



GMS Flash Alert

Immigration Edition

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United States - Federal Court Invalidates Wage-Based H-1B Lottery Rule

On September 15, 2021, in *U.S. Chamber of Commerce v. Dep't of Homeland Security*, Case No. 20-cv-07331, the U.S. District Court for the Northern District of California invalidated the Department of Homeland Security's (DHS) rule, *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*.¹ In granting the plaintiff's (Chamber's) motion for summary judgment, Judge Jeffrey S. White held that then Acting DHS Secretary Chad Wolf was not lawfully serving in the position when the rule was issued in January 2021. (For related coverage, see [GMS Flash Alert 2021-201](#), July 15, 2021.)

WHY THIS MATTERS

The implementation of the new DHS rule on the H-1B cap selection system would have had a major impact on the H-1B cap program and the selection opportunities for applicants. Specifically, the new rule would have been particularly disadvantageous to H-1B registrants such as recent university graduates who typically earn entry-level salaries meeting the lower prevailing wage levels. U.S. employers who rely on recent university graduates and the H-1B program to meet critical workforce needs would have experienced a significantly reduced ability to sponsor H-1B visas under the new system.

A National Foundation for American Policy analysis of the outcome "... found that an international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system..." than under the Trump Administration's wage-based regulation for H-1B visa selection.² On the other hand, foreign nationals whose wages fall on the higher levels of the DOL wage spectrum, based on occupation and geography, would have received priority selection of their H-1B petitions.

Existing H-1B Program

The H-1B program permits companies located in the United States to temporarily employ foreign workers in specialty occupations requiring a bachelor's degree or higher, or equivalent professional experience or expertise in the field. In a given year, the USCIS selects 65,000 applicants for H-1B visas under the regular cap and reserves an additional 20,000 visas for those with advanced degrees bestowed by qualifying U.S. institutions of higher education.³ Upon determining

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that the U.S. Citizenship and Immigration Services has received the congressionally-mandated number of H-1B applications, a computer-generated lottery system occurs to determine which applicants will receive an H-1B visa. Under the current H-1B lottery system, the proffered wage to be paid to an H-1B registrant has no bearing on the likelihood of an applicant's selection in the visa lottery.

History of the Rule and Subsequent Litigation

The DHS published the new wage-based H-1B selection rule on January 8, 2021, with the stated goal of ranking H-1B registrants in descending order by salary, as set out in the DOL's Level IV through Level I wage spectrum.⁴ The rule was scheduled to take effect on December 31, 2021, due to a delay by the DHS (in February) from its initial effective date of March 9, 2021, as a result of the Biden Administration's freeze on all federal rules that had not yet taken effect. On March 19, 2021, the U.S. Chamber of Commerce filed an amended complaint requesting declaratory and injunctive relief opposing the wage-based lottery rule.

In his decision on September 15, Judge White ruled that due to former Secretary Kirstjen Nielsen's failure to correctly amend the order of succession prior to her resignation, Acting Secretary Wolf did not lawfully hold his position when the rule was published.⁵ Judge White did not, however, rule on the DHS' authority to amend the existing H-1B quota allocation system by lottery to an allocation by salary.

Furthermore, it is not yet apparent as to how the Biden Administration intends to respond to the decision, such as through an appeal or publishing a new DHS regulation of its own. Barring any imminent actions, the existing lottery selection process will remain in effect and will likely be implemented in the upcoming FY23 H-1B cap season.

As of this writing, another case challenging the rule remains ongoing, *Humane Society of America v. Mayorkas*, Case No. 1:21-cv-01349, in the U.S. District Court for the District of Columbia.

KPMG NOTE

KPMG Law LLP in Canada is tracking this matter closely. We will aim to keep readers of *GMS Flash Alert* updated on all relevant developments.

FOOTNOTES:

- 1 For the text of the final rule, see the *Federal Register* (online) by clicking [here](#).
- 2 For further information, please see NFAP, "The Impact on International Students of Ending the H-1B Lottery" (May 2021) at: <https://nfap.com/wp-content/uploads/2021/05/The-Impact-on-International-Students-of-Ending-the-H-1B-Lottery.NFAP-Policy-Brief.May-2021.pdf> / . By accessing this URL, you are leaving the KPMG website for an external site, that KPMG is not affiliated with, nor is KPMG endorsing its content, and that the use of the external site and its content may be subject to the terms of use and/or privacy policies of its owner or operator.
- 3 See this USCIS [website](#).
- 4 For a detailed description of the Department of Labor's suggested H-1B wage-allocation rule, see [GMS Flash Alert 2021-050](#) (February 8, 2021).
- 5 See, S. Anderson, "Judge Kills the Last Trump H-1B Visa Rule Left Standing," *Forbes* (online), (Sept. 17, 2021).

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