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

IMMIGRATION UPDATE - JANUARY 19, 2021

Posted on January 19, 2021 by Cyrus Mehta

Headlines:

Biden Administration Poised to Introduce Immigration-Related Executive Orders; Democrats Prepare Legislation – The Biden administration has plans to introduce executive orders and push for immigration legislation "immediately" after taking office.

Labor, Homeland Security Dept. Issue Final Rules Changing Prevailing Wage Methodology, Employer-Employee Relationship – The agencies' final rules make substantive changes to foreign worker programs, notably prevailing wage methodology and the definition of the employer-employee relationship for H-1B workers.

USCIS To Suspend All In-Person Services for Two Days – Following violent rioting and invasion of the U.S. Capitol and amid threats of further violence, USCIS will temporarily suspend in-person services at all field offices, asylum offices, and application support centers on January 19 and 20, 2021.

DHS Announces Countries Eligible for H-2A and H-2B Visa Programs – The Department of Homeland Security, in consultation with the Department of State, announced the list of countries whose nationals are eligible to participate in the H-2A (temporary agricultural) and H-2B (temporary nonagricultural) visa programs in 2021.

Labor Dept. Updates Implementation of Final Rule on H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations in Response to Court Order – In response to a court order, the Department of Labor made changes to implementation of its final rule on AEWR methodology for non-range occupations.

Labor Dept. Announces Pending H-2A Final Rule – The Department of Labor

announced a final rule pending publication that mandates electronic filing of job orders and applications. The agency said this would make it easier to share information with the Department of Homeland Security and other entities.

SEVP Announces New OPT Employment Compliance Unit – The Student and Exchange Visitor Program (SEVP) announced a new "OPT Employment Compliance Unit" that will be dedicated to compliance matters involving wages, hours, and compensation within Optional Practical Training (OPT), the OPT extension, and Curricular Practical Training.

U.S. To Require Negative COVID-19 Tests From International Arrivals – Effective January 26, 2021, all airline or other aircraft passengers arriving in the United States from any foreign country, with a few exceptions, must present either a negative pre-departure coronavirus test or documentation of recovery from COVID-19.

DHS Extends Canada-U.S.-Mexico Border Restrictions – The Department of Homeland Security extended temporary travel restrictions among the United States, Canada, and Mexico through February 21, 2021.

Firm in the News

Details:

Back to Top

Biden Administration Poised to Introduce Immigration-Related Executive Orders; Democrats Prepare Legislation

According to reports, the Biden administration plans to introduce executive orders and push for immigration legislation "immediately" after taking office. After a related conference call, commenters called the plans "groundbreaking," "bold," and "aggressive." Congressional Democrats and advocates have been working on a bill. Ideas in the mix include a pathway to U.S. citizenship for an estimated 11 million undocumented people, permanent residence for people with temporary protected status, and an extension of the Deferred Action for Childhood Arrivals (DACA) program and permanent residence for DACA recipients.

President-elect Biden was reported as noting that impeachment proceedings in the Senate may slow progress on legislation, along with the need to pass Covid-19 pandemic relief. Immigration reform legislation has been notoriously

difficult to pass. It is unclear whether the legislation will be introduced in one comprehensive sweep or broken down into smaller bills, or some of both. Litigation could also have an impact on the Biden administration's plans.

Details:

- "Democrats Ready Immigration Push for Biden's Early Days," Politico, https://www.politico.com/news/2021/01/15/biden-immigration-plans-459766
- "Biden Plans Early Legislation to Offer Legal Status to 11 Million Immigrants Without It," Los Angeles Times, https://lat.ms/3bNnKnM
- "Biden Plans 'Roughly a Dozen' Day One Executive Actions: Aide," Reuters, https://reut.rs/2M1tX4g
- "Trump's Executive Orders on Immigration Could Be Tough to Undo," Daily Labor Report, Bloomberg Law, https://news.bloomberglaw.com/daily-labor-report/trumps-executive-orders-on-immigration-could-be-tough-to-undo
- "The Biden Plan for Securing Our Values as a Nation of Immigrants," https://joebiden.com/immigration/

Back to Top

Labor, Homeland Security Dept. Issue Final Rules Changing Prevailing Wage Methodology, Employer-Employee Relationship

The Departments of Labor (DOL) and Homeland Security (DHS) issued final rules making substantive changes to foreign worker programs, notably prevailing wage methodology and the definition of the employer-employee relationship for H-1B workers. Below are selected highlights of the two rules and related guidance.

