

# CENTER FOR IMMIGRATION STUDIES

November 9, 2026

Re: *Optional Practical Training Fees*, DHS Docket No. ICEB–2026–0100

To Whom It May Concern,

The Center for Immigration Studies (CIS) respectfully submits the following public comments in response to the Department of Homeland Security's (DHS) notice of proposed rulemaking (NPRM) *Optional Practical Training Fees*, DHS Docket No. ICEB–2026–0100, as published in the Federal Register on October 8, 2026.

CIS is a national, nonprofit, public-interest organization comprised of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. CIS examines trends and effects, educates the public on the impacts of sustained high-volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today and into the future.

## I. Background

As DHS has described Optional Practical Training (OPT), "[It] is . . . temporary employment available to [foreign] students [in F-1 nonimmigrant status[1]] . . . that directly relates to a student's major area of study in the United States. A student can apply to engage in OPT during his or her academic program . . . or after completing the academic program".[2]

Prior to 2008, DHS regulations provided that foreign students in F-1 status enrolled in institutions of higher education "who have been enrolled on a full-time basis for at least one full academic year . . . are eligible for 12 months of [OPT] to work for a U.S. employer in a job directly related to the student's major area of study",[3] that could take place "either during their educational program ('pre-completion OPT') or after the student graduates ('post-completion OPT')."[4]

In 2008, DHS promulgated an interim final rule allowing F-1 students to participate in post-completion OPT for an additional 17 months if they had received degrees in STEM (science, technology, engineering, and math) fields.[5] In 2015, the U.S. District Court for the District of Columbia vacated the 2008 rule but allowed it to stay in effect long enough for DHS to write a

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[1] *See* Immigration and Nationality Act (INA) § 101(a)(15)(F)(i) (8 U.S.C. § 1101(a)(15)(F)(i).

[2] *Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students with STEM Degrees and CapGap Relief for All Eligible F–1 Students*, 81 Fed. Reg. 13040 (Mar. 11, 2016) (final rule), *available at* https://www.govinfo.gov/content/pkg/FR-2016-03-11/pdf/2016-04828.pdf.

[3] *Extending Period of Optional Practical Training by 17 Months for F–1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F–1 Students with Pending H–1B Petitions*, 73 Fed. Reg. 18944 (April 8, 2008) (interim final rule with request for comments), *available at* https://www.govinfo.gov/content/pkg/FR-2008-04-08/pdf/E8-7427.pdf.

[4] *Id.* at 18945.

[5] *Id.* at 18944.

new rule.[6] In 2016, DHS promulgated a new rule, expanding post-completion STEM OPT by 24 (rather than 17) months – thus allowing eligible foreign students to work for three full years following the completion of their studies.[7]

OPT's safeguards for American workers are, even in theory, far less robust than those of the H-1B nonimmigrant work program[8] for foreign workers in "specialty" occupations requiring the "theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation".[9]

Congress has twice declined to permanently increase the H-1B program's annual numerical cap over its original 65,000, with the House Judiciary Committee explaining in 1998 that "Congress should not imperil the future careers of . . . young American[ computer science students] by expanding the H–1B quota indefinitely."[10] Congress had allowed the number of aliens who may be newly provided H-1B status to fall from 195,000 in fiscal year 2003 back to 65,000 in 2004, a 67 percent decrease, and has not raised the cap since.[11] Every year, demand far outpaces the supply of H-1B visas.

But unlike the statutory H-1B program, the number of foreign students participating in the regulatory OPT program has no numerical limitation whatsoever and employers of OPT workers generally do not have to pay even the prevailing wage[12] or Social Security or Medicare taxes

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[6] *Wash. Alliance of Tech. Workers v. DHS*, 156 F. Supp. 3d 123 (D.D.C. 2015).

[7] *Improving and Expanding Training Opportunities for F–1 Nonimmigrant Students with STEM Degrees*, 81 Fed. Reg. 13040.

[8] INA § 101(a)(15)(H)(i)(B) (8 U.S.C. § 1101(a)(15)(H)(i)(B)).

[9] INA § 214(i) (8 U.S.C. § 1184(i)).

[10] H.R. Rep. No. 105-657, at 20 (1998), *available at* https://www.govinfo.gov/content/pkg/CRPT-105hrpt657/pdf/CRPT-105hrpt657.pdf.

[11] INA § 214(g)(1)(A) (8 U.S.C. § 1184(g)(1)(A)). However, § 214(g)(5)(A)-(B) provides that the cap does not apply to aliens who will work for institutions of higher education (or related or affiliated nonprofit entities), nonprofit research organizations, or governmental research organizations, and § 214(g)(5)(C) provides that the cap does not apply to aliens who have earned advanced degrees from U.S. universities, "until the number of [advanced degree] aliens who are exempted from such numerical limitation during such year exceeds 20,000".

[12] The H-1B statute requires that an employer pay an H-1B worker at least the greater of the actual amount it pays to its similar employees or the prevailing wage level for similar employees:

> The employer—
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> > (i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H–1B nonimmigrant wages that are at least—
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> > > (I) **the actual wage level** paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, **or**
> > >
> > > (II) **the prevailing wage level** for the occupational classification in the area of employment,
>
> **whichever is greater**….

