Proposed Changes to the H-1B Program and Prevailing Wage Determinations

By Immigration Group | November 18, 2020 | Fredrikson & Byron, P.A.

The Past Four Years

The past four years have presented unparalleled challenges and changes to U.S. immigration.

Although the immigration statute – the Immigration and Nationality Act – and the implementing regulations have remained largely unchanged, immigration adjudications have been in a near constant state of flux, and we have seen an unprecedented number of new restrictions, seemingly on a weekly basis.

These restrictions have not been implemented through the introduction and passage of legislation – there have been no promising attempts to pass a comprehensive immigration bill for several years now – but through a stream of executive orders and internal directives on how immigration matters should be adjudicated, or not adjudicated at all.

Such executive orders and policy directives have resulted in an overall clamping down on immigration, including employment-based immigration, and the data backs this up.

Denial rates of H-1Bs have quadrupled in recent years, for example. According to the American Immigration Council, relying on data from the National Foundation for American Policy, denial rate for initial H-1B petitions for employment of new employees went from 6 percent to 24 percent in the first three quarters of FY 2019; denial rates for H-1B extensions of mostly existing employees went from 3 percent to 12 percent in the same period.

Employers may have fared worse in FY 2020. USCIS data suggests that the denial rate for H-1B petitions for initial employment was as high as 30 percent in the first quarter of FY 2020 .

Denials, lengthy and often unfounded requests for evidence, and notices of intent to deny are now common, and companies and foreign national employees must factor this reality into case processing and timelines.

New Rules

On top of the restrictive adjudicative practices we have been witnessing, we are now faced with new H-1B rules that further limit access to H-1B visa status and make permanent residency

processing through the traditional three step PERM process more complex due to possible higher required wages. If your company uses H-1Bs to hire foreign workers and also sponsors foreign workers for permanent residency, these rules could impact you and your employees.

In October 2020, the Trump administration announced three new regulations that would profoundly change – and broadly restrict – H-1B visas:

1. An interim final rule (IFR) titled "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" (DOL Wage Rule)
2. An IFR titled "Strengthening the H-1B Nonimmigrant Visa Classification Program" (Strengthening H-1B Rule)
3. A proposed rule "Modification of Registration Requirement for Petitioners Seeking to File Cap Subject H-1B Petitioners" (H-1B Lottery Rule)

Will talk briefly about all three and their potential impact.

DOL Wage Rule

First, the Department of Labor's wage rule changes the way the agency assesses and levels its wage data for the purpose of setting prevailing wages across occupational categories. The effect? The rule raises DOL-issued prevailing wages for H-1B visa holders and those who are undergoing the employment-based permanent residency process.

Three lawsuits have been filed in response to this rule, but until the rule is struck down or enjoined, we are required to use alternative salary surveys to establish the prevailing wage when preparing H-1Bs and labor certification applications, or use DOL's new and very high prevailing wages.

Why is this important to your company?

Companies are required to pay greater of the prevailing wage or the actual wage paid to other similarly situated employees when filing an H-1B. Therefore, the baseline wage that you are required to offer your H-1B worker is the prevailing wage. In the permanent residency context, you are required to pay at least the prevailing wage to your foreign national employee when they receive their green card.

The wage rule went into effect essentially overnight with no notice and comment period. And now companies and foreign nationals filing H-1Bs and PERM labor certifications are faced with highly inflated prevailing wages if they want to use DOL wages to file their cases.

There is concern that this rule, if it continues to be implemented, will have the effect of pricing out or rendering too expensive foreign labor.

Strengthening the H-1B Rule

Second, there is the Department of Homeland Security's "Strengthening the H-1B Rule" that overhauls the definition of a specialty occupation and seeks to codify restrictions against companies who engage in third-party placement of their H-1B employees.

This rule is particularly relevant and harmful to consulting companies and others whose business model places their H-1B workers at customer sites, and generally the rule will make H-1Bs harder to win.

Three lawsuits have been filed in response to this rule, but unless the rule is enjoined or set aside by these suits or others, the rule will go into effect on December 7, 2020.

