In the United States District Court for the District of Columbia

Washington Alliance of Technology Workers; 13401 Bel-Red Rd. #B8 Bellevue, WA 98005 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529 (ESH)

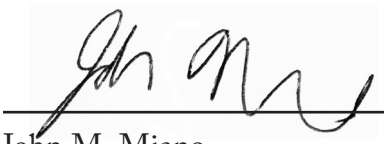
Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record

Plaintiff Washington Alliance of Technology Workers ("Washtech") moves under Fed. R. Civ. P. 56 and Local. R. 7(h) that this court grant summary judgment to Counts IV–IX of its First Amended Complaint. Summary Judgment is appropriate because this action is a review of an agency record.

Washtech submits the attached memorandum of points and authorities and proposed order in support of this motion.

Respectfully submitted,

Dated: Mar. 6, 2015



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Memorandum of Points and Authorities in Support of Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record

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QUESTIONS PRESENTED

1. Is an alien who has graduated, is no longer attending school, and who is working or unemployed and seeking work a *student* under 8 U.S.C. § 1101(a)(15)(F)(i)?
2. Is DHS required to ensure aliens admitted on student visas leave the country when they are no longer students?
3. May DHS authorize work on student visas through regulation for the purpose of circumventing statutory limits on foreign labor?
4. May an agency promulgate regulations that rely on incorporation by reference that ignore the incorporation by reference requirements of 1 C.F.R. part 51?
5. May an agency avoid notice and comment under the Administrative Procedure Act by delaying action until a self-imposed deadline and declaring good cause?
6. May an agency avoid publication in the Federal Register by modifying a document incorporated by reference in an earlier regulation?
7. Does an agency act highly capriciously when it uses misrepresentation to establish the need for regulation?
8. Does an agency act arbitrarily and capriciously when it ignores all evidence contrary to its conclusion when promulgating regulations?

TABLE OF AUTHORITIES

Opinions:

Statutes and United States Code:

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INTRODUCTION

The Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO ("Washtech") brings this action under the Administrative Procedure Act, Pub. L. 79–404, 60 Stat. 237 (codified at 5 U.S.C. § 500 *et seq*.) (*herinafter*, "APA"). It addresses regulations promulgated by the United States Department of Homeland Security ("DHS") governing its Post Completion Optional Practical Training program ("OPT").

The OPT program authorizes aliens, admitted on F-1 student visas, to remain in the United States and work or be unemployed after graduation. 8 C.F.R. § 214.2(f)(10)(ii)(A) (2014). The First Amended Complaint alleges that the OPT regulations are in excess of DHS authority to admit foreign students because they violate the provisions of 8 U.S.C. §§ 1101(a)(15)(H)(1)(B), 1101(a)(15)(F)(i), 1182(n), 1184(a), 1184(g). In addition, the complaint alleges that DHS has promulgated OPT regulations without following the procedures required by the APA and that those regulations are arbitrary and capricious.

One of the fundamental questions is whether graduates working on OPT are, in fact, *bona fide students*, as required for student visa status. 8 U.S.C. § 1101(a)(15)(F)(i). If they be not students, DHS regulations must ensure these aliens leave the country. § 1184(g).

STATUTORY FRAMEWORK

Aliens are admitted into the United States as *immigrants*, *non-immigrants* or *refugees*. 8 U.S.C. §§ 1101(a)(15), 1157. Section 1101(a)(15) authorizes DHS to admit non-immigrants for various purposes (*e.g.*, diplomats, crewmen, visitors, journalists). The common name associated with a non-immigrant visa category is derived from its subsection within § 1101(a)(15). 8 C.F.R. § 214.1(a)(2). For example, the A-1 visa for diplomats is authorized by 8 U.S.C. § 1101(a)(15)(A)(i). There are a number of visa categories for admitting non-immigrants to perform labor. For example,

the L-1 visa allows companies to transfer foreign managers to the United States, § 1101(a)(15)(L)(i); the O visa is for highly skilled workers of extraordinary ability, § 1101(a)(15)(O); and the H-2A visa governs the entry of agriculture workers, § 1101(a)(15)(H)(2)(a).

Two non-immigrant visas are at issue in this action. The first is the F-1 student visa. § 1101(a)(15)(F)(i). This authorizes admission to an alien having a residence in a foreign country which he has no intention of abandoning, who is a *bona fide* student qualified to pursue a full course of study, and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an approved academic institution or place of study that has agreed to report the termination of attendance of each nonimmigrant student. *Id.* The other is the H-1B guest worker visa. § 1101(a)(15)(H)(1)(b). This visa is for aliens in specialty occupations to work temporarily in the United States. A *specialty occupation* is defined as one that generally requires a college degree. § 1184(i)(2). As such, the H-1B visa is the statutory path for admitting the same class of college-educated labor that works on OPT (with OPT limited to graduates of United States schools).

Many of the provisions governing non-immigrant visas are codified separately from the visa definitions in §§ 1181–1189. Some of these provisions apply to visas in general. One such provision at issue here is § 1184(a). That provision allows DHS to set the duration of admission through regulation, but requires DHS regulations to ensure the alien leaves the United States when he no longer maintains the status for which he was admitted. *Id.*

Other provisions in §§ 1181–1189 apply only to specific visas. Two such provisions governing H-1B visas are at issue here. First, the H-1B visa requires the alien's employer to file a Labor Condition Application ("LCA") governing labor protections. § 1101(a)(15)(H)(i)(B). The LCA requirements are found at § 1182(n). Second, there are annual limits on the number of H-1B visas that serve as the pri-

mary protection for domestic labor. § 1184(g). Unlike H-1B, OPT allows this same class of college-educated workers to perform labor in the United States with no protections for domestic labor whatsoever. 8 C.F.R. *passim*.

A connection between F-1 and H-1B visas has developed as the result of the underlying structure of the immigration system. An imagined problem that DHS attempts to solve with the regulations at issue is that the system makes it, "difficult for foreign students to stay in the United States permanently". 73 Fed. Reg. 18,953. Congress explicitly created that difficulty. *See*, *Elkins v. Moreno*, 435 U.S. 647, 665 (1978). F-1 admission requires, "having a residence in a foreign country which [the alien] has no intention of abandoning". *Id*. If an alien on a student visa applies for an immigrant visa, that demonstrates intent to abandon his foreign residence, making him outside of F-1 status and requiring his deportation. *See*, *Elkins*, 435 U.S. at 666. As such, the straightforward path for an alien on a student visa to immigrate is to return home and then apply for an immigrant visa.

However, there is an indirect path from a student visa to an immigrant visa: H-1B. H-1B visas are one of the few non-immigrant visas that permit *dual intent*. § 1184(h). An alien on a non-immigrant H-1B visa is explicitly permitted to adjust status to an immigrant visa. *Id*. Aliens on student visas can apply for a non-immigrant H-1B visa under the fiction that, at the time of application, they are doing so without immigrant intent. Once they have changed to H-1B visa status, the aliens can *change their mind* and apply for immigrant visas. *Id*. Therefore, H-1B visas can provide a stepping-stone between a non-immigrant student visa and immigration.

HISTORICAL BACKGROUND

Work on student visas provides a classic example of unchecked regulatory incrementalism. There is no statutory authorization for aliens to work on student visas. *See*, 8 U.S.C. *passim*. All work authorizations for aliens on student visas are entirely the creation of regulation. *Id*. When the current student visa was created in 1952,

regulations permitted foreign students to work under these terms:

> In cases where employment for practical training is required or recommended by the school, the district director may permit the student to engage in such employment for a six-month period subject to extension for not over two additional six-month periods, but any such extensions shall be granted only upon certification by the school and the training agency that the practical training cannot be accomplished in a shorter period of time.

Part 125—Students, 17 Fed. Reg. 5,355–57 (Aug. 7, 1947) (Codified at 8 C.F.R. part 125). Under the 1947 regulation, work (called "practical training") took place while the alien was attending school; the work was part of a curriculum; it was conducted by a training agency; and the duration was determined by the training requirements. *Id.*

From there, work on student visas expanded incrementally, with continuous changes taking place between 1952 and 2008,[1] to the point where it clearly did not conform to the statutory authorization to admit students. By 1981 regulations allowed aliens to work after graduation if the school certified that such work was not available in the alien's home country. 8 C.F.R. § 214.2(f)(10) (1981). That restriction was removed in 1991 when all graduates were authorized to work. Nonimmigrant Classes; Students, F and M Classifications, 56 Fed. Reg. 55,608 (Oct. 29, 1991) (codified at 8 C.F.R. §§ 214, 274a). The term *Optional Practical Training* first appears in a 1992 Immigration and Naturalization Service ("INS") interim rule. Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992)

1 *E.g.*, Immigration and Nationality Regulations, 17 Fed. Reg. 11,489 (Dec. 19, 1952) (codified at Title 8 C.F.R.); Nonimmigrant Classes; Change of Nonimmigrant Classification; Revisions in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14,575 (Apr. 5, 1983) (codified at 8 C.F.R. §§ 214, 248); Admission of Nonimmigrant Students for Duration of Status, 43 Fed. Reg. 54,618 (Nov. 22, 1978) (codified at 8 C.F.R. § 214); Nonimmigrant Classes; F-1 Academic Students, 52 Fed. Reg. 13,223 (Apr. 22, 1987) (codified at 8 C.F.R. § 214); Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. §§ 214, 274a); Nonimmigrant Classes; Students, F and M Classifications, 56 Fed. Reg. 55,608 (Oct. 29, 1991) (codified at 8 C.F.R. §§ 214, 274a); Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. §§ 214, 274a); Extending the Period of Duration of Status for Certain F and J Nonimmigrant Aliens, 64 Fed. Reg. 32,146 (June 15, 1999) (codified at 8 C.F.R. § 214.2); Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256 (Dec. 11, 2002) (codified at 8 C.F.R. §§ 103, 214, 248, 274a)

(codified at 8 C.F.R. § 214.2). In 2002, DHS removed the requirement that aliens on OPT be enrolled at a school. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256 (Dec. 11, 2002) (codified at 8 C.F.R. §§ 103, 214, 248, 274a).

