UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ITSERVE ALLIANCE INC., Plaintiffs, v. Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	Case No. 18-cv-1823 Complaint for Declaratory and Injunctive Relief

INTRODUCTION

1. Federal government agencies are required to comply with the Administrative Procedure Act (APA), 5 U.S.C. § 550 et seq., when promulgating or changing legislative rules and regulations.

2. The APA requires agencies to provide the regulated public with notice of proposed rules in the Federal Register. The APA allows the public to participate in the rulemaking process by commenting on the proposed rules. The agency then

considers the comments and publishes the final rule in the Federal Register along with its analysis of the rule and comments.

3. The notice and comment process "reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

4. Defendant, the Department of Homeland Security, published a new legislative rule impacting a program that allows foreign students on F-1 visas to pursue optional practical training (OPT) following completion of a degree in qualified science, technology, engineering, and mathematics (STEM) programs. This new rule creates two tiers of employers: one that is prohibited from participating in the STEM OPT program and one that is not. The rule eliminates information technology companies who create, administer, or consult on projects at a client's location. The rule demands any student seeking STEM OPT perform all work physically at the physical location of the sponsoring employer. The rule prohibits student professions on STEM OPT from receiving training or education from anyone not employed with the same employer. Defendant did not comply with the APA's notice and comment requirements before making this rule. Defendant is also unlawfully enforcing this rule retroactively. Students who been approved to participate in the STEM OPT program under the prior rule are now being penalized by Defendant if their employer is now considered to be an ineligible employer.

I. Parties

5. Plaintiff, ITSERVE Alliance, Inc. ("ITSERVE"), is a nonprofit corporation that seeks to advance and safeguard the interests of its member information technology companies. It is a trade association in compliance with Section 501(c)(6) of the Internal Revenue Code. It is a Texas Corporation and is headquartered in Irving, Texas. ITSERVE represents the interest of member companies who operate in the information technology ("IT") sector of the economy. ITSERVE members contract with client companies to create IT solutions and administer existing IT infrastructure. ITSERVE member companies provide value by working at the client locations to provide IT services that the end client is not capable of supporting or sustaining without outside expertise. Because of the nature of the work, ITSERVE member companies are frequently required to work off site at the client location and in collaboration with other companies to create and administer complex IT products.

6. Defendant Department of Homeland Security ("DHS," "Defendant," "Defendants") is an executive agency of the United States, and an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). DHS assumed responsibility from the Immigration and Nationality Service ("INS" or "Defendant") on March 1, 2003, to

administer responsibilities under the Immigration and Nationality Act (INA) and in particular to fulfill its limited duties under 8 U.S.C. § 1101(a)(15)(F)("F-1" visas).

7. Defendant Kirstjen Nielsen is the Secretary of DHS, an "agency" within the meaning of the APA, 5 U.S.C. § 551(1). In this capacity, she is responsible for the administration of the INA and for overseeing, directing, and supervising all DHS component agencies, including United States Citizenship and Immigration Service. She is sued in her official capacity.

II. Jurisdiction and Waiver of Sovereign Immunity

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as a civil action arising under the laws of the United States.

9. The United States has waived sovereign immunity under 5 U.S.C. § 702.

10. This Court may grant declaratory and injunctive relief pursuant to 5 U.S.C. § 701-706, 28 U.S.C. §§ 2201-2202, and 28 U.S.C. § 1361.

III. Venue

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because Plaintiffs is corporation whose headquarters are in Dallas, Texas, and Defendant is an officer or employee of the United States, or agencies thereof, acting in her official capacities.

IV. Standing

12. Standing, in the APA context, is not an "especially demanding" test. Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389, 188 L. Ed. 2d 392, 405, (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211, 225 (2012)). Plaintiff is a trade association, organized to meet the requirements of Section 501(c)(6). Plaintiff's members are companies who provide information technology services to third parties. Its mission is to advance the interest of its member companies. As an association, it has standing because: 1. any of its individual members who are impacted could challenge Defendants unlawful rules; 2. challenging Defendants' rules is germane to the associations mission; 3. neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Free Speech Coal., Inc. v. AG United States, 787 F.3d 142, 153, (3rd Cir. 2015), (citing Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 283 (3d Cir. 2002) and Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

V. Statement of Claim

A. The F-1 Student Visa Process

13. The Immigration and Nationality Act identifies groups of foreign persons that are welcome in the United States as non-immigrants (temporary) and

immigrants (permanent). These groups are further subdivided into special categories depending on the purpose of stay and qualifications of the foreign person.

