
United States Court of Appeals

for the

Third Circuit

Case No. 08-4642

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION, INC.; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; HARRISON PICOT, II; PAUL E. POLAK; MIKE ROTHSCHILD; ROBERT SANCHEZ; STEPHEN BERRY; STEPHANIE M. BERRY,

Appellants,

—v.—

MICHAEL CHERTOFF, In his capacity as Secretary of Homeland Security, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY

Appellees

On appeal from an order entered in the United States District Court
for the District of New Jersey, No. 2:08-cv-2666

Brief on Behalf of Appellants

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**CORPORATE DISCLOSURE STATEMENT REQUIRED UNDER
FED. R. APP. P. 26.1**

The Programmers Guild, American Engineering Association and Bright Future Jobs are non-profit corporations with no stock and no shareholders.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The facts of this case are straightforward, but set against the backdrop of the complexities of the immigration system. The previous opinions rendered in this case have incorporated errors about the operation of the Rule and the immigration system that could easily have been avoided through oral argument.

JURISDICTION STATEMENT

The district court had jurisdiction over this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (2); because it is a federal question under 28 U.S.C. § 1331; and because the defendant is the United States, 28 U.S.C. § 1346.

This court has jurisdiction over appeals from final decisions of a district court under 28 U.S.C. § 1291.

The final order of dismissal being appealed was filed on Oct. 31, 2008. The notice of appeal was filed on November 21, 2008.

STATEMENT OF THE ISSUES

1. Did the district court err in holding that the injury-in-fact requirement for Article III standing is different for businesses than for other types of plaintiffs? Did the court then commit a plain error of fact by ignoring the pleadings that some Appellants operated businesses? (A7). Did the district court make a plain factual error by holding the challenged Rule will not increase the number of foreign workers when the administrative record explicitly states the Rule will cause such an increase? (A8-A9).
2. Did the district court err in not applying the Article III standing traceability requirement to the pled injury-in-fact of competition? Did the district court then err by misapplying the rules regarding traceability to actions by third parties? (A8).
3. Did the district court err by holding Article III standing requires that every conceivable injury must be completely redressed? (A8-A9).

4. Did the district court err by misapplying the zone-of-interest test to the challenged rule, rather than to the underlying statutes that protect Appellants' interests? (A9, FN8)
5. Did the district court err by failing to compare the operation of the Rule to the authorizing statute when it held the challenged rule to be authorized? (A10, FN10).
6. In dismissing the claim that the Rule was implemented arbitrarily and capriciously, did the district court err by failing to apply the Third Circuit's test for arbitrary and capricious agency action? Did the court also make a clear factual error when it ignored that Appellants had alleged facts supporting their claim of arbitrary and capricious agency action? (A10).
7. In holding Appellees had good cause to waive notice and comment, did the district court err in failing to apply the Third Circuit's standard for showing good cause? (A11).
8. Did the district court err by not permitting Appellants to correct any perceived deficiencies in the complaint by amendment prior to dismissal, as required by the Third Circuit? (A11).

STATEMENT OF RELATED CASES AND PROCEEDINGS

None.

STATEMENT OF THE CASE

This case comes to the Third Circuit of the United States Court of Appeals on an appeal of an order of dismissal of the United States District Court of New Jersey. Appellants

filed their complaint and motion for preliminary injunction on May 29, 2008. The district court denied the motion for preliminary injunction on August 5, 2008 and issued an Order to Show Cause why the case should not be dismissed for lack of standing due November 14, 2008. On September 4, 2008, Appellees filed a Motion to Dismiss. The district court granted this motion on October 31, 2008. Appellants appeal this order of dismissal.

STATEMENT OF THE FACTS

This action is an Administrative Procedures Act (*hereinafter*, “APA”) challenge to a regulation change that creates a significant increase in the number of foreign workers in science/technology/engineering and mathematics (*hereinafter*, “STEM”) fields. Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding CapGap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944-18,956 (proposed April 8, 2008)(codified at 8 C.F.R. §§ 214, 274a) (*hereinafter* the “Rule”). Appellants are professional organizations representing workers in STEM fields; individuals who work in STEM fields; and students who will work in STEM fields upon graduation. First Amended Complaint (*hereinafter*, “Compl.”) ¶¶ 2-16. Appellants seek to protect their market and economic interests, upon which their livelihoods depend, from the adverse effects resulting from the significant increase in the pool of foreign workers in their job fields caused by this Rule. Compl. ¶¶ 2-16.

The Organizational Appellants are well known for their advocacy of STEM worker interests. For example, the Programmers Guild is a professional organization whose membership is limited to computer professionals. Compl. ¶ 3. Representatives

of the Programmers Guild have been invited to testify before Congress four times over the past decade to represent the interests of U.S. computer programmers. John Miano, Testimony before the House Immigration and Claims Subcommittee, June 22, 2006, John Miano, Testimony before the House Immigration and Claims Subcommittee, March 30, 2006; Frank Brehm, Testimony before the House Immigration and Claims Subcommittee, May 25, 2000; John Miano, Testimony before the House Immigration and Claims Subcommittee, August 5, 1999. The media has extensively documented the Guild's advocacy efforts on behalf of computer programmers. *See e.g.* Interview with Programmers Guild Founder John Miano, Lou Dobbs Radio Show broadcast of Mar. 9, 2008; Moira Herbst, U.S. Tech Workers Fight Back, The Programmers Guild is issuing a rebuttal following calls for unlimited green cards for some foreign workers, BusinessWeek, Oct. 15, 2007; Foreigners & U.S. Jobs, CNBC Broadcast of Apr. 9, 2007.

The individual Appellants and members of Appellant Organizations encompass a variety of employment situations in STEM fields. Compl. ¶¶ 3-16. For instance, Appellant Toni Chester provides computer programming services through her S-corporation. Compl. ¶ 8. The temporary nature of her work makes her job search a continuous process. She must continuously look for new jobs in the STEM field of computer programming to have a stable income when her current project ends. *Id.* In contrast, Appellant P. Harrison Picot, III, is an unemployed computer programmer. Compl. ¶ 11. He is searching for work in a STEM field in the more traditional role as an employee of a company. *Id.* The Berry Appellants are college students who will be entering STEM fields upon graduation.

Central to this case are two programs that authorize aliens to work in the United States: the H-1B visa program and Optional Practical Training (sometimes called “Post Completion Practical Training,” *hereinafter*, “OPT”). OPT is available to foreign students admitted on F-1 visas. The H-1B visa program provides a mechanism for those in specialty occupations to work in the United States for up to six years. 8 U.S.C. § 1101(a)(15)(H). Sixty-Seven Percent of approved H-1B visas go to aliens in STEM fields. *See* United States Citizenship and Immigration Services, Characteristics of Specialty Occupation Workers (H-1B): FY 2005, Nov. 2006, p. 12. Congress has imposed limits on the number of H-1B visas granted each fiscal year (“FY”), so that not everyone who may otherwise be eligible for an H-1B visa can get an H-1B visa. 8 U.S.C. § 1184 (g).

Each year on April 1st, United States Citizenship and Immigration Services (*hereinafter*, “USCIS”) begins accepting H-1B visa applications for the next fiscal year starting on October 1st. (A16).

The demand for foreign workers has increased steadily over the years and has caused the H-1B quota to be exhausted every year since FY 2004. The H-1B quota for FY 2004 was exhausted on February 17, 2004 (11 months); FY 2005 on October 1, 2005 (6 months); FY 2006 on August 10, 2006 (4 months); FY 2007 on May 26, 2006 (2 Months), FY 2008 on the first day applications were accepted; and FY 2009 during the first week applications were accepted. *See* Press Release, USCIS, USCIS Announces New H-1B Procedures - Reaches Cap (Feb. 17, 2004), Press Release, USCIS, USCIS Announces New H-1B Procedures - Reaches Cap (Oct. 1, 2004), Press Release, USCIS, USCIS Reaches Cap (Aug. 12, 2005), Press Release, USCIS,

USCIS Reaches Cap (June 1, 2006), Press Release, USCIS, USCIS Reaches FY 2008 Cap (Apr. 3, 2007), Press Release, USCIS, USCIS Reaches FY 2009 H-1B Cap (Apr. 8, 2008).

The F-1 student visa is authorized under 8 U.S.C. § 1101(a)(15)(F)(i). F-1 student visas allow for temporary admission into the United States solely for the purpose of study. *Id.* Generally, aliens admitted under F-1 visas may not lawfully work in the United States. 8 C.F.R. § 214.2(f)(9). However, a student on an F-1 visa can be authorized for employment under OPT, “directly related to the student’s major area of study.” 8 C.F.R. § 214.2 (f)(10). An alien then can be lawfully present in the United States on an F-1 visa and be lawfully authorized to work in the United States on OPT. As such, anyone working under the OPT program has an F-1 student visa, but not everyone with an F-1 visa is eligible to work under OPT.

At OPT’s inception in 1947, it allowed foreign students to work for a period of six months but only when such work was “required or recommended by the school.” 8 C.F.R. § 125.15(b) (1947)(A33). The OPT period could be renewed twice (for a possible maximum of 18 months) but only if both the school and training agency certified that the practical training could not be accomplished without the additional periods. *Id.*

In response to the Immigration Act of 1990, the Justice Department extensively “streamlined” F-1 employment authorizations. 56 Fed Reg. 55,608. The changes included making the duration of OPT one contiguous fixed term of twelve months. 56 Fed Reg. 55,608. The Justice Department also changed the requirement that the work under OPT be required or recommended by the school to work that is “directly related

to the alien's major area of study." 8 C.F.R. § 214.2(f)(10), (f)(10)(ii) (1992). Prior to 2008, this one-year duration of OPT was in effect. 8 C.F.R. § 214.2(f)(10)(2007).

