Alert

October 8, 2020

COZEN O'CONNOR

Sweeping Changes to the H-1B Program To Go into Effect

Two Interim Final Rules (IFRs) are to be published on Thursday, October 8, 2020 by the U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL). The DHS "Strengthening the H-1B Nonimmigrant Visa Classification Program" and the DOL "Restructuring of H-1B/H-1B1/E-3 and PERM Wage Levels" IFRs will have a significant impact on the H-1B/H-1B1/E-3 visa programs. The DOL IFR will significantly increase the prevailing wages to be paid to H-1B, H-1B1, and E-3 workers, and the DHS IFR will revise the definition of "specialty occupation," change the employer-employee requirements, and increase the vetting of H-1B users.

The DHS IFR will be published on Thursday, October 8, 2020, and take effect in 60 days. The DOL IFR will go into effect at the time of publication, i.e., October 8, 2020. The administration has stated that these rules are meant to protect American workers, especially during the COVID-19 pandemic.

The DOL Wage Levels Rule

The DOL IFR will change the computation of prevailing wage levels, resulting in higher prevailing wages for all occupations for each OES-based wage level. The H-1B, H-1B1, and E-3 visa programs currently rely on a four tier wage program. Level 1 is for entry level positions and the wage levels increase through to Level IV that would be a high level position. The new wage levels will increase as follows:

Level 1 Wage: 45th percentile (from 17th percentile)

Level II Wage: 62nd percentile (from 34th percentile)

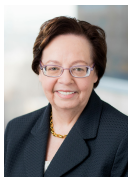
Level III Wage: 78th percentile (from 50th percentile)

Level IV Wage: 95th percentile (from 67th percentile)

Under the regulations, employers must pay H-1B workers the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or "the prevailing wage level for the occupational classification in the area of employment." By ensuring that H-1B workers are offered and paid wages that are no less than what U.S. workers similarly employed in the occupation are being paid, the wage requirements are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor. The OES wage levels that DOL uses in the H-1B program, as well as the related H-1B1 and E-3 specialty occupation programs for foreign workers from Chile, Singapore, and Australia, are the same as those used in the PERM program. Through the PERM program, DOL processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB-2 and EB-3 immigrant visa preference categories. This IFR changes the way in which DOL calculates the prevailing wage when based on OES surveys.

Here are a few examples of how the wage levels will increase:

Specialty Occupation	Location	Level One Prior Wage	Level One New Wage
Chemist	Chicago	$50,003	$65,021
Software Developer	Philadelphia	$73,715	$93,912
Mechanical Engineer	San Francisco	$83,054	$116,251



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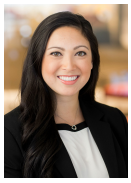

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Related Practice Areas

- Immigration Policy & Strategy

DOL will not apply the new regulations to any previously approved prevailing wage determinations, permanent labor certification applications, or LCAs.

Employers will see an immediate increase to the wages associated with each wage level, thereby increasing the wage associated with the H-1B, H-1B1, and E-3 visas, as well as the wages associated with the permanent employment-based programs.

The DHS H-1B Strengthening Rule

A specialty occupation is one that normally requires a bachelor's degree or equivalent as a minimum requirement. The H-1B, H-1B1, and E-3 visas are for professional-level individuals possessing the minimum of a baccalaureate degree who will work in the United States in a specialty occupation. The DHS Rule narrows the definition of specialty occupation as follows:

- There must be a direct relationship between the required degree field(s) and the duties of the position. It notes that a position will not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position. Likewise a position that requires a bachelor's degree in any field would be insufficient to qualify for the position, or a position that requires a bachelor's degree in a wide variety of fields unrelated to the position, would not be considered a specialty occupation.
- In those cases where the employer lists degrees in multiple disparate fields of study as the minimum requirement for the position, the employer must establish how each field of study in a specific specialty provides a body of highly specialized knowledge directly related to the duties.

The DHS IFR notes that the employer bears the burden of establishing that there is a direct relationship between the degree in a specific specialty and the duties of the position. The IFR notes that this burden should be easy for the employer to establish, such as when a required medical degree is directly correlated to the duties of a physician, or a law degree is directly correlated to the duties of a lawyer, or the requirement of an architecture degree correlated to the duties of an architect. The IFR goes on to state that if an employer requires either a degree in education or chemistry for a chemistry teacher position, the employer will be able to show the required direct relationship between the degree in a specific specialty or specialties and the duties of the position. However, a general engineering degree requirement for a software developer position would be insufficient to meet the requirements of a specialty occupation.