14. Congress prohibited most "aliens" from working in the United States unless they: are permanent residents; allowed employment authorization by statutory provision; or, authorized to be employed by [DHS] regulation. 8 U.S.C. § 1374a(a)(1), (b)(1)(C), and (h)(3).

15. Congress welcomed foreign students into the United States, as non-immigrants, to pursue a full course of study at an institution of higher education. 8 U.S.C. § 1101(a)(15)(F), 8 C.F.R. § 214.4(f) ("F-1 visa").

16. The statute is silent on whether non-immigrant students are allowed employment authorization. Students are generally prohibited employment authorization by regulation. 8 U.S.C. § 1101(a)(15)(F), and 8 C.F.R. § 214.2(f)(5)(vi).

17. Non-immigrant students are only permitted to study at Student and Exchange Visitor Program (SEVP)-certified schools and programs. Institutions of higher learning must apply for and receive SEVP certification prior to enrolling non-immigrant students under the F-1 visa category. 8 C.F.R. § 214.3.

18. Before permission is granted to receive these students, the institution must establish certain criteria and agree that they will comply with DHS's regulatory requirements. *Id*.

19. Schools agree to upload significant amounts of data to government computer systems related to non-immigrant students, and act as defacto agents of DHS to enforce aspects of immigration law and policy related to non-immigrant students. *See Id*. Once certified to receive non-immigrant students, schools must appoint a Designated School Official ("DSO") who is responsible for meeting the school's immigration regulatory requirements.

20. Among other things, the DSO is responsible for reviewing non-immigrant student applications and certifying Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, for qualified applicants.

21. DHS can decertify schools, thereby revoking their ability to host non-immigrant students, if it finds that the DSO violated provisions in 8 C.F.R. 214.4(a)(1), including:

> (iv) Willful issuance by a designated official of a false statement or certification in connection with a school transfer or an application for employment or practical training.
>
> (v) Any conduct on the part of a designated official which does not comply with the regulations.
>
> (xvii) Failure to comply with the procedures for issuance of Forms I-20A or I-20M as set forth in § 214.3(k).

B. The STEM OPT Process

22. While most F-1 visa holders are prohibited from accepting employment, there are exceptions. After finishing their full course of study, non-immigrant

students are permitted employment and lawful F-1 status in the United States for an additional twelve (12) months while pursuing optional practical training ("OPT") in their field of study. 8 CFR § 214.2(f)(10)(ii). Non-immigrant students who completed programs in science, technology, engineering, or mathematics ("STEM") can request a twenty-four (24) month extension of their initial OPT. 8 CFR § 214.2(f)(10)(ii)(C).

23. Non-immigrant students are authorized to work and receive pay while on OPT and the STEM OPT extension. 8 CFR § 214.2(f)(10) and (11).

24. The regulations implementing STEM OPT were provided to the public for notice and comment in compliance with the APA's rule making requirements. 80 Fed. Reg. 63376 (October 19, 2015) (DHS Notice of Proposed Rule: "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. 13040 (March 11, 2016) (DHS Final Rule).

25. The final regulations on STEM OPT are promulgated at 8 CFR § 214.2(f)(10). As seen below, the text of the regulation provides the process for granting lawful F-1 status and employment authorization during STEM OPT.

1. Student Eligibility and Responsibilities in STEM OPT

26. DHS regulations limit OPT applications to students who completed educational program with accredited colleges and universities. 8 CFR §

214.2(f)(10)(ii)(C)(1). The regulation further limits eligibility for STEM OPT extensions to students with degrees identified in the Secretary's "STEM Designated Degree Program List." *Id*. at (C)(2)(ii), and http://www.ice.gov/sevis. Eligibility is also limited to training opportunities in fields directly related to the student's degree. *Id*. at (C)(4).

