NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE PROGRAMMERS GUILD, INC.; AMERICAN ENGINEERING ASSOCIATION; BRIGHT FUTURE JOBS; MICHAEL AMANTI; MARK BLACKBURN; TONI L. CHESTER; DAVID HUBER; JOHN G. MARSON; GENE A. NELSON; P. HARRISON PICOT II; PAUL E. POLAK; MIKE ROTHSCHILD; and ROBERT SANCHEZ,	Civil Case No. 08-2666 (FSH)
Plaintiffs,	**ORDER and OPINION**
v.	Date: August 5, 2008
MICHAEL CHERTOFF in his capacity as Secretary of Homeland Security and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	
Defendants.	

HOCHBERG, District Judge

This matter comes before the Court upon Plaintiff's application for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). The Court has reviewed the submissions of the parties and considered the motion on the papers in accordance with Fed. R. Civ. P. 78.

I. BACKGROUND

The Programmers Guild, Inc.; American Engineering Association; Bright Future Jobs; Michael Amanti; Mark Blackburn; Toni L. Chester; David Huber; John G. Marson; Gene A. Nelson; P. Harrison Picot Ii; Paul E. Polak; and Mike Rothschild, ("Plaintiffs") are a group of three representative organizations and ten individuals trained in computer programming and engineering. Plaintiffs bring this motion for a preliminary injunction to enjoin Defendants, the Department of Homeland Security ("DHS") and Secretary of DHS, Michael Chertoff, from

implementing an Interim Final Rule ("IFR"), which extends the period of time technically-trained students may remain within the United States as lawful nonimmigrants[1] while participating in the Optional Practical Training ("OPT") program. The IFR, adopted by the DHS on April 8, 2008, provides for eligible alien students with degrees in mathematics, engineering, science, or technology disciplines who are applying for H-1B[2] visas to work under an F-1[3] student visa for 29 months.

Prior to the promulgation of the IFR, the DHS had limited OPT to 12 months. See 8 C.F.R. § 214.2(f)(11) (207). The IFR allows for eligible graduates to apply to the United States Citizenship and Immigration Services ("USCIS") for an extension of post-completion OPT for an additional 17 months. The government has changed these time periods in the past: a maximum of 18 months in 1947; a maximum of 12 months in 2007; and, under the challenged provision, a maximum of 29 months in 2008. Consequently, Defendants argue that the IFR did not create a new classification of foreign workers or a new visa category, but instead, increased the period for a long-standing benefit.

Plaintiffs claim that IFR was promulgated by Secretary Chertoff and the DHS without notice and comment, in violation of the Administrative Procedure Act. Plaintiffs further argue that without a preliminary injunction, they will face an immediate increase in job competition from the F-1 guest workers in the competitive industries of engineering and computers. According to Plaintiffs, the grant of the injunction would not cause any irreparable harm to

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[1] See 8 U.S.C. § 101(a)(15)(F)(i).

[2] An H-1B visa is a temporary visa for guest workers in specialty occupations, valid up to 6 years. 8 U.S.C. § § 1101(a)(15)(H); 1182(g)(4).

[3] An F-1 nonimmigrant is defined at 8 U.S.C. § 1101(a)(15)(F) as

> an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with [8 U.S.C. § 1184(1)] at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States...

Defendants, who do not have an interest in the promulgation of the IFR. Lastly, Plaintiffs contend that the injunction is in the public interest of protecting the jobs and wages of U.S. workers and ensuring that Defendants follow procedures under the Administrative Procedure Act.

II. STANDARD FOR PRELIMINARY INJUNCTION

The Supreme Court has stated that "a preliminary injunction is 'an extraordinary and drastic remedy'; it is never awarded as of right." Munaf v. Geren, __ U.S. __, 128 S. Ct. 2207, 2219 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). The Third Circuit has held that to obtain a preliminary injunction, the moving party must demonstrate:

> (1) the reasonable probability of eventual success in the litigation and
>
> (2) that the movant will be irreparably injured pendent lite if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court 'should take into account, when they are relevant,
>
> (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and
>
> (4) the public interest.

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). In the current case, Plaintiffs have the burden of establishing the that they satisfy the requirements for a preliminary injunction.

III. DISCUSSION

A. Plaintiffs fail to demonstrate likelihood of success on the merits.

To prevail on their motion for a preliminary injunction, Plaintiffs must demonstrate a likelihood of success on the merits. The Supreme Court has stated,

> Review of a preliminary injunction 'is not confined to the act of granting the injunctio[n], but extends as well to determining whether there is any insuperable objection, in point of jurisdiction or merits, to the maintenance of [the] bill, and if so, to directing a final decree dismissing it.'

