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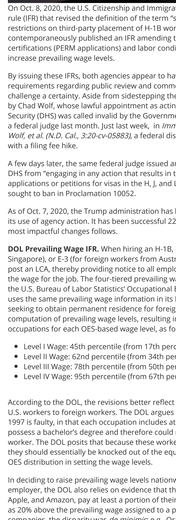
Rush To Rule: More Trump-Era Agency Actions Destined for a Loss in Court

As of Oct. 7, 2020, the Trump administration has lost a staggering 119 times in federal court over its use of agency action. It has been successful 22 times. With that in mind, this article summarizes some of the most impactful changes.

By **Amy Haberman and Zlatko Hadzismajlovic** | October 30, 2020



On Oct. 8, 2020, the U.S. Citizenship and Immigration Services (USCIS) published an interim final rule (IFR) that revised the definition of the term specialty occupation and placed additional restrictions on third-party placement of H-1B workers. The U.S. Department of Labor (DOL) contemporaneously published an IFR amending the regulations governing permanent labor certifications (PERM applications) and labor condition applications (LCAs) in order to substantially increase prevailing wage levels.

By issuing these IFRs, both agencies appear to have bypassed the administrative law requirements regarding public review and comment. This alone makes an immediate legal challenge a certainty. Aside from sidestepping the rulemaking process, these IFRs were put forth by Chad Wolf, whose lawful appointment as acting secretary of the Department of Homeland Security (DHS) was called invalid by the Government Accountability Office two months ago and by a federal judge last month. Just last week, in *Immigrant Legal Resource Center, et al., v. Chad F. Wolf, et al. (N.D. Cal., 3:20-cv-05883)*, a federal district court enjoined DHS from moving forward with a filing fee hike.

A few days later, the same federal judge issued an order preventing the State Department and DHS from "engaging in any action that results in the non-processing or non-issuance of applications or petitions for visas in the H, J, and L categories," which the Trump administration sought to ban in Proclamation 10052.

As of Oct. 7, 2020, the Trump administration has lost a staggering 119 times in federal court over its use of agency action. It has been successful 22 times. With that in mind, a summary of the most impactful changes follows.

DOL Prevailing Wage IFR. When hiring an H-1B, H-1B1 (for foreign workers from Chile and Singapore), or E-3 (for foreign workers from Australia) foreign national, an employer is required to post an LCA, thereby providing notice to all employees and contractors at the specific worksite of the wage for the job. The four-tiered prevailing wage levels guiding the employer are set forth in the U.S. Bureau of Labor Statistics' Occupational Employment Statistics (OES) database. The DOL uses the same prevailing wage information in its PERM application program for employers seeking to obtain permanent residence for foreign workers. The DOL has now changed the computation of prevailing wage levels, resulting in substantially higher prevailing wages for all occupations for each OES-based wage level, as follows:

- 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)

According to the DOL, the revisions better reflect the actual wages earned by similarly employed U.S. workers to foreign workers. The DOL argues that the OES wage data it has relied on since 1997 is faulty, in that each occupation includes at least a percentage of workers who do not possess a bachelor's degree and therefore could not qualify as similarly employed to an H-1B worker. The DOL posits that because these workers fall at the lower end of the wage distribution, they should essentially be knocked out of the equation by discounting the lower portion of the OES distribution in setting the wage levels.

In deciding to raise prevailing wage levels nationwide regardless of the size or location of the employer, the DOL also relies on evidence that the top 20 H-1B employers, including Google, Apple, and Amazon, pay at least a portion of their workers above the prevailing wage, or as much as 20% above the prevailing wage assigned to a particular position. Of course, for most of these companies, the disparity was de minimis; e.g., Oracle pays 0.48% of its H-1B workers above the prevailing wage levels for a particular position and 0.55%. of its H-1B workers earn 20% above the prevailing wage.

The DOL IFR became effective on Oct. 8, 2020, and comments will be accepted for 30 days after publication. Because the rule was published and became effective immediately, legal challenges are already underway.

