



Immigration Practice Group

USCIS Publishes Final Rule Creating a Wage-Based Selection Process for H-1Bs

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On January 8, 2021, USCIS published a final rule (the "Rule") creating a wage-based selection process for new cap-subject H-1B petitions titled ***Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*** which is scheduled to take effect on March 9, 2021, before this year's H-1B lottery. The Rule gives priority to the petitions offering foreign workers the highest wage level, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I, and modifies the registration requirement for petitioners seeking to file new cap-subject H-1B petitions.

Currently, USCIS randomly selects H-1B registrations for cap-subject petitions. After the Rule takes effect, USCIS will rank and select H-1B registrations based on the highest OES wage level offered for the relevant occupation, based on SOC code, and area(s) of intended employment. Pursuant to the Rule, USCIS will add instructions and a question to the H-1B online registration form and to the H-1B petition to select the appropriate wage level. The Rule will not affect the order of selection as between the regular cap and the advanced degree exemption, i.e., the wage level ranking will occur first for the regular cap selection and then for the advanced degree exemption.

Under the Rule, if USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the numerical limitation, USCIS will randomly select from all registrations within that particular wage level a sufficient number of registrations needed to reach the numerical limitation, before proceeding to the next, lower level.

USCIS said that a wage-based process is a better way to allocate H-1Bs, as it incentivizes employers to offer higher wages or recruit for positions requiring more advanced skills. Thus, the Rule will benefit petitioners agreeing to pay H-1B workers a proffered wage corresponding to OES wage level VI or III, by increasing their chance of selection in the H-1B cap selection process, and will negatively impact the ability of small to medium-sized businesses and start-up companies to hire foreign professionals, as they may not be able to afford the higher salaries needed to be competitive in the selection process.

The Biden administration could delay the effective date of any final rule that has not yet gone into effect, including this Rule, for 60 days, by imposing a moratorium on regulations issued during the lame duck period between the election and the inauguration. The moratorium affords the new president's team time to consider and assess the pending and new rules and, if they wish, institute rulemaking procedures to further delay, revise, or withdraw the prior administration's rules. Thus, it is possible that the new president will rescind the Rule and the Rule will not go into effect.



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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