UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS, et al.,

Intervenors-Defendants.

Case No. 1:16-cv-01170 (RBW)

BRIEF AMICI CURIAE OF AMERICAN IMMIGRATION COUNCIL AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF INTERVERNORS - DEFENDANTS

Mary Kenney
American Immigration Council
1331 G Street N.W.,
Suite 200
Washington DC, 20005
Tel: 202-507-7512
mkenney@immcouncil.org

Leslie K. Dellon
American Immigration Council
1331 G Street N.W.,
Suite 200
Washington DC, 20005
Tel: 202-507-7530
ldellon@immcouncil.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

Other Authorities

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Amici American Immigration Council (Council) and American Immigration Lawyers Association (AILA) submit this brief in support of the position of the Intervenors, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council. Amici seek to assist this Court by providing historical background regarding the complex, but complementary, network of statutory, regulatory and sub-regulatory provisions addressing noncitizen work authorization. In particular, Amici focus on the period beginning in 1952, when Congress adopted a major overhaul and consolidation of the nation's immigration laws and ending in 1986 with the passage of the first comprehensive bill addressing noncitizen employment verification and enforcement.

As demonstrated below, the Executive Branch[2] interpreted Congress' broad delegation of authority to administer and enforce the Immigration and Nationality Act (INA) as including the authority to fill the gaps left by Congress in its provisions regarding work authorization. For close to thirty-five years, the Executive exercised this authority numerous times, granting work authorization to various classes of noncitizens. During this period, Congress never indicated that the Executive's interpretation of its authority was wrong or otherwise limited such authority. To the contrary, it endorsed the Executive's interpretation of its authority by eventually copying the

---

[1] Pursuant to Local Civil Rule 7(o)(5), this brief has not been authored, in whole or in part, by counsel to any party in this case. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amici, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

[2] Because different executive level departments have exercised authority to implement U.S. immigration laws at different points in time, Amici refer to these departments collectively as the Executive Branch. This term is intended to encompass both the Department of Justice and the Department of Homeland Security (DHS), including more specifically the Attorney General, the Commissioner of the former Immigration and Naturalization Service (INS), and the Secretary of DHS.

Executive's language—its use of the terms "authorized" and "unauthorized" employment—and adopting the model of shared congressional and executive responsibility for work authorization followed by the Executive for decades. The Executive's authorization of employment for optional practical training (OPT) is but one example of the agency's valid exercise of congressionally-delegated authority.[3]

The American Immigration Council (Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of immigration and nationality law; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standards of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before Department of Homeland Security (DHS), immigration courts and the Board of Immigration Appeals (BIA), as well as before federal courts.

[3] OPT authorizes eligible academic students in F-1 nonimmigrant status to gain experience as part of their education through employment directly related to their fields of study for a specified time period. Amici's brief encompasses both the 12-month "standard" OPT and the 24-month extension for students with certain science, technology, engineering or mathematics (STEM) degrees. *See* 8 C.F.R. § 214.2(f)(10)(ii)(A)(1)-(3) ("standard"), (ii)(C) (STEM).

II. OVERVIEW OF CONGRESSIONAL AND AGENCY ROLES IN GRANTING WORK AUTHORIZATION BETWEEN 1952 AND 1986

The OPT regulation is one example in a long history of administrative grants of work authorization to which Congress has acquiesced. Since at least 1952, when the INA[4] was enacted, Congress has played a limited role in specifying which classifications of noncitizens are entitled to work authorization, instead delegating this authority to the Executive Branch. Consequently, a complimentary network of statutory, regulatory and nonregulatory provisions has governed noncitizen work authorization for decades.

In regulations adopted to implement the 1952 INA, the former Immigration and Naturalization Service (INS) introduced the terms "authorized" and "unauthorized" as relating to employment and continued to use these terms repeatedly in the ensuing decades. Additionally, it interpreted the INA as creating a shared congressional and executive responsibility with respect to employment authorization; depending on the circumstances, employment could be authorized by either Congress or the Executive Branch pursuant to Congress' delegation of authority to it. In 1976—more than twenty years after the agency used the term "unauthorized employment" in its 1952 regulations—Congress adopted this term, although it failed to define it. Subsequently, in 1986, Congress defined the term "unauthorized alien" for purposes of new employment verification provisions, specifying that an "*unauthorized*" noncitizen for purposes of employment verification was someone who, *inter alia*, was not "*authorized to be so employed by this Act or by the Attorney General.*" 8 U.S.C. § 1324a(h)(3)(B) (emphasis added). Significantly, this definition adopted the model of shared congressional and executive responsibility for