DHS H-1B "Strengthening" IFR. Presidential proclamations called for DHS to promulgate regulations to ensure that H-1B nonimmigrant classification is not disadvantaging U.S. workers—a dubious claim to begin with. Many of the new rules simply codify what employers have experienced in the past four years as a result of an overly burdensome and capricious USCIS adjudication policy, resulting in a dramatic increase in requests for evidence (RFEs) and H-1B denials.

Revising the Regulatory Definition of and Standards for a Specialty Occupation to "Better Align" with the Statutory Definition of the Term. This rule amends the regulatory definition of a specialty occupation at 8 CFR 214.2(h)(4)(ii) to clarify that there must be a direct relationship between the required degree field of study and the duties of the position. A position for which a bachelor's degree in any field or a wide variety of fields is sufficient to qualify is not considered a specialty occupation. A position would not qualify as a specialty occupation if attainment of a general degree, without further specialization, is sufficient to qualify for the position.

By now, H-1B employers should be aware that a position cannot require a general degree, such as business administration or liberal arts, without further specialization, and that the fields of study required for a position must be closely related to avoid an RFE or petition denial. Federal courts, however, have explicitly rejected such an interpretation, which is likely why the Departments to the rule clarify that the new requirement ought not be interpreted as mandating a single field of study.

For example, an electrical engineer may be required to possess a degree in electrical engineering or electronics engineering, but a position that requires an engineering degree without specialization will not pass muster for an H-1B unless the employer establishes how each field of study within an engineering degree directly relates to the duties of the position. H-1B employers already provide highly detailed explanations of how an employee's coursework applies to his or her position.

DHS further restricted the criteria for an H-1B by removing what it views as ambiguity in its regulatory language. Prior to the revisions, the employer had the burden of proving that a bachelor's degree is "normally" required in the position to the industry, or that the knowledge required for the position is "usually associated" with at least a bachelor's degree or equivalent. DHS has now eliminated the terms "normally," "common," and "usually" from the regulatory criteria, a change that will require the employer to establish that a bachelor's degree in a specific specialty or its equivalent is always the minimum requirement for entry into the occupation.

The aforementioned address two of the more significant revisions to the H-1B regulations, and reflect a narrowed interpretation of specialty occupation that has been rejected by federal courts as recently as March 2020.

Revising the Definition of "United States Employer." The term "United States employer" is defined at 8 CFR 214.2(h)(4)(ii) as "a person, firm, corporation, contractor, or other association, or organization in the United States" which, among other things, "[e]ngages a person to work within the United States" and "[h]as an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee."

DHS is changing the definition of United States employer by: (i) striking the word "contractor" from the general definition of United States employer to avoid any confusion or mistaken belief that contractors should generally qualify as United States employers; (ii) inserting the word "company" in the general definition to describe various types of business entities, such as limited liability companies; (iii) substituting the term "person" with "beneficiary" and adding the requirement that a bona fide, nonspeculative job offer exists at the time of filing the petition and that the offer is not for a prospective need; and (iv) expanding upon the employer-employee relationship and the factors used to determine whether a valid employer-employee relationship exists.

Clarifying How USCIS Will Determine Whether There Is an Employer-Employee Relationship Between the Petitioner and the Beneficiary:

• Where the H-1B Beneficiary Does Not Possess an Ownership Interest in the Petitioning Organization

The definition of an employer-employee relationship is particularly relevant where the beneficiary is located at a third-party worksite and is frequently raised in RFEs. The revised employer-employee definition lists the following nonexhaustive factors to be considered in the totality of the circumstances when determining whether a valid employment relationship exists between the petitioner and the beneficiary: (i) whether the petitioner supervises the beneficiary and, if so, where such supervision takes place; (ii) where the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision; (iii) whether the petitioner has the right to control the work of the beneficiary on a day-to-day basis and to assign projects; (iv) whether the petitioner provides the tools or instrumentalities needed for the beneficiary to perform the duties of employment; (v) whether the petitioner hires, pays, and has the ability to fire the beneficiary; (vi) whether the petitioner evaluates the work product of the beneficiary; (vii) whether the petitioner claims the beneficiary as an employee for tax purposes; (viii) whether the petitioner provides the beneficiary any type of employee benefits; (ix) whether the beneficiary uses proprietary information of the petitioner in order to perform the duties of employment; (x) whether the beneficiary produces an end product that is directly linked to the petitioner's line of business; and (xi) whether the petitioner has the ability to control the manner and means in which the work product of the beneficiary is accomplished.