INA § 212(n)(1)(A) (8 U.S.C. § 1182(n)(1)(A)) (emphasis added).

Conversely, the general OPT program's regulations contain no minimum wage requirement for OPT workers. And while the STEM OPT regulations do contain a minimum wage requirement, it is generally only that an employer pay

regarding OPT workers.[13] These differences are important, because the H-1B and OPT (especially STEM OPT) programs substantially overlap in terms of occupations and utilization by recent graduates. In fiscal year 2025, at least 68 percent of approved H-1B petitions (for initial employment) were for jobs in STEM occupations,[14] and large numbers of new H-1B workers change status directly from F-1 (or F-2 spouse[15]) status -- 38 percent of all new H-1B workers in fiscal year 2024.[16]

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its STEM OPT workers at a level commensurate with what it pays its similar employees (regardless of the prevailing wage):

> The terms and conditions of a STEM practical training opportunity during the period of the 24-month OPT extension, including duties, hours, and **compensation, must be commensurate with** terms and conditions applicable to **the employer's similarly situated U.S. workers in the area of employment**. . . . If the employer does not employ and has not recently employed more than two similarly situated U.S. workers in the area of employment, the employer nevertheless remains obligated to attest that the terms and conditions of a STEM practical training opportunity are commensurate with the terms and conditions of employment for other similarly situated U.S. workers in the area of employment.

8 C.F.R. § 214.2(f)(10)(ii)(C)(8) (emphasis added).

And an employer only has to pay STEM OPT workers within "the range of" compensation the employer offers its similar employees:

> The duties, hours, and compensation of such students are ''commensurate'' with those offered to U.S. workers employed by the employer in the same area of employment when the employer can show that the duties, hours, and compensation are consistent with the range of such terms and conditions the employer has offered or would offer to similarly situated U.S. employees.

*Id.*

[13] The Internal Revenue Service explains that:

- In general, aliens performing services in the United States . . . as employees are liable for U.S. Social Security and Medicare taxes. However, certain classes of foreign employees are exempt . . . .
- Foreign students temporarily present in the U.S. in F-1 . . . status for less than 5 calendar years are generally nonresident aliens . . . under residency rules of Internal Revenue Code (IRC) 7701(b) [26 U.S.C. § 7701(b)]. These nonresident alien students are exempt from Social Security Tax and Medicare Tax on wages paid to them for services performed within the U.S. To qualify for the exemption, the services performed need to be allowed by [U.S. Citizenship and Immigration Services] USCIS for these nonimmigrant statuses, and such services are performed to carry out the purposes for which such visas were issued to them.

U.S. Internal Revenue Service, *Foreign student liability for Social Security and Medicare taxes*, *available at* https://www.irs.gov/individuals/international-taxpayers/foreign-student-liability-for-social-security-and-medicare-taxes (accessed on Nov. 5, 2026).

[14] *See* U.S. Citizenship and Immigration Services, DHS, *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2025 Annual Report to Congress October 1, 2024 – September 30, 2025*, at tables 3 and 4 (2026), *available at* https://www.uscis.gov/sites/default/files/document/data/fy25_h1b_characteristics_congress_signed_04242026.pdf.

[15] INA § 101(a)(15)(F)(ii) (8 U.S.C. § 1101(a)(15)(F)(ii)).

[16] In fiscal year 2024, 53.8 percent of H-1B petitions approved for initial employment were for aliens already in the U.S. who had usually changed status from other nonimmigrant categories, and of those aliens, 71.2 percent were converting from F-1 or F-2 status. U.S. Citizenship and Immigration Services, DHS, *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2024 Annual Report to Congress October 1, 2023 – September 30, 2024*, at tables 14 and 15 (2025), *available at* https://www.uscis.gov/sites/default/files/document/reports/ola_signed_h1b_characteristics_congressional_report_FY24.pdf.

CIS concluded in an amicus curiae brief to the U.S. Supreme Court that DHS in its 2008 OPT interim final rule (IFR) "unapologetically and openly extended the length of OPT for the express purpose of circumventing the annual numerical limitation Congress has imposed on aliens newly accepted into the H-1B . . . program."[17] Just to cite one example, the 2008 IFR stated that "[t]he inability of U.S. employers . . . to obtain H–1B status for highly skilled foreign students [because of the statutory cap] . . . has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage."[18] DHS through "[t]his rule will help ease this difficulty by adding an estimated 12,000 OPT students to the STEM-related workforce . . . represent[ing] a significant expansion of the available pool of skilled workers."[19] Indeed, "[t]o avoid a loss of skilled students through the next round of H-1B filings . . . DHS is implementing this initiative . . . without first providing notice and the opportunity for public comment."[20] DHS promulgated the rule following a dinner party request by Microsoft's chief lobbyist to Secretary of Homeland Secretary Michael Chertoff.[21]

In 2016, DHS expanded STEM OPT through its final rule. CIS wrote in its amicus curiae brief that "The 2016 Rule completely abandoned, without any meaningful explanation, DHS's justification for the 2008 IFR. DHS acted pretextually to avoid appearing to, as with the 2008 IFR, deliberately and openly subverting Congress' objective of protecting American students when temporarily increasing the H-1B cap."[22]

Section 214 of the INA provides that while the period of authorized stay in H-1B status can generally last up to six years,[23] aliens can stay longer in H-1B status in certain instances.[24] U.S. Citizenship and Immigration Services (USCIS) has estimated that (as of September 30, 2019), a

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[17] Brief for Center for Immigration Studies, as Amicus Curiae Supporting Petitioners, *Washington Alliance of Technology Workers v. DHS* at 3 (No. 22-1071) (CIS Brief), *available at* https://www.supremecourt.gov/DocketPDF/22/22-1071/268127/20230601123648593_230510a%20AC%20Brief%20for%20efiling.pdf.

