Immigration Alert

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Trump Administration Introduces Major Changes to H-1B Visas and Employment-Based Green Cards

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Key points

- DHS and DOL publish Interim Final Rules on H-1B visas and prevailing wage levels.
- DHS tightens "specialty occupation" definition and restricts third-party placement of H-1B employees.
- DOL significantly raises wage levels required for H-1B visa holders and green card applicants with immediate effect.
- Three separate lawsuits challenging the rules have been filed, with plaintiffs requesting preliminary injunctions.

On October 8, 2020, the Trump administration published two regulations that will significantly affect the issuance of H-1B visas and employment-based green cards. Both regulations were issued as Interim Final Rules. Though both rules will go through a 30-day notice and comment period, the DHS rule has an effective date of December 7, 2020, while the DOL rule was effective on the date of publication. In this alert, we describe the specifics of both regulations, their expected impact on the adjudication of work visas and employment-based green card petitions, and the litigation that has already begun.

DHS Re-Defines "Specialty Occupation"

To be eligible for an H-1B visa, a foreign national must be hired into a position that qualifies as a "specialty occupation." The Immigration and Nationality Act (INA) Section 214(i)(1) defines "specialty occupation" as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in a specific specialty (or its equivalent)." Historically, this has meant that if (1) the beneficiary has a bachelor's degree and (2) the degree is relevant for the position and the job duties that the beneficiary is going to execute, the H-1B petition is likely to be approved. In the past several years, U.S. Citizenship and Immigration Services (USCIS)—the sub-agency of the Department of Homeland Security (DHS) responsible for adjudication of H-1B visas—has been

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questioning employers' positions that allow for more than one type of a degree, often claiming that those degrees were "disparate" and not directly related to the duties and responsibilities of a particular position. The number of such requests for evidence (RFEs) has risen sharply, and the number of H-1B petitions denied for this reason has also increased considerably since 2017.

The new DHS rule, entitled "Strengthening the H-1B Nonimmigrant Visa Classification Program," codifies the adjudication standard adopted by USCIS in the past three years. The rule states that the required degree field(s) must have a direct relationship to the duties of the position and specifically indicates that "general" degrees in engineering, liberal arts, business, etc.—without further specialization—will not be sufficient to meet the new definition of "specialty occupation." If the employer accepts several types of degree for the same position, the H-1B petition will need to establish how each field of study is directly related to the duties and responsibilities of the position.

Furthermore, previous DHS regulations stated that the position must "normally" require a bachelor's degree to qualify as a specialty occupation, or such a requirement must be "common to the industry," or "usually associated" with the position. The new rule eliminates this language and instead states that the degree must be **always** required for the entry into the occupation as a whole to meet the definition of "specialty occupation." DHS relies heavily on the Department of Labor's (DOL) Bureau of Labor Statistics, which conducts surveys of private employers and publishes the results online. Inevitably, even in professional occupations, there are some employees that do not have a bachelor's degree in a specific field and have qualified for their position thanks to years of experience in the industry. Reliance on the DOL data may effectively mean that only very few occupations that require a particular advanced degree and a license—for example, doctors, lawyers and architects—will qualify for H-1B visas. In those occupations, no candidates without a degree in a specific field and/or a license would be considered, even for an entry-level position, thus guaranteeing that USCIS would consider these occupations "specialty occupations." For all other types of occupations, the petitioner may be able to use alternative evidence and argue that a bachelor's degree is required for entry into the position by the relevant industry, or that the petitioner has required it for all the candidates for the position, or, because the position is so specialized, complex or unique, a bachelor's degree in a specific field is required to perform the duties of the position. It remains to be seen, however, how much weight USCIS will assign to employers' evidence and how heavily it will rely on DOL data. The latter could mean a dramatic reduction in the number of occupations eligible for H-1B visas.