• Where the H-1B Beneficiary Possesses an Ownership Interest in the Petitioning Organization

This section of the new rule will be of particular interest to startups and small businesses, but will come as no surprise to either. The rule sets forth the factors that would be considered in cases where the H-1B beneficiary possesses an ownership interest in the petitioning entity, a scenario common to both. These factors include: (i) whether the petitioning entity can hire or fire the beneficiary or set the rules and parameters of the beneficiary's work; (ii) whether and, if so, to what extent the petitioner supervises the beneficiary's work; (iii) whether the beneficiary reports to someone higher in the petitioning entity; (iv) whether and, if so, to what extent the beneficiary is able to influence the petitioning entity; (v) whether the parties intended that the beneficiary be an employee, as expressed in written agreements or contracts; and (vi) whether the beneficiary shares in the profits, losses, and liabilities of the organization or entity.

The new rule further clarifies that a beneficiary who is the sole or majority shareholder of the petitioning entity, does not report to anyone higher within the organization, is not subject to the decisions made by a separate board of directors, and has veto power over decisions made by others on behalf of the organization will likely not be considered an employee of that entity for H-1B purposes.

On the other hand, if a beneficiary is bound by decisions (including the decision to terminate the beneficiary's position) made by a separate board of directors or similar managing authority, and does not have veto power (including negative veto power) over those decisions, then the mere fact of his or her ownership interest will not necessarily preclude the beneficiary from being considered an employee.

While the new definition clarifies the employer-employee relationship test, it is consistent with past USCIS policy and practice, and H-1B petitioners should be very familiar with the evidence required to demonstrate that a bona fide relationship exists.

Requiring Corroborating Evidence of Work in a Specialty Occupation. This section of the new rule clarifies the types of corroborating evidence petitioners must submit in third-party placement cases, and again, will come as no surprise to employers that have been submitting H-1B petitions over the past three years. Where a beneficiary will be placed at a client site, the petitioner must submit evidence such as contracts, work orders, and a detailed letter signed by the client to document the petitioner's employer-employee relationship with the beneficiary. The rule further clarifies that in cases where the beneficiary is staffed to a third party, the corroborating documents should demonstrate the requirements of the position as imposed by the "end client" that will use the beneficiary's services.

Importantly, not all third-party placements necessarily require this corroborating evidence. Where the beneficiary is placed at a third-party's worksite but is part of a team of the petitioner's employees, including an on-site supervisor employed by the petitioner who manages the work of the petitioner's employees, the requirements of the position as established by the petitioner may be sufficient to document that an employer-employee relationship exists.

Limiting the Validity Period for Third-Party Placement Petitions to a Maximum of 1 Year. This section of the rule again codifies a policy that has been an ongoing challenge for employers placing H-1B workers at client sites. DHS has now officially set a one-year maximum validity period for all H-1B petitions in which the beneficiary will be working at a third-party worksite. Citing a need for enhanced monitoring of compliance and the fact that most work orders are issued for a six-to-12-month period, companies will now bear an onerous paperwork and financial burden for any H-1B employee placed at a client site.

USCIS' H-1B Site Visit Authority, Including the Potential Consequences of Refusing a Site Visit. The purpose of the review is to verify that the petitioner and beneficiary are complying with the terms of the approved H-1B petition. The new rule officially sets forth the scope of on-site inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. Significantly, the rule confirms that inspections may take place at third-party worksites, and that if USCIS is unable to verify compliance with the material representations in an H-1B petition due to the failure or refusal of a third party to cooperate with a site visit, it may deny or revoke the H-1B petitions of any workers performing services at the location.

These are the first immigration-related rules rather than executive orders promulgated under the Trump administration, and if implemented they will have a dramatic impact on U.S. employers, particularly those placing H-1B workers at client sites. While the administration cites unemployment caused by the coronavirus pandemic as justification for the fast-tracking of these rules, it appears far more likely that they were politically motivated.

While we are optimistic that they will follow the course of other executive orders and be struck down in court, please contact our immigration attorneys if you would like to discuss the impact of these rules on your business in the interim.

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