CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

COURT UPHOLDS REGULATION ISSUING EMPLOYMENT AUTHORIZATION TO H-4 SPOUSES EVEN AFTER THE DEMISE OF CHEVRON DEFERENCE

Posted on August 5, 2024 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

On August 2, 2024, the D.C. Court of Appeals issued its opinion in *Save Jobs USA v. DHS*, upholding the regulation that provides employment authorization to certain H-4 spouses of H-1B nonimmigrants. Save Jobs USA, an organization aiming to "address the problems American workers face from foreign labor entering the United States job market through visa programs" had challenged this regulatory provision, 8 C.F.R. §§ 214.2, 274a, arguing that it "exceeded the 's statutory authority, and that, in adopting it, acted arbitrarily and capriciously."

The DC Circuit found that DHS is authorized to extend employment authorization to H-4 spouses under 8 USC 1184(a)(1), INA 214(a)(1) (stating that "The 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…") and 8 USC 1103(a)(3), INA 103(a)(3) (stating 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 this chapter."). Moreover, the court held it had already "interpreted the relevant provisions of the INA to answer a similar question in favor of DHS in *Washington Alliance of Technology Workers v. DHS*, 50 F.4th 164 (D.C. Cir. 2022) ("Washtech"). As discussed in a prior blog, Washtech involved a challenge to the 24 month Optional Practical Training (OPT) extension for STEM graduates by the Washington Alliance of Technology Workers (Washtech), a union representing tech workers. 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 further asserted INA § 101(a)(15)(F)(i) authorizes DHS to allow F-1 students to remain in the U.S. only until they have completed degree program, not to pursue post-graduation practical training. The DC Circuit upheld DHS' STEM OPT rules, reasoning that the STEM OPT extension is a valid exercise of DHS' authority under INA § 214(a)(1) to promulgate regulations that authorize an F-1 student's stay in the U.S. beyond graduation, noting that practical training is critical to STEM students' ability to apply skills learned during their degree programs once they return to their home countries. Judge Pillard, who authored the opinion, noted that the U.S. has long permitted foreign students to remain in the country for practical training, beginning with 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 was authorized even prior to the enactment of the INA in 1952.

Because *Save Jobs USA* did not meaningfully distinguish its case against H-4 work authorization from the precedent established in *Washtech*, the DC Circuit affirmed the district court's grant of summary judgment in favor of DHS. Save Jobs USA argued that *Washtech* should be disregarded because it did not address the major questions doctrine established by the Supreme Court in *West Virginia v. EPA*, 597 U.S. 697, 716 (2022), which holds that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." The DC Circuit gave short shrift to this argument, though, stating that the purpose of the major questions doctrine is a tool of statutory construction "to help courts figure out what a statute means". Because *Washtech* had already interpreted the relevant regulations after *West Virginia v. EPA*, the court found that there was no need to overturn *Save Jobs USA v. DHS* as *Washtech* remained good law. Under stare decisis a future court lacks the authority to say a previous court was wrong about how it resolved the actual legal issue before it. As *Washtech* was decided after the major questions doctrine was established by the Supreme Court in *West Virginia v. EPA*, it was

assumed that *Washtech* already considered it and there was no need to upset the Court's holding in *Save Jobs USA*, which relied on *Washtech*.

Save Jobs USA v. DHS also represents one of the first instances of a federal court upholding a regulatory provision notwithstanding the demise of Chevron deference. In its June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*, the Supreme Court abolished the long-standing Chevron doctrine, which held that courts were required to defer to the government agency's reasonable interpretation of an ambiguous statute. We have discussed *Loper Bright* at length in a previous blog. In footnote 2 in *Save Jobs USA v. DHS,* the DC Circuit stated that "*Washtech* did not depend on Chevron" because *Washtech* had applied Chevron as a "counter-factual, fallback argument", but this did not alter Washtech's holding that INA 214(a)(1) and INA 101(a)(3) were not ambiguous in the first place.

Save Jobs USA v. DHS affirms that courts can rely on direct authorization from DHS to promulgate regulation to issue employment authorization to noncitizens. Despite the evisceration of Chevron deference, courts need not rely on an agency's interpretation of an INA provision in order to provide noncitizens with work authorization, such as the INA provisions that extend STEM OPT work authorization to F-1 students or provide work authorization to H-4 spouses, because these statutory provisions are not ambiguous in the first instance.

*Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.