UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., Defendants.	Civil Action No. 16-1170 (RBW)

MEMORANDUM OPINION

The plaintiff, the Washington Alliance of Technology Workers ("Washtech"), a collective-bargaining organization representing science, technology, engineering, and mathematics ("STEM") workers, brought this action against the defendants, the United States Department of Homeland Security ("DHS"), the Secretary of Homeland Security, the United States Immigration and Customs Enforcement ("ICE"), the Director of ICE, the United States Citizenship and Immigration Services ("Citizenship and Immigration Services"), and the Director of Citizenship and Immigration Services (collectively, the "Government") challenging, pursuant to the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701–06 (2012), DHS's 1992 regulation creating a twelve-month optional practical training program ("OPT or OPT Program") for nonimmigrant foreign nationals on F-1 student visas (the "1992 OPT Program Rule"), see 8 C.F.R. § 214.2(f)(10)(ii)(1992), and DHS's 2016 regulation extending the OPT Program by an additional twenty-four months for eligible STEM students (the "2016 OPT Program Rule"), see Complaint ("Compl.") ¶¶ 1–5, 8; see also 81 Fed. Reg. 13,040 (Mar. 11,

2016) (codified at 8 C.F.R. §§ 214 and 274a). Currently pending before the Court is the Defendants' Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) ("Gov't's Mot."), ECF No. 18, which seeks dismissal of the Complaint on the grounds that this Court lacks subject matter jurisdiction to adjudicate Washtech's complaint; Washtech lacks standing to pursue this action; Washtech's challenge to the 1992 OPT Program Rule is time-barred; and Washtech has failed to state a claim upon which relief may be granted. Upon careful consideration of the parties' submissions,[1] the Court concludes that it must deny in part and grant in part the Government's motion to dismiss.

I. BACKGROUND

A. Statutory and Legal Background

An F-1 visa provides foreign national students valid immigration status for the duration of a full course of study at an approved academic institution in the United States. See 8 U.S.C. § 1101(a)(15)(F)(i). Since 1947, F-1 visa students, in conjunction with pursuing a course of study, have been able to engage in some version of OPT during their studies or on a temporary basis after the completion of their studies. See 8 C.F.R. § 125.15(b) (1947). And since 1992, F-1 visa students have been allowed to apply for up to twelve months of OPT, to be used either during or following the completion of their degree requirements. See 8 C.F.R. § 214.2(f)(10) (2016).

"In April 2008, DHS issued an interim final rule with request for comments extending the [twelve]-month OPT [P]rogram by an additional [seventeen] months for F-1 [visa] nonimmigrants with qualifying STEM degrees, to a total of [twenty-nine] months." Gov't's

[1] In addition to the filings already identified, the Court considered the following submissions in reaching its decision: (1) the Defendants' Memorandum and Points of Authorities in Support of the Motion to Dismiss ("Gov't's Mem."); (2) the Plaintiff's Response to Defendant[s'] Motion to Dismiss ("Washtech's Opp'n"); and (3) the Defendants' Reply in Support of the Motion to Dismiss ("Gov't's Reply").

Mem. at 4 (citing Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees, 73 Fed. Reg. 18,944 (Apr. 8, 2008) (the "2008 OPT Program Rule")); see also Washtech's Opp'n at 3. The goal of this extension was to help alleviate a "competitive disadvantage" for United States employers recruiting STEM-skilled workers educated in the United States under the H-1B visa program. 73 Fed. Reg. 18,944. H-1B visas are temporary employment visas granted annually to foreign nationals in "specialty occupations," including many occupations in the STEM field. 8 C.F.R. § 214.2(h)(1)(ii)(B). The number of H-1B visas issued on an annual basis is limited, and the program is oversubscribed. See 73 Fed. Reg. at 18,946. The extension provided by the 2008 OPT Program Rule sought to "expand the number of alien STEM workers that could be employed in the [United States]," Compl. ¶ 46; see also 73 Fed. Reg. at 18,953, and explicitly referenced the specific concern regarding the rigidity of the H-1B visa program, see 73 Fed. Reg. at 18,946–47.

