No. _____

In The
Supreme Court of the United States

WASHINGTON ALLIANCE
OF TECHNOLOGY WORKERS,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Equal Access to Justice Act, prevailing party status on appeal is separate and distinct from prevailing party status in the entire litigation.

2. Whether separate claims brought under the Administrative Procedure Act seeking the identical remedy are distinct in all respects for fee purposes.

3. Whether a district court may raise objections to a fee request *sua sponte,* without giving the party making the request an opportunity to respond.

PARTIES TO THE PROCEEDING

Petitioner, who was the appellant below, is the Washington Alliance of Technology Workers, Local 37083 of the Communication Workers of America, the AFL-CIO. Respondent is the United States Department of Homeland Security.

CORPORATE DISCLOSURE STATEMENT

The Washington Alliance of Technology Workers has no shareholders.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported as *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 857 F.3d 907 (D.C. Cir. 2017) and is reproduced at App. 1-11. The opinion of the district court is reported at *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 202 F. Supp. 3d 20 (D.D.C. 2016) and is reproduced at App. 15-31.

BASIS FOR JURISDICTION

A judgment of the court of appeals was entered on May 26, 2017. The petition for rehearing was denied on July 26, 2017. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS AT ISSUE

The Equal Access to Justice Act, Pub. L. No. 94-481, § 203, 96 Stat. 2321, 2328 (1980), codified at 25 U.S.C. § 2412(d), provides:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other

than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

The H-1B guest-worker visa is the primary path for admitting aliens in technology fields into the United States workforce. 8 U.S.C § 1101(a)(15)(H)(i)(B). To protect American workers, Congress imposes annual quotas on the number of H-1B visas. 8 U.S.C. § 1184(g). However, the demand for foreign labor is so great that, in most years, the quotas on H-1B visas are exhausted. *E.g.*, Press Release, *U.S. Citizenship & Immigration Serv., USCIS Reaches FY 2018 H-1B Cap* (Apr. 7, 2017).

In 2007, Microsoft Corporation concocted a scheme to circumvent the H-1B quotas through regulation. Administrative Record (A.R.) at 120-23 (App. 91-98). Microsoft's plan was to allow aliens, who could not get H-1B visas because of the protective quotas, to be allowed to work for extended periods on F-1 student visas for years after graduation instead. *Id.* Microsoft presented its plan to the Department of Homeland Security (DHS) secretary at a dinner party. *Id.* Thereafter, DHS worked in complete secrecy with industry

lobbyists to craft regulations implementing Microsoft's plan. A.R. at 124-27, 130-34 (App. 91-112). The first notice the public had that such regulations were even being considered was when they were promulgated as a *fait accompli* without notice and comment. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a). These regulations allowed aliens to remain in the United States on student visas for up to thirty-five months after graduation, either to work or to be unemployed looking for work so that F-1 student visas could serve as a substitute for H-1B guest-worker visas. *Id.*

In 2014, the Washington Alliance of Technology Workers (Washtech) filed a lawsuit in the United States District Court for the District of Columbia under the Administrative Procedure Act (APA) challenging the regulations.[1] Complaint, *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 147 (D.D.C. 2015) (App. 37-85). Jurisdiction was invoked in the district court under 28 U.S.C. §§ 1331, 1346, and 1361. *Id.* Washtech's complaint alleged that allowing aliens to work on student visas when they were no longer students was in excess of DHS authority, and that the regulations were procedurally

[1] This was the second challenge brought by American workers to the regulations. *See Programmers Guild, Inc.* v. *Chertoff*, 338 F. App'x 239 (3d Cir. 2009). The first was dismissed on grounds of standing. *Id.*

defective, notably because DHS failed to give notice and an opportunity to comment. *Id.*

On summary judgment, the D.C. District Court held that the regulations in question were promulgated unlawfully without notice and comment. *Wash. All. of Tech. Workers*, 156 F. Supp. 3d at 147 (App. 75-81). The district court also held, however, that the regulations allowing aliens to remain in the United States and work in F-1 student visa status for years after they had graduated – that is, for years after they were no longer students – were within DHS authority. *Id.* at 145 (App. 59-75). The court ordered the regulations vacated, but stayed vacatur for six months to allow DHS to resubmit the rule for after-the-fact notice and comment. *Id.* at 149.

Washtech promptly appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, raising, *inter alia*, the issues of whether the regulation was within DHS authority and whether the district court erred by staying vacatur to allow DHS to cure the notice-and-comment deficiency retroactively. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, No. 15-5239 (D.C. Cir. May 13, 2016) (App. 35-36). During this six-month stay period, DHS decided to promulgate a new rule that increased the maximum duration aliens could work after graduation in F-1 student visa status up to 42 months. 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. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214,

274a). When DHS was unable to complete the new rulemaking within the stay period, it moved the district court to modify its judgment to extend it. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 153 F. Supp. 3d 93 (D.D.C. 2016). Even though the case was on appeal and the D.C. Circuit had jurisdiction, the district court modified the judgment to extend the stay. *Id.* at 101.

The D.C. Circuit held oral argument on the case on May 4, 2016. On May 10, the new regulation went into effect. 81 Fed. Reg. at 13,040. The D.C. Circuit then held that DHS's new rulemaking mooted the appeal, dismissed the case, and vacated the judgments of the district court **that were before it on appeal**. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, No. 15-5239 (D.C. Cir. May 13, 2016) (App. 35-36). Thus, the appeal became moot because of actions taken by DHS during the appeal. In any event, Washtech emerged from the appeal in a better position than it was before the appeal because both of the adverse holdings of the district court were gone allowing the same issues to be raised in a new complaint.[2]

Washtech then moved the district court for a fee award under the Equal Access to Justice Act (EAJA). The lodestar Washtech requested, based upon actual hours expended and the statutory rate, was $465,002.62. *Wash. All. of Tech. Workers* v. *U.S. Dep't of*

[2] Washtech brought a new case challenging the new rule and raising the very same issues that is pending in the D.C. Circuit as *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, No. 17-5110.

Homeland Sec., 202 F. Supp. 3d 20 (D.D.C. 2016) (App. 15-31). The district court held that Washtech was entitled to a fee award under the EAJA because it was a prevailing party and DHS's failure to give notice and comment was not substantially justified. *Id.* at 24-27 (App. 19-26). Yet the district court bifurcated the litigation and disallowed fees for all activity after its summary judgment opinion (consisting of post-judgment motions and the appeal). *Id.* at 28-29 (App. 26-31). Then the district court reduced the remaining fee by 75% based on Washtech's not having prevailed on its excess of authority claims (even though the district court's adverse judgment on those claims had already been vacated) and also on objections the district court raised *sua sponte* without giving Washtech an opportunity to respond. *Id.* at 29 (App. 30-31). The district court then awarded Washtech $42,239.59; a 91% reduction from the lodestar and effectively a nominal amount that did not even cover the cost of litigating standing in the case. *See id.* The district court's opinion did not address the question of whether Washtech's fee request was reasonable based on the result it achieved: vacatur of the regulation. *Id.*; *see also Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983) ("[T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.").

Washtech appealed the fee award to the D.C. Circuit. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 857 F.3d 907 (D.C. Cir. 2017). A divided panel affirmed the nominal fee award. *Id.* at 913

(App. 11). In spite of this Court's instructions in *Comm'r* v. *Jean* that a "fee award presumptively encompasses all aspects of the civil action," 496 U.S. 154, 161 (1990), the majority held that it was within the district court's discretion to bifurcate the litigation and disallow fees for all activity after the district court's merits opinion. *Wash. All. of Tech. Workers*, 857 F.3d at 911 (App. 7-8). The majority also held that prevailing party status in the litigation was distinct from prevailing party status on appeal. *Id.* at 911-12 (App. 9-10). It then held that Washtech was not a prevailing party on the appeal that had been made moot by DHS's actions. *Id.* The panel affirmed the district court's judgment in its entirety. *Id.* Like the district court, the D.C. Circuit did not address the *Hensley* question of whether the fee request was reasonable in light of the result – vacatur of the rule – achieved. *Id.* The dissent, citing the Court's instructions in *Hensley*, noted that Washtech had raised alternate grounds for that result and stated that it "would vacate the District Court's order and remand for recalculation of fees without penalizing Washtech for having raised alternative grounds for relief." *Id.* at 919 (Kavanaugh, J., dissenting) (App. 11).

REASONS TO GRANT THE PETITION

It has been thirty-four years since the Court established the process for fee awards under fee shifting statutes in *Hensley*. During that time the circuits and district courts have diverged in their interpretations of the Court's instructions to the point that the law has

gone beyond circuit splits and into the realm of chaos. The circuits have adopted different interpretations and the districts within the circuits follow conflicting interpretations that even diverge from their own circuits. This petition highlights several of the varying *Hensley* interpretations and illustrates how their conflicts can combine to produce an extreme outlier among fee awards.

This Court has noted that a reasonable attorneys' fee is one that is adequate to attract competent counsel, but does not produce windfalls to attorneys. *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984). By that standard, the nominal fee award here was woefully unreasonable. No competent attorney would find in this award any financial incentive to take this case, even for the limited purpose of litigating the notice-and-comment question alone because the award was not even enough to cover the hours required just to litigate standing.

The Court should grant this petition to bring some order to the erratic interpretation of *Hensley* in fee awards.

I. The circuits are conflicted as to whether appeals are part of the entire litigation for fee purposes.

This Court has emphasized that one must be a prevailing party to recover fees under a fee shifting statute. *E.g.*, *Hensley*, 461 U.S. at 433 (1983). In *Jean*, this Court held that a "fee award presumptively encompasses all aspects of the civil action." 496 U.S. at

161. Despite this clear language, courts of appeals are fragmented whether prevailing party status covers appeals that are part of the overall litigation. *See infra*.

Here, the district court bifurcated the litigation into activities that took place prior to its summary judgment motion and those that took place afterward (that is, the appeal, the motion to alter judgment, the motion for entry of judgment, and the motion for fees). *Wash. All. of Tech. Workers*, 202 F. Supp. 3d at 28 (App. 29-30). The district court then disallowed fees for all activity after its summary judgment motion, stating that "plaintiff achieved no success in this litigation" after that date. *Id.*

On appeal, the D.C. Circuit affirmed, but did not address, the question of why Washtech should have been deprived of fees for motions that took place after the district court's cutoff date. However, on the question of fees for appeal, the D.C. Circuit adopted the district court's position that prevailing party status on appeal is distinct from prevailing party status in the litigation. *Wash. All. of Tech. Workers*, 857 F.3d at 911 (App. 7-8). While Washtech had succeeded on appeal in having the district court's adverse holdings vacated, the D.C. Circuit stated "Washtech did not win the relief it sought from this Court – a reversal on the merits – and thus did not prevail in its appeal." *Id.* Under this precedent, a prevailing party in the litigation must be separately a prevailing party on appeal to recover fees for that appeal. *Id.* In so holding, the D.C. Circuit joined the Sixth and Eleventh Circuits. *Kelley* v. *Metro. Cty. Bd. of Educ.*, 773 F.2d 677, 682 (6th Cir. 1985)

("[T]he relevant inquiry is simply whether the party seeking compensation substantially prevailed at the appellate level."); *Jean* v. *Nelson*, 863 F.2d 759, 770 (11th Cir. 1988) (disallowing fees for a loss in this Court). It also joins the Third Circuit in holding that litigation can be bifurcated for fee purposes. *See Institutionalized Juveniles* v. *Sec'y of Pub. Welfare*, 758 F.2d 897, 919-20 (3d Cir. 1985) (disallowing all fees after the date of last benefit to the plaintiff).

Other circuits, however, hold that prevailing party status includes appeals that are part of the overall litigation. In the same circumstances as here, the Fifth Circuit holds that the question of whether the plaintiff is entitled to a fee award for a mooted appeal is determined by whether the appellant was a prevailing party in the litigation. *Murphy* v. *Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003); *see also Ford* v. *Wilder*, 469 F.3d 500, 506-07 (6th Cir. 2006) (appeal dismissed as mooted by defendant and remanded for fee award. Plaintiff was awarded fees for mooted appeal as prevailing party in *Ford* v. *Tenn. Senate*, No. 2:06-cv-2031, 2008 U.S. Dist. LEXIS 88068 (W.D. Tenn. Oct. 24, 2008)).

A plurality of the circuits go even further, making fees recoverable for *unsuccessful appeals* if the party is a prevailing party in the overall litigation.[3] *E.g.*,

[3] Oddly, prior to this case, the view that appeals are part of the entire litigation for fee purposes had been the prevailing view in the D.C. District. *See, e.g.*, *Dougherty* v. *Barry*, 820 F. Supp. 20, 25 (D.D.C. 1993) ("[W]hether a party 'prevailed' as that term is used in § 1988 is determined by examination of the entire case

Schneider v. *Colegio de Abogados de P.R.*, 187 F.3d 30, 48 (1st Cir. 1999) (Lipez, J., concurring) (explaining why the court awarded fees for unsuccessful appeals to a prevailing party); *Gierlinger* v. *Gleason*, 160 F.3d 858, 880 (2d Cir. 1998) ("[T]he proper inquiry is . . . whether, in light of the circumstances of the litigation as a whole, those efforts were reasonable."); *Alizadeh* v. *Safeway Stores*, 910 F.2d 234, 237-38 (5th Cir. 1990) (awarding fees for an unsuccessful appeal to a prevailing party in the overall litigation); *Cabrales* v. *Cty. of Los Angeles*, 935 F.2d 1050, 1052-53 (9th Cir. 1991) (awarding fees for the entire litigation to a prevailing party, including fees for a loss in this Court).

A third variant occurs in the Sixth and Seventh Circuits, where prevailing parties who lose on appeal as appellees are entitled to fees for appeal, but not those who lose as appellants. *Ustrak* v. *Fairman*, 851 F.2d 983, 990 (7th Cir. 1988); *accord Harper* v. *BP Expl. & Oil, Inc.*, 3 F. App'x 204, 208 (6th Cir. 2001).

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and not at various stages of the litigation."); *Doe* v. *Rumsfeld*, 501 F. Supp. 2d 186, 190 (D.D.C. 2007) ("[T]he prevalent approach to determining whether a plaintiff is a prevailing party on appeal is to inquire whether the plaintiff has prevailed in the litigation as a whole.") (internal quotation marks omitted); *Retained Realty, Inc.* v. *Spitzer*, 643 F. Supp. 2d 228, 239 (D.D.C. 2009) ("Caselaw construing other statutes that provide for attorneys fees, however, suggests that in such circumstances, the prevailing party's entitlement to attorneys' fees includes fees for the unsuccessful stage."); *Ass'n of Am. Physicians* v. *U.S. FDA*, 391 F. Supp. 2d 171, 179 (D.D.C. 2005) ("[A] fee award presumptively encompasses all aspects of the civil action, including the appeal.") (internal quotations omitted).

Yet another variant occurs in the Tenth Circuit, where fee awards for appeals must be sought in the court of appeals, rather than in a single motion for fees at the conclusion of litigation. *Flitton* v. *Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1179-80 (10th Cir. 2010).

This Court should grant review in this case to resolve these complicated circuit splits and adopt a uniform standard on this question.

II. The D.C. Circuit's opinion creates a circuit split over what constitutes an unrelated claim under *Hensley*.

As the dissent in the court below noted, this Court has held that parties should not be penalized for raising alternate legal grounds for a desired outcome. *Wash. All. of Tech. Workers*, 857 F.3d at 913 (Kavanaugh, J., dissenting) (App. 11). This Court held in *Hensley* v. *Eckerhart* that, "[w]here a lawsuit consists of *related claims*, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 440 (emphasis added).

Until now, there had been general agreement in the circuits on what made claims related:

> A claim is unrelated if it is distinct in all respects and based on different facts and legal theories. Claims that involve a common core of facts or are based on related legal theories such that counsel's time will be devoted generally to the litigation as a whole are related

> and compensable even if not ultimately successful.

Jackson v. *Ill. Prisoner Review Bd.*, 856 F.2d 890, 894 (7th Cir. 1988) (internal citations and quotation marks omitted); *accord Garrity* v. *Sununu*, 752 F.2d 727, 734 (1st Cir. 1984) (holding that related claims are those that either have a common core of facts or are based on related legal theories); *LeBlanc-Sternberg* v. *Fletcher*, 143 F.3d 748, 762 (2d Cir. 1998) (reversing the denial of fees for unsuccessful claims where the successful claims "were based on the same core of facts and law"); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 195 F. App'x 93, 98 (3d Cir. 2006); *Abshire* v. *Walls*, 830 F.2d 1277, 1283 (4th Cir. 1987) (reversing a denial of fees for claims based on different legal theories but arising from a common core of facts); *La. Power & Light Co.* v. *Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995) (finding claims against multiple parties related and awarding fees for work on unsuccessful ones); *DiLaura* v. *Twp. of Ann Arbor*, 471 F.3d 666, 673 (6th Cir. 2006); *Mary Beth G.* v. *Chicago*, 723 F.2d 1263, 1279 (7th Cir. 1983); *Emery* v. *Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001); *Schwarz* v. *Sec'y of Health & Human Servs.*, 73 F.3d 895, 903 (9th Cir. 1995); *Jane L.* v. *Bangerter*, 61 F.3d 1505, 1512 (10th Cir. 1995); *United States* v. *Jones*, 125 F.3d 1418, 1430 (11th Cir. 1997).

All of Washtech's claims in this matter were brought under the same section of the Administrative Procedure Act challenging the same regulatory scheme. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 128 (D.D.C. 2015). All of these

claims have the absolutely identical remedy: that the court "hold unlawful and set aside [the] agency action." 5 U.S.C. § 706(2). Therefore, all of Washtech's claims both had related legal theories and were based on a common core of facts, and thus were related claims. *See Hensley*, 461 U.S. at 435.

