

Student Visa Policy Challengers Allowed To Stay In US

By **Kevin Penton**

Law360 (January 29, 2019, 6:14 PM EST) -- A North Carolina federal judge gave a boost Monday to two people challenging a policy that tightens compliance requirements for student and visitor exchange visas, temporarily barring the government from applying the policy to the pair so they can stay in the country and participate in the case.

U.S. District Judge Loretta C. Biggs entered a temporary restraining order that stops the government from applying the August policy to Sen Li and Jia Ye, who came to the U.S. on student visas. The two plaintiffs would otherwise be forced to leave the U.S. in February so they could avoid facing a bar on re-entering the country, according to the order.

“In order to allow the court sufficient time to hear the pending matters, and to preserve the status quo and ensure that plaintiffs Sen Li and Jia Ye can fully participate in this case pending further consideration of the motions by the court, the court will temporarily restrain application of the August 2018 memorandum to plaintiffs,” the judge said in the order.

The new policy changes the way that “unlawful presence” is calculated for foreign citizens studying in the U.S. under F student visas, J exchange visitor visas and M vocational student visas. Under the policy, U.S. Citizenship and Immigration Services backdates the clock by tracking accrued days of unlawful presence to the date the student initially fell out of status, rather than starting the clock at the later date that the agency formally concludes there has been a violation.

This could carry heavy penalties for students who inadvertently or unknowingly accrue unlawful status, including re-entry bars after 180 days of unlawful presence that would prevent the students from returning to the U.S. again for years, according to the lawsuit originally filed by The New School, the American Federation of Teachers and other schools and organizations.

Li and Ye joined the suit in an amended complaint in December. They came to the U.S. on F-1 visas and subsequently entered the U.S. military through a program meant to bolster the military's personnel in certain skill areas, including foreign languages and medical expertise. But the pair have not begun formal training due to delays in the security clearance process and their visas are due to expire in February, according to court documents.

In announcing the policy change in May, USCIS said anyone in the U.S. as a “nonimmigrant status” foreign student, foreign vocational student or foreign exchange visitor who falls out of legal immigration

status — such as by failing to renew a visa or dropping out of school — will begin accruing unlawfully present time on the date the status lapses, which could be earlier than the date the student is notified of the lapse.

Under the previous policy, set in 1997 by the agency then known as the Immigration and Naturalization Service, unlawful presence for foreign students and exchange visitors began accumulating on the day USCIS finds that the student no longer has lawful immigration status or when an immigration judge ordered the foreign student removed.

Also on Monday, Judge Biggs approved the filing of an amicus brief submitted in December by more than 60 colleges and universities — including New York University, Duke University and Stanford University — that challenges the government’s policy.

“Absent an injunction, the ... policy memorandum regarding the calculation of unlawful presence will have destructive and harmful consequences for international students and scholars, and the U.S. institutions with which they are associated,” the amicus brief says.

Counsel for the parties could not be reached for comment Tuesday.

The plaintiffs are represented by Paul W. Hughes, Michael B. Kimberly, Andrew A. Lyons-Berg and Cory S. Menees of Mayer Brown LLP, and H. Ronald Klasko of Klasko Immigration Law Partners LLP.

The AFT is additionally represented in-house by David J. Strom and Jessica Rutter.

The federal government is represented by Joshua S. Press of the U.S. Department of Justice's Civil Division.

The case is Guilford College et al. v. Nielsen et al., case number 1:18-cv-00891, in the U.S. District Court for the Middle District of North Carolina.

--Additional reporting by Suzanne Monyak and Steven Trader. Editing by Aaron Pelc.

Correction: A previous version of this article misidentified when the colleges and universities submitted their amicus brief. The error has been corrected.