



# GMS Flash Alert

Immigration Edition

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## United States - Court Invalidates DHS and DOL H-1B Program Rules

A federal district court has set aside recent, controversial Department of Homeland Security (DHS) and Department of Labor (DOL) interim final rules affecting H-1B, H-1B1 and E-3 workers. (For prior coverage on the interim rules and related court challenges see GMS [Flash Alert 2020-424](#), 7 October 2020 and [GMS Flash Alert 2020-438](#), 22 October 2020.)

On December 1, 2020, the U.S. District Court for the Northern District of California in *Chamber of Commerce v. DHS* found that the DHS' interim final rule, "Strengthening the H-1B Nonimmigrant Visa Classification Program," and DOL interim final rule titled "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" were enacted in violation of standard federal rulemaking procedures.<sup>1</sup>

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### WHY THIS MATTERS

The interim DOL and DHS rules would have significantly impacted the ability of U.S. employers to employ and sponsor foreign talent in the H-1B, H-1B1, and E-3 visa categories. The DOL rule changed the method in which the agency computes prevailing wage levels, exponentially raising the minimum wages that must be paid to foreign workers with H-1B, H-1B1, and E-3 non-immigrant visa petitions. The DHS rule sought to tighten H-1B eligibility criteria by narrowing the definition of "specialty occupation," decreasing the pool of occupations eligible for H-1B visa sponsorship. The DHS rule also sought to codify several new obligations on businesses who employ H-1B workers at secondary client locations.

Based on the court's decision, which takes effect immediately, implementation and enforcement of the DOL and DHS rules have been halted. The DOL's computation of prevailing wage levels is to return to pre-October 2020 methodology, and the DHS' new policies affecting the H-1B program will most likely not take effect as scheduled on December 7, 2020.

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## Court's Decision

The court sided with the plaintiffs who argued that the DOL and DHS did not follow appropriate federal procedure when the agencies published the regulations without adequate notice or an opportunity for the public to provide feedback. While the government argued expedited implementation of the rules was necessary to alleviate the economic impacts of the COVID-19 pandemic, the court ultimately found that the DOL and DHS failed to adequately demonstrate good cause to exempt them from the standard rulemaking requirements of the Administrative Procedures Act.

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## KPMG LAW LLP NOTE

The DOL and DHS are expected to appeal the court's decision. KPMG Law LLP in Canada will continue to carefully follow the progress of the DOL and DHS rules, and will endeavor to keep GMS Flash Alert readers informed as developments occur.

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## FOOTNOTE:

1 See *Chamber of Commerce et al. v. DHS et al.*, Case No. [20-cv-07331-JSW \(N.D. Cal, December 1, 2020\)](https://www.courtlistener.com/docket/18552033/74/chamber-of-commerce-of-the-united-state-of-america-v-united-states/). <https://www.courtlistener.com/docket/18552033/74/chamber-of-commerce-of-the-united-state-of-america-v-united-states/>

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