Instead of following the interpretation of *Hensley* used by the rest of the circuits, the D.C. Circuit introduced a different standard for determining if claims are related:

> [T]he fact that, as the district court stated, "the outcome Washtech achieved – vacatur of the 2008 OPT Rule, subject to DHS's later promulgation of a replacement rule – is far more limited than if the Court had accepted its overarching claim that DHS exceeded its statutory authority, since DHS could not then have promulgated the replacement rule."

Wash. All. of Tech. Workers, 857 F.3d at 912 (quoting *Wash. All. of Tech. Workers*, 202 F. Supp. 3d at 28) (App. 10). Thus, under the standard introduced by the D.C. Circuit, claims are unrelated if they can produce different outcomes. This is a completely different standard than used by the rest of the circuits.

Additionally here, the D.C. Circuit upheld the denial of fees for claims on which the courts had achieved no decision. This Court held in *Hensley* that a court's "failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. The district court's basis for its drastic fee reduction was:

> In determining what is reasonable, it is noteworthy that the [district] Court rejected plaintiff's "principal argument" – that DHS exceeded its statutory authority in promulgating the 2008 Rule – and it found that plaintiff lacked standing to bring three of its challenges to the OPT program as a whole.

Wash. All. of Tech. Workers, 202 F. Supp. 3d at 29 (D.D.C. 2016) (App. 30). Yet Washtech had specifically appealed both of these adverse holdings and they had been vacated on appeal. *Wash. All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.*, No. 15-5239 (D.C. Cir. May 13, 2016). Since a vacated decision is a nullity, when a district court decision on an issue has been vacated, the courts can hardly be said to have reached a decision on that issue. *Animal Legal Def. Fund* v. *Veneman*, 490 F.3d 725, 729-30 (9th Cir. 2007). Thus, under *Hensley*, such claims should not have served as a basis for reducing fees here. *See* 461 U.S. at 435. This appears to be the first case where an appellate court has reviewed a fee award where a vacated decision served as the basis for a fee reduction.

This Court should grant review to answer the question of whether different causes of action seeking to set aside the same rule under the APA are alternate grounds under *Hensley*. This Court should also clarify whether the vacatur of a district court's holding on an issue means that no decision has been made by the courts.

III. The circuits are split over whether a district court may raise objections to a fee request *sua sponte*.

In *Hensley*, this Court adopted the lodestar approach to determining fee awards. 461 U.S. at 433; *see also Riverside* v. *Rivera*, 477 U.S. 561, 568 (1986). The starting point for a fee "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, *supra.* This Court did not address how objections to the reasonableness of the fee could be raised.

If the opposing party raises objections to a fee request in response to the fee motion, the prevailing party can answer those objections in its reply. Yet if a district court is allowed to raise objections to a fee request in its opinion, the prevailing party may have no opportunity to address those objections at all. The circuits are divided on how to handle this situation.

Here, the district court raised four objections to the fee request *sua sponte* in its opinion. *Wash. All. of Tech. Workers*, 202 F. Supp. 3d at 29 (App. 30-31). Washtech's first opportunity to address these objections was on appeal. Yet the D.C. Circuit simply stated without analysis that these *sua sponte* reductions were within the district court's discretion. *Wash. All. of Tech. Workers*, 857 F.3d at 911-13 (App. 8-10). Thus, the D.C. Circuit joined the Fifth Circuit in holding that courts can make *sua sponte* reductions to a fee request where the party has no opportunity to respond. *Curtis* v. *Bill Hanna Ford, Inc.*, 822 F.2d 549, 553 (5th Cir. 1987).

Both of these circuits, however, are in conflict with the Third Circuit, which holds that a district court is prohibited from raising factual objections to fee requests *sua sponte*. *United States* v. *Eleven Vehicles*, 200 F.3d 203, 212 (3d Cir. 2000). Fees may not be reduced "unless the opposing party makes specific objections to the fee request." *Id.* at 211. The district courts of several circuits have followed the Third Circuit's rule. *E.g.*, *Tillman* v. *District of Columbia*, 123 F. Supp. 3d 49, 57 (D.D.C. 2015); *Martinez* v. *Astrue*, No. 08-CV-0117, 2010 U.S. Dist. LEXIS 21269, at *11-12 (N.D.N.Y. Mar. 8, 2010); *Martinez* v. *Capitol Drywall, Inc.*, No. DKC 13-1563, 2014 U.S. Dist. LEXIS 151840 (D. Md. Oct. 24, 2014); *Moore* v. *Univ. of Notre Dame*, 22 F. Supp. 2d 896, 908 (N.D. Ind. 1998); *Nutt* v. *Kees*, No. 3:10-cv-00307-KGB, 2016 U.S. Dist. LEXIS 36810, at *2-3 (E.D. Ark. Mar. 22, 2016); *Rosas* v. *Cty. of San Bernardino*, 260 F. Supp. 2d 990, 996 n.4 (C.D. Cal. 2003).

The Second and Seventh Circuits approach this question in yet a different way. They both reject the Third Circuit's outright ban on *sua sponte* objections to fee requests. *Vincent* v. *Comm'r of Soc. Sec.*, 651 F.3d 299, 308 n.1 (2d Cir. 2011); *Jaffee* v. *Redmond*, 142 F.3d 409, 416 n.2 (7th Cir. 1998). Nonetheless, "a district court must afford plaintiffs an opportunity to respond when the court raises concerns about the fee petition that are based upon its independent scrutiny of the record or when the court establishes reasons *sua sponte* for reducing the fee award." *Pickett* v. *Sheridan Health Care Ctr.*, 664 F.3d 632, 652 (7th Cir. 2011); *accord Vincent*, 651 F.3d at 308.

This Court should resolve the dispute over whether a district court may raise factual objections to a fee request *sua sponte*, and, if so, whether that court has the obligation to give the party seeking fees an opportunity to respond to those objections.

CONCLUSION

The purpose of the EAJA was to enable citizens with limited resources to challenge "unreasonable governmental action." *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989). The secret, backroom rulemaking with lobbyists at issue in this case represents an outlandish example of the type of administrative action Congress sought to encourage citizens to challenge through the EAJA. Yet, if the response of the courts to citizens who survive the standing gauntlet, overcome the procedural challenges, and manage to prevail on the merits is to award a nominal fee that does not cover a fraction of the litigation costs, the purpose of the EAJA is undermined. Such an approach to the law of fee awards will make it even more difficult for small plaintiffs to obtain competent counsel. This is especially true in a case, as here, where the courts have drawn out the question of whether a regulatory scheme is lawful into nearly a decade of litigation and there still is no end in sight.

While discretion is a large part of fee awards, the law guides that discretion. In the thirty-four years since *Hensley*, that law has become deeply conflicted in

the circuits and the district courts. This Court should grant the petition to clarify the law and resolve these conflicts.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 20, 2017 Decided May 26, 2017

No. 16-5235

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00529)

John M. Miano argued the cause for appellant. With him on the briefs were Dale Wilcox and Michael Hethmon.

Joshua S. Press, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was Glenn M. Girdharry, Assistant Director.

Before: HENDERSON and KAVANAUGH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

Dissenting opinion filed by *Circuit Judge* KAVANAUGH.

SENTELLE, *Senior Circuit Judge*. Appellant Washington Alliance of Technology Workers ("Washtech") received a fee award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, for proceedings in which it partially succeeded in challenging a Department of Homeland Security practice allowing student visa holders to remain in the United States after completion of their formal education. Washtech appeals from the award, arguing that the district court erred in compensating it only for legal services time devoted to the one claim upon which it succeeded, as opposed to the entire litigation, and that the court abused its discretion in ordering further reductions from the amount sought. Because we conclude that the district court did not abuse its discretion, we affirm the decision of the district court.

I. BACKGROUND

In 2002, when Congress created the United States Department of Homeland Security ("DHS"), it transferred to the Secretary of Homeland Security the authority and responsibility theretofore residing in the Attorney General for the administration and enforcement of the Immigration and Naturalization Act, 8 U.S.C. § 1101, *et seq*. (the "Act"). The statute authorizes various visas allowing of the admission to the United States of specified categories of aliens for specified purposes. The "F-1 student visa" authorizes admission of

"bona fide student[s] qualified to pursue a full course of study" and who seek entry to the United States "temporarily and solely for the purpose of pursuing" studies as specified in the Act. *Id.* § 1101(a)(15)(F)(i). DHS and its predecessor agencies have long permitted aliens with student visa status to remain in the United States after graduation to participate in the workforce as part of an Optional Practical Training program ("OPT"). *See, e.g.*, Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. § 214.2(f)(10)(ii)) ("1992 OPT Rule"). Between 1992 and 2007, the 1992 OPT Rule authorized one year of employment after graduation to alien guestworkers. 8 C.F.R. § 214.2(f)(11) (2007). DHS subsequently extended the OPT period by 17 months for students with a science, technology, engineering, or mathematics degree. Extending Period of Optional Practical Training, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (codified at 8 C.F.R. pts. 214, 274a) ("2008 OPT Rule"). Washtech, a labor union that represents American workers in technology fields, filed a complaint in federal district court, alleging three counts challenging the OPT program as a whole, arguing that it was unlawful for DHS to allow "students" to remain in the United States and work after they had graduated. These claims were dismissed early in the case after the district court found that Washtech lacked standing to pursue them. *See Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247, 252 (D.D.C. 2014). Remaining counts related to the 2008 OPT Rule extending the maximum OPT period, challenging the 2008 OPT Rule on procedural and substantive

grounds. The district court rejected Washtech's claim that DHS exceeded its statutory authority by issuing the 2008 OPT Rule but upheld Washtech's claim that DHS had waived notice and comment without good cause. *Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 140-45, 145-47 (D.D.C. 2015) ("Merits Opinion"). The court vacated the rule but stayed vacatur for six months and directed DHS to "submit the 2008 [OPT] Rule for proper notice and comment." *Id.* at 149. Washtech appealed.

During the pendency of the appeal, DHS moved the district court to alter its judgment so as to extend the stay of vacatur of the 2008 OPT Rule, a motion that Washtech opposed. The district court extended the stay of vacatur for approximately three months. Washtech subsequently appealed that decision.

On March 11, 2016, DHS promulgated a new rule to replace the 2008 OPT Rule. *See* 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. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. pts. 214, 274a) ("2016 OPT Rule"). On May 13, 2016, this Court held that the issues raised in the appeal before it were therefore moot. *Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, No. 15-5239, 650 F. App'x 13 (D.C. Cir. May 13, 2016).

Washtech filed a motion for fees under the EAJA. The district court held that Washtech was a prevailing party under the EAJA and awarded fees. *Wash. All. of*

Tech. Workers v. Dep't of Homeland Sec., 202 F. Supp. 3d 20, 24-26 (D.D.C. 2016). However, the court awarded a significantly lower fee than Washtech requested. *Id.* at 29. The court declined to award fees for any activities undertaken after its Merits Opinion because "plaintiff achieved no success in this litigation" after that date. *Id.* at 28-29. And because it found Washtech's victory "marginal," the court awarded Washtech 15% of the remaining requested fees and expenses. *Id.* at 29. Washtech filed the present appeal.

II. DISCUSSION

A. Standard of Review

The EAJA provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Under the EAJA, district courts may award "reasonable" fees and must disallow claims for "excessive,

redundant, or otherwise unnecessary" charges. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).[1] "It remains for the district court to determine what fee is 'reasonable.'" *Id.* at 433. As we have stated, "the determination of how much to trim from a claim for fees is committed to the [district] court's discretion." *Okla. Aerotronics, Inc. v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1991). Therefore, we "review an EAJA fee award for abuse of discretion." *Truckers United for Safety v. Mead*, 329 F.3d 891, 894 (D.C. Cir. 2003). We "'will reverse the district court if its decision rests on clearly erroneous factual findings or if it leaves us with a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* (quoting *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996)).

B. Analysis

When, as in this case, plaintiffs seeking EAJA awards have brought multiple claims and prevailed on only one or fewer than all of the claims, the question arises, as it does before us, as to what portion of the fees claimed by the EAJA applicant are compensable under the Act. In answering that question, we begin with the proposition that "counsel's work on one claim

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[1] Although *Hensley* dealt with an award of fees under 42 U.S.C. § 1988 rather than the EAJA, *Hensley* is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 n.7. Thus, *Hensley*'s standards apply in the present case.

[is] unrelated to his work on another claim[,]" and "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Hensley*, 461 U.S. at 435 (internal quotation marks and citation omitted). However, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* In such situations, "the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.*; *see also Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993). "The result is what matters." *Hensley*, 461 U.S. at 435.

The district court found "no difficulty segregating fees related to [Washtech]'s appeal and opposition to DHS's motion for reconsideration" from its successful claims because Washtech achieved "no success" in the litigation after the court issued its Merits Opinion. *Washtech*, 202 F. Supp. 3d at 28-29. Even where a plaintiff's claims are "interrelated, nonfrivolous, and raised in good faith[,]" fees are not authorized where a plaintiff has achieved only limited success and a district court may "identify specific hours that should be eliminated." *Hensley*, 461 U.S. at 436. It was therefore within the district court's discretion to deny fees generally for Washtech's unsuccessful efforts.

Included among the disallowed fees is Washtech's unsuccessful appeal to this Court. Washtech argues that "[t]he effect of the appeal to this Court was to eliminate the question of whether the lawfulness of the OPT program was a *res judicata*" so that Washtech could pursue its substantive argument in a subsequent case. Pet'r's Br. at 15. Therefore, "the appeal and this Court's judgment produced a favorable change for Washtech in its legal relationship with DHS." *Id.* (citing *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)). But "fees are available only to a party that 'prevails' by winning the relief it seeks." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (citations omitted). Although this Court vacated the district court's opinion, Washtech did not win the relief it sought from this Court – a reversal on the merits – and thus did not prevail in its appeal. The Supreme Court has squarely held that, where a controversy is mooted before a court of appeals' judgment issues, an appellant is "not, at that stage, a 'prevailing party' as it must be to recover fees. . . ." *Id.* at 483. It was therefore within the district court's discretion to deny Washtech fees for work done on its appeal.

The district court also denied entirely reimbursement for Washtech's attorneys traveling to and from Washington to testify before the Senate. *Washtech*, 202 F. Supp. 3d at 29. This was within the court's discretion because counsel's testimony "had no impact whatsoever on this litigation." *Id.*

Washtech further argues that the district court abused its discretion by "arbitrarily" awarding a smaller fee than that requested. The district court agreed with Washtech that its other "various challenges to the OPT program were interrelated and thus . . . issue-by-issue compartmentalization of the unsuccessful claims is not feasible." *Id.* (citations omitted). The court was then required to consider "whether the expenditure of counsel's time was reasonable in relation to the [limited] success achieved." *Hensley*, 461 U.S. at 436; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C. Cir. 1992). The Supreme Court has made clear that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Hensley*, 461 U.S. at 440.

The district court explained that "the [requested] award must be reduced in light of [Washtech's] limited success in this action." *Washtech*, 202 F. Supp. 3d at 28. While Washtech prevailed on its notice-and-comment claim, the district court rejected its claims challenging the 1992 OPT Rule and "its primary claim that DHS exceeded its statutory authority by issuing the 2008 [OPT] Rule." *Id.* at 27-28. Washtech asserts that these arguments were merely alternative grounds for its desired outcome – vacatur of the 2008 OPT Rule – and "the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435. Indeed, the district court ordered vacatur of the 2008 OPT Rule. However,

Washtech's argument ignores the fact that, as the district stated, "[t]he outcome [Washtech] achieved – vacatur of the 2008 [OPT] Rule, subject to DHS's later promulgation of a replacement rule – is far more limited than if the Court had accepted its overarching claim that DHS exceeded its statutory authority, since DHS could not then have promulgated the replacement rule." *Washtech*, 202 F. Supp. 3d at 28. Further, the three claims dismissed for lack of standing challenged the entire OPT program, rather than the 2008 extension, and "success on those claims would have certainly provided greater relief than plaintiff actually achieved." *Id.* It was therefore within the district court's discretion to find Washtech's victory "marginal," *id.* at 29, and reduce the fee in light of its "partial or limited success[,]" *Hensley*, 461 U.S. at 436.

In addition, the district court found that Washtech's fees were "unjustifiably high" in light of the number of attorneys working on the matter and "unnecessary duplication" of efforts as well as insufficient detail in billing records. *Washtech*, 202 F. Supp. 3d at 29. Such judgments were well within the district court's discretion. *See, e.g.*, *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 973 (D.C. Cir. 2004) (reducing plaintiff's award in part because of its attorneys' duplication of effort and deficient time entries and holding that a "fixed reduction is appropriate" where a large number of time entries are deficient); *Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986) ("A fee award may be discounted as a result of poor documentation.").

III. CONCLUSION

For the reasons set forth above, the district court's order awarding Washtech attorney's fees is affirmed.

KAVANAUGH, *Circuit Judge*, dissenting: Plaintiff Washtech sued to challenge a 2008 rule issued by the Department of Homeland Security. Washtech sought to have the rule vacated. Washtech succeeded: The District Court vacated the rule. The fact that Washtech raised a number of different arguments against the 2008 rule, but prevailed on only one, does not matter for attorney's fees purposes, because that one winning argument afforded Washtech the result that it sought. As the Supreme Court has stated: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Based on that *Hensley v. Eckerhart* principle, I would vacate the District Court's order and remand for recalculation of fees without penalizing Washtech for having raised alternative grounds for relief. I respectfully dissent from the majority opinion's contrary decision.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5235 **September Term, 2016**

1:14-cv-00529-ESH

Filed On: May 26, 2017 [1676912]

Washington Alliance of Technology Workers,

Appellant

v.