The new rule applies to all H-1B petitions filed after December 7, 2020, including extension and transfer petitions. The rule acknowledges that some of the H-1B employees already granted their immigration status may no longer qualify for it at the time of extension and those extension petitions may be denied. DHS notes in the rule that "simply because a petition was approved previously does not guarantee that a similar petition would be approved in the future as prior approvals are not binding on USCIS." In fact, Ken Cuccinelli, the Senior Official Performing the Duties of the USCIS Director, stated at a press conference on October 6, 2020, that the DHS rule will render ineligible at least one-third of H-1B positions that are currently approved.

DHS Re-Defines Employer-Employee Relationship and Restricts H-1B Validity at Third-Party Worksites

In the same rule, DHS defines the "employer-employee relationship" as the conventional common-law master-servant relationship and includes commonly used elements like right to control, supervise, hire and fire. It also adds new elements to the definition, for example, that the H-1B beneficiary will have to produce an end-product that is directly linked to the petitioner's line of business. It also requires a bona fide, "non-speculative" offer of employment. The rule amends the definition of "employer" by striking the word "contractor" from it, even though it states that contract work may still qualify for the H-1B visa.

The rule also defines "worksite" as a "physical location where the work is actually performed by the H-1B nonimmigrant" and requires that petitioners who plan to place their H-1B workers at third-party worksites submit evidence of contracts, work orders, "or other similar legally-binding agreements," to establish that the beneficiary will perform duties in a specialty occupation position and that the petitioner will maintain an employer-employee relationship with the beneficiary. This requirement de facto reinstates the USCIS adjudication practice based on a 2010 agency memo that became the focus of recent litigation in *IT Serve v. USCIS*. The memo was withdrawn as the result of a settlement reached in that lawsuit. By adopting this new regulation, the agency reinstates the practice based on the memo and codifies it.

The rule also states that third-party placement H-1B petitions can only be approved for a maximum of one year, even if the employee will spend the majority of the time at the company's main worksite and only a minority of the time at a third-party worksite, such as a client's site. This means that employers will have to file renewal petitions for those employees every year, which will lead to an increase in filing fees, legal fees, time and effort that it takes to prepare an H-1B petition. These new requirements will have the biggest impact on IT consulting companies that place their employees at client sites.

DHS to Increase Worksite Inspections

The rule also expands DHS's power to determine employer compliance with more frequent worksite inspections that may occur before, during and after an H-1B petition is approved. Under the new rule, inspections may now be conducted at an employer's headquarters, satellite locations, and worksites, including third-party worksites. If an employer—or a third party—refuses to cooperate with the government during the worksite visits, USCIS will have the authority to deny or revoke H-1B petitions filed by that employer.

DOL Raises the Prevailing Wage Levels Applicable to H-1B Visas and Green Card Petitions

Concurrently with the new DHS regulation on H-1B visas, the DOL published an Interim Final Rule that increases required wages for beneficiaries of H-1B, H-1B1 and E-3 visas, as well as employment-based green cards based on labor certifications. Entitled "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," the rule became effective on the date of publication, October 8, 2020.

Prevailing wage is the minimum wage that must be paid to a foreign worker employed in a particular occupation in a particular geographic area. Under the current system, in place since 2004, the DOL collects survey data from employers and then calculates and publishes four wage levels for each occupation. Each wage level is assigned a percentile that corresponds to the average wage level paid to employees, depending

on the required skills to perform the job duties. In this regulation, the DOL changed the computation of prevailing wage and raised each wage level for all occupations across-the-board in the following manner:

- Level I – Entry level employees – wage increased from 17th percentile to 45th percentile.
- Level II – Qualified employees – wage increased from 34th percentile to 62nd percentile.
- Level III – Experienced employees – wage increased from 50th percentile to 78th percentile.
- Level IV – Fully competent employees – wage increased from 67th percentile to 95th percentile.

The new calculation means that an entry-level foreign worker will be required to be paid a wage that corresponds to the 45th percentile of average wages in that particular occupation, which is almost as high as the old Level III wage, which used to correspond to "experienced" workers' compensation. Foreign workers that are more experienced than those in entry-level positions will also be required to be paid significantly higher wages than before, and, most likely, will need to be paid higher wages than the industry standard to remain eligible for temporary work visas and green cards. In many states, labor laws would require employers to raise all the other employees' salaries if they are hired in comparable positions, which may not be financially feasible.