27. Students seeking a STEM OPT extension are required to create and submit a training plan to their educational institution's DSO on DHS Form I-983, Training Plan for STEM OPT Students. *Id*. at (C)(7). This training plan must be signed by the prospective employer. *Id*.

28. To remain in the program, the student is required to provide the DSO with periodic training evaluation reports. *Id*. at (C)(9).

2. Employer Eligibility and Requirements in STEM OPT

29. The only employer eligibility requirements listed in the regulation are:

> The student's employer is enrolled in E-Verify, as evidenced by either a valid E-Verify Company Identification number or, if the employer is using an employer agent to create its E-Verify cases, a valid E-Verify Client Company Identification number, and the employer remains a participant in good standing with E-Verify, as determined by USCIS. An employer must also have an employer identification number (EIN) used for tax purposes.

Id. at (C)(5).

30. The regulation does not define "employer" or exclude "employers" from the STEM OPT program based on their size, business models, revenue, or any other

factor beyond those listed above. *See id*. Neither the regulation nor Form I-983 use the term "bona fide employer." The Form I-983 does not have a box for employers to check or fill out that includes the term "bona fide employer."

31. Employers are required to described and attest to training objectives and program requirements on Form I-983. *Id*. at (C)(7). Once an employer has been approved to train a student, the employer is required to report certain information relevant to the student's immigration status. *Id*. at (C)(6). The employer is required to offer the training experience on terms commensurate with those offered to US employees. *See id*. at (C)(8).

32. On the I-983, at Page 2, the employer acknowledges and accepts DHS's authority to conduct site visits and agrees to comply. According to the regulation:

> [t]he purpose of the site visit is for DHS to ensure that each employer possesses and maintains the ability and resources to provide structured and guided work-based learning experiences consistent with any Form I-983 or successor form completed and signed by the employer. DHS will provide notice to the employer 48 hours in advance of any site visit, except notice may not be provided if the visit is triggered by a complaint or other evidence of noncompliance with the regulations in this paragraph (f)(10)(ii)(C).

33. Finally, employers sign the Form I-983 under penalty of perjury and certify that the application meets regulatory requirements.

3. School Eligibility and Requirements in STEM OPT

34. Only a DSO at a certified SEVP school can process an application for STEM OPT. The student must submit the completed Form I-983 to her DSO for a

recommendation. *Id*. at § 214.2(f)(11). If the DSO determines the application complies with regulatory requirements, they recommend approval on Form I-20, and provide a copy to the student. *Id*. at (11)(C). The student then applies for work authorization by submitting a Form I-765 to DHS along with the Form I-983 and Form I-20. *Id*. DHS will then adjudicate the application for employment authorization. *Id*. at (11)(C)(iii). Students are not allowed to file an administrative appeal on denied Form I-765 applications. *Id*.

35. A student cannot receive work authorization without a certified Form I-20, which is supported by a Form I-983.

C. Rule Changes to STEM OPT Via Website

1. DHS Intent to Enforce New Requirements

36. DHS published a summary of the regulatory requirements for applying for STEM OPT extensions on the internet. Exhibit 1, November 2017 STEM OPT Guidance. In the section titled "STEM OPT Employer Responsibilities," DHS summarized the regulatory requirements employers accept under the program. *Id.* at pg. 3.

37. Neither the regulation nor the summary on the DHS web page prohibited STEM OPT student professionals from working with consulting companies who work on projects located at client work sites.

38. Neither the regulation nor the summary on the DHS web page prohibited students from learning and developing their professional skills in contact with persons not employed by the same entity.

39. Without request for comment, and without even notice to the public, DHS changed this section of its web page. Exhibit 2, 2018 STEM OPT Guidance. The website now contains a rule that does not appear in the regulation. *Id.* at pg. 3. DHS has begun enforcing the substantive changes to the rule as published on its website.

40. In the section discussing employer eligibility, DHS states that "the employer will have a bona fide employer-employee relationship with the student." *Id.* This is characterized by DHS as a "term and condition" for approval of STEM OPT applications. *Id.* DHS now states that by signing the Form I-983 the employer attests that they meet this new definition of employer. *Id*. at pg. 4, and Exhibit 2, Sections 4 and 6 (requiring employers to sign under penalty of perjury).