Employers that want a student to remain in the United States beyond the OPT period may apply for an H-1B visa for that student. (A15). However, due to Congressionally imposed caps on H-1B visas, those admitted temporarily on F-1 student visas may be unable to obtain an H-1B work visa. (A15). Such students who are unable to extend their lawful status, must depart the United States at the expiration of their OPT term. (A15). The inability of some students to get H-1B work visas prompted Appellees to drastically change the OPT program through the Rule. (A13-A25).

The present Rule substantially changes OPT. The Rule allows Appellees to identify and maintain a list of fields in which they perceive there to be a labor shortage. (A17). During the rulemaking process, Appellees identified STEM fields as having a labor shortage. (A17). However, the record establishes no standard for determining which fields have labor shortages. (A13-A25).

The Rule grants a 17-month extension of OPT (to 29-months) to aliens with degrees in STEM fields who are unable to obtain an H-1B guest worker visa. (A17). The Rule also creates the new benefit of allowing STEM students who receive this extension to remain in the United States for up to four months while unemployed to search for jobs or change employers (A19). The effect of the Rule is to create a "significant expansion" of the pool of STEM workers. (A22).

The Rule contains a second, distinct extension of OPT, available regardless of degree field. (A16-A17). This provision extends the period of OPT for those with a pending H-1B petition until the petition is rejected or the start of the fiscal year. 8

C.F.R. § 214.2(f)(5)(vi). Previously, such people could remain in the United States on an extended F-1 status but were not authorized to work during the extension (A16-A17).

Appellees implemented the Rule without “notice and comment” citing exemption under “good cause.” (A19). The record gives no explanation why Appellees could not comply with the notice and comment requirements when they had five years’ running notice of the expiration of the H-1B visa cap. (A19).

In 2007 Congress considered and rejected a measure that would have expanded the number of foreign guest workers in the United States. Comprehensive Immigration Reform Act of 2007, S. 1348 (110th Congress). This rejected bill contained a provision similar to the Rule that would have extended the duration of OPT to 24 months. *Id.* at § 507. It would have also increased the number of H-1B visas. *Id.* at § 523.

After Congress refused to expand the pool of foreign workers by rejecting the Comprehensive Immigration Reform Act of 2007, the Bush administration “tackled” the issue, “with as many administrative actions as possible.” Press Release, U.S. Dept. of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address, June 9, 2008. The challenged Rule is just one of a number of Administrative actions Appellees announced in 2008 to provide the increase in foreign labor Congress had refused to make. *See e.g.* Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 76,891-76,914 (Dec. 18, 2008)(Increasing the duration of stay for H-2A agricultural guest workers from one year to three years), Period of Admission and Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities—TN

Nonimmigrants, 73 Fed. Reg. 26,340-26,344 (Proposed May 9, 2008)(Increasing the duration of TN guest worker visas from one year to three years), Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg 49,109-49,122 (Proposed Aug. 20, 2008)(Increasing the duration of H-2B guest worker visas to three years).

Appellants have already suffered from the visible adverse affects of the Rule on their job market. Comp. ¶¶ 2-13. For example, several of the individual Appellants, including Chester and Picot, and members of the appellant organizations are seeing their job opportunities limited by the Rule. Compl. ¶¶ 3-6, 8, 12, 13. In searching for jobs, these Appellants have encountered job advertisements which they are qualified except that the employer has made being on OPT a requirement. *Id.* Job advertisements posted after the Rule went into effect have stated, “We are currently hiring graduates in Computer Science, Engineering and Business Administration on OPT” (A35); “Java/J2EE Developer (F1 on CPT/OPT Only).” (A36); “Recent graduates with Masters Degree in Computer Science or related field and OPT/CPT status preferred.” (A37); and “Need OPT’s/H1’s for Java.” (A38).

STANDARD OF REVIEW

The standard for review of a dismissal under Fed. R. Civ. Proc. 12(b)(6) is plenary. *Taliaferro v. Darby Twp. Zoning Bd.*, 10 458 F.3d 181, 188 (3d Cir. 2006). “To survive a motion to dismiss, a civil plaintiff must allege facts that raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).” *Victaulic v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007).

SUMMARY OF THE ARGUMENT

Appellants are STEM workers who are challenging a rule that creates more direct competitors for them by increasing the number of foreign workers in STEM fields. The district court concluded that although competition does establish an injury-in-fact, standing rules apply differently to businesses than to individuals. (A7, FN2). However, neither the Supreme Court nor any other circuit has ever limited competition as an injury-in-fact under Article III to businesses. The district court also ignored the pleadings that some Appellants operated businesses and pleadings of additional harms caused by the Rule change. The district court also incorrectly held that the Rule did not increase the number of STEM workers in spite of the record's explicit statement that the Rule causes such an increase.

To hold Appellants injuries were not traceable to the Rule, the district court did not address the competitive injuries actually pled. (A8). The pled injury of increased competition is the direct result of agency action itself and does not depend upon the actions of third parties.

The district court next held that Appellants could not establish redressability because a favorable ruling could not redress every injury possible to Appellants. This is not the standard set down by the Supreme Court where injury only needs to be relieved. *Larson v. Valente*, 456 U.S. 228,423 (1982). Furthermore, the district court based its analysis of redressability on injuries that had not been pled.

The district court simply misapplied the zone-of-interests test by looking to the purpose of the Rule rather than the authorizing statute for the protected interests. The Rule was promulgated under the Immigration and Nationality Act (*hereinafter*, "INA").

Protecting the wages and working conditions of U.S. workers is an explicit purpose of the INA. Ignoring the INA, the district court found the Rule sought to protect foreign workers and United States industry, preventing Appellants from satisfying the zone of interests test. (A9).

The district court went to the merits and held the Rule was authorized by statute. In making this holding, the district court failed to follow the Third Circuit's standard that requires comparing the Rule to the authorizing statute. The authorizing statute specifies that student visas are for temporary admission solely for study. However, the record has no explanation how this Rule relates to purpose of study. Instead, the purpose of the Rule is to identify labor shortages and supply United States industries with labor. In addition, Congress did not intend Appellees to have unfettered discretion in determining the length of time someone may remain in the United States on a student visa after the person has graduated and is enjoying a full time career.

Appellees promulgated this Rule using a highly arbitrary and capricious process. Appellees' justify the Rule by claiming that there is a "critical shortage" of STEM workers in the U.S. However, the only source they cite to establish such a shortage has nothing to do with labor shortages. Appellees ignored all contrary evidence in promulgating the Rule. The district court ignored the arbitrary and capricious factors pled in the complaint and improperly took Appellees' statements at face value in granting their Fed. R. Civ. Proc. 12(b)(6) motion. Furthermore, the record identifies no explicit statutory gaps the Rule fills that would give rise to *Chevron* deference.

The district court went to the merits of the case and held Appellees established good cause for waiving notice and comment. In doing so, the district court ignored the

Third Circuit’s standard for good cause. The record gives no explanation why the five year’s notice of H-1B quotas being exhausted and one year’s notice of the quota being exhausted on the first day did not permit the rule to be promulgated with notice and comment. The district court merely accepted Appellees’ assertion of “good cause” at face value and ignored the overwhelming body of precedent disfavoring such an action.

The district court did not give Appellants an opportunity to amend their complaint or make any findings as to futility of such amendments. Dismissal under these circumstances is directly contrary to longstanding Third Circuit procedures.

ARGUMENT

I. BACKGROUND

Appellants bring three causes of action under the APA challenging the lawfulness of the Rule: 1) The Rule is outside the statutory authority of Appellees in violation of 5 U.S.C. § 706(2)(C); 2) The Rule was implemented arbitrarily and capriciously in violation of 5 U.S.C. § 706(2)(A); and 3) The Rule was implemented without notice and comment without good cause, as required under 5 U.S.C. § 553(b), and in violation of 5 U.S.C. § 706(2)(D).

Through this action, Appellants seek to restore the OPT program to the *status quo* that existed prior to April 2008. The purpose of OPT was to allow foreign students a short period of work to further their education objectives and to prepare for careers in their home countries. This challenge is not a broad one to Appellees’ entire package of regulations intended to increase the number of guest worker programs. Instead, Appellants bring a limited challenge to the one specific rule, that directly harms them

by transforming OPT from a short period of work for education into an extended period to provide labor to the industry in which they work.

II. PRECEDENT SHOWS APPELLANTS CLEARLY HAVE STANDING TO BRING THIS ACTION.

Appellants pled a case where standing should have been established on its face. Appellants are workers in STEM fields, students who will soon enter STEM fields, and professional organizations representing workers in STEM fields. Compl. ¶¶2-16. Appellants are challenging a rule that significantly increases the pool of workers in STEM fields that directly compete with Appellants for STEM jobs. (A22). These allegations themselves establish the injury-in-fact of increased competition resulting from a Rule change, which is traceable to the Rule itself, and is redressable by declaring the Rule unlawful.