DOL final rule. On January 14, 2021, DOL published a final rule changing the prevailing wage methodology for several immigrant and nonimmigrant foreign worker programs. The final rule is effective March 15, 2021, but filers will not be required to use the revised prevailing wage methodology until July 1, 2021.

Among other things, the final rule changes the calculation of prevailing wages for jobs requiring certain employment-based immigrant visas or for jobs in the PERM, H-1B, H-1B1, and E-3 visa programs for which employers seek labor certification. The related interim final rule, issued in October 2020, was scuttled

by court decisions. DOL said it made changes to the interim rule in response to comments. For example, the agency adjusted the Level I and Level IV wages downward to the 35th percentile and 90th percentile, respectively, and is implementing changes to how it uses data in the H-1B and PERM programs "that will further reduce the incidence of inappropriately inflated wages identified by commenters." DOL also is adopting a "phase-in approach" to give employers and workers time to adapt.

DHS final rule. On January 15, 2021, DHS released a final rule on its website that it has sent for publication in the Federal Register. The rule amends its regulations, for petitions filed on or after the effective date of the regulation, to clarify how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an "employer-employee relationship" between an H-1B petitioner and a beneficiary for the purposes of qualifying as a "United States employer." DHS said it is not finalizing other provisions of the related interim final rule published in the Federal Register on October 8, 2020, and that it "plans to pursue future rulemaking for those provisions," which were vacated by the U.S. District Court for the Northern District of California on December 1, 2020.

The final rule adopts a "common-law test" for determining which entities have an employment relationship with an H-1B worker. Under the common law, DHS explained, "multiple entities can have an employment relationship with a worker simultaneously." Under a third-party placement arrangement, therefore, it is possible that the third-party entity would also be considered an employer of the H-1B worker and would be required to file a petition for the H-1B worker. DHS said that because adoption of the rule "may require adjustments to business practices on the part of employers, including third-party common-law employers," the agency determined that it is appropriate for the rule to take effect 180 days from publication.

Related guidance. DOL's Office of Foreign Labor Certification (OFLC) revised its interpretation of regulations concerning which employers of H-1B workers must file a Labor Condition Application (LCA). Under the interpretation announced on January 15, 2021, all common-law employers of H-1B workers, including any secondary employers meeting the common-law test, must file an LCA.

The OFLC bulletin explained that H-1B employment frequently involves primary

employers, such as staffing agencies, that petition to hire H-1B workers, as well as secondary employers, such as staffing agencies' clients, where the H-1B workers are assigned to work. Secondary employers must now comply with the statutory and regulatory requirements of the H-1B program if they are common-law employers of the H-1B worker, OFLC said.

Also, on January 15, 2021, DOL released a bulletin providing guidance to Wage and Hour Division field staff regarding H-1B program obligations for common-law employers "in light of interpretive changes being made" by DHS and DOL.

Litigation is expected.

Details:

- DOL final rule, https://bit.ly/3swjZsG
- DHS final rule (not yet published in the Federal Register), https://www.dhs.gov/sites/default/files/publications/21_0115_uscis_strengthening-final-rule.pdf
- "DHS and DOL Team Up on H-1B Visas Against IT Services Companies," Forbes, https://www.forbes.com/sites/stuartanderson/2021/01/18/dhs-and-dol-team-up-on-h-1b-visas-against-it-services-companies/?sh=417c765547e9
- "Labor Department Raises Mandatory Wages for H-1B Workers," India West, https://bit.ly/3bNskSW
- "U.S. Agency Issues Final Wage Rules for H-1Bs and Green Card Holders, Higher Wages to Apply in a Phased Manner," Times of India, https://bit.ly/3ip3tWD
- "DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift to Immigrants," Forbes, https://www.forbes.com/sites/stuartanderson/2021/01/13/dol-h-1b-visa-wage-rule-donald-trumps-bad-parting-gift-to-immigrants/?sh=1a069506774f (available by registration)
- "Trump Administration Moves Ahead With H-1B Pay Rule Over Silicon Valley's Objections," https://www.sfchronicle.com/business/article/Trump-administration-moves-ahead-with-H-1B-pay-15865554.php
- "OFLC Announces Revised Interpretation and Issues New Guidance Clarifying Requirements Under the H-1B Program," OFLC, Jan. 15, 2021, https://www.dol.gov/agencies/eta/foreign-labor