United States Department of Homeland Security,

Appellee

ORDER

It is **ORDERED**, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41. This instruction to the Clerk is without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5235 **September Term, 2016**
FILED ON: MAY 26, 2017

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00529)

Before: HENDERSON and KAVANAUGH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the District Court's order awarding Washtech attorney's fees be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: May 26, 2017

Opinion for the court filed by Senior Circuit Judge Sentelle.
Dissenting opinion filed by Circuit Judge Kavanaugh.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, ***Plaintiff,*** **v.** **U.S. DEPARTMENT OF HOMELAND SECURITY,** ***Defendant.***	**Civil Action No. 14-529 (ESH)**

MEMORANDUM OPINION

Plaintiff Washington Alliance of Technology Workers ("WashTech") moves for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, following its challenge to various rules issued by the Department of Homeland Security ("DHS"). *See Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 2015 WL 9810109, at *16 (D.D.C. Aug. 12, 2015). The Court rejected a number of WashTech's claims, but it did vacate one of the rules due to DHS's failure to provide notice and comment. *See id.* For the reasons that follow, plaintiff's motion will be granted in part and denied in part.

BACKGROUND

WashTech filed its complaint in 2014, which contained nine claims challenging a DHS program that allows F-1 student visa holders to engage in optional practical training ("OPT") after completion of their studies. (*See* Am. Compl. [ECF No. 20] ¶¶ 155-282.) Counts I-III attacked the OPT program as a whole, alleging that it was unlawful to allow "students" to remain in the U.S. and work after they had graduated. (*See id.* ¶¶ 155-86.) These claims were dismissed early in the case, after the Court found that plaintiff lacked standing to pursue them. *See Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247, 252 (D.D.C. 2014). The remaining six counts attacked a DHS rule promulgated in 2008 that extended the maximum OPT period from twelve to twenty-nine months for participants with degrees in science, technology, engineering, or math ("STEM"), as well as subsequent amendments to the 2008 Rule. (*See* Am. Compl. ¶¶ 186-282.) The Court rejected plaintiff's claim that DHS exceeded its statutory authority by issuing the 2008 Rule, which it deemed plaintiff's "principal argument." *See Wash. Alliance of Tech. Workers*, 2015 WL 9810109, at *8-*13. However, plaintiff succeeded on its claim that DHS lacked good cause to avoid notice and comment when promulgating the 2008 Rule. *Id.* at *15. The Court determined that the appropriate remedy was to vacate the rule and its subsequent amendments, but it stayed the effect of vacatur for six months to avoid a regulatory gap while

DHS subjected the rule to notice and comment. *Id.* at *16.[1]

Rather than repromulgate the 2008 Rule in its entirety, DHS opted to enact a similar replacement that, *inter alia*, further extended the maximum STEM OPT period to thirty-six months. *See* 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. 13,039, 13,040 (Mar. 11, 2016). However, after publishing that proposed rule, DHS received an unprecedented number of public comments, which prevented it from finalizing the rule prior to expiration of the stay of vacatur. *See Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 2016 WL 308775, at *3 (D.D.C. Jan. 23, 2016). It thus moved for a three-month extension of the stay, which the Court granted over plaintiff's opposition. *See id.* at *5. The extended stay expired on May 10, 2016, *see id.*, and the following day the replacement rule was finalized.

WashTech appealed a number of the Court's rulings, including the stay extension, but before the Court of Appeals could issue an opinion, the replacement rule had gone into effect and thereby mooted the appeal.

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[1] Given that result, the Court had no need to address plaintiff's remaining claims that DHS arbitrarily and capriciously promulgated the 2008 Rule (Count IV), that DHS violated regulations governing incorporation by reference (Count VI), and that DHS's amendments of the 2008 Rule were procedurally infirm (Counts VII-VIII). *See Wash. Alliance of Tech. Workers*, 2015 WL 9810109, at *16 n.14.

See Wash. Alliance of Tech. Workers v. Dep't of Homeland Sec., 2016 WL 3041029, at *1 (D.C. Cir. May 13, 2016). The Circuit dismissed the appeal and vacated this Court's judgment. *See id.*

Plaintiff now moves for reimbursement of $465,002.62 in fees, expenses, and costs, including those incurred on appeal. (*See* Mot. for Attorney Fees [ECF No. 56] at 1.)

ANALYSIS

Under the EAJA, a party seeking a fee award must submit an application showing (1) that it is a prevailing party, (2) its statutory eligibility to receive an award, and (3) the amount sought, including an itemized statement breaking down that claim for reimbursement. *See* 28 U.S.C. § 412(d)(1)(B). It must also "allege that the position of the United States was not substantially justified." *Id.* Once that allegation is made, "[t]he burden of establishing that the position of the United States was substantially justified . . . must be shouldered by the Government." *See Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (internal quotations omitted).

DHS argues both that plaintiff was not a "prevailing party" and that its litigation position was "substantially justified." Alternatively, it argues that if plaintiff is entitled to fees, the award sought by plaintiff must be reduced to provide reimbursement only for the claim on which plaintiff prevailed.

A. Prevailing Party

To be deemed a prevailing party, WashTech must have "succeeded on any significant issue in litigation which achieve[d] some of the benefit [it] sought in bringing suit." *See Waterman S.S. Corp. v. Mar. Subsidy Bd.*, 901 F.2d 1119, 1121 (D.C. Cir. 1990) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)) (internal quotations omitted). More specifically, a plaintiff must do more than trigger a voluntary change in the defendant's conduct, but instead it must achieve a "judicially sanctioned change in the legal relationship of the parties." *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

This Court previously found that DHS lacked good cause to bypass required notice-and-comment procedures when it promulgated the 2008 Rule. *Wash. Alliance of Tech. Workers*, 2015 WL 9810109, at *15. Because failure to adhere to notice-and-comment requirements "is a serious procedural deficiency that counsels against remand without vacatur," the Court ordered vacatur of the 2008 Rule and its subsequent amendments. *See id.* at *16. This relief was specifically sought in WashTech's complaint. (*See* Am. Compl. at 40-41 (seeking a declaration that "DHS unlawfully implemented the Rule without notice and comment and that the 2008 OPT Rule is therefore null and void").) Thus, as DHS repeatedly acknowledged before the Court of Appeals, WashTech "prevailed on the notice-and-comment [challenge]," because "the 2008 Rule

that they detested no longer exist[s]." *See* Oral Argument Recording at 19:53, *Wash. Alliance of Tech. Workers v. U.S. Dep't of Homeland Sec.*, Case No. 15-5239, 2016 WL 3041029 (D.C. Cir. May. 4, 2016); *see also id.* at 35:15 (WashTech has "gotten what they've wanted, they're victorious"). DHS now tries to backtrack from that concession, arguing that these "off-the-cuff comments . . . could not speak for this Court's past rulings," which purportedly show that plaintiff did not actually prevail. (*See* Def.'s Response Br. [ECF No. 62] at 6-7.) The inescapable fact remains, however, that DHS's "off-the-cuff comments" were correct – plaintiff established that DHS committed a serious procedural violation that justified vacatur of the 2008 Rule. In any sense of the word, plaintiff "prevailed" on that claim by securing a court-ordered change of the parties' legal relationship. *See Buckhannon*, 532 U.S. at 605.

DHS's arguments to the contrary are unavailing. It points to a number of claims on which it prevailed – rulings that plaintiff subsequently appealed (Def.'s Response Br. at 8-9) – but those claims are irrelevant for EAJA purposes. A prevailing party need not win on its central claim, let alone every single claim it makes. *See Tex. State Teachers Ass'n*, 489 U.S. at 790.

Nor is the analysis altered by the fact that DHS later promulgated a replacement rule, which neutralized the effect of vacatur. Even if an agency later repromulgates the same rule, a party prevails when it gains the opportunity to provide comment, as plaintiff did here. *See Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1257 (D.C. Cir. 1993) ("In the real world of the

APA, an opportunity for comment – which the EDF did get – is not to be denigrated."). This is not a situation in which plaintiff achieved some enhanced legal position that "increased the odds of [its] ultimately securing a real-world benefit." *See Waterman*, 901 F.2d at 1123. Rather, the vacatur of the 2008 Rule and plaintiff's opportunity to comment on its replacement was itself the "real-world benefit." DHS's replacement rule may have made plaintiff's victory seem like a hollow one, but that victory is nonetheless sufficient for EAJA purposes.[2] *Cf. Edmonds v. FBI*, 417 F.3d 1319, 1323 (D.C. Cir. 2005) (court order requiring expedited processing of FOIA request sufficient to make plaintiff a prevailing party).

Plaintiff also remains a prevailing party despite the D.C. Circuit's subsequent finding of mootness and vacatur of this Court's judgment. As DHS correctly notes, mootness does not affect prevailing-party status if the party received concrete relief that "could not be reversed despite [the] subsequent finding of mootness." *See Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003). Here, the Court of Appeals found mootness "because the 2008 Rule is no longer in effect," *Wash. Alliance of Tech. Workers*, 2016 WL 3041029, at

[2] DHS also suggests that WashTech's position "is most similar to the 'catalyst theory' rejected in *Buckhannon*." (*See* Def.'s Response Br. at 9.) This argument is baseless. The "catalyst theory" applies when an agency takes some voluntary corrective action in response to the filing of a lawsuit, prior to a court's resolution of the suit. *See Buckhannon*, 532 U.S. at 601. Here, DHS took no voluntary action prior to the Court's resolution of the suit against it. The catalyst theory is thus plainly inapplicable.

*1, and the 2008 Rule is no longer in effect because of this Court's vacatur and DHS's promulgation of a new rule. In other words, the relief that plaintiff received was not (and could not have been) reversed by the Court of Appeals, because DHS's response to that relief made the effect of vacatur permanent. Having received concrete relief that could not have been reversed on appeal, plaintiff is a prevailing party under the EAJA.

B. Substantially Justified

It is a closer question whether DHS's position – that it had good cause to bypass notice and comment – was "substantially justified."[3] The Supreme Court has defined this phrase to mean "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (rejecting argument that government's position must have been "justified to a high degree"). This does not mean, however, that attorney's fees must be denied as long as DHS's position was non-frivolous. *See id.* at 566. Thus, contrary to DHS's suggestion, the Court's statement that DHS "advanc[ed] a non-frivolous argument" for bypassing notice and comment does not end the analysis. *See Wash. Alliance of*

[3] DHS incorrectly argues that plaintiff waived any argument regarding substantial justification, because plaintiff's motion "never discusses this issue." (Def.'s Response Br. at 10 n.3.) Plaintiff was required only to "*allege* that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B) (emphasis added). Because plaintiff did so (Pl.'s Mot. at 3), the burden rests with DHS to show that its position was substantially justified. *See Scarborough*, 541 U.S. at 414.

Tech. Workers, 2016 WL 308775, at *4. Instead, the Court must consider whether DHS had a "reasonable basis in law and fact" to argue that it had good cause to bypass notice and comment. *See Pierce*, 487 U.S. at 566 n.2.

Because notice-and-comment rulemaking is the primary means of assuring informed agency decisions, it is well-established in this Circuit that any exception to the notice-and-comment requirement "will be narrowly construed and only reluctantly countenanced." *See New Jersey v. U.S. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *see also Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (exceptions "are not 'escape clauses' that may be arbitrarily utilized at the agency's whim"). Notice and comment can only be avoided in truly exceptional emergency situations, which notably, cannot arise as a result of the agency's own delay. *Envtl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983). Courts have thus upheld emergency rulemakings where, for instance, the FAA needed to counteract "the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001," *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), or where "an entire industry and its customers were imperiled" by an imminent regulatory gap, *see Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93-94 (D.C. Cir. 2012) (discussing *Am. Fed'n of Gov't Emps.*, 655 F.2d at 1157). At the outset, then, it should have been clear to DHS that its good-cause argument faced a significant legal hurdle.

DHS argued that good cause existed "[b]ecause the Secretary faced an urgent situation in which tens of thousands of specially-educated individuals would have been required to leave this country just as the nation was plummeting into recession – resulting in irreparable harm to critical sectors of the national economy as well as American universities." (*See* Def.'s Mot. for Summ. J. [ECF No. 27] at 1.) The Court rejected this argument. First, it found that DHS offered nothing concrete to substantiate its claims of a pending labor shortage, but spoke only in general terms about the importance of STEM workers to the economy. *See Wash. Alliance of Tech. Workers*, 2015 WL 9810109, at *15. More specifically, DHS did nothing to quantify the economic impact of delaying a rule until notice and comment could be completed. *See id.* Furthermore, DHS could not show an "emergency" when it had been aware of the problem for years and had nonetheless failed to take action. *See id.* ("Defendant does not explain why it waited to initiate proceedings on this issue, and it has not pointed to any changed circumstances that made the OPT extension suddenly urgent.").

Of course, DHS is correct when it argues that "a position can be [substantially] justified even though it is not correct." (*See* Def.'s Response Br. at 10.) However, given its own delay in initiating rulemaking, DHS did not come close to establishing a bona-fide emergency, such that the Court could have "reluctantly countenanced" the avoidance of notice and comment. *See New Jersey*, 626 F.2d at 1045; *see also Nat'l Res. Def. Council*

v. U.S. EPA, 703 F.2d 700, 703, 712 (3d Cir. 1983) (agency "failed utterly" to show substantial justification because it could have complied with both notice and comment and a deadline imposed by Executive Order). In this regard, the Court is guided by the D.C. Circuit's decision in *Environmental Defense Fund*, in which the EPA lacked substantial justification to argue that a self-created "emergency" entitled it to bypass notice and comment. *See* 716 F.2d at 920-21.[4] The agency had argued that it had no choice but to immediately suspend an industry reporting requirement, without notice and comment, because the reporting deadline was only a week later. *See id.* The Court rejected this purported emergency, holding that the EPA had long planned to do away with the reporting requirement, deferring the previous year's requirement and later stating its intention to eliminate it altogether. *See id.* The agency could not then delay action until a week before the reporting deadline and then suddenly claim an "emergency." *See id.* at 921. Just so

[4] The Court recognizes that *Environmental Defense Fund* has been abrogated on two points, including the correct standard for showing substantial justification. *See Buckhannon*, 532 U.S. at 601-02 (rejecting catalyst theory); *Pierce*, 487 U.S. at 567 (rejecting D.C. Circuit precedent requiring government to show that its position was "slightly more" than reasonable). Nonetheless, its discussion of substantial justification remains instructive, because even under the correct, less stringent "reasonable" standard, the government would still have failed to meet its burden. *See Envtl. Def. Fund*, 716 F.2d at 921 (finding that "it was *not at all reasonable* for EPA to rely on the good cause exception") (emphasis added).

here, as DHS acknowledges that the purported emergency began in 2004, when "the visa numbers allocated for the H-1B program were reduced" from 195,000 to 65,000. (*See* Def.'s Mot. for Summ. J. at 43.) In fact, the agency's delay in responding is far longer than the EPA's eight-month delay in *Environmental Defense Fund*. *See* 716 F.2d at 921. It was therefore unreasonable for DHS to argue, after four years of inaction, that an ongoing labor shortage entitled it to proceed with an emergency rulemaking.

C. Reasonable Fees and Expenses

Having concluded that WashTech is eligible to be reimbursed for the "reasonable fees and expenses of [its] attorneys," 28 U.S.C. § 2412(b), the Court must now determine what amount would be reasonable. Plaintiff bears the burden of establishing the reasonableness of its fee request. *See Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004). It seeks an award $465,002.62, which represents all fees, expenses, and costs it has incurred in this matter, including those incurred in its unsuccessful appeal. (*See* Ex. 1 to Pl.'s Mot. [ECF No. 56-1].) DHS argues that plaintiff is only entitled to an award that reflects its limited victory, *i.e.*, reimbursement for only those fees related to the notice-and-comment claim. (*See* Def.'s Response Br. at 12-15.) Plaintiff responds that its claims were so interrelated that it would be impossible to distinguish which amounts were spent on that claim, and further, that it is unnecessary to do so because the unsuccessful claims were merely alternative grounds for reaching

the outcome it ultimately achieved. (*See* Pl.'s Reply Br. at 8-11.)

The Supreme Court has made clear that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).[5] WashTech prevailed only on its notice-and-comment claim. The Court rejected (1) three of its claims challenging the twelve-month, post-completion OPT program on standing grounds, *see Wash. Alliance of Tech. Workers*, 74 F. Supp. 3d at 252; and (2) its primary claim that DHS exceeded its statutory authority by issuing the 2008 Rule, *see Wash. Alliance of Tech. Workers*, 2015 WL 9810109, at *13. Similarly, the Court later granted DHS's motion to extend the stay of vacatur, over plaintiff's opposition. *See Wash. Alliance of Tech. Workers*, 2016 WL 308775, at *5. Plaintiff's appeal also failed to secure any relief, as it was dismissed as moot in light of DHS's 2016 replacement rule. *See Wash. Alliance of Tech. Workers*, 2016 WL 3041029, at *1. Finally, as discussed (*see supra* at 5), the vacatur it was awarded did not prevent DHS from promulgating a replacement rule that is similar to the 2008 Rule. Thus, there is no

[5] Although *Hensley* dealt with an award of fees under 42 U.S.C. § 1988, the standards it announced "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433 n. 7. As discussed, the EAJA awards fees to a "prevailing party," 28 U.S.C. § 2412(d)(1)(A), and thus, *Hensley*'s standards are applicable here.

question that the award must be reduced in light of plaintiff's limited success in this action.

