

Under Federal Rule of Civil Procedure 60(b)(6), Defendant, United States Department of Homeland Security (“DHS”), moves the Court for limited relief from its Order on August 12, 2015, staying vacatur of the 2008 Interim Final Rule described at 73 Fed. Reg. 18,944 (Apr. 8, 2008) (the “2008 STEM OPT Extension rule”) until February 12, 2016. *See* Order, ECF No. 44. DHS requests the Court extend the stay of vacatur for approximately ninety (90) days, through May 10, 2016, providing for approximately 30 days to complete the rulemaking and 60 days for a delayed-effective-date period, under which DHS would train agency personnel and coordinate with the regulated community. The timing of this request is reasonable as it comes approximately thirty days after the close of the period for public comments on the agency’s Notice of Proposed Rulemaking (“2015 NPRM”) for the new STEM OPT Extension rule, 80 Fed. Reg. 63,375 (Oct. 19, 2015). Moreover, the request is based on extraordinary circumstances, as the agency requires additional time to review and respond to the approximately 50,500 comments received and develop guidance and train officers in the new STEM OPT program requirements, as well as provide training aids and material for foreign students, U.S. schools and U.S. employers. Accomplishing these tasks before the Court lifts the stay of vacatur should ensure an uninterrupted regulatory transition to the new final rule and prevent “substantial hardship for foreign students and a major labor disruption for the technology sector.” Opinion, ECF No. 43 at 36.

The instant motion for limited relief, therefore, satisfies the requirements under Rule 60(b)(6). Accordingly, DHS requests the Court extend the stay of vacatur of the 2008 STEM OPT extension rule from February 12, 2016, to May 10, 2016.

The parties have conferred and Plaintiff indicated its intention to oppose the instant motion for limited relief.

DATED: December 22, 2015

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

Under Federal Rule of Civil Procedure 60(b)(6), Defendant, United States Department of Homeland Security (“DHS”), moves the Court for limited relief from its August 12, 2015 Order, staying vacatur of the 2008 Interim Final Rule described at 73 Fed. Reg. 18,944 (Apr. 8, 2008) (the “2008 STEM OPT Extension rule”) until February 12, 2016. *See* Order, ECF No. 44. DHS requests the Court extend the stay of vacatur for approximately ninety (90) days, through May 10, 2016, providing for approximately 30 days to complete the rulemaking and 60 days for a delayed-effective-date period, under which Defendant would train agency personnel and coordinate with the regulated community. The timing of this request is reasonable, and it is based on extraordinary circumstances. The agency has been working diligently to complete the STEM OPT rulemaking by February 12, 2016 to avoid a regulatory gap that would cause “substantial hardship for foreign students and a major labor disruption for the technology sector.” Opinion, ECF No. 43 at 36.

During the 30-day comment period that followed publication of the agency’s Notice of Proposed Rulemaking (“2015 NPRM”) for the new STEM OPT Extension rule, 80 Fed. Reg. 63,375 (Oct. 19, 2015), DHS received approximately 50,500 public comments, 43,000 of which were unique, individual comments.¹ Staying vacatur of the 2008 STEM OPT Extension Rule for

¹ Importantly, DHS’s proposed rule outlined in the 2015 NPRM responds to the Court’s determination vacating the 2008 STEM OPT Extension rule on procedural grounds. *See* 80 Fed. Reg. at 63,376. Specifically, the proposed rule includes changes to the policies announced in the 2008 rule to “further enhance the academic benefit provided by STEM OPT extensions and increase oversight, which will better ensure that students gain valuable practical STEM experience that supplements knowledge gained through their academic studies, while preventing adverse effects to U.S. workers.” *Id.*

an additional ninety (90) days will give DHS the additional time it needs to review and consider this unprecedented number of comments before completing the STEM OPT rulemaking. The extended stay will also provide the agency with additional time to develop guidance and train officers in new STEM OPT program requirements. Accomplishing these tasks before the Court lifts the stay of vacatur should ensure an uninterrupted regulatory transition to a new final rule and minimize any disruption to foreign students, U.S. schools, and U.S. employers.

If the Court grants DHS's instant request, the 2008 STEM OPT Extension Rule would remain vacated, *see* ECF Nos. 43, 44, but the Court's stay of vacatur would extend from February 12, 2016, to May 10, 2016.

Plaintiff has indicated its intention to oppose Defendant's instant motion under Rule 60(b)(6) for limited relief.

STANDARD OF REVIEW

Rule 60(b)(6) grants the Court discretion to "relieve a party . . . from a final . . . order" for "any other reason that justifies relief." The Supreme Court has interpreted this catchall provision to apply when a party demonstrates "extraordinary circumstances." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 393 (1993). Rule 60(b)(6) is mutually exclusive with the grounds for relief in the other provisions of Rule 60(b), which include excusable neglect, newly discovered evidence, and fraud. *See Pioneer Inv. Servs.*, 507 U.S. at 393. A party seeking relief under Rule 60(b)(6) must meet the threshold timeliness requirement under Rule 60(c)(1), and show that it has "a meritorious claim or defense" to the ground on which the district court entered its order. *See Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995). Finally, Rule 60(b)(6) "must be carefully interpreted to preserve the delicate balance between the

sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of *all* the facts.” *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984).