It is not clear at what specific point in this evolution that the regulations authorizing work on student visas first exceeded DHS statutory authority. Clearly that had occurred some time before 2007. By that year, DHS was simply ignoring its statutory obligation to ensure that aliens admitted on student visas leave the country when they cease to be students, 8 U.S.C. § 1184(a), by allowing all graduates to remain in the country to work for up to a year under OPT, 8 C.F.R. § 214.2(f)(10) (2007). But DHS did not stop there.

In 2008, DHS transformed OPT into a full-fledged guest worker program designed to supply labor to American industry. Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) (The "2008 OPT Rule"). The 2008 OPT Rule was designed specifically to circumvent the statutory limits on H-1B guest workers by allowing aliens, who could not obtain an H-1B visa, to work on a student visa instead. 73 Fed. Reg. 18,946. It does so by authorizing two distinct increases to the previous 12-month duration of OPT. 73 Fed. Reg. 18,947–48. Combined, these increases allow graduates to work in the United States on student visas for up to 35 months. 73 Fed. Reg. 18,947–48. The 2008 OPT Rule also allows aliens to be unemployed and looking for work while on OPT. 73 Fed. Reg. 18,950.

One of the two duration increases in the 2008 OPT Rule is a 17-month extension to the basic 12-month OPT term. 73 Fed. Reg. 18,948. This extension is available only to aliens with degrees in fields DHS designates as *STEM* (Science/

Technology/Engineering/Mathematics). *Id*. Under the 2008 OPT Rule, a field is STEM if it is on a list DHS maintains on its web site. *Id*. In 2011 DHS expanded the number of fields it classifies as STEM by amending the list on its web site. Press Release, "ICE announces expanded list of science, technology, engineering, and math degree programs," Immigration and Customs Enforcement, May 21, 2011 (the "2011 OPT Expansion"). DHS did the same in 2012. Press Release, "DHS Announces Expanded List of STEM Degree Programs," U.S. Dept. of Homeland Security, May 11, 2012 (the "2012 OPT Expansion"). There was no publication in the Federal Register for either of these expansions of the OPT program.

The intended effect of the 2008 OPT Rule's changes was to create a "significant expansion" in the amount of foreign labor available to employers. 73 Fed. Reg. 18,953. DHS justified the foreign labor increase by (1) falsely claiming a National Science Foundation study established "critical shortages of science, math, and engineering talent in the United States", 73 Fed. Reg. 18,947, and (2) asserting the imagined labor shortage created a need to supply foreign labor to industry, 73 Fed. Reg. 18,946–48, 18,950, 18,953.

On Nov. 20, 2014, the White House announced, "DHS will propose changes to expand and extend the use of the existing Optional Practical Training (OPT) program". Press Release, "Fact Sheet: Immigration Accountability Executive Action", The White House, Nov. 20, 2014.

By comparing where student visa work regulations started in 1947 to where they are now, one can see how far the OPT program has gone off the rails. At the time the current student visa was created in 1952, work on a student visa was performed while the alien was enrolled at the school—but in 2015, enrollment at a school is not required. *Compare* 8 C.F.R. § 125.15(b) (1948) *with* 8 C.F.R. § 214.2(f)(10)(ii)(A)(3) (2014). In 1952, the duration of work was determined by the time needed to complete the training—but in 2015, the duration of work is set by whether DHS determines

there is a labor shortage in the alien's field and the status of an H-1B visa application. *Compare* 8 C.F.R. § 125.15(b) (1948) *with* 73 Fed. Reg. 18,948. In 1952, work was permitted only when required or recommended by the school—but in 2015, anyone can work after graduation on a student visa. *Compare* 8 C.F.R. § 125.15(b) (1948) *with* 8 C.F.R. § 214.2(f)(10)(ii) (2014). In 1952, the work was supervised by a training agency—but in 2015, aliens can work anywhere in an occupation directly related to their field of study. *Compare* 8 C.F.R. § 125.15(b) (1948) *with* 8 C.F.R. § 214.2(f)(10)(ii) (2014). In 1952, the purpose of work on student visas was for education—but in 2015, the purpose of work on student visas is to supply labor to industry. *Compare* 8 C.F.R. § 125.15(b) (1948) *with* 73 Fed. Reg. 18,946–47, 18,950–51, 18,953.

Aliens working on OPT in 2015 are not *students* by any accepted definition of the term, even though they are in the United States on student visas. By implementing OPT through regulation, DHS has ignored the statutory limits on its authority to admit *bona fide* students on F-1 visas. 8 U.S.C. § 1101(a)(15)(f)(i); bypassed the requirements of the appropriate statutory guest worker program, §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(g); and ignored the requirement that DHS regulations ensure aliens leave the country when they no longer have the status for which they were admitted, § 1184(a). Therefore, OPT is in excess of DHS authority to admit *bona fide* students. By expanding an unlawful program, the 2008 OPT Rule, 2011 OPT Expansion, and 2012 OPT Expansion are in excess of DHS authority as well. Furthermore, these regulations were promulgated without following the procedures required by law and are arbitrary and capricious.

STATEMENT OF THE FACTS

The admission of foreign students is authorized by 8 U.S.C. § 1101(a)(15)(f)(i). DHS regulations are required to ensure that aliens leave the country when they no longer maintain the status for which they were admitted (unless they have obtained a new visa). 8 U.S.C. § 1184(a).

There is no statutory authorization for aliens to work in the United States on student visas. 8 U.S.C. *passim*. However, DHS and its predecessors have authorized aliens to work on student visas through regulation. 8 C.F.R. § 214.2(f)(10) (2014). One of those programs is OPT. 8 C.F.R. § 214.2(f)(10)(ii) (2014). OPT authorizes aliens on student visas to remain in the United States and work after graduation. 8 C.F.R. § 214.2(f)(10)(ii) (2014). Aliens do not have to be enrolled at a school to work under OPT. 8 C.F.R. § 214.2(f)(10)(ii)(A) (2014).

The H-1B visa program is the statutory mechanism for admitting college-educated labor into the United States. 8 U.S.C. § 1101(a)(15)(H)(1)(b). The H-1B program grants aliens, with a college degree or equivalent, admission and authorization to work. 8 U.S.C. § 1184(i)(2). The H-1B program incorporates protections for labor through the Labor Condition Application process, § 1182(n), and limits on the number of visas, § 1184(g).

In some fiscal years the number of petitions for H-1B visas has exceeded the statutory limits on the number of available visas. Ans. ¶ 29. In 2004 Congress created a pool of 20,000 H-1B visas dedicated to graduates of U.S. universities. Consolidated Appropriations Act of 2005. Pub. L. 108-447, 118 Stat. 2809, § 425 (codified at 8 U.S.C. § 1184(g)(5)(c)).

Unlike H-1B, the OPT program contains no protections for domestic labor. 8 C.F.R. § 214.2 *passim*. Workers on OPT do not have to be paid the prevailing wage. *Id*. There is no limit on the number of graduates allowed to work under OPT. *Id*.

Prior to 2008, regulations authorized graduates to work for up to one year on a student visa under OPT. 8 C.F.R. § 214.2(f)(10) (2007).

On Mar. 7, 2007, William H. Gates (then chairman of Microsoft) warned that the number of H-1B visas for F.Y. 2008 would be exhausted within a month (*i.e.*, before May 1, 2007). Administrative Record ("A.R.") 106. During 2008, various industry groups called on DHS to respond to the exhaustion of annual H-1B visa quotas by

extending OPT to 29-months. *E.g.*, A.R. 115–16, 120–23, 125. In March 2008, various employers called on DHS to announce an expansion of OPT to 29-months by that Spring. A.R. 133–34.

On April 8, 2008, DHS promulgated one of the regulations at issue: Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) (The "2008 OPT Rule"). This rule was promulgated without notice and comment. 73 Fed. Reg. 18,950.

The 2008 OPT Rule made several changes to OPT, three of which are most significant in this case. 73 Fed. Reg. 18,944–56. First, the 2008 OPT Rule authorizes aliens on OPT to be unemployed to look for work. 73 Fed. Reg. 18,950. Second, for aliens who have filed an H-1B visa petition, it extends the 12-month work period until a final decision is made on that petition. 73 Fed. Reg. 18,947, 18,949. Third, for aliens with majors in degree fields that DHS classifies as *STEM*, the 2008 OPT Rule authorized an additional 17-month period of work in the United States. 73 Fed. Reg. 18,948. Depending upon when the alien graduates and the alien's degree field, these extensions combine so that the maximum OPT period can range from 12 to 35 months under the 2008 OPT Rule.[2] DHS determined that these changes to OPT would create a "significant expansion" of the pool of skilled workers available to employers. 73 Fed. Reg. 18,953.