In addition to changes to the definition of specialty occupation, the DHS IFR also notes that the current regulation allows a position to qualify for H-1B classification when a bachelor's degree is "normally" required, or "common to the industry," or when the knowledge required for the position is "usually" associated with at least a bachelor's degree or equivalent. The new DHS IFR eliminates the terms normally, common, and usually and now requires the employer to establish one of the following:

1. A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into the particular occupation in which the beneficiary will be employed;
2. A U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, is the minimum requirement for entry into parallel positions at similar organizations in the employer's U.S. industry;
3. The employer has an established practice of requiring a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent, for the position. The petitioner must also establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties; or
4. The specific duties of the proffered position are so specialized, complex, or unique that they can only be performed by an individual with a U.S. baccalaureate or higher degree in a directly related specific specialty, or its equivalent.

The DHS IFR also revised the language to clarify that meeting one of the (4) regulatory criteria for a specialty occupation is a necessary part of, but not necessarily sufficient for, demonstrating that a position qualifies as a specialty occupation.

Lastly, the DHS IFR also requires an employer trying to show that the position qualifies as a specialty occupation because of the employer's own established hiring practice to hire those with the same bachelor degree qualifications, that employer must also show that the position itself requires a directly related specialty degree.

Under this new definition of specialty occupation, a job that requires an applicant to have any college degree, or one of many possible degrees, would not qualify as a specialty occupation unless the employer can show that each degree option is directly related. The rule specifically states that a position is not a specialty occupation if a general degree — such as business administration or liberal arts — is sufficient to qualify, without any further specialization.

The DHS IFR goes on to state that "each case is decided on its own merits, and 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. The burden of proof remains on the petitioner, even where an extension of stay in H-1B nonimmigrant status is sought."

Establishing the Employer-Employee Relationship

DHS IFR revises the requirements an employer must meet to establish a bona fide employer-employee relationship exists, and addresses the H-1B visa holder working offsite. First, the DHS IFR changes the definition of a U.S. employer by striking the word "contractor" from the definition of a U.S. employer and inserting the word "company." By clarifying the definition of U.S. employer, the IFR makes clear that the U.S. employer must establish the requisite "employer-employee" relationship with the H-1B beneficiary. However, contractors can be a U.S. employer if the contractor can establish the requisite employer-employee relationship with the beneficiary.

The DHS IFR distinguishes a "worksite" from a "third-party worksite." Worksite is defined as "the physical location where the work is actually performed" by the H-1B worker and must conform to the DOL Labor Condition Application rules. A third-party worksite is defined as a "worksite, other than the beneficiary's residence in the U.S., that is not owned or leased, and not operated by the petitioner."

DHS IFR states that an employer must "engage the beneficiary to work within the U.S., and have a bona fide, non-speculative job offer for the beneficiary." As such, the petitioner must have non-speculative employment for the beneficiary at the time of filing and must establish that "actual work will be available as of the requested start date." Further, the new rules require third-party placement situations to establish the employer-employee relationship by submitting copies of contracts, work orders, and additional evidence such as detailed end-client letters from an authorized official establishing the employer-employee relationship between the employer and employee and demonstrating that the employee will be engaged in specialty occupation work.

DHS IFR finds that the current definition of an employer-employee relationship is not adequately defined. As such, the revised regulation lists the following factors to be considered in the totality of the circumstances in cases where the H-1B beneficiary does not possess an ownership interest in the petitioning organization: (i) whether the petitioner supervises the beneficiary, and if so, where such supervision takes place; (ii) where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision; (iii) whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects; (iv) whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment; (v) whether the petitioner hires, pays, and has the ability to fire the beneficiary; (vi) whether the petitioner evaluates the work-product of the beneficiary; (vii) whether the petitioner claims the beneficiary as an employee for tax purposes; (viii) whether the petitioner provides the beneficiary any type of employee benefits; (ix) whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment; (x) whether the beneficiary produced an end product that is directly linked to the petitioner's line of business; and (xi) whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished. By listing these factors, DHS is making clear that "no single factor is dispositive and that all factors must be taken into consideration to the extent applicable and appropriate to the factors of the specific case."

Petition Validity Periods

The DHS IFR establishes a new one-year maximum validity period for all H-1B petitions where the beneficiary will be working at a third-party worksite. This change alone will have a drastic impact on many employers by requiring them to renew the H-1B, H-1B1, or E-3 visas annually. If an employer requests the three-year validity period, and USCIS determines that the one-year would be appropriate, USCIS will provide an explanation for the shorter validity period. Likewise, the new rule eliminates the need for an employer to provide an itinerary when filing the H-1B petition.

Site Visits

Finally, the DHS IFR specifically addresses site visits at employer worksites and states the DHS has the authority to conduct site visits before or after the approval of the H-1B petition, the authority to conduct site visits at the third-party worksite, and the authority to deny or revoke a petition as the result of the employer's or third-party's refusal to cooperate with or permit a site visit.

The DHS IFR will take effect on December 7, 2020.