[4] The 1952 INA was a comprehensive immigration bill which consolidated in one location—with modifications and additions—the then-existing collection of separate immigration-related statutes. Pub. L. No. 82-414, 66 Stat. 163 (Jun. 27, 1952). The INA remains in place today, although it has been amended numerous times.

authorizing work which the agency had followed for almost 35 years. Congress' adoption of the agency's terms— "authorized" and "unauthorized"—in connection with noncitizen employment, coupled with its copying of the model of shared responsibility, is an endorsement of the Executive's long history of exercising its delegated authority to fill the employment authorization gaps left by Congress.

A. 1952 INA and implementing agency regulations

The 1952 INA did not specify work authorization for all classes of noncitizens who could lawfully work in the United States, such as, for example, family-based immigrants. Congress only addressed employment with respect to employment-based immigrants, certain nonimmigrants, and grounds of inadmissibility. *See, e.g.*, INA §§ 101(a)(15)(E), (H)(i)-(ii) (nonimmigrant examples), 203(a)(3)(A) (immigrant), 212(a)(14) (certain employment-based immigrants inadmissible without Labor Secretary's certification as to insufficient U.S. workers and no adverse impact on wages and working conditions) (1952), 8 U.S.C. §§ 1101(a)(15)(E), (H)(i)-(ii), 1153(a)(3)(A), 1182(a)(14) (1952).

In particular, Congress incorporated the prior system of setting annual numerical limitations (quotas) based upon country of origin. Congress allocated a portion of the annual quota "(A) to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States, …" INA § 203(a)(1)(A) (1952), 8 U.S.C. § 1153(a)(1)(A) (1952). Upon admission to the United States, these individuals were authorized to work by virtue of their classification as employment-based immigrants. Similarly, Congress also included a category under which a

religious minister could become a permanent resident of the United States without being subject to an annual numerical limitation (a "nonquota immigrant" category). INA § 101(a)(27)(F)(i) (1952), 8 U.S.C. § 1101(a)(27)(F)(i) (1952) (specifying that this applied to ministers who, *inter alia*, "seek[] to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination.")

The 1952 INA also included several nonimmigrant categories for which Congress specified work authorization. These included the treaty trader "entitled to enter … solely to carry on substantial trade," INA § 101(a)(15)(E)(i) (1952), 8 U.S.C.§ 1101(a)(15)(E)(i) (1952); the treaty investor "entitled to enter … solely to develop and direct the operations of an enterprise in which he has invested or … is in the process of investing," INA § 101(a)(15)(E)(ii) (1952), 8 U.S.C. § 1101(a)(15)(E)(ii) (1952); noncitizens of "distinguished merit and ability …. coming temporarily to the United States to perform services of an exceptional nature," INA § 101(a)(15)(H)(i) (1952), 8 U.S.C. § 1101(a)(15)(H)(i) (1952); noncitizens "coming temporarily … to perform other temporary services or labor," if no "capable" workers can be found, INA § 101(a)(15)(H)(ii) (1952), 8 U.S.C. § 1101(a)(15)(H)(ii) (1952); and the foreign media representative, "who seeks to enter the United States solely to engage in such vocation." INA § 101(a)(15)(I) (1952), 8 U.S.C. § 1101(a)(15)(I) (1952).

In several other categories, Congress' description left no doubt that the noncitizen would be working in the United States. These included certain types of accredited diplomats and other foreign officials and employees, INA § 101(a)(15)(A)(i)-(ii) (1952), 8 U.S.C. § 1101(a)(15)(A)(i)-(ii) (1952); their personal staff, INA § 101(a)(15)(A)(iii) (1952), 8 U.S.C. § 1101(a)(15)(A)(iii) (1952); and foreign government-designated principal representatives and accredited representatives serving at certain types of international organizations, officers and

employees of these organizations, and their personal staff. INA §§ 101(a)(15)(G)(i)-(v) (1952), 8 U.S.C. § 1101(a)(15)(G)(i)-(v) (1952).