Additionally, Appellants suffered cognizable harms of wage depression, loss of job opportunities, displacement, and discrimination resulting from the larger pool of foreign workers created by the Rule. *Id.* Appellants demonstrated the immediacy of these injuries through exhibits of STEM job advertisements by employers already discriminatorily recruiting OPT workers made available under the Rule to the exclusion of Appellants. (A34-A39).

In the Third Circuit, Article III standing has not been a question when agency action has changed a plaintiff's market conditions. *See e.g. UPS v. U.S Postal Serv.*, 66 F.3d 621,626 (3d Cir. 1995) (“no dispute” regulatory change in market conditions was injury-in-fact), *Schering v. Food & Drug Admin.*, 51 F.3d 390, 395 (3d Cir. 1995)(Article III standing “uncontested”). The Supreme Court and other Circuits do the same. *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 154 (1970) (sellers of data

processing services “no doubt” had standing to test ruling allowing national banks to sell data processing services); *First Nat’l Bank & Trust Co. v. Nat’l Credit Union Admin.*, 988 F.2d 1272,1275 (D.C. Cir. 1992) (“no one questions appellants’ Article III standing”).

However, in this case, the district court chose to follow a twisted Himalayan path that takes the law of standing to a place it was never intended to go. See e.g. *Danvers v. Ford*, 432 F.3d 286, 294 (3d Cir. 2005)(“Injury-in-fact is not Mount Everest”).

The requirements for Article III standing are relatively straightforward.

First, the plaintiff must have suffered an “injury in fact” -- an invasion of a legally protected interest which is (a) concrete and particularized; and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). These standards are very generous and,

At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we “presume that general allegations embrace those specific facts that are necessary to support the claim.”

Id. at 561.

In addition to the Article III standing requirements, a plaintiff must satisfy the prudential standing requirements that 1) “the plaintiff generally must assert his own legal rights and interests;” 2) “the Court has refrained from adjudicating abstract questions of wide public significance which amount to ‘generalized grievances;’”

and 3) “the plaintiff’s complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464,471-472 (1982).

III. APPELLANTS’ PLEADINGS ESTABLISH THE INJURY-IN-FACT OF INCREASED COMPETITION RESULTING FROM ADMINISTRATIVE ACTION AND ADDITIONAL INJURIES RESULTING FROM THAT COMPETITION.

A. Increased competition resulting from an administrative action establishes Article III injury-in-fact.

The Supreme Court has expressly held that economic injury through changed market conditions to increase competition establishes “injury-in-fact.”

The [Supreme] Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III ‘injury-in-fact’ requirement It follows logically that any . . . petitioner who is likely to suffer economic injury as a result of governmental action that changes market conditions satisfies this part of the standing test.

Clinton v. N. Y., 524 U.S. 417, 433 (1998). Both the Supreme Court and Third Circuit typically recognize increased competition as injury-in-fact without discussion. *See e.g. Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970); *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971). *Nat’l Credit Union Admin. v. First Nat’l Bank*, 522 U.S. 479 (1998); *UPS v. U.S. Postal Serv.*, 66 F.3d 621, 626 (3d Cir. 1995) (Regulation allowing Postal Service to enter business’s market was an injury-in-fact), *Schering v. Food & Drug Admin.*, 51 F.3d 390 (3d Cir. 1995) (Approval of competing generic drugs was an injury-in-fact). As do other circuits. *See Adams v. Watson*, 10 F.3d 915 (1st Cir, 1993)(collecting cases).

The D.C., Federal, First, and Fifth Circuits have been explicit that increased competition from an agency action is an injury-in-fact. *New World Radio, Inc. v. Fed. Commc'ns Comm'n*, 294 F.3d 164, 172 (D.C. Cir. 2002)(D.C. circuit applies “‘competitor standing’ doctrine to an agency action that itself imposes a competitive injury, i.e., that provides benefits to an existing competitor or *expands the number of entrants in the petitioner’s market.*”), *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008)(applying the D.C. Circuit’s competitor standing doctrine), *Adams v. Watson*, 10 F.3d 915 (1st Cir, 1993)(collecting cases), *Tex. Cable and Telecomms. Assoc. v. Hudson*, 265 Fed. Appx. 210, 217 (5th Cir. 2008) (“[T]he regulatory allowance of increased competition in a plaintiff’s market has been established in our circuit as a clear injury-in-fact, even when such competition is inchoate.”). Appellants’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss (“Resp.”) cited extensive case law supporting this view.

B. Appellants have alleged the injury-in-fact of increased competition

This Circuit has never squarely addressed what must be shown to establish competitive injury-in-fact, because it has treated increased competition as injury-in-fact without discussion. *UPS*, 66 F.3d at 626, *Schering* 51 F.3d 390. Other circuits require that a plaintiff be a “direct competitor whose position in the relevant marketplace would be affected adversely by the challenged government action.” *Adams*, 10 F.3d at 922, *Lee v. Board of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 913 (2d Cir. 1997)(“[A] plaintiff must show that he personally competes in the same arena”). Courts have not required demonstration of specific instances of economic harms to demonstrate competitive injury. *Tex. Cable and Telecomms. Assn.* 265 Fed. Appx. at 213 (standing found

where association had not identified a specific member already injured from the increased economic competition); *Canadian Trade Alliance* 517 F.3d at 1332 (“Economic logic” was sufficient to establish the injury-in-fact of competition and empirical proof was not required”). The increased competition itself is the injury-in-fact.

Increased competition resulting from a rule has also been accepted as injury-in-fact in a wide variety of circumstances. *See Adams*, 10 F.3d 921-922 (collecting cases). Competition has been an injury-in-fact in cases where the competition has ranged from one-on-one (*e.g. UPS*, 66 F.3d 621) to a small number of plaintiffs challenging a rule affecting a national marketplace (*e.g. First Nat’l Bank*, 988 F.2d 1272, *Ass’n of Data Processing Serv. Orgs*, 397 U.S. 150).

Appellants are experiencing an increase in competition from a Rule change in the discrete market in which they work, the STEM fields. These facts establish the injury-in-fact of increased competition.

C. Appellants pled additional specific, provable harms that are concrete, particularized, actual and imminent resulting from the Rule.

Appellants’ complaint contains additional allegations of specific harms, in addition to competitive injury. *E.g.* Compl. ¶ 3 (“As a result of the additional competition authorized by this Rule, the Guild members have experienced loss of business opportunities and employment discrimination by employers who are seeking only OPT workers in types of jobs that Guild members are qualified and willing to accept.”). Such allegations are to be proven at the factual stage in proceedings, not in a 12(b)(6) motion.

The standard for an injury-in-fact is a “trifle of injury.” *Danvers v. Ford*, 432 F.3d 286, 294 (3d Cir. 2005). Any loss in income, any discriminatory job advertise-

ment, or any lost business opportunity encountered by any Appellant, or by any member of an Organizational Appellant can establish this trifle of injury.

Appellants have already demonstrated that the Rule produces an injurious effect to Appellants' market. (A35-A38). Appellants submitted exhibits of job advertisements specifically discriminating against Appellants in favor of the additional OPT workers supplied under the Rule. These ads represent lost job opportunities to the additional OPT workers for Appellants as a result of this Rule's promulgation. Accepting Appellants' allegations as true, Appellants have established injury-in-fact for the purposes of pleading.

D. The District Court's holding that the standing rules apply differently depending upon the type of plaintiff conflicts with the Supreme Court's statement of the constitutional standing requirements.

The district court's holding that there was no possibility that Appellants pleadings could support standing relied upon several interdependent errors that effectively revise established standing law. The district court held that increased competition is not an injury-in-fact for Appellants because "courts have applied the competitive standing doctrine only in limited circumstances and only when an agency action imposes a competitive injury to businesses, rather than to individuals such as job applicants." (A7, FN3). The district court's holding, that there is not one standing rule that applies to everyone but rather the rules *are different* and more permissible for businesses, is astounding and would be a major development in the law of standing should it be upheld by this court.

The district court's adoption of Appellees' argument that that competitive standing is applied only in "limited circumstances" and only to "businesses" conflicts with

the body of competitor standing case law. Other courts have found competitor standing outside of the business context. *See e.g. Shays v. Fed. Election Comm'n*, 414 F.3d 76, 86-87 (D.C. Cir. 2005)(applying the competitive standing doctrine to politics); *DeLoss v. Dep't of Housing and Urban Dev.*, 822 F.2d 1460 (8th Cir. 1987)(Administrative action caused property owners competitive injury-in-fact); *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58 (D.C. Dist. 2000)(Competitive injury in an election was injury-in-fact).

The district court's holding is also inconsistent with the competitor standing rules articulated by the Supreme Court. *See Clinton*, 524 U.S. at 433 (“[A]ny... petitioner who is likely to suffer economic injury as a result of governmental action that changes market conditions satisfies this part of the standing test”). There is no hint from the Supreme Court that changes in competitive conditions apply differently to businesses or that other types of plaintiffs have less access to the courts. The district court's creation of a “business-only” distinction to competitive injury for standing is an artificial one and will rewrite standing law if not reversed.

Applying the competitor standing doctrine to the job market is also consistent with accepted economic principles. Economic theory shows injury to Appellants by the Rule is likely. “An increase in labor supply will, other things being equal, tend to depress wage rates.” Paul A. Samuelson & William D. Nordhaus, *Economics*, p. 680 (13th Ed. 1989) (Addressing the effect of immigration policy on wages). Such economic principles are accepted under the law to establish standing:

While the law of supply and demand may sometimes be suspended by unpredictable marketplace decisions, and even lesser fortuities like bovine obstinacy, basic economic theory quite consistently transcends utter randomness by positing elemental laws of cause and effect predicated on actual market experience

and probable market behavior. Indeed, most ‘competitor standing’ cases depend on such core economic postulates.

