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# Judge Kills The Last Trump H-1B Visa Rule Left Standing



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A federal judge has ended a Trump administration regulation designed to make it difficult for international students to gain H-1B status. [The ruling](#) is the latest judicial decision to stop a Trump administration H-1B rule, leaving in tatters the legacy pursued by Trump aide Stephen Miller and others.

Between 2017 and 2021, Trump administration officials increased H-1B denial rates by issuing memos and policies that [judges determined to be unlawful](#). Once those policies ended, H-1B denial rates returned to pre-Trump levels, according to a National Foundation for American Policy [analysis](#). Today, the most significant H-1B restriction is the same one in place before Donald Trump took office—the 85,000 annual limit on new H-1B petitions for companies.

**The History of the Trump H-1B Rules:** In the final months of the Trump administration, officials attempted to cement the president’s anti-immigration policies through three H-1B visa rules—all of which judges have now vacated (i.e., set aside). The first two were interim final rules from the Department of Homeland Security (DHS) and the Department of Labor (DOL). Employers said the DHS rule would have made it virtually impossible for many foreign-born scientists and engineers to qualify for H-1B status. The DOL rule [inflated the required minimum salaries for H-1B visa holders and employment-based immigrants](#) well beyond the market wage paid to U.S. workers with similar experience.

On December 1, 2020, in a significant victory for businesses and universities in *U.S. Chamber of Commerce v. DHS*, U.S. District Judge Jeffrey S. White, [in a written order](#), vacated and set aside the DHS and DOL H-1B rules.

“Defendants [the Trump administration] failed to show there was good cause to dispense with the rational and thoughtful discourse that is provided by the APA’s [Administrative Procedure Act] notice and comment requirements,” he wrote. Judge White cited [data](#) from the National Foundation for American Policy: “The statistics presented regarding pandemic-related unemployment still indicate that unemployment is concentrated in service occupations and that a large number of job vacancies remain in the areas most affected by Rules: computer operations which require high-skilled workers.” (The Trump administration had argued the unemployment rate justified emergency rulemaking.)

On January 14, 2021, the Trump administration attempted to salvage the DOL regulation by publishing a [final rule](#). The final rule was [only slightly modified from the original](#) and still aimed to price H-1B visa holders and employment-based immigrants out of the U.S. labor market. DHS did not revive its rule, which would have narrowed the definition of a specialty occupation and placed new restrictions on H-1B visa holders working at customer locations.

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After the Biden administration [delayed the DOL rule](#), the U.S. Chamber of Commerce and allied business groups and education organizations [filed an amended complaint](#) that continued its lawsuit to end the Department of Labor wage regulation.

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In June 2021, [Judge White vacated the DOL rule](#), and the Biden administration did not oppose setting aside the regulation. That meant the Department of Labor would need to engage in a new rulemaking process (i.e., issue a new regulation) to change the current prevailing wage process for high-skilled foreign nationals.

**The Trump Rule to End the H-1B Lottery:** On January 8, 2021, the Trump administration published as “final” a controversial [regulation to end the H-1B visa lottery](#), which is used when more H-1B applications are filed than the annual limit, and replace it with a system that awards H-1B petitions by highest to lowest salary.

“The National Foundation for American Policy [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 regulation that would end the H-1B lottery,” according to [an NFAP analysis](#) of cases of recent international students and filings for H-1B petitions. “The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition.”

On March 19, 2021, the U.S. Chamber of Commerce and its allies [filed an amended complaint for declaratory and injunctive relief](#) with Judge White that included opposition to the H-1B lottery rule. “If these rules become operational, they will significantly limit the ability of many companies to meet their critical workforce needs,” said Jon Baselice of the U.S. Chamber of Commerce in an interview at the time.

**The Ruling on the H-1B Lottery Regulation:** In his [order](#) on September 15, 2021, Judge Jeffrey S. White agreed with a critical legal argument made by the plaintiffs. “Plaintiffs argue the Final Rule must be set aside because Mr. Wolf was not lawfully appointed as Acting Secretary at the time DHS promulgated the rule,” he wrote. “In *ILRC*, the Court concluded the plaintiffs were likely to succeed on the merits of their claim that Mr. Wolf’s appointment was not lawful. At that time, two other district courts had considered and rejected DHS’s arguments, as had the Government Accountability Office (“GAO”). . . . Since then, a number of other courts also have determined that Mr. McAleenan and Mr. Wolf not acting with lawful authority.

“With one exception, DHS ‘recycle[d] exactly the same legal and factual claims made in the prior cases, as if they had not been soundly rejected in well-reasoned opinions[.]’ It also did not offer any new facts or legal argument at

the hearing. Accordingly, for the reasons set forth in *ILRC*, the Court concludes that when Secretary Nielsen issued the April 9 Order, she did not amend the order of succession in the event of her resignation. Therefore, the order of succession set forth in Executive Order 13753 still governed, and Mr. McAleenan was not lawfully elevated to the position of Acting Secretary. Because he was not lawfully appointed, Mr. McAleenan's subsequent attempts to amend the order of succession and to elevate Mr. Wolf to Acting Secretary also were not valid."

Paul Hughes of McDermott Will & Emery, representing the plaintiffs, also argued the H-1B rule violated current law. "First, the Lottery Rule is flatly inconsistent with the text of the Immigration and Nationality Act," according to the plaintiffs. "The statute provides unambiguously that H-1B visas 'shall be issued . . . in the order in which petitions are filed for such visas.' Yet the Rule instead unabashedly institutes 'ranking and selection based on wage levels,' such that the relatively highest-paid noncitizens are issued visas first, likely leaving none for those at lower wage levels. Agencies are powerless to thus 'rewrite clear statutory terms.'"

"Judge White invalidated the regulation on the grounds that then-Acting DHS Secretary Chad Wolf was not lawfully serving in his role at the time the agency promulgated the cap selection regulation," noted the [Fragomen law firm](#). "He did not address the plaintiffs' argument that DHS does not have the authority to allocate the H-1B quota according to wage level or other criteria."

Does that mean any rule to end the H-1B lottery is dead? It depends on the time frame. "USCIS [U.S. Citizenship and Immigration Services] cannot implement the rule as planned on Dec. 31, in time for FY23 H-1B cap season," according to [Berry Appleman and Leiden](#). "Petitioning employers will *not* need to provide a wage level on the H-1B registration and USCIS will select registrations randomly as it has in the past. . . . When President Biden took office, DHS could have 'ratified' the rule to make it easier to defend in court. DHS chose not to do that. Though the agency could certainly restart the

regulatory process to create a wage-based H-1B allocation process, that is unlikely to happen before the next cap season.”

White House adviser Stephen Miller and other Trump administration officials hoped to eliminate the H-1B lottery and replace it with a mechanism certain to prevent more international students from working in the United States. The judicial decisions blocking the three H-1B rules mean the Trump administration failed to cement an anti-immigration legacy that economists believe would have made America [less competitive](#) and [pushed more technology-related jobs](#) outside of the United States.

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