The Court finds both of plaintiff's arguments against a reduction to be unpersuasive. First, it is not true that each of its claims were simply "alternative legal grounds for a desired outcome." (*See* Pl.'s Reply Br. at 9 (quoting *Hensley*, 461 U.S. at 435).) The outcome it achieved – vacatur of the 2008 Rule, subject to DHS's later promulgation of a replacement rule – is far more limited than if the Court had accepted its overarching claim that DHS exceeded its statutory authority, since DHS could not then have promulgated the replacement rule. By the same token, the three claims dismissed for lack of standing challenged the entire OPT program, not just the 2008 extension (*see* Am. Compl. ¶¶ 155-186), so success on those claims would have certainly provided greater relief than plaintiff actually achieved.

Second, plaintiff misreads *Hensley* when it argues that reduction is only appropriate if its successful claim "can be easily compartmentalized" from its unsuccessful claims. (*See* Pl.'s Reply Br. at 9.) Instead, *Hensley* expressly states that if claims are interrelated and cannot be compartmentalized, the Court must consider whether "the expenditure of counsel's time was reasonable in relation to the [limited] success achieved." *See* 461 U.S. at 436; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C. Cir. 1992) ("*Hensley* does instruct that if successful and unsuccessful claims [are interrelated], then a court

should simply compute the appropriate fee as a function of degree of success."); *Dickens v. Friendship-Edison P.C.S.*, 724 F. Supp. 2d 113, 122 (D.D.C. 2010) (reducing one attorney's fees 50% to reflect plaintiff's limited success). Therefore, to the extent that certain claims are interrelated, the Court will simply reduce the award sought to reflect WashTech's limited success on those claims. *See Hensley*, 461 U.S. at 436.[6]

There is no difficulty segregating fees related to plaintiff's appeal and opposition to DHS's motion for reconsideration – plaintiff achieved no success in this litigation after the Court's August 12, 2015 Opinion, and therefore, those amounts are not compensable. *See Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993) ("*Hensley* says loud and clear that when a party has obtained no favorable results in a particular aspect of a litigation, that party may receive no fee for work on that part of the case."). WashTech also inexplicably seeks reimbursement for its New Jersey-based attorney traveling to and from Washington to testify before the Senate. (*See* Ex. 1 to Pl.'s Mot. at 20.) That testimony had no impact whatsoever on this litigation, so those amounts will also be denied in full. However, the Court agrees that plaintiff's various challenges to the OPT program were interrelated (*see* Pl.'s Reply Br. at

[6] That said, WashTech is correct that the Supreme Court has rejected DHS's proposed method of reducing fees – awarding a fraction of fees that consists of the number of successful claims divided by total claims, or 1/9th of the total amount sought here. *See Hensley*, 461 U.S. at 435 n.11. Rather, the appropriate method involves a determination of what percentage of total fees accurately reflects plaintiff's level of success. *See id.* at 436.

9), and thus, true, issue-by-issue compartmentalization of the unsuccessful claims is not feasible. *See Hensley*, 461 U.S. at 435 (noting that cases in which issue-by-issue compartmentalization is possible are "unlikely to arise with great frequency"). Thus, given this situation, the Court must exercise its "substantial discretion" to fix an award that would be reasonable in light of WashTech's lack of success on those challenges. *See Comm'r, INS v. Jean*, 496 U.S. 154, 163 (1990).

In determining what is reasonable, it is noteworthy that the Court rejected plaintiff's "principal argument" – that DHS exceeded its statutory authority in promulgating the 2008 Rule – and it found that plaintiff lacked standing to bring three of its challenges to the OPT program as a whole. Success on any of these claims would have secured far greater relief than plaintiff ultimately secured (*i.e.*, vacatur of a rule that was replaced in short order, and the opportunity to offer comment on the replacement rule). The Court also finds that plaintiff, which bears the burden on this issue, provided scant detail in many of its time entries and block-billed for multiple tasks in others. (*See, e.g.*, Ex. 1 to Pl.'s Mot. at 19-20 (attributing 63 hours to entries labeled only "Supplemental Brief" and 15 hours to a single block-billed entry labeled "Appendices, SJ Brief, Client calls, emails until 2:30 AM").) A modest fee reduction is therefore appropriate on that basis. *See Kennecott Corp. v. EPA*, 804 F.2d 763, 767 (D.C. Cir. 1986) ("A fee award may be discounted as a result of poor documentation."). Finally, some seven attorneys worked on this matter over time, and as a result, the

Court finds that plaintiff's fees were unjustifiably high. For instance, it employed three different attorneys to review and revise their co-counsel's brief, which amounted to 26.2 hours of revision of a single filing. (*See* Ex. 1 to Pl.'s Mot. at 8.) This unnecessary duplication of efforts on many tasks warrants another modest reduction. *See Role Models Am., Inc.*, 353 F.3d at 973 (reducing plaintiff's award by 50% in part because of its attorneys' duplication of effort).

Therefore, especially in light of plaintiff's marginal victory, the Court finds that an award of 15% of plaintiff's remaining fees and expenses is appropriate.

CONCLUSION

For the foregoing reasons, plaintiff's motion for attorney fees is **GRANTED IN PART** and **DENIED IN PART**. DHS shall reimburse plaintiff for 15% of its fees and expenses incurred prejudgment, which as detailed in the attached Appendix amounts to $42,239.59. A separate Order accompanies this Memorandum Opinion.

/s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 8, 2016

APPENDIX

Pre-Judgment Claims (incurred on or before the date of the Court's 8/12/15 Opinion)

Fees:

Attorney JMM (2010):	80 hours x $177.50/hour =	$14,200.00
Attorney JMM (2011):	112 hours x $183.75/hour =	$20,580.00
Attorney JMM (2012):	209 hours x $187.50/hour =	$39,187.50
Attorney JMM (2013):	33 hours x $191.25/hour =	$6,311.25
Attorney JMM (2014):	368 hours x $193.75/hour =	$71,300.00
Attorney JMM (2015):	481 hours x $193.94/hour =	$93,285.14
Attorney GRR (2010):	6 hours x $177.50/hour =	$1,065.00
Attorney GRR (2011):	9.6 hours x $183.75/hour =	$1,764.00
Attorney GRR (2012):	2.1 hours x $187.50/hour =	$393.75
Attorney GRR (2013):	2.2 hours x $191.25/hour =	$420.75
Attorney GRR (2014):	36.8 hours x $193.75/hour =	$7,130.00
Attorney GRR (2015):	15.5 hours x $193.94/hour =	$3,006.07
Attorney MMH (2011):	3 hours x 183.75/hour =	$551.25

Attorney MMH (2014):	8.4 hours x 193.75/hour =	$1,627.50
Attorney MMH (2015):	17.3 hours x 193.94/hour =	$3,355.16
Attorney MM (2011):	9 hours x $183.75/hour =	$1,653.75
Attorney MM (2012):	10 hours x $187.50/hour =	$1,875.00
Attorney DLW (2014):	24.3 hours x $193.75/hour =	$4,708.13
Attorney DLW (2015):	33.6 hours x $193.94/hour =	$6,516.38
		$278,930.63
		x 15%
		$41,839.59

Expenses and Costs:

Complaint Filing Fee:	$400.00
TOTAL AWARD:	**$42,239.59**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, ***Plaintiff*,** **v.** **U.S. DEPARTMENT OF HOMELAND SECURITY,** ***Defendant*.**	**Civil Action No. 14-529 (ESH)**

ORDER

For the reasons stated in the accompanying Memorandum Opinion [ECF No. 65], it is hereby

ORDERED that plaintiff's motion for attorney fees is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that defendant shall reimburse plaintiff for attorney's fees, costs, and expenses in the amount of $42,239.59.

SO ORDERED.

/s/ **Ellen Segal Huvelle**
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 8, 2016

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5239 **September Term, 2015**
FILED ON: MAY 13, 2016

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-00529)

Before: KAVANAUGH, MILLETT and WILKINS *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the appeal be **DISMISSED**.

The challenges to the 2008 Rule raised by plaintiff on appeal – including the argument that the 2008 Rule reopened the 1992 Rule – are moot because the 2008

Rule is no longer in effect. We therefore dismiss the appeal and vacate the judgment of the District Court. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Humane Society of the United States v. Kempthorne*, 527 F.3d 181, 184-88 (D.C. Cir. 2008).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, ***Plaintiff*,** **v.** **U.S. DEPARTMENT OF HOMELAND SECURITY,** ***Defendant*.**	**Civil Action No. 14-529 (ESH)**

MEMORANDUM OPINION

Plaintiff Washington Alliance of Technology Workers, a collective-bargaining organization that represents science, technology, engineering, and mathematics ("STEM") workers, has sued the U.S. Department of Homeland Security ("DHS"). Plaintiff challenges an interim final rule promulgated by defendant DHS in April 2008 extending, for eligible STEM students, the duration of optional practical training ("OPT"), which allows nonimmigrant foreign nationals on an F-1 student visa to engage in employment during and after completing a course of study at a U.S. educational institution. *See* 8 C.F.R. § 214.2(f)(10)(ii). Before this Court are the parties' cross motions for summary judgment. (Pl.'s Cross Mot. for Summ. Judgment or Judgment on the Administrative Record [ECF No. 25] ("Pl.'s Mot.")); Def.'s Mot. for Summ. Judgment [ECF No. 27] ("Def.'s Mot.").) For the

following reasons, both motions will be granted in part and denied in part.

BACKGROUND

The Immigration and Nationality Act ("INA") creates several classes of nonimmigrants who are permitted to enter the United States for a limited time and for a specific purpose. 8 U.S.C. § 1101(a)(15). This case involves two such classes. First, F-1 visas provide entry for individuals who qualify as

> 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 established . . . academic institution. . . .

Id. § 1101(a)(15)(F)(i). Second, H-1B visas cover individuals who fall into the following category:

> an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Secretary of Homeland Security and the Secretary of State that the intending employer has filed with the Secretary of Labor an attestation under section 212(t)(1). . . .

Id. § 1101(a)(15)(H)(i)(b). A "specialty occupation" requires the attainment of a bachelor's degree. *Id.* § 1184(i)(1). An alien may not obtain an H-1B visa unless his employer has certified, among other things, that the alien will be paid at least "the prevailing wage level for the occupational classification in the area of employment." *Id.* § 1182(t)(1). The total number of H-1B visas is currently capped by Congress at 65,000 per year. *Id.* § 1184(g).

The INA gives the Executive Branch authority to issue regulations governing the admission of nonimmigrants. *See id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe. . . ."). For almost 70 years, DHS and its predecessor, the Immigration and Naturalization Service ("INS"), have interpreted the immigration laws to allow students to engage in employment for practical training purposes. *See* 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) ("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. . . ."). At present, students may engage in OPT "[a]fter completion of the course of study, or, for a student in a bachelor's, master's, or doctoral degree program, after completion of all course requirements for the degree." 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). The employment must be "directly related to the student's major area of study." *Id.*

§ 214.2(f)(10)(ii)(A). Before 2008, a student could only be authorized for 12 months of practical training, which had to be completed within a 14-month window following the student's completion of his course of study. *See id.* § 214.2(f)(10) (2007).

In April 2008, DHS issued an interim final rule with request for comments that extended the period of OPT by 17 months for F-1 nonimmigrants with a qualifying STEM degree. Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions, 73 Fed. Reg. 18,944 (Apr. 8, 2008) ("2008 Rule"). As such, STEM students can now engage in a maximum of 29 months of OPT. *See* 8 C.F.R. § 214.2(f)(10)(ii)(C). In describing the purpose of the 2008 Rule, DHS explained that "the H-1B category is greatly oversubscribed," with visa applications reaching the 65,000-person cap progressively earlier every year since 2004. 2008 Rule at 18,946. In 2007, the cap was reached on April 2, the first business day for filing. *Id.* As a consequence,

> OPT employees often are unable to obtain H-1B status within their authorized period of stay in F-1 status, including the 12-month OPT period, and thus are forced to leave the country. 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.

Id. DHS concluded that the 2008 Rule would alleviate the "competitive disadvantage faced by U.S. high-tech industries" and would "quickly ameliorate some of the adverse impacts on the U.S. economy" by potentially adding "tens of thousands of OPT workers . . . in STEM occupations in the U.S. economy." *Id.* at 18,947-50. DHS noted that the 2008 Rule was issued without notice and public comment "[t]o avoid a loss of skilled students through the next round of H-1B filings in April 2008." *Id.* at 18,950. Since promulgating this interim rule, DHS has on several occasions modified, without notice and comment, the list of disciplines that qualify for the STEM extension via updates to their website. (*See* Pl.'s Mot., App. A [ECF No. 25-2] at 34-35.)

Plaintiff filed suit on March 28, 2014. In Counts I-III, plaintiff alleges that the OPT program exceeds DHS's statutory authority and conflicts with other statutory requirements, including the labor certifications related to H-1B visas. In Count IV, plaintiff argues that DHS acted arbitrarily and capriciously in promulgating the 2008 Rule. In Count V, plaintiff argues that DHS lacked good cause to waive the notice and comment requirement in promulgating the rule. In Count VI, plaintiff contends that DHS's reference to an external website to list the STEM courses of study violates the relevant rules on incorporation by reference. In Counts VII-VIII, plaintiff claims that DHS improperly failed to allow for notice and comment before issuing the 2011 and 2012 modifications of the list of

STEM disciplines. And in Count IX, plaintiff argues that the 2008 Rule and the subsequent 2011 and 2012 modifications exceeded DHS's statutory authority.

On November 21, 2014, this Court granted in part and denied in part defendant's motion to dismiss. *Wash. Alliance of Tech. Workers v. DHS*, No. 14-cv-529, 2014 U.S. Dist. LEXIS 163285 (D.D.C. Nov. 21, 2014). First, the Court dismissed Counts I-III on the ground that "the Complaint does not identify a single WashTech member who has suffered an injury as a result of the twelve-month OPT program." *Id.* at *9. In the alternative, this Court held that Counts I-III were barred by APA's six-year statute of limitations. *See id.* at *10 n.3. The Court found, however, that the complaint did allege sufficient facts to confer onto plaintiff standing to challenge the 2008 Rule and the 2011 and 2012 modifications. *See id.* at *15. Plaintiff filed an Amended Complaint on December 15, 2014. (*See* First Am. Compl. for Declaratory and Injunctive Relief [ECF No. 20] ("Compl.").)

The parties have now filed cross motions for summary judgment.

ANALYSIS

I. STANDING

This Court has already held that "plaintiff's Complaint . . . is sufficient to establish Article III standing." *Wash. Alliance*, 2014 U.S. Dist. LEXIS 163285, at *15.

The Court found that the complaint alleged that plaintiff's "named members, who have technology-related degrees in the computer programming field and have applied for STEM employment during the relevant time period, were in direct and current competition with OPT students on a STEM extension" and that "[t]his competition resulted in a concrete and particularized injury." *Id.* Nevertheless, defendant now argues that "[b]ecause Plaintiff has failed to provide the required specific, particularized evidence necessary to demonstrate that its three members are in direct and current competition for jobs with OPT students on STEM extensions, its members lack competitor standing and consequently, Plaintiff lacks associational standing to proceed." (*See* Def.'s Mem. of Law. in Opp. to Pl.'s Cross Mot. for Summ. Judgment [ECF No. 36] ("Def.'s Opp.") at 2.)

To establish constitutional standing, plaintiff must demonstrate that (1) it has suffered an injury-in-fact, (2) the injury is fairly traceable to defendant's challenged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). " 'The party invoking federal jurisdiction bears the burden of establishing' standing – and, at the summary judgment stage, such a party 'can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts.' " *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148-49 (2013) (quoting *Lujan*, 504 U.S. at 561). Because plaintiff is an association seeking to establish standing to sue on behalf of its members,

it must show that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)). Only the first element of this test is at issue here. *See Wash. Alliance*, 2014 U.S. Dist. LEXIS 163285, at *8.

Plaintiff argues that its members have been injured by DHS's OPT program because that program "increase[s] the number of economic competitors" and "expose[s] Washtech members to unfair competition by allowing aliens to work under rules in which they are inherently less expensive to employ." (Pl.'s Mot. at 12.) "The competitor standing doctrine recognizes 'parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.'" *Mendoza v. Perez*, 754 F.3d 1002, 1011 (D.C. Cir. 2014) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). "A party seeking to establish standing on the basis of the competitor standing doctrine 'must demonstrate that it is a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action.'" *Id.* at 1013 (quoting *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004)). In the competitor sales context, the D.C. Circuit has held

that "petitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate *potential* to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively." *La. Energy & Power Auth.*, 141 F.3d at 367 (quoting *Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990)).