Beyond establishing these categories of noncitizens eligible to work in the United States, Congress also delegated broad authority to the Executive Branch to "administ[er] and enforce[]" the INA. INA § 103(a) (1952), 8 U.S.C § 1103(a) (1952). More specifically, it empowered the Executive, through the Attorney General, *inter alia*, to "establish such regulations" and "perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act." *Id*. Additionally, in a still existing provision, Congress specifically granted the Executive the authority to determine the conditions under which nonimmigrants, including those at issue here, would be permitted into the United States and allowed to remain:

> The admission to the United States of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulation prescribe, including when he deems necessary the giving of a bond …

INA § 214(a) (1952), 8 U.S.C. § 1184(a) (1952).

Congress further specified that the Attorney General could delegate his duties and powers. INA § 103(a) (1952), 8 U.S.C. § 1103(a) (1952). Finally, Congress expressly delineated the authority of the Commissioner of INS as deriving from the Attorney General:

> [The Commissioner] shall be charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General.

INA § 103(b) (1952), 8 U.S.C. § 1103(b) (1952).

In December 1952, the Immigration and Naturalization Service (INS) issued final regulations implementing the 1952 Act. Immigration and Nationality Regulations, 17 Fed. Reg. 11469, 11469-564 (Dec. 19, 1952). In these, INS specifically addressed its authority to grant work authorization to nonimmigrants. *See* 17 Fed. Reg. at 11489 (to be codified at 8 C.F.R.

§ 214.2 (1953), *Conditions of nonimmigrant status*). The regulations made clear that a nonimmigrant was required to "maintain the particular nonimmigrant status" under which he was admitted or which he acquired. *Id*. (to be codified at 8 C.F.R. § 214.2(a) (1953)). For those categories in which Congress specified employment, nonimmigrant status maintenance would include that the noncitizen comply with the employment conditions incident to that status. *See, e.g.*, 17 Fed. Reg. at 11491 (to be codified at 8 C.F.R. §§ 214e.4(a)(2) (1953)) (treaty trader fails to maintain status if he changes his activities to those of a treaty investor without prior consent from INA); 17 Fed. Reg. at 11494 (to be codified at 8 C.F.R. § 214i.3-214i.4 (1953)) (an information media representative fails to maintain status if he changes employment without prior INS consent). But INS also gave notice that, to meet the conditions of nonimmigrant status, a noncitizen without the congressionally specified authorization could not work unless INS approved the employment:

> while in the United States [a nonimmigrant] will not engage in any employment or activity inconsistent with and not essential to the status under which he is in the United States *unless such employment or activity has first been authorized* by the district director or the officer in charge having administrative jurisdiction over the [nonimmigrant's] place of temporary residence in the United States.

17 Fed. Reg. at 11489 (to be codified at 8 C.F.R. § 214.2(c) (1953)) (emphasis added). *See, e.g.*, 17 Fed. Reg. at 11492 (to be codified at 8 C.F.R. § 214f.4(a)-(b) (1953)) (providing that noncitizen students seeking to work on-campus due to financial need or to engage in employment for practical training must get approval from INS). INS identified INA § 103, 8 U.S.C. § 1103 (1952), as its authority for issuing Part 214, Admission of Nonimmigrants. 17 Fed. Reg. at 11488.

B. The Executive Branch repeatedly exercised its delegated authority between 1952 and 1986

Between 1952 and 1986, INS routinely exercised the authority to grant work authorization to classes of noncitizens beyond those granted by Congress pursuant to its interpretation of the statutory delegation of authority. In 1971, INS amended its regulations to provide in more succinct language that nonimmigrant work authorization either was specified in the INA or approved by the agency per its delegated authority. After explicitly prohibiting visitors and noncitizens in transit from working, the agency stated that any other nonimmigrant "may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the [agency's regulations]." Employment of Certain Nonimmigrants, 36 Fed. Reg. 8048, 8049 (Apr. 29, 1971) (to be codified at 8 C.F.R. § 214.1(c) (1972)).[5]

The INS promulgated two regulations in 1978 which granted work authorization to classes of noncitizens not authorized to work by statute. The first provided work authorization to certain categories of noncitizens to whom the agency had granted voluntary departure in lieu of deportation.[6] Voluntary Departure Prior to Commencement of Hearing, 43 Fed. Reg. 29526, 29528 (July 10, 1978) (to be codified at 8 C.F.R. § 242.5(a)(3) (1979) (indicating that INS could stamp "Employment Authorized" on the noncitizen's Arrival/Departure form). The eligible classes included certain students and exchange visitors or their dependents; quota-exempt and non-quota immigrants who were under temporal restrictions; noncitizens granted asylum but not parole or a stay of deportation; and noncitizens granted voluntary departure by INS for

---

[5] This regulation was later redesignated as 8 C.F.R. § 214.1(e) without change. Extension of Stay for Nonimmigrant Visitors for Pleasure B-2, 43 Fed. Reg. 12673, 12674 (Mar. 27, 1978).