Adams v. Watson, 10 F.3d 915, 922 (1st Cir. 1993). The effect of competition through supply and demand, with new entrants into Appellants’ marketplace through job competition, is no different from a business competing with new entrants to their marketplace. The district court was incorrect to find that injury-in-fact in this context was different than for a business.

E. To hold Appellants had no injury-in-fact, the district court ignored the pleadings that some appellants operated businesses.

More importantly, standing in this case does not depend upon whether standing rules for businesses are different from individuals. To find that the business distinction prevented Appellants from establishing injury-in-fact, the district court had to ignore the pleadings that some appellants actually operate businesses. Appellants represent STEM workers in a variety of circumstances. Compl. ¶¶ 3-16. These include appellants who sell or seek to sell their professional services through their sole proprietorships (Compl. ¶¶ 3, 7, 9) and wholly-owned corporations (Compl. ¶¶ 8, 13). Additionally, Appellants’ response brief explicitly stated:

Several of the individual Plaintiffs (Marson, Blackburn, Chester, Huber, Rothschild) and many of the organizational Plaintiffs’ members work on a contract basis as business entities (*e.g.* sole proprietorship, corporation, limited liability corporation), so the competition is both for jobs as employees and for the sale of services as small businesses.

Resp. p. 3. Even if competitor standing only applies to business, Appellants have pled an injury-in-fact.

F. The district court's holding that the Rule does not increase the number of workers competing with Appellants is in direct conflict with the administrative record.

As a last effort to find Appellants did not establish competitive injury, the district court made a plain error of fact: “Moreover, the IFR does not itself increase the number of visas available and does not, therefore, directly increase the number of applicants competing with Plaintiffs for jobs in this field.” (A8, FN6). This finding directly conflicts with the record being challenged. Appellees explicitly state that the Rule creates a, “significant expansion of the available pool of skilled workers.” (A22). It is also inconsistent with the court’s observation that, but for the implementation of the Rule without notice and comment, thousands of F-1 visa students on OPT would have had to leave the country. (A11, FN12). It appears that the district court confused H-1B visa numbers (that remain unchanged after the Rule) with the increased pool of OPT workers created by allowing “students” who have been unable to obtain H-1B visas to work for twenty-nine months.

IV. APPELLANTS’ INJURY-IN-FACT IS TRACEABLE TO THE RULE BECAUSE THE INCREASED POOL OF FOREIGN STEM WORKERS WAS INTENDED BY THE RULE.

Appellants pled the Rule will cause the injury-in-fact of increased competition because it increases the number of foreign workers in their fields. Compl. ¶¶ 3-16. The record states the Rule will significantly increase the pool of skilled workers. (A22). Traceability between the alleged injury and the complained of action is clear: The Rule itself created Appellants’ injury-in-fact, *i.e.* the change in market conditions.

A. The Rule promulgated by the Appellees causes the injury, so actions by third parties are irrelevant

The district court held there was no connection between the Rule and the Appellants' injuries, because Appellants' "employment status is dependent upon the independent actions of third parties." (A8).

Here the court completely misinterpreted the source of the injury. Appellants seek to reverse the harmful changes in job market conditions caused by Appellees in promulgating the Rule. The Rule itself is what causes Appellants' injury of increased competition. When the challenged action is "fairly...traceable to the challenged action" of Appellees, the court does not even have to look at "independent actions of third parties." *See Lujan*, 504 U.S. at 560. "If an agency's act creates 'a substantial probability' of an 'injury in fact,' the causation requirement of Article III is satisfied." *Adams*, 10 F.3d at 922-923 (finding increased competition caused by a Rule change meets traceability requirement).

The Rule adds a significant number of foreign STEM workers into the Appellants' market that would not otherwise be there. As a result, Appellants injury is fairly traceable to Appellees' actions. The "fairly traceable" requirement does not necessitate "injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154,168-169 (1997).

B. Appellants demonstrated that employers have already made choices that cause injury as a result of the Rule.

Furthermore, even if standing depended upon the actions of third parties, the district court misapplied the law by omitting the next step. If injury does depend upon the actions of third parties, it becomes the "burden of the plaintiff to adduce facts showing

that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.” *Lujan*, 504 U.S. at 562.

By dismissing Appellants’ complaint at the pleading stage, the district court refused to give them the opportunity to make such a demonstration. However, Appellants had already provided such facts in the record before the district court, in the form of exhibits of job advertisements specifically seeking workers on OPT provided under the Rule to the exclusion of Appellants. (A34-A39). These advertisements illustrate that employers are already making the choice to bypass Appellants in favor of workers on OPT and demonstrate the possibility of proving such injuries at the factual stage.

V. APPELLANTS’ INJURIES ARE REDRESSABLE BECAUSE DECLARING THE RULE TO BE UNLAWFUL REMOVES THE ADDITIONAL FOREIGN GUEST WORKERS CREATED BY THE RULE FROM APPELLANTS’ MARKET.

If Appellants prevail in this matter, the significant number of foreign workers made available under the Rule will be removed from the job market, or will never enter the relevant job market at all. (A22). This result reduces the number of workers in Appellants’ job market, and thus redresses their injury-in-fact, i.e. an increased number of direct competitors. It will also significantly reduce the hiring discrimination currently experienced by Appellants.

A. The district court’s holding that an injury must be completely redressed is inconsistent with the law.

The district court held that Appellants’ injuries, “are not likely to be redressed by a favorable decision because invalidating the proposed extension would neither eliminate competition for jobs in their field nor guarantee the improved economic conditions sought.” (A8). The court incorrectly stated the applicable law.

Redressability does not require eliminating competition, just relieving it. “[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.” *Larson v. Valente*, 456 U.S. 228,243 (1982). Removing the significantly increased pool of foreign workers created by the Rule (A22) reduces the number of direct competitors to Appellants, relieving their injury.

B. The district court’s analysis of redressability of injury does not reflect the injuries actually pled.

The district court also erred by basing its analysis of redressability on injuries that had not been pled. (A8)(“it appearing that Plaintiffs argue that their unemployment or under-employment is causally linked to the 17-month extension of OPT eligibility”). *Appellants have never made such a claim.* Compl. *passim*. The pleadings related to unemployed and underemployed Appellants allege injuries flowing from the changes in market conditions in response to the Rule (*e.g.* increasing competition, limiting job opportunities, lower wages), not an assertion that unemployment that existed at the time of the complaint was caused by the Rule. Compl. ¶¶ 6,8-11,14. These allegations establish that Appellants are currently seeking work, which is made more difficult by the Rule.

C. The district court’s analysis of standing ignores future injury.

The district court also ignored the likelihood of future injury. The Rule is not an agency action that will have a one-time effect, but is a continuing program that will have an adverse effect of indefinite duration. “Article III standing is satisfied when a plaintiff demonstrates that it has suffered a...threatened injury as a result of the defendant’s conduct which is capable of redress.” *Schering*, 51 F.3d at 395. *See also Hollingsworth*

v. Harris, 608 F.2d 1026, 1028 (5th Cir. 1979)(“[E]conomic ‘injury’ in the form of increased competition” adequate for standing where nursing home owner challenged administrative decision that would have allowed entry of competitor into market but where competition had not yet taken place).

To illustrate this type of injury, the two Berry student Appellants will be entering the STEM field job market upon graduation. Compl. ¶¶ 15-16. Stephanie and Stephen Berry will face an increased pool of OPT workers in the job market when they enter it. If the Rule remains in place, they will endure the increased competition from additional foreign workers in their fields resulting from the Rule for their entire careers.

VI. APPELLANTS HAVE PRUDENTIAL STANDING BECAUSE THE INTEREST THEY SEEK TO PROTECT IS EXPLICITLY RECOGNIZED IN THE STATUTES.

In addition to Article III standing, Appellants must show prudential standing under the zone of interests test. *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153. “Under the zone of interests test, plaintiffs must establish that the “interest [they] seek[] to vindicate is arguably within the ‘zone of interests to be protected or regulated by the statute’ in question.” (A9, FN8) citing *Dir., Office of Workers’ Compensation Programs, Dep’t Of Labor v. Newport News*, 514 U.S. 122, 128 (1995). Moreover, “[T]he ‘zone of interest’ test ‘is not meant to be especially demanding,’ and, ‘in cases where the plaintiff is not itself the subject of the contested regulatory action,’ the test is satisfied unless ‘the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.’” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

A. Protecting the working conditions for Appellants is an interest explicitly stated in the Immigration and Nationality Act.

Protecting the American labor market from an influx of foreign labor is an interest protected by statute. The INA is replete with examples of Congressional intent to extend such protection. Probably the clearest example is the explicit statement:

In general. Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that ... the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i). By admitting workers as students then having them work for extended periods of time to supply labor to industry, Appellees have circumvented the labor certification requirement. In addition, foreign students on OPT and their employers also do not pay Social Security and Medicare taxes. 26 U.S.C. § 3121(b)(19).

During the last major revision of the OPT program in 1991, the Department of Justice highlighted the national interest in protecting U.S. workers.

The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every opportunity to further their educational objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 ... demonstrated a clear Congressional concern about the Service's plan to expand student employment authorization without any built-in labor safeguards.