Id. at 2219 (quoting City and County of Denver v. New York Trust Co., 229 U.S. 123, 136 (1913) (alteration in original). In the current case, the government argues that Plaintiffs lack standing.[4] Though the Court will permit further briefing before making a final determination of Plaintiffs' standing, the serious questions related to standing cast doubt on Plaintiffs' likelihood of success. Instead of alleging a concrete injury, Plaintiffs assert a generalized grievance with a particular government policy. Courts have consistently held that

> a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 (1992).[5] Plaintiffs claim that by promulgating the IFR, the DHS threatens the jobs and wages of U.S. citizens. However, this allegation expresses a general dissatisfaction with the DHS policy towards employment of nonimmigrant visa holders. The complaint also seeks relief that no more directly benefits Plaintiffs than it does the public at large. Thus, the Plaintiffs' claim suffers from serious potential standing problems.

In addition, Plaintiffs are unlikely to succeed on their claim because the DHS had authority to promulgate the IFR. Congress granted the Secretary of the DHS statutory authority

[4] The Court does not decide standing issue in this opinion; the Court today issues an Order to Show Cause why the case should not be dismissed for lack of standing.

[5] See Allen v. Wright, 468 U.S. 737, 754 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 483 (1982) ("assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning"); see also Lujan, 504 U.S. at 575 (quoting United States v. Richardson, 418 U.S. 166, 171, 176-77 (1974)) (where plaintiffs, who sued the government for an alleged constitutional violation of failure to disclose expenditures, raised an impermissible "generalized grievance" that was inconsistent with "the framework of Article III" because "the impact on [plaintiffs was] plainly undifferentiated" and "common to all members of the public").

to "establish such regulations...as he deems necessary for carrying out his authority under the provisions of [the Immigration and Nationality] Act." 8 U.S.C. § 1103(a)(3). Congress also conferred regulatory authority upon the DHS to set the time period in which nonimmigrants can remain in the country.[6] This means that the DHS is within its authority to promulgate the IFR. "All agencies charged with enforcing and administering a statute have inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." Metropolitan Sch. Dist. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992). Courts "give deference to the interpretation of a statute by the agency charged with administering it." Southern Cal. Edison Co. v. Fed. Energy Reg. Comm'n, 770 F.2d 779, 782 (9th Cir. 1985). The practice of giving discretion to agencies further undermines Plaintiffs' complaint against the DHS.[7]

B. Plaintiffs fail to demonstrate irreparable harm.

Plaintiffs also fail to show that they will be irreparably harmed if the preliminary injunction is not granted. The Third Circuit has held that "a failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction." Instant Air Freight Co. v. C. F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (quoting In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982).

In the present case, Plaintiffs claim irreparable harm from the admission of alien guest workers because of its alleged impact upon Plaintiffs' employment opportunities and

[6] See 8 U.S.C. § 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 of Homeland Security] may by regulations prescribe...")

[7] Congress has also incorporated OPT into its own interpretation of the Immigration and Nationality Act by repeatedly re-enacting the Act after OPT was implemented. See Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("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.") Given that various forms of OPT have been part of the immigration policy for 60 years, Plaintiffs' claim that DHS is creating a "guest worker program" is not likely to succeed.

compensation. Plaintiffs' complaint, however, does not show irreparable injury, but instead, attacks the underlying policy of the IFR. Plaintiffs contend they are harmed each day they are not able to work in a job filled by an OPT employee, and the IFR compounds the injury to them as well as other U.S. workers. Plaintiffs state that the United States approved 330,000 H1-B visas for computer workers between 1999 and 2005 and 95,925 H-1B visas for engineers. Plaintiffs attribute the decline in employment in engineering and computer fields to the amount of nonimmigrant workers allowed by the DHS.

