In the United States District Court for the District of Columbia

Washington Alliance of Technology Workers; 13401 Bel-Red Rd. #B8 Bellevue, WA 98005 *Plaintiff*, *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529 (ESH)

Response Brief in Support of Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record

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INTRODUCTION

Department of Homeland Security ("DHS") regulations governing its post-completion Optional Practical Training program ("OPT") are at issue in this case. The Washington Alliance of Technology Workers ("Washtech") demonstrated in its Opening Brief, Doc. No. 25 ("Washtech Br."), that the regulation, Extending Period of Optional Practical Training by 17-Months for F-1 nonimmigrant Students with STEM (Science, Technology, Mathematics, and Engineering) Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944–56 (Apr. 8, 2008) (codified at 8 C.F.R. §§ 214, 274a) (the "2008 OPT Rule"), is in excess of DHS authority because it authorizes aliens on F-1 student visas to remain in the United States and work when they are no longer students. DHS raises new issues regarding the statutory authority of DHS and congressional acquiescence in its Opening Brief, Doc. No. 27 ("DHS Br.") This response brief is limited to the new issues. Washtech's opening brief also showed that DHS promulgated the 2008 OPT Rule without complying with the procedures required by the Administrative Procedure Act. As Washtech's opening brief sufficiently addresses those procedural issues, and DHS's opening brief raises no significant new issues in this regard, Washtech will conserve judicial resources and not reargue the matter.[1]

ARGUMENT

I. The scope of Washtech's Complaint encompasses work performed by non-student aliens after graduation.

DHS's argument in its Opening Brief relies on misinterpreting Washtech's Complaint. DHS asserts, "Plaintiff erroneously maintains that the statutory term 'stu-

1 *E.g.*, "Some projections suggest that the United States will fall behind other economic competitors if it is unable to attract and retain workers educated in science and technology" and "science and technology are the fastest growing sector of the labor market in the United States" are interesting factoids but they do not demonstrate a "critical shortage" of STEM workers. DHS Br. p. 33. Nor does DHS explain why it was unable to provide notice and comment within the year's notice it had to promulgate the 2008 OPT Rule. DHS Br. pp. 42–45.

dent' limits the alien admitted as a student to a classroom setting only and therefore does not allow for work in the United States post-graduation." DHS Br. p. 19. While Washtech expresses no opinion on the authority of DHS to allow actual students to work, it has not challenged that practice here. The ability of education majors to work as student teachers for pay in their senior year or for a mining engineering student to spend a summer between classes working as an intern at a mine is not at issue here. The Complaint addresses the situation where DHS authorizes aliens to work on student visas after completion of the course of study (*i.e.*, after graduation), which DHS now authorizes for the purpose of supplying labor to employers. Compl. ¶ 2. Consequently, DHS's syllogism *alien students are restricted to classroom education* therefore *aliens may not work on student visas post-graduation*, is not an accurate statement of the issues Washtech raises.

The Complaint alleges aliens are prohibited from working on student visas after graduation because such aliens are not *bona fide students*, solely pursuing a full course of study at an approved academic institution—not because student visas restrict education to a classroom setting. Compl. ¶¶ 155–71, 279–80. The regulations at issue allow aliens to remain in the United States and work "following completion of studies"—not as part of their studies. 8 C.F.R. § 214.2(f)(5). The gravamen of Washtech's complaint is that DHS unlawfully is authorizing duration of stay beyond student status and authorizing work when the alien should have been required to leave the United States.

Here, the statute leaves no ambiguity. The F-1 student status requires admission "solely for the purpose of pursuing [] a course of study … at an established [academic institution]." 8 U.S.C. § 1101(a)(15)(F)(i). In contrast, DHS defines the duration of F-1 status as, "[T]he time during which an F-1 student is pursuing a full course of study at an educational institution …, or *engaging in authorized practical training following completion of studies*." 8 C.F.R. § 214.2(f)(5)(i) (emphasis added).