Furthermore, upon publication of the new wage levels, immigration practitioners noticed that the DOL does not collect information on wages above $208,000 per year, so for many positions the DOL does not have sufficient data to determine all four wage levels. Instead, the DOL put "N/A" in all four wage levels with a note that the wage may be "at least" $208,000 per year. The National Foundation for American Policy estimates that there are over 18,000 combinations of occupations and geographic labor markets where, due to the lack of DOL data, the minimum wage rate, even for entry level positions, is set at $208,000 per year. Examples of affected occupations are financial analysts in New York City, software developers in San Francisco and many other common occupations. This creates confusion for H-1B sponsors because employers typically utilize published DOL wage levels in H-1B petitions to identify wages offered to the prospective employee. Instead of relying on DOL data, employers may need to utilize private wage surveys, which can be costly. For green card applications, employer cannot rely on private wage surveys and must request the prevailing wage from the DOL. The $208,000 minimum wage determination may make many green card petitions untenable for employers because they may not be able to afford to pay such a high minimum wage.

Additionally, some analysts have reviewed the computational methodology of the DOL rule described above and have stated that the rule contains significant computational errors, which may require the rule to be rescinded and republished with corrections.

The rule will apply to all new requests for labor condition applications, which are required for H-1B, H-1B1 and E-3 temporary work visas, as well as to all pending and newly initiated requests for prevailing wage determination, which are required for employment-based green cards. This means that employers who relied on previously published wage levels, expended time and legal fees to determine the position description and requirements for the position, and initiated their green card

sponsorship with the DOL may now not be able to continue with the petition if the new prevailing wage is higher than what they are able to pay to their prospective green card beneficiaries. At this time, the DOL will not re-calculate wages for any previously issued prevailing wage determinations and will not reopen any previously approved labor condition applications or labor certifications.

Litigation Over the Rules

As mentioned above, both regulations have been adopted as Interim Final Rules with the DOL rule effective immediately. The administration acknowledges in the rules that they will bring significant changes to the employers' ability to sponsor foreign workers for H-1B visas and green cards, but aims to justify effective dates of the new rules by citing the considerable loss of employment by U.S. workers due to COVID-19 and the need to eliminate competition by foreign workers. However, this approach makes the rules more vulnerable to a legal challenge.

Various business groups, trade associations, universities and other U.S. employers have already filed three separate lawsuits challenging the substance of the rules, as well as the administration's decision to adopt the rules as Interim Final Rules, without waiting to consider the public comments that will be submitted in the next 30 days. Two of the lawsuits—Purdue University v. Scalia, filed in the District Court for the District of Columbia, and ITServe Alliance Inc. v. Scalia, filed in the District of New Jersey—challenge the DOL rule only. The third lawsuit—Chamber of Commerce of the USA v. DHS, filed in the Northern District of California—challenges both rules.

Plaintiffs in all three lawsuits ask the court to enter a preliminary injunction against the new rules, arguing that the regulations significantly change the ability of U.S. employers to fill vacant positions with foreign workers and, therefore, the agencies should take public comments into consideration before finalizing the new rules. The challengers further argue that the government's reference to COVID-19-related unemployment does not justify the issuance of these new regulations as Interim Final Rules because the rules are not closely related to the unemployment created by the pandemic and have been contemplated for a long time (indeed, the DHS rule first appeared on the agency's regulatory agenda in the fall of 2017). The complaints site statistical evidence that the unemployment level in computer-related occupations—which account for two thirds of all H-1B visas—is significantly lower than the general unemployment level across industries and is essentially the same as before the pandemic started. The complaints also point to outdated unemployment data cited as justification for the rules and argue that the good cause exception standard allowing administrative agencies to adopt new regulations as Interim Final Rules has not been met by either the DOL or DHS. It remains to be seen if a federal court enters a preliminary injunction against either of those rules, and if such an injunction would apply nationwide or if it would only apply to the plaintiffs and their member companies, as has been the case in several recent preliminary injunctions entered by U.S. courts in immigration cases.

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