41. In the new rule, DHS created a multi-prong test for determining a bona fide employment relationship. According to the new rule, the following practices invalidate a STEM OPT bona fide employment relationship, and subject students, employers, and educational institutions to penalties and sanctions:

- The student receives training or educational benefit from anyone other than employees or contractors of the employer who signed the Form I-983.

- The student receives training at any location other than the employers place of business. The rule prohibits working on online

> or distance learning arrangements. The rule also prohibits technology companies from placing STEM OPT students on a team working offsite projects for a client.

42. These substantive requirements are not in the regulation.

43. These substantive requirements were never required in earlier STEM OPT filings and adjudications. Prior STEM OPT requests filed by student professionals and employers, and recommended for approval by DSOs did not require evidence in support of this new rule. ITSERVE member companies were previously allowed to hire STEM OPT student professionals and were allowed to have them perform work a client locations.

44. The terms of the new rule are explicit and do not allow adjudicators to use judgment or discretion. The creation of the rule on the DHS website has created a freeze on the STEM OPT program for ITSERVE's Members. DSOs are refusing to recommend approval of STEM OPT plans for students working for affected IT companies. Exhibit 3, Denial Email From DSO.

45. DHS has control over DSOs participation in the STEM OPT program and enforcement of requirements. Failure of a school to follow Defendants rule will result in being debarred from the SEVIS program. Information technology employers who previously hired student professionals on F-1 visas to work on information technology projects at a client's location are now prohibited from hiring STEM OPT students.

2. Retroactive Application of Rule Change

46. DHS has not limited its enforcement of this new rule to new STEM OPT applications. DHS is now enforcing these rules retroactively and penalizing students who worked at a company's client worksite while in on previously approved STEM OPT extensions. Exhibit 4, Request for Evidence of STEM OPT Rule Compliance.

47. DHS seeks to retroactively impose this new legislative rule against affected students, thereby finding they violated the terms of their F-1 visa and engaged in unauthorized employment.

48. The immediate impact of retroactive application is to prevent these students from receiving immigration benefits such as changing status to an H-1B visa.

49. Retroactive application also bars these students from seeking future immigration benefits for several years.

50. Retroactive application taken to the next level will penalize employers and DSOs for signing and approving forms related to STEM OPT training plans.

3. STEM OPT Rule Change Excludes US Trained STEM Professionals

51. The Administrative Procedure Act and the rule making process provides business owners a voice in the government regulatory process. It also provides companies with the predictability they need to manage operations and invest in future projects.

52. DHS has ambushed the IT industry and their clients through an unannounced legislative rule change in a website. It has introduced chaos into the business world and destroyed predictability. DHS has failed to comply with both the technical requirements and the intent of the APA.

53. ITSERVE's member companies are unexpectedly excluded from a program that provides their clients and OPT STEM students with practical and economic benefits. DHS is eliminating ITSERVE's members from the STEM OPT program and in the process destroying training opportunities previously provided by companies like ITSERVE's members. DHS is also eliminating potential H1B beneficiaries from the US economy by retroactively enforcing this rule and finding students to have violated the terms of their OPT STEM F-1 visas.

COUNT I

Defendants Violated the APA by creating a Legislative Rule Without Notice and Comment Rulemaking

54. Defendant created a new and unlawful legislative rule in violation of the Administrative Procedure Act's rulemaking process. 5 U.S.C. § 553. Defendant did not publish the legislative rule in the Federal Register for notice and comment and did not provide the regulated community with an opportunity to respond. Such action violates 5 U.S.C. § 706(2)(A), (B), (C) and (D). Defendant's rule creates new

categories of employers with different rights and responsibilities in the STEM OPT program. The rule is the product of data collection and analysis of facts that were not disclosed to the public. It is the consummation of the agency's decision-making process on the issue. It is a final agency action as defined by the APA.

