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## Calif. Federal Court Strikes Down Trump-Era H-1B Lottery Rule

By **Hailey Konnath**

Law360 (September 15, 2021, 10:56 PM EDT) -- A California federal judge on Wednesday struck down a rule prioritizing higher-paid noncitizens for H-1B visas, ruling that former Acting Secretary of Homeland Security Chad Wolf was illegally installed in his position and therefore lacked the authority to implement the visa regulation.

U.S. District Judge Jeffrey White had hinted last week that he was **"tentatively inclined"** to grant the request from the U.S. Chamber of Commerce, the California Institute of Technology and other universities **to scrap** the policy. In Wednesday's decision, he did just that, granting summary judgment in their favor and rejecting a competing summary judgment motion from the U.S. Department of Homeland Security.

"Because Mr. Wolf was not lawfully appointed as acting secretary at the time the final rule was approved, the court concludes the rule must be set aside," Judge White said.

According to Wednesday's order, before former DHS Secretary Kirstjen M. Nielsen resigned, she issued an order that purported to amend the order of succession for acting secretary, designating Kevin McAleenan to that role. McAleenan served in the position from April 2019 until November 2019, at which time he issued an order purporting to further amend the order of succession and promoting Wolf to acting secretary.

But Judge White said that when Nielsen issued her order, she didn't actually amend the order of succession in the event of her resignation. Therefore, McAleenan wasn't lawfully elevated to the position, and his attempts to promote Wolf also weren't valid, the judge said.

And current DHS Secretary Alejandro Nicholas Mayorkas hasn't ratified the H-1B visa rule, Judge White noted.

The judge vacated the final rule and remanded the matter to DHS.

As of last week, eight federal judges, including another judge in the Northern District of California, have also found that Wolf was illegally installed as acting DHS chief over the correct successor and lacked the authority to implement new federal policy.

The **H-1B visa regulation** would've amended the lottery process that determines visa winners to prioritize employees being offered the highest salaries. The visa is reserved for foreign workers in specialty occupations requiring a bachelor's degree or higher, and demand for it regularly exceeds availability.

The Chamber of Commerce and the universities had argued that the rule conflicts with the Immigration and Nationality Act, which states that visas should be issued in the order in which petitions are filed. They further say DHS violated the Administrative Procedure Act by failing to meaningfully consider criticism that the rule would leave no H-1B visas for foreigners early in their careers.

The Biden administration had defended Wolf's installation as interim DHS chief as it looked to preserve the H-1B rule, though it conceded that other district courts that have considered the succession issue have ruled against Wolf's authority to issue new rules.

Last week, Judge White asked DHS to offer new arguments in favor of Wolf's authority to issue the rule. He also asked the federal government to explain if current DHS Secretary Mayorkas ratified the rule after he took office. In separate lawsuits challenging Wolf's immigration policies, DHS has revealed that Mayorkas ratified at least two of his predecessor's policies, a regulation restricting asylum work permits and a rule nearly doubling the investment requirements for the EB-5 investor visa.

Representatives with the Chamber of Commerce and U.S. Citizenship and Immigration Services, the federal immigration agency housed within DHS, didn't immediately return requests for comment late Wednesday.

The Chamber of Commerce is represented by Paul Hughes and William Gaede III of McDermott Will & Emery LLP and Daryl Joseffer of the U.S. Chamber Litigation Center.

The U.S. is represented by Brian Boynton, Brigham Bowen, Alexandra Saslaw and August E. Flentje of the U.S. Department of Justice's Civil Division.

The case is Chamber of Commerce et al. v. DHS et al., case number 4:20-cv-7331-JSW, in the U.S. District Court for the Northern District of California.

--Additional reporting by Alyssa Aquino and Jennifer Doherty. Editing by Michael Watanabe.

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