[18] *Extending Period of Optional Practical Training by 17 Months for F–1 Nonimmigrant Students with STEM Degrees*, 73 Fed. Reg. at 18946.

[19] *Id.* at 18953.

[20] *Id.* at 18950.

[21] *See Washington Alliance of Technology Workers v. DHS*, 50 F.4th 164 (D.C. Cir. 2022), *petition for cert. filed* (No. 22-1071) (May 2023), *available at* https://www.supremecourt.gov/DocketPDF/22/22-1071/265761/20230501122134692_Washington%20Alliance%20PFC%20Final.pdf (App. To Pet. Cert. 747a-753a, *available at* https://www.supremecourt.gov/DocketPDF/22/22-1071/265761/20230501122144386_WA%20Alliance%20Petition%20Appendix%20Final.pdf).

[22] CIS Brief at 4.

[23] INA § 214(g)(4) (8 U.S.C. § 1184(g)(4)).

[24] If a year or more has elapsed since an employer's filing of an application for labor certification in furtherance of a petition for an alien to become an employment-based immigrant, or the filing of the petition itself, the six year limit is inapplicable until a final decision is made to deny the application or petition or to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence. *See* Pub. L. 106–313, title I, § 106(a), (b) (2000), 114 Stat. 1253, 1254, as amended by Pub. L. 107–273, div. C, title I, § 11030A (2002), 116 Stat. 1836.

total of 583,420 aliens were authorized to work under the H-1B program.[25] Conversely, only 24,838 aliens with employment start dates during calendar year 2007 participated in OPT that year.[26] But by fiscal year 2024, 340,066 aliens were participating in OPT and an additional 165,524 in STEM OPT, for a total of 505,590.[27] Thus, the regulatory OPT program now rivals the statutory H-1B program in the number of alien workers it adds to the U.S. labor force.

## II. The Proposed Optional Practical Training Fee

On October 8, 2026, ICE published a proposed rule to establish a $70,000 fee a U.S. college or university would have to pay to be able to recommend a F-1 foreign student for participation in OPT, reaching a total of $100,000 for participation in STEM OPT.[28] The current OPT regulations provide that "[a] student must initiate the OPT application process by requesting a recommendation for OPT from his or her" school.[29]

The proposed rule explained that ICE "would establish a fee of $70,000 per F–1 . . . student applicable to . . . schools that recommend a[] . . . student to engage in OPT for the first time"[30] and a supplementary "fee of $30,000 per F–1 . . . student applicable to . . . schools that make any subsequent OPT recommendation for a[] . . . student who has previously participated in OPT and has previously paid the initial OPT fee of $70,000."[31] The $30,000 fee "would apply to any type of OPT that a . . . student participates in after having completed their initial OPT (regardless of whether it is another pre-completion [of studies] OPT, post-completion OPT, or STEM OPT extension)".[32] An institution's designated school officer (DSO) would have to "confirm that the school has paid the applicable OPT fee prior to updating [The Student and Exchange Visitor Information System] SEVIS with the DSO's recommendation and before the student can apply . . . for employment authorization."[33]

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[25] Office of Policy & Strategy, Policy Research Division, USCIS, DHS, *H-1B Authorized to Work Population Estimate*, at 5, *available at* https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf.

[26] *See* U.S. Immigration and Customs Enforcement (ICE), DHS, *Total number of annual OPT, STEM OPT and CPT Authorizations with Employment Start Dates During an Indicated Calendar Year from 2007 to 2024*, *available at* https://www.ice.gov/doclib/sevis/btn/2024/TotalNumberAnnualOPT_STEM_OPT_CPT_AuthorizationsWithEmpStartDatesDuringIndicatedCY2007_2024.pdf.

[27] *See* ICE, DHS, *2024 Total Number of SEVIS Records with authorizations to Participate in CPT, OPT or STEM-OPT*, *available at* https://www.ice.gov/doclib/sevis/btn/2024/2024_TotalNumberSevisRecordsWithAuthorizationsParticipate_OPT_CPT_STEM_OPT.pdf.

[28] *Optional Practical Training Fees*, 91 Fed. Reg. 64566 (Oct. 8, 2026) (proposed rule), *available at* https://www.govinfo.gov/content/pkg/FR-2026-10-08/pdf/2026-20660.pdf.

[29] 8 C.F.R. § 214.2(f)(10)(ii)(C)(11)(i).

[30] *Optional Practical Training Fees*, 91 Fed. Reg. at 64577.