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2 Examples: (1) An English major graduates in May, 2014, receiving 12 months of OPT. The employer applies for an H-1B visa on the alien's behalf in April 2015 and the alien receives the H-1B petition OPT extension. Finally, the alien receives an H-1B visa effective at the start of the fiscal year (Oct. 2015). The alien had a total of 16 months working on OPT. (2) A physics major graduates in Nov. 2014, receiving 12 months of OPT. The alien applies for the STEM OPT extension, giving 29 months of OPT (to April 2017). In April 2017, the employer applies for an H-1B visa and the alien receives the H-1B petition OPT extension. Finally, the alien receives an H-1B visa effective at the start of the fiscal year (Oct. 2017). The alien had a total of 35 months working on OPT.

DHS also determined that the 17-month OPT expansion must be limited to major areas of study within technology fields where there is a shortage of qualified, highly skilled, U.S. workers. 73 Fed. Reg. 18,948. DHS does this by defining STEM using a list of degree fields maintained on its web site. 73 Fed. Reg. 18,948.

DHS cited a National Science Foundation study to establish the shortage of workers the 2008 OPT Rule addresses. 73 Fed. Reg. 18,947 ("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)").

In 2011 DHS announced in a press release that it had expanded the number of fields eligible for the longer OPT term by amending the STEM field list on its web site. Press Release, "ICE announces expanded list of science, technology, engineering, and math degree programs," Immigration and Customs Enforcement, May 21, 2011 (the "2011 OPT Expansion"). DHS did the same in 2012. Press Release, "DHS Announces Expanded List of STEM Degree Programs," U.S. Dept. of Homeland Security, May 11, 2012 (the "2012 OPT Expansion").

STANDARD OF REVIEW

The courts of this circuit have repeatedly held that summary judgment is an appropriate procedure when a court reviews an agency's administrative record. *E.g.*, *Bloch v. Powell*, 227 F. Supp. 2d 25, 30–31 (D.D.C. 2002); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 81–82 (D.D.C. 2007). Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did. *Chao*, 496 F. Supp. 2d at 81–82 (citing cases).

Skidmore v. Swift & Co. provides the standard of review for the actions at issue. 323 U.S. 134, 140 (1944). *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,

normally provides the appropriate standard of review for an agency action. 467 U.S. 837, 842–43 (1984). However, in rulemaking or adjudication, deference under *Chevron* is limited to—

> []where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, *where the agency uses full notice-and-comment procedures* to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.

Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 58 (2011) (emphasis added). DHS forfeited deference under *Chevron* because it failed to provide notice and comment for any of the actions at issue. 73 Fed. Reg. 18,950.

When an agency action is not entitled to *Chevron* deference, the Supreme Court applies the standard under *Skidmore*. *United States v. Meade Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000). The standard of review under *Skidmore* is:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140.

STANDING

On November 21, 2014 the court held that Washtech's complaint established a legal basis for standing (except for counts I–III). The filed affidavits and Appendix B contains the evidence supporting the factual allegations for standing in the complaint and a table mapping the allegations to evidence.

The legal basis for and against standing has been argued *ad nauseum* in previous briefing. Washtech briefly summarizes its past arguments. A party invoking a court's jurisdiction has the burden of demonstrating that it satisfies the irreducible constitutional minimum of standing: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury

and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision. *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014).

Washtech's members suffer at least three injuries in fact caused by DHS OPT Regulations. First, they deprive Washtech and its members of statutory protections from foreign labor (*i.e.*, 8 U.S.C. §§ 1182(n), 1184(g)). Second, they increase the number of economic competitors. Third, they expose Washtech members to unfair competition by allowing aliens to work under rules in which they are inherently less expensive to employ.

An association has standing to bring suit on behalf of its members if at least one member would have standing to sue in its own right, the interests the association seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires that an individual member of the association participate in the law suit. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1005 (D.C. Cir. 2014).

Washtech identifies three members who would have standing to bring this suit on their own. The Affidavit of Rennie Sawade establishes that he is a computer programmer. Sawade Aff. ¶ 6. The Affidavit of Douglas Blatt establishes he, too, is a computer programmer. Blatt Aff. ¶ 7. The Affidavit of Ceasar Smith establishes he is a computer systems and networking administrator. Smith Aff. ¶ 5. Both of these fields appear on all of DHS's STEM field lists.[3] Protecting the economic security and working conditions of its members is one of Washtech's purposes as a labor union. Schendel Aff. at ¶ 3; *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d

3 http://www.ice.gov/sites/default/files/documents/Document/2014/stem-list.pdf; http://www.ice.gov/doclib/sevis/pdf/stem-list.pdf; http://www.ice.gov/doclib/sevis/pdf/nces_cip_codes_rule_09252008.pdf; and http://www.ice.gov/doclib/sevis/pdf/stem-list-2011.pdf (all last visited Feb. 11, 2015). As described, p. 36, *infra*, there is no STEM field list at the location specified by regulation. There is no way for an outsider to determine which of these lists on its website DHS considers being the official current version.

206, 212 (D.C. Cir. 2013) (Unions exist to protect the economic interests of their members). Relief under the APA does not require an individual member to participate in the suit. 5 U.S.C. § 702. Therefore, Washtech can represent the interests of its members in this suit.

In regard to the first injury, "Even where the prospect of job loss is uncertain, [the D.C. Circuit has] repeatedly held that the loss of labor-protective arrangements may by itself afford a basis for standing." *Bhd. of Locomotive Eng'rs v. United States*, 101 F.3d 718, 724 (D.C. Cir. 1996). The OPT program creates a foreign labor pool consisting of workers that should have been required to obtain an H-1B visa. DHS OPT regulations at issue are specifically designed to deprive American workers of their statutory protections limiting the admission of foreign labor under 8 U.S.C. § 1184(g). 73 Fed. Reg. 18,946–47, 18,953; *see,* p. 20, *infra*. In promulgating the 2008 OPT Rule, DHS stated its concern that employers could not get all the H-1B workers they wanted, 73 Fed. Reg. 18,946, and that DHS would remedy this concern by using F-1 student visas instead, 73 Fed. Reg. 18,947. At the same time, by admitting foreign labor under the OPT program, rather than the statutory H-1B program, DHS circumvents the labor protections of § 1182(n) that rightly should be applied to such labor. This injures Washtech by depriving its members of these statutory protections as well.

In regard to the second injury, this court recently observed that "the D.C. Circuit has long recognized—and recently reaffirmed—the doctrine of competitor standing, whereby a party suffers a cognizable injury under Article III when an agency lifts regulatory restrictions on their competitors or otherwise allows increased competition against them." *Permapost Prods. v. McHugh*, 2014 U.S. Dist. LEXIS 91611 (D.C. Dist. 2014) (citing cases). American workers routinely have had standing to challenge regulations that increase the number of their competitors.[4] Under the

4 *E.g.*, *Curran v. Laird*, 420 F.2d 122, 125–26 (D.C. Cir. 1969); *Autolog v. Reagan*, 731 F.2d 25, 31 (D.C. Cir. 1984); *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483 (D.C. Cir. 1994); *Int'l Ladies' Garment*

rules at issue, DHS allows employers to hire foreign workers in the specific fields in which Mr. Sawade, Mr. Blatt, and Mr. Smith work under OPT. *See*, p. 12, *supra*. The regulations are designed to create a "significant expansion" of workers in these specific fields, eliminating any possibility that their injury is speculative. 73 Fed. Reg. 18,953. Furthermore, employers, such as IBM, place recruitment advertisements that make OPT status a job requirement, thereby disqualifying Washtech members from consideration. Appendix B-72–B-77.

In regard to the third injury, the inability to compete on equal footing is an injury in fact. *Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995); *see also*, *Int'l Ladies' Garment Workers' Union*, 722 F.2d at 810–11 By allowing foreign labor unlawful entry into the United States labor market under student visas, OPT puts Washtech members at a competitive disadvantage because of taxation rules. Employers do not have to pay Medicare and Social Security taxes for aliens on student visas. 26 U.S.C. § 3121(b)(19). However, employers do have to pay those taxes when they employ Washtech members, 26 U.S.C. § 3121(b), which makes workers under the OPT program 15.3% cheaper to employ than Washtech members. *See*, App. B-166–B-167. This disparity creates the injury in fact of unfair competition. *See, Int'l Ladies' Garment Workers' Union*, 722 F.2d at 810–11.

DHS raises the zone of interest test in its answer. Because the parties have extensively briefed this issue as well, Washtech only summarizes. The zone of interests test requires that the plaintiff be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012); *Mendoza v.*

Workers' Union v. Donovan, 722 F.2d 795, 809–10 (D.C. Cir. 1983); *Int'l Union of Bricklayers v. Meese*, 761 F. 2d 798, 802–05 (D.C. Cir. 1985); *Int'l Longshoremen's & Warehousemen's Union v. Meese*, 891 F.2d 1374, 1379 (9th Cir. 1989); *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013); *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014); *C.f.*, *Bustos v. Mitchell*, 481 F.2d 479, 486 (D.C. Cir. 1973) (standing not an issue); *AFL-CIO v. Brock*, 835 F.2d 912 (D.C. Cir. 1987) (standing not an issue); *AFL-CIO v. Dole*, 923 F.2d 182 (D.C. Cir. 1991) (standing not an issue); *Saxbe v. Bustos*, 419 U.S. 65 (1974) (standing not an issue).

Perez, 754 F.3d 1002, 1016–17 (D.C. Cir. 2014). In the context of the APA, the zone of interests test is not especially demanding. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The benefit of any doubt goes to the plaintiff when applying the zone of interest Test. *Patchak*, 132 S. Ct. at 2210. The interests Washtech seeks to protect are the working conditions and job opportunities for its members. Compl. *passim*.

