Immigration Alert

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Federal Court Invalidates Trump Administration Rules on H-1B visas and Employment-Based Green Cards

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Key Points

- DHS and DOL Interim Final Rules on H-1B visas and prevailing wage levels have been struck down by the Court.
- Definition of "specialty occupation" and rules for third-party placement of H-1B employees will no longer change on December 7, 2020.
- DOL wage levels for H-1B visa holders and green card applicants will revert to the levels in place prior to October 8, 2020.
- Two additional lawsuits challenging the DOL rules are still pending.

On December 1, 2020, a federal court invalidated the Trump administration's regulations that would have significantly restricted high-skilled immigration to the United States. Judge Jeffrey S. White at the U.S. District Court for the Northern District of California issued a decision setting aside two Interim Final Rules (the "Rules") published by the Department of Labor (DOL) and the Department of Homeland Security (DHS) on October 8, 2020. We covered the Rules and their potential implications in a prior alert.

The case, titled *Chamber of Commerce v. DHS*, primarily dealt with the government's decision to enact the new Rules without waiting for public comment pursuant to the notice-and-comment procedures under the Administrative Procedure Act (APA). The Court's decision prevents the implementation of both Rules because Judge White found that the government did not meet the "good cause" standard required to forego the notice-and-comment requirement before finalizing a new regulation.

As we discussed in the prior alert, on October 8, 2020, the Trump administration published two regulations meant to significantly affect the issuance of H-1B visas and employment-based green cards. Both regulations were issued as Interim Final Rules, which meant that they were final before any public comments were received. The DHS rule, scheduled to become effective on December 7, 2020, among other provisions, re-defined "specialty occupation," which would have considerably narrowed the number of occupations eligible for an H-1B visa. The DOL rule, effective the day of publication

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on October 8, 2020, sought to significantly increase required wages for beneficiaries of H-1B, H-1B1 and E-3 visas, as well as employment-based green cards based on labor certifications.

On October 19, 2020, plaintiffs, which included the U.S. Chamber of Commerce and the National Association of Manufacturers, brought a lawsuit against the agencies, seeking relief under the APA. In its decision, the Court agreed with the plaintiffs' argument that, under the APA, the agencies were required to first publish a notice with the proposed regulations, collect public comments, analyze them and only then finalize them. The Court listed several factors as reasons for reaching this conclusion, among them, (1) the agencies waited more than six months to issue the rules they purported were necessary due to the COVID-19 related unemployment; (2) the DHS rule first appeared on the agency's regulatory agenda in the fall of 2017; and (3) even the rules themselves noted that these measures should have been taken years ago. All of these factors undermined the agencies' argument that a delay in implementation due to the notice-and-comment process would have been detrimental to the goals they were aiming to achieve.

The agencies had also argued that the impact of the COVID-19 pandemic on the U.S. labor market made it impracticable to allow for notice and comment. However, the Court sided with plaintiffs on this issue as well, citing the evidence of relatively low unemployment for workers with bachelor's degrees and those highly skilled in computer operations, even during the ongoing pandemic. The plaintiffs' argument that the jobs lost during the pandemic and the jobs occupied by H-1B employees were not "fungible" ended up prevailing in this case.

The Court also found it "significant" that—even though both Rules allow for post-promulgation comments—the agencies made no intention that the Rules were meant to be a "temporary solution" to COVID-19 related unemployment. The Court noted that the agencies had failed to consult with U.S. employers, making planning and budgeting unpredictable for these employers, contrary to the stated purpose of promoting business interests. Judge White also chastised the government for publishing the rules merely seven days after he enjoined a Presidential Proclamation that became the basis for these Rules. In the Proclamation, the President directed the Secretaries of Labor and Homeland Security to promulgate regulations on H-1B visas and employment-based green cards that would ensure that the presence of H-1B visa holders and employment-based immigrants "does not disadvantage United States workers." The same plaintiffs brought a challenge to the Proclamation earlier this year, and Judge White's decision on October 1 enjoining the Proclamation became a blueprint for his December 1 decision invalidating the two Rules.

The Court did not enter a preliminary injunction but rather a summary judgment on the merits of the plaintiffs' APA claims, and its decision is binding nationwide. As a result, in order to re-enact the Rules, the administration would have to publish them again, allow for notice-and-comment for 60 days, analyze the comments and finalize the rules. There is less than 60 days left before Inauguration Day, so it is unlikely that the Trump administration will be able to accomplish that. The administration could appeal the Court's decision to the Ninth Circuit Court of Appeals, but in the meantime, the rules will remain invalidated. If the appeal is not resolved before Inauguration Day, the incoming Biden administration could withdraw the appeal and agree to abide by the District Court's decision.

Finally, the Court did not address the fact that, since October 8, the DOL has been issuing determinations on wages for H-1B visas and employment-based green cards according to the new, significantly increased, wage levels. The DOL is expected to publish a notice informing employers of the Court's decision's impact on its operations. It is possible that the DOL will reissue the prevailing wage determinations issued between October 8, 2020 and December 1, 2020. We note that two other lawsuits—*Purdue University v. Scalia*, filed in the District Court for the District of Columbia, and *ITServe Alliance Inc. v. Scalia*, filed in the District of New Jersey—also challenge the DOL rule and remain pending. Decisions in those lawsuits may specifically direct the DOL to reissue prevailing wage determinations. Until then, it may be prudent to file new requests for such determinations with the DOL.

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