[6] A person granted voluntary departure agrees to depart the United States within a set period of time in exchange for the agency not pursuing deportation proceedings. *See* 8 U.S.C. § 1229c.

"compelling circumstances." *See id.* (to be codified at 8 C.F.R. § 242.5(a)(2)(v)-(viii) (1979)). INS asserted INA § 103, 8 U.S.C. § 1103, as its authority for this regulatory grant of work authorization. *Id*.

Relying on this same statutory grant of authority, INS issued a second regulation in 1978 establishing formal criteria by which it would decide applications for work authorization by spouses and unmarried dependent children of international organization officers or employees (the G-4 nonimmigrant category). Application to Accept or Continue Employment by G-4 Nonimmigrants, 43 Fed. Reg. 33229, 33231 (July 31, 1978). The agency noted that the Department of State had been informally deciding requests for work authorization from these G-4 nonimmigrants, without uniform criteria. *Id*. at 33229. Justifying its exercise of this authority, the agency explained:

> Under the [INA], G-4 spouses and dependents are nonimmigrants. Nonimmigrants generally are prohibited from working by Service regulations, unless permission to work has first been granted ty the Service…. [T]he proposed G-4 regulation …. is [not] inconsistent with the authority of Congress over [noncitizens] in the United States which has been delegated through the Attorney General to the Service under the [INA].

Id.

In 1979, INS proposed "for the first time [to] codify" employment authorization procedures contained in its Operations Instructions and in informal policy statements for its field offices. Proposed Rules for Employment Authorization for Certain Aliens, 44 Fed. Reg. 43480, 43480 (July 25, 1979). Throughout the regulatory process—which consisted of two rounds of proposed rules—INS never changed its assertion that INA § 103, 8 U.S.C. § 1103 provided the Attorney General the authority to grant work authorization as it "authorizes him to establish regulations, issue instructions, and perform any actions necessary for the implementation and

administration of the [INA]." 44 Fed. Reg. at 43480 and Employment Authorization, Proposed Rule, 45 Fed. Reg. 19563, 19563 (Mar. 26, 1980).

In both versions of the proposed rules, INS also stated that Congress "specifically recognized" the Attorney General's authority to authorize the employment of noncitizens "as a necessary incident of his authority to administer the [INA]," when it enacted § 6 of the 1976 Amendments to the INA, Pub. L. No. 94-571. *Id*. (but erroneously cited as 95-571 in both Federal Register notices). Congress had amended INA § 245(c) (1976), 8 U.S.C. § 1255(c) (1976), to prohibit noncitizens, with the exception of immediate relatives of U.S. citizens, from adjusting status to permanent resident if, prior to filing an application to adjust status, they had engaged in unauthorized employment after January 1, 1977. *See id*.

In its summary of the final rule, INS reiterated that "[t]he new rules are necessary to codify the various Service Operations Instructions and policy statements in one place …" Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25079, 25080 (May 5, 1981). INS again cited INA §§ 103 and 245(c), 8 U.S.C. §§ 1103, 1255(c) as its authority for this final regulation. *Id*.

The final rule covered noncitizens whose work authorization was incident to their immigration status, such as, for example, lawful permanent residents, asylees, and certain nonimmigrants. *Id*. (to be codified at 8 C.F.R. § 109.1(a) (1982)). Additionally, the regulation addressed noncitizens who were required to apply for work authorization from INS, whom INS divided into six subgroups. The first subgroup included certain nonimmigrants for whom INS had provided terms for employment in 8 C.F.R. § 214.2, such as the spouse or unmarried dependent child of a G-4 international organization employee or the spouse of an exchange visitor. 46 Fed. Reg. at 25081 (to be codified at 8 C.F.R. § 109.1(b)(1)(iii)-(iv) (1982)). The