This court recently observed that the zone of interest analysis may consider the overall purpose of the underlying act. *Permapost* Prods. at n.6 (citing *Mendoza* and *Lexmark*, 134 S. Ct. at 1389). Washtech identifies five specific provisions violated by DHS OPT regulations: 8 U.S.C. §§ 1101(a)(15)(F)(i), 1101(a)(15)(H)(i)(b), 1182(n), 1184(a), and 1184(g). These provisions are all part of the Immigration and Nationality Act ("INA"), as amended. Pub. L. 82–414, 66 Stat. 163. The Supreme Court has repeatedly held that, "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *E.g., Reno v. Flores*, 507 U.S. 292, 334 (1993) (citation omitted). Following that maxim, courts have held that American workers fall within the zone of interest to be protected by the INA provisions governing the entry of nonimmigrant alien workers. *E.g., Int'l Union of Bricklayers*, 761 F.2d at 804–805 (holding that several unions comprised of American workers had prudential standing to challenge Immigration and INS practices that allowed foreign workers to come to the U.S. and perform work that U.S. workers could perform); *Int'l Longshoremen*, 891 F.2d at 1379 (holding that the union and its members were, "within the 'zone of interests' protected by the INA" because a "primary purpose of the immigration laws, with their quotas and certification procedures, is to protect American laborers").

In contrast to this court's interpretation of the zone of interest Test in *Permapost Prods.*, a tiny minority of courts have required a provision-by-provision analysis for the zone of interest Test. *E.g.*, *Fed'n for Am. Immigration Reform v. Reno*, 93 F.3d

897, 904 (D.C. Cir. 1996); *contra*, *Mendoza*, 754 F.3d at 1016–18 (considering both the language of the specific provision and the overall purposes of the Immigration and Nationality Act when delineating the zone of interests). However, following that rarely used interpretation has no effect on the outcome here. Applying a provision level analysis, sections 1182(n) and 1184(g) are specific protections for domestic labor under § 1101(a)(15)(H)(i)(b) admission. Section 1184(a) governs the duration of admission under §§ 1101(a)(15)(F)(i), (H)(i)(b). The interest of protecting American workers under § 1101(a)(15)(F)(i) has been explicitly acknowledged by Congress, H.R. Rep. No. 101-723, 1990, p. 67; by the Department of Labor, "An Evaluation of the Pilot Program of Off-Campus Work Authorization for Foreign Students," U.S. Dep't of Labor & Immigration and Naturalization Service, Aug. 10, 1994, pp. 4–6, 8; and the DHS predecessor, the INS:

> The F-1 student employment program in the final rule represents a careful balance between the [Immigration and Naturalization] 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. 55,610 (Oct. 29, 1991). Washtech clearly satisfies the zone of interest test's arguably protected with any benefit of the doubt going to the plaintiff standard because the Congress, INS, and Department of Labor have expressly argued that Washtech's interests are to be protected under the specific provisions at issue.

ARGUMENT

I. The 2008 OPT Rule is in excess of DHS authority to admit foreign students (Count IX).

An agency action should be set aside when it is in excess of its statutory authority. 5 U.S.C. § 706(2)(C). Several statutory provisions govern DHS authority in this action: 8 U.S.C. § 1101(a)(15)(H)(i)(b) provides the statutory vehicle for admitting

college educated labor; § 1182(n) provides protections from such labor; § 1184(g) provides limits on admissions for foreign labor; § 1101(a)(15)(F)(i) provides the authority to admit foreign students; and § 1184(g) governs the duration of admission for non-immigrant aliens. DHS OPT regulations violate all of these provisions. The following sections explain how the 2008 OPT Rule conflicts with these provisions.

A. Aliens working on OPT have student visas but they are not students.

The fundamental problem with the 2008 OPT Rule is obvious: Aliens on OPT are not *students* by any accepted definition of the term. OPT allows aliens to work or even be unemployed, "after the student graduates." 73 Fed. Reg. 18,945. In plain English, OPT participants are *former students*; not students.

The term *student* is not ambiguous. *Mayo Found. v. United States*, 503 F. Supp. 2d 1164, 1175 (D. Minn. 2007). Courts apply the ordinary, contemporary, and common meaning of words, absent a different indication of Congressional intent. *Williams v. Taylor*, 529 U.S. 420, 421 (2000). In the broadest sense, "Merriam-Webster's Collegiate Dictionary defines 'student' as 'one who attends a school' or 'one who studies: an attentive and systematic observer.'" *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008) (Citing Merriam-Webster's Collegiate Dictionary 1239 (11th ed. 2003)). More narrowly stated, "The usual definition of the word [student] is 'a person engaged in a course of study' (New Standard Dictionary, 1922), or 'a person who is engaged in a course of study, either general or special' (37 Cyc. 338)." *United States ex rel. Simonian v. Tod*, 297 F. 172, 173 (2d Cir. N.Y. 1924). Ballentine's Law Dictionary defines student as, "A person in attendance at a college or university. One receiving instruction in a public or private school.", LexisNexis, 2010.

Aliens on OPT meet no accepted definitions of the word *student*. They are not attending school. 73 Fed. Reg. 18,945; 8 C.F.R. § 214.2(f)(10)(ii)(A). There is no requirement under OPT for the alien to engage in systematic training or a study program. 8 C.F.R. § 214.2 (2014). Aliens on OPT may be either unemployed while looking for

work, 8 C.F.R. § 214.2(f)(10)(ii)(E) (2014), or engaged in "temporary employment … directly related to the student's major area of study." 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). Making the link between student status and OPT even more tenuous, DHS does not even have the ability to ensure aliens on OPT are actually, "working in jobs related to their studies". Government Accountability Office, *Student and Exchange Visitor Program: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization*, GAO-14-356, Feb. 2014 (Rep. at A-44). Under OPT, aliens are turned loose in the job market with no supervision.

Further undermining the authority of the OPT regulations, the statutory definition of a *student* is narrower than the dictionary definition. 8 U.S.C. § 1101(a)(15)(f)(i). DHS is authorized to admit aliens as students under the following terms: (1) The aliens must have a residence in a foreign country that they have no intention of abandoning; (2) they must be *bona fide* students; (3) they must be entering the United States temporarily; (4) they must be entering solely to pursue a course of study; and (5) that course of study must take place at an approved academic institution that will report when the alien terminates attendance. 8 U.S.C. § 1101(a)(15)(F)(i). These provisions unambiguously define a *student* as one who attends specific, approved schools. *Id.*; *accord*, 5 U.S.C. § 8101(17), 20 U.S.C. § 1071a-1(c), 26 U.S.C. § 3306(q), 30 U.S.C. § 902(g)(2)(C), 33 U.S.C. § 902(18), 42 U.S.C. §§ 402(d)(7), 12511(46) (all defining a *student* as one who attends a school);[5] *but see*, 8 C.F.R. § 214.2(f)(5)(i) (DHS regulatory definition of F-1 student status adds the alternative "or engaging in authorized practical training following completion of studies" to the statutory definition of *student*).

By authorizing non-student aliens to remain in the United States on student visas to work or be unemployed looking for work under the OPT program, DHS

5 The only statutory definition of *student* Washtech has found that would cover graduates is 20 U.S.C. § 1232g(a)(6). This definition applies provisions governing privacy of student records to both graduates and current students.

exceeds its statutory authority to admit foreign students. § 1101(a)(15)(F)(i). The 2008 OPT Rule expands the duration of the unlawful work authorization under OPT, making that rule in excess of DHS authority as well.[6] 73 Fed. Reg. 18,944–56.

B. DHS is required to ensure aliens admitted as students leave the country when they are no longer students.

When an alien graduates, he no longer maintains F-1 status as defined by Congress. *See*, § 1101(a)(15)(F)(i).

> A student by definition is one who is enrolled and attends educational classes.… Hence, having ceased to be valid students, … the basis upon which they were allowed to enter this country has ceased to exist and they are required to return home.

Narenji v. Civiletti, 1980 U.S. App. LEXIS 20952 (D.C. Cir. Jan. 31, 1980) (denying rehearing *en banc* of *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), MacKinnon, J. concurring); *see also*, *Yadidi v. IN*S, 1993 U.S. App. LEXIS 20855, 2–3 (9th Cir. Aug. 12, 1993) (Graduation from high school ended F-1 status); *Sokoli v. AG*, 499 Fed. Appx. 214, 215–216 (3d Cir. 2012).

Once aliens admitted on student visas cease to be students, DHS regulations are required to insure they depart the country unless they get a new visa. § 1184(a). Rather than ensuring departure, DHS regulations do the opposite—they permit aliens to remain in the United States, on student visas, even though they no longer maintain that status. 8 C.F.R. § 214.2(f)(10). Therefore, OPT is in excess of DHS authority governing the duration of alien admission. 8 U.S.C. § 1184(g). The 2008

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6 On Nov. 21, 2014, the court dismissed Counts I–III of the complaint challenging the OPT program as it existed prior to Apr. 8, 2008. Washtech addresses the prior OPT rule solely because the question of whether the 2008 OPT Rule is in excess of DHS authority is inseparable from the question of whether the prior OPT rule is in excess of DHS authority. The major change in the 2008 OPT Rule is duration. If it be within DHS authority to allow an alien to remain in the United States and work for 12 months after graduation on a student visa, it would be within DHS authority to allow the alien to work for 3 years, 5 years, or 25 years after graduation on a student visa because this is just a change in duration. Washtech demonstrates that the previous 12-month OPT period is unlawful to show that the 12- to 35-month OPT period under the 2008 OPT Rule is unlawful as well.

