

Higher Standards for H-1B Visas Announced

By Roy Maurer

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Federal agencies announced on Oct. 6 long-expected reforms to the H-1B visa program for high-skilled foreign workers that will raise the bar for qualifying for the popular visas.

The interim final rules (<https://www.dhs.gov/news/2020/10/06/department-homeland-security-and-department-labor-rule-restores-integrity-h-1b-visa>), expected to be issued by the Department of Homeland Security (DHS) and Department of Labor (DOL) Oct. 8, would increase the required wages employers must pay their H-1B workers and redefine the degrees, occupations and employer-employee relationships eligible for the visas.

"These rule changes target the very heart of the program," said Hendrik Pretorius, an immigration attorney and CEO of ImmiPartner, an immigration legal services firm based in San Francisco. "They change the way an H-1B position and an individual's background would be assessed for qualification, attach new requirements to H-1B wage levels—where possibly only the highest wage levels will qualify—and add additional requirements to H-1B cases involving placement at third-party client sites."

Pretorius said that the rule will limit the types of jobs that will qualify for H-1B transfers and extensions this year and could potentially limit which roles will qualify for workers applying for their first H-1B visa early next year in the next lottery cycle.

Ken Cuccinelli, the senior official performing the duties of the deputy secretary at DHS, told reporters that he expects about one-third of H-1B visa applications will be rejected under the new set of rules.

Cuccinelli and other critics of the H-1B visa program argue that too many of the visas go to outsourcing companies, which displaces U.S. workers and drives down wages.

"The U.S. Department of Labor is strengthening wage protections, addressing abuses in these visa programs, and ensuring American workers are not undercut by cheaper foreign labor," said U.S. Secretary of Labor Eugene Scalia.

The policy changes have been on the administration's agenda since 2017 (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dhs-ice-uscis-h1b-visa-l1-reforms-for-2020.aspx). Experts say the new regulations are the Trump administration's effort to codify adjudication policies issued over the last three years that have resulted in a dramatic increase in requests for evidence and denials of H-1B petitions.

The denial rate for H-1B petitions for initial employment increased from 6 percent in fiscal year 2015 to 29 percent through the second quarter of fiscal year 2020, according to a recent analysis from the National Foundation for American Policy.

"The Trump administration has restricted H-1B visas more than any previous administration, but it has done so without issuing a new regulation until now," said Stuart Anderson, the executive director of the public policy research organization based in Arlington, Va.

Emily M. Dickens, corporate secretary, chief of staff, and head of government affairs at the Society for Human Resource Management (SHRM), said that SHRM and its members are "looking for policy solutions that protect U.S. workers, bring clarity and improvements to our work-based immigration system, and address the immediate needs of our talent pipeline."

These new rules fall short of providing solutions, she said, and "could set back efforts to meet the pressing needs of the country's workforce. We will use the comment period to share the real-life stories of U.S. human resource professionals committed to providing access to employment to meet the needs of their communities, their businesses and the U.S. and foreign workers they currently serve."

DOL Rule

The DOL's wage-scale revision is set to take effect Oct. 8. Under the new rule, the required wage level for entry-level workers would rise to the 45th percentile of their profession's category, from the current requirement of the 17th percentile. The requirement for the highest-skilled workers would rise to the 95th percentile, from the 67th percentile.

"After an extensive review, the DOL has determined that the existing wage methodology leads to potential abuses of these programs that in some cases undermine the wages and job opportunities of U.S. workers," the agency said. "These harms are exacerbated by the recent effects of the coronavirus public health emergency on the U.S. labor market and require immediate corrective action."

When seeking to employ an H-1B worker or to hire a foreign worker under the EB-2 or EB-3 green card categories, U.S. employers must attest that they will pay the workers the higher of the prevailing wage or the actual wage paid to other employees with similar experience and qualifications.

DHS Rule

The DHS rule will be effective 60 days after its publication in the *Federal Register*.

This rule will narrow the definition of "specialty occupation" in hopes of "obtaining the best and the brightest" to the H-1B program, and will revise the definition of employment and employer-employee relationship to make it more difficult for workers from consulting, outsourcing and staffing firms to qualify for the visas.

Next Steps

Publishing the regulation as an interim final rule allows it to go into effect without public input but also makes it more vulnerable to legal challenge.

"The Trump administration's potentially most consequential action to restrict high-skilled immigration ... is almost certain to be challenged in court," Anderson said.

Pretorius recommended affected employers:

- Run wage reports for all H-1B employees. "Highlight which employees are impacted by these new wage levels and be ready to have to adjust and file amendments if in fact the wages fall below the new DOL prevailing wage standards," he said. "We are still unsure whether this rule will impact those already in status with valid I-94 periods of stay and if it will be required to change wages and file amendments."
- Ensure that H-1B holders understand how to maintain valid status in the U.S., particularly due to the wage issues and whether their role is, in fact, a specialty occupation role.
- Expect case processing to slow down due to more requests for evidence related to the changes.

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