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## F-1 STUDENT VISAS AND THE STUDENT DEBT CRISIS

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## F-1 STUDENT VISAS AND THE STUDENT DEBT CRISIS<sup>†</sup>

*Sean Ashoff\**

The student debt crisis is a problem too full of intersectionality of social, legal, and economic issues to be effectively solved by an analysis of just one component. However, any coordinated effort to address this impending financial disaster by scholars, politicians, and lawmakers would be incomplete without considering how immigration law and policy affects the economics of secondary education.

The F-1 student visa for international students is among the most popular temporary visas for entering the United States.<sup>1</sup> Universities rely on both the steady revenue stream and the international esteem they receive from F-1 students attending their universities. International students typically pay full tuition and provide universities with opportunities to access global sources of revenue.<sup>2</sup> In Pittsburgh, Carnegie Mellon University champions their undergraduate international students and celebrates that in 2019, 22% of their undergraduate student body came from other countries.<sup>3</sup>

However, since 2016, and as a result of the Trump Administration's efforts to reform our immigration system, fewer F-1 students are entering the United States to pursue a secondary education.<sup>4</sup> Frustrated by stricter enforcement of discretionary policies in the Department of Homeland Security, the inability to eventually attain legal permanent residence, and fear

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<sup>†</sup> As a result of the COVID-19 pandemic, data from the 2020 academic year has purposely been excluded from this case study into F-1 student visas and the student debt crisis to prevent indirect correlations and conclusions from being drawn.

\* Thank you to my family, Professor Lebowitz, and E for all the love and support.

<sup>1</sup> U.S. DEP'T. OF STATE REP. OF THE VISA OFF. 2019, Table XVI(A) Classes of Nonimmigrants Issues VISAS Fiscal Years 2015–2019.

<sup>2</sup> WALL ST. J., *How International Students are Changing U.S. Colleges*, <http://graphics.wsj.com/international-students/#the-transformation> (last visited Oct. 18, 2020).

<sup>3</sup> Carnegie Mellon Univ., *Undergraduate International Students*, <https://admission.enrollment.cmu.edu/pages/undergraduate-international-students> (last visited Feb. 27, 2020).

<sup>4</sup> See U.S. DEP'T OF STATE, *supra* note 1.

of removal, F-1 students are turning away or being turned away from the United States.

Many immigration policies have economic incentives to bring business and capital to the United States and to prevent the adverse economic effects of immigration.<sup>5</sup> F-1 student visas should be seen as an economic opportunity for our immigration system. Not only will international students bring money to United States universities, but international students can bring ideas, investment capital, and significant contributions to United States businesses if given a pathway to eventual legal permanent residence.

#### I. STUDENT DEBT CRISIS AND THE FINANCIAL IMPACT OF INTERNATIONAL STUDENTS

The student loan debt of United States students exceeded \$1.5 trillion in 2019.<sup>6</sup> This debt is held by 44.7 million Americans, 16.8 million who are under the age of 30.<sup>7</sup> This will effectively handicap an entire generation of Americans from participating in the consumer economy, as their expendable income is dedicated to student loan payments.<sup>8</sup> Debt funded education, a now trillion-dollar industry, has an alarmingly high default rate at 11.4%.<sup>9</sup> The student loan debt of United States students is larger than the size of Australia's GDP in 2019 and experts predict that student loan defaults have the potential to trigger another recession.<sup>10</sup>

As early as 1991, there were warning signs of a looming crisis. A 1991 analysis reported that “[s]tudent aid account[ed] for more than one-third of

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<sup>5</sup> See generally 8 U.S.C.S. § 1153(b)(5) (an “Employment Creation” visa is made available to qualified immigrants who invest at least \$1,000,000 (§§ C) and employ at least 10 United States citizens or legal permanent residents); see U.S.C.S. § 1182(a)(4) (grants Attorney General discretion to deem an applicant inadmissible because they are likely to become a public charge); see U.S.C.S. § 1182(a)(5)(II) (grants Attorney General discretion to deem an applicant inadmissible because they will adversely affect the wages and working conditions of workers in the United States similarly employed).

<sup>6</sup> Zach Friedman, *Student Loan Debt Statistics in 2019: A \$1.5 Trillion Crisis*, FORBES (Feb. 25, 2019), <https://www.forbes.com/sites/zachfriedman/2019/02/25/student-loan-debt-statistics-2019>.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> *Id.*

<sup>10</sup> TRADING ECON., *Australia GDP*, <https://tradingeconomics.com/australia/gdp> (last visited Nov. 30, 2019) (Australia's 2019 GDP was 1.392 trillion); Patrick B. Healey, *We Should All Be Concerned About the Student Debt Crisis*, CNBC (Nov. 4, 2019), <https://www.cnbc.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html>.

the Education Department's \$24 billion budget for fiscal 1990, yet tuition increases, inflation and the growing number of grant recipients [had] more than wiped out the effect of nominally increased federal grants to students."<sup>11</sup> In 1995–1996, total tuition, room, and board at a four-year institution costs \$16,590 (in 2017–2018 dollar rates) per year.<sup>12</sup> In the 2017–2018 academic year, enrollment in the average 4-year academic institution cost \$27,357.<sup>13</sup> That is an increase in yearly tuition of around \$10,000.<sup>14</sup>

