

Lawsuit Over Student Visa Policy Emphasizes Looming Deadline (1)

By Laura D. Francis

Posted Jan. 22, 2019, 3:15 PM Updated Jan. 22, 2019, 3:30 PM

- Three-year bar on re-entering U.S. triggered Feb. 5
- Workers seeking H-1B visas could be affected

Jia Ye faces a choice in two weeks: leave the U.S. and violate his contract with the Army, or stay in the country and risk getting barred from re-entering for three years if he ever does leave.

That's why his attorneys, who are fighting a U.S. Citizenship and Immigration Services policy memorandum, are pushing a federal judge in North Carolina to make a decision by Feb. 4. At worst, they say, the memo violates the Immigration and Nationality Act. At best, it should've gone through a public notice and comment process.

The USCIS enacted "an enormous policy change" by posting a memo on its website, Paul Hughes of Mayer Brown in Washington told Bloomberg Law Jan. 22.

What's "quite notable" is the agency's failure to defend the memo's legality in court, said Hughes, the chief attorney on the case. Its focus instead on technicalities "telegraphs the extraordinary weakness of its position," he said.

A brief filed late Jan. 21 urges the court to rule against the policy for that reason.

"The only thing intentional is our fidelity to the law," USCIS spokesman Michael Bars said in a Jan. 22 email to Bloomberg Law. "This administration is intensely focused on upholding it to the greatest extent possible in conjunction with all existing U.S. law, policy, and regulation."

The agency declined to comment specifically on the lawsuit.

'Unlawful Presence'

The lawsuit, originally filed in October, challenges an August 2018 policy that determines when international students on F, M, or J visas start accruing "unlawful presence." Unlawful presence refers to time spent out of lawful immigration status that counts against an immigrant when he or she tries to re-enter the U.S. legally.

A three-year bar on re-entry is triggered after 180 days of unlawful presence, while more than a year of unlawful presence triggers a 10-year bar.

Prior to August, unlawful presence didn't start to accrue until after a formal government finding that an immigrant lacked legal status. Now, when the USCIS makes a formal finding, it can also decide that unlawful presence started accruing on a prior date.

That practice is illegal, the lawsuit says. A group of more than 60 colleges and universities agrees.

Three-Year Bar

In Ye's case, a three-year bar would be triggered Feb. 5 if he remains in the U.S. Ye has been waiting more than three years to be called up for basic training under the Military Accessions Vital to National Interest program, which provides a fast-track to U.S. citizenship in exchange for military service.

In order to remain ready to be called up as his Army contract requires, Ye has stayed in the U.S. on his F visa despite graduating and completing optional practical training, a post-graduation work period allowed under the law.

But it's not just immigrants in MAVNI who are affected by the policy, Hughes said.

Many immigrants could "get tripped up in the OPT context," he said, such as finding out when applying for an H-1B skilled guestworker visa that the USCIS doesn't believe that their jobs qualified for OPT. That potentially could land an immigrant with a year or more of unlawful presence, he said.

(Story updated to include comment from the USCIS.)

To contact the reporter on this story: Laura D. Francis in Washington at lfrancis@bloomberglaw.com

To contact the editors responsible for this story: Jay-Anne B. Casuga at jcasuga@bloomberglaw.com; Terence Hyland at thyland@bloomberglaw.com

Related Articles

[New Federal Policy on Student Visas Challenged in Court](#) (Oct. 23, 2018, 2:50 PM)

[Government Cracking Down on Student Visa Violators](#) (Aug. 10, 2018, 11:13 AM)

© 2019 The Bureau of National Affairs, Inc. All Rights Reserved