DHS's alternative of "practical training following completion of studies" is in direct, irreconcilable conflict with the statutory requirement that aliens on student visas be *solely* pursuing a course of study at an approved academic institution. 8 U.S.C. § 1101(a)(15)(f)(i). Congress's use of the present tense ("pursuing"), precludes its application to the past. *See*, *Carr v. United States*, 560 U.S. 438, 448 (2010) (Under the Dictionary Act, 1 U.S.C. § 1, present tense in a statute includes the future but not the past). Similarly, the authorization for OPT states that it takes place, "After completion of the course of study" and that enrollment at a school is not required. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3). Once again, this provision directly contradicts the statutory definition of F-1 status because it does not require the alien to be pursuing a course of study at an approved academic institution. 8 U.S.C. § 1101(a)(15)(F)(i).

II. There are no ambiguous terms that affect this case.

DHS asserts that the terms *student* and *course of study*[2] are ambiguous, leaving an ambiguity for it to resolve. DHS Br. p. 16. While Washtech disagrees that the word *student* is ambiguous, DHS regulations do not define the term, leaving the plain English meaning in place. 8 C.F.R. § 214.2(f). Like Washtech, DHS uses a dictionary to define *student*. DHS Br. p. 19. The DHS definition is not materially different from any of those cited by Washtech. Washtech Br. p. 17. The court may use one of the definitions presented by Washtech or the definition presented by DHS interchangeably. Aliens working or unemployed looking for work on OPT are not *students* under any definition of the term.

From there, DHS invents ambiguity where none exists. DHS incorrectly claims the F-1 statute does not, "indicate whether training or employment may accompany or follow the course of study as a practical part of the student's education." DHS Br. p. 17. On the contrary, the statute is crystal clear on that point.

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2 DHS does define the term *course of study*. 8 C.F.R. § 214.2(f)(6). However, this definition has never been at issue because the aliens working on OPT are not engaged in a course of study under DHS regulations. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3).

F-1 status has other requirements in addition to being a student. It is defined as an "alien … qualified to pursue a full course of study … who seeks to enter the United States temporarily and *solely* for the purpose of pursuing such a course of study … [at an approved academic institution that will report termination of attendance]". 8 U.S.C. § 1101(a)(15)(F)(i) (emphasis added). The only activity authorized on F-1 status is a course of study, *id*., and DHS regulations are required to ensure aliens leave the country when they no longer maintain F-1 status. § 1184(a). That unambiguously precludes employment on a student visa after completion of the course of study (*i.e.*, after graduation).

DHS asks the court to interpret the term *student* universally to encompass individuals who have graduated and are working in their chosen career. DHS Br. pp. 21–22. Not only is such an interpretation in conflict with the dictionary definition of *student*, it is irreconcilable with the more narrow statutory definition of F-1 student visa status. Adopting the DHS interpretation requires the court to ignore other provisions in the statute. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts have a "duty to give effect, if possible, to every clause and word of a statute.") (citation and internal quotations omitted). First, DHS ignores the requirement that an alien must be a *bona fide* student. § 1101(a)(15)(F)(i). *Bona fide* under § 1101(a)(15)(F)(i) refers to *actuality,* "[determined] substantially on objectively verifiable characteristics." *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 483 (3d Cir. 1987). By including the modifier *bona fide*, Congress clearly intended to limit F-1 visa status to genuine or actual students. Second, DHS ignores the requirement that F-1 status requires the alien to be solely pursuing a course of study. *See*, § I, *supra*. Third, the DHS interpretation requires the court to ignore the requirement that the course of study must take place at an approved academic institution. § 1101(a)(15)(F)(i). Fourth, it requires the court to ignore the requirement that the institution where the course of study takes place must report the termination of attendance of the alien. *Id*. Fitting OPT

into the definition of F-1 student visa status requires the court to ignore most of the provisions of § 1101(a)(15)(F)(i).