There is a colorful bouquet of economic and social problems that are contributing to the student debt crisis. Rising tuitions, climbing default rates, and swollen Administrations are just a few of the factors that are contributing to the secondary-education crisis.<sup>15</sup> No matter the cause, the result remains the same: universities are losing money. Universities need money. Despite raising tuition, nearly 30% of all four-year schools brought in less tuition revenue per student in 2017–18 than in 2009–10.<sup>16</sup> Even before the COVID-19 pandemic, Universities were under immense financial stress.<sup>17</sup>

The National Association of Foreign Student Advisors: Association of International Educators (NAFSA) is a non-profit organization that in their 2018–2019 report collected data from Open Doors, U.S. Department of Commerce, and the U.S. Department of Education on the impact of international students on the United States economy.<sup>18</sup> Using the data collected, they advocate for international student exchange and monitor the

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<sup>11</sup> R. Paul Guerre, *Financial Aid in Higher Education: What's Wrong, Who's Being Hurt, What's Being Done*, 17 J. COLL. & UNIV. L. 483, 483 (1991).

<sup>12</sup> To compare tuition rates over time, I will use a constant 2017–2018 dollar amount to account for inflation; DEPT. OF EDUC., NAT'L CTR. FOR EDUC. STAT., *Tuition Costs of Colleges and Universities*, NCES (2017), <https://nces.ed.gov/fastfacts/display.asp?id=76>.

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*; see Friedman, *supra* note 6; see CHARLES J. SYKES, *FAIL U: THE PROMISE OF HIGHER EDUCATION* 7 (2016).

<sup>16</sup> Sarah Butrymowicz & Pete D'Amato, *A Crisis Looming for U.S. Colleges—and Not Just Because of the Pandemic*, NBCNEWS.COM, Aug. 4, 2020, <https://www.nbcnews.com/news/education/crisis-looming-u-s-colleges-not-just-because-pandemic-n1235338>.

<sup>17</sup> *See id.*

<sup>18</sup> NAT'L ASS'N OF FOREIGN STUDENT ADVISORS: ASS'N OF INT'L EDUCATORS, *THE UNITED STATES OF AMERICA BENEFITS FROM INTERNATIONAL STUDENTS* (2019), <https://www.nafsa.org/sites/default/files/media/document/isev-2019.pdf>.

impact international students have on the United States economy.<sup>19</sup> According to NAFSA, international students contributed \$41 billion and brought 458,290 jobs to United States economy in the 2018–2019 school year.<sup>20</sup> If Universities are raising tuition because they are losing money, then they need international students to continue to attend in order to benefit from a foreign influx of cash.

As of 2018–2019 school year, there were 1,095,299 international students enrolled in United States universities and colleges.<sup>21</sup> 2016–2018 represented a significant stagnation and plateau of international students coming to the United States.<sup>22</sup> More importantly, the economic benefit of and jobs attained by international students has also plateaued as a result.<sup>23</sup> The question remains: why is the current immigration system failing to supply universities with much needed capital?

## II. ATTAINING A F-1 STUDENT VISA AND PIPELINE TO A “GREEN CARD”

The F-1 category is one of many non-immigrant designations of aliens admitted into the United States for a temporary basis.<sup>24</sup> It is a vehicle by which many international students enter the United States, earn an education, find employment in the United States, and eventually immigrate to the United States permanently. In order to understand the Trump Administration’s effect on F-1 student visas, it is important to have a general overview of requirements to attain an F-1 visa and the common pathway to legal permanent residence that follows.

### A. F-1 Visa

There are three general requirements to attain a F-1 student visa: (1) have residence in a foreign country in which you have no intent to

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<sup>19</sup> See NAT’L ASS’N OF FOREIGN STUDENT ADVISORS, NAFSA INTERNATIONAL STUDENT ECONOMIC VALUE TOOL, <https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2> (last visited Oct. 30, 2020).

<sup>20</sup> See NAT’L ASS’N OF FOREIGN STUDENT ADVISORS, *supra* note 18.

<sup>21</sup> See *id.*

<sup>22</sup> See NAT’L ASS’N OF FOREIGN STUDENT ADVISORS, *supra* note 19.

<sup>23</sup> See *id.*

<sup>24</sup> 8 U.S.C. § 1101(a)(15) (2019).

abandon, (2) be a bona fide student, and (3) be entering the United States solely to pursue an education at a certified institution approved by the Attorney General and Secretary of Education.<sup>25</sup>

A student seeking to attain an F-1 visa must first apply to one of the schools approved by the Attorney General and Secretary of Education.<sup>26</sup> Second, they must be accepted to that school.<sup>27</sup> Third, the school will provide the student with an I-20 form.<sup>28</sup> Fourth, the student will complete the I-20 form and apply for an F-1 visa at the United States Consulate in their home country with a DS-160 application.<sup>29</sup> Then, the student will be interviewed and be screened by a consular officer.<sup>30</sup> Lastly, upon arrival to the United States, the student will complete an I-94 “arrival/departure” form which establishes the date the student must leave the United States.<sup>31</sup>

If accepted at all steps of the process, the student’s F-1 non-immigrant visa will expire at the end of their “Duration of Status.”<sup>32</sup> This includes the time it takes to complete the academic program, and *one year* of practical training where they can use their degree to attempt to attain a work authorized immigrant or non-immigrant visa, and a sixty-day grace period to leave the United States.<sup>33</sup>

In May 2016, the Obama Administration extended what was already an additional 17 months of practical training for F-1 students in science, technology, engineering, or math (STEM) programs to *24 months* of additional practical training.<sup>34</sup> In effect, a student in a STEM program had *three years* of practical training. By extending the practical training, there

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<sup>25</sup> 8 U.S.C. § 1101(a)(15)(F)(i) (2019).

