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Immigration

U.S. District Court Vacates H-1B Interim Final Rules

Legal Update

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This article was prepared with the assistance of ABIL, the Alliance of Business Immigration Lawyers, of which Loan Huynh, Fredrikson Immigration Department Chair, is a member.

On December 1, 2020, a U.S. district court vacated two interim final rules promulgated by the Departments of Labor (DOL) and Homeland Security (DHS) that made important changes to the H-1B program, including to prevailing wage calculations and the definition of "specialty occupation," among other things. The order prevents the interim final rules from taking effect and prevents the agencies from implementing the rules. The DHS rule was scheduled to take effect December 7, 2020; the DOL rule took effect in October.

The court said the question was whether the agencies demonstrated that the impact of the COVID-19 pandemic on domestic unemployment justified dispensing with the "due deliberation" that normally accompanies rulemaking to make significant changes to the H-1B program. The court concluded that the agencies had not done so.

DOL's Office of Foreign Labor Certification (OFLC) issued a related announcement on December 3, 2020, stating that the agency is "taking necessary steps to comply" with the order, including making required changes to the Foreign Labor Application Gateway (FLAG) system, such as replacing wage data. Beginning "around" 8:30 a.m. ET on December 9, 2020, "employers and their authorized attorneys or agents will be able to submit new LCAs [labor condition applications], Form ETA-9035/9035E, using the OES [Occupational Employment Statistics] survey data that was in effect on October 7, 2020," the Office of Foreign Labor Certification said. Employers desiring review of a prevailing wage determination issued using the interim final rule's calculations can request review from the National Prevailing Wage Center before January 4, 2021.

Details:

- Court order <https://www.courtlistener.com/recap/gov.uscourts.cand.367484/gov.uscourts.cand.367484.73.0.pdf>

- OFLC announcement, <https://www.dol.gov/agencies/eta/foreign-labor>
- Foreign Labor Certification Data Center, <https://www.flcdatacenter.com/>
- USCIS news release, <https://www.uscis.gov/news/alerts/us-district-court-for-the-northern-district-of-california-vacates-the-strengthening-the-h-1b-program>
- "Court Strikes Down Trump Admin's H-1B Restrictions," Times of India, <https://bit.ly/3ghomSt>