OPT Rule expands the duration of unlawful work authorization under OPT, making it in excess of DHS authority as well. 73 Fed. Reg. 18,944–56.

C. DHS may not use student visa regulations to circumvent statutory restrictions on foreign labor.

H-1B is the statutory path for admitting college-educated labor. § 1101(a)(15)(H)(i)(b). By creating regulations allowing this same class of labor to work on student visas under OPT, DHS circumvents the statutory restrictions that rightfully should be applied to such labor. There has been a long history of administrative abuse of the immigration system through allowing aliens to work on inappropriate visas. *E.g.*, *Int'l Union of Bricklayers*, 761 F.2d at 800–01. The H-1B guestworker program for college-educated labor was created to address the "unwarranted administrative expansion" of the previous H-1 visa. H.R. Rept. No. 101-723, p. 67. The irony in this case is that the very quotas on foreign labor the 2008 OPT Rule is designed to circumvent were enacted to counter a similar abusive administrative interpretation of the prior H-1 visa in the first place. *Id.* ("[U]nwarranted administrative expansion of the statutory terms in the H-1 category has resulted in a labor impact necessitating a limitation on those admisions [*sic*].")

When DHS allows aliens that should be using one type of visa to work on another type of visa, the action can be analyzed in two ways. First, one can look at whether the aliens are authorized to work on the visa used for admission (as, p. 17, *supra*). *E.g.*, *Int'l Longshoremen*, 891 F.2d at 1380–84. Second, one can look at whether the provisions of the visa that should have been used have been violated. *E.g.*, *Int'l Union of Bricklayers*, 761 F.2d at 799–06. In *Bricklayers*, the INS had authorized foreign bricklayers to work in the United States on B (visitor) visas instead of H-2[7] (guest worker) visas which were the appropriate classification for such labor. 761 F.2d at 800–01. The D.C. Circuit analyzed the case from the perspective of vio-

7 The Immigration Act of 1990, Pub. L. 101-649, § 205, 104 Stat. 4978, reorganized the H visa category. There is no longer an H-2 visa.

lating terms the H-2 visa rather than those of the B visa. *Id.* The Northern District of California did the same when it decided the merits of the case. *Int'l Union of Bricklayers and Allied Craftsmen v. Meese,* 616 F. Supp. 1387 (N.D. Calif 1985).

The *Bricklayers* analysis is applicable here as well. Congress created the H-1B visa as the statutory path for admitting college-educated foreign labor—the very type of labor working under OPT. § 1101(a)(15)(H)(i)(b); § 1184(i)(2) (defining "specialty occupation"). Unlike OPT, H-1B includes protections for domestic labor (and the foreign workers). §§ 1182(n), 1184(g). One of those protections is annual limits on the number of foreign workers. § 1184(g).

The very purpose of the 2008 OPT Rule is to circumvent these statutory limits on foreign workers. In promulgating the 2008 OPT Rule, DHS stated its concern that employers could not get all the H-1B workers they want—

> Because the H–1B category is greatly oversubscribed … OPT employees often are unable to obtain H–1B status within their authorized period of stay in F–1 status … The inability of U.S. employers, in particular in the fields of science, technology, engineering and mathematics, to obtain H–1B status for highly skilled foreign students and foreign nonimmigrant workers has adversely affected the ability of U.S. employers to recruit and retain skilled workers and creates a competitive disadvantage for U.S. companies.

73 Fed. Reg. 18,946—and that DHS would remedy this concern by using F-1 student visas instead:

> This interim final rule addresses the immediate competitive disadvantage faced by U.S. high-tech industries … It does this by allowing an F–1 student already in a period of approved post-completion OPT to apply to extend that period by up to 17 months.

73 Fed. Reg. 18,947. For DHS, the statutory limits on foreign labor became the problem to be solved, rather than the rules to be obeyed.

By using OPT to deliberately circumvent the statutory limits on college-educated labor, § 1184(g), and consequently circumventing the Labor Condition Application requirements for such labor, § 1182(n), the 2008 OPT Rule is in excess of DHS authority.

D. DHS has no authority to use student visas to remedy labor shortages.

DHS justified the 2008 OPT Rule by asserting the need to provide labor to United States employers to remedy a "critical shortage" of labor. 73 Fed. Reg. 18,944–56. In fact, the duration of OPT for a particular alien depends upon DHS's perception of a labor shortage:

> [DHS] must also continue to ensure that the extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled U.S. workers and that is essential to this country's technological innovative competitiveness.

73 Fed. Reg. 18,948.

There is not a scintilla of a statutory authorization for DHS to use student visas to remedy labor shortages. 8 U.S.C. § *passim*. DHS has created that power for itself out of thin air. 73 Fed. Reg. 18,944–56. Congress did not include labor market research in the mission or function of DHS when it created the agency. Homeland Security Act of 2002, Pub. L. 107-296, 115 Stat. 2125, §§ 101–102. In immigration legislation, Congress has designated the Department of Labor as the agency responsible for determining the state of the labor market. *E.g.*, Immigration and Nationality Act of 1952, Pub. L. 82–414, 66 Stat. 163, § 211; Immigration and Nationality Act of 1965, Pub. L. 89–236, 79 Stat. 911, §§ 201, 204, 211; The Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4978, §§ 121, 122, 205, 221, 601. DHS acted in an area in which it has no expertise when it usurped the role of arbiter of the labor market. By using student visas to address an imagined[8] labor shortage, DHS exceeds its authority to admit foreign students to study under the 2008 OPT Rule. *Id.*

II. DHS promulgated the 2008 OPT Rule, 2011 OPT Expansion and 2012 OPT Expansion, without following the procedures required by law.

Agency actions must be set aside when they have been made without observing the procedure required by law. 5 U.S.C. § 706(2)(D). The following sections describe

8 See the discussions on STEM worker shortages, p. 31, *infra*.

some of deviations from the required procedures that occurred when DHS promulgated the regulations at issue.

A. DHS failed to provide notice and comment for the 2008 OPT Rule without good cause (Count V).

Under the APA, agencies are required to provide public notice and comment prior to promulgating regulations. 5 U.S.C. § 553. There are three exceptions to this requirement. Notice and comment may be waived when (1) impracticable, (2) unnecessary ("confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public"), or (3) contrary to the public interest (*e.g.*, "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent"). *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93–95 (D.C. Cir. 2012). These exceptions are narrowly construed and only reluctantly countenanced. *Id.* at 93. The good cause analysis is "meticulous and demanding" and a court gives no deference to an agency's determination of good cause. *Sorenson Communs. Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

When an agency waives notice and comment, it must provide a brief statement giving the reasons why providing notice and public procedure is impracticable, unnecessary, or contrary to the public interest. 8 U.S.C. § 553(b)(B). "The degree of specificity required is not great …, but the reasons provided must demonstrate the need for a new regulation in a shorter-than-usual time span." *United States of America v. Billy Joe Reynolds*, 710 F.3d 498 (3d Cir. 2013) (interpreting *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004)).

Instead of giving such an explanation, DHS simply stated:

> 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 com-

> plete 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.

73 Fed. Reg. 18,950. DHS did not even identify which of the three exceptions it was claiming, let alone any reason justifying the exception. *Id.* DHS simply asserted that its perceived need for the rule justified waiving notice and comment; not why DHS was unable to give notice and comment.[9]

However, it is easy to see why DHS did not identify a specific notice and comment exemption: none applied to the 2008 OPT Rule. The important interests DHS claims existed preclude the unnecessary exception. *Mack Trucks*, 682 F.3d at 93–95. After promulgating the 2008 OPT Rule, DHS provided a sham[10] after-the-fact notice and comment period. http://www.Regulations.gov Case ID:ICEB-2008-0002-0001. That action eliminates any possibility that providing notice and comment would have been contrary to the public interest. *Mack Trucks*, 682 F.3d at 93–95.

The record cannot support a claim of impracticability either. DHS claimed the need to act by a self-imposed deadline of Spring 2008 justified waiving notice and comment. 73 Fed. Reg. 18,950. "[T]he mere existence of deadlines for agency action, whether set by statute or court order,[11] does not in itself constitute good cause for a § 553(b)(B) exception." *New Jersey v. EPA*, 626 F.2d 1038, 1042 (D.C. Cir. 1980). If delaying until a deadline constituted good cause, "an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory,

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9 DHS used the same need for the rule justification to create OPT in the first place in a 1992 interim rule that remains largely in place today. Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (proposed July 20, 1992) (codified at 8 C.F.R. § 214.2).

10 An after the fact comment period does not satisfy the notice and comment requirement. *New Jersey,* 626 F.2d at 1049–50. Even after nearly 7 years, DHS has not bothered to address the comments it solicited after the fact.

11 This is the only case Washtech has found were an agency set a self-imposed deadline to act by a specific date and claimed meeting its own deadline created good cause. Good cause cases normally involve deadlines ordered by courts or Congress (*e.g.*, *Methodist Hosp.*) or immediate action in the face of emergencies (*e.g.*, *Hawaii Helicopter Operators Ass'n*).

judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Council of the Southern Mountains v. Donovan*, 653 F.2d 573, 580–81 (D.C. Cir. 1981).