<sup>26</sup> See 8 C.F.R. § 214.2(f) (2019).

<sup>27</sup> See *id.* § 214.2(f)(1)(i)(C).

<sup>28</sup> See *id.* § 214.2(f)(1)(i)(A).

<sup>29</sup> See DEP’T OF STATE, *Online Nonimmigrant Visa Application: How to Complete the Application (DS-160)*, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/forms/ds-160-online-nonimmigrant-visa-application/ds-160-faqs.html> (last visited Feb. 16, 2021).

<sup>30</sup> See *id.*

<sup>31</sup> See U.S. CITIZENSHIP AND IMMIGR. SERV., *Form I-94, Arrival/Departure Record, Information for Completing USCIS Forms*, <https://www.uscis.gov/forms/form-i-94-arrivaldeparture-record-information-for-completing-uscis-forms> (last updated July 18, 2018).

<sup>32</sup> See 8 C.F.R. § 214.2(f)(5) (2019).

<sup>33</sup> *Id.* § 214.2(f)(10) & (5)(iv).

<sup>34</sup> Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed. Reg. 13039, 13040 (May 10, 2016).

was a greater chance of keeping the student in the United States to attain a job that benefits the United States economy.<sup>35</sup>

### *B. H-1B Visa*

During the one to three years of practical training, F-1 students who work for a company that directly applies to their field of education may attain an H-1B non-immigrant visa.<sup>36</sup> The H-1B Visa is one of the few non-immigrant visas that does not require proof of a temporary intent and therefore serves as a pathway to an immigrant visa (a “green card”).<sup>37</sup>

There are three general requirements to attain an H-1B non-immigrant visa: (1) the individual must have at least a bachelor’s degree in a directly relevant discipline to the job, (2) the job requires at least a bachelor’s degree, and (3) the job pays at or above the prevailing wage.<sup>38</sup> The H-1B duration of status is three years with a three year optional extension.<sup>39</sup>

Attaining an H-1B visa requires participation in the H-1B lottery system.<sup>40</sup> The United States currently only accepts 65,000 H-1B applications.<sup>41</sup> The visas are awarded on a first come, first serve basis, starting in the beginning of April.<sup>42</sup> If there are more than 65,000 applications within the first five business days of April, the visas are then awarded through the lottery.<sup>43</sup> The H-1B lottery is drawn in early April every year, with around 200,000 individuals applying each year.<sup>44</sup> For an F-1 student attempting to obtain a H-1B visa, they must find a company to hire them and be

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<sup>35</sup> *Id.* at 13043.

<sup>36</sup> See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2019).

<sup>37</sup> IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL 1170 (17th ed. 2019).

<sup>38</sup> See U.S. CITIZENSHIP AND IMMIGR. SERV., *Instructions for Petition for Nonimmigrant Worker* 11, <https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf> (last visited Oct. 18, 2020).

<sup>39</sup> See KURZBAN, *supra* note 37, at 1191.

<sup>40</sup> See AUSTIN T. FRAGOMEN JR. ET AL., H-1B HANDBOOK § 3:27 (2020 ed.).

<sup>41</sup> See Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23775, 23776 (May 5, 2005).

<sup>42</sup> Neil G. Ruiz, *Key facts about the U.S. H-1B visa program*, PEW RESEARCH CENTER (Apr. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>.

<sup>43</sup> *Id.*

<sup>44</sup> See *id.*; see U.S. CITIZENSHIP AND IMMIGR. SERV., *USCIS Completes the H-1B Cap Random Selection Process for FY 2019* (Apr. 12, 2018), <https://www.uscis.gov/news/alerts/uscis-completes-the-h-1b-cap-random-selection-process-for-fy-2019>.

successfully drawn in the lottery.<sup>45</sup> Non-STEM students have only one year to attain employment and be selected, while STEM students are granted three chances at the H-1B lottery because of their extended practical training.<sup>46</sup> If unsuccessful, the student often has only one option to stay in the United States: go back to school.

### *C. Employment Based Legal Permanent Residence “Green-Card”*

After their six years as an H-1B worker, the student’s non-immigrant visa will expire, and they will have to leave the United States.<sup>47</sup> Before the expiration of this six-year period, a worker must apply for an employment-based visa (a “green card”) if they wish to stay in the United States permanently.<sup>48</sup> There are four programs for an individual to attain legal permanent residence in the United States through an immigrant visa: family, employment, diversity, or asylum.<sup>49</sup> Each program has its own requirements and procedures, with many programs having extraordinarily long queues that take years to be granted.<sup>50</sup>

There are five different categories of an employment-based immigration visa: EB-1, EB-2, EB-3, EB-4, EB-5.<sup>51</sup> Each have their own requirements and can have up to decade-long queues.<sup>52</sup> EB-1 requires that the immigrant have extraordinary ability with international acclaim, the EB-4 visa applies mainly to religious workers, and the EB-5 visa applies to significant investors into the U.S. economy.<sup>53</sup> Very few H-1B visa immigrants meet the requirements of the EB-1, EB-4, or EB-5 and mostly rely on the EB-2 and

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<sup>45</sup> See U.S. CITIZENSHIP AND IMMIGR. SERV., *supra* note 31; see FRAGOMEN ET AL., *supra* note 40.

