CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

IMMIGRATION UPDATE - OCTOBER 12, 2020

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Headlines:

DOL Issues Interim Final Rule Raising Prevailing Wages for Foreign Workers – DOL is increasing prevailing wages by changing their computation under the existing four-tier wage structure.

DHS Revises Definition of H-1B 'Specialty Occupation,' Makes Other Changes – The rule amends the definition of a "specialty occupation" to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position, among other things.

USCIS Updates Guidance on TPS and Eligibility for Adjustment of Status – USCIS issued policy guidance clarifying whether temporary protected status beneficiaries are eligible for adjustment of status under § 245(a) of the Immigration and Nationality Act.

USCIS Issues Guidance on Inadmissibility Based on Membership/Affiliation in Communist Party or Totalitarian Party – A new section in the *USCIS Policy Manual* provides guidance on how to adjudicate inadmissibility due to membership in the Communist Party or any other totalitarian party in the context of adjustment-of-status applications. In general, unless otherwise exempt, any intending immigrant who is a member or affiliate of the Communist Party or any other totalitarian party (or subdivision or affiliate), domestic or foreign, is inadmissible to the United States.

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DOL Issues Interim Final Rule Raising Prevailing Wages for Foreign Workers

The Department of Labor (DOL) issued an interim final rule on October 8, 2020, amending Employment and Training Administration (ETA) regulations governing prevailing wages for nonimmigrant H-1B, H-1B1, and E-3 foreign workers and immigrant EB-2 and EB-3 and foreign workers. Specifically, DOL is increasing prevailing wages by changing their computation under the existing four-tier wage structure.

The agency said the changes are intended to "better reflect the actual wages earned by U.S. workers similarly employed to foreign workers. This update will allow DOL to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers."

According to DOL's Office of Foreign Labor Certification (OFLC), the interim final rule will apply to:

- Applications for Prevailing Wage Determination, Form ETA-9141, pending with OFLC's National Prevailing Wage Center (NPWC) as of the effective date of the regulation;
- Applications for Prevailing Wage Determination, Form ETA-9141, filed with the NPWC on or after the effective date of the regulation; and
- Labor Condition Applications for Nonimmigrant Workers (LCA), Form ETA-9035/9035E, filed with OFLC on or after the effective date of the regulation where the Occupational Employment Statistics survey data is the prevailing wage source, and where the employer did not obtain the prevailing wage determination from the NPWC before the effective date of the regulation.

According to some practitioners and analysts, there was insufficient time for public comment, as the rule was effective immediately, and the DOL's methodology inflates the prevailing wage. As a result of prevailing wage inflation, the rule is likely to have an adverse effect on U.S. employers, especially cost-sensitive entities like nonprofits, universities, hospitals, start-ups, and small businesses. The rule and other recent anti-H-1B actions are also likely to push some employers and foreign workers to relocate to other countries.

Litigation is expected. Although the rule is effective immediately, comments may be submitted until November 9, 2020.

Details:

- DOL interim final rule, https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22132.pdf
- OFLC notice, https://www.dol.gov/agencies/eta/foreign-labor
- "Featured Issue: DHS and DOL Rules Altering the H-1B Process and Prevailing Wage Levels" (data collection form for potential plaintiffs), https://www.aila.org/advo-media/issues/all/dhs-dol-rules-alterning-h1b-prevailing-wage-levels
- "DOL's H-1B Wage Rule Massively Understates Wage Increases by Up to 26 Percent," https://www.cato.org/blog/dols-h-1b-wage-rule-massively-understates-wage-increases-26
- "The New Minimum Salaries in Finance and Tech for H-1B Visas," efinancialcareers, https://news.efinancialcareers.com/us-en/3004591/h1b-visas-finance-tech-minimum-pay
- "Trump Administration Issues Two New Rules To Restrict H-1B Visas," Forbes, https://www.forbes.com/sites/stuartanderson/2020/10/07/trump-administration-issues-two-new-rules-to-restrict-h-1b-visas/#22e044835120
- "Big Tech's Fight for High-Skilled Visa Holders," Axios, https://www.axios.com/big-tech-fight-high-skilled-visa-holders-c4827feb-20a9-45ca-8474-90b81f003bd8.html
- Foreign Labor Certification Data Center, https://www.flcdatacenter.com/

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DHS Revises Definition of H-1B 'Specialty Occupation,' Makes Other Changes

The Department of Homeland Security (DHS) issued an interim final rule effective December 7, 2020, that revises the regulatory definition of and standards for a "specialty occupation" for
H-1B purposes. The rule:

...amends the 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(s) and the duties of the position. Consistent with existing USCIS policy and practice, a position for which a bachelor's degree in any field is sufficient to qualify for the position, or for which a bachelor's degree in a wide variety of fields unrelated to the position is sufficient to qualify, would not be considered a specialty occupation as it would not require the application of a body of highly specialized knowledge. Similarly, the amended definition clarifies that 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.

