Update: DHSFinal Rule Creating Wage-Based Selection Rule for H-1B Cap Subject Petitions

Background

On January 8, 2021, in one of the last regulatory moves made by the Trump Administration, the Department of Homeland Security ("DHS") published its final rule entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," ("Wage-Based H-1B Selection Rule" or the "Rule"), ***which ends the H-1B lottery as we know it*** and instead establishes a wage-based selection process. Under this new Rule, H-1B registrations will be selected based on the highest proffered wage ("offered wage"), which equals or exceeds the prevailing wage as established by the Occupational Employment Statistics ("OES") for the relevant Standard Occupational Classification ("SOC") code in the area of intended employment.[1]

Led by the U.S. Chamber of Commerce, numerous plaintiffs, including the National Association of Manufacturers, Bay Area Council, National Retail Federation, American Association of International Healthcare Recruitment, Presidents' Alliance on Higher Education and Immigration, California Institute of Technology, Cornell University, The Board of Trustees of the Leland Stanford Junior University, University of Southern California, University of Rochester, University of Utah, and Arup Laboratories, filed a lawsuit in the Northern District of California, challenging the legality of the Wage-Based H-1B Selection Rule, claiming that: (1) DHS failed to follow the notice-and-comment requirements or rulemaking under the Administrative Procedure Act; (2) the Rule exceeded the Agency's statutory authority; and (3) the Rule was arbitrary and capricious.

In a surprising turn of events, on July 23, 2021, the Biden Administration's DHS actually defended the legality of the Wage-Based H-1B Selection Rule published by the Trump Administration. In its notice of motion and cross-motion for summary judgement, the Biden Administration claimed: (1) the Wage-Based H-1B Selection Rule was properly issued by an authorized official of DHS; (2) the Rule comports with the INA; and (3) during the rulemaking

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[1]

https://www.federalregister.gov/documents/2021/01/08/2021-00183/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions

process, DHS adequately responded to all comments and addressed all issues and concerns raised by the public.

What will the Wage-Based H-1B Selection Rule do?

This final rule, published on January 8, 2021, will go into effect on December 31, 2021, unless enjoined by a Court that issues an injunction against its implementation, or withdrawn by the Biden Administration.

- This rule will replace the random selection process or lottery with one that selects registrations based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC and area of intended employment, beginning with OES wage Level 4 and proceeding in descending order with OES wage Levels 3, 2 and 1.

- DHS states that the wage-based selection will "incentivize H-1B employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels…Moreover, it will maximize H-1B cap allocation, so that they more likely will go to the best and brightest workers; and it will disincentivize abuse of the H-1B program to fill relatively lower-paid, lower-skilled positions, which is a significant problem under the present selection system."

  - This means the information that Employers must provide for H-1B registrations will change and must include: (a) proffered wage, (b) area of intended employment; and (c) corresponding OES wage level based on the SOC code.

  - ***Very few, if any, Level 1 or Level 2 wage positions will be selected***. Priority will be given to Level 4 and then Level 3 wages. A registration classified as a Level 4 wage would have 4 times a greater chance of being selected than a Level 1 position; a level 3 position would have 3 times a greater chance of being selected than a Level 1 position; and a Level 2 position would have 2 times a greater chance of being selected than a Level 1 position.

  - If more registrations are received during the annual initial registration period than necessary to reach the applicable numerical allocation, ***USCIS will rank and select the registrations received on the basis of the highest OES wage level that the proffered wage equaled or exceeded for the relevant SOC code and in the area of intended employment, beginning with OES wage level 4*** and proceeding in descending order with OES wage levels 3, 2, and 1.

- In theory, this could mean that if USCIS receives enough registrations (65,000 for regular cap and 20,000 for advanced degree) where Beneficiaries are receiving a Level 4 wage, only those registrations will be selected.

- If the proffered wage falls below an OES wage level I, because the proffered wage is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration as OES level I. Accordingly, using an alternate wage source, even though permitted by the regulations, will not help employers.

- If the H-1B beneficiary will work in multiple locations, USCIS will rank and select the registration based on the lowest corresponding OES wage level that the proffered wage will equal or exceed.

- The proposed rule requires that a valid registration must represent a legitimate job offer. ***This could mean that if a registration is selected and the employer decides not to file, the employer will need to provide a valid explanation as to why it is rescinding a job offer. Simply not filing a response will not be sufficient.***

- A petition also may be denied if it is not based on a valid registration submitted by the petitioner (or its designated representative), or a successor in interest, for the beneficiary named in the petition.

- ***USCIS may deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage leve***l, after listing a higher wage level on the registration to increase the odds of selection.

Conclusion

The Biden Administration's support of this policy is very frustrating, disappointing and disheartening for immigration professionals, employers and foreign nationals. President Biden campaigned on a platform that was pro-immigrant stating: "The United States deserves an immigration policy that reflects our highest values as a nation. Today, our immigration system is under greater stress as a direct result of Trump's misguided policies...Trump's policies are also bad for our economy. For generations, immigrants have fortified our most valuable competitive advantage–our spirit of innovation and entrepreneurship. Research suggests that 'the total annual contribution of foreign-born workers is roughly $2 trillion.' Key sectors of the U.S. economy,

from agriculture to technology, rely on immigration. Working-age immigrants keep our economy growing, our communities thriving, and country moving forward."[2]

The final Rule, as published, is nothing more than an attempt to limit legal immigration and is based on the falsehood that a person's contribution to society can only be measured by how much money that person earns. The Wage-Based H-1B Selection Rule favors and holds in higher esteem individuals who earns six figures, but not, for example, the doctor who provides medical services in an underserved or impoverished community nor the teacher who works with at risk youth throughout the United States, because such workers usually earn less money.

The Wage-Based H-1B Selection Rule conflicts with the Biden Administration's statements and campaign platform supporting immigration and compassionate, common sense immigration reform. Accordingly, the Biden Administration should withdraw this Rule and keep its promises to implement compassionate immigration reforms that more effectively address the needs of U.S. employers to attract and retain highly-skilled and professional foreign national workers.

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[2] https://joebiden.com/immigration/