III. Inaction alone does not translate into congressional acquiescence.

The main thrust of DHS's defense of the 2008 OPT Rule is that Congress has adopted its interpretation through inaction. DHS Br. pp. 1, 4–6, 21–22, 26–31. There are three doctrines that apply to adoption through congressional inaction:

> (1) the "acquiescence rule," positing that if Congress does not overturn a judicial or administrative interpretation it probably acquiesces in it; (2) the "reenactment rule,"[3] which posits that a reenactment of the statute incorporates any settled interpretations of the statute by courts or agencies; and (3) the "rejected proposal rule," which posits that proposals rejected by Congress are an indication that the statute cannot be interpreted to resemble the rejected proposals.[4]

William N. Eskridge, Jr., Interpreting Legislative Inaction, 67 Mich. L. Rev. 1990 at 69. Each of these doctrines has different rules.

A. It is the responsibility of the court to ensure an administrative practice is consistent with statutory authority, even if the practice is longstanding.

Age does not immunize an administrative practice from judicial review. In *Sloan v. SEC*, the agency was authorized to suspend the trading of a security for up to ten days. 436 U.S. 103, 105 (1978). The SEC had issued consecutive suspensions of a security lasting, in total, over a year. *Id*. The SEC had consistently interpreted the statute as permitting such consecutive suspensions for thirty-four years. *Id*. at 117. The Court held that, while it is a general principle of law that a longstanding *and consistent* practice is entitled to deference, it does not relieve the court of its responsibility to ensure the practice is consistent with the agency's statutory authority. *Id*.

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3 The *reenactment rule* is also usually called the *doctrine of ratification*. *E.g.*, *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2018 (2012).

4 Washtech omits the rejected proposal rule from further discussion because no facts have been raised to invoke it.

The Court decided that the practice of serial suspensions, even though it was consistent and longstanding, was in excess of SEC authority because it was inconsistent with the statute. *Id.* at 116–17. Likewise, the age of the practices at issue here does not exempt them from judicial review.

B. DHS does not identify which policy Congress acquiesced to.

Unlike the SEC practice in *Sloan*, those at issue here have not been consistent over the years. The regulations governing work on student visas have undergone frequent revisions with major changes in policy. *See*, Washtech Br. pp. 3–7. The policy in effect when the current student visa was created in 1952 only allowed students to work when it was required or recommended by their school (not at issue in this case). 17 Fed. Reg. 5,355–57 (Aug. 7, 1947). When the next major immigration bills were enacted, the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3445 ("IRCA"), and the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, aliens were allowed to work on student visas after graduation only if a similar work experience was not available in their home country. 8 C.F.R. § 214.2(f)(10)(ii)(A)(3) (1986); § 214.2(f)(10)(ii)(B)(3) (1990). In 1991 the policy changed to allow all aliens to work after graduation. 56 Fed. Reg. 55,608 (Oct. 29, 1991). In 2002, the policy changed so that aliens did not have to be enrolled at a school to work after graduation. 67 Fed. Reg. 76,256 (Dec. 11, 2002). In 2008, the policy changed to allow labor on student visas to be used to remedy imagined labor shortages. 73 Fed. Reg. 18,944–56 (Apr. 8, 2008). This is not even a complete recitation of the changes made over the years. DHS does not identify which of these policies governing student visa employment Congress has acquiesced to, let alone provided any evidence that it acquiesced to any particular policy.

DHS has rejected congressional acquiescence by changing its policy governing work on student visas at will over the years. Once Congress has acquiesced to an agency interpretation, the agency no longer has discretion to change the interpreta-

tion. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 152–56 (2000); *C.f.*, *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 740 (Fed. Cir. 2011). Hypothetically, had Congress acquiesced to, for example, the policy that was in place in 1986 and 1990 of allowing aliens to work after graduation only if such work was not available in their home countries, DHS would not have been able to change that policy to allow all aliens on student visas to work after graduation without explicit congressional approval. *See*, *Brown & Williamson*, 529 U.S. at 155–56 (Congress's acquiescence to an FDA interpretation that it did not have statutory authority to regulate tobacco precluded the agency from changing that interpretation.). DHS's past actions do not support its claim of congressional acquiescence. [5]