- "H-1B Program Obligations for Common-Law Employers," DOL Field Assistance Bulletin, Jan. 15, 2021, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2021_1.pdf

Back to Top

USCIS To Suspend All In-Person Services for Two Days

Following violent rioting and invasion of the U.S. Capitol and amid threats of further violence, U.S. Citizenship and Immigration Services (USCIS) announced that it "will temporarily suspend in-person services at all field offices, asylum offices and application support centers" on January 19 and 20, 2021, "to ensure the safety of our employees and individuals with appointments."

USCIS will reschedule individuals who had appointments on those dates and send them notices with their new appointment dates.

Details:

- USCIS alert, https://www.uscis.gov/news/alerts/uscis-suspending-in-person-services-jan-19-and-20

Back to Top

DHS Announces Countries Eligible for H-2A and H-2B Visa Programs

The Department of Homeland Security, in consultation with the Department of State, announced the list of countries whose nationals are eligible to participate in the H-2A (temporary agricultural) and H-2B (temporary nonagricultural) visa programs in 2021.

For 2021, the Departments agreed to:

- Add the Philippines to the H-2B list;
- No longer designate Samoa and Tonga as eligible countries because they no longer meet the regulatory standards for the H-2A and H-2B visa programs; and
- No longer designate Mongolia as an eligible country for the H-2A visa program because it no longer meets the regulatory standards for that program.

Details:

- DHS Federal Register notice, https://bit.ly/3immXep
- DHS announcement, https://www.uscis.gov/news/alerts/dhs-announces-countries-eligible-for-h-2a-and-h-2b-visa-programs

Back to Top

Labor Dept. Updates Implementation of Final Rule on H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations in Response to Court Order

In response to a court order, the Department of Labor (DOL) made changes to implementation of its final rule on adverse effect wage rate (AEWR) methodology for non-range occupations. On December 23, 2020, the U.S. District Court for the Eastern District of California issued an order in *United Farm Workers v. DOL*, enjoining the agency from implementing its final rule, issued November 5, 2020, on AEWR methodology for the temporary employment of H-2A nonimmigrants in non-range occupations, and ordering DOL to operate under the 2010 rule.

On January 12, 2021, the court issued a supplemental order requiring DOL to publish the AEWRs for 2021 by February 25, 2021, using the methodology set forth in the 2010 rule, and to make those AEWRs effective upon their publication. Additionally, the court ordered DOL to notify all state workforce agencies, employers, and the general public that the AEWRs in effect on December 20, 2020, will remain in effect during the interim period until DOL publishes 2021 AEWRs in the *Federal Register*.

Additionally, the court reserved decision on whether an award of backpay is warranted based on the difference, if any, between the 2020 AEWRs and the final 2021 AEWRs. DOL reminded employers to record the names and permanent home addresses of all H-2A workers who may later be entitled to backpay.

Details:

- "OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order," January 15, 2021, https://www.dol.gov/agencies/eta/foreign-labor

Back to Top

Labor Dept. Announces Pending H-2A Final Rule

The Department of Labor (DOL) announced a final rule pending publication that mandates electronic filing of job orders and applications. DOL said the action is "designed to bring the
H-2A application process into the digital era, by harnessing the power of the FLAG electronic filing system to share information with other federal agencies like the Department of Homeland Security while also sharing information with the State Workforce systems and domestic farmworkers."

Additionally, the final rule will include the ability to stagger the entry of workers into the United States over a 120-day period and will allow agricultural employers to file a single application for different dates of need instead of multiple applications.

The agency said it expects the final rule to be published shortly, with a 30-day delayed effective date from the date of publication.