Some of the provisions we have seen before. The rule codifies some of the restrictionist policies that we have been dealing with over the last several years, but now makes an already difficult process even more challenging due to the heavy documentary burden placed on companies who place employees at third-party sites.

The following are several important takeaways:

The rule changes the long-standing definition of specialty occupation. To qualify for H-1B classification, a job must be a specialty occupation or one that requires at least a bachelor's degree in a specific specialty. The proposed rule clarifies that in order for a job to be a specialty occupation and eligible for H-1B classification, there must be a direct relationship between the required degree fields and duties of the position. Disparate, general or unrelated fields may no longer qualify.

For example, the preamble to the rule indicates that a position requiring a degree in business administration might be too general to qualify without requiring further specialization. Similarly, a job that requires a degree in IT, engineering or business might not qualify because the degree fields are too general, but also unrelated. To pursue H-1Bs under this rule, a company might consider sponsorship only for those positions that require a bachelor's degree in a finite set of related degree fields, which degree fields relate back to the job.

Also, under the current regulations, employers only have to show that a bachelor's degree is normal or common in the industry; the new rule eliminates the normal and common language in the regulations. Now employers have to show that a bachelor's degree in a specific specialty is *always* the requirement 1) in the industry; 2) for the occupation as a whole; 3) at the employer; 4) or because the position is so complex or unique that a bachelor's degree is required. We understand that the agency will rely heavily on the DOL's *Occupational Outlook Handbook* to understand whether the DOL has concluded a particular occupation requires a degree in a specific specialty.

The rule codifies a no deference to prior approvals policy. Under this codified no deference policy, if an initial H-1B petition was previously approved, the agency can deny an extension of status petition, even if it is for the same job at the same employer. In response to this provision and when extending an individual's H-1B status, we can no longer just assume USCIS will again

approve the case or accept the content of an argument in the previously filed petition. Companies may have to bolster their cases to solidify their chance at approval.

The rule changes the requirements for a valid employer-employee relationship. To file an H-1B petition, the petitioning employer must have an employer-employee relationship with the beneficiary. This has always been the case, but the new rule changes the definition regarding which entities constitute a U.S. employer. In redefining which entities constitute U.S. employers for H-1B purposes, DHS has eliminated the term *contractor* as one of the types of possible U.S. employers. In the preamble to the rule, DHS clarifies that contractors are not now precluded from filing H-1B petitions, *per se,* and may still qualify on a case-by-case basis, but that contractors will no longer receive blanket qualification as U.S. employers.

The rule indicates it may be harder for USCIS to find that there is a valid employer-employee relationship when the petitioner is a contractor, especially if there are multiple parties to a contract. The rule clarifies that the more contracts involved in a contractual chain, the less likely it is that the petitioner has control over the beneficiary, which is one of the factors in determining whether the requisite EE-ER relationship exists. USCIS will now be required to assess based on a totality of the circumstances and based on a review of several factors, whether the requisite employer-employee relationship exists with no single factor being determinative.

Non-speculative work is now a must. Under the rule, employers must now engage a beneficiary to work and have a bona fide non speculative job offer for the beneficiary; actual work must be available as of the requested start date. According to the preamble, companies may not use the H-1B to meet possible workforce needs.

Documentary requirements for third-party placements. The new rule clarifies what types of evidence is needed for third-party placements: (1) Contracts including signed master service agreements and associated work orders or SOWs; and if contracts are not sufficiently detailed to describe the duties and requirements of the work (2) detailed letters from authorized officials at the third-party site.

The documentation must substantiate the terms and conditions under which the work will be performed; must detail what the beneficiary will be doing; and must document the job requirements of the end user, and the requirements must be consistent with H-1B eligibility (must show that a bachelor's degree in a specific specialty is required).

One-year validity period replaces three-year validity period. The new rule imposes a maximum validity period for an H-1B involving a third-party placement of one year whereas presently individuals are allowed three years.

