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, and NATIONAL ASSOCIATION OF MANUFACTURERS, et al., Intervenor-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, brings this action against the defendants, the United States Department of Homeland Security ("DHS"), the Secretary of DHS, 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"), and the intervenor-defendants, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the Information Technology Industry Council (collectively, the "Intervenors"), see Complaint ("Compl.") ¶¶ 8, 10–15, challenging, pursuant to the

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06 (2012), (1) DHS's 1992 regulation creating a twelve-month optional practical training ("OPT") program (the "OPT Program") for nonimmigrant foreign nationals admitted into the United States with an F-1 student visa, see Pre-Completion Interval Training; F-1 Student Work Authorization, 57 Fed. Reg. 31,954 (July 20, 1992) (codified at 8 C.F.R. pts. 214 & 274a) (the "1992 OPT Program Rule"); see Compl. ¶¶ 54–61; and (2) DHS's 2016 regulation permitting eligible F-1 student visa holders with STEM degrees to apply for extensions of their participation in the OPT Program for up to an additional twenty-four 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. 13,040 (Mar. 11, 2016) (codified at 8 C.F.R. pts. 214 & 274a) (the "2016 OPT Program Rule"), see Compl. ¶¶ 62–84. Currently pending before the Court are (1) the Plaintiff's Motion for Summary Judgment ("Pl.'s Mot."); (2) the Defendants' Opposition and Cross-Motion for Summary Judgment ("Defs.' Mot."); (3) the Intervenors' Motion for Summary Judgment ("Intervenors' Mot."); and (4) the Plaintiff's Motion to Strike the Brief Amici Curiae of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike"). Upon careful consideration of the parties' submissions,[1] the Court concludes for the following reasons that it must deny Washtech's motion for summary judgment, grant the

[1] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Memorandum in Support of Defendants' Opposition and Cross-Motion for Summary Judgment ("Defs.' Mem."); (2) the Statement of Points and Authorities in Support of Intervenors' Combined Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Intervenors' Mem."); (3) the Brief of Amici Curiae of Institutions of Higher Education in Support of Intervenors ("Amici Br."); (4) the Plaintiff's Reply on its Motion for Summary Judgment and Response to Defendant[]s['] and Intervenors' Cross Motions for Summary Judgment ("Pl.'s Reply"); (5) the Defendants' Reply in Support of Cross-Motion for Summary Judgment ("Defs.' Reply"); (6) the Reply in Support of Intervenors' Motion for Summary Judgment ("Intervenors' Reply"); (7) the Memorandum of Points and Authorities in Support of Plaintiff's Motion to Strike the Brief Amici Curiae of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike Mem."); (8) the Amici Curiae Institutions of Higher Education's Opposition to Plaintiff's Motion to Strike ("Amici's Opp'n"); and (9) the Reply in Support of Plaintiff's Motion to Strike the Brief Amici Curiae of Institutions of Higher Education and Objections to Evidence Submitted in the Brief ("Pl.'s Mot. to Strike Reply").

Government's and the Intervenors' motions for summary judgment, and deny Washtech's motion to strike.[2]

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,

[2] The Court concludes that the intervenors' Brief Amici Curiae of Institutions of Higher Education in Support of Intervenors (the "Amici Curiae Brief") "present[s] ideas, arguments, theories, insights, facts[,] or data that are not . . . found in the parties' briefs." N. Mariana Islands v. United States, No. 08-CV-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (internal quotation marks omitted). Therefore, this "unique information or perspective [ ] can help the [C]ourt beyond the help that the lawyers for the parties are able to provide." Hard Drive Prods. Inc. v. Does 1–1,495, 892 F. Supp. 2d 334, 337 (D.C. Cir. 2012) (internal quotation marks omitted); see Ellsworth Assocs. v. United States, 917 F. Supp. 841, 846 (D.D.C. 1996) (granting "the non-party movants' [m]otions to participate as amicus curiae" because the Court found that the "non-party movants [had] a special interest in th[e] litigation as well as a familiarity and knowledge of the issues raised therein that could aid in the resolution of this case"). Accordingly, the Court will exercise its broad "discretion to determine 'the fact, extent, and manner' of participation by the amicus[,]" Hard Drive Prods., 892 F. Supp. 2d at 337, and therefore deny Washtech's motion to strike. See id. (noting that "[a]n amicus curiae, defined as 'friend of the court,' does not represent the parties but participates only for the benefit of the Court[,]" and that "it is solely within the Court's discretion to determine 'the fact, extent, and manner' of participation by the amicus"). Washtech's arguments in support of its motion to strike are unavailing. Washtech asserts that the Amici Curiae Brief "go[es] beyond attempting to supplement the record" and instead "tries to introduce outside statements as evidence that would not be admissible under any circumstances." Pl.'s Mot. to Strike at 3 (asserting, inter alia, that the anecdotal statements contained in the Amici Curiae Brief "are made without oath or affirmation[,]" "are inadmissible hearsay[,]"and "lack relevance"). However, as the Intervenors correctly note, "[a]mici are not parties to this action, and they are not seeking to supplement the administrative record at issue here[,]" Amici's Opp'n at 3 n.1, but rather, they are "supply[ing] the [Court] with [an] important perspective as [it] evaluate[s] the administrative record against the applicable legal standard[,]" id. at 3. Additionally, Washtech's "reliance on cases addressing the evidentiary standards for sworn testimony is misplaced[,]" id. at 5, and "[Washtech] fails to provide a single example where those standards have been applied to amicus briefs[,]" id. Indeed, this Circuit has previously considered amicus briefs that contain anecdotal statements, including anonymous accounts. See, e.g., Br. of American Veterans Alliance, et al. as Amici Curiae in Supp. of Pls.-Appellees at 8–21, 23–25, Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019) (No. 1:17-cv-01597) (amicus brief containing several quoted statements from anonymous veterans and service members to advise the Court about the impact of the challenged Department of Defense policy barring openly transgender individuals from serving in the military); Br. of Immigrant Rights Advocates as Amici Curiae Supporting Pls.-Appellees at 12–14, Jane Doe v. Azar, 925 F.3d 1291 (D.C. Cir. 2019) (No. 18-5093) (amicus brief recounting experiences of individuals affected by the challenged Office of Refugee Resettlement policy precluding unaccompanied alien minors from obtaining an abortion).

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).

1. 2008 OPT Program Rule

In April 2008, DHS issued an interim final rule with request for comments that extended the period of OPT in which a student could participate by seventeen months for F-1 nonimmigrants with a qualifying STEM degree. See Extending Period of Optional Practical Training by [Seventeen] 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) (to be codified at 8 C.F.R. pts. 214 & 274a) (the "2008 OPT Program Rule"). 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. See 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 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) ("Washtech II Appeal"), and stayed vacatur of the rule to allow DHS to promulgate a new rule, see 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 [Program] Rule" and that "the OPT program was not within DHS's authority." Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec. ("Washtech III"), 249 F. Supp. 3d 524, 531–33 (D.D.C. 2017) (Walton, J.) (internal quotation marks and alterations omitted), aff'd in part, rev'd in part, 892 F.3d 332 (D.C. Cir. 2018) ("Washtech III Appeal").

2. 2016 OPT Program Rule

In response to the ruling issued by this Court's colleague, 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). While 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.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.