The impracticability exception requires the agency to show that the timeframe imposed by the deadline made it unable to give notice and comment. *See*, *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981); *compare*, *Methodist Hosp. v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (a statutory requirement to radically overhaul the Medicare reimbursement system—requiring 133 pages of new regulations—within 5 months created good cause) *with Kollett v. Harris,* 619 F.2d 134, 145 (1st Cir. 1980) (there was no good cause for waiving notice and comment when the agency had 14 months advance notice of the deadline).

The record shows that it was entirely practicable for DHS to have given notice and comment for the 2008 OPT Rule. The first entry chronologically in the administrative record is dated Mar. 7, 2007. A.R. 97–110 In that entry, William H. Gates (then chairman of Microsoft) warns in Congressional Testimony that the H-1B quotas for F.Y. 2008 would run out in the first month applications were accepted (A.R. 106)—the very problem the 2008 OPT Rule purports to solve. 73 Fed. Reg. 18,947. The 2008 OPT Rule was promulgated on Apr. 8, 2008. 73 Fed. Reg. 18,944. Therefore, the record shows DHS had at least 13 months advance notice to promulgate the 2008 OPT Rule. Yet DHS gave no explanation why giving notice and comment would have precluded it from promulgating 3 pages of regulations within its self-imposed deadline. 73 Fed. Reg. 18,944–56; *But see, Methodist Hosp.*, 38 F.3d at 1237 (agency had good cause when Congress required the agency to produce 133 pages of regulations within 5 months).

Waiver of notice and comment is normally reserved for "emergency situations." *Jifry*, 370 F.3d at 1179 (The finding of a national security threat from terrorism in the wake of 9/11 justified waiving notice and comment for regulations permitting

the revocation of pilot certificates held by aliens). *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995) (the FAA was justified in waiving notice and comment to implement safety regulations after seven helicopter crashes in Hawaii in nine months). History shows there was no emergency here at all.

The exhaustion of the H-1B cap is a natural and predictable consequence of Congress imposing the limit on the number of H-1B visas—not an emergency. 8 U.S.C. § 1184(g). The FY 2007 H-1B quotas had been on reached on May 26, 2006. Press Release, "USCIS Reaches H-1B Cap", U.S. Citizenship and Immigration Services, June 1, 2006. The FY 2008 H-1B quotas had been reached again on Apr. 3, 2007. Press Release, "USCIS Reaches FY 2008 H-1B Cap", U.S. Citizenship and Immigration Services, Apr. 3, 2007. From this history, DHS knew that the H-1B quotas would be exhausted for F.Y. 2009 and it announced procedures in advance for processing the application volume that would exceed the quotas shortly after it started accepting applications on Apr. 1, 2008. Press Release, "USCIS Announces Interim Rule on H-1B Visas", U.S. Citizenship and Immigration Services, Mar. 19, 2008. The FY 2009 H-1B Cap was reached on Apr. 8, 2008.[12] Press Release, "USCIS Reached FY 2009 H-1B Cap", Apr. 8, 2008. By focusing exclusively on the desire of employers for foreign labor, 73 Fed. Reg. 18,944–56, DHS ignored the fact that cutting off the supply of foreign workers, once the H-1B cap is reached, is both *beneficial and desirable* for Washtech members and other American technology workers.

Further undermining the justification for DHS's waiver of notice and comment is that it failed to act earlier. If reaching the H-1B cap within a week in 2007 be not an emergency requiring immediate action, then the very same thing occurring in 2008 could not be an emergency either.

"Notice of agency action is crucial to ensure that agency regulations are tested via exposure to diverse public comment, to ensure fairness to affected parties, and

12 The same day DHS announced the 2008 OPT Rule

to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) (internal quotations to *United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) omitted). Even informally, DHS did not solicit diverse opinions for the 2008 OPT Rule. DHS was able to discuss the OPT expansion with a lobbyist at a dinner party. A.R. 120. It gave briefings on the OPT expansion to industry lobbying groups. A.R. 126. Yet labor groups that would be adversely affected received no notice whatsoever that DHS was even considering an expansion of OPT until the regulations were promulgated without notice and comment. 73 Fed. Reg 18,944–56. The entire administrative record lacks any entries that express any opposition to an OPT expansion. A.R. *passim*.

The most generous interpretation of the facts is that DHS dawdled. It delayed action until it realized its self-imposed deadline was approaching. A more sinister interpretation of the facts is that DHS postponed action in bad faith. DHS knew that the 2008 OPT Rule was a train wreck of regulation. It was aware that it was resorting to misrepresenting the contents of the NSF study to establish the basis for the 2008 OPT Rule. *See,* p. 31, *infra*. It was aware it was violating the rules for incorporation by reference. *See*, p. 29, *infra*. It was aware that it was ignoring all views and facts contrary to its conclusions. *See,* p. 33, *infra*. However, DHS was under such pressure from industry lobbyists in an election year to provide more foreign labor, *e.g.*, A.R. 133–34, that it dared not subject the 2008 OPT Rule to the scrutiny of public notice and comment before making it *fait accompli.* After which, DHS could subject anyone who might object to a run through the standing gauntlet in the Federal courts. Regardless of how the court construes the motive for delay, the record cannot support DHS's claim of good cause for waiving notice and comment.

B. DHS did not provide notice and comment for the 2011 OPT Expansion and 2012 OPT Expansion (Counts VII & VIII).

DHS pointed out in its Motion to Dismiss Opening Brief that there is no such thing as the *STEM labor market*. Motion to Dismiss Op. Br. pp. 17–18. Because it has no standard meaning in industry, the definition of *STEM* is entirely at the whim of DHS. The 2008 OPT Rule defines STEM using a list of degree fields on DHS's web site that it incorporates by reference. 8 C.F.R. § 214.2(10)(ii)(C)(2). Aliens whose majors are on the list are STEM and are allowed a longer OPT period. *Id.* Therefore, the 2008 OPT Rule does not use any interpretive process to define *STEM*. *Id.*

Under the APA, a rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Nat'l Tank Truck Carriers v. Fed. Highway Admin.,* 170 F.3d 203, 207 n.3 (D.C. Cir. 1999) (quoting 5 U.S.C. § 551(4)). However, "an agency may develop 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice' without providing public notice and comment." *Id.* "[A]n agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Holding a degree in a field on the STEM list is an *absolute requirement* for the 17-month OPT extension under the 2008 OPT Rule. 8 C.F.R. § 214.2(f)(10)(ii)(C)(2) (2014). Therefore, the STEM field list is a rule under the APA. *Nat'l Mining*, 758 F.3d at 252. Any change to the STEM field list requires notice and comment. *See*, *Nat'l Tank Truck Carriers.,* 170 F.3d at 207 n.3.

While the STEM field list is a rule, DHS has changed it without publication in the Federal Register and without public notice and comment. Press Release, "ICE announces expanded list of science, technology, engineering, and math degree programs," Immigration and Customs Enforcement, May 21, 2011 (the "2011

OPT Expansion"); Press Release, "DHS Announces Expanded List of STEM Degree Programs," U.S. Dept. of Homeland Security, May 11, 2012 (the "2012 OPT Expansion").[13] Therefore, DHS has made these changes without following the procedures required by law.

C. The 2008 OPT Rule does not comply with the procedures required for incorporation-by-reference (Count VI).

The previous section described how DHS used incorporation by reference to the STEM field list on its web site to avoid notice and comment and publication in the Federal Register for the 2011 OPT Expansion and the 2012 OPT Expansion. The rules governing the Federal Register are designed to prevent rule changes through modifying referenced documents, as DHS did with the 2011 OPT Expansion and 2012 OPT Expansion. *See*, 1 C.F.R. part 51.

Congress granted the Administrative Committee of the Federal Register the authority to regulate publication in the Federal Register. 44 U.S.C. § 1506. Congress intended that the Director of the Federal Register have centralized control over incorporation by reference in regulations. *Appalachian Power Co. v. Train*, 566 F.2d 451, 455–56 (4th Cir. 1977). The Administrative Committee of the Federal Register has promulgated regulations (1 C.F.R. part 51) agencies are required to comply with when using incorporation by reference in their own regulations. *Appalachian Power*, 566 F.2d at 455 ("The regulations of the Office of the Federal Register governing incorporation by reference contain numerous safeguards that must be complied with").

DHS simply ignored these safeguards when it promulgated the 2008 OPT Rule. Indeed, DHS violated at least five specific requirements for incorporation by reference in the 2008 OPT Rule, 73 Fed. Reg. 18,9544–56. First, the use of an external list was not approved by the Director of the Federal Register as required by 1 C.F.R. § 51.1. Specifically, 1 C.F.R. § 51.9(c)(1) (2007) requires that the date of approval be in

13 There may have been other changes as well. The "STEM List" shown in Appendix A-42 indicates another expansion made on Sept. 25, 2008.

the preamble of the rule and this is not present in the 2008 OPT Rule. 73 Fed. Reg. 18,944. Second, the STEM field list is not a type of material eligible for incorporation by reference under 1 C.F.R. § 51.7 (2007) because DHS created the list itself. 1 C.F.R. § 51.7(b) ("The Director will assume that a publication produced by the same agency that is seeking its approval is inappropriate for incorporation by reference."). Third, the 2008 OPT Rule does not use the words "incorporated by reference" as required by 1 C.F.R. § 51.9(b)(1) (2007). 73 Fed. Reg. 18,944–56. Fourth, the 2008 OPT Rule fails to state "the title, date, edition, author, publisher, and identification number of the publication" of the STEM field list as required by 1 C.F.R. § 51.9(b)(1) (2007). 73 Fed. Reg. 18,944–56. Fifth, the 2008 OPT Rule does not refer to 5 U.S.C. § 552(a) as required by 1 C.F.R. § 51.9(b)(5) (2007). 73 Fed. Reg. 18,944–56.

