

Litigation

Agency Rule Prioritizing Visas for High-Wage Workers Set Aside

By Holly Barker

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- Acting DHS secretary unlawfully appointed at time
 - Current DHS secretary hasn't ratified the rule
-

A 2019 rule that prioritizes H-1B visa applications for high-income workers has been set aside, after the U.S. District for the Northern District of California decided it was unlawfully implemented.

Chad Wolf wasn't lawfully appointed acting secretary when the rule was approved, the court said Wednesday, granting plaintiffs' motion for summary judgment.

H-1B visas enable employers to hire foreign professionals for certain specialty occupations. As part of their sponsorship of a would-be employee's visa application, they make certain representations regarding the wages they will pay.

The number of H-1B visas issued each year is capped at 65,000, plus an additional 20,000 reserved for individuals with advanced degrees. The current system for selecting applications for consideration is a hybrid of first-come, first-served and a lottery.

Visas for individuals employed by certain institutions, including nonprofit and government research organizations and institutions of higher education, are exempt from the cap.

Although the plaintiffs here—including the Chamber of Commerce of the United States of America and a number of higher education institutions—may be institutions that are exempt from the cap, the court said they had standing to bring the lawsuit because their claims fell within the “zone of interests” the Administrative Procedure Act is meant to protect.

International students consider the availability of H-1B visas when deciding whether to study in the U.S., according to the plaintiffs. If the H-1B visa process gives priority to high-wage applicants, graduates will be less likely to secure them they may be discouraged from attending U.S. schools, they say.

The Northern District of California's decision is consistent with a 2020 report issued by the Government Accountability Office, other district court case law, and its own earlier decision granting a preliminary injunction to prevent implementation of a different DHS rule last year in *Immigrant Legal Rights Center v. Wolf*.

The agency just rehashed the prior arguments it didn't abandon, Judge Jeffrey S. White said.

Wolf's accession to the the role of acting secretary in November 2019 was by an order issued by his predecessor, acting secretary Kevin McAleenan, who was himself appointed by an order issued by his predecessor, secretary Kirstjen M. Nielsen, just before she resigned in April 2019.

The order purported to do what it could not: amend the order of succession for the agency's leaders, the court said.

It was only after the GAO's report was issued that Trump formally appointed Wolf in September 2020.

Plaintiffs are represented by McDermott Will & Emery LLP. The agency is represented by the U.S. Department of Justice.

The case is Chamber of Com. of U.S. v. U.S. Dept. of Homeland Sec., N.D. Cal., No. 4:20-cv-07331, 9/15/21.

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Documents

Decision

[Order Granting Motion for Summary Judgment](#)

Docket

[Chamber of Com. of the U.S. v. U.S. Dept. of Homeland Sec.](#)

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