UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Civil Action No. 16-cv-1170 (RBW)

DEFENDANTS' RENEWED MOTION TO DISMISS

Under Federal Rules of Civil Procedure 12(b)(1) and (6), Defendants hereby move this Court to dismiss Plaintiff's Complaint because this Court no longer has jurisdiction over Plaintiffs' claims or because Plaintiffs have failed to state a claim upon which relief may be granted. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. A proposed order is attached.

Dated: October 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 18, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will deliver a copy to all counsel of record.

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UNITED STATES DISTRICT COURT
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WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 16-cv-1170 (RBW)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR RENEWED MOTION TO DISMISS

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INTRODUCTION

This Court should dismiss the sole remaining claim in the Washington Alliance of Technology Workers' ("Washtech") complaint. That claim alleges that the Department of Homeland Security's 2016 STEM Optional Practical Training Rule, 81 Fed. Reg. 13,039 (Mar. 11, 2016) ("2016 STEM OPT Rule"), exceeds DHS's authority under the Immigration and Nationality Act ("INA"). *See* Compl. ¶¶ 62–63 (Count II).

Washtech's sole remaining claim is time-barred. Under federal law, a civil action "commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Washtech's remaining claim challenges DHS's authority to issue an OPT Rule *at all*. But any cause of action that Washtech may have had "first accrue[d]" (*id.*) in 1992— when DHS last promulgated an OPT Rule that actually addressed the policy of allowing aliens to remain in the United States to work after graduation (that is, "post-completion" or post-graduation OPT). As the D.C. Circuit recognized in Washtech's appeal of this case, "the six-year statute of limitations on" Washtech's challenge thus "closed in 1998." *Wash. Alliance of Tech. Workers v. DHS* ("*Washtech III*"), 892 F.3d 332, 342 (D.C. Cir. 2018). Washtech's suit—filed in 2016—comes far too late.

Washtech has suggested that its last remaining claim is not time-barred because DHS "reopened" the question of its authority by promulgating the 2016 STEM OPT Rule. *See* Compl. ¶ 55. This suggestion is meritless. The 2016 STEM OPT Rule did not reopen the issue of DHS's authority over post-completion OPT. Since 1992, neither DHS nor its predecessor agency has sought comment on the agency's authority to allow such training. With the 2016 STEM OPT Rule, DHS never suggested that it would undertake a substantive reconsideration of its authority for such training—and it did not do so. The reopening doctrine does not permit Washtech to now revisit that same issue of agency authority over *twenty-five years* after that issue was subjected to notice and comment. Holding otherwise would undermine the purpose of statutes of limitations—to secure prompt and final review of agency decisions. *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989).

Accordingly, what is left of Washtech's Complaint, Count II, should be dismissed.

BACKGROUND

I. Statutory and Regulatory Background.

Since 1952, Congress has authorized DHS and its predecessor, the Immigration and Naturalization Service ("INS"), to establish regulations to implement and administer the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1103(a)(3). Among the Secretary of Homeland Security's delegated duties is determining the conditions upon which designated classes of nonimmigrant aliens—foreign nationals who enter the United States for fixed, temporary periods of time—may be admitted and allowed to maintain nonimmigrant status within the United States. *See id.* § 1101(a)(15)(F) (designating the F nonimmigrant student category); *id.* § 1184(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.").[1] DHS establishes such conditions for many groups of nonimmigrant aliens, including foreign students. "DHS and its predecessor agencies have long permitted aliens with [F-1] student visa status to remain in the United States after graduation to participate in the workforce as part of an Optional Practical Training program." *Wash. All. of Tech. Workers v. DHS*, 857 F.3d 907, 909 (D.C. Cir.

