United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed February 1, 2023

No. 21-5028

WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01170)

On Petition for Rehearing En Banc

Before: SRINIVASAN, *Chief Judge*; HENDERSON**, MILLETT, PILLARD, WILKINS, KATSAS*, RAO***, WALKER, CHILDS, and PAN*, *Circuit Judges*.

O R D E R

Appellant's petition for rehearing en banc and the responses thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon

consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* Circuit Judges Katsas and Pan did not participate in this matter.

** Circuit Judge Henderson would grant the petition for rehearing en banc. A statement by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

*** Circuit Judge Rao would grant the petition for rehearing en banc. A statement by Circuit Judge Rao, joined by Circuit Judge Henderson, dissenting from the denial of rehearing en banc, is attached.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting from the denial of rehearing en banc: For the reasons explained in my panel dissent, which is hereby incorporated by reference thereto, *Wash. All. of Tech. Workers v. DHS* ("*Washtech*"), 50 F.4th 164, 194–206 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part), I dissent from the denial of rehearing en banc.

RAO, *Circuit Judge*, with whom Circuit Judge HENDERSON joins, dissenting from the denial of rehearing en banc: For the reasons thoughtfully explained in Judge Henderson's dissent, the panel's interpretation of the F-1 student visa provision cannot be reconciled with the text and structure of the Immigration and Nationality Act ("INA"). Rehearing en banc is warranted because the panel decision has serious ramifications for the enforcement of immigration law. In holding that the nonimmigrant visa requirements are merely conditions of entry, the court grants the Department of Homeland Security ("DHS") virtually unchecked authority to extend the terms of an alien's stay in the United States. This decision concerns not only the large number of F-1 visa recipients, but explicitly applies to all nonimmigrant visas and therefore has tremendous practical consequences for who may stay and work in the United States. By replacing Congress's careful distinctions with unrestricted Executive Branch discretion, the panel muddles our immigration law and opens up a split with our sister circuits. This is a question of exceptional importance, and I respectfully dissent from the decision not to rehear it as a full court.

* * *

This case involves a challenge to a DHS regulation that allows F-1 student visa holders to remain in the country after they graduate and to work in fields related to their area of study for up to 36 months. 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, 13,087 (Mar. 11, 2016). Under the INA, the F-1 designation requires an alien to be a "bona fide student qualified to pursue a full course of study" who "seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study." Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(F), 66 Stat. 163, 168 (1952) (codified as amended at 8 U.S.C. § 1101(a)(15)(F)(i)).

Despite the requirements that an F-1 visa go to a person who is a "bona fide student" seeking "solely" to pursue a course of study in the United States, the majority concludes that DHS has general authority to extend an F-1 visa for any "reasonably related" purpose. *See Wash. All. of Tech. Workers v. DHS* ("*Washtech*"), 50 F.4th 164, 178 (D.C. Cir. 2022). On the majority's reading, the highly specific requirements of the F-1 provision define only requirements of entry, rather than ongoing conditions for an alien to remain in the United States. The majority explicitly recognizes that its reasoning and analysis applies to all nonimmigrant categories. *See id.* at 169, 189.

The panel opinion turns Congress's carefully calibrated scheme on its head. The INA enumerates 22 categories of "nonimmigrants" who may be eligible for visas to come to the country temporarily, with many categories further divided into specific subcategories. *See* 8 U.S.C. § 1101(a)(15)(A)–(V). The nonimmigrant categories are precisely delineated, reflecting Congress's judgments as to which aliens may be admitted into the country and for what reason. For instance, an E-3 visa is available to an alien seeking "to perform services in a specialty occupation in the United States" but only "if the alien is a national of the Commonwealth of Australia." *Id.* § 1101(a)(15)(E)(iii). An H-2A visa is available to an alien seeking to perform "agricultural labor," but only such labor as explicitly "defined in section 3121(g) of title 26," "as defined in section 203(f) of title 29," or "the pressing of apples for cider on a farm." *Id.* § 1101(a)(15)(H)(ii)(a).

These provisions exemplify Congress's detailed attention to the very specific conditions that attach to each nonimmigrant visa. Nonetheless, the panel concludes such statutory requirements apply only at the moment of entry. DHS therefore may "regulate how long and under what conditions

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