Plaintiff has submitted substantial evidence to support its standing, including affidavits from its president and three of its members. (*See* Aff. of Douglas J. Blatt [ECF No. 25-1] ("Blatt Aff."); Aff. of Rennie Sawade [ECF No. 25-1] ("Sawade Aff."); Aff. of Michael Schendel [ECF No. 25-1] ("Schendel Aff."); Aff. of Ceasar Smith [ECF No. 25-1] ("Smith Aff.").) Douglas Blatt states that he is "employed currently as a computer programmer" and lists twelve programming jobs that he applied for between 2010 and 2012. (*See* Blatt Aff. ¶¶ 7-18.) Rennie Sawade states that he is "employed currently as a temporary programmer" working "on a contract basis" and that he applied for programming jobs at numerous software companies between 2010 and 2014, including Microsoft, Amazon, and Facebook. (Sawade Aff. ¶¶ 6-37.) Ceasar Smith states that he is a "temporary computer systems and network administrator" and that he applied for computer technician and computer system administrator positions at multiple companies between 2008 and 2014. (Smith Aff. ¶¶ 5-43.) Michael Schendel, plaintiff's president,

notes that "[m]any employers openly solicit OPT participants for jobs to the exclusion of WashTech members," and he includes with his affidavit one such solicitation seeking a software engineering [sic] in Redmond, Washington, the location of Microsoft. (Schendel Aff. ¶ 12.) In addition to these affidavits, plaintiff has submitted dozens of job listings seeking individuals with computer programming experience. (*See* Pl.'s Mot., App. B [ECF No. 25-3].) Many of these job advertisements are limited to, or at least targeted at, OPT candidates. (*E.g.*, *id.* at 7, 17, 35, 53.) Others state that OPT status is "preferred" or list OPT as one of several acceptable statuses. (*E.g.*, *id.* at 9, 11, 24, 40, 93.)

This evidence is more than sufficient to support plaintiff's constitutional standing. The affidavits from Blatt, Sawade, and Smith demonstrate that they are "part of the computer programming labor market, a subset of the STEM market." *Wash. Alliance*, 2014 U.S. Dist. LEXIS 163285, at *14. The affidavits also show that those individuals "have sought out a wide variety of STEM positions with numerous employers, but have failed to obtain these positions following the promulgation of the OPT STEM extension in 2008." *Id.* The 2008 Rule was explicitly intended to increase the number of foreign nationals competing for jobs in the STEM labor market. *See* 2008 Rule at 18,953 ("This rule will . . . add[] an estimated 12,000 OPT students to the STEM-related workforce. . . . [T]his number represents a significant expansion of the available pool of skilled workers."). These facts alone suffice to show

that the regulation "ha[s] the clear and immediate *potential*" to expose plaintiff's members to increased workforce competition. *La. Energy & Power Auth.*, 141 F.3d at 367 (quoting *Associated Gas Distribs.*, 899 F.2d at 125). The dozens of job advertisements submitted by plaintiff – many of which express a preference for OPT computer programmers – suggest that the potential for increased competition has indeed come to pass.

Defendant lodges multiple objections, most of which this Court addressed in its previous Memorandum Opinion. Defendant argues that plaintiff must demonstrate that its members "work in the *same* job category, that they are willing to work the *same* jobs going to STEM-OPT students, and that they are qualified to do so." (Def.'s Opp. at 6.) In a similar vein, defendant insists that "Plaintiff must demonstrate with specific facts that the jobs Messrs. Sawade, Blatt, and Smith attest to applying to in their affidavits were jobs that [they] *and* OPT students were applying to." (*Id.* at 10.) Defendant demands too much. Plaintiff has demonstrated that its members work in the computer programming field, which is among the disciplines encompassed by DHS's STEM regulations. *See STEM-Designated Degree Program List: 2012 Revised List*, http://www.ice.gov/sites/default/files/documents/Document/2014/stem-list.pdf (last visited Aug. 5, 2015). Defendant has failed to cite any D.C. Circuit case that requires a greater degree of specificity. In *Mendoza*, for example, the Department of Labor had issued regulations easing the rules for employing alien sheepherders and goatherders. *See Mendoza*, 754 F.3d

at 1008-09. The D.C. Circuit held that "individuals competing in the herder labor market have standing" to challenge the regulations. *Id.* at 1013. Notwithstanding the fact that the plaintiffs had "not worked as herders since 2011 and may not have applied for specific herder jobs since that time," the Circuit found that the *Mendoza* plaintiffs had standing because they were "experienced and qualified herders" who "continue[d] to monitor the herder job market." *Id.* at 1013-14. Nowhere in *Mendoza* did the Circuit suggest that the plaintiffs needed to be willing to accept precisely the same jobs as the hypothetical aliens who were affected by the agency's regulations. The *Mendoza* Court certainly did not require affidavits stating that the plaintiffs had applied to the same jobs as the affected aliens. Rather, it was sufficient that "plaintiffs' affidavits . . . demonstrate[d] their informal involvement in the labor market." *Id.* at 1014. Plaintiff in the present case has proven substantially more than the *Mendoza* plaintiffs. Its members are active participants in the computer programming labor market, and they have applied to numerous programming jobs since DHS promulgated the 2008 Rule. That is sufficient to confer competitor standing.

Defendant also argues that plaintiff's members are not part of the computer programming market because they are presently employed. (Def.'s Opp. at 8-9.) This argument is meritless. A worker does not exit his job market simply because he currently has a job. An influx of OPT computer programmers would increase the labor supply, which is likely to depress plaintiff's

members' wages and threaten their job security, even if they remain employed. Moreover, being presently employed does not eliminate plaintiff's members' incentive to continue looking for jobs. For example, one of plaintiff's members "work[s] on software projects on a contract basis rather than as an employee." (Sawade Aff. ¶ 6.) He explains that "[c]ompanies can end temporary jobs without notice" and states that, "[s]ince 2003, [he has] had to find a new programming job twelve times when [his] temporary jobs have ended." (*Id.* ¶ 7.) In light of this evidence, the Court concludes that plaintiff has sufficiently demonstrated that the competition its members face as a result of the 2008 Rule constitutes an "'injury in fact' that is 'actual or imminent.'" *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (quoting *Lujan*, 504 U.S. at 560); *see also KERM*, 353 F.3d at 60-61 (to establish competitor standing, plaintiff must prove that he is "likely to suffer financial injury as a result of the challenged action"); *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001) (in the competitor standing context, a plaintiff must merely show that there is a "substantial . . . probability of injury," and "there is no need to wait for injury from specific transactions" (internal quotation marks omitted)).

Finally, defendant contends that plaintiff's complaint constitutes a generalized grievance "akin to 'taxpayer standing'" because the group of STEM job applicants is "a vague and generalized category that includes over 150 categories of separate jobs." (Def.'s Opp. at 14 (citing *United States v. Richardson*, 418 U.S.

166 (1974)).) As plaintiff correctly points out, however, "DHS confuses *widespread injury* with a *generalized grievance*." (Reply in Supp. of Pl.'s Mot. for Summ. Judgment [ECF No. 41] ("Pl.'s Reply") at 5.) "Although injuries that are shared *and* generalized – such as the right to have the government act in accordance with the law – are not sufficient to support standing, 'where a harm is concrete, though widely shared, the Court has found injury in fact.'" *Seegars v. Ashcroft*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (citation omitted) (quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998)). The 2008 Rule cannot escape review simply because it encompasses a large number of disciplines.

In short, plaintiff has amply demonstrated that its members are direct and current competitors of the aliens benefited by the 2008 Rule. *See Mendoza*, 754 F.3d at 1013. Plaintiff therefore has standing to sue.

II. ZONE OF INTERESTS

Defendant argues that plaintiff "cannot establish that it falls within the zone of interest of the statutory provision that forms the crux of its complaint." (Def.'s Mem. of Law on the Lack of Zone-of-Interest Standing [ECF No. 22] ("Def.'s ZOI Mem.") at 1.) Defendant contends that "the F-1 statute's text . . . does not indicate that Congress was concerned with protecting the domestic labor market in providing for a foreign student program" and that plaintiff cannot "rely[] on the general labor protections under the H-1B nonimmigrant

category" to prove that its complaint is proper.[1] (*Id.* at 5, 8.)

To bring suit under the APA, "[t]he interest [plaintiff] asserts must 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) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). To make this determination, the Court must "apply traditional principles of statutory interpretation" to assess "whether [plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387-88 (2014). The zone-of-interests test "is not meant to be especially demanding." *Patchak*, 132 S. Ct. at 2210 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes

[1] Defendant did not raise this objection in its motion to dismiss. (*See* Def.'s Mot. to Dismiss for Lack of Subject-Matter Jurisdiction [ECF No. 10].) Concerned about its jurisdiction, this Court issued an Order on December 4, 2014, asking the parties to submit memoranda of law. Notwithstanding the Court's error, the zone-of-interests argument has now been briefed. Contrary to plaintiff's assertion, defendant did not waive this argument by failing to address it in its motion to dismiss. *See* Fed. R. Civ. P. 12(h)(2) (explaining that Rule 12(b)(6) arguments can be made in pleadings, by motion under Rule 12(c), or at trial). This Court will therefore address the zone-of-interests question, even though it was not raised by defendant, as it should have been, via Rule 12(b)(6).

implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke*, 479 U.S. at 399).

Broadly stated, plaintiff is asserting that defendant used the F-1 nonimmigrant category to circumvent the restrictions Congress placed on H-1B visas. In so doing, plaintiff argues that defendant violated a number of statutes. The complaint alleges that the 2008 Rule "is in direct conflict with the statutory requirements of 8 U.S.C. § 1101(a)(15)(F)(i) that aliens on student visa[s] be *bona fide* students."[2] (Compl.¶ 164.) It also alleges that the 2008 Rule violates 8 U.S.C. § 1184(a), a general directive that, according to plaintiff, "requires DHS to ensure aliens on student visas leave the country when they are no longer students." (*Id.* ¶ 174.) Finally, the complaint alleges that the "OPT regulations are in conflict with the statutory requirements for foreign labor under 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), [and] 1184(g)" because they "deliberately circumvent the statutory caps on H-1B visas" and "authorize aliens to perform labor without complying with and in violation of the labor certification and prevailing wage requirements of the H-1B program." (*Id.* ¶¶ 179-80.)

In light of these allegations, the Court disagrees with defendant's assertion that plaintiff's complaint is

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[2] This quote, and several that follow, are from Counts I-III, which this Court previously dismissed. But they apply with equal force to Count IX, which incorporates by reference all previous allegations. (*See* Compl. ¶ 279.)

limited solely to violations of F-1. Rather, plaintiff objects more broadly that defendant's interpretation of F-1 indirectly violates other limitations set forth by Congress, notably those related to H-1B visas. As such, it is proper to examine the zone of interests protected by H-1B, as well as F-1. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 804 (D.C. Cir. 1985) (looking to zone of interests protected by § 1101(a)(15)(H) when plaintiff alleged that INS had attempted to circumvent that provision by issuing visas pursuant to § 1101(a)(15)(B)). And, plaintiff is clearly within the zone of interests of H-1B and its related statutes, which include many provisions designed to protect American labor. *See* 8 U.S.C. § 1182(n) (requiring employer certification that the H-1B nonimmigrant will be paid prevailing market wages, that the employer will provide working conditions for the nonimmigrant employee that will not adversely affect working conditions for the other workers, and that there is not a strike at the place of employment); *id.* § 1184(g) (setting caps on H-1B visas).

Defendant, citing the non-precedential Third Circuit decision in *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009), objects that this Court should not consider H-1B and related statutes in its zone-of-interest inquiry "because these statutes are not integrally related to the statute under which the agency acted in allegedly violating the law." (Def.'s ZOI Mem. at 7.) The D.C. Circuit has explained that, "[i]n determining whether a petitioner falls within the 'zone of interests' to be protected by a statute, 'we do not look

at the specific provision said to have been violated in complete isolation[,]' but rather in combination with other provisions to which it bears an 'integral relationship.'" *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (alteration in original) (quoting *Fed'n for Am. Immigration Reform, Inc. v. Reno* (*FAIR*), 93 F.3d 897, 903 (D.C. Cir. 1996)). As explained above, plaintiff alleges direct violations of H-1B. Beyond that, however, the Court concludes that F-1 and H-1B are integrally related. The provisions are part of the same statute; indeed, they are contained within a single subsection of the statute. *See* 8 U.S.C. § 1101(a)(15). Even more important than the statute's codification scheme, though, is the substantive relationship between the provisions. F-1 is directed at students studying at an American academic institution, including colleges and universities. *See id.* § 1101(a)(15)(F)(i). H-1B is limited to individuals who have completed their bachelor's degree. *See id.* § 1184(i)(1). As such, F-1 and H-1B perform the interlocking task of recruiting students to pursue a course of study in the United States and retaining at least a portion of those individuals to work in the American economy. The 2008 Rule supports this interpretation. As DHS explained,

> [m]any employers who hire F-1 students under the OPT program eventually file a petition on the students' behalf for classification as an H-1B worker in a specialty occupation. If the student is maintaining his or her F-1 nonimmigrant status, the employer may also

> include a request to have the student's nonimmigrant status changed to H-1B.

2008 Rule at 18,496.

In fact, DHS identified the problem with transitioning individuals from F-1 to H-1B as the "cap gap," which occurs when an F-1 student is the beneficiary of an approved H-1B visa, but whose period of authorized stay expires before their designated H-1B employment start date. *See id.* at 18,497. To remedy the cap gap, the 2008 Rule "extends the authorized period of stay, as well as work authorization, of any F-1 student who is the beneficiary of a timely-filed H-1B petition that has been granted by, or remains pending with, USCIS." *Id.*; *see* 8 C.F.R. § 214.2(f)(5)(vi). In light of this tight connection between F-1 and H-1B, the Court concludes that the provisions are integrally related and that it is appropriate to consider H-1B when measuring the relevant zone of interests.[3]

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[3] The portion of the 2008 Rule at issue in this lawsuit further buttresses the notion that the two provisions are integrally related. Defendant argues at length that Congress has acquiesced in DHS's interpretation that F-1 can cover students post-completion. As explained in Section III.C *infra*, the Court agrees with this argument. Consequently, F-1 and H-1B apply to overlapping populations of nonimmigrants. A point that defendant appears to endorse. (*See* Def.'s ZOI Mem. at 9 ("The INA establishes a comprehensive scheme defining various nonimmigrant categories, and many of these categories overlap in point of the subject matter regulated." (citation omitted)).) This overlap further establishes the integral relationship between F-1 and H-1B.

Defendant argues that finding an integral relationship between F-1 and H-1B "could potentially provide standing to challenge almost every agency decision relating to the admission of nonimmigrants, which would deprive the zone-of-interest requirement of all meaning." (Def.'s ZOI Mem. at 9 (citing *FAIR*, 93 F.3d at 903-04).) Not so. As this Court has explained, F-1 and H-1B constitute a complementary statutory mechanism for attracting foreign students and retaining those students after they complete their studies. The relationship between these provisions is starkly evident from the 2008 Rule itself, which, while promulgated pursuant to F-1, is concerned entirely with compensating for the deficiencies in H-1B. The Court doubts that such a relationship exists between H-1B and many of the other nonimmigrant categories. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(A)(i) (nonimmigrant status for diplomats); *id.* § 1101(a)(15)(I) (representatives of foreign press); *id.* § 1101(a)(15)(T) (victims of human trafficking). As such, this Court's limited holding of a relationship between F-1 and H-1B does not implicate the concerns raised in *FAIR*. *See* 93 F.3d at 904 ("Of course every immigration provision is in a broad sense part of the framework of every other provision. But if that were enough, then every provision constraining the admission of anyone under any circumstances . . . would be pertinent in applying the zone-of-interests test to *any* provision.").

Finally, even if this Court were to consider F-1 in isolation, it would find that plaintiff falls within that statute's zone of interests. First and foremost, the

Court finds significant the use of the word "solely" in the F-1 subsection. *See* 8 U.S.C. § 1101(a)(15)(F)(i) (requiring that the alien "seek[] to enter the United States temporarily and solely for the purpose of pursuing such a course of study"). The Court reads this limitation as an attempt by Congress to restrict F-1 student employment and to prevent aliens from using F-1 as a means to come to the United States to work. Indeed, this view was espoused by the Commissioner of INS in his testimony before Congress in 1975. *See Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 21 (1975) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of INS) ("I emphasize the word 'solely' . . . as to emphasize that the effect of the law is that the student must come here solely to pursue his education. That does not imply that he can come here with the expectation and intention of working."). Second, in 1990, Congress established a three-year pilot program to permit F-1 students in good academic standing to work off-campus "in a position unrelated to the alien's field of study" for less than 20 hours a week. Immigration Act of 1990, Pub. L. No. 101-649, § 221, 104 Stat. 4978, 5027. Congress required employers to attest that the alien and other similarly situated workers were being paid prevailing wages. *Id.* Congress also mandated that, by 1994, the Commissioner of INS submit a report on the program, including its "impact . . . on prevailing wages of workers." *Id.* The agency issued the report and ultimately recommended against extending the program. (*See* Pl.'s Mem. of Law in Supp. of Prudential Standing

[ECF No. 21] ("Pl.'s ZOI Mem."), App. at 9.) Among its concerns, the agency noted that "[t]here is the potential for job competition between foreign students and local youth." (*Id.* at 4.) It also speculated that U.S. workers might be "clos[ed]" out of "selected occupations and jobs" by "[n]etwork-based hiring" of foreign students. (*Id.* at 5.) Ultimately, the report concluded that the "off-campus F-1 pilot program can have adverse consequences for some American workers." (*Id.* at 6.) Congress followed the report's recommendation and let the program lapse. This pilot program – and Congress' decision to cancel it – makes clear that Congress is aware of and concerned about the impact of F-1 student employment on the U.S. labor market. This conclusion is unsurprising given that "[a] primary purpose in restricting immigration is to preserve jobs for American workers."[4] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). The individuals in plaintiff's organization are therefore "arguably within the zone of interests to be protected" by F-1. *Patchak*, 132 S. Ct. at 2210 (internal quotation marks omitted).

[4] While it is true that the zone-of-interests test is concerned with the "particular provision of law upon which the plaintiff relies," *see Bennett v. Spear*, 520 U.S. 154, 175-176 (1997), the Supreme Court's recent *Lexmark* decision suggests that courts should consider the overall purpose of the statute when interpreting the zone of interests for particular provisions. *See Permapost Prods. v. McHugh*, 55 F. Supp. 3d 14, 26 n.6 (D.D.C. 2014).