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[1] In 2002, Congress passed the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, which abolished the INS (which had been housed in the Department of Justice) and transferred many of the Attorney General's functions to DHS. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

2017); *see* 8 U.S.C. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f)(5)(i). For students present in the United States in F-1 nonimmigrant status, current regulations provide that "[d]uration of status is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution approved by [DHS] for attendance by foreign students, or engaging in authorized practical training following completion of studies." 8 C.F.R. § 214.2(f)(5)(i); *see also id.* § 214.2(f)(10); 48 Fed. Reg. 14,575, 14,583–84 (Apr. 5, 1983).

The most recent revision to the general OPT program was issued in 1992, via an interim final rule, when the INS promulgated an OPT regulation that reinstituted pre-completion practical training, and importantly, continued to authorize "post-completion" practical training for 12 monthsto F-1 nonimmigrant students. *See* 57 Fed. Reg. 31,954-01 (July 20, 1992) and 8 C.F.R. § 214.2(f)(10) & (11). Practical training is intended to enhance students' educational experience by allowing F-1 students to obtain a different perspective on their course of study. *See* 48 Fed. Reg. at 14,577 ("Various suggestions were made which the Service is not adopting that practical training be eliminated for some or all students. The Service believes that restrictions of this type would impede the development of knowledge and skills which occurs through meaningful practical training experiences and their subsequent transfer to other countries.").

The public previously had several opportunities to comment on OPT when the INS published a notice of proposed rulemaking ("NPRM") in 1982 requesting comments on OPT. *See* 47 Fed. Reg. 23,463 (May 28, 1982); 47 Fed. Reg. 27,565 (June 25, 1982). The INS proposed authorizing "post-completion" or post-graduation OPT, addressed nearly 100 comments concerning practical training, and established the current structure of the practical-training regulations. *See* 48 Fed. Reg. 14,575, 14,577 (Apr. 5, 1983). In 1991 the INS published another NPRM proposing (*inter alia*) to clarify that post-graduation OPT would be permissible regardless of whether students pursued another program after completing authorized OPT. *See* 56 Fed. Reg. 27211-01, 27215 (June 13, 1991). The INS received more than 300 comments before implementing several OPT amendments. *See* 56 Fed. Reg. 55608 (Oct. 29, 1991). Ultimately, the INS next published the 1992 rule ("1992 OPT Rule"), 8 C.F.R. § 214.2(f)(10)(ii), "with request for comments," and amended elements of the existing practical training program—primarily "restor[ing]" a pre-completion practical training provision that had existed before the 1991 amendment and allowed for 12 months of OPT after a student's graduation, 57 Fed. Reg. 31,954-01 (July 20, 1992). (There is accordingly no merit to Washtech's allegation that "[t]he 1992 OPT Rule was promulgated without notice and comment." Compl. ¶ 43.)

A. The 2008 STEM OPT Rule.

In 2008, DHS issued an interim final rule, with a request for comments, that expanded the 12-month OPT period for certain students. The 2008 rule allowed certain students with qualifying Science, Technology, Engineering, and Mathematics ("STEM") degrees to apply for a 17-month extension of optional practical training. *See* 73 Fed. Reg. 18,944 (2008) ("2008 STEM OPT Rule"). The 2008 STEM OPT Rule prompted two court challenges.

The first of those challenges, *Programmers Guild, Inc. v. Chertoff*, was filed in 2008 in the District of New Jersey on behalf of domestic workers in or about to enter the STEM job market and organizations representing them. *See* 338 F. App'x 239, 241 (3d Cir. 2009). The plaintiffs alleged that DHS exceeded its statutory authority and violated the Administrative Procedure Act ("APA") in issuing the 2008 STEM OPT Rule. *Id.* The district court dismissed the case, holding that the plaintiffs lacked standing and that their claims lacked merit. *See Programmers Guild v. Chertoff*, No. 08-cv-2666, ECF No. 42 (D.N.J. Oct. 31, 2008). The Third Circuit affirmed on prudential standing grounds. *Programmers Guild*, 338 F. App'x at 244.