ARGUMENT

1. The timing of Defendant's request for limited relief under Rule 60(b)(6) is reasonable.

The timing of DHS's request to extend the Court's stay of vacatur of the 2008 STEM OPT Extension rule by approximately 90 days is reasonable, *see* Fed. R. Civ. P. 60(c)(1), because it comes approximately thirty days after the close of the public comment period for the 2015 NPRM. The agency utilized an “all hands on deck” personnel approach to develop and publish the 2015 NPRM, in which multiple offices from throughout DHS and other agencies helped to develop and review the draft regulation on an expedited basis. *See* Canty Decl., Ex. A at ¶ 9. As a result, on October 19, 2015, DHS published the 2015 NPRM titled “Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students.” 80 Fed. Reg. 63,375 (Oct. 19, 2015). The 2015 NPRM notified the regulated public that in direct response to this Court's Opinion and Order, ECF Nos. 43, 44, the agency proposed to significantly revise the 2008 STEM OPT Extension Rule by replacing it “in its entirety and seek a fresh round of public comment.” *Id.* at 63,381. The comment period ran from October 19, 2015 through November 18, 2015. *Id.* at 63,376. During this thirty-day window, DHS received approximately 50,500 public comments from a variety of groups, including U.S. and foreign students, U.S. workers, schools and universities, professional associations, labor organizations advocacy groups and businesses. *See* Canty Decl., Ex. A at ¶ 11. The agency dedicated internal staff and newly-hired contractors to collect, review and organize the unprecedented number of comments received. *Id.*

DHS moves this Court for limited relief from its August 12, 2015 Order approximately thirty days after the close of the public comment period on the 2015 NPRM – as soon as the agency determined with a reasonable degree of certainty that despite its additional efforts to expedite publication of the 2015 NPRM and increase its personnel resources, it would not be able to review and consider all public comments and complete the STEM OPT rulemaking by February 12, 2016. The agency is striving to meet this deadline to prevent any regulatory uncertainty that might ensue if the Court lifts the stay of vacatur of the 2008 STEM OPT Extension rule with no new STEM OPT extension final rule in place. Accordingly, as approximately thirty days have passed since the 2015 NPRM comment period closed, the timing of DHS's request for limited relief under Rule 60(b)(6) to extend the stay of vacatur from February 12, 2016, until May 10, 2016, is reasonable. *See* Fed. R. Civ. P. 60(c)(1).

2. Extraordinary circumstances exist to justify DHS's request for limited relief under Rule 60(b)(6).

In addition to being timely, extraordinary circumstances exist justifying DHS's instant request. The agency received an unprecedented number of public comments in response to the 2015 NPRM and needs additional time to review and consider the comments before completing the STEM OPT rulemaking. Further, DHS requires additional time to develop guidance and train officers in the new STEM OPT program requirements as well as provide training aids and material for foreign students, U.S. schools and U.S. employers. Finally, DHS is striving to publish the new final rule before the stay of vacatur of the 2008 STEM OPT Extension rule is lifted to prevent disruption to foreign students, U.S. schools, and U.S. employers. Extraordinary circumstances, therefore, exist to justify DHS's request for limited relief under Rule 60(b)(6).

A. *During the 30-day comment period for the 2015 NPRM, DHS received approximately 50,500 public comments.*

The unprecedented number of public comments DHS received in the thirty-day window following publication of the 2015 NPRM – approximately 50,500 comments, which is two and a half times the largest collection of comments ever received on an NPRM in the agency’s history – has created an extraordinary circumstance that justifies the agency’s instant request to stay vacatur of the 2008 STEM OPT Extension rule by approximately 90 days. The agency requires an additional period of time to review and respond to comments to comply with APA notice and comment requirements and to ensure a seamless transition to the new final rule and prevent any regulatory gap in the F-1 STEM OPT extension program. Defendant’s proposed timetable—under which DHS would complete the rulemaking approximately four months after the close of the comment period—would be very aggressive in comparison with similar agency rulemakings. *See Canty Decl.*, Ex. A at ¶ 21. The agency’s request for limited relief from the Court’s August 12, 2015 Order, therefore, is meritorious. *See Murray*, 52 F.3d at 355.