III. STATUTORY AUTHORITY

A. STANDARD OF REVIEW

Plaintiff's principal argument is that DHS exceeded its statutory authority by issuing the 2008 Rule. (*See* Pl.'s Mot. at 16-22.) As an initial matter, however, the parties disagree as to the level of deference this Court should accord the agency's actions. Plaintiff argues that "DHS forfeited deference under *Chevron* because it failed to provide notice and comment for any of the actions at issue" and urges this Court to apply the standard of review articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). (Pl.'s Mot. at 11.) Defendant counters that *Chevron* applies because Congress delegated to DHS the "authority to speak with the force of law through rulemaking." (*See* Def.'s Opp. at 17.)

"*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Contrary to plaintiff's argument, the Supreme Court in *Mead* held that, while notice and comment is "significant . . . in pointing to *Chevron* authority, the want of that procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was

afforded." 533 U.S. at 230-31; *accord Barnhart v. Walton*, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." (citation omitted)).

Congress has delegated substantial authority to DHS to issue immigration regulations. This delegation includes broad powers to enforce the INA and a narrower directive to issue rules governing nonimmigrants. *See* 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens. . . ."); *id.* § 1103(a)(3) ("[The Secretary of Homeland Security] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]."); *id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, . . . such alien will depart from the United States.").

The 2008 Rule was promulgated as an exercise of this delegated authority. The subject matter of the 2008 Rule falls squarely within the ambit of § 1184(a)(1), and the Rule invokes that statute in listing its sources of authority. *See* 2008 Rule at 18,954. The Rule was published in the Federal Register, and the agency provided the public with a post-publication comment period. *Id.* at 18,945; *see Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 467 (D.C. Cir. 2007) ("Although publication in the federal register is not in itself sufficient to constitute an agency's intent that its pronouncement have the force of law, where, as here, that publication reflects a deliberating agency's self-binding choice, as well as a declaration of policy, it is further evidence of a *Chevron*-worthy interpretation." (citation omitted)). Unlike the Customs ruling letter in *Mead*, which was not binding as to third parties, the 2008 Rule was clearly issued "with a lawmaking pretense in mind" and was intended to have "the force of law." 533 U.S. at 233. As such, the Court concludes that *Chevron* deference is appropriate.

B. *CHEVRON* STEP ONE

Under *Chevron* step one, this Court must determine whether "Congress has 'directly addressed the precise question at issue.'" *Mayo Found.*, 562 U.S. at 52 (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984)). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Plaintiff argues that "[t]he term *student* is not ambiguous." (Pl.'s Mot. at 17.) Citing several dictionary definitions, plaintiff contends that F-1 nonimmigrants engaging in post-completion OPT cannot be considered students because "[t]hey are not attending schools." (*Id.*) Plaintiff further contends that other parts of the F-1 statute, such as the requirement that the student "enter the United States . . . solely for the purpose of pursuing such a course of study," demonstrate that the statute "unambiguously define[s] a *student* as one who attends specific, approved schools." (*Id.* at 18.) In response, defendant argues that the statute is ambiguous in that it does not define the terms "student" or "course of study," and contends that this congressional silence leaves "an ambiguity for the agency to resolve." (Def.'s Mot. at 17.) Defendant also points out that "the agency has long interpreted the foreign student provision to allow for employment of students during practical training." (*Id.* at 21.)

The Court agrees that the statute's lack of a definition for the term "student" creates ambiguity. As the Supreme Court said in *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. And, in the context of a tax statute, the Supreme Court recently held that the word "student" was ambiguous with respect to medical residents because "[t]he statute does not define the term 'student,'

and does not otherwise attend to the precise question whether medical residents are subject to FICA."[5] *Mayo Found.*, 562 U.S. at 52.

This Court is not persuaded by plaintiff's argument that the statutory context clarifies the word "student." To be sure, F-1 defines a nonimmigrant as a student "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. 8 U.S.C. § 1101(a)(15)(F)(i). However, as argued by defendant, this clause could sensibly be read as an *entry requirement*. (Def.'s Opp. at 21 ("[T]he INA definition of 'student' is only the definition of what is required to be proved at the time of admission to obtain a student visa.").) This reading is bolstered by Congress' delegation of the power to prescribe regulations related to a nonimmigrant's duration of stay. *See* 8 U.S.C. § 1184(a)(1).

Moreover, several pieces of evidence indicate that Congress understood F-1 to permit at least some period of employment. For example, as discussed in Section II *supra*, in 1990, Congress implemented a pilot

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[5] *Mayo* is not dispositive of the present case because the medical residents were still participating in "a formal and structured educational program," even though the bulk of their time was spent caring for patients. *Mayo Found.*, 562 U.S. at 48. Interestingly, however, the statute at issue in *Mayo* contained an additional qualification: the students were exempt from FICA taxes only if they were "enrolled and regularly attending classes at [a] school, college, or university." *Id.* at 49 (quoting 26 § 3121(b)(10) (2006 ed.)). The absence of such a qualifier in F-1 highlights the ambiguous scope of the word "student" in § 1101(a)(15)(F)(i).

program that allowed F-1 students to work up to 20 hours per week in a job unrelated to their field of study. *See* Immigration Act of 1990 § 221. And F-1 nonimmigrants are explicitly exempted from several wage taxes. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). These statutory provisions lend credence to defendant's argument that the clause in F-1 – "solely for the purpose of pursuing such a course of study" – does not foreclose employment. Since F-1 does not bar *all* foreign student employment, it is not clear what employment the statute *does* permit. As such, the statute's text is ambiguous as to whether such employment may extend for a period of time after they complete their studies.

Dictionary definitions are similarly unhelpful in clarifying this statutory ambiguity. To be sure, some definitions of the word "student" require school attendance. *E.g.*, *Student, Ballentine's Law Dictionary* (3d ed. 2010) ("A person in attendance at a college or university. One receiving instruction in a public or private school."). Most, however, include broader notions of studying and learning. *E.g.*, *Student, Merriam Webster's Collegiate Dictionary* (10th ed. 1997) ("SCHOLAR, LEARNER, especially: one who attends a school. . . . One who studies: an attentive and systematic observer."); *Student, Oxford English Dictionary* ("A person who is engaged in or addicted to study. . . . A person who is undergoing a course of study and instruction at a university or other place of higher education or technical training."), http://www.oed.com (last visited Aug. 5, 2015). These definitions are unhelpful

not only because they are competing, but because they do not address the fundamental ambiguity presented by this case. No one disputes that all F-1 aliens enter the United States as "students" under any conceivable definition, since they must enroll at a qualifying academic institution. The ambiguity is whether the scope of F-1 encompasses post-completion practical training related to the student's field of study. Neither dictionary definitions nor statutory context resolves this issue. The Court concludes that the statute is ambiguous.[6]

C. *CHEVRON* STEP TWO

The second step of *Chevron* asks whether the 2008 Rule "is a 'reasonable interpretation' of the enacted text." *Mayo Found.*, 562 U.S. at 58 (quoting *Chevron*, 467 U.S. at 844). This Court must uphold the Rule unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *see also Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 71 (D.C. Cir. 2000) ("Under *Chevron*, we are bound to uphold agency interpretations as long as they are reasonable – 'regardless whether there may be other reasonable, or even more reasonable, views.'" (quoting *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998))).

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[6] This Court's conclusion that F-1 is ambiguous is reinforced by Congress' longstanding acquiescence in DHS's interpretation, discussed in Section III.C *infra*.

Defendant argues that Congress' "longstanding acquiescence" in its interpretation suggests its reasonableness. (Def.'s Mot. at 31.) In particular, it contends that federal agencies have interpreted F-1 to allow for post-completion practical training for over 60 years, and that Congress has never abrogated that interpretation despite amending the statute multiple times. (*See id.* at 21.) Plaintiff responds that Congress could not have acquiesced in DHS's interpretation of F-1 because that interpretation has frequently changed, and there is insufficient evidence to establish that Congress was actually aware of the agency's interpretation. (*See* Resp. Br. in Supp. of Pl.'s Cross Mot. for Summ. Judgment or Judgment on the Administrative Record [ECF No. 35] ("Pl.'s Opp.") at 5-9.)

"[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, 539 F.3d 492, 500 (D.C. Cir. 2008) (alteration in original) (quoting *Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003)); *see also Barnhart*, 535 U.S. at 220 ("Court[s] will normally accord particular deference to an agency interpretation of longstanding duration." (internal quotation marks omitted)); *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute

without change." (internal quotation marks omitted)). The D.C. Circuit has cautioned, however, that the so-called "legislative reenactment" doctrine is of "little assistance" when Congress has "simply enacted a series of isolated amendments to other provisions." *Public Citizen, Inc. v. HHS*, 332 F.3d 654, 668 (D.C. Cir. 2003). Moreover, there must be "some evidence of (or reason to assume) congressional familiarity with the administrative interpretation at issue." *Id.* at 669.

Since at least 1947, INS and DHS have interpreted the immigration laws to allow foreign students to engage in employment for practical training purposes. *See* 12 Fed. Reg. at 5357 ("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. . . ."). In 1952, Congress overhauled the immigration laws with the Immigration and Nationality Act, which created the modern category of student nonimmigrants. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952). INS continued to interpret the law to permit foreign students to engage in practical training.[7] *See, e.g.*, Special Requirements for Admission, Extension, and Maintenance of Status, 38 Fed.

[7] While the 1947 and 1973 regulations do not explicitly authorize post-completion practical training, several pieces of evidence strongly suggest that these provisions allowed alien students to engage in full-time, post-completion employment without simultaneously attending classes. First, both the 1947

and 1973 regulations, in addition to permitting students to engage in practical training, allowed students to work out of financial necessity, but only if the employment would not interfere with the student's ongoing course of study. *See* 12 Fed. Reg. at 5357; 38 Fed. Reg. at 35,426. The practical training subsections included no similar limitation. Second, contemporary documents demonstrate an understanding that those practical training regulations allowed full-time, post-completion employment. For example, in *Matter of T-*, 7 I. & N. Dec. 682 (B.I.A. 1958), the Board of Immigration Appeals noted that the "length of authorized practical training should be reasonably proportionate to the period of formal study in the subject which has been completed by the student" and that only in "unusual circumstances" would "practical training . . . be authorized before the beginning of or during a period of formal study." *Id.* at 684; *see also Matter of Yau*, 13 I. & N. Dec. 75, 75 (B.I.A. 1968) (noting that an alien student had been granted permission to engage in practical training after graduating); *Matter of Ibarra*, 13 I. & N. Dec. 277, 277-78 (B.I.A. 1968) (same); *Matter of Alberga*, 10 I. & N. Dec. 764, 765 (B.I.A. 1964) (same). Moreover, a 1950 Report by the Senate Committee on the Judiciary, in describing foreign student employment, stated that "practical training has been authorized for 6 months after completion of the student's regular course of study." S. Rep. No. 81-1515, at 503 (1950). The Report also noted a "suggestion that the laws . . . be liberalized to permit foreign students to take practical training before completing their formal studies." *Id.* at 505. Similarly, a House Report from 1961 disclosed that, on April 24, 1959, the Department of State, acting in concert with INS, issued a notice to its officers that "[s]tudents whom the sponsoring schools recommend for practical training should be permitted to remain for such purposes up to 18 months after receiving their degrees or certificates." H.R. Rep. No. 87-721, at 15 (1961). Finally, in a 1975 statement to Congress on the subject of foreign students, the Commissioner of INS noted that, although there "is no express provision in the law for an F-1 student to engage in employment," such a student could engage in practical training on a full-time basis for up to eighteen months. *Review of Immigration Problems: Hearings Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 21, 23

Reg. 35,425, 35,426 (Dec. 28, 1973) (allowing foreign students to secure employment "in order to obtain practical training . . . in his field of study," if such training "would not be available to the student in the country of his foreign residence," for a maximum of 18 months). And, at least as early as 1983, INS explicitly authorized post-completion practical training.[8] Nonimmigrant Classes; Change of Nonimmigrant Classification; Revision in Regulations Pertaining to Nonimmigrant Students and the Schools Approved for Their Attendance, 48 Fed. Reg. 14,575, 14,586 (Apr. 5, 1983) (allowing students to engage in practical training "[a]fter completion of the course of study"); Retention and Reporting Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256, 76,274 (Dec. 11, 2002) (same).

Since 1952, Congress has amended the provisions governing nonimmigrant students on several occasions. *See* Pub. L. No. 87-256, § 109(a), 75 Stat. 527, 534 (Sept. 21, 1961) (allowing an F-1 nonimmigrant's alien

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(1975) (statement of Hon. Leonard F. Chapman, Jr., Comm'r of INS).

[8] To be sure, plaintiff is correct that the details of the practical training regulations have changed over the decades. (Pl.'s Opp. at 6.) Notwithstanding these changes, however, INS and DHS have, since 1947, consistently interpreted the immigration laws to permit post-completion practical training. *See supra* note 7. Congress' acquiescence in this longstanding interpretation undercuts plaintiff's argument that the word "student" unambiguously requires F-1 nonimmigrants to maintain ongoing enrollment in a school or university.

spouse and minor children to accompany him); Immigration Act of 1990 § 221(a) (permitting F-1 nonimmigrants to engage in limited employment unrelated to their field of study); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 625, 110 Stat. 3009-546, 3009-699 (adding limitations related to F-1 nonimmigrants at public schools); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, §§ 501-502, 116 Stat. 543, 560-63 (implementing monitoring requirements for foreign students); Pub. L. No. 111-306, § 1, 124 Stat. 3280, 3280 (Dec. 14, 2010) (amending F-1 with respect to language training programs). During that time, Congress has also imposed various labor protections for domestic workers. *E.g.*, Immigration Act of 1990 § 205 (requiring a labor condition certification for H-1B nonimmigrants from the employer attesting that the alien will be paid the prevailing wage and that the alien's employment will not adversely affect working conditions); *id.* § 221 (requiring a similar certification for F-1 nonimmigrants working in a position unrelated to their field of study); American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105277, § 412, 112 Stat. 2681-641, 2681-642 (requiring employers of H-1B nonimmigrants to certify that they "did not displace and will not displace a United States worker"). Notwithstanding this legislative activity, Congress has never repudiated INS or DHS's interpretation permitting foreign students to engage in post-completion practical training.

This legislative history leads the Court to two conclusions. First, DHS's interpretation of F-1 – inasmuch as it permits employment for training purposes without requiring ongoing school enrollment – is "longstanding" and entitled to deference. *See Barnhart*, 535 U.S. at 220. Second, Congress has repeatedly and substantially amended the relevant statutes without disturbing this interpretation. These amendments have not been "isolated." *Public Citizen*, 332 F.3d at 668. The Immigration and Nationality Act of 1952, in particular, radically changed the country's immigration system. And, the Immigration Act of 1990 imposed a host of new protections for domestic workers and explicitly authorized F-1 students to engage in certain forms of employment. By leaving the agency's interpretation of F-1 undisturbed for almost 70 years, notwithstanding these significant overhauls, Congress has strongly signaled that it finds DHS's interpretation to be reasonable.

Plaintiff objects that there is insufficient evidence to prove that Congress was aware of DHS's interpretation. (*See* Pl.'s Opp. at 7-9.) The Court disagrees. As an initial matter, as explained above, DHS's interpretation of F-1 clearly dates back to 1983, and likely to 1947. *See supra* note 7. Congressional obliviousness of such an old interpretation of such a frequently amended statute strikes this Court as unlikely. In any case, ample evidence indicates congressional awareness. Congress' 1990 amendment of the INA included a three-year pilot program authorizing F-1 student employment for positions that were "unrelated to the

alien's field of study." Immigration Act of 1990 § 221(a). Considered in isolation, this provision is perplexing – why would Congress only authorize foreign students to do work *unrelated* to their schooling? The answer, of course, is that INS's regulations already authorized student employment related to the student's field of study, and these regulations were explicit in permitting post-completion employment. *See* 8 C.F.R. § 214.2(f)(10) (1989) (authorizing F-1 students to engage in "[p]ractical training prior to completion of studies" or "after completion of studies" upon certification that "the proposed employment . . . is related to the student's course of study"). Moreover, in recommending against the continuation of the pilot program, the Commissioner of INS specifically referenced post-completion practical training. (Pl.'s ZOI Mem., App. at 10.)

Several other pieces of legislative history suggest that Congress was aware of the practical training program. The program was described at length in a 1950 Senate Report, a 1961 House Report, and 1975 congressional testimony by the Commissioner of INS. *See supra* note 7. In addition, the practical training program has been discussed during multiple congressional hearings. *E.g.*, *Immigration Policy: An Overview: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15-16 (2001) (statement of Warren R. Leiden, American Immigration Lawyers Assocation [sic]); *Immigration Reform: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary on S. 358*

and S. 448, 101st Cong. 485-86 (1989) (statement of Frank D. Kittredge, President, National Foreign Trade Council); *Immigration Reform and Control Act of 1983: Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary on H.R. 1510*, 98th Cong. 687, 695, 698 (1983) (statement of Billy E. Reed, Director, American Engineering Association); *Illegal Aliens: Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 92d Cong. 265-66 (1971) (statement of Sam Bernsen, Assistant Comm'r, INS). The Court finds this evidence more than sufficient to demonstrate "congressional familiarity with the administrative interpretation at issue." *See Public Citizen*, 332 F.3d at 669.