The rule also:

- Adds definitions for "worksite" and "third-party worksite";
- Revises the definition of "United States employer";
- Clarifies how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an "employer-employee relationship" between the petitioner and the beneficiary;
- Requires corroborating evidence of work in a specialty occupation;
- Limits the validity period for third-party placement petitions to a maximum of 1 year;
- Provides a written explanation when the petition is approved with an earlier validity period end date than requested;
- Amends the general itinerary provision to clarify it does not apply to H–1B petitions; and
- Codifies USCIS' H–1B site visit authority, including the potential consequences of refusing a site visit.

Among other things, the interim rule requires that the petitioner establish, at the time of filing, that it has actual work in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition. In addition, all H-1B petitions for beneficiaries who will be placed at a third-party worksite must submit evidence showing that the beneficiary will be employed in a specialty occupation, and that the petitioner will have an employer-employee relationship with the beneficiary. DHS said the interim final rule will impose new annual costs of almost $25 million for petitioners completing and filing H-1B petitions, with an additional time burden of 30 minutes.

Litigation is likely, according to practitioners. Comments are due by November 9, 2020, on the information collection and by December 7, 2020, on the interim

final rule.

Details:

- DHS interim final rule, https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf
- "Featured Issue: DHS and DOL Rules Altering the H-1B Process and Prevailing Wage Levels" (data collection form for potential plaintiffs), https://www.aila.org/advo-media/issues/all/dhs-dol-rules-alterning-h1b-prevailing-wage-levels
- "USCIS Issues Interim Final Rule Restricting Definition of H-1B Specialty Occupation," Morgan Lewis, https://www.morganlewis.com/pubs/uscis-issues-interim-final-rule-restricting-definition-of-h-1b-specialty-occupation

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USCIS Updates Guidance on TPS and Eligibility for Adjustment of Status

On October 6, 2020, U.S. Citizenship and Immigration Services (USCIS) issued policy guidance clarifying whether temporary protected status (TPS) beneficiaries are eligible to adjust status under § 245(a) of the Immigration and Nationality Act (INA). That section requires a noncitizen to have been inspected and admitted, or inspected and paroled, into the United States unless exempt from this requirement.

USCIS said that its updated guidance "reaffirms USCIS' longstanding interpretation that an alien who enters the United States without having been inspected and admitted or inspected and paroled, and who is subsequently granted TPS, generally does not meet that requirement."

The updated guidance also incorporates *Matter of Z-R-Z-C-*, which held that generally TPS beneficiaries who travel outside the United States with prior authorization under INA § 244(f)(3) retain the same status when they return to the United States that they had when they departed. "If they were not considered inspected and admitted, or inspected and paroled, before their departure, that will not change when they return," USCIS said.

This updated policy guidance "clarifies that decisions in the Sixth and Ninth Circuits holding that TPS is an admission for INA § 245(a) purposes are limited to those jurisdictions. Outside of the Sixth and Ninth Circuits, *Matter of H-G-G-*,

27 I. & N. Dec. 617, 635 (AAO 2019), applies."

Details:

- USCIS alert, https://www.uscis.gov/news/alerts/uscis-updates-policy-guidance-regarding-temporary-protected-status-and-eligibility-for-adjustment-of

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USCIS Issues Guidance on Inadmissibility Based on Membership/Affiliation in Communist Party or Totalitarian Party

On October 2, 2020, U.S. Citizenship and Immigration Services (USCIS) issued policy guidance to address inadmissibility based on membership in or affiliation with the Communist Party or any other totalitarian party.

A new section in the *USCIS Policy Manual* provides guidance on how to adjudicate inadmissibility due to membership in the Communist Party or any other totalitarian party in the context of adjustment-of-status applications. In general, unless otherwise exempt, any intending immigrant who is a member or affiliate of the Communist Party or any other totalitarian party (or subdivision or affiliate), domestic or foreign, is inadmissible to the United States.

According to practitioners, although the new guidance adheres to existing U.S. immigration law, it appears to direct immigration officers to enforce the law more strictly and provides step-by-step instructions for immigration officers making such inadmissibility determinations.

Details:

- USCIS alert, https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-regarding-inadmissibility-based-on-membership-in-a-totalitarian-party
- "Experts Weigh Impact of U.S. Immigration Ban on Chinese Communists," Voice of America News, https://www.voanews.com/usa/experts-weigh-impact-us-immigration-ban-chinese-communists

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Firm in the News

Cyrus Mehta was quoted in a Times of India article on the new H-1B rules that will restrict the ability of employers to obtain approvals. The link to the article is available at https://timesofindia.indiatimes.com/world/us/new-h-1b-rules-a-month-before-elections-trump-admin-does-a-surgical-strike-wage-parameters-hiked-and-visa-norms-tightened/articleshow/78530104.cms

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