Three Big Changes Alter the H-1B Landscape

by Sonseere H. Goldenberg, Esq. - Monday, November 02, 2020

Whether you are an H-1B employer or employee, you should understand how these changes will affect you.

Both USCIS and the Department of Labor have issued rules that are effective immediately, or within weeks. They significantly alter:

1. The prevailing wage determination.
2. The definition of specialty occupation.
3. The H-1B visa lottery-selection.

Endless rule and regulation changes and Presidential Proclamations affecting immigration law have immigration lawyers spending several hours a day trying to stay on top of them and understand their impact. We meet often to discuss strategy and are increasingly worried about the future of H-1B workers and the companies that employ them.

Lawsuits Filed against the Trump Administration

Already several lawsuits are in play over changes to the H-1B lottery process, determining a specialty occupation, and how prevailing wages should be calculated, with hearings scheduled during the next few weeks.

The Chamber of Commerce of the United States of America is the first-named plaintiff in a lawsuit challenging the prevailing wage and specialty occupation rule changes, filed against the U.S. Citizenship and Immigration Services and U.S. Department of Labor. The Complaint notes the real reason behind these regulatory changes is that, after *losing* in its earlier attempts to limit travel for nonimmigrants in H and other visa categories, the Trump administration is now

attempting to limit the H-1B program a different way. Along with the implementation of a salary-based lottery, USCIS may well be putting the last nail in the H-1B coffin. The Complaint asserts:

Five days later, having failed to demolish the H-1B program by imposing an entry ban, the Department of Homeland Security (DHS) and the Department of Labor (DOL) announced interim final rules designed to substantially restrict, if not outright eliminate, the H-1B visa category. These rules are extraordinary: If left unchecked, they would sever the employment relationship of hundreds of thousands of existing employees in the United States, and they would virtually foreclose the hiring of new individuals via the H-1B program. They would also gut EB-2 and EB-3 immigrant visas, which provide for employment-based permanent residence in the United States.

Here's what's at stake and why every business that employs H-1B workers should be concerned.

The DOL Rule Change

The DOL changed how prevailing wages should be determined. Essentially, the wage rate that the employer must pay an H-1B worker could be double what it is currently paying. At the very least, it most certainly will be significantly higher than what U.S. workers in the same job will be earning.

Quoting the Complaint:

- The DOL Rule, [known as] Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, is a poison pill that would destroy the whole H-1B system.
- The DOL Rule raises the minimum wages employers must pay to H-1B workers (as well as to workers with EB-2 and EB-3 visas) to artificially high levels—wages that vastly exceed what comparable domestic workers are paid.
- For some 18,000 combinations of occupations and geographic locations, DOL has set the prevailing wage rate at $100 an hour, or $208,000 a year. This includes, for example, a software developer in the San Jose-Sunnyvale-Santa Clara area. While a private wage survey from Willis Towers Watson shows that an entry level employee in this field and location earns approximately $70,600 per year, DOL would raise that amount by $137,400.

The USCIS Rule Changes

1. USCIS changed the definition of a specialty occupation. From the Complaint:
    - The "DHS Rule," Strengthening the H-1B Nonimmigrant Visa Classification Program, issues sweeping changes to H-1B eligibility. It redefines what qualifies as a "specialty occupation," restricting the category of individuals who will qualify—all at odds with the statutory definition.

    - The DHS Rule also targets H-1B workers employed at third-party job sites by restricting the maximum validity period of their visa status for only one year, as compared to three for other H-1B workers.
    - In addition, the administration's assault on H-1B employers that provide professional services includes the imposition of burdensome compliance requirements regarding third party contracts and work itineraries, which substantially restricts the ability of H-1B workers to fill these roles.
    - When the government earlier attempted to enact these policies via a policy memorandum, a court enjoined it. *See* ITServe Alliance, Inc. v. Cissna, 443 F. Supp. 3d 14, 42 (D.D.C. 2020).
2. USCIS wants to change the H-1B lottery process in 2021. Instead of holding a random lottery across all employers, job categories, and wage levels, USCIS will choose winners first from those petitioning employers paying the highest salaries.
    - While this rule is not effective immediately, if implemented, it will affect the H-1B lottery next year. USCIS will first rank-and-select applications based on the wages offered for the specific occupation in the area of employment, beginning with the highest wage levels.
    - After USCIS allocates visas to the applicants receiving the highest wages (level IV) it will then proceed to allocate remaining visas to the next-lower wage level and on down.
    - This methodology will effectively preclude new graduates and less affluent employers from participating in the H-1B program, clearly in contrast to the stated intent of the H-1B program.

How These Rules Play out in Real Life

The Complaint cites an example of how these changes to the prevailing wage rules will affect one of the Plaintiffs, The University of Utah. The University would now have to pay a professor, currently earning $80,000 (which is already significantly above the current prevailing wage of $62,760), over $208,000.

Also noted is the simply bad data and statistical analysis on which the government relies to support its positions. Traditionally, DOL has thrown out the highs and the lows when determining average prevailing wages for a particular position and location. The regulations currently mandate how the various percentiles should be calculated to result in a range of permissible salaries, given a worker's level of experience and education within a specific job location. The intended (and correct) result of these calculations is to ensure that wages of U.S. workers will be protected i.e. that a foreign national will not take a job away from an American by working for a lower wage.

These rules, if allowed to go into effect, ensure the demise of the H-1B program. Since there are not enough domestic workers in certain fields, even during this period of high, general unemployment, companies will relocate to Canada where many of these foreign technology workers are now welcome. The paradox is that U.S. workers could lose their jobs altogether when a company leaves the U.S. labor market.

The DHS Rule (regarding specialty occupation) by itself- and by design- will render ineligible at least one-third of H-1B positions that are currently approved because their degrees or coursework will no longer match job duties they are already doing. Many types of engineering degrees, for example, meet the specialty occupation requirements under the old rules. Now, H-1B workers with certain types of degrees, who are already performing the job duties, will no longer qualify for an extension or new employment because they don't have an engineering degree that meets the new rules.

Also, employers will simply not be able to afford the new wage mandates. They will not be able to replace these H-1B workers with U.S. citizens because there simply aren't enough of them.

Bottom Line

There are currently 10,000 H-1B doctors helping to meet the need for medical care in rural areas across America. There are thousands more working in hospitals, higher education, and research labs. The effect of losing these H-1B workers would be staggering.

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