

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

WASHINGTON ALLIANCE OF )  
TECHNOLOGY WORKERS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
 )  
Defendant. )

Civil Action No. 14-529-ESH

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**DEFENDANT’S MOTION UNDER FED. R. CIV. P. 60(b)(6)  
FOR LIMITED RELIEF FROM THE COURT’S ORDER  
AND MEMORANDUM IN SUPPORT**

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DATED: December 22, 2015

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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.<sup>1</sup> Staying vacatur of the 2008 STEM OPT Extension Rule for

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<sup>1</sup> 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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