DHS’s initial review of the approximately 50,500 public comments received in response to the 2015 NPRM indicates that slightly more than 85% of them – 43,000 comments – are unique. *Canty Decl.*, Ex. A at ¶¶ 5, 15. This means that under APA notice and comment requirements, 5 U.S.C. § 553(c), although the unique comments may raise overlapping issues, the agency must review, consider, and respond to these comments before publishing the new final rule. *See Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). To put into context the sheer volume of public comments that the 2015 NPRM attracted, the comments received in response to the 2015 NPRM are more than those received on any other proposed rule that DHS or its component agencies have issued since Congress established DHS in 2003. *See Canty Decl.*, Ex. A at ¶ 12. Prior to the 2015 NPRM,

the DHS proposed rule that received the largest number of comments was the NPRM published more than eight years ago titled “Minimum Standards for Driver’s Licenses and Identification Cards Acceptable to Federal Agencies for Official Purposes,” 72 Fed. Reg. 10,820 (Mar. 9, 2007) (hereinafter “REAL ID NPRM”). DHS received approximately 21,300 comments in response to the REAL ID NPRM. *See Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*, 73 Fed. Reg. 5271, 5274 (Jan. 29, 2008) (hereinafter “REAL ID Final Rule”).

The number of comments received on the 2015 NPRM is approximately *two-and-a-half times* the number of comments received on the REAL ID NPRM. Moreover, DHS received more comments on the 2015 NPRM than the next four most-commented-on DHS regulations combined. *See* Canty Decl., Ex. A at ¶ 13 (citing REAL ID Final Rule, 73 Fed. Reg. at 5274 (approximately 21,300 comments); *Employment Authorization for Certain H-4 Dependent Spouses*, 80 Fed. Reg. 10,283 (Feb. 25, 2015) (hereinafter “H-4 Final Rule”) (approximately 13,000 comments); *Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program*, 73 Fed. Reg. 64,790 (Oct. 30, 2008) (approximately 7,400 comments), *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287 (Mar. 26, 2013) (approximately 5,500 comments)).

Accordingly, the unprecedented number of public comments received in response to the 2015 NPRM is an extraordinary circumstance justifying DHS’s request for a limited extension of the stay of vacatur of the 2008 OPT-STEM extension rule. *See Murray*, 52 F.3d at 355; Fed. R. Civ. P. 60(b)(6).

B. DHS requires additional time to develop guidance and train officers on the new STEM OPT program requirements.

DHS's initial assessment of the public comments received in response to the 2015 NPRM revealed that the regulated community would need significant guidance from agency officers on new STEM OPT program requirements. *See* Canty Decl., Ex. A at ¶ 22; Kane Decl., Ex. B at ¶ 6. As the 2015 NPRM comment period just recently closed, the agency requires additional time to continue reviewing applicable comments and conduct extensive training of agency personnel to assist in coordinating with members of the regulated community (*e.g.*, Designated School Officials or "DSOs" at U.S. schools and universities) on implementation of new eligibility and application requirements. *See* Canty Decl., Ex. A at ¶ 22; Kane Decl., Ex. B at ¶ 6. The additional time needed for the training of agency personnel to assist in the efficient implementation of the new final rule is another extraordinary circumstance justifying DHS's request to extend the stay of vacatur of the 2008 STEM OPT Extension rule by approximately 90 days.

The 2015 NPRM notified the regulated public that DHS proposed to significantly revise the 2008 STEM OPT Extension Rule by replacing it "in its entirety" with a new STEM OPT extension final rule. 80 Fed. Reg. at 63,381. Because of this wholesale revision and replacement effort, DHS should be able to avoid uncertainty and confusion felt by members of the regulated community by giving agency personnel time to train adjudicators on the new requirements of the final rule and educate the public through stakeholder engagements. *See* Canty Decl., Ex. A at ¶ 22; Kane Decl., Ex. B at ¶ 6. Thus, any "substantial hardship for foreign students" or "major labor disruption for the technology sector," ECF No. 43 at 36, resulting from miscommunication on eligibility requirements, erroneous adjudication, or agency processing delays would be minimized. *See* Kane Decl., Ex. B at ¶ 10. Along these lines, an extension of the stay of vacatur

would provide the agency with additional time to inform the public about the upcoming changes and new filing and eligibility requirements while the existing rule temporarily remains in place.

Id. at ¶¶ 6, 10. DHS’s efforts in this regard would enable a clearer understanding of new eligibility and filing requirements and thus when the new final rule goes into effect, deficient applications that may require the submission of additional evidence of eligibility would be minimized. *Id.* at ¶ 10. Moreover, burdens on foreign students and U.S. employers under the new final rule would also be reduced, as each would not need to duplicate efforts during application processing if eligibility requirements are made clear in advance. *Id.* at ¶ 12.

Accordingly, the additional time needed for the training of agency personnel to assist in the efficient implementation of the new final rule is another extraordinary circumstance justifying DHS’s request to extend the stay of vacatur of the 2008 STEM OPT Extension rule by approximately 90 days. *See Murray*, 52 F.3d at 355; Fed. R. Civ. P. 60(b)(6).

C. Hardship to foreign students and disruption to U.S. employers in the technology sector.

This Court stayed vacatur of the 2008 STEM OPT Extension rule with the express goal of preventing “substantial hardship for foreign students and a major labor disruption for the technology sector.” ECF No. 43 at 36. Vacating the 2008 rule on February 12, 2016 – *i.e.*, taking the rule “off the books,” *see Heartland Reg’l Ctr. v. Sebelius*, 566 F.3d 193, 198-99 (D.C. Cir. 2009), before DHS can publish the new final rule would run counter to this goal. This is yet another extraordinary circumstance justifying DHS’s request to extend the stay of vacatur of the 2008 STEM OPT Extension rule by approximately 90 days.

