

Updates

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Administration Issues New Regulations on H-1B Workers and Prevailing Wage Requirements

The administration published two new regulations on October 8, 2020, that make significant changes to the H-1B visa rules and to the prevailing wage requirements for PERM labor certification applications as well as H-1B, H-1B1, and E-3 workers. With no notice and comment period in place, these regulations are bypassing the regular rulemaking process.

The first regulation, [Strengthening the H-1B Nonimmigrant Visa Classification Program](#), revises the definition of "specialty occupation" and other aspects of H-1B eligibility. The second, [Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States](#), amends regulations related to determining the prevailing wage for PERM labor certification (green card) applications and Labor Condition Applications (LCAs) used when a company sponsors an H-1B, H-1B1, or E-3 worker.

Most notably, the first regulation, Strengthening the H-1B Nonimmigrant Visa Classification Program, revises the definition of "specialty occupation" by requiring a direct relationship between the required degree fields and the duties of the position. This means a position would not be a specialty occupation if a bachelor's degree in a wide variety of fields or a general degree without further specialization is sufficient to qualify for the position. The rule also adds definitions for important concepts for H-1B visas, including "worksite," "third-party worksite," and "employer-employee relationship." The regulations closely track a recently invalidated U.S. Citizenship and Immigration Services (USCIS) policy memorandum. This rule will make it more difficult to obtain an H-1B visa by restricting the definition of specialty occupation and limiting employer-employee relationships. This regulation becomes effective on December 7, 2020.

The second regulation, Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, changes the prevailing wage calculation, significantly increasing wages that must be paid to H-1B, H-1B1, and E-3 workers. The U.S. Department of Labor uses Occupational Employment Statistics (OES) data to determine the appropriate wage paid to similarly employed workers in a specific occupation in the geographic area of intended employment. The OES wage data is divided into four tiers corresponding with four percentiles based on education, experience, and skill level. The new rule increases the prevailing wage by increasing the percentiles that correspond with each wage level, as shown below:

Level I 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)

This will result in many employers having to pay certain foreign national workers significantly more under the new rule, unless a valid private wage survey is available. As this rule becomes effective immediately, the Department of Labor will apply the new wage rules to all applications involving prevailing wages submitted and/or pending on or after October 8, 2020.

These two rules will certainly face legal challenges. Normally, a new regulation is initially published as a Notice of Proposed Rulemaking followed by a comment period of at least 30 to 60 days. Here, however, the regulations were published as Interim Final Rules, which are final rules and become effective without the agency evaluating and responding to public comments. The agency must show "good cause" to skip the notice and comment

process and there will likely be litigation on this point, but the timeline for and ultimate outcome of any litigation is unknown at this time.

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