56 Fed. Reg. 55,608 (1991). The court ignored that Congress has expressly stated concerns about expanding student employment.

Case law also recognizes that protecting American workers is a key national interest in the Immigration and Nationality Act. *See Wang v. Immigration & Naturalization Serv.*, 602 F.2d 211,217 (9th Cir. 1979)("The purpose of labor certification under 8

U.S.C. § 1182(a)(14) is to exclude aliens competing for jobs American workers could fill and ‘protect the American labor market from an influx of both skilled and unskilled foreign labor.’ S.Rep.No.748, 89th Cong., 1st Sess., reprinted in (1965)”). The interest Appellants seek to protect here goes well beyond “marginally related;” it is an express statutory interest enacted by Congress and affirmed by case law.

B. The district court’s holding that Appellants did not have prudential standing relied on misapplying the law and ignoring the facts.

To hold Appellants did not meet the zone-of-interests test, the district court erred in applying the test to the Rule rather than to the statute that protects Appellants’ interest.

According to the district court,

[I]t appearing that Plaintiffs have also failed to satisfy the zone of interests test required to establish prudential standing because the *purposes of the IFR* are to improve the U.S.’s competitive position for students and workers in these fields while easing visa application procedures for OPT students, not to increase competition within the U.S. for these jobs or harm American workers in these professions.

(A9)(emphasis added). This is a clear misapplication of the zone-of-interest test. The zone-of-interest test should be applied to the statute as set forth in *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 154.

The district court further erred in applying the law to the facts by holding that Appellants only raised a generalized grievance. It is correct that, “a plaintiff raising only a generally available grievance about government - claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large - does not state an Article III case or controversy.” (A8, FN7 citing *Lujan*, 504 U.S.

at 574). However, this holding does not fit the facts in the record, or the pleadings by Appellants.

Appellants and other STEM workers only represent a small segment of the U.S. workforce. *See e.g.* National Science Board, Science and Engineering Indicators, 2008, p. 3-8 available at <http://www.nsf.gov/statistics/seind08/> (“[W]orkers with S&E [STEM] skills make up only a small fraction of the total U.S. civilian labor force...”). The record shows that the increase in foreign workers under *this rule* will only occur in STEM fields, not the general employment pool. (A17). The harm claimed is to a small percentage of the U.S. workforce in the STEM fields in which Appellants work. Compl. ¶¶ 3-16. The ultimate relief sought, removing the additional foreign workers in STEM fields created by the Rule, will only affect the STEM labor pool. The relief directly and tangibly benefits Appellants, more than the public at large. The challenge here is to the one rule that affects only Appellants’ professions. The district court’s characterization of this harm as a generalized grievance simply does not fit the record and the pleadings of the case.

VII. THE RULE IS UNLAWFUL BECAUSE IT CONFLICTS WITH THE STATUTORY LIMITATION THAT F-1 VISA STUDENTS BE ADMITTED SOLELY FOR AUTHORIZED STUDY.

The first cause of action is a question of statutory interpretation. It alleges the Rule is not authorized by statute. Compl. ¶¶ 40-44. This cause of action is explicitly authorized under the APA. 5 U.S.C. § 706(2)(C). The complaint specifically identified two aspects of the Rule that were inconsistent with the statute: 1) that 8 U.S.C. § 1101(a)(15)(F)(i)(*hereinafter* “the Student Visa Statute”) does not authorize Appellees to identify labor

shortages; and 2) that the Student Visa Statute does not authorize Appellees to correct labor shortages through regulatory action. *Id.*

This is a simple cause of action that asks the question “Is the Rule authorized by statute?” In its dismissal under Fed. R. Civ. Proc. 12(b)(6), the district court went beyond the pleadings and addressed the merits, holding that “DHS is within its authority to promulgate the IFR” (A10, FN10). The district court made several errors of law and statutory interpretation in reaching this holding.

A. Determining the lawfulness of a rule requires an examination of the provisions of the authorizing statute.

The standard of review for this cause of action is straightforward. “A claim that agency action is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority.” *W. Union v. Fed. Comm’ns Comm’n*, 541 F.2d 346, 354 (3d Cir. 1976). “The terms of the enabling statute establish the scope of agency authority and the factors to consider.” *Yeboah v. U.S. Dept. of Justice*, 345 F.3d 216, 221 (3d Cir. 2003). “What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.” *Id.* citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). Regulations that fill explicit statutory gaps are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984).

The first step in determining whether the Rule is authorized by statute is to examine the enabling statute. The Student Visa Statute is the enabling statute. It authorizes admission to

(i) [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...

8 U.S.C. § 1101(a)(15)(F)(i). The statute imposes several requirements for admission on an F-1 student visa: the alien must 1) maintain a residence in a foreign country which he has no intention of abandoning; 2) be a bona fide student; 3) enter the United States temporarily; and 4) enter the United States solely for the purpose of study. *Id.*

One can see from the statute that the OPT program operates in a gray area that appears to conflict with the solely for study and the temporary admission requirements. However, prior to the Rule, OPT operated within two relevant constraints: Foreign students' OPT work authorization was to "further their educational objectives in this country." 56 Fed. Reg. 55,608 (1991); and the OPT program was "intended to prepare students for careers in their home countries." *Id.* Leading authorities on immigration agree with this assessment. *See Austin Fragomen et al.*, Immigration Procedures Handbook, Vol. 1, § 2:42, pp. 2-88 (2004)(OPT, "cannot be used by a U.S. employer to train a foreign national for a permanent position in the United States."); Rodney A. Malpert & Amanda Peterson, Business Immigration Law, § 2-07[1][a] (2002)(In employing a student on OPT, "the employer's intent may not be to train the individual for permanent employment in the United States."). These regulatory principles kept OPT from facially conflicting with the statutory constraints of temporary admission and admission solely for study.

B. The Rule's purpose of using the OPT foreign student training program to provide labor to industry and remedy perceived labor shortages is not consistent with the temporary admission and solely for study requirements of F-1 visas.

The record gives no educational justification for the Rule whatsoever. Instead, it focuses on identifying fields with labor shortages, (A17), and supplying labor to employers in the United States in the identified fields. (A13-A25). Appellee Chertoff's description of the Rule demonstrates its lack of educational and temporary purpose:

What this does is it allows us to continue to keep smart, well-educated foreign students who want to come over and ultimately get a work visa, allows us to keep them in place doing productive work while they are awaiting the work visa process.

Press Release, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the State of Immigration Address, U.S Dept. of Homeland Security, June 9, 2008.

Comparing the enabling statute, the Student Visa Statute, to the provisions of the Rule, it is apparent that the new Rule is not authorized. Did Congress contemplate regulatory action under the Student Visa Statute to identify labor shortages? Did Congress contemplate regulatory action to allow alien students admitted on F-1 student visas to remain in the United States to remedy labor shortages? Did Congress consider someone who has completed their formal educational program and becomes unemployed while on OPT a *bona fide* student? The answer to all of these questions is *no*.

The Student Visa Statute is explicit that Congress intended temporary admission solely for the purpose of study. Other sections of the code further demonstrate this intent. Congress exempted those on F-1 visas from Medicare and Social Security Tax, illustrating Congress's expectation that most aliens admitted on F-1 student visas

would return home. 26 U.S.C. § 3121 (b)(19). Congress imposed the requirement that applicants for F-1 student visas must prove that they will return home (be a “non-immigrant”) before they can be admitted. 8 U.S.C. § 1184(b). Congress imposed annual quotas on H-1B visas, setting the policy that not everyone who might otherwise be eligible for such a visa will get one. 8 U.S.C. § 1184 (g). In creating a Rule whose expressed purpose is to keep people on F-1 student visas who were unable to get work visas in the country, Appellees treated the constraints that Congress put on F-1 visa students—temporary admission and solely for the purpose of study—as a problem they could overcome through regulation. Congress could never have contemplated regulatory use of the Student Visa Statute to identify and solve labor shortages. As such, the Rule is not authorized by statute.

C. The district court failed to apply the Third Circuit’s standard of review to the Rule, including failing to examine the provisions of the enabling statute, in holding the Rule was authorized.

The district court made the holding of law that the Rule was authorized by statute, “Congress also conferred regulatory authority upon the DHS [under 8 U.S.C. § 1184(a)(1)] to set the time period in which nonimmigrants can remain in the country. This means that the DHS is within its authority to promulgate the IFR.” (A10, FN10). To reach that holding, one that precludes any possible pleading that the Rule is not authorized, the district court made several errors.

The district court’s opinion makes no mention of the provisions of the Student Visa statute. (A5-A11). The Third Circuit’s standard for determining whether a rule is authorized requires making such an examination. *W. Union v. Fed. Commc’ns Comm’n*,

541 F.2d at 354. Appellants are puzzled how the court could hold the Rule is authorized without examining the provisions of the statute under which the Rule operates.

D. The district court failed to apply 8 U.S.C. § 1184(a)(1) in its entirety to the Rule.

The district court selectively chose to apply fragments of 8 U.S.C. § 1184(a)(1) to hold the Rule lawful, rather than applying the statute in its entirety. The opinion adopted Appellees quotation from the statute,

The 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...

(A10, FN10), quoting 8 U.S.C. § 1184(a)(1). However, that phrase is a fragment that omits dispositive language at the end of that same sentence.

... [], to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States.

