

Mobility: immigration alert

January 2021

United States

Higher wage prioritization for registrants in upcoming H-1B Cap lottery

Executive summary

On 8 January 2021, the Department of Homeland Security (DHS) published its [final rule](#) instituting a wage-based lottery system for registered, cap-subject H-1B cases. The final rule, titled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions" will take effect on 9 March 2021.

Background

In November 2020, DHS gave notice of a proposed rulemaking to the Federal Register amending the regulations that direct the U.S. Citizenship and Immigration Service's (USCIS) selection of registrants in the H-1B cap lottery. The comment period for this proposed rule ended on 2 December 2020. USCIS's intention is to encourage employers to hire the most skilled and experienced foreign workers for highly specialized roles and incentivize employers to fill lower-wage and entry level roles with American workers.

Selection process

USCIS will rank and select H-1B cap registrations based on the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order to OES wage levels III, II, and I.

For registrants relying on a prevailing wage that is not based on the OES survey, if the proffered wage were less than the corresponding level I OES wage, the registrant would fall under the wage level I in the registration form. If a registrant will be working in multiple locations with varying prevailing wages, UCSIS will rank the registrant based on the lowest OES wage level.

The rule will not impact the quota of H-1B visas issued annually or the order of selection. There will continue to be 85,000 new H-1B petitions granted each year and 20,000 will be reserved for individuals with a U.S. Master's degree.

Required registrant information

The electronic registration form will require information on the proffered wage and whether it is equal to or exceeds the relevant SOC code in the geographic area of employment. Petitioners will need to provide the wage that will be paid to the beneficiary upon registering them in the lottery.

What this means

This new regulation will impact new H-1B petitions subject to the H-1B cap. It is not favorable to employers who wish to hire foreign workers on H-1B visas for roles with lower wage levels or employers who cannot afford to pay higher wages. Litigation opposing this final rule is expected and it may be impacted by the incoming Biden administration's stated intentions to freeze and review



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regulations issued by the Trump administration after the election.

Regulatory developments

A. Department of Labor wage rule update

Summary

On 6 January 2021, the Department of Labor (DOL) submitted an amended version of its wage rule, titled “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens” to the Office of Information and Regulatory Affairs (OIRA). It is expected to be published in the Federal Register next week.

The wage changes will increase the wages paid to temporary workers in H-1B, H1-B1, and E-3 status. Employers seeking permanent labor certifications (PERMs) must also meet the prevailing wage requirements. The changes are expected to be phased in over a two-year period and changes to the wage data in the OES system will not take effect until July 2021.

The amended rule lowers the percentiles for which the DOL places the prevailing wages within the wage range for each occupation. The new prevailing wage percentiles are as follows:

Prevailing wage level	H-1B, H1-B1, E-3 and PERM prevailing wage levels
I	35 th percentile
II	53 rd percentile
III	72 nd percentile
IV	90 th percentile

Background

On 8 October 2020, the DOL published an interim final rule increasing the H-1B, H1-B1, E-3, and PERM prevailing wage levels as follows:

Prevailing wage level	Original wage levels before 8 October 2020	Wage levels after 8 October 2020
I	17 th percentile	45 th percentile
II	34 th percentile	62 nd percentile
III	50 th percentile	78 th percentile
IV	67 th percentile	95 th percentile

The interim rule was effective immediately and was followed by opposing litigation. In early December 2020, federal courts in New Jersey and California struck down the rule, finding that the DOL did not follow transparency procedures. The courts also dismissed the DOL’s assertion that the increase of prevailing wages was a response to pandemic job losses in the United States.

What this means

The new rule increases the prevailing wage that employers must pay their foreign employees in H-1B, H1-B1, or E-3 status. Additionally, employers seeking PERMs must offer the job at or above the prevailing wage.

The 6 January 2021 rewrite of the DOL’s wage rule is one of the Trump administration’s latest attempts to make regulatory changes before the new administration takes over on 20 January 2021. The Biden administration may freeze or rescind this rule upon taking office. Lawsuits challenging the new prevailing wages are expected to be filed after the rule is finalized.

B. Department of Homeland Security rules being finalized

The Department of Homeland Security (DHS) is currently finalizing the following rules:

1. Immigration and Customs Enforcement’s (ICE) proposed rule, “Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media”.

Currently, foreign nationals in the F, J, and I categories are admitted into the U.S. for the period of time that they are complying with the terms and conditions of their nonimmigrant category (“duration of status”), rather than for a fixed time period. This rule proposes to change the admission period of F, J, and I foreign nationals from duration of status to a fixed period of time. If finalized, foreign nationals seeking to stay in the United States beyond their authorized admission period would have to apply for an extension of stay with USCIS or depart the country and apply for admission at a port of entry.

2. DHS’s interim final rule (IFR), “Strengthening the H-1B Nonimmigrant Visa Classification Program”.

This IFR was vacated by the U.S. District Court for the Northern District of California on 1 December 2020. The DHS took steps to comply with the court order and has made changes to the rule, including implementation timeframes for changes to the Foreign Labor Certification Online Data Center, Labor Condition Application (LCA) filings, and for processing Prevailing Wage Determinations.

Each of these rules could be published to the Federal Register by 18 January 2021, before Joe Biden is inaugurated as President. It is likely that both rules will go directly to the Federal Register without being sent to OIRA for review. The impact of this is that it will take regulatory approval, and time, should the new administration wish to unwind the rule.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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