Site visits at customer sites might now be expected. Finally, the new rule clarifies that DHS will engage in anti-fraud site visits at third-party sites in order to verify that the worker is doing what s/he is supposed to be doing pursuant to the H-1B petition.

H-1B Lottery Rule

Finally, turning to the third rule regarding the H-1B lottery, this rule would end the H-1B visa lottery as we know it when USCIS receives more first time H-1B petitions than H-1B visa slots available under the 85,000-limit. In its place, USCIS would grant petitions based on the salary associated with the H-1B petition. Registrations would be accepted for the highest paid positions first, followed by lower paid positions. There is widespread concern the proposed regulation violates the immigration statute and unduly harms international students, information technology professionals, physicians, and others with less experience or lower salaries since the effect is that they may be shut out of the H-1B program for being so far down the rank.

The H-1B lottery was published in the Federal Register on November 2 and has a 30-day notice and comment period that ends on December 2, 2020.

Unless there are successful legal challenges enjoining or throwing out the rules, we may be required to operate under the same for a period of time even after Biden becomes president.

What Might We Expect From a Biden Presidency?

So what *does* happen when Biden takes office? Biden has pledged to roll back many of Trump's immigration changes, but this might be easier said than done since there have been just so many changes.

There are some rollbacks he could implement right away by way of executive order, and others that could take a longer period of time and may depend on Congress' willingness to collaborate.

There is discussion that in Biden's first days in office he could eliminate the travel bans that have impacted individuals coming from mostly Muslim countries (the Muslim ban), which have been in effect since the beginning of 2017. In addition, he could strike the presidential proclamations suspending the issuance of H-1B passport visas on the premise of COVID, but he has not indicated whether or not he is planning on doing so.

There is also discussion that Biden will put back on the table the ability of individuals to file initial DACA applications. DACA or Deferred Action for Early Childhood Arrivals allows individuals who were brought to the United States as children, but without immigration authorization, to apply for work authorization in the United States. Following revisions made by the Trump administration to the DACA program, USCIS is no longer accepting initial DACA applications, only renewal applications, limiting the number of individuals who might benefit. In addition to Biden's pledged action to restore the benefit, a lawsuit has been filed in the U.S. District Court for the Eastern District of New York challenging the legitimacy of the DHS' revisions under the premise that Acting Homeland Security Secretary Chad Wolf lacked the authority to issue the revisions to the rule because he was improperly designated as acting DHS secretary at the time the revisions were put in play.

Biden has vowed to send to Congress in the first 100 days of his presidency legislation that would create a pathway to citizenship for an estimated 11 million immigrants living in the country without documentation.

But that bill and other comprehensive immigration actions would require congressional-approval, and this could be challenging if Republicans retain control of the Senate.

Short of that, a Biden administration could still use its executive authority to reshape the immigration system on a piecemeal basis.

If he wanted to roll back regulations, like the new H-1B regulations above, he might be able to do so through new rulemaking, or working with the immigration agencies to develop new rules or clarify existing rules that implicitly amend or rescind the previous regulations of the agency, similar to what the Trump administration is now doing with the new H-1B rules. Through agency rulemaking, one essentially eradicates previous rules by rewriting them. Biden has not yet indicated whether he would roll back these new rules if they are not already enjoined by the courts.

In place of completely rolling back the new H-1B regulations, he could direct immigration agencies to be more lenient on adjudications that are seemingly prescribed in the preamble to the rule. And culturally, overtime, the agencies might adopt a less combative, adversarial adjudicative culture, which is the norm now, but chances are that there would be somewhat of a lag in a complete change of culture.

Biden could also plausibly roll back regulations under the Congressional Review Act. The Congressional Review Act allows congress to quickly wipe out regulations pushed through in the last 60 legislative days of a presidential term, but such a tactic might only prove viable if Democrats take control of both the Senate and the House. For context, Republicans used the Congressional Review Act to undo at least 14 of Obama's administrative rules after Trump took office.

We expect the future immigration landscape, including the implementation of the above rules, to become clearer over the next few weeks and months.