<sup>46</sup> See 81 Fed. Reg. 13039, 13040 (May 10, 2016).

<sup>47</sup> See KURZBAN, *supra* note 37, at 1191.

<sup>48</sup> See 8 U.S.C. § 1153(b) (2006).

<sup>49</sup> *Id.* § 1153(a)-(c) (2006); 8 U.S.C. § 1158 (2005).

<sup>50</sup> See *id.*; see U.S. Dep’t of State, *Visa Bulletin March 2020*, TRAVEL.STATE.GOV (Mar. 2020), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-march-2020.html> (the visa bulletin provides priority dates which indicate which individuals may now apply for their legal permanent residence. The further back the priority date, the longer the wait time is estimated to be).

<sup>51</sup> See 8 U.S.C. § 1153(b)(1)-(5) (2006).

<sup>52</sup> U.S. Dep’t. of State, *supra* note 50 (e.g., the “Dates for Filing Employment-Based Visa Applications” table indicates that citizens of India must have filed their EB-2 category visa application by July 1, 2009 to be currently qualified to adjust their status).

<sup>53</sup> See 8 U.S.C. § 1153(b)(1)(4)(5) (2006).



EB-3 visas.<sup>54</sup> The EB-2 visa requires that the immigrant hold an advanced degree and their employment will substantially benefit the national economy.<sup>55</sup> The EB-3 applies to immigrants performing skilled labor, who hold a bachelor's degree in their profession, and have met the Secretary of Labor's certification requirement.<sup>56</sup>

The procedure for attaining an EB-3 visa relies heavily on the employer's time and resources. If the employer wishes to sponsor an H-1B visa worker, or F-1 visa (on practical training), they must first meet the Department of Labor's certification and qualifications for certain immigrants; simply put, that the worker would not be taking the job from a possible American worker.<sup>57</sup> The Department of Labor's Permanent Labor Certification requires that an employer offer the job at the prevailing wage of the market, require at least a Baccalaureate degree in the profession, and conduct a recruitment process that searches for American citizen workers that meet the requirements of the open position ("labor market test").<sup>58</sup> This includes advertising in the newspaper, posting to employer job sites, and advertising at local job fairs.<sup>59</sup> If the employer discovers any American worker who meets the requirements of the position, the employer is not authorized to hire the foreign applicant.<sup>60</sup> If the employer is not required to hire the American worker they identified during the recruitment process, there is nothing to stop companies from just recycling F-1 students or H-1B workers for their labor and never hiring long term.

If the EB-3 applicant survives the Department of Labor certification process, and the applicant's visa application is approved, the applicant "reserves a place in line" to adjust their status depending on his or her nationality of origin.<sup>61</sup> According to March 2020 Visa Bulletin, EB-3

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<sup>54</sup> See *id.*; see U.S. CITIZENSHIP AND IMMIGR. SERV., *supra* note 31 (H-1B applicants are temporary workers with an advanced degree and are most likely not eligible for an EB-1, EB-4, and EB5 visa who are world renowned artists or scholars, religious workers, and wealthy investors).

<sup>55</sup> See 8 U.S.C. § 1153(b)(2)(A) (2006).

<sup>56</sup> See 8 U.S.C. § 1153(b)(3) (2006).

<sup>57</sup> 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2013).

<sup>58</sup> 20 C.F.R. § 656.17 (2005). See KURZBAN, *supra* note 37, at 1541.

<sup>59</sup> *Id.* § 656.17(e)(1)(i)(B).

<sup>60</sup> See KURZBAN, *supra* note 37, at 1541 ("An LC (Labor Condition) is needed for all third preference categories.").

<sup>61</sup> See U.S. Dep't of State, *Visa Bulletin March 2020*, TRAVEL.STATE.GOV (Mar. 2020), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-march-2020.html>;

applicants can expect a three year wait.<sup>62</sup> However, applicants from China have 4 year wait, and applicants from India have an 11-year wait-time.<sup>63</sup> Only after the waiting period would an applicant become a legal permanent resident of the United States.

This narrow and winding pathway through the stacks statutory regulation is, for many, the only option for legally immigrating to the United States. The F-1 student visa is the beginning of what many call the “American Dream.” The visa allows students to chase an education and a career in the United States. For the United States, a foreign student is a steady revenue stream for universities.<sup>64</sup> The student visa supplies the American workforce with diverse, talented workers who significantly improve the U.S. economy and may eventually become legal permanent residents or citizens themselves.