second and third subgroups consisted of asylum applicants with "non-frivolous" applications and adjustment of status applicants with "properly filed" applications. *Id*. (to be codified at 8 C.F.R. § 109.1(b)(2)-(3) (1982)). The final three subgroups consisted of noncitizens who were not maintaining lawful nonimmigrant status: noncitizens who had applied to an immigration judge for suspension of deportation, an expanded group of noncitizens granted voluntary departure, and noncitizens whom INS recommended for a temporary reprieve from deportation in the form of deferred action. Employment Authorization; Revision to Classes of Aliens Eligible, 46 Fed. Reg. 55920, 55921-22 (Nov. 13, 1981) (to be codified at 8 C.F.R. § 109.1(b)(v)-(vii) (1982)).

In November 1981, INS also added parolees to the classes of noncitizens eligible for work authorization, explaining that:

> [I]t became evident that [noncitizens] paroled into the United States temporarily for emergent reasons or for reasons deemed strictly in the public interest were not explicitly covered as a class under [8 C.F.R.] Part 109. Although [INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A)] authorizes the exercise of discretion regarding the conditions of parole for such [noncitizen], and which implies work authorization, this new class of noncitizens is added to [Part 109] to avoid any uncertainty.

46 Fed. Reg. at 55921. *See id*. (to be codified at 8 C.F.R. § 109.1(b)(iv) (1982)).

During this period, INS also issued sub-regulatory guidance permitting work authorization for at least one additional class of noncitizens for whom Congress had not granted such authorization. After Congress added a nonimmigrant visa category in 1970 for fiancés and fiancées, INS issued guidance to the field through it Operations Instructions (O.I.) regarding fiancé/fiancée, nonimmigrants which included instructions for employment authorization: "The words 'EMPLOYMENT AUTHORIZED' shall be stamped in the lower right hand corner of the original Form I-94 by the admitting officer upon admission …." INS O.I. 214.2(k)(5).

In short, pursuant to its interpretation of Congress' delegation of authority in the INA, INS authorized employment for numerous—and diverse—classes of noncitizens, including certain students, the spouses and children of exchange visitors, fiancés of U.S. citizens, those with non-frivolous asylum or properly-filed adjustment of status applications, those paroled into the United States, and individuals granted voluntary departure or with other relief from deportation pending. In every instance, the agency made clear it was exercising this authority pursuant to its interpretation of Congress' broad delegation of authority in INA § 103 (1952), 8 U.S.C. § 1103 (1952).

C. Congress amended the INA numerous times between 1952 and 1986 but did not address the agency's power to authorize noncitizen employment

Throughout the same period, 1952 to 1986, Congress amended the INA several times but never addressed the agency's authority to grant work authorization. For example, in 1965 and 1970, Congress amended several existing provisions regarding employment-based visas. *See e,g,*, Pub. L. No. 91-225, 84 Stat. 116 (Apr. 7, 1970), INA § 101(a)(15)(H) (1970), 8 U.S.C. § 1101(a)(15)(H) (1970); Pub. L. No. 89-236, 79 Stat. 911, 912-14, 916-17 (Oct. 3, 1965), INA §§ 101(a)(27)(D), (a)(32), 203, 212(a)(14) (1965), 8 U.S.C. §§ 1101(a)(27)(D), (a)(32), 1153, 1182(a)(14) (1965). In 1970, Congress also amended the INA to add a nonimmigrant employment category so that noncitizens who worked for multinational companies in certain capacities outside of the United States could work in the United States. Pub. L. No. 91-225, 84 Stat. 116, 116 (Apr. 7, 1970), INA § 101(a)(15)(L) (1970), 8 U.S.C. § 1101(a)(15)(L) (1970). That same year, Congress added a category under which a fiancé or fiancée of a U.S. citizen could receive a visa to enter the United States and marry within 90 days after entry. *Id.*, § 101(a)(15)(K) (1970), 8 U.S.C. § 1101(a)(15)(K) (1970). Because Congress said nothing about

work authorization for this new visa category, the agency subsequently addressed their work authorization in its Operations Instructions. *See* II.B. at 11-12, above.