In 2014, Washtech filed a suit purporting to challenge both the 2008 STEM OPT Rule and the 1992 OPT Rule. It alleged that the Rules exceeded DHS's statutory authority and conflicted with the INA, and further alleged that the 2008 extension was arbitrary and capricious, was issued without good cause to forgo notice and comment, and violated regulations governing incorporation by reference. *See Wash. Alliance of Tech. Workers v. DHS*, 74 F. Supp. 3d 247, 250 (D.D.C. 2014) (Huvelle, J.) ("*Washtech I*"). At the motion-to-dismiss stage, the district court ruled that it lacked jurisdiction over Washtech's challenge to the 1992 OPT Rule because no Washtech member alleged injury from the Rule and because the claims were time-barred under the six-year limitations period imposed by 28 U.S.C. § 2401. *Id.* at 250–53 & n.3.

The district court did, however, invalidate the 2008 STEM OPT Rule at the summary judgment stage. *See Wash. Alliance of Tech. Workers v. DHS*, 156 F. Supp. 3d 123 (D.D.C. 2015). Judge Huvelle concluded that Washtech had established standing by alleging an adverse job-market impact on its members. *See id.* at 132–33. The court relied on the affidavits of three Washtech members—Rennie Sawade, Douglas Blatt, and Ceasar Smith—for this proposition. Each asserted that he was a computer programmer who had applied for computer jobs after the 2008 STEM OPT Rule was issued, and pointed to job advertisements from technology employers soliciting STEM OPT students under the 2008 STEM OPT Rule as proof that they faced increased job competition in their job market. Judge Huvelle ruled that Washtech had demonstrated injury by showing that the affiants were "part of the computer programming labor market," had "sought out a wide variety of STEM positions with numerous employers, but [had] failed to obtain those positions following the promulgation of the OPT STEM extension in 2008." *Id.* at 132. On the merits, the court rejected Washtech's claims that DHS lacked authority to promulgate the OPT program. *Id.* at 138, 139–43. But the court invalidated the 2008 STEM OPT Rule because DHS had issued it without proper notice and comment. *Id.* at 147. The court vacated the 2008 STEM OPT Rule but stayed vacatur to allow DHS to issue a new rule following notice and comment or take other corrective action. *Id.* at 148–49.

B. The 2016 STEM OPT Rule.

Soon after the decision in *Washtech I*, DHS issued an NPRM, with a request for comments, seeking to address the shortfalls identified in Judge Huvelle's decision. *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. 63,376 (Oct. 19, 2015). The NPRM proposed to amend the F-1 nonimmigrant student regulations for certain students with STEM degrees from U.S. institutions to "allow such F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months." *Id.* at 63,376. DHS explained that "[t]his 24-month extension would effectively replace the 17-month STEM OPT extension currently available to certain STEM students," *id.*, which was the subject of *Washtech I*. The NPRM included additional measures to enhance the academic benefits of the STEM OPT extension and to prevent adverse effects on U.S. workers. *Id.* The NPRM discussed these proposed changes in detail. *See id.* at 63,379–94. DHS sought comment only on "reinstat[ing] the STEM OPT extension," and "increas[ing] program oversight," *see id.* at 63,378; the agency also made clear that it "[wa]s not considering adding the requirements contained within this rulemaking to the general OPT program," *id.* at 63,384.

In March 2016, DHS issued its final 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. 13,040 (Mar. 11, 2016), which took effect on May 10, 2016. *Id.* The rule provides:

> [A] qualified student may apply for an extension of OPT while in a valid period of post-[graduation] OPT .... An extension will be for 24 months for the first qualifying degree for which the student has completed all course requirements ... , including any qualifying degree .... If a student completes all such course requirements for another qualifying degree at a higher degree level than the first, the student may apply for a second 24-month extension of OPT while in a valid period of post-[graduation] OPT .... In no event may a student be authorized for more than two lifetime STEM OPT extensions.