Plaintiff makes several other arguments in an attempt to demonstrate that DHS's interpretation is unreasonable. First, it contends that DHS has "circumvent[ed] [H-1B's] statutory restrictions that rightfully should be applied" to college-educated labor. (Pl.'s Mot. at 20.) But H-1B – which applies to aliens seeking to work in a "specialty occupation," 8 U.S.C. § 1101(a)(15)(H)(i)(b) – is far broader than the employment permitted by the OPT program. DHS's interpretation of the word "student" does not render any portion of H-1B, or its related restrictions, surplusage. Congress has tolerated practical training of alien students for almost 70 years, and it did nothing to prevent a potential overlap between F-1 and H-1B when it created the modern H-1B category in 1990. *See* Immigration Act of 1990 § 205(c). As such, the Court does not

believe that DHS's interpretation is unreasonable merely because of its limited overlap with H-1B.

Plaintiff also contends that "[t]here is not a scintilla of a statutory authorization for DHS to use student visas to remedy labor shortages." (Pl.'s Mot. at 22.) The Court disagrees. DHS has been broadly delegated the authority to regulate the terms and conditions of a nonimmigrant's stay, include [sic] its duration. *See* 8 U.S.C. § 1103(a); *id.* § 1184(a)(1). One of DHS's statutorily enumerated goals is to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." 6 U.S.C. § 111(b)(1)(F). Moreover, a significant purpose of immigration policy is to balance the productivity gains that aliens provide to our nation against the potential threat to the domestic labor market. *Compare In re Griffiths*, 413 U.S. 717, 719 (1973) ("From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply."), *with Sure-Tan*, 467 U.S. at 893 ("A primary purpose in restricting immigration is to preserve jobs for American workers. . . ."). Indeed, in its zone-of-interests memorandum, plaintiff argues that "the interest of safeguarding American workers is inextricably intertwined with employment on F-1 student visas." (Pl.'s ZOI Mem. at 9.) The Court concurs.

DHS's consideration of the economic impact of extending the OPT program does not render its interpretation unreasonable.[9]

In light of Congress' broad delegation of authority to DHS to regulate the duration of a nonimmigrant's stay and Congress' acquiescence in DHS's longstanding reading of F-1, the Court concludes that the agency's interpretation is not unreasonable.

IV. EMERGENCY RULEMAKING

DHS promulgated the 2008 Rule without notice and comment. In justifying this decision, the agency cited 5 U.S.C. § 553(b), which allows an agency to dispense with the notice-and-comment requirement "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 2008 Rule at 18,950. The agency explained that 30,205 F-1 students were on OPT status that would expire between April 1 and July

[9] To be clear, at this stage the Court is only considering whether the agency's interpretation of the statute is unreasonable, not whether the agency's regulation is substantively deficient under 5 U.S.C. § 706. *See Council for Urological Interests v. Burwell*, 2015 U.S. App. LEXIS 9867, at *25 (D.C. Cir. June 12, 2015) ("[A]lthough *Chevron*'s second step sounds closely akin to plain vanilla arbitrary-and-capricious style review, interpreting a statute is quite a different enterprise than policy-making." (internal quotation marks omitted)). In light of the holding in Section IV *infra*, the Court withholds judgment on the issue of whether the agency has marshaled sufficient evidence to support its rule.

31, 2008, that those students "will need to leave the United States unless they are able to obtain an H-1B visa for FY09 or otherwise maintain their lawful nonimmigrant status," and that the 17-month extension "has the potential to add tens of thousands of OPT workers to the total population of OPT workers in STEM occupations in the U.S. economy." *Id.* The agency concluded that it had good cause to issue the rule without notice and comment because

> [t]he ability of U.S. high-tech employers to retain skilled technical workers . . . would be seriously damaged if the extension of the maximum OPT period to twenty-nine months for F-1 students who have received a degree in science, technology, engineering, or mathematics is not implemented early this spring, before F-1 students complete their studies and, without this rule in place and effective, would be required to leave the United States.

Id. Plaintiff disputes this conclusion, contending that none of the § 553(b) exemptions applies to the 2008 Rule. (*See* Pl.'s Mot. at 23-27.)

This Court reviews an agency's good-cause determination without deference. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). The D.C. Circuit has "repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'" *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)). Determining whether notice and comment is

impracticable "is an 'inevitably fact-or-context dependent' inquiry."[10] *Sorenson*, 755 F.3d at 706 (quoting *Mid-Tex Elec. Co-op. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987)). In the past, the D.C. Circuit has "approved an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property." *Id.*; *see also Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (finding good cause when rule was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States").

The Circuit has recently considered whether an economic crisis could sustain a good-cause determination under § 553(b). In *Sorenson*, the Federal Communications Commission bypassed notice and comment in promulgating rules imposing certification requirements on hearing-impaired individuals receiving telephones with captioning capability. 755 F.3d at 704-05. The rules were precipitated by the plaintiff distributing free captioning-enabled phones, which in turn greatly increased the demand for captioning services that are subsidized by a government-organized fund. *Id.* Although the D.C. Circuit would "not exclude the

[10] Defendant does not explicitly state that it was relying on the "impracticability" prong of § 533(b), but nowhere does it suggest that notice and comment would have been "unnecessary" or "contrary to the public interest." 5 U.S.C. § 553(b). All of its arguments revolve around the purported urgency it faced in issuing the rule, which this Court takes to mean that the delay inherent in giving notice and soliciting comment would have been impracticable.

possibility that a fiscal calamity could conceivably justify bypassing the notice-and-comment requirement," it found that the record before it was "simply too scant to establish a fiscal emergency." *Id.* at 707. The Circuit noted that the administrative record did "not reveal when the Fund was expected to run out of money, whether the Fund would have run out of money before a notice-and-comment period could elapse, or whether there were reasonable alternatives available to the Commission." *Id.*

To demonstrate the urgency of the situation it faced in issuing the 2008 Rule, DHS relied principally on three sources: a 2008 report by the National Science Foundation titled *Science and Engineering Indicators, 2008* ("*Indicators*") (Joint Appendix: Administrative Record Excerpts [ECF No. 26] ("JA") at 135-536[11]); a 2005 report by the National Academy of Sciences titled *Rising Above the Gathering Storm: Energizing and Employing America for a Brighter Economic Future* ("*Gathering Storm*") (JA at 1366-1803); and a collection of submissions from Members of Congress and stakeholders in the technology industry.[12] (JA at 97-134.)

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[11] The Court will use the administrative record's numbering when citing the joint appendix.

[12] DHS cited one additional study that does not appear in the joint appendix, which the Court has also reviewed. Task Force on the Future of American Innovation, *Measuring the Moment: Innovation, National Security, and Economic Competitiveness* (Nov. 2006), http://www.innovationtaskforce.org/docs/Benchmarks%20-%202006.pdf.

The Court has reviewed these materials and finds that they fail to demonstrate that the 2008 Rule was necessary to forestall a "fiscal emergency." *See Sorenson*, 755 F.3d at 707. The first problem is that the record does not establish the economic consequences of failing to immediately issue the rule. The reports cited by the agency speak only in very general terms about the importance of STEM workers to the U.S. economy. (*See, e.g.*, *Indicators* at 158 ("Indicators of the shift toward knowledge-intensive economic activity abound. . . . Countries are investing heavily in expansion and quality improvements of their higher education systems, easing access to them, and often directing sizable portions of this investment to training in science, engineering, and related S & T fields."); *id.* at 172 ("The progressive shift toward more knowledge-intensive economies around the world is dependent upon the availability and continued inflow of individuals with postsecondary training to the workforce."); *id.* at 338 ("Migration of skilled S & E workers across borders is increasingly seen as a major determinant of the quality and flexibility of the labor force in most industrialized countries. . . . The United States has benefited, and continues to benefit, from this international flow of knowledge and personnel. . . ."); *Gathering Storm* at 1552 ("The biggest concern is that our competitive advantage, our success in global markets, our economic growth, and our standard of living all depends on maintaining a leading position in science, technology, and innovation. As that lead shrinks, we risk losing the advantages on which our economy

depends."); *id.* at 1553 ("This nation's science and technology policy must account for the new reality and embrace strategies for success in a world where talent and capital can easily choose to go elsewhere.")) To be sure, these quotations highlight the importance of science and technology to the U.S. economy as a general matter. But nowhere do the reports contemplate the role of recent graduates with F-1 visas in sustaining the pace of innovation. And, they certainly do not consider the economic impact of delaying the rule for however long it would have taken to solicit broader feedback via notice and comment.

Defendant's contention that notice and comment would have been impracticable is further undercut by the fact that H-1B oversubscription is old hat. As defendant concedes, "[f]rom the time the visa numbers allocated for the H-1B program were reduced . . . from 195,000 to 65,000 in fiscal year 2004, the H-1B program has been consistently oversubscribed." (Def.'s Mot. at 43 (citation omitted); *see also* 2008 Rule at 18,946 (noting that the H-1B limit has been reached progressively earlier every year since 2004).) Presumably, at least some F-1 students had been unable to obtain an H-1B visa and were forced to leave the country for each of the four years prior to the issuance of the 2008 Rule, but defendant gives no evidence that these exits contributed to an economic crisis.[13] Moreover, the

[13] The only items in the record that speak to the impact of the H-1B cap on economic competitiveness are letters from interested stakeholders. For example, in a letter dated November 15, 2007, Microsoft lamented the difficulty of obtaining H-1B visas

consistent H-1B oversubscription should have made the economic consequences identified by defendant entirely predictable. Indeed, much of the evidence before the agency had long been available to DHS. Bill Gates testified before Congress on March 7, 2007 – 13 months before DHS issued the 2008 Rule – about the shortage of H-1B visas. (JA at 106.) And the report relied on by DHS describing the dangers to American competitiveness of losing STEM workers was published in 2005. (*Id.* at 1367.)

Defendant does not explain why it waited to initiate proceedings on this issue, and it has not pointed to any changed circumstances that made the OPT extension suddenly urgent. The Court therefore finds that DHS's self-imposed deadline of April 2008 lacks support in the record. DHS has thus failed to carry its burden to show that it faced an "emergency situation[]," *Jifry*, 370 F.3d at 1179, that exempted it from subjecting the 2008 Rule to notice and comment.

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for its employees, noting that "[t]o compete globally . . . Microsoft . . . must have access to the talent it needs." (JA at 121.) Even these letters, however, do not articulate the immediate impact of failing to extend OPT. Moreover, by failing to engage in notice-and-comment rulemaking, the record is largely one-sided, with input only from technology companies that stand to benefit from additional F-1 student employees, who are exempted from various wage taxes. *See* 26 U.S.C. §§ 3121(b)(19), 3306(c)(19); 42 U.S.C. § 410(a)(19). Indeed, the 17-month duration of the STEM extension appears to have been adopted directly from the unanimous suggestions by Microsoft and similar industry groups. (*See* JA 115, 121, 125, 126.)

V. REMEDY

Plaintiff contends that "[t]he procedural defects of the OPT Rules are so great that vacatur is the appropriate remedy." (Pl.'s Reply at 8.) Defendant responds that, "because of the emergency situation invalidation would cause, the appropriate course of action would be an order that holds any *vacatur* in temporary abeyance." (Def.'s Opp. at 43.)

The "decision whether to vacate depends on the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (alteration in original) (quoting *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). "When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). In contrast, "[f]ailure to provide the required notice and to invite public comment – in contrast to the agency's failure . . . adequately to explain why it chose one approach rather than another for one aspect of an otherwise permissible rule – is a fundamental flaw that 'normally' requires vacatur of the rule." *Id.* at 199. With respect to the second *Allied-Signal* factor, "[w]here the proverbial 'egg has been scrambled and there is no apparent way to restore the status quo ante,' the Court may remand without vacating." *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 118 (D.D.C. 2011) (quoting

Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002)). A middle ground embraced by several courts in this Circuit is to vacate the challenged rule but to stay the vacatur for a period of time. *E.g.*, *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) ("The Commission is in a better position than the court to assess the disruptive effect of vacating the Rule's two conditions. . . . Therefore, the court will . . . withhold the issuance of its mandate . . . for ninety days."); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) ("In this case, we vacate the rule because the Secretary's omissions are quite serious. . . . Yet we exercise our power to withhold issuance of our mandate [for six months], to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade."); *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F. Supp. 2d 50, 52 (D.D.C. 2010) ("Because remand without vacatur is inappropriate, . . . the Court will vacate the challenged [rules], but will stay vacatur."); *Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12-13 (D.D.C. 2003).

The first *Allied-Signal* factor weighs heavily in favor of vacatur. Failure to provide notice and invite public comment is a serious procedural deficiency that counsels against remand without vacatur. *Heartland*, 566 F.3d at 199; *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("[D]eficient notice is a 'fundamental flaw' that almost always requires vacatur." (quoting *Heartland*, 566 F.3d at 199)).

Indeed, defendant does not even suggest such a remedy. (*See* Def.'s Opp. at 43-45.) However, the Court concludes that immediate vacatur of the 2008 Rule would be seriously disruptive. In 2008, DHS estimated that there were approximately 70,000 F-1 students on OPT and that one-third had earned degrees in a STEM field. 2008 Rule at 18,950. While DHS has not disclosed the number of aliens currently taking advantage of the OPT STEM extension, the Court has no doubt that vacating the 2008 Rule would force "thousands of foreign students with work authorizations . . . to scramble to depart the United States." (Def.'s Opp. at 44.) Vacating the 2008 Rule could also impose a costly burden on the U.S. tech sector if thousands of young workers had to leave their jobs in short order. The Court sees no way of immediately restoring the pre-2008 status quo without causing substantial hardship for foreign students and a major labor disruption for the technology sector. As such, the Court will order that the 2008 Rule – and its subsequent amendments – be vacated, but it will order that the vacatur be stayed.[14] The stay will last until February 12, 2016, during which time DHS can submit the 2008 Rule for proper notice and comment.

[14] In light of this holding, the Court need not address plaintiff's arguments that DHS acted arbitrarily and capricious in promulgating the 2008 Rule and that DHS failed to follow the correct procedure in amending the list of STEM disciplines. (*See* Pl.'s Mot. at 28-38.)

CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part both plaintiff's motion for summary judgment [ECF No. 25] and defendant's motion for summary judgment [ECF No. 27]. The Court will vacate the 17-month STEM extension described in the 2008 Rule, 73 Fed. Reg. 18,944 (Apr. 8, 2008), staying the vacatur until February 12, 2016, and will remand to DHS for further proceedings consistent with this Memorandum Opinion. An Order consistent with this Memorandum Opinion will be issued on this day.

/s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 12, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, ***Plaintiff,*** **v.** **U.S. DEPARTMENT OF HOMELAND SECURITY,** ***Defendant.***	**Civil Action No. 14-529 (ESH)**

ORDER

For the reasons stated in the accompanying Memorandum Opinion [ECF No. 43], it is hereby

ORDERED that plaintiff's motion for summary judgment [ECF No. 25] is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that defendant's motion for summary judgment [ECF No. 27] is **GRANTED IN PART AND DENIED IN PART**; it is further

ORDERED that the 17-month STEM extension described at 73 Fed. Reg. 18,944 (Apr. 8, 2008), is **VACATED** but that the vacatur is **STAYED** until February 12, 2016; and it is further

ORDERED that the above-captioned case is remanded to DHS for further proceedings consistent with the Court's Memorandum Opinion.

SO ORDERED.

/s/ *Ellen Segal Huvelle*
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 12, 2015

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5235 **September Term, 2016**

1:14-cv-00529-ESH

Filed On: July 26, 2017

Washington Alliance of Technology Workers,

Appellant

v.

United States Department of Homeland Security,

Appellee

BEFORE: Henderson and Kavanaugh, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on June 20, 2017, and the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5235 **September Term, 2016**

1:14-cv-00529-ESH

Filed On: July 26, 2017

Washington Alliance of Technology Workers,

Appellant

v.

United States Department of Homeland Security,

Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en bane, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

[Administrative Record pp. 120–123]

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2007 NOV 15 PM 2:25 ***Microsoft***

November 15, 2007

The Honorable Michael Chertoff
Secretary
United States Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

I appreciated very much the chance to speak with you recently at the dinner that Ed and Debra Cohen hosted to discuss immigration reform issues. I am writing to follow up in more detail on the suggestion we briefly discussed for action that the Department of Homeland Security can take easily and immediately, as part of its administrative reforms initiative, to help address the H-1B visa shortage. That is, DHS can extend the period of Optional Practical Training ("OPT") – the period of employment that students are permitted in connection with their degree program – beyond its current maximum of one year. Additional suggestions relating to visa programs for the highly skilled follow as well.

Fulfilling a Key Part of DHS's August 10, 2007 Administrative Reform Initiative

Microsoft believes that it was wise of the Administration, after Congress failed to move forward on comprehensive immigration reform, to commit to exploring changes it could make to strengthen the immigration system without congressional action. As part of the twenty-six point plan that you announced on August

10, 2007, DHS committed, along with the Department of Labor, to explore "potential administrative reforms to visa programs for the highly skilled." DHS has properly recognized that reforms of visa categories for professionals should be given a high priority, because America's talent crisis has reached emergency levels.

The 11-1B [sic] *Shortage and American Competitiveness*

Our high-skilled immigration policies are blocking access to crucial foreign talent. With demand in fields like science, technology, math, and engineering far surpassing the supply of American workers, America's employers find themselves unable to get the people they need on the job. The H-1B program, with its severely insufficient base annual cap of 65,000 visas, is at the center of the problem. This year, on April 2 – the very *first* day that employers could seek an H-1B visa for the coming fiscal year – DHS received about twice as many requests as there were visas available, *for the entire year*. This means that (1) employers stood only a one-in-two chance of getting a visa at all for critical recruits, (2) employers could not even ask for an H-1B visa for students about to graduate the next month *from our own universities*; (3) employers are now in the midst of a staggering *eighteen-mouth blackout period* before they can put a worker on the job with a visa from the following year's supply; and (4) the chances of even getting one of those visas in the first place will be even worse than this year's throw of the dice.