### III. THE DECLINE OF F-1 STUDENT VISAS: THE TRUMP EFFECT

Foreign students are valuable financial assets for universities. They pay full tuition and pull foreign investors into United States academic institutions.<sup>65</sup> “International students . . . contribute \$39 billion to our national economy and more than 400,000 jobs, according to NAFSA, the association of international educators.”<sup>66</sup> The F-1 Student Visa is the second most common non-immigrant Visa category with hundreds of thousands of foreign students currently enrolled in American Universities.<sup>67</sup>

In 2018, the United States issued 362,929 F-1 foreign student visas, marking a 44% decrease in issuing new F-1 student visas since 2015’s 644,233.<sup>68</sup> Because foreign students are an important source of income for

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*see* KURZBAN, *supra* note 37, at 1595–96 (the procedure of attaining a legal permanent residence is two-steps, the first is the application for the visa, and the second is the application to adjust status, in order to reserve “a spot in line” the visa application must be approved first).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See* WALL ST. J., *supra* note 2.

<sup>65</sup> *See id.*

<sup>66</sup> Marvin Krislov, *Why International Students Are Good for Colleges, Universities, and America*, FORBES, <https://www.forbes.com/sites/marvinkrislov/2019/03/22/why-international-students-are-good-for-colleges-universities-and-america/#5ed82b0ef496> (last visited Feb. 27, 2020).

<sup>67</sup> U.S. DEP’T OF STATE, NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION, TBL. XVI(B) (2018).

<sup>68</sup> *See id.*

United States universities, Administrations may be asking, “where are they going?”

In short, they are going to Canada. In 2018, Canada’s international student population climbed to 572,415.<sup>69</sup> In 2015, that population was only 349,921.<sup>70</sup> In the 2018 CBIE International Student Survey, foreign students indicated that Canada was their preferred academic destination for three statistically significant reasons: the reputation of Canadian education, Canada’s offering of a tolerant and non-discriminatory society, and Canada’s reputation as a safe country.<sup>71</sup> Furthermore, 60% of the participants in the study showed interest in becoming future Canadian citizens.<sup>72</sup>

The CBIE International Student Survey hints at a major reason why there might be fewer students applying to U.S. colleges: the “Trump Effect.”<sup>73</sup> Increased uncertainty in immigration enforcement and policy has pushed prospective international students away from the United States.<sup>74</sup> “[Trump’s immigration policy] creates uncertainty in the immigration process for those who have traditionally felt secure in the passage.”<sup>75</sup> President Trump’s election in 2016 represented the highest anti-immigration sentiment in the United States in recent history.<sup>76</sup> The following measures taken by the Trump Administration have transformed the United States into a less attractive place for international students to study and invest.

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<sup>69</sup> *Canada’s Foreign Student Enrolment Took Another Big Jump in 2018*, INT’L CONSULTANTS FOR EDUC. & FAIRS (Feb. 20, 2019), <https://monitor.icef.com/2019/02/canadas-foreign-student-enrolment-took-another-big-jump-2018/>.

<sup>70</sup> *International Students with a Valid Permit on December 31st by Top 50 Countries of Citizenship, 2008–2017*, GOV’T OF CAN. (2017), <https://open.canada.ca/data/en/dataset/2bf9f856-20fe-4644-bf74-c8e45b3d94bd>.

<sup>71</sup> See *The Student’s Voice: National Results of the 2018 CBIE International Student Survey*, CAN. BUREAU FOR INT’L EDUC. 5 (2018).

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.* at 5 (indicates that permanent migration and employment opportunities were why they chose Canada); see also Ming H. Chen & Zachery New, *Silence and the Second Wall*, 28 S. CAL. INTERDISCIPLINARY L.J. 549, 549–50 (2019).

<sup>74</sup> See Chen & New, *supra* note 73, at 549–50.

<sup>75</sup> *Id.*

<sup>76</sup> See generally Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigration Sentiments*, 51 P.S.: POL. SCI. & POLS. 528 (2018).

#### IV. THE DECLINE OF F-1 STUDENT VISAS: TRUMP'S INVISIBLE WALL

One of the frustrations of foreign applicants is the declining prospect of staying in the United States following their education. One possible pathway to citizenship for a foreign student would be to change their status from a F-1 visa to the H1-B temporary visa, and then receive their green card from their employer once it becomes available.<sup>77</sup> The Trump Administration has created frustrations at every step of the process to slow down the system.<sup>78</sup> This phenomenon has been labeled by immigration lawyers as Trump's "invisible wall" (also referred to as "the second wall").<sup>79</sup>

Chants of "build the wall" continue to echo through stadiums and auditoriums throughout the country as Trump solicited support from U.S. voters.<sup>80</sup> Trump's campaign and subsequent Administration have made a physical border wall their number one priority.<sup>81</sup> While Trump and his Administration have faced congressional roadblocks in funding the border wall designed to stop illegal immigration, Trump's Administration has effectively built an "invisible wall" aimed at stopping or limiting legal migration.<sup>82</sup>

The Federation for American Immigration Reform (FAIR), a right-wing anti-immigration group, has considered the first two years of the Trump presidency a resounding success.<sup>83</sup> RJ Hauman FAIR's head lobbyist, considers elements of the "invisible wall" part of the Administration's great accomplishments, saying, "[a] lot of his [Trump's] accomplishments are more granular, more in the weeds, than build the wall."<sup>84</sup> Trump has been

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<sup>77</sup> See 8 U.S.C. § 1101(a)(15)(F)(i)(2019); see 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2019); see 8 U.S.C. § 1153(b)(1)-(5) (2006).