As of September 16, 2015, over 34,000 students were in the United States on a STEM OPT extension. Canty Decl., Ex. A at ¶ 8. Additionally, hundreds of thousands of international students (most in F-1 status) have already chosen to enroll in U.S. educational institutions and

are currently pursuing courses of study in fields that may provide eligibility for this program. *Id.* And, some of those students may have considered the opportunities offered by the STEM OPT extension when deciding whether to pursue their degree in the United States. *Id.* If the Court vacates the 2008 STEM OPT Extension rule before DHS can publish a new final rule, foreign students seeking to continue their course of study through extended optional practical training in a STEM field with a U.S. employer will be prevented from doing so during a regulatory gap. *See* 8 C.F.R. § 214.2(f)(11)(i)(C). Given the substantial hardship such a situation will cause these foreign students and their U.S. schools and universities, a temporary extension of the stay of vacatur of the 2008 STEM OPT Extension rule is appropriate. *See, e.g., Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7 (D.D.C. 2003), *appeal dismissed by* No. 03-5347, 2004 WL 1052989 (D.C. Cir. May. 7, 2004).

Accordingly, the regulatory gap that will occur when the vacatur takes effect and no new OPT-STEM extension rule is in place is another extraordinary circumstance justifying DHS's request to extend the stay of vacatur of the 2008 STEM OPT Extension rule by approximately 90 days. *See Murray*, 52 F.3d at 355; Fed. R. Civ. P. 60(b)(6).

CONCLUSION

For the reasons indicated, the timing of DHS's request to extend the stay of vacatur of the 2008 STEM OPT Extension rule is reasonable, and the request is based on extraordinary circumstances. Under Rule 60(b)(6), therefore, DHS respectfully requests the Court amend its order and extend the stay of vacatur for approximately ninety (90) days, through May 10, 2016.

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DATED: December 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2015, I electronically filed the foregoing DEFENDANT'S MOTION UNDER FED. R. CIV. P. 60(b)(6) FOR LIMITED RELIEF FROM THE COURT'S ORDER AND MEMORANDUM IN SUPPORT with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the following attorney of record:

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DATED: December 22, 2015

s/ Glenn M. Girdharry
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EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WASHINGTON ALLIANCE OF
TECHNOLOGY WORKERS,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

Case No.: 1:14-cv-00529-ESH

DECLARATION OF RACHEL CANTY
IN SUPPORT OF DEFENDANTS' MOTION FOR LIMITED RELIEF
FROM AUGUST 12, 2015 ORDER AND JUDGMENT

I, Rachel Canty, hereby state and declare as follows:

1. I am over the age of 18 and provide this declaration based upon my personal knowledge and information available to me in my official capacity as the Associate Deputy Assistant Director for External Operations for the Student and Exchange Visitor Program (SEVP) at U.S. Immigration and Customs Enforcement (ICE), a component agency of the Department of Homeland Security (DHS).

2. I have held my current position since January 2012. In this position, I am responsible for overseeing the certification and compliance of schools enrolling international students, the Field Representative Unit, the Student Response Center and the development of all policies and regulations related to SEVP. Prior to joining SEVP, I was the acting head of ICE's Office of Policy, a position which involved working closely with SEVP personnel on regulations and related issues.

3. As a result of these duties, I am well-acquainted with the requirements for notice-and-comment rulemaking as well as with the general process for developing and clearing regulations at ICE. I am also familiar with the 2008 interim final rule at issue in this case (hereinafter “2008 IFR”), the new Notice of Proposed Rulemaking published by DHS on October 19, 2015 (hereinafter “2015 NPRM”), and with the Court’s opinion in *Wash. Alliance of Tech. Workers v. DHS*, No. 14-529 (D.D.C. Aug. 12, 2015) [ECF 43], which vacated the 2008 IFR but stayed the vacatur “until February 12, 2016, during which time DHS can submit the 2008 Rule for proper notice and comment.” See Mem. Op. dated Aug. 12, 2015, *Wash. Alliance of Tech. Workers v. DHS*, No. 14-529, (D.D.C. Aug. 12, 2015) [ECF 43] at 37.

4. I make this declaration in support of DHS’s motion to extend the Court’s stay of its vacatur to permit DHS to complete this rulemaking, which, as proposed, would extend optional practical training (OPT) for F-1 nonimmigrant students who graduate from U.S. institutions of higher education with degrees in science, technology, engineering, or mathematics (STEM). This declaration explains why DHS is requesting that the court further stay its vacatur for approximately 90 days until May 10, 2016.