These restrictive policies are a stark contrast to the policies of many other countries, which are now streamlining their immigration programs to attract highly skilled professionals. Notably, the European Union recently proposed a "Blue Card" program, under which skilled workers would be able to obtain a temporary work visa, similar to an 11-1B [sic] visa, in just one to three months.

Microsoft has long made it a top-level company priority to center its development work in the United States, and we have devoted a great deal of energy into trying to help shape the policy changes that would permit us to continue to do so. To compete globally, however, Microsoft – like other employers of the highly skilled across America – must have access to the talent it needs.

How Existing OPT Will Help

True reform of the H-1B program, of course, will require congressional action. Yet the Administration, consistent with its August 10 commitment, can take a simple, immediate step to help address this crisis: extend from twelve to twenty-nine months the period that students can work in their field of study for OPT. Today OPT exists solely by regulation; no statutory change is necessary to make this needed adjustment. The current regulations provide for OPT to last up to twelve months [see 8 C.F.R. 214.2(f)(10)-(11)]. This period of employment is typically a crucial bridge to a more stable position in the American workforce through an

H-1B visa. With this year's historic H-1B cap crisis, however, OPT will expire long before it can bridge the gap to an H-1B. Without corrective action, the same can be expected next year. As a result, U.S. employers will lose recruits to competitors overseas. Soon, by necessity, U.S. jobs will follow. Extending OPT to twenty-nine months would permit U.S. employers to hire those students and keep them in service until longer-term visas become available.

OPT can be extended quickly. It would require no more than the issuance of a regulation to replace the word "twelve" with "twenty-nine" in 8 C.F.R. 214.2(f)(11). This simple extension of a critical existing program would provide tremendous relief in this emergency situation. Immediate action is necessary to initiate and announce this change so that U.S. companies and their recruits can make decisions knowing that relief is coming.

Timing of OPT Extension

A commitment to extend OPT should be announced immediately, and a regulation effectuating the extension should be in place no later than next spring. The regulation must be in place by next spring because OPT must be requested before the completion of the student's academic program. We suggest that an interim regulation and comment period would be fully permissible under the Administrative Procedures Act and would facilitate the regulation being in place on time. The announcement must be made now so both

employers and students can plan for the recruitment cycle. An announcement now will give employers the assurance that, if they recruit on campus but lose the H-1B lottery, they will not have to lose their recruits and can again seek an H-1B for them when the next year's supply becomes available. It will also give highly prized students considering their employment options the knowledge that they will have reliable work authorization for a period sufficient to move into a longer-term immigration status.

Other Administrative Reforms

There are other significant steps the Administration can take to alleviate the talent crisis facing the U.S. These steps would help to address the retention and other problems that result from the extreme waits that face most professionals seeking employment-based green cards.

Multi-year work and travel authorization documents

DHS could issue multi-year employment authorization documents ("EADs") and advance parole documents. These documents are typically issued for only one year and, during the several-year green card wait, must be renewed multiple times. Given its massive adjudications caseload, DHS often is unable to process renewal applications promptly, and often cannot meet the 90-day deadline that its regulations provide for EAD adjudications. This literally means professionals must come off the job, as employers cannot lawfully continue

to employ any employees who do not have evidence of employment authorization, even where timely filed renewal applications have not been adjudicated within the regulatory deadline.

This problem would be alleviated greatly if DHS were to issue EADs and advance paroles that were valid for two or three years rather than one. DHS has full authority to issue multi-year documents. It already issues multi-year EADs to certain nonimmigrants, including the spouses of E and L visas holders. There is no statutory or regulatory limit on the validity periods for EADS and advance paroles, and the Secretary of Homeland Security has wide discretion under section 103 of the Immigration and Nationality Act to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act."

Moreover, it is in the strong interest of DHS itself to issue multi-year EADS and advance paroles. By doing so, USCIS would greatly reduce the adjudicative burden it now faces, unnecessarily, as a result of annual renewals. This is especially significant now, when USCIS is struggling with a major front-log and is having difficulty even receipting incoming petitions. In this situation, any elimination of unnecessary adjudication workload should be highly desirable to DHS. In addition to this efficiency incentive, DHS has a financial incentive as well. Under the new USCIS fee regulations that took effect on July 30, 2007, applicants

who have paid the fee for Form I-485 to adjust to lawful permanent resident status do not have to pay an additional fee to renew an EAD or advance parole. This means that DHS will collect no additional revenue for all the additional work it performs to renew EADs and advance paroles repeatedly for these applicants.

Pre-certification

DHS also could establish a "pre-certification" process to allow employers who petition USCIS frequently for visas to submit petitions via an expedited system. Under such a system, USCIS would review an employer's organizational documents to establish certain generic information, such as the employer's ability to pay employees, and would pre-certify the employer. When a pre-certified employer submitted a visa application, it would not mean an automatic approval; USCIS would analyze the particular foreign national's eligibility for the visa. It would simply relieve USCIS of the burden of re-adjudicating, over and over, the criteria that have already been determined through pre-certification. Such a system would reduce the burden on USCIS and allow employers to obtain the visas they need in a more efficient and expeditious manner.

Conclusion

We are very grateful to you for your commitment to administrative reforms of the visa programs for the highly skilled. If there is anything that Microsoft can

do to be of assistance to your efforts, please do not hesitate to contact me.

Sincerely,

/s/ Jack Krumholtz
Jack Krumholtz
Managing Director of Federal
Government Affairs
Associate General Counsel

[Administrative Record p. 124]

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2007 NOV 19 PM 3:21 **NAFSA**

November 15, 2007

The Honorable Michael Chertoff
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Chertoff

On behalf of NAFSA: Association of International Educators, the world's largest association of international education professionals with more than 10,000 members, I urge you to extend optional practical training (OPT) for International students from 12 to 29 months. This request supports the recommendation made by 19 Senators in a letter to you on November 8.

The United States is in a global competition for international students and highly educated and talented workers. The option to work in the United States after graduation plays an important role in attracting international students to our colleges and universities, while also providing U.S. employers with the talent needed in our innovative and dynamic economy.

OPT allows international students the option to work for one year upon graduating from a U.S. college or university. After that year, some employers wish to hire the international student as an H-1B worker, but are confronted with two problems. First, the H-1B cap is reached quickly; this year on the first day of filing and

six months before the beginning of the fiscal year. Second, if an H-1B status is approved, international students are often without status for a period of time between the expiration of OPT status and the validity period of H-1B status. Extending OPT to 29 months will provide ongoing status during the period of time between the end of OPT and the beginning of H-1B status. It would also allow employers to continue to employ these highly-educated and talented workers as they cope with artificially low caps and delays in the immigration system.

Fortunately, you have the authority to propose a regulatory fix that will aid American competitiveness and innovation by extending the OPT period from 12 to 29 months. I urge you to make this regulatory change.

Sincerely.

/s/ Marlene M. Johnson
Marlene M. Johnson
Executive Director and CEO

[Administrative Record p. 125]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE
PRESIDENT
GOVERNMENT AFFAIRS

1613 H STREET N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

November 16, 2007

The Honorable Michael Chertoff
Secretary
U.S. Department of Homeland Security
381 Nebraska Avenue, NW
Washington, DC 20393

Dear Secretary Chertoff:

The United States Chamber of Commerce thanks you and the administration for continuing efforts to alleviate the nation's lengthy visa backlogs and the recently announced initiative considering any, "potential administrative reforms to visa programs for the highly skilled." Consistent with this effort, the Chamber would like to request that the Department of Homeland Security extend the Optional Practical Training (OPT) period permitted to international students and graduates of American universities from 12 to 29 months.

The Chamber is the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region. Many of the Chamber's member companies hire thousands of international students from the

United States' institutions of higher education. These students are usually hired under the H-1B visa category. The OPT allows students on an F-1 student visa to work for a year after graduation – giving employers time to file and obtain an H-1B visa for this new worker. As you know, the H1-B [sic] visa cap limit for FY2008 was reached the very first day of filing, April 3, 2007. Since the cap was reached on the first day, many talented students who graduated in May 2007 and had, thus, completed their 12 month OPT, were forced out of the country.

This extension would, at the very least, afford these graduates a chance to work in the United States for a longer period of time, while increasing their chances of receiving a fair opportunity to procure an H1-B [sic] visa. This request would not create any new classes of visas, but simply extend one of the most valuable visa programs. The inability of companies to keep these highly educated workers hurts their competitiveness in the global market and often leads to companies moving operations and jobs overseas.

The Chamber looks forward to working closely with the administration and Congress in finding a long-term and workable solution to fixing the country's immigration system.

Sincerely,

/s/ R Bruce Josten
R. Bruce Josten

[Administrative Record pp. 126–127]

[LOGO] **SIFMA**
Securities Industry and
Financial Markets Association

January 24, 2008

Mr. Stewart A. Baker
Assistant Secretary for Policy
Department of Homeland Security
Washington, DC 20528

Re: Extension of Optional Practical Training

Dear Assistant Secretary Baker:

Thank you for meeting with SIFMA and other associations on Friday, January 11, 2008 to discuss the possibility of extending the current Optional Practical Training (OPT) program from 12 to 29 months. The meeting was insightful and we very much appreciate our ongoing dialogue with the Department of Homeland Security (DHS) to promote the global competitiveness of the US economy through an extension of OPT. Specifically, it is our view that OPT extension is urgent and should be available to those with degrees outside of STEM fields.

One of the issues raised at the meeting was the possibility of limiting those eligible to extend their Optional Practical Training to 29 months to students who have obtained or who are studying in the science, technology, engineering, and mathematics (STEM) fields. While SIFMA understands DHS's concern with the potential growth of the OPT program, limiting the extension to those in the STEM fields raises a number of

concerns. The practical effect of imposing a STEM-only mandate to an extended OPT program could limit what foreign students want to study once admitted to US colleges and universities and could limit financial services employers ability to attract the best and the brightest in non-STEM fields. It is imperative that the financial services industry is able to attract the most talented foreign students to retain its competitive edge.

Competition from both developed and developing countries for these talented foreign students is becoming fierce and it is imperative, in order to retain our position of leadership, to remain open and welcoming to talented individuals *in all fields*. The European Union, Australia, Canada, and South Korea have been actively recruiting foreign talent and attempting to lure foreign students away from the United States. We can no longer assume that we will be able to, by default, attract the most talented students. It has been reported that to attract top foreign talent the European Union is considering a "blue diploma" to compliment their "blue card" allowing students graduating with a masters degree or equivalent from European universities or top universities abroad to automatically be eligible for their blue card. Since April 2006, Canada has allowed eligible foreign students to work up to two years in their field of studies. Limiting the extension program to only those in the STEM fields would significantly weaken the US attractiveness for some students and increase the relative attractiveness of other countries.

If the US is to remain a global leader in the provision of financial services, it must have the ability to attract talent not only from within, but also from outside of the United States. We respectfully request that DHS move expeditiously to extend OPT, and that such extension be applicable to those seeking careers in the financial services sector.

SIFMA represents the shared interests of more than 650 securities firms, banks and asset managers. Collectively, in 2006 the securities industry raised $3.9 trillion in corporate capital, managed $5.9 trillion in assets, and accounted for over 830,000 jobs. We thank you for considering our views and look forward to working with you on this issue in the near future.

Sincerely,

/s/ David Strongin
David Strongin
Managing Director
Securities Industry and
Financial Markets
Association

c: L. Francis Cissna
Deputy Director, Immigration Policy, Office of
Policy Development
Alfonso Martinez-Fonts
Assistant Secretary, Private Sector Office
Adam Salerno
Business Liaison, Private Sector Office

[Administrative Record pp. 130–132]

Yale University

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February 18, 2008

The Honorable Stewart Baker
Assistant Secretary for Policy
Department of Homeland Security
Washington, D.C. 20528

Dear Assistant Secretary Baker:

I understand that the Department of Homeland Security is considering administrative reforms that would extend the Optional Practical Training (OPT) period permitted to F-1 students to 29 from 12 months. This change would provide relief to international students who are seeking temporary employment opportunities after the completion of their studies. I am writing on behalf of Yale University to urge the Department to adopt this change.

Current regulations allow students in F-1 nonimmigrant status who are enrolled full time at an undergraduate, graduate and professional school one year of OPT in a position that is directly related to their major

area of study. Until recently, many of the international students at Yale used their OPT time on summer internships and other valuable training opportunities. However, students are increasingly forgoing these opportunities and banking their OPT time to use after they earn their degree. They are doing so because H-1B visas are virtually impossible to obtain after the beginning of the federal fiscal year.

Like many of its peer institutions, Yale holds commencement in late May. Graduating students face a "Catch-22" of sorts – most of them cannot obtain an H-1B visa before graduation because they must show proof a bachelor's or other degree, and, if they apply after graduation, no visas are available until the following fiscal year (16 months later). Students have thus come to rely on OPT for permission to work after graduation with the intention of applying for an H-1B visa at the earliest opportunity. In addition, even students who save their full 12 months of OPT will face a four month gap during which they are ineligible to work in the United States.

The current policy on OPT, combined with the cap on H-1B visas, raises serious obstacles to international graduates who wish to pursue careers in the United States. Employers are making an effort to accommodate highly talented international graduates. Some companies will transfer the graduate abroad temporarily. And some will permanently relocate them to offices overseas. Unfortunately, and especially for smaller companies that do not have offices outside the

United States, some graduates have had their contracts cancelled. For many of these graduates, this uncertainty is highly disruptive to their lives and their future plans, which may no longer include a career in the United States.

If these trends continue, companies based in the UnitedStates [sic] may become more reluctant to recruit our international graduates. Graduates may choose to work in other countries and contribute to their economies instead of our own. In turn, international students may become less interested in studying in the United States. That would undermine the public diplomacy that is at core of the Administration's policy of "secure borders and open doors."

We urge the Department to extend OPT to 29 months for all international graduates, including those with bachelor's degrees, for all majors of fields in study, not just science, engineering, and math. Federal policy in this area should heed the market – if a company hires an international graduate, it clearly values that person's skills even if they are outside of the sciences or engineering. Federal policy should facilitate, instead of second-guess, well-informed decisions of employers.

In addition, we urge that the extension of OPT not be linked to an employer's participation in E-VERIFY. The fact that students with OPT must have valid USCIS-adjudicated employment authorization documents would seem to ensure sufficiently both student and employer compliance.

On behalf of the entire Yale community, let me say how much we appreciate your attention and serious consideration to these administrative remedies. I hope you will not hesitate to contact me with any questions you might have.

With best regards,

Sincerely,

/s/ Dorothy K. Robinson
Dorothy K. Robinson

cc: Richard C. Levin

[Administrative Record pp. 133–134]

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2008 MAR 11 PM 4:30

March 11, 2008

The Honorable Michael Chertoff
Secretary, Department of Homeland Security
Naval Security Station
Nebraska and Massachusetts Avenues, NW
Washington, D.C. 20528

Dear Secretary Chertoff:

We commend your commitment last August to pursue "potential administrative reforms to visa programs for the highly skilled." Without comprehensive immigration reform, many issues that are central to our national well-being remain unaddressed. In particular the position of our nation as the world's top educator and top innovator. Your agency can make key policy changes to continue to attract the world's top students into our universities and to address the innovation economy's urgent need for highly educated professionals. The most important and most time-sensitive of these is to extend from 12 months to 29 the period of time that foreign students are permitted to work in this country following graduation.

This period of postgraduate employment, called optional practical training (OPT), is of tremendous importance to America's universities and employers. It can be an important factor to top foreign students considering where to study. It also is a crucial way for U.S.

employers to benefit from the skills of talented professionals who have been educated in our best universities.

The current 12-month OPT period is far too short to fit effectively with the visa programs for the highly skilled that many employers rely on to employ top foreign students. H-1B visas for these top professionals are increasingly unavailable. Even for employers fortunate enough to secure visas, there is a many-month gap in the employee's ability to work, and even to remain in the United States, as the employee makes the transition from OPT to the visa.

These conditions may dissuade the best foreign students from studying or remaining in the United States. It is increasingly difficult for U.S. employers to secure the services of those who do study here. Companies have no option but to leave positions unfilled or to move them to other countries. Top talent is lost to competitor countries that have shaped their immigration policies to attract and keep highly educated foreign professionals.

Extending the OPT period to 29 months will play a significant role in alleviating these problems. Top students would have greater access to meaningful training in the U.S. workplace. U.S. employers would have reliable access to these students' skills and enhanced flexibility to transition them to longer-term visa programs for the highly skilled. To achieve this result, however, it is very important that this change take effect in time for this spring's graduations. We

strongly urge you to announce a simple extension of OPT from 12 to 29 months that will be in place by this spring's graduation season.

Sincerely,

/s/ Craig R. Barrett
Craig R. Barrett
Chairman of the Board
Intel Corporation

/s/ Carl Bass
Carl Bass
President and CEO
Autodesk Inc.

/s/ Lee C. Bollinger
Lee C. Bollinger
President
Columbia University

/s/ William R. Brody
William R. Brody
President
Johns Hopkins University

/s/ Bill Gates
Bill Gates
Chairman
Microsoft Corporation

/s/ Paul E. Jacobs
Paul E. Jacobs
Chief Executive Officer
Qualcomm

/s/ Susan Nowakowski
Susan Nowakowski
CEO
AMN Healthcare

/s/ John A. Swainson
John A. Swainson
Chief Executive Officer
CA, Inc.