[31] *Id.*

[32] *Id.*

[33] *Id.*

The proposed rule concluded that the fee "would reduce the rampant fraud and abuse of OPT"[34] with its benefits "includ[ing] strengthening the integrity of the immigration system, protecting U.S. workers, and alleviating burdens imposed on DHS tied to OPT investigations."[35]

On January 13, 2021, U.S. Immigration and Customs Enforcement (ICE) concluded that it "must take bold action to ensure that the [OPT] programs operate in a manner that does not harm U.S. workers".[36] The proposed fee rule itself concluded that "[e]mploying foreign workers in entry-level positions at discounted rates, such as through practical training programs, undercuts American worker wages and opportunities".[37] It stated that the "[t]he large-scale replacement of American workers through systemic abuse of the OPT program undermines the U.S. economy",[38] that the new fee would "alleviate the job market from depressed wages",[39] and that the fee was "intended to discourage aliens from using the OPT program to market themselves to employers seeking to bypass H–1B caps, fees, and prevailing wage requirements",[40] thus "curb[ing] the number of students and employers attempting to circumvent the H–1B visa cap and fee".[41]

The proposed rule contended that "the financial obligation of the proposed fee, in tandem with the requirement that SEVP certified institutions provide proof of payment of this fee when submitting a recommendation for OPT . . . serves as a deterrent to schools, foreign students, and employers seeking to abuse OPT."[42] Schools "would need to consider both the costs of OPT participation and the value each F–1 . . . student's OPT participation brings to the institution"[43] and thus the fee "would ensure that only highly qualified eligible F–1 students participate in OPT".[44] This "would effectively eliminate students who engage in OPT as a pathway for low-paid employment or those who are trying to circumvent the H–1B visa cap and fee requirements, as they would no longer be able to obtain 'automatic' recommendations for OPT from their schools."[45] "The financial costs would deter schools from recommending students with questionable qualifications for OPT, leading to higher program integrity."[46]

Further, since the fee "would incentivize schools to only recommend the most promising students to engage in OPT after a thorough review and payment of the required fee"[47] and "the financial commitment . . . may encourage schools to apply a heightened level of scrutiny when reviewing

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[34] *Id.* at 64579.
[35] *Id.*
[36] ICE, DHS, *Broadcast Message: New SEVP Unit to Oversee Employment Compliance in the OPT Programs and Report on Impact on U.S. Workers*, *available at* https://www.ice.gov/doclib/sevis/pdf/bcm-2101-02.pdf.
[37] *Optional Practical Training Fees*, 91 Fed. Reg. at 64574.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 64575.
[41] *Id.* at 64574.
[42] *Id.* at 64575.
[43] *Id.* at 64579.
[44] *Id.* at 64572.
[45] *Id.* at 64574.
[46] *Id.*
[47] *Id.*

an F–1 . . . student's request",[48] "the "fee would result in a smaller pool of participants, as schools would be more selective in determining which students are qualified to participate in OPT."[49]

CIS shares DHS's concerns as to the negative effects that the OPT program has had on American workers and American students[50] and applauds ICE for the proposed OPT fee, which would reduce the availability of OPT workers for employers seeking cheap labor and possibly reduce the financial incentive for such employers in utilizing the OPT program.

## III. DHS Should Repeal 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3), (C) (and related provisions) and 274a.12(c)(3)(i)(B)-(C) in Order to Terminate Post-Completion Optional Practical Training

While DHS's proposed OPT fee would go a long way towards lessening the program's deleterious effects on American workers and students, the proposed rule itself acknowledged that the fee would not eliminate these effects. It stated that the fee would "ensure that . . . the labor market is not oversaturated with low-paid foreign workers",[51] "reduce an excess of low-paid foreign workers in the labor market, thereby increasing job opportunities for U.S. workers and minimizing possible wage depression",[52] and "result in less replacement of U.S. workers".[53]

But why should DHS continue a program not mandated by statute (and in fact, as discussed below, actually inconsistent with the Immigration and Nationality Act (INA)) that causes any degree of saturation of the labor market with low-paid foreign workers? Why should DHS continue such a program that adds any supply of lower-paid foreign workers in the labor market? Why should DHS continue such a program that causes any wage depression for American workers? Why should DHS continue such a program that facilitates any replacement of American workers?

If DHS has concluded that the proposed OPT fee cannot fully curtail these OPT-generated impacts on American workers and students, CIS recommends that DHS should terminate post-completion OPT.