In 2014, Washtech filed suit, challenging on procedural and substantive grounds, both the underlying twelve-month 1992 OPT Program Rule and the seventeen-month extension added by the 2008 OPT Program Rule. See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. ("Washtech I"), 74 F. Supp. 3d 247, 251–52 (D.D.C. 2014). There, another member of this Court found that Washtech lacked standing to challenge the 1992 OPT Program Rule, see id. at 252–53, but did have standing to challenge the 2008 OPT Program Rule, see id. at 253. The Court, however, vacated the 2008 OPT Program Rule because it had been promulgated without notice and comment, see Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. ("Washtech II"), 156 F. Supp. 3d 123, 149 (D.D.C. 2015), judgment vacated, appeal dismissed, 650 Fed. App'x 13 (D.C. Cir. 2016), and stayed vacatur of the rule to allow DHS to promulgate a new rule, id. On appeal of that decision to the District of Columbia Circuit, Washtech alleged

that the court "had improperly allowed DHS to continue the policies unlawfully put in place in the 2008 OPT Rule . . . [and that] the OPT program was [not] within DHS['s] authority." Washtech's Opp'n at 4.

In response to this Court's colleague's ruling, DHS issued a notice of proposed rulemaking on October 19, 2015, requesting the submission of public comments prior to November 18, 2015. See Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 80 Fed. Reg. 63,376 (Oct. 19, 2015). Whereas the 2008 OPT Program Rule had extended the OPT Program tenure by seventeen months for eligible STEM students, this notice instead proposed extending the OPT Program tenure by twenty-four months. See id. (explaining that "[t]his [twenty-four] month extension would effectively replace the [seventeen] month STEM OPT [Program] extension currently available to certain STEM students"). The notice also deviated from the 2008 OPT Program Rule in several other respects. See id. at 63,379–94 (discussing the proposed changes in detail). Namely, the notice contained a distinct change in tone—it dropped all references to the H-1B visa program that had been in the 2008 OPT Program Rule and instead explained that its purpose was to "better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to [United States] workers." Id. at 63,376.

On March 11, 2016, after the expiration of the public notice and comment period, DHS issued the final version of the 2016 OPT Program Rule. See Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees, 81 Fed. Reg. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. §§ 214 and 274a). The District of Columbia Circuit then dismissed as moot Washtech's appeal challenging the 2008 OPT Program Rule and vacated this

Court's colleague's judgment in its entirety. See Washtech II, 650 Fed. App'x. at 14. On June 17, 2016, Washtech initiated this action.

B. Current Posture of Washtech's Challenges to the OPT Program

Washtech alleges that the 1992 OPT Program Rule and 2016 OPT Program Rule "exceed the authority of DHS [under] several provisions of the Immigration and Nationality Act ('INA')," Compl. ¶ 4, (Counts I and II); that the 2016 OPT Program Rule was issued in violation of the Congressional Review Act (the "CRA") because of non-compliance with the notice and comment and incorporation by reference requirements of the statute (Count III), see id. ¶¶ 64–80; and that the 2016 OPT Program Rule is arbitrary and capricious (Count IV), see id. ¶¶ 81–84. Also in its Complaint, Washtech names three of its members that have allegedly suffered injury as a result of the 1992 and 2016 OPT Program Rules—Rennie Sawade, Douglas Blatt, and Ceasar Smith (collectively, the "Named Washtech Members"). See id. ¶¶ 106, 137, 184. Sawade and Blatt work in computer programming, and Smith is a computer systems and networking administrator—all fields that fall within the STEM designation.[2] Id. Between April 2008 and March 2016, the Named Washtech Members unsuccessfully applied for several jobs in the STEM field with companies that either "placed job advertisements seeking workers on OPT," see id. ¶ 140, or sought multiple OPT extension applications for their current workers, see id. ¶¶ 186–219. Washtech alleges that all three named members were unable to obtain the jobs for which they had applied because "the 2016 OPT [Program] Rule and the 1992 OPT [Program] Rule allow additional competitors into Washtech members' job market," thereby forcing

[2] Although STEM has no standard definition, the fields in which Washtech members work are commonly considered part of the same job market. Indeed, the 2016 OPT Program Rule consistently refers to the "STEM field" to describe the job market in question, and DHS maintains a list of fields within the STEM umbrella on its website pursuant to 81 Fed. Reg. 13,118. See Washtech's Opp'n at 8, 13; see also STEM Designated Degree Program List, U.S. Immigration Customs and Enforcement, https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf. Sawade, Blatt, and Smith all work in professions that are on DHS's list, see Compl. ¶¶ 106, 137, 184, therefore qualifying them as STEM workers.

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