Even if DHS had complied fully with the incorporation by reference requirements, it could not have promulgated the 2011 OPT Expansion and 2012 OPT Expansion[14] because—

> Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.

1 C.F.R. § 51.1(f) (2007). The incorporation by reference regulations are designed to prohibit agencies from rulemaking by modifying a referenced document—as DHS has done with the rules here. By failing to comply with the incorporation by reference regulations, DHS did not observe the procedure required by law when it promulgated the 2008 OPT Rule.

III. DHS acted arbitrarily and capriciously when it promulgated the 2008 OPT Rule.

Agency actions must be set aside when they are arbitrary and capricious. 5 U.S.C. § 706(2)(A). The following sections describe how DHS acted arbitrarily and capriciously when it promulgated the 2008 OPT Rule.

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14 Or any other expansions that it has apparently made. *See,* n.13, *supra*.

A. The 2008 OPT Rule is highly capricious because DHS's findings rely on misrepresenting the contents of a National Science Foundation study to establish the need for the rule (Count IV).

"[R]egulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *Home Box Office. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (quoting *Chicago v. Federal Power Com.*, 458 F.2d 731, 742 (D.C. Cir. 1971)). The purpose of the 2008 OPT Rule is to address a purported "critical shortage" of STEM workers. 73 Fed. Reg. 18,947–48. The problem DHS was trying to solve (a shortage of STEM workers) does not exist and cannot be established by the record.

The claims of worker shortages in the United States have a long history. The distinguished demographer Dr. Michael Teitelbaum recently published a book providing a detailed history of and the motivation for these claims. *Falling Behind?*, Princeton University Press, 2014. The book's findings state, "[T]he alarms about widespread shortages or shortfalls in the number of U.S. scientists and engineers are quite inconsistent with nearly all evidence." *Id*. at 3.

In 2008, DHS faced a predicament while preparing the 2008 OPT Rule. DHS had industry lobbyists demanding more foreign labor, claiming there was a STEM worker shortage. *E.g.*, A.R. 120–23. In stark contrast, surveying the available research that it could use to support a determination, DHS would have found no credible support for the proposition that a STEM worker shortage existed. Teitelbaum, p. 3. Typical of the state of research on the technology labor market, a report prepared for the White House Office of Technology Policy in 2004 (and therefore available for DHS consideration) found:

> If there were shortages of STEM workers, we would expect these shortages to be reflected in certain economic indicators, most notably low levels of unemployment and rising wages for STEM workers. However, in examining earning patterns and employment patterns for STEM workers, we found no patterns that were consistent with a shortage of STEM workers.

William P. Butz, *et. al.*, *Will the Scientific and Technology Workforce Meet the Requirements of the Federal Government?*, Rand Corporation, MG118, 2004, p. xv.

DHS found a creative solution to the lack of an authoritative source to justify the need for rulemaking: It made one up. This is how DHS supported its claim of a "critical shortage" of workers:

> U.S. high-tech employers are particularly concerned about the H–1B cap because of the critical shortage of domestic science and engineering talent and the degree to which high-tech employers are as a consequence necessarily far more dependent on foreign workers than other industries. See 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).

73 Fed. Reg. 18,947. The problem here is that the cited passage in *Rising About the Gathering Storm* ("International Competition for Talent") has absolutely nothing to do with labor shortages.[15] *Id*. It describes how other countries are taking steps to attract foreign students. *Id*.

This is not a citation error. *Id*. The phrase "critical shortage" does not occur in anywhere in *Rising Above the Gathering Storm* nor does the report conclude there is a critical shortage of STEM workers. *See*, *id. passim*. Instead, the report repeatedly contradicts DHS's characterization of the labor market.

> There has been much debate in recent years about whether the United States is facing a looming shortage of scientists and engineers, including those at the doctoral level. Although *there is not a crisis at the moment* and there are differences in labor markets by field that could lead to surpluses in some areas and shortages in others, the trends in enrollments and degrees are nonetheless cause for concern in a global environment wherein science and technology play an increasing role.

Id. p. 170[16] (emphasis added).

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15 DHS denies Washtech's characterization of the NSF report. Ans. ¶ 196. Appendix A-1–A-7 reproduces the cited text in full. A searchable version of the complete NSF report is available at http://www.nap.edu/catalog.php?record_id=11463.

16 The full administrative record includes a prepublication copy of *Rising Above the Gathering Storm*. A.R. 1366–1871. However, the 2008 OPT Rule cites to the published version of the report. These two

> Indeed, skeptics argue that there is no current documented shortage in the labor markets for scientists and engineers. In fact, in some areas we have just the opposite. For example, during the last decade, there have been surpluses of life scientists at the doctoral level, high unemployment of engineers, and lay-offs in the information-technology sector in the aftermath of the "dot-bomb."

Id. p. 164; *accord*, *id.* p. 73 ("the apparent American deficit in scientists and engineers is also exaggerated," quoting Robert J. Samuelson). The only shortage *Rising Above the Gathering Storm* asserts is "chronic shortages in the teaching workforce." *Id.* at p. 113; *accord, id.* at p. 120 & p. 121 n.20.

DHS completely misrepresented the contents and overall message of *Rising Above the Gathering Storm*. 73 Fed. Reg. 18,947. Yet this is the only evidence DHS provided in its findings to establish a worker shortage,[17] a shortage so critical that DHS felt it needed to promulgate the 2008 OPT Rule without notice and comment. 73 Fed. Reg. 18,950. Without a worker shortage, there is no need for more foreign labor on OPT, making the 2008 OPT Rule highly capricious. *Home Box Office*, 567 F.2d at 36.

B. DHS acted arbitrarily because it considered no evidence contrary to its desired outcome when it promulgated the 2008 OPT Rule (Count IV).

An agency's action is arbitrary and capricious if it has entirely failed to consider an important aspect of the problem it faces. *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 769 F.3d 1184, 1187–88 (D.C. Cir. 2014). The record for the 2008 OPT Rule is striking in that it shows DHS did not consider any evidence contrary to its desired outcome of increasing the amount of foreign labor. 73 Fed. Reg. 18,944–56; A.R. *passim*. The following subsections describe some of the important aspects of the problem that were not considered in the 2008 OPT Rule's administrative record.

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versions use different page numbering schemes. 73 Fed. Reg. 18,947. Washtech follows the 2008 OPT Rule and cites to page numbers in the published version of the report.

17 DHS denies that the record lacks published research that actually shows there was a labor shortage. Ans. ¶ 192. Perhaps it will provide a citation to the record.

1. DHS ignored the overwhelming evidence that no STEM worker shortage existed.

The discussion, p. 31, *supra*, demonstrates how DHS used misrepresentation to fabricate a labor shortage to justify the 2008 OPT Rule. The other half of this procedural problem is that DHS acted arbitrarily and capriciously by ignoring all the evidence that there was no STEM worker shortage in the United States. *See*, *SecurityPoint Holdings*, 769 F.3d at 1187–88.[18] Such evidence was available to DHS when it prepared the 2008 OPT Rule. Butz, p. 31, *supra*, is especially pertinent because it was written for the executive branch. Other examples were available to DHS as well. B. Lindsay Lowell and Hal Salzman found, "Our analysis at the aggregate level does not find a shortage of potential [Science & Engineering] students or workers." *Into the Eye of the Storm: Assessing the Evidence on Science and Engineering Education, Quality, and Workforce Demand*, Urban Institute, 2007, p. 2. Richard B Freeman wrote, "[L]abor market measures show no evidence of shortages of [Science & Engineering] workers". *Does Globalization of the Scientific/Engineering Workforce Threaten U.S. Economic Leadership?,* MIT Press, Aug. 2006, p. 140. From Clair Brown and Craig Linden came—

> [E]conomists find it hard to believe a shortage exists in a labor market when real earnings are not rising across the board, as we will see is generally the case in the high-tech engineering labor market.

Is There a Shortage of Engineering Talent in the U.S.?, Institute for Research on Labor and Employment, U.C. Berkeley, Feb. 2008, p. 2.

These examples[19] prove that authoritative evidence that contradicted DHS's conclusion that there was a "critical shortage" of STEM workers in the United

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18 DHS denies that it did not consider evidence that there was no STEM worker shortage. Ans. ¶ 201. Perhaps DHS will provide a citation to the record where this evidence was considered. The widely disparaged *Rising Above the Gathering Storm* is not authoritative evidence on this point. *C.f.*, Teitelbaum, pp. 13–24; Lowell & Salzman, *passim* (note the title).

19 Washtech does not argue that DHS had to consider these specific sources. It provides these examples to prove that authoritative evidence contrary to DHS's finding of a critical shortage of technology workers existed and was available for DHS to consider.

States was available to DHS to consider during its rulemaking process. 73 Fed. Reg. 18944–56; A.R. *passim*. DHS was required to gather and consider all available evidence, pro and con, on the issue of labor shortages and make an evaluation based on all of it. *See*, *SecurityPoint Holdings*, 769 F.3d at 1187–88. Had DHS done so, they would have found the evidence one-sided, weighing against its desired outcome. It is hardly surprising then that DHS ignored contrary evidence when it had to resort to misrepresentation to support its position in the first place. *See*, p. 31, *supra*.