C. Acquiescence requires overwhelming evidence of congressional awareness and approval.

"Where there has been evidence of congressional knowledge of and acquiescence in a long-standing agency construction of its own powers, courts have occasionally concluded that the agency construction had received a *de facto* ratification by Congress." *Nat'l Petroleum Refiners Ass'n. v. FTC*, 482 F.2d 672, 695 (D.C. Cir. 1973); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care."). The Supreme Court applies a two-step process when facing the question of acquiescence: "Was Congress aware of the interpretation, and did it deliberate about it?" 67 Mich. L. Rev. 1990 at 87 (analyzing cases); *see also*, *Int'l Union v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987).

The leading case for congressional acquiescence is *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, the Court upheld an IRS Revenue Ruling that re-

5 DHS continues to act as though Congress has not ratified its regulations. *See*, Allissa Wickham, "Obama Immigration Adviser Offers Peek At Upcoming Policy," Law360, Mar. 26, 2015 (According to White House Immigration Advisor, Felicia Escobar, DHS will announce new regulations to further expand the OPT program later this year.).

voked the tax-exempt status of private schools practicing racial discrimination, holding that Congress had acquiesced to that interpretation. *Id.* at 599–01. In that case,

> Congress had held "hearings on this precise issue," making it "hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed.

Solid Waste Agency, 531 U.S. at 170 n.5 (describing *Bob Jones*); *accord*, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 429 n.14 (D.C. Cir. 1983) ("[A]n important factor in determining the weight to be given congressional acquiescence in an agency interpretation is the extent of Congress' familiarity with that interpretation."). "Absent such overwhelming evidence of acquiescence, [courts] are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.*

The only evidence DHS provides that Congress was aware of its policy is a House report that DHS interprets as, "indicating that the legislation 'expands the current authority of students to work off-campus,' rather than supplants or otherwise supersedes that authority." DHS Br. p. 29. (citing H.R. Rep. 101-723, p. 66). Isolated statements in a committee report, however, are not sufficient to establish widespread congressional awareness of an issue required for acquiescence. *Sloan*, 436 U.S. at 121; *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 n.32 (D.C. Cir. 1982). From DHS's excerpt, one cannot even tell what work program the report refers to. Then, as now, DHS had multiple, concurrent work programs for aliens on student visas. *E.g.*, 8 C.F.R. §§ 214.2(f)(9)(i), (f)(9)(ii), (f)(10) (1990).

One gets a better picture of the level of congressional knowledge by completing the passage quoted by DHS. The remainder of the text spells out what Congress expects when aliens are allowed to work on student visas by:

> [] subject[ing] employers to an attestation requirement similar to that for other visas, requiring recruitment of U.S. workers and payment of prevailing wages. …. Additionally, *to assure compliance with the student visa, the alien is required to be in good academic standing.*

H.R. Rep. 101-723, p. 66 (emphasis added); *see also*, *id*. at 45. In context, one finds that Congress understood that F-1 status requires academic standing, suggesting Congress was not aware certain aliens were being allowed to work after graduation and that it would not have approved of the policy had it known.

D. The doctrine of ratification is not applicable because DHS cannot identify a specific policy that was ratified.

Under the ratification doctrine, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The Supreme Court has called into question its broader, past ratification holdings relying on congressional inaction, stating, "as a general matter … [the ratification] argument deserves little weight in the interpretive process." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994)).