<sup>78</sup> Chen & New, *supra* note 73, at 549–50.

<sup>79</sup> *Id.*

<sup>80</sup> See Donald Trump, *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, WHITE HOUSE (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>.

<sup>81</sup> *See id.*

<sup>82</sup> Amanda Holpuch, *How Trump's 'Invisible Wall' Policies Have Already Curbed Immigration*, THE GUARDIAN (Jan. 15, 2019), <https://www.theguardian.com/us-news/2019/jan/15/invisible-wall-trump-policies-have-curbed-immigration>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

wildly successful in constructing an invisible wall through statutory, regulatory, and executive change.

However, the Trump Administration has been completely silent regarding their success in constructing these invisible barriers. In fact, Trump has gone to great lengths to reassure Americans that he is pro legal immigration. In an unscripted comment during the 2019 State of the Union Address, “he called for immigrants to enter the U.S. legally in ‘the largest numbers ever.’”<sup>85</sup> However, the Trump Administration’s actions seem to contradict that statement. Ali Noorani, executive director of the National Immigration Forum explains, “[t]he President is very happy to say he’s in favor of legal immigration, but there’s really no evidence of that. Policy after policy, regulation after regulation, block by block, the Administration is slashing legal immigration to the United States.”<sup>86</sup> Broadly, the Administration has imposed barriers to legal immigration through procedural hurdles.<sup>87</sup> They have intensified vetting and scrutiny for visa petitions, have made record number of requests for evidence, and added new interview requirements.<sup>88</sup>

While the physical border wall seeks to obstruct illegal immigration, the target of the “invisible wall” is legal immigrants, including F-1 foreign students. For example, the Trump Administration proposed raising fees for foreign students and limiting practical training opportunities for certain nonimmigrant students.<sup>89</sup> In addition, the Trump Administration has proposed regulations to harshly enforce duration of status violations for international students:

Previously if the government found an international student on a F-1 . . . status had violated his/her status, the individual did not start accruing unlawful presence until the date that the USCIS or an immigration judge determined that a violation occurred. Under the new policy, a student or scholar on a F-1 . . . visa would start

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<sup>85</sup> Michael Collins & Alan Gomez, ‘We Need People’: Donald Trump Says He Wants to See More Legal Immigration in U.S., USA TODAY (Feb. 6, 2019), <https://www.usatoday.com/story/news/politics/2019/02/06/immigration-trump-says-he-wants-more-legal-migrants-u-s/2792732002/>.

<sup>86</sup> Catherine E. Shoichet, *This Wall President Trump is Building Has Nothing to Do with the Border*, CNN (Feb. 27, 2020), <https://www.cnn.com/2020/02/24/us/trump-invisible-wall-public-charge/index.html>.

<sup>87</sup> Chen & New, *supra* note 73, at 549.

<sup>88</sup> *Id.*

<sup>89</sup> Howard S. Myers, III, *America’s Immigration Policy—Where We Are and How We Arrived: An Immigration Lawyer’s Perspective*, 44 MITCHELL HAMLINE L. REV. 743, 797 (2018).

accruing unlawful presence from the day after the violation occurred. The new policy affects international students, scholars, and their dependents.<sup>90</sup>

This policy takes aim at F-1 students seeking employment after their duration of status has completed.<sup>91</sup>

The Trump Administration has also slowed the process of attaining a F-1 visa by repealing bureaucratic procedures designed to speed up the process. In March 2016, Executive Order 13780 suspended the interview waiver program that renewed low risk high-volume visa renewals without requiring an in-person interview at USCIS.<sup>92</sup> By suspending the interview waiver program, F-1 visa holders looking to renew their visa will have to pay USCIS processing fees and endure slowed wait times.<sup>93</sup>

#### V. THE INVISIBLE WALL: FAILURE OF THE H-1B VISA

The invisible wall has also frustrated the purpose for which many international students have come to the United States, which is to attain U.S. employment. The proposed regulations mentioned previously have generally made F-1 student visas an unattractive pathway to legal permanent residence.<sup>94</sup> However, the roadblocks in the H-1B system is perhaps the biggest frustration of prospective F-1 students. Under the Trump Administration the H-1B visa denial rate has climbed from 4.3% in 2015 to an astonishing 15.2% in 2019.<sup>95</sup>

The Trump Administration has enacted many policies that will limit the effectiveness of the H-1B program. For example, the travel ban affected “individuals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen,

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<sup>90</sup> Kevin J. Fandl et al., *Immigration and Naturalization*, 53 INT'L L. 315, 317–18 (2019) (citing *USCIS Changing Policy on Accrued Unlawful Presence by Nonimmigrant Students and Exchange Visitors*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/news/newsreleases/uscis-changing-policy-accrued-unlawful-presence-nonimmigrant-students-and-exchange-visitors> (last updated May 11, 2018)).

<sup>91</sup> *See id.*

<sup>92</sup> AM. IMMIGR. LAW. ASS'N, *Deconstructing the Invisible Wall: How Policy Changes by the Trump Administration Are Slowing and Restricting Legal Immigration*, AILA Doc. No. 18031933 1, 6 (Apr. 24, 2018).