Id. at 13,117–18. DHS explained the basis and purpose of regulatory action, including: (1) the benefits of international students in the United States; (2) the increased competition for international students globally; and (3) the necessity for improving the existing STEM OPT extension (the 2008 STEM OPT Rule). *Id.* at 13,047–49. DHS devoted over 60 pages to explaining the basis and purpose of each feature of the 2016 STEM OPT Rule and responding to the approximately 50,500 comments. *Id.* at 13,049–109. DHS also noted: "To the extent that comments challenging DHS's legal authority concerned the OPT program generally, such comments are outside the scope of this rulemaking, which relates specifically to the availability of STEM OPT extensions. DHS did not propose to modify the general post-completion OPT program in the proposed rule." 81 Fed. Reg. 13,059. This aspect of the 2016 STEM OPT Rule is confirmed by the previously issued NPRM, which noted how "the focus of th[e] rule on the extension of OPT for STEM students also represents a step by the agency to improve a *discrete portion of the practical training program*." 80 Fed. Reg. 63,384 (emphasis added).

On May 13, 2016, the D.C. Circuit vacated the district court's decision on the 2008 STEM OPT Rule as moot. *Wash. All. of Tech. Workers v. DHS*, 650 F. App'x 13 (D.C. Cir. 2016).

II. Procedural Background

In June 2016, Washtech filed this suit challenging both the 1992 OPT Rule and the 2016 STEM OPT Rule. It brought four claims. Count I claimed that the 1992 OPT Rule exceeded the agency's statutory authority under the INA. *See* Compl. ¶¶ 54–61. Count II claims that the 2016

STEM OPT Rule exceeds DHS's statutory authority. *See id.* ¶¶ 62–63. Count III claimed that the 2016 STEM OPT Rule was issued in violation of the Congressional Review Act, without notice and comment, and without complying with incorporation-by-reference requirements. *See id.* ¶¶ 64–80. Count IV claimed that the 2016 STEM OPT Rule is arbitrary and capricious. *See id.* ¶¶ 81–84.

This Court granted Defendants' previous motion to dismiss the entirety of Washtech's Complaint. *See Wash. All. of Tech. Workers v. DHS* ("*Washtech II*"), 249 F. Supp. 3d 524 (D.D.C. 2017). It dismissed Count I (the challenge to the 1992 OPT Rule's statutory authority) on two alternative grounds. First, because Washtech "fail[ed] to address the Government's argument that it lacks standing" in its opposition to the motion to dismiss. *Id.* at 536. Second, the Court held that Washtech in fact did not have standing. *Id*. at 536–37. The Court dismissed Count II (the challenge to the 2016 STEM OPT Rule's statutory authority) based on Washtech's same failure "to address the Government's arguments" that Washtech insufficiently pleaded the claim in its opposition to the motion to dismiss. *Id*. at 555. It did not address the reopening doctrine. *See id.* at 538 n.3. The Court dismissed Count III on the same argument of concession and Washtech's failure to plead a cause of action in Count III. *Id*. at 555. The district court dismissed Count IV for failure to state a claim for relief. *Id.* at 555–56.

Washtech appealed and the D.C. Circuit largely affirmed, except that it reversed the dismissal of Count II and remanded with instructions that this Court consider in the first instance the question "whether Washtech's challenge to the general OPT program's statutory authority was reviewable under the reopening doctrine." *Washtech III*, 892 F.3d at 346 (citing *Washtech II*, 249 F. Supp. 3d at 537 n.3 (declining "to assess whether DHS's promulgation of the 2016 STEM OPT Program Rule substantively changed the 1992 OPT Program Rule, such that it reopened the statute of limitations to challenge the 1992 OPT Program Rule")). The court of appeals noted that "whether Count II may proceed remains in question" given that, without reopening, "the six-year statute of limitations on such a challenge closed in 1998." *Id.* at 345.

