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Litigation



California judge says flawed DHS appointment dooms H-1B rule

By Daniel Wiessner

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U.S. Department of Homeland Security emblem is pictured at the National Cybersecurity & Communications Integration Center (NCCIC) located just outside Washington in Arlington, Virginia September 24, 2010. REUTERS/Hyungwon Kang

Judge struck down rule prioritizing higher-paid H-1B applicants

Chad Wolf, who served as acting secretary at DHS, was not validly appointed

Judges came to same conclusion in at least eight other cases

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(Reuters) - A California federal judge struck down a Trump-era rule challenged by business groups that aimed to prioritize higher-paid foreign workers for H-1B visas, saying former Acting Homeland Security Director Chad Wolf had not been validly appointed when he approved it.

U.S. District Judge Jeffrey White in Oakland on Wednesday **said** the Department of Homeland Security had failed to offer up any new arguments that Wolf's appointment was lawful since White last year invalidated a separate rule on the same basis and granted summary judgment to the U.S. Chamber of Commerce and other groups.

"DHS recycled exactly the same legal and factual claims made in the prior cases, as if they had not been soundly rejected in well-reasoned opinions," White wrote, referring to at least eight **other rulings** over the last year.

Those decisions came after the **U.S. Government Accountability Office** concluded that DHS did not follow the proper order of succession after former Secretary of Homeland Security Kirstjen Nielsen resigned in 2019, and so Wolf's subsequent appointment as acting secretary was invalid.

DHS, which continued to defend Wolf's appointment after the change in administrations, did not immediately respond to a request for comment.

Jon Baselice, the Chamber's vice president of immigration policy, said the decision was a major victory for U.S. businesses and the economy.

"If implemented, the H-1B lottery rule would have denied many companies access to the talent they need to expand their operations and create American jobs," Baselice said.

The Immigration and Nationality Act caps the number of H-1B visas that can be issued each year at 65,000, with an additional 20,000 for workers with advanced degrees. Homeland Security for years has used a lottery system when the number of visa applications exceeds those caps.

The department moved to change that in January, **adopting** a rule that would have moved the highest-paid workers to the front of the line once the caps were met beginning in 2022.

Advocacy groups that had generally opposed the Trump administration's immigration policies nonetheless supported the rule. The left-leaning Economic Policy Institute **said** the change would protect U.S. workers and reduce the number of H-1B holders who are underpaid without decreasing the overall number of visas issued.

But many business groups opposed the rule, saying it would deprive companies in many industries of the ability to fully staff up. The Chamber in its lawsuit said the rule violated the visa criteria established in federal immigration law.

White on Wednesday agreed with the Chamber's secondary argument regarding Wolf's appointment. He cited his 2020 ruling blocking a rule that would have raised application fees for visas and other immigration relief, and said DHS had failed to change his mind.

The agency has maintained that prior to her resignation, Nielsen had properly changed DHS's order of succession for when vacancies arise.

The case is Chamber of Commerce of the United States of America v. U.S. Department of Homeland Security, U.S. District Court for the Northern District of California, No. 4:20-cv-07331.

For the plaintiffs: Paul Hughes of McDermott Will & Emery

For the government: Alexandra Saslaw and Carol Federighi of the U.S. Department of Justice

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Daniel Wiessner

Dan Wiessner (@danwiessner) reports on labor and employment and immigration law, including litigation and policy making. He can be reached at daniel.wiessner@thomsonreuters.com.



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