It was not until 1976, however, that Congress first used INS's term, "unauthorized employment." In this amendment, it specified that individuals, other than immediate relatives of U.S. citizens, who engaged in "unauthorized employment" would be barred from becoming lawful permanent residents from within the United States. *See* Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703, 2706 (Oct. 20, 1976), INA § 245(c) (1976), 8 U.S.C. § 1255(c) (1976).[7] Notably, however, Congress altogether failed to define what this term meant or to specify how a noncitizen other than an employment-based immigrant or nonimmigrant obtained authorization to work. Congress then used the term "employment authorized" in the Refugee Act of 1980, when it stated that the Attorney General could grant a limited group of asylum applicants permission to work in the United States and could "provide [the noncitizen] an 'employment authorized' endorsement or other appropriate work permit." Pub. L. No. 96-212, § 401(b), 94 Stat. 102, 118 (Mar. 17, 1980).

D. In 1986, Congress endorsed the Executive's long-standing exercise of delegated authority to grant employment authorization

In the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), Congress enacted a system for employers to verify that their employees were work authorized, as part of a larger provision penalizing employers for hiring unauthorized noncitizen workers. For purposes of these employer penalty and verification provisions, Congress defined "unauthorized employment" for the first time:

---

[7] A noncitizen who is physically present in the United States and who meets the statutory eligibility requirements, may file an application to adjust status to lawful permanent resident from within the United States rather than apply for an immigrant visa abroad.

> [W]ith respect to the employment of a[noncitizen] at a particular time, that the [noncitizen] is not at that time either (A) a[noncitizen] lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

Id., 100 Stat. at 3368, INA § 274A(h)(3) (1986), 8 U.S.C. § 1324a(h)(3) (1986). This provision was notable for two reasons. First, it was the first congressional specification that *all* lawful permanent residents were authorized to work. Prior to this, Congress made no reference to the employment authorization of an entire subset of lawful permanent residents—those who gained this status through family-relationships rather than employment. Second, it referenced alternate ways in which a noncitizen could be authorized to work: either by Congress or the Executive.

III. ARGUMENT

A. Congress' broad delegation of authority to the Executive included the authority to grant work authorization

The Supreme Court has instructed that, "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (footnote and citations omitted). Here, Congress delegated precisely that authority to the Executive, charging it—through the Attorney General—with the "administration and enforcement" of the INA and empowering it, *inter alia*, to "establish such regulations" and "perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act." INA § 103(a) (1952), 8 U.S.C. § 1103(a) (1952).

As such, the validity of all of the Executive's employment authorization rules and regulations—including the OPT regulation at issue here—must be found valid as they are "reasonably related to the purpose" of the INA. *Mourning*, 411 U.S. at 369 (citation omitted). In

fact, with respect to work authorization for nonimmigrants, such as the OPT regulation, the Executive is carrying out an explicit directive by Congress: to prescribe the "conditions" under which a nonimmigrant may be admitted. 8 U.S.C. § 1184(a)(1). Moreover, as fully addressed in Intervenors' Brief, which points Amici adopt by reference, the OPT regulations are consistent with the statutory provisions related to the student visa classification.

Congress' broad delegation of authority to administer the INA, is sufficient, standing alone, for this Court to uphold the OPT regulation.

B. Congress has endorsed the Executive's exercise of authority with respect to work authorization

1. The language of INA § 274A(h)(3) demonstrates Congress' endorsement

Significantly, Congress' broad delegation of authority to the Executive in INA § 103(a) (1952), 8 U.S.C. § 1103(a) (1952), does not stand alone. Rather, it is buttressed by INA § 274A(h)(3) (1986), 8 U.S.C. § 1324a(h)(3) (1986), in which Congress explicitly recognized—and thus endorsed—the Executive's power to grant employment authorization. Congress made clear in this provision its intent that the Executive had the authority to grant work authorization, defining an "unauthorized" noncitizen with respect to employment, as being one who, *inter alia*, is not "authorized to be so employed by this Act or by the Attorney General." *Id.* Had it not intended the Executive to have the authority to grant work authorization, Congress would not have specified "or by the Attorney General," since the reference to "this Act" covers all of the statutory directives regarding work authorization. Courts generally presume "that each word Congress uses is there for a reason." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (citation omitted). *See also Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (citation omitted) ("the canon against superfluity assists only where a competing interpretation gives effect 'to every clause and word of a statute'").