5. As explained in further detail below, DHS originally believed it could meet the Court’s timeframe and it took extraordinary steps to do so. Due to the unexpected and unprecedented number of comments received in response to the NPRM, however, DHS now needs additional time to complete this rulemaking. DHS received more than 50,500 comments (of which over 43,000 are unique, individual comments) during the 30-day comment period for the NPRM. This number is higher than the number of responses received with respect to the next four most-commented-on DHS rules combined. Due to the high volume of comments

received, DHS believes it needs an additional 30 days to individually review and consider all submitted comments, address any issues raised, and complete the rulemaking process.

6. In addition, DHS's initial review of the comments received suggests that implementation of a published final rule would require extensive training of agency personnel and coordination with the regulated community. Although DHS had previously considered proceeding without a delayed effective date in order to respond appropriately to this Court's order, DHS now believes that it could avoid substantial uncertainty and confusion related to the rule by publishing a final rule with a 60-day delayed effective date, during which time SEVP can train designated school officials (DSOs), students, and employers concerning the requirements of the rule. To provide such a delayed effective date, DHS is seeking an additional 60-day extension of the Court's stay.

ICE's Response to the Vacatur of the 2008 Interim Final Rule

7. To address the Court's order, DHS diligently worked to publish the 2015 NPRM in the Federal Register on October 19, 2015. *See* 80 Fed. Reg. 63,375. The NPRM, titled "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students," responds to the Court's order by proposing to maintain a revised version of the STEM OPT program that has been in place since the 2008 IFR.

8. DHS acted quickly in order to avoid "causing substantial hardship for foreign students and a major labor disruption for the technology sector." *See Washington Alliance of Tech. Workers v. DHS*, No. 14-529, at 36; *see also* 80 Fed. Reg. at 63,382 (describing the need for imminent action as follows: "DHS also recognizes that it must quickly address the imminent vacatur of the 2008 IFR, and the significant uncertainty surrounding the status of thousands of

students in the United States. As of September 16, 2015, over 34,000 students were in the United States on a STEM OPT extension. In addition, hundreds of thousands of international students, most of whom are in F-1 status, have already chosen to enroll in U.S. educational institutions and are currently pursuing courses of study in fields that may provide eligibility for this program. Some of those students may have considered the opportunities offered by the STEM OPT extension when deciding whether to pursue their degree in the United States. DHS must therefore act swiftly to mitigate the uncertainty surrounding the 2008 IFR. Prompt action is particularly appropriate with respect to those students who have already committed to study in the United States, in part based on the possibility of furthering their education through an extended period of practical training in the world's leading STEM economy"). Also in response to the Court's order, DHS revised its draft regulation to address the new economic "baseline" created by the order (the scheduled vacatur of the STEM OPT extension on February 12, 2016), *see* 80 Fed. Reg. at 63,394, and proposed specific "transition procedures" for students who may be on an existing 17-month STEM OPT extension as of February 12, 2016.

9. The 2015 NPRM was the product of an "all-hands-on-deck" approach, in which multiple offices from throughout DHS and other agencies helped develop and review the draft regulation on an expedited basis. The 2015 NPRM proposed multiple changes to the policies in place since the 2008 IFR; as stated in the rule, these proposed changes were intended to further enhance the academic benefit of the STEM OPT extension, increase oversight over the program, and prevent adverse effects to U.S. workers, while ensuring that this important program continues to benefit and attract foreign students, U.S. educational institutions, and the broader economy.

10. As reflected in the agency's regulatory agenda, ICE has assigned this STEM OPT rulemaking the highest possible priority. For instance, in contrast to the six regulatory actions that ICE lists in the "long-term actions" section of its regulatory agenda, ICE lists only one regulatory action in the main regulatory agenda—the STEM OPT rulemaking that resulted in the 2015 NPRM. *See* Department of Homeland Security Agency Rule List for Fall 2015 Unified Agenda of Regulatory and Deregulatory Actions, *available at* <http://www.reginfo.gov/public/do/eAgendaMain> (listing agencies' ongoing regulatory actions).

Comments Received on the STEM OPT Proposed Rule

11. DHS accepted comments on the 2015 NPRM for 30 days, until November 18, 2015. DHS planned and made arrangements for a large number of comments by dedicating internal staff and by hiring a contractor to also collect, review and organize comments. As noted above, DHS received approximately 50,500 public comments during the 30-day comment period. Comments were submitted by a variety of groups, including U.S. and foreign students, U.S. workers, schools and universities, professional associations, labor organization, advocacy groups, and businesses. The comments may be viewed on the electronic docket for the rulemaking, at <http://www.regulations.gov/#!docketDetail;D=ICEB-2015-0002>.

12. The 2015 NPRM attracted many more public comments than any proposed rule that DHS or its components have issued since DHS was established in 2003. Prior to the 2015 NPRM, the DHS proposed rule that received the largest number of comments was the NPRM titled "Minimum Standards for Driver's Licenses and Identification Cards Acceptable to Federal Agencies for Official Purposes," 72 Fed. Reg. 10,820 (Mar. 9, 2007) (hereinafter "REAL ID NPRM"). DHS received approximately 21,300 comments in response to the REAL ID NPRM. *See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal*

Agencies for Official Purposes, 73 Fed. Reg. 5271, 5274 (Jan. 29, 2008) (hereinafter “REAL ID Final Rule”).

