

IMMIGRATION ALERT

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Federal court invalidates amended H-1B regulations

On Oct. 8, 2020, the administration published two far-reaching regulations governing the H-1B program. First, the Interim Final Rule announced by the U.S. Department of Labor (DOL) changed the calculation of prevailing wages determined by the data collected by the U.S. Bureau of Labor Statistics. With this rule, the calculation of the prevailing wage was effectively increased by 25 to 45 percent in the reported occupations by increasing the percentage of the surveyed wages collected in the Occupational Employment Statistics (OES). This may price out employers from hiring foreign nationals through the H-1B program. While there was a 30-day public comment period, the rule became effective the same day it was announced, with the administration arguing that the unemployment rate resulting from the pandemic required emergency action.

Second, the U.S. Department of Homeland Security (DHS) published its own Interim Final Rule, redefining the term "specialty occupation." The administration used the same reasoning as in the DOL rule, arguing that this redefinition of specialty occupation was needed to respond to the pandemic and the high unemployment rate. The rule redefined specialty occupation by severely limiting the number of occupations that could qualify for an H-1B visa. While comments on the rule will be accepted until Dec. 7, 2020, the rule was published to become effective on that same date, regardless of the comments made.

In a decision issued in *Chamber of Commerce v Department of Homeland Security* on Dec. 1, 2020, Judge Jeffrey White of the Federal District Court in San Francisco invalidated both rules. The final judgment, issued in response to cross motions for summary judgment, held that reliance on the unemployment rate caused by the pandemic did not justify the emergency implementation of the rules without following the normal

notice and comment period required by the Administrative Procedure Act. The court found a disconnect between the high unemployment rate and proposed solution set forth in the interim final rules. The court also found “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 [the] Rules: computer operations which require high-skilled workers.”

The court also took note that the administration had announced its intention to redefine specialty occupation as early as April 2017, suggesting that the pandemic was merely a pretext to implement a rule without the required consideration of public comments. With regard to the DOL regulation on prevailing wages, the court reviewed administration announcements from several months ago regarding the perceived need to adjust the wage calculation, which undermined the administration’s claim that the regulation had to be published in October without advance notice to effectively implement the changes during an emergency.

The court’s decision set aside the regulations and will now be subject to appeal. The government has not responded, and we do not yet know if it will appeal. There is speculation that the administration will attempt to implement the regulations by treating the interim final rules as proposed rule-making, responding to the comments and re-publishing the rules as final rules before Jan. 20, 2021.

Finally, we note that there are also two more lawsuits challenging the DOL rule pending in district courts in Washington, D.C. and Newark, New Jersey. Decisions in these cases are expected shortly and may determine if this is the final challenge to the proposed rules, or another instance of the on-again, off-again changes to immigration regulations as administration initiatives are challenged, reversed and reconsidered in the courts. There is every indication that the Biden administration will take a different strategy, but it is not yet clear whether either of these regulations can be implemented before President-Elect Biden’s inauguration.

For more information please contact [Rob Cohen](#) or any member of Porter Wright’s [Immigration Practice Group](#).