Trump Administration Loses Another Immigration Federal Challenge

Immigration Alert

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As we predicted two months ago in our analysis of the specious arguments underlying the Department of Labor (DOL) and the Department of Homeland Security (DHS) Interim Final Rules (IFRs) published on October 8, 2020, the executive branch has lost another federal legal challenge. On December 1, 2020, Judge Jeffrey S. White at the US District Court for the Northern District of California issued a decision setting aside the pair of IFRs. We then drew attention to the number of losses the Trump administration has amassed in federal court—134 as of December 1, 2020—over its use of agency action, a testament to a concerning disregard for the rule and process of law.

In *Chamber of Commerce v. DHS*, Judge White ruled that the government’s move to enact the IFRs while bypassing the customary notice-and-comment procedures pursuant to the Administrative Procedure Act (APA) cannot stand. The ruling found that the Trump administration did not demonstrate the “good cause” standard required to do so. In sum and substance, Judge White confirmed that, in these United States, we do not rule by whim or fiat.

The IFRs sought to upend the adjudicative and wage standards for nonimmigrant (H-1B) and immigrant (employment-based second and third preference, or EB-2 and EB-3) petitions for professional and specialty occupation foreign workers. Most importantly, the IFRs were issued and, in one case, took effect without the opportunity for any public comments. Judge White’s reprimand comes in the nick of time, as the DHS IFR was supposed to go into effect on December 7, 2020. Had that occurred, the standard for adjudicating “specialty occupation” petitions would have been unrecognizable. The DOL rule, which went into effect the day of publication on October 8, 2020, increased the required wages by 35%. In effect, DHS and DOL argued that the new IFRs were necessary due to COVID-19-related unemployment. To put this in perspective, at the time of the DOL rule’s issuance, more than 11 million people were unemployed according to the Bureau of Labor Statistics. That number was down from 18 million in April, a significant time frame because it marked both the height of COVID-19 unemployment and the period when 85,000 new H-1B petitions were filed and since issued. The court also found that the DHS rule first appeared on its regulatory agenda more than three years ago, severely undercutting the government’s contention that implementation without a notice-and-comment period was necessary immediately.

A key point recognized by the court is that, even in the midst of the incredible unemployment crisis caused by COVID-19, unemployment for workers with bachelor's degrees as well as workers skilled in programming remained low. In fact, contemporaneously, DHS received a record 275,000 H-1B petitions against the 85,000 cap, reaching the allowable numbers in a mere 20 days. The obvious conclusions are:(1) the H-1B category does not track overall unemployment; (2) does not disadvantage US workers; and (3) is necessary to secure access to globally sought-after talent – a point made in our June 23, 2020 analysis of the misguided Proclamation that lead to these IFRs.

The court's summary judgment invalidating the IFRs is binding nationwide, which means that this administration has run out of time to reenact them in accord with the 60-day notice and comment period required pursuant to the APA. Similarly, any Court of Appeals challenge to Judge White's decision would be left in the stewardship of the incoming administration.

Key takeaways:

- The adjudicatory standard with regard to H-1B petitions will still require the employer to prove that a bachelor's degree is ''normally'' required or ''common to the industry,'' or that the knowledge required for the position is ''usually associated'' with at least a bachelor's degree or equivalent. Therefore, DHS cannot eliminate the terms ''normally,'' ''common,'' and ''usually'' from the regulatory criteria. This means that **employers will not be required to demonstrate that a bachelor's degree in a specific specialty is always the minimum requirement** for entry into the occupation.
- Since October 8, the DOL has been issuing determinations on wages for both nonimmigrant and immigrant petitions in accordance with the significantly increased wage levels. As a result of this ruling, the DOL must abrogate the prevailing wage determinations issued between October 8 and December 1, 2020.

Beginning on December 9, employers will be able to submit new LCAs and resume preparation of those H-1B applications that were held at bay as a result of prohibitive wage increases. Likewise, as of December 15, employers may request a review of any prevailing wage determination issued on or after October 8 that was implemented under the IFR.