2. The history behind INA § 274A(h)(3) demonstrates Congress' endorsement

Congress' endorsement of the Executive's interpretation of its delegated authority is also evident from the history preceding adoption of INA § 274A(h)(3), including the long history of agency action of which Congress is presumed to have been aware. *See Autolog Corp. v. Regan*, 731 F.2d 25, 32 (D.C. Cir. 1984) ("When an agency interpretation has been officially published and consistently followed, 'Congress is presumed to be aware of [the] administrative . . . . interpretation of a statute . . .'") (alteration in original, citation omitted).

It is significant that in INA § 274A(h)(3), Congress adopted the very language that INS had been using for close to thirty-five years and in doing so, specified the same model of shared congressional and executive responsibility for work authorization followed by INS throughout that entire period. Under similar circumstances, the Supreme Court in *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007), found that the history of the statute before it "strongly supports" the conclusion that Congress intended to endorse the Secretary of Education's method for implementing the statute. There, as here, the Secretary promulgated a regulation shortly after the statute initially was enacted and applied this regulation for close to twenty years. *Id*. In subsequently amending the statute, Congress adopted almost entirely draft legislative language supplied by the Secretary, with no indication that it intended the Secretary to change course. *Id*., at 90-91. Similarly, in defining an "unauthorized" noncitizen as one who is not "authorized to be so employed by this Act or by the Attorney General," INA § 274A(h)(3), Congress adopted the language and model followed by the agency and gave no indication that it intended the Executive to change course.

3. Congress' acquiescence to the Executive's interpretation of its delegated authority is an endorsement of that interpretation

INS first stated its interpretation of its delegated authority in the 1952 regulations, which explicitly stated that "[a nonimmigrant] will not engage in any employment or activity inconsistent with and not essential to the status under which he is in the United States *unless such employment or activity has first been authorized*" by the INS. 17 Fed. Reg. at 11489 (to be codified at 8 C.F.R. § 214.2(c) (1953)) (emphasis added). Between that time and 1986, when it amended the statute by, *inter alia*, adding provisions related to work authorization, *see* IRCA, 100 Stat. at 3360 (adding 8 U.S.C. § 1324a), the Executive exercised its delegated authority by authorizing employment for classes of noncitizens on numerous occasions, through both regulations and policy directives. *See* section II.A., above.

Congress' failure to legislate with respect to the Executive's authority to grant work authorization to classes of noncitizens that Congress had not previously authorized demonstrates its acceptance of this agency authority. As the Supreme Court has explained:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted); *see also Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) ("longstanding administrative construction" of special immigrant commuters as U.S. permanent residents "is entitled to great weight particularly when, as here, [C]ongress has revisited the Act and left the practice untouched").

This is precisely the case here. Congress was aware of, and acquiesced to, this Executive action when it adopted the 1986 work authorization provisions. In *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, the D.C. Circuit approved of the lower court's conclusion that

Congress' addition of statutory language authorizing regulations "as may be necessary … otherwise to carry out the provisions of this chapter" almost ten years after USDA had first asserted its authority to issue a regulation restricting the use of biological products meant a successor regulation, also issued before Congress amended the law, was consistent with congressional intent since Congress did not act to restrict the regulation. 539 F.3d 492, 498, 500 (D.C. Cir. 2008). The court added: "Even assuming the 1985 [statutory] amendment does not satisfy the requirements of the legislative reenactment doctrine, however, the Congress' 1985 decision to leave [the regulation] undisturbed is 'persuasive evidence' that it is consistent with congressional intent." *Id*. at 500 (citation omitted). Similarly, here, Congress' reference in 8 U.S.C. § 1324a(h)(3) to noncitizens whom the Executive has "authorized" to be employed must be interpreted as an endorsement of this history of agency action as being the proper interpretation of the power it delegated to the Executive.

IV. CONCLUSION

For all of the reasons stated above, Amici urge this Court to find that the OPT regulations were issued pursuant to a valid exercise of the authority delegated to Defendants and deny Plaintiffs' Motion for Summary Judgment and Grant Defendants' Motion for Summary Judgment.

Dated: November 25, 2019

Respectfully submitted,

s/ Leslie K. Dellon
Leslie K. Dellon (D.C. Bar #250316)
Staff Attorney
ldellon@immcouncil.org

s/ Mary Kenney
Mary Kenney (D.C. Bar #1044695)

Directing Attorney, Litigation
mkenney@immcouncil.org

AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7530
Fax: (202) 742-5619

Attorneys for Amici Curiae
American Immigration Council
American Immigration Lawyers