After a status hearing upon remand, ECF No. 36, this Court ordered that Defendants file their contemplated motion to dismiss on Washtech's sole remaining claim of Count II—the claim that "the entire OPT program is *ultra vires*" under the 2016 STEM OPT Rule, *Washtech III*, 892 F.3d at 345 (citing Compl. ¶¶ 62–63).

STANDARDS OF REVIEW

A motion to dismiss under Rule 12(b)(1) tests whether the court has subject-matter jurisdiction over an action. Unless another statute provides otherwise, civil claims against the United States—including those brought under the APA—are subject to the statute of limitations contained in 28 U.S.C. § 2401, which allows for civil actions against the United States when "the complaint is filed within six years after the right of action first accrues." *See Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004).[2] As the D.C. Circuit recognized on appeal in this case, that six-year period applies here: "The 1992 Rule was unquestionably final agency action. Therefore, the

[2] The circuits are divided as to whether the six-year statute of limitations on APA claims is jurisdictional. *See, e.g.*, *Chance v. Zinke*, 898 F.3d 1025, 1030–33 (10th Cir. 2018) (describing the split and holding that section 2401(a) is not jurisdictional); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 812 (6th Cir. 2015) (Sutton, J.) (disagreeing with D.C. Circuit and holding that section 2401(a) is not jurisdictional). It is largely immaterial to this case whether section 2401(a) is jurisdictional. This Court has recognized that "the only consequence of § 2401(a)'s nonjurisdictionality is to change the basis for dismissal from Rule 12(b)(1) to Rule 12(b)(6)." *P & V Enters. v. U.S. Army Corp of Eng'rs*, 466 F. Supp. 2d 134, 142–43 (D.D.C. Cir. 2006) (Walton, J) (citing *Lindsey v. United States*, 448 F. Supp. 2d 37, 54–55 (D.D.C. 2006) (Walton, J.) (discussing the reasons why "a defendant does not waive its right to assert that the plaintiff has failed to state a claim upon which relief can be granted simply by not including that defense in its initial Rule 12(b) motion to dismiss")), *aff'd on other grounds*, 516 F.3d at 1026.

six-year window to directly challenge the statutory authority of the 1992 Rule closed in 1998." *Washtech III*, 892 F.3d at 342.

In evaluating a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), "the court need not accept factual inferences drawn by plaintiffs if those inferences are not supported by facts alleged in the complaint, nor must the [c]ourt accept plaintiff's legal conclusions." *Disner v. United States*, 888 F. Supp. 2d 83, 87 (D.D.C. 2012) (quoting *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006)). Finally, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000).

APA review of agency action is a legal determination that can be made by reviewing the controlling statutes, relevant agency and federal court decisions, and the administrative record. In other words, "[t]he entire case on review is a question of law, and only a question of law." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993); *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001) (claim that agency decision violates statute it "is charged with enforcing" requires no more than "the statute and legislative history").

ARGUMENT

Washtech's sole remaining claim is time-barred. Under 28 U.S.C. § 2401(a) and *Washtech III*, any lawsuit facially challenging DHS's authority to allow for optional practical training needed to be filed by 1998—six years after the INS published that Rule in the *Federal Register*. 892 F.3d at 342 & n.4. Washtech failed to meet its deadline. And Washtech's effort to evade the statute of limitations through the reopening doctrine fails: the 2016 rulemaking did not propose, invite comments on, or effect any change in whether OPT would be authorized—and so it did not reopen the issue of DHS's authority.

I. Washtech's Sole Remaining Claim—That The 2016 STEM OPT Rule Is *Ultra Vires*—Is Time-Barred.

Just as Washtech's claim against the 1992 OPT Rule's authorization of post-completion OPT as *ultra vires* was time-barred, *Washtech III*, 892 F.3d at 342, the same substantive claim against the 2016 STEM OPT Rule is also time-barred. In essence, Washtech is trying to use the 2016 STEM OPT Rule to make the same *ultra vires* claim that was previously dismissed by this district court (and affirmed by the court of appeals) with respect to the 1992 OPT Rule. The Court should reject that effort.