8 U.S.C. § 1184(a)(1). In the first clause, Congress gave Appellees the authority to set time periods to remain in the country, while in the latter clause Congress required that the alien maintain the status for which he was admitted. Subsection 1184(a)(1) is not a blanket grant of broad discretionary authority to the Secretary to set durations of stay for populations of aliens within a statutory non-immigrant classification, as the district court incorrectly concluded.

E. The district court applied 8 U.S.C. § 1184(a)(1) in isolation to the Rule and ignored the enabling statute.

Next, the district court improperly relied on an isolated section of the code while ignoring the specific enabling statute for F-1 student admission, 8 U.S.C. § 1101(a)(15)(F)(i) (the Student Visa Statute). It is a basic principle of statutory construction that “when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly

expressed congressional intention to the contrary, to regard each as effective.” *Fed. Commc’ns Comm’n v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 304 (2003). The court is “not at liberty to pick and choose among congressional enactments.” *Pittsburgh & L.E.R. Co. v. Railway Labor Executives’ Ass’n*, 491 U.S. 490, 509 (1989). In the district court’s interpretation, the first clause of § 1184(a)(1) gets full weight and § 1101(a)(15)(F)(i) becomes a nullity.

The district court ignored that Appellants’ actual challenge to is whether Appellees can increase the length of time an alien can remain on a student visa *for the purpose of supplying labor to United States employers*. Appellees’ authority to grant longer periods of admission *for study* is not at issue here. If the record had established some educational need for students in STEM fields to work in the United States for 29-months to be adequately prepared for careers in their home countries, this case would be entirely different. However, nothing in the record shows that Appellees even considered educational needs when drafting the 29-month duration extension provision in the contested Rule. (A13-25).

The implications of the district court’s holding are disturbing. If § 1184(a)(1) gives Appellees unfettered discretion to set visa durations, as the district court has held, Appellees can nullify any Congressionally imposed requirement for temporary admission in any visa, simply by modifying the elements of admission in the statute through regulation.

The new maximum possible duration of OPT under the Rule is 35 months (29 months under 8 C.F.R. § 214.2(f)(5)(iv)(C), plus an extension of up to 6 months under § 214.2(f)(5)(iv)(A)). This period is nearly as long as the 36-month term (renewable once)

of an H-1B guest worker visa. 8 C.F.R. 214.2(h)(9)(iii)(A)(1). If the district court's holding were affirmed, Appellants could eliminate any future need for students in STEM occupations to acquire work visas by implementing another increase in the duration of OPT. Taken to its extreme, the district court's reasoning gives Appellees the power to extend the duration of OPT for students to work in the United States for decades—no matter the purpose for which the visa was actually authorized.

Congress did not intend to grant USCIS that practically unlimited discretion in implementing the foreign student visa program. Both §§ 1101 and 1184 were created by the McCarran-Walter Act of 1952, Pub. L. No. 414-477, 66 Stat. 163. In enacting them together, Congress had to intend §§ 1101 and 1184 to work together. Any term of duration for an F-1 student visa would have to conform to the requirements of § 1101(a)(15)(F)(i). Together, they should properly read that Appellees have the authority to set the term of F-1 admission for temporary admission solely for the purpose of study. Subsection 1184(a)(1) does not give Appellees the authority to set the term of F-1 admission to any length of time for any reason they dream up, including remedying labor shortages.

VIII. THE RULE IS UNLAWFUL BECAUSE IT WAS IMPLEMENTED ARBITRARILY AND CAPRICIOUSLY UNDER A PROCESS WHERE NO EVIDENCE THAT DID NOT FURTHER THE CAUSE OF THE RULE WAS CONSIDERED.

The second cause of action is that Appellees acted arbitrarily and capriciously in implementing the Rule. Compl. ¶¶ 45-47. The record shows that, in making the Rule, Appellees considered factors Congress had not intended, ignored important factors

they should not have considered, developed explanations that were counter to the evidence, and they came up with an implausible result.

A. Appellants' complaint alleges facts to support the claim that the Rule was implemented arbitrarily and capriciously.

An agency action is arbitrary and capricious when

[T]he agency 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. The reviewing court should not attempt itself to make up for such deficiencies; [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given.

CBS Corp. v. Federal Comm'n's Comm'n, 535 F.3d 167, 174 (3d Cir. 2008).

The complaint states, "In announcing the Rule, Defendants provide no explanation how this Rule furthers the purpose of 'pursuing [] a course of study.'" Compl. ¶ 26. Under a statute authorizing admission solely for the purpose of study, this should be a key consideration in rulemaking. However, the record identifies no educational purpose for the Rule. (A13-A25).

The complaint also states, "The new rule allows foreign 'students' on F-1 visas with degrees in STEM fields to work up to 29-months for the purpose of solving a "critical shortage" of workers in fields identified by the Defendants." Compl. ¶ 33. This allegation complements the previous one. The authorizing statute for the Rule specifies admission *solely for the purpose of study*. 8 U.S.C. 1101(a)(15)(F)(i) (the Student Visa Statute). The need to identify and solve perceived labor shortages is a factor Appellees should not have considered in making the rule. While this is not an exhaustive list of

facts illustrating arbitrary and capricious rulemaking, it should be sufficient for notice pleading.

In any event, an inspection of the Federal Register shows that the Appellees considered no factors whatsoever that did not advance the cause of the Rule. (A13-A25). In sharp contrast, during the 1991 changes to OPT, the potential effect of the proposed regulations on U.S. workers was a major concern for regulators. 56 Fed Reg. 55,608. For this Rule, its impact on U.S. workers is not mentioned. (A13-25). While Appellees are entitled to deference in how they weigh the various competing factors during the rulemaking process, in this case, Appellees completely failed to weigh any competing factors.

B. The district court ignored the pleadings in holding that Appellants state no facts that tend to establish Appellees acted arbitrarily and capriciously.

Ignoring the complaint, the district court's opinion claims Appellants stated "no facts that tend to establish that DHS acted arbitrarily and capriciously." (Opinion A10). As shown above, the complaint contains such facts. If those pleadings were not sufficient, Appellants should have been granted leave to amend. *See Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) *infra* at Sec. VIII.

Additionally, the administrative record was mailed to Appellants on October 29, 2008, just two days before the Opinion was issued. Neither Appellants nor the district court had the opportunity to review the full record before the case was dismissed. Now, having seen the full record, Appellants are in a position to identify additional examples of the arbitrary and capricious nature of the Rule. The court should have given Appellants that opportunity. *Phillips*, 515 F.3d at 236.

C. The Chevron Doctrine does not apply to the Rule because it only applies to gap filling.

The court next erred in misapplying the *Chevron Doctrine* by omitting an important part of the *Chevron* opinion. Citing *Chevron U.S.A. v. Natural Resources Def. Counsel*, 467 U.S. 837, 844 (1984), the district court states

Pursuant to the Chevron Doctrine, when Congress expressly delegates the authority to make regulations such as these, “[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”

(A10-A11, FN11). In holding the *Chevron Doctrine* gave Appellees authority to make the Rule, the district court omitted *Chevron’s* preceding sentence:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Chevron, 467 U.S. at 843-844. In order for the *Chevron Doctrine* to apply to “regulations such as these” there must be explicit gaps.

No such gaps are identified in the opinion or the record because none exist. (A4-A11, A13-A25). The purpose of the Rule was to change the nature of OPT, not to fill legislative omissions by Congress. This improper purpose is clear from Appellants’ press release describing the Rule:

[I]mmigration reform remains a top priority for the Bush Administration. *In the absence of legislation from Congress* we’ve been proactively tackling this issue head on *with as many administrative actions as possible*.

Press Release, U.S. Dept. of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and Department of Commerce Secretary Gutierrez at the

State of Immigration Address, June 9, 2008 (emphasis added). Reform in the *absence of Congressional action* is not gap filling entitled to *Chevron* deference.

But for this Rule, aliens on F-1 student visas in STEM fields who have not received an H-1B visa would have to return home at the expiration of OPT. Congress did not leave this as a gap. Instead, Congress mandated that F-1 visa holders' stay be temporary and only for the purpose of study. 8 U.S.C. § 1101(a)(15)(F)(i). Congress even expressly required that F-1 visa holders maintain a residence for them to have a place to return. *Id.* Congress thus expressly provided for the situation where an alien student is unable to get a guest worker visa. Without explicit gaps left by Congress for Appellees to fill, the *Chevron Doctrine* is irrelevant to this case.

D. The contents of the record demonstrate a “highly capricious” rulemaking process.

The Rule's *raison d'être* is a claimed “critical shortage” of STEM workers in the United States. (A16-A17). The Federal Register treats as axiomatic the existence of a STEM worker shortage. *Id.* However, a “regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.” *Turner Broadcasting System, Inc. v. Fed. Commc’ns Comm’n*, 512 U.S. 622, 664 (1994)(quoting *Home Box Office, Inc. v. Fed. Commc’ns Comm’n*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

This is an extreme case, where the capricious nature of the Rule goes beyond Appellees failure to consider all the factors. A closer look at the record before the district court demonstrates how the rulemaking process here had broken down. Appellees offered just a single citation to a secondary authority to establish the “critical shortage” of STEM workers:

The National Science Foundation, *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future* (2007), pp. 78–83 (describing the critical shortages of science, math, and engineering talent in the United States).[FN6] (FN6 This publication may be found at http://www.nap.edu/catalog.php?record_id=11463).