55. The Fifth Circuit employs a two-part test to distinguish if an agency statements from legislative rules. *See Texas v. United States*, 809 F.3d 134, 171, (5th Cir. 2015)(Judgment affirmed by an equally divided Court. *United States v. Texas*, 136 S. Ct. 2271, 2272, 195 L. Ed. 2d 638, 638 (2016))

56. Courts first look to whether a statement "impose[s] any rights and obligations." *Id*. Next, courts determine if the statement "genuinely leaves the agency and its decisionmakers free to exercise discretion." *Id.*

57. The regulatory requirements in the Code of Federal Regulations are clearly stated, and focus on administrative issues (registering in SEVIS, etc.) and training. *See* ¶¶ 29-33. Defendant's rule creates new evidentiary obligations on STEM OPT participants and forces them to provide evidence that: the student professional will not gain any experience outside the confines of the employers' physical location; and, the student professional will not gain experience or training from anyone not employed by the same employer.

58. These evidentiary requirements and attestations are not found in the regulation.

59. The rule change meets the second prong of the Fifth Circuit test because it strips away any discretion from adjudicators and DSOs to approve a training plan if it does not meet the above criteria. *Id*. at 173 (even policy statements that facially grant discretion are legislative rules if they are applied in a way that indicates they are binding).

60. The new rule eliminates ITSERVE's members rights to participate in the STEM OPT program, and consequently has a substantial impact that requires notice and comment rulemaking. *Id*. at 176 ("An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply.")

COUNT II

Defendants are Unlawfully Retroactively Enforcing a New Legislative Rule

61. DHS is retroactively enforcing new rules against STEM OPT student professionals who have accepted employment in the United States pursuant to previously approved F-1 visa petition extensions and employment authorizations. Such action violates 5 U.S.C. § 706(2)(B), (C) and (D). DHS has made a determination that they have authority to retroactively enforce this rule. This is the

consummation of agency decision making and is a final agency action and pronouncement of their authority.

62. DHS is now penalizing student professionals who had lawfully approved STEM OPT F-1 visas and employment authorizations to work for ITSERVE member companies at client locations or otherwise received a training or educational benefit from someone not employed by the same employer. DHS is informing these student professionals that they violated the terms of the STEM OPT F-1 visas and unlawfully accepted employment if they worked at a client location, received training from someone not employed by the same employer or otherwise violated the new rule.

63. DHS is demanding evidence that these student professionals complied with evidentiary burdens not in effect at the time the initial STEM OPT F-1 visa extension and employment authorization application was approved.

64. Federal agencies may exercise only that power delegated to them by Congress or the Constitution. 5 U.S.C. §§ 551–59, 701–06.

65. Generally, changes in federal statutory law may not be applied retroactively. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

66. Changes to laws that alter prior burdens of proof are certainly impermissible. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 204 (2017)

citing *Landgraf* invalidating a statute because it "change[d] the substance of the existing cause of action for qui tam defendants…").

67. DHS lacks statutory or Constitutional authority to retroactively apply this rule change to previously approved STEM OPT F-1 visas. DHS retroactive enforcement of this requirement is in violation of the U.S. Constitution, the Administrative Procedure Act, and the Immigration and Nationality Act.

V. Prayer For Relief

WHEREFORE, Plaintiff prays that this Court:

A. Declare Defendant's prohibition on STEM OPT student professionals performing tasks remotely or at client work sites is a legislative rule requiring notice and comment rulemaking.

B. Declare Defendant's prohibition on STEM OPT student professionals from receiving professional training or education from anyone not employed by the same entity is a legislative rule requiring notice and comment rulemaking.

C. Enjoin Defendant from enforcing its prohibition on STEM OPT student professionals performing tasks remotely or at client work sites.

D. Enjoin Defendant from enforcing its prohibition on STEM OPT student professionals from receiving professional training or education from anyone not employed by the same entity.

E. Enjoin Defendant from retroactively enforcing these new rules against students and employers whose STEM OPT and employment authorization applications were approved prior to creating the new rule;

F. Grant attorneys' fees and costs pursuant 28 U.S.C. §2412, 28 U.S.C. §1920, Fed. R. Civ. P. 54(d) and other authority; and

G. Grant any other relief the Court deems appropriate and just.

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