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Alert

Immigration Practice Group

New DOL and DHS Rules Significantly Impact H-1B Program

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On October 8, 2020, the Department of Labor ("DOL") and Department of Homeland Security ("DHS") published new rules that will have a considerable impact on the H-1B visa program. The DOL rule substantially modifies and increases prevailing wages payable to foreign workers and limits the H-1B program to the most highly paid professionals, regardless of actual prevailing wage labor market data. The DHS rule revises or clarifies several definitions and increases the amount of evidence required in an H-1B case. The summary of the rules is set forth below.

DOL's Rule on "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" ("DOL Rule")

As a rule, an employer seeking to employ foreign workers in the United States must offer the higher of (1) the actual wage paid by the employer for the job when filled by individuals with similar qualifications or (2) the prevailing wage. The employer promises to pay this required wage by submitting a Labor Condition Application ("LCA") to the DOL. The DOL typically relies on the Occupational Employment Statistics ("OES") annual wage survey to compute the prevailing wage.

What Does the DOL Rule Do?

The DOL Rule significantly increases the "required wage" employers must pay to H-1B, H-1B1, and E-3 non-immigrant workers, as well as EB-2 and EB-3 immigrant workers, where the underlying LCA or prevailing wage determination request is based on the OES wage survey. According to the National Foundation for American Policy, for all occupations and geographic locations, the new minimum salary that employers are required to pay under the new DOL Rule is, on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3, and 45% higher for Level 4.

The DOL Rule will apply to (1) new LCAs; (2) new PERM prevailing wage requests; and (3) PERM prevailing wage requests currently under DOL review. The DOL Rule will not affect: (1) LCAs already certified by the DOL; (2) LCAs filed before October 8, 2020; or (3) already issued PERM prevailing wage determinations. This means that employers may continue paying an H-1B employee their current salary pursuant to the certified LCA, but could be required to considerably increase such employee's salary the next time they need to submit an H-1B extension and apply for a new LCA.

Importantly, the DOL Rule does not prevent employers from using, in lieu of the OES wage data, an alternative wage survey or other acceptable methodology that meets regulatory requirements for H-1B, H-1B1, E-3, or PERM cases. Given the above, we expect that many employers will resort to the use of alternative wage surveys for their H-1B and PERM filings. A wage survey from an alternate source (i.e., an employer-conducted survey, a commissioned survey or a published/ commercial survey) may offer a solution because such surveys frequently have a broader range of occupations, as well as salary levels that are more in-line with the real-world conditions of employers. Although obtaining an alternative wage survey may slow the H-1B or PERM sponsorship process in general, it will likely result in obtaining more accurate prevailing wage data.

The DOL Rule went into effect on the date of publication, October 8, 2020. Several lawsuits have been filed seeking to enjoin or vacate the DOL Rule.

DHS's Rule on "Strengthening the H-1B Nonimmigrant Visa Classification Program" ("DHS Rule")

Under the DHS Rule, USCIS will be adjudicating H-1B petitions with a stricter scrutiny to confirm that the offered position precisely meets the H-1B employee's qualifications and complies with other additional requirements, particularly, as set forth below.

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What Does the DHS Rule Do?

Changes to the Specialty Occupation Definition

- A specialty occupation is one that requires attainment of at least a bachelor's degree in a specific specialty to enter that occupation. Under the existing rule, this standard could be met by showing that the job offered is one for which a bachelor's degree in a specific area (1) is normally required, (2) is usually associated with the job, or (3) is common to the industry. Under the new definition, a petitioner must show that at a minimum a bachelor's degree in a specific specialty is always required. This change means that H-1B sponsorship would effectively be available only for jobs where the employer could prove that a bachelor's degree in a specific specialty or its equivalent is (1) always a requirement for the occupation as a whole; (2) an occupational requirement based on industry norms; (3) the employer's particular requirement (which must be explained and documented); or (4) required because the duties for the position are so specialized, complex, or unique. Given that the USCIS will continue relying on the U.S. Bureau of Labor Statistics' Occupational Outlook Handbook, which rarely indicates that a degree in a specific specialty is always required for an occupation, meeting this new criterion will present a considerable challenge for many occupations.
- A petitioner must show a direct relationship between the required degree field(s) and the duties of the position to meet the specialty occupation requirement. A position for which a bachelor's degree in any field (e.g., a general engineering degree, a general business degree, etc.) or in a wide variety of fields is sufficient, would not be considered a specialty occupation. If the employer will accept a degree in more than one field (e.g., mechanical engineering or computer engineering), the employer must show that each acceptable degree field is directly related to the job offered.

Changes to "Worksite" and "Third Party Worksite" Definitions

- The DHS Rule limits the validity period of an H-1B petition that requires the worker to perform duties at a third-party worksite to one-year (instead of the standard three-year validity period) resulting in more frequent renewals, increased uncertainty, and higher costs.
- Under the new DHS Rule, USCIS may request copies of contracts, work orders, or other similar corroborating evidence on a case-by-case basis in all cases, regardless of where the beneficiary will be placed. This provision will apply to any H-1B petition, including a petition where the petitioner indicates that the beneficiary will exclusively work in-house.
- The DHS Rule formally adopted the criteria for determining whether the requisite "employer-employee relationship" exists for H-1B sponsorship and effectively restricted offsite H-1B employment based on third-party placement of H-1B workers.
- The DHS Rule expands site visits for H-1B compliance and specifies that a refusal of the petitioner or a third party to cooperate with a site visit may be basis for denial or revocation of any H-1B petition for H-1B workers performing services at the inspection sites.

The DHS Rule is scheduled to take effect on December 7, 2020. On October 19, 2020, the U.S. Chamber of Commerce, along with several other organizations and universities filed a complaint against the DHS and DOL Rules seeking to vacate both Rules and enjoin DOL and DHS from enforcing these Rules.

The Bousquet Holstein immigration group is closely monitoring these developments and will provide updates on these important issues. For questions and/or additional information, please contact:

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