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A TALE OF TWO CASES - WASHTECH V. DHS AND TEXAS V. USA: TO WHAT EXTENT CAN THE EXECUTIVE BRANCH ALLOW NONCITIZENS TO REMAIN AND WORK IN THE US

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To what extent can the Executive Branch allow noncitizens to remain and work in the US when there is no explicit provision in the Immigration and Nationality Act (INA) covering these categories of noncitizens? Two courts of appeals have ruled differently in recent decisions. One court found authority while the other court did not. The D.C. Circuit addressed the question of F-1 students and whether they could remain in the U.S. after graduation for practical training. Citing DHS' authority under INA § 214(a)(1) and the long history of post-graduation practical training, the court upheld OPT. The Fifth Circuit confronted a different issue – that of young people who came to the U.S. and whether they could remain in the country through deferred action. Finding that DACA exceeds DHS' inherent authority to exercise prosecutorial discretion, the court struck down the program, though deferred action is a well-established practice like OPT.

On October 4, 2022, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in *Washington Alliance of Technology Workers v. the U.S. Department of Homeland Security* ("*Washtech v. DHS*"). The case involved a challenge to the STEM Optional Practical Training (OPT) rules by the Washington Alliance of Technology Workers (Washtech), a union representing tech workers. DHS allows eligible students in STEM fields an additional 24 month OPT extension beyond the usual 12 month OPT period. Washtech argued that "the statutory definition of the F-1 visa class precludes the Secretary from exercising the time-

and conditions authority to allow F-1 students to remain for school recommended practical training after they complete their coursework". *Washtech* read INA § 101(a)(15)(F)(i) as authorizing DHS to allow F-1 students to remain in the U.S. only until they have completed their course of study, as the provision does not specifically mention post-graduation practical training. The court affirmed a district court judgment that upheld DHS' current OPT rules. The court reasoned that the STEM OPT extension is a valid exercise of DHS' authority under in INA § 214(a)(1) to promulgate regulations that authorize an F-1 student's stay in the U.S. beyond graduation. The court further noted that "practical training not only enhances the educational worth of a degree program, but often is essential to students' ability to correctly use what they have learned when they return to their home countries. That is especially so in STEM fields, where hands-on work is critical for understanding fast-moving technological and scientific developments." Judge Pillard, who authored the opinion, noted that the concept of post-coursework practical training for foreign students predates the Immigration and Nationality Act of 1952, pointing to a 1947 rule which "allowed foreign students 'admitted temporarily to the United States . . . for the purpose of pursuing a definite course of study' to remain here for up to eighteen months following completion of coursework for 'employment for practical training' as required or recommended by their school". Under *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), Congress is presumed to be aware of an administrative interpretation of a statute and to adopt that interpretation when it reenacts its statutes without change. Practical training has been authorized even prior to the enactment of the INA in 1952. In previous blogs, we have discussed Congressional authority for OPT at length, *see* here, here, here, and here.

In *Texas v. U.S.*, decided on October 5, 2022, the U.S. Court of Appeals for the Fifth Circuit ruled that the Deferred Action for Childhood Arrivals (DACA) program is unlawful, upholding an earlier decision by Judge Andrew Hanen of the United States District Court for the Southern District of Texas. Although the practice of deferred action, of which the DACA program is a form, has also existed for decades, the Fifth Circuit's decision was much less favorable than that of the D.C. Circuit. The court reasoned that the DACA program exceeds DHS' inherent authority to exercise prosecutorial discretion, as "declining to prosecute does not transform presence deemed unlawful by Congress into lawful presence and confer eligibility for otherwise unavailable benefits based

on that change". Further, the court found that there is no "clear congressional authorization" for DACA. In light of a recent regulation promulgated by the Biden administration to "preserve and fortify" DACA, the case was remanded to the U.S. District Court for the Southern District of Texas. Although DACA lives for now, it remains on the respirator as both the district court and the Fifth Circuit have consistently held that DACA is not authorized by the INA, and notwithstanding the new regulation, may still be held to be unlawful.

Though the courts in these cases arrived at few different outcomes, the two decisions share at least one commonality - both made reference to the "major question" doctrine recently introduced in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There the Supreme Court held that "in certain extraordinary cases" where it is unclear whether an agency action was authorized by Congress, "given both separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization' for the authority it claims". Such extraordinary cases where the "major questions" doctrine is invoked have vast economic and political significance. Interestingly, the dissent in *Washtech* indicated that the issue of whether DHS' 2016 OPT Rule exceeds its statutory authority is a "major question". Finding that the major questions doctrine applied, the dissent in *Washtech* directed the district court upon remand to examine whether DHS had the authority to issue OPT regulations under this principle.

In footnote 206, the court in *Texas v. USA* cited *West Virginia v. EPA* in holding that DHS had no Congressional authority to implement DACA. The court also held that DACA did not pass the first step of the *Chevron* test, which asks "whether Congress has 'directly addressed the precise question at issue.'" *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). The court in *Washtech* analyzed the OPT rule under the lens of *Chevron* also, but gave DHS' interpretation of INA § 214(a)(1) deference.

If the major questions doctrine is implemented in this way, it could result in fewer agency actions receiving *Chevron* deference. *Chevron* gives the Biden administration the ability to interpret the INA by implementing OPT and DACA programs, so it is hoped that the major questions doctrine does not impede the application of this longstanding precedent. Moreover, immigration decisions unlike environmental cases ought not to be cases involving vast economic and political significance. The majority decision in *Washtech* involved challenges to the INA provisions that provide the authority for noncitizens to remain in the

U.S. The court gave due deference under *Chevron* to the executive's interpretation of INA § 214(a)(1) and upheld OPT. The majority did not reference the "major questions" doctrine in *Virginia v. EPA*. The Fifth Circuit, on the other hand, held that DHS cannot rely on INA § 103(a)(3) as a basis for implementing DACA, and cited *Virginia v. EPA*. This provision states that the DHS Secretary "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of the Act." This provision is comparable to INA § 214(a)(1), which the First Circuit held provided the basis for F-1 OPT. INA § 214(a)(1) provides that "he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe……."

Although the *Washtech* case dealt with students, the D.C. Circuit's decision can serve as a template for the Supreme Court to uphold the authority for other categories of noncitizens to remain in the U.S., including DACA recipients. The same deference that the D.C. Circuit afforded to the executive's authorization of OPT ought to also be given to the government's interpretation of INA § 103(a)(3) and 6 USC § 202(5) so that the DACA program is upheld.

Another interesting issue discussed in both cases is whether the Executive Branch can issue work authorization to noncitizens. The court in *Washtech* upheld the authority of the executive to grant employment authorization documents (EADs) under INA § 274(a)(h)(3), which has long provided authority for the Executive Branch to provide employment authorization to broad categories of noncitizens. The executive's authority to grant EADs under this provision had been soundly rejected by the Fifth Circuit in the earlier DAPA decision and Judge Hanen's lower court decision in *Texas v. U.S*. In footnote 37, Hanen's decision makes reference to INA §274a(h)(3) as a definitional miscellaneous provision, which cannot provide the basis for DACA and the grant of EADs, while the First Circuit relied on the same provision as a statutory basis for OPT EAD.

Charles Dickens opened his A Tale of Two Cities with the following famous line: "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we

had nothing before us, we were all going direct to Heaven, we were all going direct the other way – in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only." Like London and Paris in Dickens' novel, *Washtech* and *Texas* are comparable in some respects and very different in others. Though *Texas* may represent the worst of times and the age of foolishness, *Washtech* ushers in an age of wisdom and the best of times for foreign students hoping to gain practical training in the U.S.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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