S. Rep. 96-859, at 7 (1980)) If regulations followed the statutes, work on student visas through regulation would have ended right there.

The next regulations governing work on student visas came on April 5, 1983, after notice and comment (48 Fed. Reg. 14,575, 14,577). These new regulations made no mention of — and simply ignored — Congress's limiting student visas to "academic students". These regulations were the first to explicitly authorize "practical training" to take place after graduation for all graduates (48 Fed. Reg. at 14,586).

The next change to "practical training" occurred on April 22, 1987. These regulations eliminated the requirement that such training not be available in the alien's home country (52 Fed. Reg. 13,223, 13224).

As mentioned previously, the Immigration Act of 1990 created a trial employment program for aliens in student visa status. The House report on the bill stated of this program, "to assure compliance with the student visa, the alien is required to be in good academic standing." (H.R. Rep. 101-723, at 66 (1990)) Apparently, Congress was not aware that the regulations covering student visas were ignoring this requirement. In response to the 1990 Act, the Justice Department promulgated regulations covering the trial and existing work programs for student visas on October 29, 1991 (56 Fed. Reg. 55,608, 55610).

On July 20, 1992, the Justice Department promulgated without public notice and comment regulations creating the Optional Practical Training program (57 Fed. Reg. 31,954). This is the current guestworker program operating under the guise of student visas. The OPT program originally allowed all alien graduates to work for one year.

On August 10, 1994, the secretary of Labor and the commissioner of the INS recommended that the trial work program for student visas created in the Immigration Act of 1990 not be continued. Congress did not renew the program and it expired.

On June 15, 1999, the Department of Justice promulgated without public notice and comment regulations allowing aliens to remain in student visa status after graduation for the duration of OPT plus 60 days (64 Fed. Reg. 32,146, 32,147).

In response to 9/11, the Department of Justice promulgated regulations on December 11, 2002, covering several visa categories and made technical changes to OPT after public notice and comment (67 Fed. Reg. 76,256, 76,271).

Policymaking by Cronyism

The biggest change to work on student visas occurred in 2008. In 1998, 2000, and 2004, industry lobbyists convinced Congress to enact increases in the number of H-1B visas. After three times, Congress had grown tired of industry demands for more. Instead, lobbyists tried another route.

In 2007, Microsoft concocted a scheme to use OPT as a means to circumvent the H-1B quotas. Microsoft's plan was to extend the duration of OPT from a year to 29-months, so that the duration would be sufficient to serve as a guestworker program, rather than just an internship-type program. Microsoft proposed this scheme to the Homeland Security Secretary Michael Chertoff at a dinner party at the home of the owner of the Washington Nationals baseball team. (See pp. 229-230 in my book *Sold Out*, co-authored with Michelle Malkin.) From there, DHS worked in absolute secrecy with industry lobbyists to craft regulations implementing Microsoft's plan.

In a classic example of Washington cronyism, the first notice that DHS was even considering such regulations came when they were promulgated as a *fait accompli*, without notice and comment, on April 8, 2008 (73 Fed. Reg. 18,944). These regulations made three major expansions to OPT. First, they allowed aliens to remain in student visa status while they were unemployed so they could look for work. Second, they allowed aliens working under OPT to remain in student visa status from the time an H-1B petition was filed on their behalf until a final decision was made on the petition or the start date. This adds a maximum of six months to the OPT duration. Finally, they authorized a 17-month work period for aliens with degrees in fields DHS designates as Science/Technology/Engineering/Mathematics (STEM). This gave a maximum OPT duration of 35 months.

The OPT program has been the subject of continuous litigation since then where, after nearly a decade, the federal courts have been unable to come to a decision on whether it is lawful. However in 2015, the D.C. District Court held that the 2008 OPT regulations had been promulgated unlawfully without notice and comment. In response to this opinion, DHS promulgated new regulations that did the same as the old regulations except that they expanded the STEM work period from 17 months to 24 months, giving a maximum OPT work period of 42 months (24+12+6).

OPT is an example of the administrative state run amok. Instead of law coming from Congress, we have law coming from bureaucrats working hand-in-hand with lobbyists. OPT also illustrates the slippery-slope problem of regulation. Work on student visas started innocently as an integral part of a course of study to give foreign students an experience not available in their home country, but eventually was transformed into a full-blown guestworker program whose stated purpose is to provide labor to American business.

The current definition of student visa status is:

> *[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(l) of this title at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn. [8 U.S.C. 1101(a)(15)(F)(i)]*

Congress's definition of student visa status cannot possibly encompass aliens who are either working full-time or are unemployed years after they have graduated.

The question now is whether the courts will ever make a decision on OPT or whether the Trump administration will realize that OPT is an unlawful program that should be terminated.