<sup>93</sup> *See id.* at 17–18.

<sup>94</sup> *See* AM. IMMIGR. LAW. ASS'N, *supra* note 92, at 17–18; *see* Fandl et al., *supra* note 90.

<sup>95</sup> Sophie Alcorn, *USCIS H-1B Denial Rate Remains High, Requests for Evidence Rise*, ALCORN, <https://www.alcorn.law/immigration/uscis-h-1b-denial-rate-remains-high-requests-for-evidence-rise/> (last visited Feb. 28, 2020).

and Somalia from entering into the U.S. The proclamation made an exception for individuals from Iran who have a valid student visa (F or M visa), though it does not address the H-1B visa for post-graduate employment.<sup>96</sup> While Trump recognized exceptions for Iranians who are current students,<sup>97</sup> it created questions for any Iranian trying to adjust their F-1 student into an H-1B visa. “[T]ravel bans and extreme vetting directives . . . halt or delay immigration without any justification beyond vague references to national security.”<sup>98</sup>

Beyond the travel ban, Trump has promised that his immigration policies will be focused on hiring American.<sup>99</sup> In 2017, Trump enacted the “Buy American and Hire American” executive order that suggests reforms to the H-1B program to address his concerns that H-1B visas are being awarded to unskilled and undeserving beneficiaries.<sup>100</sup> In the process of obtaining an H-1B visa, many applicants are being halted by burdensome requests for evidence proving certain eligibility requirements (e.g., proving they are entering a profession relevant to their bachelor’s degree).<sup>101</sup> Requests for Evidence (RFE’s) have climbed from 22.3% in 2015 to 40.2% in 2019.<sup>102</sup> RFE’s can delay the process for employment so significantly that employees can lose work authorization and can cause extensive hardship for employers in need of skilled labor.<sup>103</sup>

United States technology companies are seeing talent slip through their fingers as many F-1 students return to their home country to start businesses. According to the National Center for Education Statistics, in 2015 there were “10 times more computer science jobs than students graduating with

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<sup>96</sup> Julie Monroe, *Protecting the H-1B Visa: A Promise to “Hire American” in the “Nation of Immigrants,”* 2019 UNIV. ILL. L. REV. 1385, 1397 (2019) (citing Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,164 (Sept. 27, 2017)).

<sup>97</sup> See *id.*

<sup>98</sup> George Tzamaras & Belle Woods, *AILA’s “Invisible Wall” Report Sheds Light on Trump Administration Policies to Restrict Legal Immigration*, AM. IMMIGR. LAW. ASS’N (Mar. 21, 2018).

<sup>99</sup> AM. IMMIGR. LAW. ASS’N, *supra* note 92, at 1, 8.

<sup>100</sup> See Exec. Order No. 13788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

<sup>101</sup> See Alcorn, *supra* note 95; see U.S. CITIZENSHIP AND IMMIGR. SERV., *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018*, 1, <https://www.uscis.gov/sites/default/files/document/data/understanding-requests-for-evidence-h-1b-petitions-in-fiscal-year-2018.pdf> (last visited Sept. 18, 2020).

<sup>102</sup> See Alcorn, *supra* note 95.

<sup>103</sup> See AM. IMMIGR. LAW. ASS’N, *supra* note 92, at 8.

computer science degrees.”<sup>104</sup> These computer science jobs would be attractive employment destinations for F-1 students. However, the failure of the H-1B system to supply United States companies with enough foreign employees results in American-educated foreign engineers taking their talents back to their home countries.<sup>105</sup> In Silicon Valley, 57% of workers in STEM jobs with a bachelor’s degree or higher were born outside the United States.<sup>106</sup> The demand for foreign STEM workers and the failure of the H-1B program to retain entrepreneurial talent has resulted in a “brain drain” in the STEM industry since the early 2000’s.<sup>107</sup>

Exacerbating the Silicon Valley brain-drain, “[o]n March 31, 2017, the eve of the opening of the FY 2018 H-1B cap filing window, USCIS rescinded prior guidance from December 22, 2000 that generally recognized the position of ‘computer programmer’ as one that would merit eligibility as a ‘specialty occupation’ under the H-1B visa program.”<sup>108</sup> Since a computer programmer might only have an associate degree, the position will not qualify for an H-1B.<sup>109</sup> With Silicon Valley starving for foreign talent, this sudden change in H-1B policy has “caught thousands of employers and hopeful beneficiaries unaware.”<sup>110</sup>

Trump’s invisible wall is exacerbating the STEM need in Silicon Valley and has attempted to curtail the STEM 24-month practical training extension.<sup>111</sup> In January 2018, USCIS, without any announcement, declared that staffing companies can no longer hire F-1 STEM practical training

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<sup>104</sup> Monroe, *supra* note 96, at 1385, 1389 (quoting Grace Donnelly, *New Data Shows Foreign Interest in American Jobs May Be Declining Under Trump*, FORTUNE (Aug. 2, 2017), <http://fortune.com/2017/08/02/new-data-shows-foreign-interest-in-american-jobs-may-be-declining-under-trump/>).

<sup>105</sup> See Ellen Sheng, *Silicon Valley is fighting a brain-drain war with Trump that it may lose*, CNBC (Apr. 9, 2018), <https://www.cnbc.com/2018/04/09/trumps-war-on-immigration-causing-silicon-valley-brain-drain.html>.

