H-1B and Employment Immigration Processes Under Attack

October 13, 2020

In its continuing effort to limit *legal* immigration, the Trump Administration announced two rule changes last week to radically limit H-1Bs and the most common employment-based permanent residence process.

The first rule change was from the Department of Labor affecting prevailing wages that are used for both the H-1B labor condition application (LCA) and the labor certification (PERM) process. This rule was effective immediately on October 8, 2020.

The second was a rule change from U.S. Citizenship and Immigration Service (USCIS) narrowing H-1B eligibility, particularly for companies that place workers at third-party worksites.

The Wage Rule

The Department of Labor (DOL) determines the "prevailing wage" to be used in the H-1B and PERM process. The concept is to make sure that the wages offered to immigrant workers do not undercut the U.S. job market. Prevailing wages are determined by employer wage surveys and are reported by geographic area and occupation. They are determined in four levels, indicating the education and experience required to do the job offered.

While continuing this general methodology, DOL increased the "percentiles" of the data to be used for the four levels. For example, level 1 (entry-level) stood at the 17th percentile before the rule. Now it is the 45th percentile.

Besides it being counter-intuitive that an entry-level job would start at the 45th percentile of wages, the DOL made serious mathematical and statistical errors in their calculations, particularly in considering its adverse effect, as documented by the CATO institute.

Additionally, the rule mainly considered wages for the big users of the system, such as large technology companies. We fear the ramifications for smaller employers, including hospitals, school systems, and small businesses – especially in rural areas – that have little room to raise wages.

The rationale for the rule is to prevent foreign workers from obstructing U.S. worker employment as the economy struggles under the strains of COVID-19. Sadly, the real-world effect will be more outsourcing and financial strain when U.S. workers are not available (a problem in many parts of the country).

Who is affected?

If you have **an *approved* LCA or prevailing wage determination for PERM**, the new rule has no effect. We can use those determinations for filing an H-1B or PERM.

If you ***filed*** **an LCA before October 8, 2020**, it will be processed under the rules in effect at the time of *filing*. This is one reason that DOL made the rule effective immediately – to prevent a crush of LCA filings.

If you have a **prevailing wage determination request for a PERM on file**, it will be determined under the *new rule*. Unfortunately, this means that if advertising commenced before the prevailing wage determination was received (because the outcome was considered to be clear), it will need to be re-done if the offered wage does not meet the new rule.

Options for Prevailing Wages

Fortunately, those filing H-1B LCAs are not stuck with the DOL's flawed prevailing wage guidance. We can use private wage surveys, so long as they meet certain statistical guidelines. Private surveys may also be conducted for a specific job.

For PERM prevailing wages, we can ask DOL to use a private survey, but it has discretion to use it for its wage determination.

In both cases, if a collective bargaining agreement, it will still be used for the prevailing wage. The Davis-Bacon Act or McNamara Service Contract Act also may be considered if the occupation is subject to them.

The H-1B Definition Rule

The USCIS defines the H-1B "specialty occupation" for professional workers. To qualify, the job offered must require at least a bachelor's degree in a particular field. What that means has been the subject of thousands of requests for evidence and scores of lawsuits during the Trump Administration. The rule seeks to roll back gains obtained in litigation by changing the regulatory definition.

Most of the changes are aimed at the favorite target of many in the Administration: H-1B IT contractors. However, all applicants will be impacted. "Highlights" include:

- Changes to prevent jobs that will accept a range of degree fields or a "general degree" from qualifying. This change would make it more difficult for those in emerging fields, such as data analytics, to qualify because more than one educational path leads to these occupations, which are also often inter-disciplinary.
- Directing that a bachelor's degree be "always" required for an occupation instead of "commonly" or "normally" required. Because USCIS relies on the *Occupational Outlook Handbook*, a generalized career advice publication, as the last word in analyzing job requirements, more proof of real-world requirements will be needed. It also does not recognize the evolution of IT jobs as the field grows more complex.

- Limiting placement at third-party worksites to one year. This will *not* affect remote work at the employee's home. It is addressed at the contracting industry.
- Taking yet another swipe at how the "employer-employee" relationship is defined and the proof that will be required when an H-1B employee works at a third-party site.

Fortunately, the USCIS rule is not immediately effective. Also, it does not prevent an H-1B from being approved, but potentially increases the cost of making the application as more legal work will be involved. For some occupations, such as physicians, there is no question about their "specialty" nature and this rule change may have little effect.

Now what?

Several lawsuits are in the works against both rules. They may be vulnerable both procedurally and substantively as they were rushed through the approval process and contain factual errors.

Additionally, both DOL and USCIS are taking public comments, which they must review. USCIS must consider the comments before the rule is published and goes into effect. While the DOL rule is in effect currently, comments will still be helpful, especially if litigation causes its immediate effective date to be reconsidered.

We encourage anyone who is adversely affected – especially U.S. employers – to comment on the rule. As always, we also encourage outreach to your members of Congress. Both rules are in opposition to the underlying law and Congress could make that clear by amending the authorizing legislation.