The Supreme Court has also added caveats to the basic reenactment doctrine put forth by *Lorrilard. Pub. Citizen* v. *HHS*, 332 F.3d 654, 668 (D.C. Cir. 2003). First, there must be actual reenactment without change. *Id*. at 668. In *Lorillard*, the provision in question had existed in a previous statute (Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201 et seq.) and had been enacted without change in a later act (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.S. § 621 *et seq*.). 434 U.S. at 577–579. The provisions at issue here have never been reenacted without change as in *Lorrilard*. In fact, there have only been three statutory changes to student visas in their history.[6] "When Congress has not comprehensively revised

6 "Pub. L. 97–116, §§2(a)(1), 18(a)(1), substituted in cl. (i) "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program" for "institution of learning or other recognized place of study", and "Secretary of Education" for "Office of Education of the United States"; "Pub. L. 104–208, §625(a)(2), inserted 'consistent with section 1184(l) of this title' after 'such a course of study'."; and "Pub. L. 111–306, §1(a)(1), substituted "an accredited language" for "a language". 8 U.S.C. § 1101 (Amendments Section).

a statutory scheme but has made only isolated amendments, … it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Sandoval*, 532 U.S. at 292 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989)). Second, even where there has been reenactment without change, *Lorrilard* only creates a presumption. *AFL-CIO v. Brock*, 835 F.2d 912, 916 n.6 (D.C. Cir. 1987) ("[N]o case has rested on this presumption alone as a basis for holding that the statute required that interpretation."). "[] Congress must not only have been made aware of the administrative interpretation, but must also have given some 'affirmative indication' of such intent." *Ass'n of Am. R.Rs. v. Interstate Commerce Comm'n*, 564 F.2d 486, 493 (D.C. Cir. 1977) (quoting *Comm'r v. Glenshaw Glass*, 348 U.S. 426 (1955)); *Pub. Citizen*, 332 F.3d 654 at 669 (Ratification arguments have little weight absent some evidence of congressional familiarity with the administrative interpretation at issue.). Third, the congressional ratification and the policy in question must be contemporaneous. *Pub. Citizen*, 332 F.3d at 669–670. As described in § III.B, *supra*, the policy for work on student visas has changed constantly. Which specific policy governing work on student visas was ratified and through what reenactment? That question has no answer because DHS has rejected congressional reenactment of each policy governing work on student visas by changing its policy constantly and at will. *GPX Int'l Tire Corp.*, 666 F.3d at 740 ("Once Congress has ratified a statutory interpretation through reenactment, agencies no longer have discretion to change this interpretation."). Finally, the insurmountable hurdle to congressional ratification of OPT is that there can never be ratification of a regulatory interpretation that is contrary to the plain language of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 603–604 (1991); *see*, § I, *supra*.

DHS relies on a nonprecedential opinion from the Third Circuit, *Programmers Guild, Inc. v. Chertoff*, 338 F. App'x 239 (3d Cir. 2009), to support its claim of rati-

fication and identifies the opinion as a primary source of authority in its table of authorities. DHS Br. pp. iv, 21, 31. However, in *Programmers Guild*, the court dismissed the case under Fed. R. Civ. P. 12(b)(1) (lack of subject-matter jurisdiction). *Id*. at 245. The *Programmers Guild* opinion could not possibly provide authority on the merits issue of ratification because a court that pronounces on the merits when it has no jurisdiction to do so acts *ultra vires*. *Ruhrgas Ag v. Marathon Oil*, 526 U.S. 574, 583 (1999).

IV. The Immigration Reform and Control Act of 1986 did not delegate discretion for DHS to decide when noncitizens may work in the United States.

In its opening brief, DHS raised a new defense that, if confirmed by the court, would profoundly change American immigration law. DHS claims (1) "Congress [] delegated responsibility to the Attorney General to determine which aliens are 'authorized' for employment in the United States. *Id*. (8 U.S.C. § 1324a(h)(3))." DHS Br. p. 5; and (2) "Moreover, since 1986, Congress has expressly delegated to the Secretary broad discretion to determine when noncitizens may work in the United States." DHS Br. p. 21 (citing IRCA, § 101(a)). Those claims misrepresent the plain text of the IRCA statute.