2. DHS gave no consideration to the effect of adding foreign labor on American workers.

In implementing regulations governing the only statutory authorization for aliens to work on student visas (now expired), the INS addressed the need to protect domestic workers from such foreign labor. Nonimmigrant Classes; Students, F and M Classifications, 56 Fed. Reg. 55,610 (Oct. 29, 1991) (codified at 8 C.F.R. §§ 214, 274a). Given that this issue had been addressed in the past for F-1 labor regulations, one of the most puzzling omissions in the 2008 OPT Rule is the lack of any consideration for its effect on American workers. 73 Fed. Reg. 18944–56. DHS went on at length about the benefits more foreign labor would bring employers, but completely ignored how Americans in the targeted fields would be affected by dumping a significant quantity of foreign labor into the job market.[20] 73 Fed. Reg. 18,946–53.

3. DHS gave no consideration to education in the 2008 OPT Rule.

The 2008 OPT Rule consistently refers to program participants as "students." 73 Fed. Reg. 18944–56. An important consideration for regulations governing "students" would be educational purpose. How does the 2008 OPT Rule promote education? The only benefit DHS claims the 2008 OPT Rule provides OPT participants is this conclusory statement:

20 DHS denies that no consideration was given to the effect on American workers. Ans. ¶ 225. Perhaps DHS will provide a citation to the record where such consideration was given.

> The most significant qualitative improvement made by this rule is the enhancement related to improving the quality of life for participating students by making available an extension of OPT status for up to 17 months for certain students following post-completion OPT.

73 Fed. Reg. 18,953. How does a 17 month extension of OPT improve quality of life or promote education? DHS gives no answer. In any event, the findings give no indication of any educational benefit from the rule. 73 Fed. Reg. 18,944–56.

4. DHS gave no consideration to the appropriate duration of OPT.

Assuming *arguendo* that DHS has the authority to allow non-student aliens to remain in the United States and work after graduation. It would then be arbitrary for DHS to extend the duration beyond the length appropriate for the alien's educational needs.

DHS chose a 29-month duration for graduates in STEM fields—but why? Again, the rule's findings give no explanation. 73 Fed. Reg. 18,944–56. However, the full administrative record is very revealing. The industry lobbying group CompeteAmerica, wrote a letter to Secretary Chertoff requesting DHS to give a 29-month OPT term on Oct 29, 2007. A.R. 115–16. Microsoft's Chief lobbyist also wrote a letter to Secretary Chertoff requesting 29 months on Nov. 15, 2007. A.R. 120–23. On Nov. 16, 2007, the U.S. Chamber of Commerce wrote Chertoff requesting a 29-month OPT Term. A.R. 125. On Jan. 24, 2008, the Securities Industry and Financial Markets Association wrote Chertoff requesting at 29 month OPT term. A.R. 126–27. The only explanation for the 29 month OPT term in the record is that this is what industry lobbyists demanded from DHS. The record shows no other durations were considered.

5. DHS provided no explanation how it determines there is a labor shortage.

DHS tied the duration of OPT under the 2008 OPT Rule to its perception of the state of the labor market:

> The Department, however, must also continue to ensure that the extension remains limited to students with degrees in major areas of study falling within a technical field where there is a shortage of qualified, highly-skilled U.S. workers.

73 Fed. Reg. 18,948. However, the 2008 OPT Rule gives no explanation of how DHS determines there is a labor shortage in a specific field. 73 Fed. Reg. 18,944–56. DHS has expanded the number of fields at least twice and still has given no explanation of the process it used.[21] Press Release, "ICE announces expanded list of science, technology, engineering, and math degree programs," Immigration and Customs Enforcement, May 21, 2011; Press Release, "DHS Announces Expanded List of STEM Degree Programs," U.S. Dept. of Homeland Security, May 11, 2012. In point of fact, DHS has never identified *who* has the authority to add fields to (or remove from) DHS's STEM field list. If a contract programmer working on DHS's web site edits the STEM field list, does that have the force of law?

That is not a theoretical question. 8 C.F.R. § 214.2(f)(10)(ii)(C)(2) specifies that the STEM field list authorizing 17-month OPT extensions is found at http://www.ice.gov/sevis. From at least Nov. 29, 2014 to Feb. 11, 2015 that URL neither included the STEM field list nor a link to it.[22] Who then is eligible for 17-month OPT extensions when there is no STEM field list at the designated location?

Complicating the matter further, a Google search found a "STEM-Designated Degree Program List" at http://www.ice.gov/doclib/sevis/pdf/stem-list.pdf (last visited Feb. 10, 2015) There was another "STEM Designated Degree Programs" list at http://www.ice.gov/doclib/sevis/pdf/nces_cip_codes_rule_09252008.pdf[23] (last visited Feb. 10, 2015). Yet another "STEM-Designated Degree Program List" was at http://www.ice.gov/sites/default/files/documents/Document/2014/stem-list.pdf (last visited Feb. 10, 2015). Still another "STEM-Designated Degree Program List"

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21 DHS denies the allegations that the rule establishes no procedures for determining fields that have a labor shortage. Ans. ¶ 208. Perhaps DHS can provide a citation to the record describing that process.

22 Appendix A-41 shows the contents of http://www.ice.gov/sevis on Feb. 11, 2014.

23 This document indicates that a change was made to the STEM field list on Sept. 25, 2008. If such a change were made, this is yet another rule promulgation made without publication in the Federal Register and without notice and comment. *See*, Appendix A-42.

was at http://www.ice.gov/doclib/sevis/pdf/stem-list-2011.pdf (last visited Feb. 11, 2015). Which, if any, of these has the force of law?

Furthermore, there is no way to verify the source of any of these STEM field lists. None of the documents described in the previous paragraph is digitally signed.[24] Anyone with access to the DHS web site could innocently post a draft version STEM field list and it would be impossible for outsiders to distinguish it from the real one.

The problem goes beyond failing to define who has authority to declare a labor shortage. The 2008 OPT Rule did not establish standards for defining what constitutes a labor shortage. 73 Fed. Reg. 18,944–56. At the very least, the existence of a STEM worker shortage is in dispute. *See*, Butz, Lowell & Salzman, Freeman, Teitelbaum, and Brown & Linden. If DHS be asserting there is a shortage when it defines a field as *STEM*, 73 Fed. Reg. 18,948, what standard is it using? Again the record is silent, making the entire process arbitrary.

By entirely failing to consider the important problem of how one determines there is a labor shortage before flooding the job market with a significant amount of foreign labor, DHS acted arbitrarily and capriciously when it promulgated the 2008 OPT Rule. *See*, *SecurityPoint Holdings*, 769 F.3d at 1187–88.

CONCLUSION

DHS OPT rulemaking presents an administrative process run amok. In all of its legal research, Washtech has been unable to find a comparable case where an agency has run roughshod over administrative procedure to the extent DHS has done with OPT. This is the only case Washtech is aware of where the agency created a *self-imposed* deadline date for action, waited until the eve of that deadline, then declared meeting its own deadline created good cause to waive notice and comment. *See*, p. 23, *supra*; 73 Fed. Reg. 18,950. This is the only case Washtech is aware of where

24 As are electronic versions of the law published by the Government Printing Office.

an agency used misrepresentation to establish the need for regulation. *See*, p. 31, *supra*; 73 Fed. Reg. 18,947. This is the only case Washtech is aware of where an agency has performed rulemaking by modifying a document incorporated by reference. *See*, p. 29, *supra*. The actions at issue here represent the nadir of conformance to the procedures required by the APA.

In addition, permitting aliens to remain in the United States and work on student visas when they are not students is in excess of DHS statutory authority under 8 U.S.C. §§ 1101(a)(15)(F)(i), 1101(a)(15)(H)(i)(b), 1182(n), 1184(a), and 1184(g). By expanding the scope of an unlawful work authorization, the 2008 OPT Rule, 2011 OPT Expansion, and 2012 OPT Expansion are unlawful as well.

Therefore, these actions must be set aside as required by 5 U.S.C. §§ 706(2)(A),(C),(D).

Respectfully submitted,
Dated: Mar. 6, 2015

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In the United States District Court for the District of Columbia

Washington Alliance of Technology Workers; 13401 Bel-Red Rd. #B8 Bellevue, WA 98005 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529-ESH

[Proposed] Order

Upon consideration of the Plaintiff's and Defendant's Cross-Motions for Summary Judgment, Memoranda of Law supporting those motions, and replies, it is hereby

ORDERED that the Plaintiff's Cross Motion for Summary Judgment is GRANTED, and further

ORDERED that the Defendant's Cross Motion for Summary Judgment is DENIED, and further

ORDERED that the regulation Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) is vacated, and further

ORDERED that the Secretary of Homeland Security shall notify all aliens whom it authorized to work beyond 12 months after graduation under Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Stu-

dents with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) and their employers that such work must cease, and further

ORDERED that the court permanently enjoins the Secretary of Homeland Security and his successors from expanding the scope or duration of work authorized for aliens on student visas after graduation beyond that permitted prior to April 1, 2008, and further

ORDERED that the Plaintiffs are awarded attorney fees and litigation costs.

ELLEN SEGAL HUVELLE
United States District Judge

In the United States District Court for the District of Columbia

Washington Alliance of Technology Workers; 13401 Bel-Red Rd. #B8 Bellevue, WA 98005 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529-ESH

Certificate of Service

I certify that on Mar. 6, 2015, I filed the attached Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record, Memorandum of Points and Authorities in Support of Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record, proposed order, supporting affidavits, joint appendix, and Appendices A & B with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Defendant's attorneys of record.

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