To start, Washtech's remaining claim is barred by the governing statute of limitations. A six-year statute of limitations generally applies to challenges against the United States. The statute provides: "(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). APA claims are subject to this six-year statute of limitations. *P & V Enters.*, 466 F. Supp. 2d at 142–44; *see also Washtech I*, 74 F. Supp. 3d at 252 n.3 ("The Court treats the 1992 regulation on post-completion training available to nonimmigrant students as the existing rule because it established and named the twelve-month OPT program as it currently operates." (citing 57 Fed. Reg. 31,954 (1992))). In a facial challenge to the substance of a regulation, the "limitations period begins to run when the agency publishes the regulation." *Hire Order, Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (quoting *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)). Washtech's remaining claim challenges DHS's authority to issue an OPT Rule *at all*. Any cause of action that Washtech may have had "first accrue[d]" (*id.*) in 1992—when DHS promulgated an OPT Rule that put into question the issue of its authority. As the D.C. Circuit recognized in Washtech's appeal of this case, "the six-year statute of limitations on" Washtech's challenge thus "closed in 1998." *Wash. Alliance of Tech. Workers v. DHS*, 892 F.3d 332, 339 (D.C. Cir. 2018). Washtech's suit—filed in 2016—comes far too late.

This Court has recognized that "there are only two ways in which the facial validity of '[a]n agency's regulations may be attacked ... once the statutory limitations period has expired,'" *P & V Enters.*, 466 F. Supp. 2d at 143 (quoting *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987)): either (1) an "as-applied challenge" or (2) "[by] petition[ing] the agency for amendment or rescission of the regulations and then ... appeal[ing] the agency's decision," *id.* (alterations in original; citation omitted). Neither option helps Washtech. The first avenue does not help Washtech because it has never disputed that its *ultra vires* claims against both the 1992 and 2016 STEM OPT Rules are facial challenges of the sort that are covered by this rule. Washtech's complaint confirms this: the complaint points to no application of the 2016 STEM OPT Rule and simply copies and pastes *identical language* brought against the now-dismissed 1992 OPT Rule. *Compare* Compl. ¶ 61 ("[A]llowing aliens to remain in the United States after completion of the course of study to work or be unemployed is in excess of DHS authority."), *with* Compl. ¶ 63 (same). The second avenue does not help Washtech because Washtech has refused to take this option, asserting that "[a] petition for rulemaking asking DHS to reconsider the policy of allowing aliens to work after graduation would be futile." *Id.* ¶ 58. That assertion is strange, given Washtech's recent (and correct) concession in its appeal to the D.C. Circuit after *Washtech I*, that "the appropriate way to challenge a longstanding regulation on the ground that it is violative of statute is ordinarily by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition." Br. of Apl't, 2016 WL 722135, at *49; *see Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C.

Cir. 1996) (holding that "the appropriate way to challenge a longstanding regulation" as "violative of [a] statute" is ordinarily "by filing a petition for amendment or rescission of the agency's regulations" (internal quotations and citations omitted)). At all events, Washtech's refusal to take this option eliminates this route to overcoming the applicable time bar.

Because the statute of limitations for Washtech's challenge to the agency's authorization of OPT expired on July 20, 1998, *see Washtech III*, 892 F.3d at 342, Washtech's remaining claim is time-barred.

II. The 2016 Rulemaking Did Not Reopen The Issue Of Whether OPT Should Exist At All.

Washtech contends that the six-year limitations period does not apply because DHS "reopened the question of whether the policy of allowing aliens to work on student visas after graduation is lawful in the 2016 OPT Rule." Compl. ¶ 59. Washtech is wrong.