<sup>106</sup> *Id.*

<sup>107</sup> See Vivek Wadhwa, *The Immigrant Exodus: Why America is Losing the Global Race to Capture Entrepreneurial Talent*, 16 (2012).

<sup>108</sup> AM. IMMIGR. LAW. ASS’N, *supra* note 92, at 9–10.

<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Id.*

<sup>111</sup> Laura D. Francis, *Foreign Student Training Program Gets Little Notice From Trump (2)*, BLOOMBERG L. (Mar. 20, 2019), <https://news.bloomberglaw.com/daily-labor-report/foreign-student-training-program-gets-little-notice-from-trump-2>.



participants.<sup>112</sup> As one author comments, “[m]any employers use [practical training] in order to hire foreign nationals straight out of school without having to wait for a decision on an H-1B petition. That option is now closed to staffing companies.”<sup>113</sup> Limiting the ability for employers to acquire employees during their F-1 STEM practical training indicates that Trump might take aim at the program in its entirety.

#### VI. THE INVISIBLE WALL: ATTAINING LEGAL PERMANENT RESIDENCE

Applicants for nonimmigrant F-1 and H-1B visas are not the only ones impacted by Trump’s invisible wall. The process for attaining legal permanent residence has become increasingly unrealistic for prospective F-1 students thinking about starting a life in the United States.

In October 2017, the Trump Administration announced that it will no longer waive interview requirements for Employment-Based Immigrant Applicants, such as EB-3 applicants, and will require all applicants who have been vetted extensively and lived in the United States for years to complete yet another interview with a Consular Officer.<sup>114</sup> “USCIS explained that with the goal of exhausting all employment-based numbers each year, a slowdown in processing of family-based cases and naturalization cases can be expected at least in the short term. Longer-term impact will depend on the ability of USCIS to add additional staff and streamline procedures.”<sup>115</sup> Similar to increased requests for evidence, Trump’s repeal of programs designed to keep our Immigration System efficient has successfully slowed legal immigration to a crawling pace.

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<sup>112</sup> Laura D. Francis, *Foreign Student Training Program Rules Quietly Tightened*, BLOOMBERG L. (Apr. 26, 2018), <https://news.bloomberglaw.com/daily-labor-report/foreign-student-training-program-rules-quietly-tightened>.

<sup>113</sup> *Id.*

<sup>114</sup> AM. IMMIGR. LAW. ASS’N, *supra* note 92, at 7.

<sup>115</sup> *Id.* (citing AM. IMMIGR. LAW. ASS’N, AILA DOC. NO. 17100232, PRACTICE ALERT: DETAILS ON EMPLOYMENT-BASED INTERVIEW REQUIREMENTS EMERGE DURING CIS OMBUDSMAN STAKEHOLDER CALL (Oct. 2, 2017), [http://www.aila.org/infonet/practice-alert-details-on-employment-based-interv?utm\\_source=aila.org&utm\\_medium=InfoNet%20Search](http://www.aila.org/infonet/practice-alert-details-on-employment-based-interv?utm_source=aila.org&utm_medium=InfoNet%20Search)).

## VII. CONCLUSION

From the eyes of a prospective international student, the U.S. is becoming a less attractive destination for study. Anti-immigration sentiments and aggressive administrative policies limiting legal immigration have international students looking elsewhere to spend their tuition dollars.<sup>116</sup> The “Trump effect” has created uncertainty at every turn of the immigration process, and Trump’s invisible wall is attempting to block any pathway to employment and legal permanent residence for a prospective international student. Annaluisa Padilla, the President of the American Immigration Lawyers Association explains,

“New restrictive policies implemented without any action by Congress are now blocking . . . longstanding opportunities [for beneficial immigration]. Although these policies are promoted as necessary to protect national security and the American workforce, they are shrouded in the fallacy that immigration is bad for our country when study after study shows that immigration makes our country stronger.”<sup>117</sup>

The student debt crisis was one of the big talking points in the 2020 election.<sup>118</sup> It is a trillion-dollar issue that has become pervasive in predicting the economic trends for the future generation.<sup>119</sup> Despite raising tuition, U.S. colleges and Universities are losing money due to decreased international student numbers.<sup>120</sup> Making the United States a more attractive destination for international students may not solve the student debt crisis, but it certainly would help.

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<sup>116</sup> See George Tzamaras & Belle Woods, *AILA’s “Invisible Wall” Report Sheds Light on Trump Administration Policies to Restrict Legal Immigration*, AM. IMMIGR. LAW. ASS’N (Mar. 21, 2018), <https://www.aila.org/advo-media/press-releases/2018/ailas-invisible-wall-report-sheds-light-on-trump>.

<sup>117</sup> *Id.*

<sup>118</sup> See Annie Nova, *Where the 2020 Democratic Candidates Stand on Student Debt*, CNBC (Sept. 21, 2019), <https://www.cnbc.com/2019/09/21/what-the-2020-candidates-are-proposing-to-do-about-student-debt.html>.

<sup>119</sup> See generally Friedman, *supra* note 6.

<sup>120</sup> See generally U.S. DEP’T OF STATE VISAS ANN. REP. (2018).