IRCA § 101 (creating a new § 247A of the INA codified at 8 U.S.C. § 1324a) for the first time, criminalized and imposed civil sanctions for the act of hiring an alien who is not authorized to work in the United States. INA § 247A(h)(3) defines the term *unauthorized alien*, that is, those whom it is unlawful for employers to hire:

> (3) DEFINITION OF UNAUTHORIZED ALIEN.—As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

INA § 247A(h)(3) (codified at 8 U.S.C. § 1324a(h)(3)).

In recent months, DHS has serially recast this prohibition on hiring unauthorized aliens ever more broadly as a grant of authority for it to allow aliens to work in the United States. Last year, DHS described § 247A(h)(3) as a provision, "which refers to the Secretary's authority to authorize employment of noncitizens in the United States," without identifying the source of the authority being referred to. Employment Authorization for Certain H–4 Dependent Spouses, 79 Fed. Reg. 26,886, 26,887 (proposed May 12, 2014). This year, DHS reinterpreted § 247A(h)(3) as, "recognizes the Secretary's authority to extend employment to noncitizens in the United States." Employment Authorization for Certain H–4 Dependent Spouses, 80 Fed. Reg. 10,284, 10285 (Feb. 25, 2015) (codified at 8 C.F.R. §§ 214, 274a). This later interpretation, as reflected in DHS's opening brief, conflicts with the structure and legislative intent of IRCA and the context of §1324a(h)(3) in the statutory scheme of the INA.

A. Section 101 of IRCA does not grant DHS any authority to allow aliens to work.

Section 1324a does not confer on DHS any authority to allow aliens to work. It merely prohibits *employers* from hiring unauthorized aliens. The exclusion of those "authorized to be employed by … the Attorney General" from being unauthorized aliens simply makes the section work rationally with the rest of IRCA. § 1324a(h)(3)(B). Other sections of IRCA contain seven specific, mandatory directives for the Attorney General to authorize aliens without visas who are in the legalization process to engage in employment. § 201 ("Legalization") 100 Stat. 3397, 3399 (two), § 301 ("Lawful Residence for Certain Special Agriculture Workers") 100 Stat. 3418, 3421 (two), 3428. In the absence of the clause "or by the Attorney General" in § 1324a(h)(3)(B), such aliens would be authorized to work but it would be illegal for employers to hire them. *See*, S. Rep. 99-132, p. 43 ("An alien employed as a transitional worker and in possession of a properly endorsed such work permit or

other documentation shall, for purpose of INA section 247A, be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation.").

B. DHS's interpretation of § 1324a nullifies other provisions of the INA.

The court should scrutinize the DHS claim of general executive discretion *in pari materia* with the extensive mandatory provisions regulating employment-based admissions. *Griffith v. Lanier*, 521 F.3d 398, 402 (D.C. Cir. 2008) (stating courts read a body of statutes addressing the same subject matter *in pari materia*, as if they were one law). Looking at the INA as a whole, the DHS claim of unfettered executive discretion over alien employment authorization must be rejected because it would nullify the many provisions of the act governing alien employment. *See*, *Walker*, 533 U.S. at 174 (stating courts have a "duty to give effect, if possible, to every clause and word of a statute") (citation and internal quotations omitted). One example is § 1182(a)(5)(A) that bars the admission of "any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor" unless the Secretary of Labor—not DHS—has "determined and certified" that such employment will not adversely affect the employment, wages or working conditions of similarly employed U.S. workers.[7] Aliens who have already been admitted, including F-1 visa holders applying for OPT benefits, who are "present in the United States in violation of this Act" and fail to request and receive labor certification from the Secretary of Labor, are also removable. 8 U.S.C. § 1227(a)(1)(A)–(B). Nothing in the legislative history of IRCA or subsequent federal legislation regarding the employment of aliens supports the DHS interpretation of § 1324a.