13. The approximately 50,500 comments received on the 2015 NPRM are approximately two-and-a-half times the number of comments received on the REAL ID NPRM. Indeed, DHS received more comments on the 2015 NPRM than the next four most-commented-on DHS regulations combined. *See* REAL ID Final Rule, 73 Fed. Reg. at 5274 (approximately 21,300 comments); *Employment Authorization for Certain H-4 Dependent Spouses*, 80 Fed. Reg. 10,283 (Feb. 25, 2015) (hereinafter “H-4 Final Rule”) (approximately 13,000 comments); *Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program*, 73 Fed. Reg. 64,790 (Oct. 30, 2008) (approximately 7,400 comments), <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=TSA-2008-0021>; *Passenger Screening Using Advanced Imaging Technology*, 78 Fed. Reg. 18,287 (Mar. 26, 2013) (approximately 5,500 comments), <http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=TSA-2013-0004>.

14. In particular, proposed rules submitted by ICE have historically received far fewer comments than the DHS proposed rules referenced above. For instance, in the past two years, ICE has issued three final rules, none of which involved more than 2,000 public comments. *See Change to Existing Regulation Concerning the Interest Rate Paid on Cash Deposited to Secure Immigration Bonds*, 80 Fed. Reg. 34,239 (June 16, 2015) (hereinafter ICE Bond Interest Final Rule) (two comments); *Adjustments to Limitations on Designated School Official Assignment and Study by F-2 and M-2 Nonimmigrants*, 80 Fed. Reg. 23,680 (Apr. 29, 2015) (hereinafter ICE DSO Final Rule) (approximately 40 comments); *Standards to Prevent, Detect, and Respond to*

Sexual Abuse and Assault in Confinement Facilities, 79 Fed. Reg. 13,100 (Mar. 7, 2014) (hereinafter Sexual Abuse and Assault Final Rule) (approximately 1,700 comments).

15. ICE's initial review suggests that most of the comments received on the 2015 NPRM are unique—i.e., the comments are not identical to other comments received as part of a “mass mail” campaign. Although many of the comments raise overlapping issues, including issues that DHS explicitly considered and addressed in the 2015 NPRM, the regulatory process requires giving each unique comment individual review and consideration.

Completing the STEM OPT Rulemaking

16. Completing the STEM OPT rulemaking is an interdisciplinary and resource-intensive project, involving completion of a number of discrete and largely sequential steps. Specifically, ICE must: (1) review, summarize, and respond to all significant comments received; (2) revise the associated economic and other analyses in response to the public comments and consistent with other changes to the proposed rule; and (3) finalize complete drafts of a STEM OPT Final Rule, associated economic analyses, and Paperwork Reduction Act forms, respectively. Because the STEM OPT rulemaking also involves U.S. Citizenship and Immigration Services (USCIS) processes and programs, such as the issuance of employment authorization documents and use of the E-Verify employment eligibility verification program, some of this work must be done in coordination with counterparts at USCIS. Following completion of the first three steps, ICE must coordinate with DHS to facilitate: (4) intradepartmental concurrence, (5) DHS leadership concurrence, and (6) OMB review under the Paperwork Reduction Act and Executive Order 12,866. These steps are standard features of the notice-and-comment rulemaking process for DHS and executive branch agencies.

17. In consideration of the impending vacatur, ICE has dedicated significant resources to reviewing the public comments and completing the STEM OPT rulemaking. ICE has dedicated more than five times the staff usually assigned to regulations, including attorneys, subject-matter experts, and program leadership, with responsibilities related to reviewing, summarizing, and responding to the public comments. ICE has also received regular input, assistance, and leadership support from USCIS and DHS headquarters staff. ICE continues to review, summarize, and consider public comments as expeditiously as possible. Completion of the STEM OPT rulemaking has been and continues to be ICE's highest regulatory priority.

18. The high volume of comments, however, represents a significant hurdle to completing the STEM OPT rulemaking in advance of the end of the Court's stay. Rulemakings that attract a high volume of comments can take a significant period of time to complete. *See, e.g.,* REAL ID Final Rule, 73 Fed. Reg. at 5274 (rulemaking concluded approximately nine months following close of comment period); H-4 Final Rule, 80 Fed. Reg. 10,283 (rulemaking concluded approximately seven months following close of comment period).

19. Recent ICE final rules with many fewer comments have taken longer to complete. *See, e.g.,* ICE Bond Interest Final Rule, 80 Fed. Reg. 34,239 (rulemaking concluded approximately 18 months following close of comment period); ICE DSO Final Rule, 80 Fed. Reg. 23,680 (rulemaking concluded approximately 15 months following close of comment period). The Sexual Abuse and Assault Final Rule, which received a relatively greater number of comments as compared to other ICE rulemakings and was subject to a rulemaking deadline in an Executive Order, was completed approximately 12 months following close of comment period. *See* 79 Fed. Reg. 13,100.