(A16). However, the cited section has nothing to do with labor shortages; the phrase “critical shortage” occurs nowhere in the entire report; and the full report does not conclude there is a shortage of STEM workers.

The record’s inability to demonstrate a “critical shortage” of STEM workers is not surprising, given the lack of data to support that conclusion. *See e.g.* the testimony of Dr. Michael S. Teitelbaum, Vice President, Alfred P. Sloan Foundation before the Subcommittee on Technology and Innovation Committee on Science and Technology U.S. House of Representatives, November 6, 2007 *available at* http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/tech/06nov/Teitelbaum_testimony.pdf.

[N]o one who has come to the question with an open mind has been able to find any objective data suggesting general “shortages” of scientists and engineers. The RAND Corporation has conducted several studies of this subject; ... saying that not only could they not find any evidence of shortages, but that instead the evidence is more suggestive of surpluses.

Although well known, none of the RAND studies were considered in the record either. *See e.g.* Rand Corporation, *Is the Federal Government Facing a Shortage of Scientific and Technical Personnel?*, 2004 *available at* http://www.rand.org/pubs/research_briefs/2005/RB1505.pdf (“U.S. STEM Workforce Shows No Sign of Impending Shortages”).

In fact, none of the ample evidence showing that no shortage of STEM workers exists is even mentioned in the record prepared by Appellees. *See e.g.* B. Lindsay Lowell & Hal Salzman, *Into the Eye of the Storm: Assessing the Evidence on Science and Engineering Education, Quality, and Workforce Demand*, The Urban Institute, Oct. 2007, p. 34-39, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1034801: (“[T]he data we have reviewed suggest that secondary and higher education systems are providing more than adequate supply [of STEM workers] for industry’s hiring needs”). Appellees refused to even consider any evidence that the premise upon which the Rule is based is a false one.

The purpose of the Rule is to solve a “critical shortage” of STEM workers. The extended 29-month OPT period is only available to those in fields where Appellees have identified such a shortage. (A17). As shown, Appellees relied on a bogus citation to justify the Rule and ignored all evidence that the premise upon which the Rule was promulgated was a false one. These errors take the rule making process beyond capricious into the realm of highly capricious. *See Turner Broadcasting System, Inc.*, 512 U.S. at 664.

IX. THE RULE WAS UNLAWFULLY IMPLEMENTED WITHOUT NOTICE AND COMMENT EVEN THOUGH APPELLEES HAD AT LEAST A YEAR’S NOTICE TO PREPARE THE RULE.

A. The Third Circuit has a clear standard for what constitutes “good cause” under the APA.

A court must begin with the premise that it “shall hold unlawful and set aside agency action found to be without observance of procedure by law.” *Natural Resources Defense Council, Inc. v. U.S. EPA*, 683 F.2d 756, 767 (3d Cir. 1982). A rule is exempt from notice and comment in limited circumstances:

[W]hen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C § 553(b)(B). “This exception is to be narrowly construed.” *Am. Steel & Iron Inst. v. Env’tl. Prot. Agency*, 568 F.2d 284,292 (3d Cir. 1977). The Third Circuit has explained what constitutes “good cause”:

“Impracticable” means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings...“Public interest” supplements the terms “impracticable” or “unnecessary”; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure. Senate Rept. No. 752, 79th Congress, 1st Session at 16. (1945).

Id., 568 F.2d at 291; *See also Zhang v. Slattery*, 55 F.3d 732, 746 (2nd Cir. 1995)(Using the same standard).

Appellants alleged the plain statement of fact needed to support this cause of action. “There were no circumstances that justified that waiver.” Compl. ¶¶ 50. The burden was on the rulemaking agency to establish good cause on the record. Appellees failed to meet this burden because they cannot meet the Third Circuit’s standards for establishing good cause.

B. Appellees’ claim of “good cause” does not meet the standard in the Third Circuit for the public interest waiver of notice and comment.

Appellees claimed the Rule was exempt from the notice and comment as a public interest, stating:

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. This interest would be seriously damaged if the

extension of the maximum OPT period to twenty-nine months for F-1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F-1 students complete their studies and, without this rule in place and effective, would be required to leave the United States. Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to issue this rule as an interim final rule.

(A19).

The “Public Interest” exception applies in two circumstances: 1) when there is a lack of public interest in a rule; or 2) public rule making procedures would prevent an agency from operating. *Am. Steel & Iron Inst.*, 568 F.2d at 291. The first circumstance for this exception does not apply to this case. The Rule has attracted great public interest. Appellants’ after-the-fact public comment on the Rule attracted nearly 800 comments. *Available at* www.regulations.gov.

The other circumstance for the “Public Interest” exception “requires that public rule-making procedures shall not prevent an agency from operating.” *Am. Steel & Iron Inst.*, 568 F.2d at 291. That situation is not present here either. The circumstance claimed to create the need for the Rule was the exhaustion of the H-1B quota. (A22)(“[T]he oversubscription of the H-1B program makes obtaining even temporary work authorization an uncertain prospect.”). However, this condition had existed since FY 2004, and the quota was exhausted on the first day applications were received the year before the Rule was promulgated. No interruption in the Appellees agency’s operations ever occurred as a result.

C. Appellees did not demonstrate impracticability in the administrative record.

Although not claimed in the record, Appellees have not met their burden of establishing impracticability either. “[T]he imminence of a deadline or the ‘urgent need for

action’ is not sufficient to constitute ‘good cause’ within the meaning of the APA, where it would have been possible to comply with both the APA and with the statutory deadline.” *Natural Res. Def. Council, Inc. v. U.S. Env’tl. Prot. Agency*, 683 F.2d 752,764 (3d Cir. 1982).

The H-1B quota had been exhausted every year since FY 2004, and was exhausted on the first day applications were taken for FY 2008—in April of 2007. Appellees had five years’ running notice of exhaustion of the H-1B quota and a year’s notice of the quota being exhausted on the first day applications were accepted from the previous fiscal year. However, the record contains no explanation why a regulation so urgent that it required resorting to the clearly disfavored waiver of notice and comment could not have been promulgated in a year or more. *See U.S. Steel Corp. v. U.S. Env’tl. Prot. Agency*, 649 F.2d 572, 575-576 (8th Cir. 1981)(An agency must demonstrate the impracticability of notice and comment in the face of a deadline).

Furthermore, even if notice and comment had been impracticable, Appellees should have implemented a temporary measure, rather than one intended to remain substantially in place permanently. “Common sense suggests that any administrative action taken in a rare ‘emergency’ situation ..., while perhaps necessarily ‘immediately effective,’ need only be temporary, pending public notice-and-comment procedures.” *Am. Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153,1157 (D.C. Cir. 1981). “[O]nce an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation that is embodied in section 553.” *Id.* at 1158. Such a tem-

porary measure would have allowed the public to give input on the wisdom of such a measure before casting it in stone as it is now. In the record, Appellees have described the Rule as an “Interim Final Rule.” (A13). Yet the Defendants’ state, “This interim rule also provides a permanent solution to the ‘capgap’ issue.” (A13). It is clear from the record that Appellants waived notice and comment for a rule they intended to remain substantially in place permanently. *See* (A17).

D. In holding that waiver of notice and comment was justified, the district court did not apply the Third Circuit’s standard of review.

Ignoring the Third Circuit’s instruction that the “good cause” exception be “narrowly construed”, *Am. and Iron Inst.*, 568 F.2d at 292, the district court gave it the broadest possible interpretation possible.

Plaintiffs incorrectly allege that DHS provided no justification for giving the IFR immediate effect. In fact, DHS explained that “good cause” was established because delayed implementation would be “contrary to the public interest” for thousands of students whose visas, arranged through OPT, would have expired during public consideration of the IFR. If the IFR had not been given immediate effect through the “good cause” exception, students already holding approved H-1B petitions would have had to terminate employment and either leave the United States or enroll in another course of study to maintain their F-1 status at the end of their OPT terms. Such a situation would have been contrary to the expressed public interest in keeping these qualified graduates from going to other countries to find work in these fields.

(A11).

The district court improperly held there was “good cause” without applying the Third Circuit’s standard for “good cause.” *Am. Steel & Iron Inst.*, 568 F.2d at 291. The opinion gives no explanation at all how the Rule meets the “public interest” standard. Instead, the district court accepted as “good cause” the Appellees mere declaration of “good cause” on the eve of a self-created deadline whose reoccurrence the rule maker

had been aware of for five years. This Circuit has expressly held such actions do not constitute “good cause.” *Natural Res. Def. Council*, 683 F.2d at 765 (Raising the “good cause banner” on the eve of a deadline is not good cause).

The district court also improperly allowed the claimed purpose for the Rule (keeping STEM foreign students on OPT in the U.S.) to serve as the justification for good cause. *See Mobil Oil Corp. v. Dep’t of Energy*, 610 F.2d 796, 803 (Em. Ct. App. 1979)(“It is axiomatic that a mere recital of good cause does not create good cause.”).

Moreover, the situation described by the district court, where the OPT eligibility of an alien student with an approved H-1B petition could expire before the H-1B start date, has existed since the H-1B program’s inception in 1990. Addressing a situation that has existed for nearly three decades does not justify waiver of notice and comment. *See* (A18, ¶B).

X. THE DISTRICT COURT DID NOT FOLLOW THE THIRD CIRCUIT’S PROCEDURE FOR DISMISSAL UNDER FED. R. CIV. PROC. 12(B)(6).

The district court dismissed this case without following the procedure used in this circuit. The Third Circuit has established that a district court should use the following procedure before dismissing a complaint for failure to state a claim.