Further, post-completion OPT is ultra vires and in contravention of the INA. It allows aliens to remain in F-1 student status and to work while in such status even though they are no longer in compliance with the F-1 program's very definition of a foreign student eligible for such status. Section 101 of the INA provides that an alien is only eligible for F-1 status if they are "a bona fide student qualified to pursue a full course of study and who seeks to enter the United States

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[48] *Id.* at 64576.
[49] *Id.* at 64574.
[50] *See, e.g.*, George Fishman, Senior Legal Fellow, CIS, *OPT Needs to End 'Optional Practical Training': A guestworker program for aliens masquerading as 'students'*, 2025 Center for Immigration Studies, *available at* https://cis.org/Fishman/OPT-Needs-End ("Terminating OPT would serve a number of important purposes" including "protect[ing] the wages and employment opportunities of American students and workers".).
[51] *Optional Practical Training Fees*, 91 Fed. Reg. at 64572.
[52] *Id.* at 64591.
[53] *Id.* at 64574.

temporarily and **solely for the purpose of pursuing such a course of study**".[54] (emphasis added). Once an alien has completed his or her course of study, they surely can no longer be in the U.S. solely for the purpose of pursuing such course of study. They have indeed become subject to deportation. Section 237 of the INA provides that "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed . . . , or to comply with the conditions of any such status, is deportable."[55]

It is true that in its 2022 decision in *Washington Alliance of Technology Workers v. DHS*[56] (*Wash Tech*), the D.C. Circuit Court of Appeals concluded that § 101's requirements regarding the F foreign student program merely "impose[] threshold entry criteria" and are not "ongoing conditions under which F-1 students may lawfully stay".[57] But as D.C. Circuit Judge Neomi Rao later argued, "[N]o [other] court of appeals has adopted th[is] approach…. [T]he Supreme Court and other circuits have consistently held nonimmigrant visa holders must satisfy the statutory criteria both at entry and during their presence in the United States."[58]

If post-completion OPT cannot be justified under the INA, CIS recommends that DHS terminate post-completion OPT.

## IV. ICE Should Adjust the Amount of the Initial and Subsequent OPT Fees in Proposed 8 C.F.R. § 214.13(i)(1)-(3) to Recoup the Monetary Windfall Enjoyed by Employers Who Hire OPT Participants Rather than H-1B or American Workers

The proposed rule identified the fee's statutory authority as § 214(a)(1) of the INA, which provides that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe".[59] The rule concluded that:

> In the context of F–1 [students], setting the parameters of practical training has historically been acknowledged as a valid exercise of DHS's statutory authority stemming under the ''time-and-conditions'' provision. . . . [T]he requirements for the training are part of the ''conditions'' of such a status. Accordingly, DHS is authorized to regulate . . . the ability for F–1 . . . students to ''engage in limited periods of employment for practical training . . . according to the terms set out in

[54] INA § 101(a)(15)(F)(i) (8 U.S.C. § 1101(a)(15)(F)(i)).
[55] INA § 237(a)(1)(C)(i) (8 U.S.C. § 1227(a)(1)(C)(i)).
[56] 50 F.4th 164 (D.C. Cir. 2022), *cert. denied*, 144 S. Ct. 78 (2023), 2023 U.S. LEXIS 3009 (2023), *available at* https://case-law.vlex.com/vid/wash-alliance-of-tech-934494138.
[57] *Id.* at 192.
[58] *Wash. All. of Tech. Workers v. DHS*, 58 F.4th 506, 509 (D.C. Cir. 2023) (Judge Rao, dissenting from the denial of a rehearing en banc) (citation omitted). *See* CIS Brief at 19-30.
[59] INA § 214(a)(1) (8 U.S.C. § 1184(a)(1)).

> the [OPT] [r]ule."[60] [quoting the D.C. Circuit Court of Appeals' decision in *Wash Tech*]

The rule also concluded that the new fee is "reasonably related to the purpose of the visas issued."[61] In *Wash Tech*, the D.C. Circuit itself concluded that:

> Congress intended the Secretary's time and-conditions authority to be exercised in a manner appropriate to the types of people and purposes described in each individual visa class. . . . To be valid, the challenged post-graduation OPT Rule . . . must reasonably relate to the distinct composition and purpose of the F-1 nonimmigrant visa class.[62]

The court also concluded that "where Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be 'reasonably related to the purposes of the legislation.'"[63]

Does the proposed OPT fee "reasonably relate" to the distinct composition and purpose of the F-1 nonimmigrant visa class? Is DHS's exercise of its § 214(a)(1) authority "reasonably related" to the purpose of the F-1 visas issued? CIS believes that in principle an OPT fee most assuredly meets these tests. The fee was designed to prevent employers from utilizing the OPT program in a manner harmful to American workers and students and to circumvent or evade the H-1B visa program's numerical cap and fees. And the fee was designed to facilitate compliance with the OPT program itself.

How did DHS decide on the amount of the fee? The proposed rule explained that:

> DHS . . . considered the possibility that [foreign students] could undermine the H–1B visa payment by abusing OPT. As such, DHS selected a fee amount for OPT comparable to the fee for H–1B visas that would deter visa fraud. The fee amount is designed to closely align with the H–1B fees to reduce students and employers from using OPT to circumvent the H–1B visa program fees.[64]

The rule was making reference to President Trump's September 2025 Proclamation which found that "the unrestricted entry into the United States of certain [H-1B] foreign workers . . . would be detrimental to the interests of the United States because such entry would harm American workers,

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[60] *Optional Practical Training Fees*, 91 Fed. Reg. at 64567.
[61] *Id.*
[62] 50 F.4th at 168.
[63] *Id.* at 178 (quotation marks simplified) (quoting the D.C. Circuit's 2019 decision in *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866 (D.C. Cir. 2019), *available at* https://case-law.vlex.com/vid/john-doe-v-fed-892587765, which in turn quoted the Supreme Court's 1973 decision in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) *available at* https://supreme.justia.com/cases/federal/us/411/356/).
[64] *Optional Practical Training Fees*, 91 Fed. Reg. at 64575.