Plaintiffs further argue that the IFR allowing more guest workers would have an even greater adverse effect upon the jobs of American workers. This argument, however, attacks the underlying DHS policy of nonimmigrant employment, rather than addressing an irreparable harm faced by Plaintiffs. In addition, the DHS projects that the IFR will allow 12,000 students to apply for an OPT extension. Interim Final Rule, 73 Fed. Reg. at 18951. These applications represent 0.2% of the 5.5 million jobs in computer and engineering fields in the United States in 2006. The students within the OPT who seek H-1B visas are already included in the total number of H-1B petitioners previously established by the DHS. Thus, the 12,000 applications will be a subset of the 163,000 petitions set for fiscal year 2009.[8]

A lack of causal connection between Plaintiffs' alleged injury and DHS action further undermines Plaintiffs' claim of irreparable harm. The extension of OPT eligibility by 17 months through the IFR did not cause Plaintiffs' unemployment or under-employment. As the government argues, Plaintiffs may find adequate employment tomorrow or next week. Finally, even if there was a nexus between Plaintiffs' injury and DHS action, the injury still is not "irreparable" to qualify for injunctive relief because it is economic harm compensable in

[8] See "USCIS Releases Preliminary Numbers of FY2009 H-1B Cap Filings" (Apr. 10, 2008), *available at* www.uscis.gov.

damages.[9] Therefore, Plaintiffs fail to adequately demonstrate irreparable harm if the preliminary injunction is not granted.

C. Granting a preliminary injunction would harm other interested parties.

The grant of the preliminary injunction would create a possibility of harm to other interested persons. Although Plaintiffs contend that the injunction would not cause irreparable harm to the Defendants, the technically-trained students who are lawfully present in the United States would suffer hardships. The students would have to leave the country to apply for an H-1B visa. Furthermore, eligibility for OPT depends on a student's maintaining lawful status.[10] The grant of a preliminary injunction would harm these students by forcing them to be classified as out-of-status. Such harm must be taken into account before issuing a preliminary injunction.

D. A preliminary injunction would not serve the public interest.

Lastly, Plaintiffs maintain that granting the preliminary injunction is consistent with the public interest in preserving jobs and wages for American workers. There are, however, competing interests. As discussed in the previous section, a preliminary injunction would cause extreme hardships to lawfully present guest students, such as being forced out-of-status and facing deportation. In addition, the government points out that third parties and members of the public would be harmed if the guest workers were stripped of lawful status. The predictable guest worker system would turn into one of confusion and unpredictability because neither the

[9] See Adams v. Freedom Forge Corp., 204 F.3d 475, 485 (3d Cir. 2000) ("The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages"); see also Morton v. Beyer, 822 F.2d 364, 371–72 (3d Cir. 1987) (holding that plaintiff claiming unlawful discharge, and consequently, irreparable harm, was not entitled to a preliminary injunction because the nature of plaintiff's remedy was "purely economic in nature and thus compensable in money").

[10] See 8 U.S.C. § 1258(a) ("The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the Untied States as a nonimmigrant who is continuing to maintain that status...).

employers nor the guest workers would know the length of time the nonimmigrants were eligible for working.

The government also has a compelling interest in being able to create necessary extensions to ease rigid time line requirements in order to maximize the efficiency of its programs. Since the federal government has the "responsibility...to regulate immigration," it is essential to allow it a degree of flexibility to do so. In re Alien Children Education Litigation, 501 F. Supp. 544, 549 (S.D. Tex. 1980). The Supreme Court has stated:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary...[There is a] need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.

Mathews v. Diaz, 426 U.S. 67, 81 (1976). In the instant case, the DHS has identified a need for extending the post-OPT period and promulgating the IFR. The administrative and practical purposes that underlie the IFR support giving deference to the DHS in implementing its immigration program.

IV. CONCLUSION

Although there are public interest arguments on the sides of both Plaintiffs and the DHS, Plaintiffs clearly fail the first three prongs of the test for a preliminary injunction. For the reasons given above, the motion for a preliminary injunction is denied. The Court also is concerned about whether Plaintiffs have standing to bring this case. Standing is an issue that courts properly raise sua sponte at the outset of an action. See, e.g., Munaf v. Geren, __ U.S. __, 128 S. Ct. 2207 (2008) (calling for sua sponte dismissal). For this reason, Magistrate Judge

Shwartz has permitted an expedited period of discovery related to standing, which shall not be extended. Thereafter, the Court orders the parties to brief whether this case should be dismissed for lack of standing.

ACCORDINGLY IT IS on this 5th day of August, 2008

ORDERED that Plaintiffs' Motion for Preliminary Injunction is **DENIED**; and it is further

ORDERED that both parties brief **by November 14, 2008** whether this case should be dismissed lack of standing; and it is further

ORDERED that both parties shall have the opportunity to respond to the submissions **by November 21, 2008**.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.