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Tech Union Asks High Court To Review STEM Work Program

By **Lauren Berg**

Law360 (May 4, 2023, 10:26 PM EDT) -- A union of domestic tech workers has urged the U.S. Supreme Court to weigh in on its challenge of an Obama-era program allowing foreign STEM graduates to work in the U.S. on student visas after the full D.C. Circuit refused to hear the case.

The D.C. Circuit **in February** let stand a split, **2-1 panel decision** blessing former President Barack Obama's expansion of the F-1 student visa's Optional Practical Training program, a move that allows foreign science, technology, engineering and mathematics students to work in the U.S. for up to three years after graduation.

But U.S. Circuit Judge Neomi Rao disagreed with her colleagues' denial of an en banc hearing. She said in her dissent that by allowing F-1 students to work well after their studies are done, the D.C. Circuit had given the U.S. Department of Homeland Security "virtually unchecked authority" to extend a foreigner's stay, regardless of their visa types.

In its **petition** for writ of certiorari filed May 1, the Washington Alliance of Technology Workers told the high court it needs to review the case because the D.C. Circuit's decision created a circuit split. Before the decisions in this case, federal courts were unanimous in interpreting the legal requirements for nonimmigrant visas as applying to a foreigner's entire authorized stay in the U.S., according to the petition.

"By holding that nonimmigrant visa requirements only apply at entry and that DHS is free to ignore those requirements once a nonimmigrant enters the country, the court of appeals created an 11-1 circuit split with all the numbered circuits," WashTech said.

The union also argued that the court of appeals decision conflicts with Supreme Court precedent, noting that last year in West Virginia v. Environmental Protection Agency the high court reaffirmed that Congress needs to "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance," according to the petition.

The D.C. Circuit, by contrast, held in this case that Congress "implicitly conferred vast authority" on DHS to create the OPT program, WashTech said.

John M. Miano of the Immigration Reform Law Institute, an attorney representing WashTech, told Law360 on Thursday that the D.C. Circuit's decision "leaves the largest segments of the immigration system — nonimmigrants — in an incoherent state. If you walk through how the opinion affects various visas and visa combinations, you find that the results are positively Looney Tunes."

The case also goes to the heart of how the U.S. will be governed, Miano said, noting that the largest foreign employment program in the immigration system was "created in total secrecy after being pitched at a dinner party."

"The truly sad thing is that government by dinner party did not bother the lower courts in the least," he added. "To the contrary, the lower courts affirmatively acted to facilitate that kind of government. They have stripped from the people the ability to influence our government and handed that power over to lobbyists."

A representative for DHS did not immediately respond to a request for comment.

For more than 14 years, Obama's OPT expansion has faced legal attack from WashTech, which argues that the program not only increases the number of foreign workers directly competing in the domestic labor market, but **runs afoul** of the Immigration and Nationality Act's F-1 visa provision, which it claims allows student visas for academic purposes only.

A Washington, D.C., district court and the D.C. Circuit both rejected the challenge, with an appeals panel ruling that the INA allows DHS to set the time and conditions of foreigners' stay in ways that "reasonably relate" to the visas they used to enter the country. The OPT program clears that bar by giving students the on-the-job training that is often necessary for specialty fields, the panel said.

Circuit Judge Rao, however, criticized that "reasonably related" threshold as a weak constraint. The visa requirements outlined in the INA define both the conditions on which visa holders could enter the country and the ongoing conditions of their stay, she said.

She further found it difficult to square the panel decision with the INA's requirements for work visas, particularly those — like the H-1B skilled worker visa and the H-2B nonagricultural worker visa — that are subject to annual caps. Allowing student visa holders to work does an "end run around" those limits, she said.

WashTech is represented by John M. Miano and Christopher J. Hajec of the Immigration Reform Law Institute.

DHS is represented by Elizabeth B. Prelogar of the U.S. Department of Justice's Office of the Solicitor General.

The case is Washington Alliance of Technology Workers v. U.S. Department of Homeland Security et al., case number 22-1071, in the Supreme Court of the United States.

--Additional reporting by Alyssa Aquino and Micah Danney. Editing by Emily Kokoll.