including by undercutting their wages."[65] President Trump thus directed that "[p]ursuant to section[] 212(f)[66] . . . of the [INA] … the entry into the United States of aliens as [H-1B] nonimmigrants . . . is restricted, except for those aliens whose petitions are accompanied or supplemented by a payment of $100,000".[67]

However, the U.S. District Court for the District of Massachusetts issued an order vacating USCIS's guidance implementing the H-1B fee.[68] The First Circuit Court of Appeals denied DHS's motion to stay the order pending appeal.[69] DHS has appealed[70] the district court's order and states that "[i]f this order is later lifted, DHS still plans to collect the payment."[71] On September 30, 2026, another district court, the U.S. District Court for the Northern District of California, issued a similar order.[72]

Should the H-1B fee not be operational at the time of the promulgation of the final OPT fee rule, DHS's justification for the amount of the fee (to match the H-1B fee and thereby taking away employers' incentive to use the OPT program to evade the H-1B fee) would be vulnerable to challenge. We note, however, that should USCIS's proposed $103,265 fee for all H–1B cap-subject petitions[73] be finalized and implemented, that H-1B fee would provide a strong independent basis for an equivalent OPT fee, as all H-1B employers would be subject to the fee (as long as their petitions were subject to the cap).

In addition, in many instances there is no need for the OPT fee to match the H-1B fee – for the simple reason that for many employers there is no such incentive as the H-1B fee (even when operational) does not apply to them. This is most notably the case regarding employers seeking to petition for foreign students graduating from U.S. colleges and universities as H-1B workers. The $100,000 H-1B fee is based on § 212(f) of the INA, which grants the President the power only to

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[65] Proclamation No. 10973, 90 Fed. Reg. 46027, 46028 (Sept. 24, 2025), *available at* https://www.govinfo.gov/content/pkg/FR-2025-09-24/pdf/2025-18601.pdf.

[66] INA § 212(f) (8 U.S.C. § 1182(f)) provides in part that: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens".

[67] Proclamation No. 10973, 90 Fed. Reg. at 46028.

[68] *California v. Mullin*, 833 F. Supp. 3d 50 (D. Mass. 2026) (*Memorandum and Order on Plaintiffs' Motion for Summary Judgment (Doc. No. 86) and Defendant's Cross-Motion for Summary Judgment and Motion to Dismiss (Doc. No. 92))*, *available at* https://storage.courtlistener.com/recap/gov.uscourts.mad.293201/gov.uscourts.mad.293201.106.0_1.pdf.

[69] *California v. Mullin*, 183 F.4th 42 (1st Cir. 2026).

[70] *California v. Mullin*, 833 F. Supp. 3d 50, *appeal docketed*, No. 26-1699 (1st Cir. June 12, 2026), *available at* https://storage.courtlistener.com/recap/gov.uscourts.mad.293201/gov.uscourts.mad.293201.108.0_1.pdf.

[71] USCIS, DHS, *H-1B Specialty Occupations*, *available at* https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (accessed on Nov. 5, 2026).

[72] *Glob. Nurse Force v. Trump*, 2026 U.S. Dist. LEXIS 224854 (N.D. Cal. 2026) (*Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction, and Denying Motion for Class Certification and Motion to Dismiss*), *available at* https://storage.courtlistener.com/recap/gov.uscourts.cand.457426/gov.uscourts.cand.457426.130.0.pdf.

[73] *Fee for Certain H–1B Petitions*, 91 Fed. Reg. 54817 (Aug. 25, 2026) (proposed rule), *available at* https://www.govinfo.gov/content/pkg/FR-2026-08-25/pdf/2026-17324.pdf.

bar aliens and groups of aliens from entry into the United States. However, foreign students in F-1 status attending U.S. schools have already entered the country, and an entry bar is thus inapplicable to them. A USCIS webpage in fact states that "[t]he Proclamation applies to certain H-1B petitions filed . . . on behalf of beneficiaries who are outside the United States".[74] As noted, 38 percent of all new H-1B workers in fiscal year 2024 were in fact changing status from F status.

Further, the OPT fee and the H-1B fee are not directly comparable to the extent that employers employ the relevant alien workers for different periods of time. The maximum length of time an alien can engage in post-completion OPT is three years. Thus, a $100,000 OPT fee would reflect up to three years' worth of an alien's labor to an employer. On the other hand, the maximum length of time an alien can remain in H-1B status is six years (and potentially longer if the employer is seeking to petition for an immigrant visa for the worker). So, for an employer utilizing an H-1B or OPT worker for the maximum allowable period of time, the H-1B fee would actually equate to $16,667 or less per year of employment, while the OPT fee would equate to $33,333 (not taking into account the time value of money).

