Judge voids rule pricing H-1B doctors out of areas that need them

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The AMA strongly urged the Department of Homeland Security (DHS) to rescind a recently issued interim final rule (IFR) because it would “cause immediate and lasting harm to the ability to provide timely, accessible health care services in rural and medically underserved communities across the U.S.”

The IFR had been scheduled to take effect Dec. 7, but implementation was blocked by a federal district judge in Northern California who ruled that it had been promulgated “without observance of procedure required by law” and must be set aside.

U.S. District Judge Jeffrey White ruled that the administration did not follow the Administrative Procedure Act (APA) because the IFR was issued with only 36 hours’ prior notice and without the required public-comment period.

These APA requirements can be waived if it is in the public interest, but the judge ruled that the administration “failed to show there was good cause to dispense with the rational and thoughtful discourse that is provided by the APA’s notice and comment requirements.”

The administration argued by that the changes were “urgently necessary” to ensure that the employment of H-1B visa holders “did not have an adverse impact on the wages and working conditions of similarly employed U.S. workers” during the COVID-19 public health emergency.

The AMA strongly disagreed.

“The AMA believes that this logic is severely flawed,” AMA Executive Vice President and CEO James L. Madara, MD, wrote in a Dec. 4 letter to former acting DHS Secretary Chad Wolf. “These physicians are not ‘causing adverse effects on the wages and job opportunities of U.S. workers, but rather are keeping the health of our nation afloat now more than ever.”
The Trump administration could still appeal the decision or ask for a stay of the decision until the appeal is decided. The AMA is asking for the IFR to be rescinded and, if it or a similar rule is ever implemented in the future, that physicians be exempt because it would make it economically unfeasible for H-1B physicians to practice in underserved communities.

Changes included in the IFR discriminate against H-1B physicians and the communities that they serve by drastically altering the distribution of the four-tiered wage system that will likely make it more difficult to hire H-1B physicians in rural and medically underserved communities.

In addition, the IFR will exacerbate physician shortages during the COVID-19 pandemic in areas where doctors are needed the most.

The H-1B program applies to employers seeking to hire nonimmigrant foreign nationals as workers in specialty occupations that require “the application of a body of highly specialized knowledge,” according to the Labor Department website.

**How would the rule do harm?**

If the rule is not rescinded, the AMA urges that physicians be exempt from the IFR and that the DHS “annually accept, without reservation,” the data from the Association of American Medical Colleges Survey of Resident/Fellow Stipends and Benefits Report to determine wage levels.

“The proposed rule will either cause these much-needed physicians to be priced out of a market that cannot afford to lose them, or will require employers to pay a wage that is much higher, which could cause fewer doctors to be hired overall during a time when we are facing a severe physician shortage,” Dr. Madara wrote in a Nov. 9 letter to Wolf and Labor Secretary Eugene Scalia.

Under the IFR, salaries would be based on the prevailing wage as determined by the Bureau of Labor Statistics’ voluntary mail-in Occupational Employment Statistics survey that does not provide data on individual employees, likely skews toward higher wage levels from large urban centers, and would not accurately reflect those from smaller practices in high-need, underserved areas.

If data is not available, the prevailing wage level defaults to $208,000 per year, “which would potentially, and unfairly, price out a significant number of physicians in the U.S.,” Dr. Madara wrote.
The IFR failed to “take into account the harms to H-1B physicians, foreign medical residents and the public,” Dr. Madara’s Nov. 9 letter explains. Additionally, it says the Labor Department “acted arbitrarily and capriciously by failing to consider the interests of the various industries impacted by this IFR, including IMGs [international medical graduates] who are now subject to what the AMA believes is a wholly irrational change in wage levels.”

The letter outlines several other key arguments against the IFR.

**It inappropriately changed the prevailing wage determination harming the “entire medical community and the patients they serve.”** The rule changes would have drastically changed wage requirements for foreign national doctors.

Many of the physicians who would have been affected “serve low-income, rural or other medically underserved areas that do not have the capability or resources to meet these new criteria,” the letter says. “Without providing evidence-based reasoning, this rule increased wage levels over night and in some cases, employers had to increase their H-1B employees’ salaries by nearly 50%.”

**It discriminated against H-1B resident physicians.** IMGs make up nearly one-fourth of all resident physicians within the U.S. The IFR would have priced H-1B physician residents out of the market or required employers to pay an H-1B resident about three times more than their U.S. counterpart.

**It could have caused the Conrad 30 Waiver Program to collapse.** The AMA supports the Conrad 30 Waiver Program, under which J-1 IMGs must change their status to that of an H-1B physician in order to remain in the U.S. while working in an underserved area for a minimum of three years.

Under the IFR, a clinic may have had to pay a H-1B physician immediately out of residency $208,000 a year, which is dramatically higher than the market rate and more than most rural hospitals and medical centers are able to pay.

“The AMA believes that the U.S. should promote an increase of IMGs and that current IMGs should not be hampered by additional unnecessary regulations in the midst of helping the U.S. fight COVID-19,” Dr. Madara wrote.