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CHANGES TO THE H-1B PROGRAM

Many of you are probably aware that President Trump is trying to change H-1B regulations on his own, bypassing the normal rulemaking process in Congress. This move comes now for 2 reasons: 1) Trump administration Executive Orders targeting the H-1B visa have been overturned by many federal court decisions, including the ITServe decision. The Trump administration is now attempting a new method of attacking the H-1B visa; and, 2) The election is near, and President Trump is trailing in the polls. He is attacking the H-1B visa as a way to rally his supporters.

WHAT ARE THE CHANGES?

The Trump administration is attempting to curtail the H-1B visa by issuing two (2) new rules that greatly affect H-1B workers. These regulations also hit IT consulting companies in a major way. The 2 new rules are:

1. The Department of Labor (DOL) has changed its wage levels. Under the law, an employer must pay an H-1B visa holder the higher of the prevailing wage or actual wage paid to similar U.S. workers. Currently, the DOL determines the prevailing wage by using data from the government's Occupational Employment Statistics (OES) wage survey and using a mathematical formula to create four levels of wages for each occupation.

   Effective October 8, 2020 (immediately after the rule was announced), new mathematical formulas have been applied to the OES wage survey. The old and new percentiles are as follows:

Wage level	Old mathematical percentile	New mathematical percentile
Level 1	17th percentile	45th percentile
Level 2	34th percentile	62nd percentile
Level 3	50th percentile	78th percentile
Level 4	67th percentile	95th percentile

For any LCAs filed now (if an LCA is already filed, it does not need to be refiled), and any prevailing wages that may be determined as of October 8, 2020, these wages MUST be applied.

As an example of what this looks like, here are the old and new wages for SOC code 15-1132 for the Washington DC metro area:

Old Wages
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV
OES/SOC Code:15-1132
OES/SOC Title: Software Developers, Applications
GeoLevel:1
Level 1 Wage:$36.87 hour - $76,690 year
Level 2 Wage:$46.83 hour - $97,406 year
Level 3 Wage:$56.78 hour - $118,102 year
Level 4 Wage:$66.74 hour - $138,819 year

New Wages
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV
OES/SOC Code:15-1132
OES/SOC Title: Software Developers, Applications
GeoLevel:1
Level 1 Wage:$55.00 hour - $114,400 year
Level 2 Wage:$68.81 hour - $143,125 year
Level 3 Wage:$82.61 hour - $171,829 year
Level 4 Wage:$96.42 hour - $200,554 year

As you can see, wages have increased drastically. We have received inquiries on whether it is acceptable to downgrade the employee's wage level. Unfortunately, there is a danger in doing that. The wage levels are defined as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. Statements that the job offer is

for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment.

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), are indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They generally have management and/or supervisory responsibilities.

USCIS will look at the years of experience the employee possesses and the responsibilities of the job. If employers decrease the beneficiary's wage level to pay a lesser wage under this new scheme, USCIS will most likely RFE/ deny the H-1B petition. Therefore, right now we do not recommend filing an LCA, if at all possible. This new rule will be attacked in the courts (this will be addressed further on), and we suggest waiting to see the results before any further LCAs are filed.

2. The Department of Homeland Security (DHS) also published regulations amending requirements for H-1B nonimmigrant visa classification on October 8, 2020. The new policies were issued as interim final rules, meaning they will take effect without first undergoing a public-comment and review process that is customary for such rules. The administration also waived its typical regulatory review process before issuing it to the rule in order to be able to publish it faster. These rules will go into effect in 60 days, on December 7, 2020, unless they are enjoined by the courts.

Some of the key provisions of the rule are:

Specialty Occupation

- The rule amends the definition of a "specialty occupation" at 8 CFR 214.2(h)(4)(ii) to indicate that there must be a direct relationship between the required degree field(s) and the duties of the position:
    - General degrees in engineering, liberal arts, business, et cetera without further specialization or explanation are not sufficient to meet specialty occupation.
    - In cases where the petitioner lists degrees in multiple "disparate" fields of study as the minimum entry requirement for a position, the petitioner must establish how each field of study is in a specific specialty providing "a body of highly specialized knowledge" directly related to the duties and responsibilities of the particular position.
    - Where a position may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position.
- Instead of demonstrating that a bachelors' degree is "normally", "commonly" or "usually" required, petitioners will have to establish that the bachelor's degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the United States by showing that the required degree is always:
    - The requirement for the occupation as a whole;
    - The occupational requirement within the relevant industry;
    - The petitioner's particularized requirement; or
    - Because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position.