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7 Section 1182(a)(5)(A) was restored in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 101-649, § 302(e)(6), 105 Stat. 1733, 1746. Under the canon *leges posteriores priores contrarias abrogant*, it takes precedence over IRCA. *Beals v. Hale*, 45 U.S. 37, 53 (1846). Nonetheless, there is no conflict that requires invoking that canon unless one adopts the novel interpretation of § 1324a DHS puts forth. *Id.*

C. There is no precedent supporting DHS's interpretation of § 1324a.

There is no precedent in this circuit holding that § 1324a gives DHS the authority to authorize aliens to work in the United States. DHS cites a Ninth Circuit opinion, *Arizona Dream Act Coalition v. Brewer*, in support of that proposition. 757 F.3d 1053, 1062 (9th Cir. 2014). However, *Arizona Dream Act* is directly contradicted on that point by another opinion from the Ninth Circuit, *Guevara v. Holder,* 649 F.3d 1086 (9th Cir. 2011). In *Guevara*, the Ninth Circuit held that there was "nothing in the statute [8 U.S.C. § 1324a] or administrative regulation to provide for more" than "merely allow[ing] an employer to legally hire an alien (whether admitted or not) while his [adjustment of status] application is pending." *Id.* at 1095. As authority for DHS's new interpretation of § 1324a, *Arizona Dream Act* stands alone. The otherwise unanimous view of the courts is that the purpose of § 1324a is to restrict alien employment (not to grant DHS unfettered power to authorize aliens to work). *E.g.*, see, *Rivera v. United Masonry*, 948 F.2d 774, 776 (D.C. Cir. 1991); *Richmond v. Holder*, 714 F.3d 725, 728 n.1 (2d Cir. 2013); *Castro v. AG of the United States*, 671 F.3d 356, 369 n.9 (3d Cir. 2012); *Ferrans v. Holder*, 612 F.3d 528, 532 (6th Cir. 2010); *Guevara,* 649 F.3d at 1095*; United States v. Ala.*, 691 F.3d 1269, 1289 (11th Cir. 2012).

Finally, DHS's evocation of INA section 214(a), 8 U.S.C. § 1184(a) as authority for the proposition that DHS possesses "broad discretion to determine the most effective way to administer the laws" is also misleading. DHS Br. p. 16–17. Section 1184(a) "authorizes" the Attorney General (now DHS) to condition the admission to the United States of an alien for such time and under such regulations as the Attorney General may prescribe" but also such regulations must "insure that at the expiration of such time or upon failure to maintain the status under which he was admitted … *such alien will depart from the United States*" § 1184(a)(1) (emphasis added). DHS authority under section 1184(a) is by no means discretionary, and by its express terms may be exercised only to *augment* conditions of admission, in order

to "insure" that the alien will leave the United States once the terms of temporary admission have been completed. Even if, hypothetically, DHS had the authority to authorize graduates to work on F-1 visas, it still lacks the authority to allow such aliens to remain in the United States. *C.f.*, *Guevara, 649* F.3d at 1095.

CONCLUSION

For the reasons set forth in Washtech's opening brief and response, the 2008 OPT Rule is in excess of DHS's authority and was promulgated without complying with the procedures required by law. The 2008 Rule must be set aside and DHS should be enjoined from further expanding the scope of work on student visas performed by non-student graduates.

Respectfully submitted,
Dated: Apr. 6, 2015

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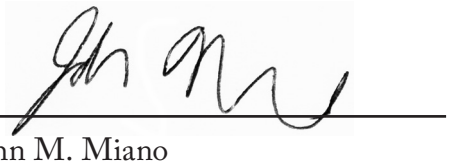
In the United States District Court for the District of Columbia

Washington Alliance of Technology Workers; 13401 Bel-Red Rd. #B8 Bellevue, WA 98005 *Plaintiff,* *v.* U.S. Dep't of Homeland Security; Office of General Counsel Washington, DC 20258. *Defendant.*	Civil Action No. 1:14-cv-529-ESH

Certificate of Service

I certify that on Apr. 6, 2015, I filed the attached Response Brief in Support of Plaintiff's Cross Motion for Summary Judgment or Judgment on the Administrative Record with the Clerk of the Court using the CM/ECF system that will provide notice and copies to the Defendant's attorneys of record.



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