Because of these factors, CIS recommends that DHS modify the rationale for the amount of the OPT fee (and consequently possibly modify the amount of the fee) from matching the amount of the H-1B fee to recouping the monetary windfall that an employer receives by being able to hire an OPT worker rather than an H-1B worker or an American worker. Such windfall would include not having to pay the OPT worker the H-1B prevailing wage, not having to pay the OPT worker the (higher than prevailing) wage an American worker would likely receive should H-1B visas be unavailable[75] and not having to pay Social Security and Medicare taxes.

## V. DHS Should Amend Proposed 8 C.F.R. § 214.13(i)(1)-(3) to Make the Employers of OPT Participants, Rather than the Participants' SEVP-Certified Educational Institutions, Directly Responsible for Paying the Initial and Subsequent OPT Fees

[74] USCIS, *H-1B Specialty Occupations*, *available at* https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (accessed on Nov. 5, 2026).

[75] Comparable American workers generally receive compensation well in excess of the H-1B program's flawed prevailing wage. For instance, while the U.S. Labor Department's (DOL) Bureau of Labor Statistics (BLS) estimated that the nationwide median salary for software developers was $132,270 in 2023, USCIS reported that for H-1B petitions approved in fiscal year 2023, the median salary that petitioning employers promised to pay H-1B workers in computer-related occupations (for initial employment) was $99,000. BLS, DOJ, *Occupational Employment and Wage Statistics (OEWS) Table*s, May 2023, *available at* https://www.bls.gov/oes/tables.htm#15-0000; USCIS, DHS, *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2023 Annual Report to Congress October 1, 2022 – September 30, 2023,* at table 9b (2024) (rounded by USCIS to the nearest thousand dollars), *available at* https://www.uscis.gov/sites/default/files/document/reports/OLA_Signed_H-1B_Characteristics_Congressional_Report_FY2023.pdf. Thus, the median salary for new H-1B workers in computer-related occupations was only 74.8 percent of what software developers were paid overall. *See, generally*, George Fishman, Senior Legal Fellow, CIS, *Elon Musk Is Right about H-1Bs: 'I've been very clear that the program is broken and needs major reform'*, 2025 Center for Immigration Studies, *available at* https://cis.org/Report/Elon-Musk-Right-about-H1Bs.

The proposed rule acknowledged that "the proposed fees are not nominal amounts".[76] It found that:

> Of the 1,389 small affected institutions [of higher education] . . . 622 would experience an impact less than or equal to 1 percent of their estimated annual revenue as a result of the fee . . . . 483 would experience an impact between 1 percent and 5 percent of their estimated annual revenue, 104 would experience an impact between 5 percent and 10 percent, 82 would experience an impact between 10 percent and 20 percent, and 98 would experience an impact greater than 20 percent.[77]

The rule stated that "DHS carefully evaluated various fee options, including exemptions to the fee for small educational institutions",[78] but decided not to include such an exemption because an "estimate[d] . . . 56 percent of regulated SEVP-certified institutions are small entities",[79] and consequently "[t]his approach could leave significant fraud vulnerabilities unaddressed".[80]

CIS is concerned that some federal judges might consider the requirement that all U.S. colleges and universities pay the $70,000/30,000 fee for each foreign student recommended for OPT to be onerous and thus "not reasonable", or "arbitrary" or "capricious" under the Administrative Procedure Act,[81] giving them the excuse to enjoin the rule once finalized.

It is true, as the proposed rule stated, that "DSOs are not required to recommend F–1 [students] for OPT and can elect not to pay the fee for a particular F–1 [student] who is not a strong candidate for OPT or whose participation in OPT could adversely affect the integrity of the program."[82] It is also true that "schools may mitigate their budgetary impact by passing the financial obligation of this proposed fee onto F–1 . . . students, all students, or employers"[83] and that if they do so, this "would further discourage misuse of OPT by increasing the cost of participation for those whose intent is primarily to work or reside in the U.S. without legitimate academic purpose and for employers displacing U.S. workers."[84]

However, it is not clear how many foreign students would be in a position to reimburse their school for the fee. And it is not clear how many employers would be willing to pay the fee in the first instance, given that both the initial ($70,000) and supplemental ($30,000) fees are "not . . . tied to a specific employer",[85] but must be paid "prior to a DSO's . . . recommendation of an F–1 . . .

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[76] *Optional Practical Training Fees*, 91 Fed. Reg. at 64575.
[77] *Id.* at 64594.
[78] *Id.* at 64576.
[79] *Id.*
[80] *Id.*
[81] 5 U.S.C. § 706(2)(A).
[82] *Optional Practical Training Fees*, 91 Fed. Reg. at 64578.
[83] *Id.*
[84] *Id.* at 64575.
[85] *Id.* at 64577.

student to participate".[86] If they were to pay, would employers first demand that prospective OPT workers sign legally binding contracts providing that if granted OPT work authorization, they would work for these employers (with a repayment penalty otherwise)? Would courts uphold such agreements?

Given these quandaries, CIS believes that requiring the employers of OPT workers to pay the fee would better buttress the fee against court challenge. After all, the employer generally has the greatest ability to pay and is the party who will financially benefit from the worker's employment. CIS thus recommends that DHS modify the proposed rule to make OPT workers' employers directly responsible for paying the OPT fee. One possible method for doing so would be to tie the OPT participant's work authorization to receipt of the employer's required payment.