Third-Party Worksites

- The definition of "worksite" is amended (so that it is similar to the DOL definition of "place of employment" at 20 CFR 655.715) as "the physical location where the work is actually performed by the H-1B nonimmigrant."
- The rule defines "third-party worksite" as "a worksite, other than the beneficiary's residence in the United States, that is not owned or leased, and not operated, by the petitioner."

- The rule sets a 1-year maximum validity period for all H-1B petitions in which the beneficiary will be working at a third-party worksite. This applies to all H-1B petitions where any identified worksite is a third-party worksite, not just the primary worksite

Employer-Employee Relationship

- The definition of "United States Employer" is amended by:
    - Striking the word "contractor" from the definition of "United States employer," although DHS also explains at length that the deletion does not necessarily preclude a contractor from qualifying as a U.S. employer;
    - Inserting the word "company" in the general definition; and
    - Expanding upon the existing requirements by requiring that an employer must engage the beneficiary to work within the United States and have a bona fide, non-speculative job offer for the beneficiary.
- The rule codifies, at 8 CFR 214.2(h)(4)(iv)(C), that at the time of filing, the petitioner must establish that a bona fide job offer exists and that actual work will be available as of the requested start date.
- The rule defines the term "employer-employee relationship" to be the "conventional master-servant relationship as understood by common-law agency doctrine." It includes a non-exhaustive list of factors to be considered in the totality of the circumstances, essentially restoring the January 2010 Neufeld Memo on employer-employee relationship. However, in addition to taking into account whether employer has "the right to control" the employee's work as one of the enumerated factors, USCIS will also look at whether the employer actually exercises that right to control.
- Additionally, the petitioner will be required to demonstrate that it can actually take the claimed actions when it comes to these factors.
- The rule requires that petitioners filing third-party worksite petitions must submit evidence such as contracts, work orders, or other similar evidence (such as a detailed letter from an authorized official at the third-party worksite) to establish that the beneficiary will perform services in a specialty occupation and that the petitioner will have an employer-employee relationship with the beneficiary. Such documentation may also be requested by USCIS for any and all H-1B petitions in a case-by-case basis.

Other Provisions

- The rule requires USCIS to issue a brief explanation when an H-1B nonimmigrant petition is approved but USCIS grants an earlier end validity date than requested by the petitioner.
- The rule revises the itinerary requirement at 8 CFR 214.2(h)(2)(i)(B) to specify that this provision will not apply to H-1B petitions. DHS will still apply the itinerary requirements at 8 CFR 214.2(h)(2)(i)(F)(1) to H-1B petitions filed by agents.
- The rule adds provisions regarding H-1B site visits to codify its authority to conduct site visits and describe the scope of inspections:
    - The regulation indicates that the possible scope of an inspection may include the petitioning organization's headquarters, satellite locations, or the location where the beneficiary works or will work, including third-party worksites, as applicable.
    - The rule also specifies that failure or refusal of the petitioner or a third-party to cooperate with a site visit may be grounds for denial or revocation of any H-1B petition for H-1B workers performing services at the location or locations which are a subject of inspection, including any third-party worksites.

These changes are vast and far-reaching. If implemented and not enjoined by court order, the IT consulting industry will be the hardest hit.

LEGAL RESPONSE TO THESE CHANGES

As a preliminary matter, comments to these regulatory changes may be submitted through the Federal eRulemaking Portal: http://www.regulations.gov (DHS Docket No. USCIS-2020-0018).

These changes will be litigated in the federal courts. We are aware of two (2) pending lawsuits. The American Immigration Lawyers Association (AILA) is preparing to file a lawsuit against these changes. Additionally, Wasden Banias Immigration and Litigation (the firm who won the ITServe Alliance case that forced USCIS to rescind the Third-Party Worksite Memo and the Neufeld Memo) and ITServe Alliance are also planning to file a lawsuit that requests an injunction against these changes. As we learn more about these planned lawsuits, we can advise our clients further.

There are several bases upon which litigation may be filed:

- An interim final rule is less likely to survive a court challenge. The Administrative Procedure Act (APA) only allows "good cause" exceptions to notice and comment rulemaking. A judge in the D.C. Circuit in 2015 said that such exceptions are construed narrowly and without deference to the agency. For example, the DOL issued the wage level changes and implemented them without notice. It will be hard-pressed to argue that this was necessary because public health and welfare are at stake.
- A report issued in August by the Government Accountability Office found that DHS Acting Secretary Chad Wolf was not legally appointed to his position. Several preliminary injunctions have now been issued blocking DHS rule changes. The lawsuits argued that because Wolf's appointment was unlawful, any rule changes made by DHS are also unlawful.

We are monitoring the situation closely. As soon as we learn anything, we will share this information with you and adjust our advice accordingly.

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