



December 11, 2020

## December 2020 Immigration Alert

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### Federal District Court in California Sets Aside October 2020 DOL and USCIS H-1B Regulations

In last month's Epstein Becker Green [Immigration Alert](#), we reported that the U.S. Department of Labor ("DOL") and U.S. Citizenship and Immigration Services ("USCIS") had published interim final rules ("IFRs") titled, respectively, "Restructuring of H-1B/H-1B1/E-3 and PERM Wage Levels" and "Strengthening the H-1B Nonimmigrant Visa Classification Program."

On December 1, 2020, a U.S. district court in California, in *Chamber of Commerce, et al., v. DHS, et al.*, Case No. 20-cv-07331-JSW, 12/1/2020, set aside both IFRs, granting the plaintiffs injunctive relief. The court found that both the DOL and USCIS did not possess appropriate good cause to dispense and skip the Administrative Procedure Act's notice-and-comment requirements before implementing the regulations. As a result of the court order, the USCIS's IFR will no longer apply to H-1B adjudications. Moreover, the DOL's IFR, which significantly increased the prevailing wage, will no longer be valid under the court order. The DOL will revert to the pre-IFR Occupational Employment Survey ("OES") wage survey.

The DOL has provided the following notice regarding how it plans to follow the court decision:

- The DOL changed its Foreign Labor Application Gateway ("FLAG") system to meet the requirements of the decision. Any employer wishing to file a Labor Condition Application ("LCA") using the court-ordered OES wage survey could do so beginning December 9, 2020. The FLAG system is where employers request the DOL to issue an LCA. DOL's issuance of a certified LCA is a prerequisite to support any H-1B petition.
- LCAs using other alternative wage sources can be filed after 8:30 a.m. ET on December 4, 2020.

- Employers can continue to file PERM-based prevailing wage applications with the FLAG system.
- DOL will pause the processing of prevailing wage applications until after 8:30 a.m. ET on December 15, 2020.
- For those prevailing wage determinations already issued using the above-mentioned IFR wage data, employers may seek a redetermination between now and January 4, 2021, despite the usual 30-day deadline.

### **U.S. Justice Department Sues Facebook for Alleged Discrimination Based on the PERM Application Process**

On December 3, 2020, the U.S. Department of Justice (“DOJ”) filed a lawsuit against Facebook Inc. (“Facebook”) alleging that the company refused to recruit, consider, or hire qualified and available U.S. workers for more than 2,600 positions, based on following the company’s market tests procedures required for Program Electronic Review Management (“PERM”) labor certification filings.

Under DOL regulations, employers must obtain PERM foreign labor certification before sponsoring their foreign national employees for employment-based permanent residency (*aka* the “green card”). A PERM labor certification process includes making good-faith efforts to test the local labor market for qualified, willing, and available U.S. workers for the position offered to a foreign national employee. If the employer cannot find such workers and certifies it cannot do so, then the company can file the labor certification with the DOL under its PERM system.

According to the DOJ’s lawsuit, based on a nearly two-year investigation, from January 2018 to September 2019, Facebook allegedly created a hiring system in which it denied qualified U.S. workers a fair opportunity to learn about and to apply for jobs available at Facebook during the PERM labor market test. The DOJ further alleges that Facebook’s labor market test practice was discriminatory against U.S. workers, as the company did not use its careers website, which it normally uses with all its other standard recruitment methods, and required those applying for positions through the PERM market test to provide resumes through the mail instead of accepting them electronically.

According to the DOJ, Facebook’s ineffective recruitment methods dissuaded U.S. workers from applying for its PERM-advertised market test positions.

The DOJ’s complaint seeks civil penalties, back pay on behalf of U.S. workers denied employment at Facebook, and other relief. According to the lawsuit, Facebook’s discrimination against U.S. workers was intentional, widespread, and in violation of a provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(1), that the DOJ’s Civil Rights Division enforces.

It should be noted that the DOJ's lawsuit is based solely on alleged discrimination against U.S. workers. It is not based on any improper use of the PERM market test process nor is the DOL involved in the suit. Per the suit, companies and organizations need to have a holistic view of their entire PERM process. Even though companies or organizations may be following proper procedures within the PERM application process, potential conflicts could arise if their prior pattern of practice of recruiting for positions is inconsistent with how they follow the PERM market test process.