The "reopening" doctrine permits an otherwise time-barred challenge to a prior rule if the agency, through new rulemaking, "has undertaken a serious, substantive reconsideration of the existing rule or substantively changed it." *Mendoza v. Perez,* 754 F.3d 1002, 1019 (D.C. Cir. 2014). "The reopening doctrine allows an otherwise stale challenge to proceed because 'the agency opened the issue up anew,' and then 'reexamined ... and reaffirmed its [prior] decision.'" *P & V Enters.*, 516 F.3d at 1023 (quoting *Pub. Citizen v. Nuclear Reg. Comm'n,* 901 F.2d 147, 150-51 (D.C. Cir. 1990)) (alterations in original). "An explicit invitation to comment on a previously settled matter, even when not accompanied by a specific modification proposal, is usually sufficient to [e]ffect a reopening." *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 142 (D.C. Cir. 1998). "The doctrine only applies ... where 'the entire context' demonstrates that the agency 'ha[s] undertaken a serious, substantive reconsideration of the [existing] rule.'" *P & V Enters.*, 516 F.3d at 1024 (citations omitted). This requirement of "serious, substantive reconsideration" is well settled and the D.C. Circuit has made clear that *particular aspects* of old rules were not subject to fresh challenge in various situations when agencies opened rulemaking proceedings that addressed only *different aspects* of those rules. *See Envtl. Def. v. EPA*, 467 F.3d 1329, 1333–34 (D.C. Cir. 2006) ("Petitioners, however, present no evidence that EPA has ever reinterpreted section 93.118 since it was promulgated in 1997."); *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267–68 (D.C. Cir. 2003) ("Not only have petitioners failed to show that the EPA reconsidered the role of the LDR rule, but the record sections they cite indicate the opposite …. Petitioners' challenge to the EPA's use of the LDR standards is therefore barred."), *modified by*, 365 F.3d 46 (D.C. Cir. 2004); *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004) ("The EPA correctly points out that petitioners never raised these claims to the agency in the administrative proceedings when the modeling period was adopted, or in the earlier challenges in this Court. … Petitioners, having forgone the ability to attack these aspects of the model while the rule was being promulgated and initially challenged in court, cannot now do so."). The D.C. Circuit has accordingly noted that "it is absurd to suppose that every time an agency requests parties to compare the regulatory status quo with specific proposed alternatives, all facets of the status quo become fair game for new challenges." *Safe Food & Fertilizer*, 350 F.3d at 1267.

The reopening doctrine does not help Washtech because DHS did not reopen the issue of its authority to issue a general OPT rule. DHS did not undertake any "serious, substantive reconsideration" of the existing twelve-month OPT rule. *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995). DHS's 2015 NPRM sought comment on a separate 24-month extension of OPT for a limited group of F-1 nonimmigrants, which would be subject to different eligibility, training, reporting, and enforcement requirements than the generic twelve-month OPT. *See* 81 Fed. Reg. 13,058–59. Indeed, the 2015 NPRM explained that its purpose was to "make changes to the current OPT program by *lengthening the extension of the OPT period* for certain F-1 students who have earned STEM degrees." 80 Fed. Reg. at 63,377 (emphasis added). In short, DHS did not seek comment on and never reconsidered the substantive provisions of the twelve-month OPT program through the 2016 STEM OPT Rule.