20. Notwithstanding these efforts, based on recent progress, I expect that even with current staffing levels, ICE will require at least another six weeks to finalize complete drafts of a STEM OPT Final Rule, associated economic analyses, and Paperwork Reduction Act forms and analyses, respectively. Following completion of this initial task, ICE must complete the remaining steps in the regulatory process. Based on the clearance process for the STEM OPT NPRM, I estimate that the remaining steps for publication of a final rule would require at least another six weeks to fully finalize and clear the document. Based on these estimates, and barring unforeseen delay, we would expect completion of the STEM OPT rulemaking by March 11, 2016.

21. This timetable—under which ICE would complete the rulemaking approximately four months after the close of the comment period—would be significantly more aggressive than any timetable that has applied to the rulemakings referenced above. ICE, USCIS, and DHS nonetheless continue to devote significant resources to completing the rulemaking as soon as possible.

22. At the same time, the content of many of the comments indicates a need to provide training on the new provisions and processes before implementation of a final rule. Providing an additional 60 days after the publication date prior to implementation would allow DHS to distribute training aids aimed at different audiences (including schools, students, and potential employers) through a variety of means. Such means could include postings on the ICE website as well as webinars and presentations to affected communities. None of this training can begin prior to completion of the STEM OPT rulemaking.

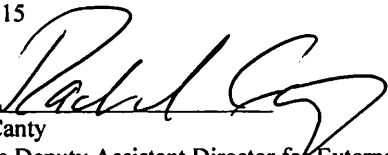
23. DHS is therefore seeking an approximately 90-day extension of that stay for the purpose of ensuring that DHS can adequately consider and address the unprecedented number of public comments, and engage in sufficient outreach following publication of a final rule.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 22, 2015
Washington, D.C.



Rachel Canty
Associate Deputy Assistant Director for External Operations
Student and Exchange Visitor Program
U.S. Immigration and Customs Enforcement

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WASHINGTON ALLIANCE OF
TECHNOLOGY WORKERS,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendant.

Case No.: 1:14-cv-00529-ESH

DECLARATION OF DANIEL J. KANE
IN SUPPORT OF DEFENDANTS' MOTION FOR LIMITED RELIEF
FROM AUGUST 12, 2015 ORDER AND JUDGMENT

I, Daniel J. Kane, hereby state and declare as follows:

1. I am over the age of 18 and provide this declaration based upon my personal knowledge and information available to me in my official capacity as a Supervisory Adjudications Officer (Branch Chief) for Service Center Operations (SCOPS) at U.S. Citizenship and Immigration Services (USCIS), a component agency of the Department of Homeland Security (DHS). SCOPS is responsible for adjudicating Forms I-765, Application for Employment Authorization, including Forms I-765 that are submitted by F-1 nonimmigrant students, requesting a STEM OPT extension.

2. I have held my current position since November 2014. In this position, I direct, coordinate and provide technical and administrative supervision to SCOPS's Adjudication Officers. In conjunction with the Adjudication Officers, I also establish the mechanisms and tools necessary to support the continued planning, monitoring, development and implementation

of the activities appropriate to SCOPS. Prior to joining SCOPS, I was employed at the USCIS Vermont Service Center (VSC) in St. Albans, Vermont, in progressively more responsible positions ranging from Adjudications Officer, Supervisory Adjudications Officer, and, finally, Section Chief over the VSC Training Unit.

3. As a result of these duties, I am well-acquainted with implementing new processes and training USCIS adjudicators when there are regulatory changes. I am also familiar with the 2008 interim final rule at issue in this case (hereinafter “2008 IFR”), the new Notice of Proposed Rulemaking published by DHS on October 19, 2015 (hereinafter “2015 NPRM”), and with the Court’s opinion in *Wash. Alliance of Tech. Workers v. DHS*, No. 14-529 (D.D.C. Aug. 12, 2015) [ECF 43], which vacated the 2008 IFR but stayed the vacatur “until February 12, 2016, during which time DHS can submit the 2008 Rule for proper notice and comment.” *See* Mem. Op. dated Aug. 12, 2015, *Wash. Alliance of Tech. Workers v. DHS*, No. 14-529, (D.D.C. Aug. 12, 2015) [ECF 43] at 37.

4. I make this declaration, in my role as a USCIS supervisor, in support of DHS’s motion to extend the Court’s stay to permit DHS to complete this rulemaking, which, as proposed, would extend optional practical training (OPT) for F-1 nonimmigrant students who graduate from U.S. institutions of higher education with degrees in science, technology, engineering, or mathematics (STEM). This declaration explains why USCIS supports DHS’s request to further stay the Court’s vacatur for approximately 90 days until May 10, 2016.