### **President-Elect Joe Biden Announces Alejandro Mayorkas as Secretary-Elect for Department of Homeland Security**

On November 23, 2020, President-Elect Joe Biden announced the selection of Alejandro Mayorkas, who was born in Havana, Cuba, to be the next Secretary for the U.S. Department of Homeland Security ("DHS"). The DHS oversees and manages three agencies: Customs and Border Protection, Immigration and Customs Enforcement (also known as "ICE"), and USCIS. Many may know Secretary-Elect Mayorkas from his service as the Director of USCIS and Deputy Secretary of DHS during the Obama administration. According to CNN, "The announcement was immediately met with praise from immigrant advocates and Democratic lawmakers, as well as former and current officials who have expressed concern over the politicization of the department from some of its top leaders."

Coming from an immigrant background, Secretary-Elect Mayorkas has a history at both DHS and USCIS of implementing fair and efficient immigration policies while also properly enforcing laws and securing the borders.

### **USCIS Expands the Time Allowed to Use EAD Approval Notices as an I-9 Verification Document**

On August 19, 2020, the USCIS agency announced a delay in Employment Authorization Document ("EAD") processing and the allowed use of the approval notice (Form I-797) as proof of work authorization up to December 1, 2020. Due to the continued delay of approved EAD card issuance from USCIS, the agency will extend the use of the EAD Form I-797 approval notice as proof of work authorization until February 1, 2021. For further guidance regarding how to follow the requirements to verify work authorization using the EAD Form I-797 approval notice, please go to the [USCIS website](#).

### **DHS to Restore DACA and Start Accepting First-Time Applications Following Court Order**

Following court [order](#) from the U.S. District Court for the Eastern District of New York, effective December 7, 2020, per DHS, USCIS will:

1. accept first-time requests for consideration of deferred action under Deferred Action for Childhood Arrivals ("DACA") based on the terms of the DACA policy in effect prior to September 5, 2017;

2. accept DACA renewal requests based on the terms of the DACA policy in effect prior to September 5, 2017;
3. accept applications for advance parole documents based on the terms of the DACA policy prior to September 5, 2017;
4. extend one-year grants of deferred action under DACA to two years; and
5. extend one-year employment authorization documents under DACA to two years.

Additionally, according to DHS, “USCIS will take appropriate steps to provide evidence of the one-year extensions of deferred action and employment authorization documents under DACA to individuals who were issued documentation on or after July 28, 2020, with a one-year validity period under the defunct policy.”

### **Special Flexibility to Verify Forms I-9 Gets Another Extension**

Back on March 20, 2020, EBG posted its [Special Immigration Alert](#) regarding DHS’s decision to allow special flexibility to verify Form I-9 documents without requiring viewing the actual original documents if specific requirements are followed. Since then, DHS has extended this special flexibility several times. This special flexibility has now been extended once more, to December 31, 2020. Unless extended again, all employers must revert back to the pre-COVID-19 requirement to complete I-9 verification of new hires when this extension lapses. We will advise if this special flexibility is extended again.

### **DHS Extends Temporary Protected Status for Six Countries Through October 4, 2021**

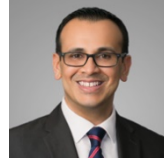
DHS announced in the *Federal Register* on December 7, 2020, that it has extended the validity of Temporary Protected Status (“TPS”)-related documentation for beneficiaries receiving TPS from El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. This notice automatically extends through October 4, 2021, the TPS-based validity of EADs; Forms I-797, Notice of Action; and Forms I-94, Arrival/Departure Record from those six countries. These TPS beneficiaries are also allowed to seek new EAD work permits with an October 4, 2021, expiration date. DHS is doing this to follow recent court orders from the Northern District of California and the Eastern District of New York. More details regarding the extension of TPS are available [here](#). For those employers that require re-verifying the Form I-9 work authorization for the above TPS-based employees, please refer to the USCIS’s [TPS and Deferred Enforced Departure page](#).

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If you have any questions regarding this Alert or any other U.S. immigration issues, please contact Epstein Becker Green’s immigration team:



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