We suggest that district judges expressly state, where appropriate, that the plaintiff has leave to amend within a specified period of time, and that application for dismissal of the action may be made if a timely amendment is not forthcoming within that time. If the plaintiff does not desire to amend, he may file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate.

Phillips, 515 F.3d at 236; *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004); *Borelli v. Reading*, 532 F.2d 950, 951, n. 1 (3d Cir. 1976). “[I]f a complaint is vulnerable to 12(b)(6)

dismissal, a District Court must permit a curative amendment unless an amendment would be inequitable or futile. *Id.*

There was no finding in the opinion that a curative amendment would be inequitable or futile. Also, no finding was made that Appellants failed to file a timely amended pleading or had filed notice of their intention to stand on the complaint. As such, under *Phillips*, dismissal was improper.

CONCLUSION

For the forgoing reasons, Appellants request that:

The District Court's order of dismissal October 31, 2008 be vacated and remanded; and

The District Court's holding of law that the Rule was authorized by statute be reversed and remanded; and

The District Court's holding of law that waiver of notice and comment was proper be reversed and remanded; and

Appellants be granted leave to amend their complaint.

Respectfully submitted:



John Miano

Michael M. Hethmon
Garrett Roe

Immigration Reform Law Institute
Attorneys for Appellants
February 2, 2009

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,162 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because it is typeset in the proportionally-spaced 14 pt. Times New Roman PS MT serif font.

A handwritten signature in black ink, appearing to read "John Miano", is centered on the page. The signature is written in a cursive, flowing style.

John Miano
Immigration Reform Law Institute
Attorney for Appellants
February 2, 2009

CERTIFICATION OF ADMISSION UNDER LAR 28.3(D)

Appellants certify that Attorneys John Miano and Michael Hethmon, whose names appear on this brief, are members of the Bar of the Third Circuit Court of Appeals.

A handwritten signature in black ink, appearing to read "John Miano", is centered on the page. The signature is written in a cursive, flowing style.

John Miano
Immigration Reform Law Institute
Attorney for Appellants
February 2, 2009

ADDENDUM REQUIRED UNDER FED. R. APP. P. 28(F)

8 U.S.C. § 1101 (A)(15)(F)(I)(LEXIS 2008)

(15) The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

[**** §§ (A)-(E) omitted ****]

(F) (i) 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 consistent with section 214(l) [8 USCS § 1184(l)] at an established 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 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, (ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien’s qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

8 U.S.C. § 1103 (A)(1) (LEXIS 2008)

§ 1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security.

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act.

8 U.S.C. § 1184 (A)-(B) (LEXIS 2008)

1184. Admission of nonimmigrants

(a) Regulations.

*(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248 [8 USCS § 1258], such alien will depart from the United States. [*** Admission to Guam and visa waiver duration omitted ***]*

*(2) [*** Duration of O and P Visas omitted ***]*

*(b) Presumption of status; written waiver. Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15) [8 USCS § 1101(a)(15)], and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) [8 USCS § 1101(a)(15)(H)(i)] except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15) [8 USCS § 1101(a)(15)]. [***International Organizations Immunities Act provisions omitted ***].*

56 FED RED. 55,608

LEXSEE 56 FR 55608
DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

AGENCY: Immigration and Naturalization Service,
Justice.

8 CFR Parts 214 and 274a

Nonimmigrant Classes; Students, F and M Classifications
[INS No. 1403-91]

RIN 1115-AC33
56 FR 55608

October 29, 1991

ACTION: Final rule.

SUMMARY: Section 221(a) of the Immigration Act of 1990 (IMMACT 90), provides a three-year off-campus employment program for F-1 students. To implement this off-campus employment provision and to clarify and streamline the current procedures for F-1 student employment authorization and extension of stay, the Immigration and Naturalization Service (the Service) is amending the F-1 student regulations. These regulations will improve efficiency in the administration of the student-school program.

EFFECTIVE DATE: October 29, 1991.

FOR FURTHER INFORMATION CONTACT: Pearl B. Chang, Senior Immigration Examiner, Immigration and Naturalization Service, Examinations Division, 425 I Street, NW., room 7122, Washington, DC 20536, telephone (202) 514-3240.

TEXT: SUPPLEMENTARY INFORMATION:

Background

[***1. Pilot Off-campus Employment Program - Omitted***]

2. The Proposed Rule.

On June 13, 1991, the Service published a proposed rule with request for comments, in the Federal Register at 56 FR 27211, to implement the pilot off-campus employment provision of IMMACT 90. *In the same proposed rule, the Service also has clarified and simplified the current procedures for F-1 student employment authorization and extension of stay. The proposed changes were designed to reduce the paperwork burden for the students and schools, and to improve the F-1 student program's operational efficiency.*

It should be noted that the proposed rule incorporated the public comments to an earlier proposed rule, 55 FR 28767 (1990), that was issued to implement the standard employment authorization application, Form I-765. The proposed rule of July 13, 1990, which was not finalized, would have required students seeking employment off-campus to apply, in person, for an employment authorization document (EAD), Form I-688B, to the Service district office having jurisdiction over them.

[***Discussion of Comments - Omitted***]
[***Extension of Stay - Omitted***]
[***On-campus Employment. 8 CFR 214.2(f)(9)(i) - Omitted ***]
[***Education Affiliation by Contract - Omitted***]
[***On-campus Employment Based on Financial Aid - Omitted***]
[Employment with On-Campus Commercial Firms - Omitted]
[***On-campus Employment Between Two Educational Programs - Omitted***]
Pilot Off-campus Employment Program. 8 CFR 214.2(9)(ii)
[***General Reaction - Omitted]
[***One Year In-status Requirement - Omitted***]
[***DSO's Authorization for Off-campus Employment - Omitted***]
[***Monitoring Responsibilities - Omitted***]

5. Consolidation of Economic Necessity Employment, Pre-completion Practical Training, and the Pilot Off-campus Employment Program

The commenters criticized the proposed regulations as replacing the existing employment provisions for economic necessity with the pilot off-campus employment program. Some commenters argued that the pilot off-campus employment program would not adequately provide for students who had unforeseen economic needs. These commenters speculated that employers would be reluctant to file the labor-and-wage attestation. They feared that the attestation requirement would severely curtail the student's opportunity for needed employment.

The F-1 student employment program in the final rule represents a careful balance between the Service's desire to allow foreign students every opportunity to further their educational objectives in this country and the need to avoid adversely affecting the domestic labor market. The House Judiciary Committee report on HR 4300 (the House version of IMMACT 90), H.R. Rep. No. 101-723, 101st Cong., 2d Sess. at 67, reprinted in 1990 U.S. Code Cong. & Admin. News 6710, demonstrated a clear Congressional concern about the Service's plan to expand student employment authorization without any built-in labor safeguards. The proposed student employment provisions are designed to carry out Congress' intent to expand opportunities for both business and students while adequately protecting domestic workers. Under the final rule, F-1 students regardless of economic needs will have numerous opportunities for employment. An F-I student may work on-campus upon enrollment as a full-time student, or may work off-campus after having been in status for one academic year (nine months) without having to prove economic necessity.

[****Pre-completion practical training - Omitted****]

In summary, after carefully considering the comments, the Service amended the proposed procedures as follows: The Service reduced the one-year bar to off-campus employment to nine months (one academic year); expanded the definition for on-campus employment; exempted the nine-month in-status requirement for required curricular practical training; and lifted the ceiling for both required and optional curricular practical training to facilitate academically-oriented employment. The Service also streamlined student employment procedures to allow the DSOs to authorize employment for students in all situations except post-completion practical training. *With all these employment opportunities for F-1 students, the Service is confident that the final rule adequately provides for F-1 students who need to or want to work without the risk of displacing United States resident workers.*

[****Curricular Practical Training - Omitted****]

Post-completion Practical Training. 8 CFR 214.2(f)(10)(ii).

1. A Single Period of Post-completion Practical Training

Public comments on the Service's proposal to adjudicate post-completion practical training in one application were divided. A number of commenters stated that students should be given the option to split post-completion practical training into two six-month segments. Since the proposed rule did not provide summer employment for graduating students who plan to begin a new degree program in the fall, these commenters argued that splitting post-completion practical training would enable these students to work during the summer vacation.

Post-completion practical training is intended to prepare students for careers in their home countries, not to serve as a source of income to help bridge educational programs. Splitting post-completion practical training into two segments would undermine the intended purpose of the program and complicate the adjudication process. Further, the final rule reduces the bar to employment from one full year to one full academic year (9 months) in order to enable students seeking summer employment to work under the new pilot off-campus employment program. The Service is not persuaded that post-completion practical training should be split into two shorter segments.

*[***2. Employment Authorization for Post-Completion Practical Training - Omitted***]*

*[***EAD for F-1 Students - Omitted***]*

*[***Timely Processing - Omitted***]*

*[***Filing of the Application - Omitted***]*

*[***Conversion to EAD - Omitted***]*

*[***Other Issues - Omitted***]*

*[***Notice to Public-Omitted***]*

*[***Text of Regulation Changes-Omitted***]*

* * * * *

Dated: September 10, 1991.

Gene McNary,

Commissioner,

Immigration and Naturalization Service.

[FR Doc. 91-25975 Filed 10-28-91; 8:45 am]

BILLING CODE 4410-10-M