5. As explained in further detail below, DHS originally believed it could meet the Court’s timeframe and it took extraordinary steps to do so. Due to the unexpected and unprecedented number of comments received in response to the NPRM, however, DHS now needs additional time to complete this rulemaking. DHS received more than 50,500 comments

(of which over 43,000 are unique, individual comments) during the 30-day comment period for the NPRM. This number is higher than the number of responses received with respect to the next four most-commented-on DHS rules combined. Due to the high volume of comments received, DHS believes it needs an additional 30 days to individually review and consider all submitted comments, address any issues raised, and complete the rulemaking process.

6. In addition, DHS's initial review of the comments received suggests that implementation of a published final rule would require extensive training of agency personnel and coordination with the regulated community. DHS had previously considered proceeding without a delayed effective date. In order to respond appropriately to this Court's order, DHS now believes that it could avoid substantial uncertainty and confusion by publishing a final rule with a 60-day delayed effective date, during which time SCOPS can train USCIS adjudicators concerning the new requirements of a final rule and educate the public through stakeholder engagements. To provide for such a delayed effective date, DHS is seeking an additional 60-day extension of the Court's stay.

USCIS's Response to the Vacatur of the 2008 Interim Final Rule

7. USCIS has made this STEM OPT rulemaking a very high agency priority. In consideration of the impending vacatur, USCIS has dedicated significant resources to assisting with the DHS review of the public comments and assisting in the completion of the rulemaking.

8. Because USCIS has dedicated so much time, and so many resources, to the immediate task of completing the STEM OPT rulemaking, and because DHS continues to consider the significant number of comments received on the STEM OPT NPRM, the agency has not been able to focus its attention on developing, let alone implementing, the necessary training of its officers, or on educating the public, regarding new program requirements.

Reasons Why USCIS Supports a Three-Month Extension

9. USCIS supports the requested extension in order to provide additional time to develop guidance and to train officers in new program requirements. Without building in time to develop and deliver guidance and training, the efficiency and accuracy of the agency's adjudications under a STEM OPT final rule may be put at risk.

10. The extension would provide adequate time for USCIS to inform the public about the upcoming changes and new filing and eligibility requirements, which would: (a) enhance public understanding of the new filing requirements, thereby reducing the number of cases in which a Request for Evidence (RFE) will be required and minimizing adjudication delays; and (b) reduce burdens on students and employers, who will not need to duplicate efforts if eligibility requirements are clear.

11. Furthermore, extending the stay of the vacatur until May 10, 2016, would allow USCIS to appropriately manage its workloads. The requested vacatur date of May 10, 2016, would most likely be beyond the filing period for H-1B nonimmigrant visa petitions subject to the annual numerical limitation ("H-1B cap"). As there is a statutory limited number of H-1B petitions that may be granted, USCIS generally receives all cap-subject H-1B petitions in a 5 day period beginning on April 1. During this time, USCIS receives hundreds of thousands of petitions, requiring the majority of SCOPS' adjudicative, contract and operational support resources to be dedicated to the acceptance, intake and adjudication of H-1B petitions. If USCIS were required to begin processing new STEM OPT extension applications at the same time, it would hamper our operations. Without the extension requested, there would be a heavy burden on the agency's resources to adjudicate these cap-subject H-1B petitions at the same time as they receive training on and begin adjudicating new STEM OPT EAD applications. Adjudication of

the cap-subject H-1B petitions requires Service Centers to pull officers assigned to several other form types into the H-1B adjudication, leaving only a small core of staff to maintain processing for other form types. As soon as these officers return to adjudicating the STEM OPT extension requests, they will be required to undergo training and a period of mentoring before they are ready to adjudicate these STEM OPT extension requests based on the new rule.

12. By providing USCIS with adequate time to make process and system changes, develop training, and properly train its adjudicators and to inform the public regarding the new program requirements, the extension would prevent F-1 STEM students from being adversely affected by processing delays and potentially erroneous adjudications of their applications.

13. If the vacatur is not further stayed, and the 2008 rule is vacated before DHS completes the rulemaking, there may be a processing time gap, with all pending cases having to be held until DHS completes the rulemaking, thus adversely impacting the F-1 students involved. Furthermore, any new applications requesting a STEM OPT extension will be rejected.

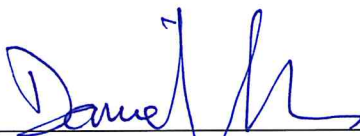
14. Due to the high volume of comments received, DHS believes it needs an additional 30 days to individually review and consider all submitted comments, address any issues raised, and complete the rulemaking process. DHS also needs an additional 60 days to implement the necessary process and system changes, and develop and deliver training for the adjudicators on the new regulatory requirements and educate the public. DHS is therefore seeking an approximately 90-day extension of the Court's stay for the purpose of ensuring that DHS can adequately consider and address the unprecedented number of public comments, train our adjudicators, and engage in sufficient outreach following completion of the rulemaking.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 22, 2015
Washington, D.C.



Daniel J. Kane
Branch Chief
Service Center Operations
U.S. Citizenship and Immigration Services