## VI. Additional Protections for American Workers and Students

Should DHS decide to terminate post-completion OPT, as CIS recommends, the following reforms would apply to pre-completion OPT. Should DHS not terminate post-completion OPT, the reforms would apply to OPT across the board.

### A. DHS Should Amend 8 C.F.R. § 214.2(f)(10)(ii) to Require that Employers of OPT Workers Offer Wages that Are at Least at the Prevailing Wage Level for the Occupational Classification in the Area of Employment

As noted, unlike employers of H-1B workers, employers of OPT workers generally are not subject to a prevailing wage requirement. While the INA's prevailing wage provision is of limited benefit in ensuring that employers do not seek out foreign workers as cheaper alternatives to American workers, it does provide some benefit. And, in the context of the OPT program, a regulatory prevailing wage requirement would remove an employer's incentive to utilize the OPT program to bypass the H-1B program's prevailing wage requirement.

Thus, CIS recommends that DHS modify the proposed rule by instituting a regulatory prevailing wage requirement for OPT workers. Further, DHS could remedy some of the inadequacies in the INA's prevailing wage provision by implementing a more stringent regulatory prevailing wage requirement for the OPT program.

### B. DHS Should Amend 8 C.F.R. § 214.2(f)(10)(ii) to Institute a Numerical Cap on the Number of Aliens in F Nonimmigrant Status Who May Be Newly Authorized to Participate in OPT in Any Year

As noted, unlike the H-1B program, the number of foreign students participating in OPT has no numerical limit. If DHS instituted a regulatory OPT numerical cap, this could accomplish three goals -- 1) reducing employers' incentive to utilize the OPT program in order to evade the H-1B

[86] *Id.*

cap, 2) reduce the "excess of low-paid foreign workers" caused by the OPT program, and 3) achieve DHS's desired result of a smaller OPT program that would be less subject to fraud.

Thus, CIS recommends that DHS modify the proposed rule to institute a regulatory numerical limit on the number of aliens in F nonimmigrant status who can participate in OPT. As to what that cap should be, keep in mind that ICE's 2008 IFR predicted that STEM OPT would add "an estimated 12,000 OPT students to the STEM-related workforce . . . represent[ing] a significant expansion of the available pool of skilled workers."[87]

### C. DHS Should Amend 8 C.F.R. § 214.2(f)(10)(ii) to Prevent the Employers of OPT Workers from Using Them to Replace American Workers.

The H-1B program itself has a long history of facilitating employers' ability to layoff American workers and replace them with cheaper foreign labor. President Trump himself concluded in a recent executive order that "[m]any employers have laid off large numbers of highly skilled American workers, only to promptly hire large numbers of H-1B workers who are often lower-skilled and lower-paid."[88]

While the INA does contain layoff protections for American workers in the H-1B program, Congress made the decision when creating those protections in 1998 to make them quite feeble and, even then, applicable only to a tiny proportion of H-1B employers.[89]

To guard against similar use of the OPT program to facilitate employers' ability to lay off American workers and replace them with cheaper foreign workers, CIS recommends that DHS modify the proposed rule to institute strong regulatory layoff protections for American workers in the OPT program.[90] Such layoff protections need not mimic the H-1B program's statutory protections, as OPT is an administrative creation.

## VII. Conclusion

CIS shares DHS's concerns regarding the negative effects that the OPT program has had on American workers and students and applauds DHS for proposing the OPT fee. We further recommend that DHS strengthen the proposed rule, for the reasons expressed herein, by:

1. repealing 8 C.F.R. §§ 214.2(f)(10)(ii)(A)(3), (C)-(E) and related provisions and 274a.12(c)(3)(i)(B)-(C) to eliminate post-completion Optional Practical Training;

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[87] *Extending Period of Optional Practical Training by 17 Months for F–1 Nonimmigrant Students with STEM Degrees*, 73 Fed. Reg. at 18953.
[88] Exec. Order No. 14431, 91 Fed. Reg. 60501 (Sept. 18, 2026), *available at* https://www.govinfo.gov/content/pkg/FR-2026-09-23/pdf/2026-19555.pdf.
[89] *See* INA § 212(n)(1)(E)-(F) (8 U.S.C. § 1182(n)(1)(E)-(F)); *Elon Musk Is Right about H-1Bs.*
[90] While 8 C.F.R. § 214.2(f)(10)(ii)(C)(10)(ii) provides that an employer attest that "[t]he student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker", there is no analogous provision covering OPT in general.

2. amending proposed 8 C.F.R. § 214.13(i)(1)-(3) in order to:

    a. adjust the amount of the initial and subsequent OPT fees in order to recoup the monetary windfall enjoyed by employers who hire OPT workers rather than H-1B or American workers; and

    b. make the employers of OPT workers, rather than their educational institutions, directly responsible for paying the initial and subsequent OPT fees; and

3. amending 8 C.F.R. § 214.2(f)(10)(ii) in order to:

    a. require that employers of OPT workers offer wages that are at least at the prevailing wage level for the occupational classification in the area of employment;

    b. institute a numerical cap on the number of aliens in F status who may be newly authorized to participate in OPT in any year; and

    c. prevent the employers of OPT workers from using them to replace American workers.