In suggesting that DHS reopened the matter, Washtech's complaint cites pages in the Final Rule that (Washtech suggests) demonstrate an "explicit[]" intent to reopen the question whether the OPT program itself is lawful. Compl. ¶ 59. But these pages are either the background of OPT's regulatory history, *see* 81 Fed. Reg. 13,044–46, or various comments that DHS addressed, *id.* at 13,057–61. DHS's NPRM declined to seek such comments, 80 Fed. Reg. at 63,377, and when commenters made them anyway, DHS stated in the Final Rule that "[t]o the extent that comments challenging DHS's legal authority concerned the OPT program generally, such comments are outside the scope of this rulemaking, which relates specifically to the availability of STEM OPT extensions." 81 Fed. Reg. at 13,059. DHS emphasized that it at no point "propose[d] to modify the general post-completion OPT program in the proposed rule." *Id.* DHS did not reopen the question of statutory authority. *See P & V Enters.*, 466 F. Supp. 2d at 146–47 (holding that reopening doctrine can only be satisfied where a "serious [and] substantive [re]consideration" on the disputed issue (second alteration in original)). And, as this Court has held, mechanically describing the history of a regulatory program or referring back to that history does not reopen prior iterations of a rule to an APA challenge. *See, e.g.*, *P & V Enters.*, 466 F. Supp. 2d at 146; *Nat'l Ass'n of Mfrs. v. Dep't of Interior*, 134 F.3d 1095, 1103 (D.C. Cir. 1998).

Indeed, the D.C. Circuit has rejected the sort of reopening gambit that Washtech is pursuing here. In *American Iron & Steel Institute,* the court of appeals considered a proposed rule issued by the Environmental Protection Agency ("EPA") in 1987 that mentioned a policy regarding "postclosure permits and permits by rule" that had been enacted in 1985. *See* 886 F.2d at 397–98. Much like this case, even though the EPA had not explicitly reopened the question whether such permits should be treated as Resource Conservation and Recovery Act permits, the EPA received some comments on the matter and responded briefly to them by reaffirming its position in the final rule. *Id.* at 398. The D.C. Circuit held that the agency's action did not restart the statutory period for challenging the EPA's 1985 regulation, remarking that "[t]he 'reopening' rule … is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue." *Id.* This same maneuver is at the core of Washtech's reopening argument, and its claim should be dismissed. *See also Biggerstaff v. FCC*, 511 F.3d 178, 186 (D.C. Cir. 2007) ("[A]n agency [does not] reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter."); *Kennecott*, 88 F.3d at 1213 (same). Indeed, Judge Huvelle, applying these same principles, rejected a similar reopening argument by Washtech:

> In the subsequent 2008 rulemaking DHS did not reconsider the substance of the existing rule that authorized nonimmigrants with F-1 visas to remain in the country during a temporary period of employment following completion of their studies. On the contrary, in seeking comments on the 2008 extension, DHS did not open the door to comments on the general twelve-month OPT program. The agency action merely expanded the length of time an F-1 visa holder trained in a narrow set of skills could remain in the OPT program. Although the authorized extension more than doubled the length of practical training available to STEM students, it is narrowly tailored to affect only a select group of nonimmigrant students who apply for the extension. This modification does not suggest that DHS reopened the existing rule by seriously reconsidering or substantively changing it. Thus, the six-year statute of limitations applies, barring plaintiff's first three claims.

Washtech I, 74 F. Supp. 3d at 252 n.3. That reasoning applies to the 2016 STEM OPT Rule: nothing in DHS's NPRM purported to question the OPT program authorized in 1992, nor implied any intent to alter or reconsider that interpretation, nor sought any comment on that subject.

In short, because (1) the 2015 NPRM did not suggest any change to the agency's interpretation of its authority to authorize OPT, (2) the 2016 STEM OPT Rule added nothing substantively new to the OPT program generally, and (3) DHS expressly disclaimed reconsideration of that program, the reopening doctrine has no application here. Washtech's challenge to the 2016 STEM OPT Rule as exceeding DHS's authority is time-barred and should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Count II and this case.

DATED: October 18, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this October 18, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Joshua S. Press
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Trial Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	)	Civil Action No. 16-cv-1170 (RBW)

[PROPOSED] ORDER GRANTING
DEFENDANTS' RENEWED MOTION TO DISMISS

Before the Court is Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). Having considered the motion, Plaintiff's opposition thereto, any reply, and oral argument, if any, the Court hereby GRANTS Defendants' Motion to Dismiss in its entirety.

Dated: ______________________

____
Hon. Reggie B. Walton
United States District Judge