Details:

- "U.S. Department of Labor Announces a Final Rule Which Modernizes and Improves the H-2A Temporary Agricultural Program," January 15, 2021, https://www.dol.gov/agencies/eta/foreign-labor
- Final rule draft submitted to the Federal Register, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A-2020-final-rule-1_8_2021-Clean-with-disclaimer.pdf

Back to Top

SEVP Announces New OPT Employment Compliance Unit

The Student and Exchange Visitor Program (SEVP) announced a new "OPT Employment Compliance Unit" that will be dedicated to compliance matters involving wages, hours, and compensation within Optional Practical Training (OPT), the OPT extension, and Curricular Practical Training. The unit will publish a report at least annually on its findings, with the first report to be published on ICE.gov by July 31, 2021.

The unit will be responsible for "recommending investigations of employers and students, as needed, to Homeland Security Investigations (HSI) to ensure

that the OPT programs operate in a lawful manner at U.S. worksites." The unit will also "evaluate whether employers are adhering to the attestations and training plans required under the OPT extension, which will include on-site visitation."

Details:

- "Broadcast Message: New SEVP Unit to Oversee Employment Compliance in the OPT Programs and Report on Impact on U.S. Workers," U.S. Immigration and Customs Enforcement, Jan. 13, 2021, https://www.ice.gov/doclib/sevis/pdf/bcm2101-02.pdf

Back to Top

U.S. To Require Negative COVID-19 Tests From International Arrivals

Effective January 26, 2021, all airline or other aircraft passengers arriving in the United States from any foreign country, with a few exceptions, must present: (1) a negative pre-departure test result for SARS-CoV-2, the virus that causes COVID-19 (Qualifying Test); or (2) written or electronic documentation of recovery from COVID-19 after previous infection in the form of a positive viral test result and a letter from a licensed health care provider or public health official stating that the passenger has been cleared for travel (Documentation of Recovery).

Details:

- "Requirement for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery From COVID-19 for All Airline or Other Aircraft Passengers Arriving Into the United States from Any Foreign Country," CDC, https://www.cdc.gov/quarantine/pdf/global-airline-testing-order_2021-01-2_R3-signed-encrypted-p.pdf
- "Test for Current Infection," Centers for Disease Control and Prevention (CDC), https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html
- "COVID-19: U.S. To Require Negative Virus Tests From International Air Travelers," New York Times, https://www.nytimes.com/live/2021/01/12/world/covid-19-coronavirus#th

e-us-will-require-negative-virus-tests-from-international-passengers-arriving-by-air

Back to Top

DHS Extends Canada-U.S.-Mexico Border Restrictions

The Department of Homeland Security (DHS) extended temporary travel restrictions among the United States, Canada, and Mexico through February 21, 2021. The restrictions suspend entry via land border, ferry crossing, passenger rail, or coastal ports of entry from Canada and/or Mexico for pleasure boat travel of immigrants and nonimmigrants, including any travel that is not deemed essential. The restrictions do not apply to air, freight rail, or sea travel.

The determination of essential travel is at the discretion of the port of entry and exceptions to the restrictions include U.S. citizens and lawful permanent residents returning to the United States, individuals traveling for medical purposes and to attend educational institutions, individuals traveling to work in the United States, and other reasons.

Details:

- "Temporary Travel Restrictions to Land Border and Ferries Between the United States, Canada and Mexico," U.S. Customs and Border Protection, https://help.cbp.gov/s/article/Article-1694?language=en_US

Back to Top

Firm in the News

Cyrus Mehta was quoted by the Times of India in "U.S. Agency Issues Final Wage Rules for H-1Bs and Green Card Holders, Higher Wages to Apply in a Phased Manner." Mr. Mehta said, "The new rule acknowledges that an abrupt transition to the new wage levels could be disruptive to the economy and detrimental to U.S. employers, so the DOL will gradually introduce the new wages over a period of a year and a half, with the first increase set to take place on July 1, 2021. In addition, for H-1B workers who were the beneficiaries of approved I-140 applications (for green cards) as of October 8, 2021 and are caught in the backlogs, the phase-in period for the increased wages is extended over a three and a half year period." He also said, "Despite the phase-in, the increased wages will be artificial and will not be consistent with market wages,

and the new rule is a continuation of the nonsensical wage rule that was previously blocked by the courts. I expect this rule to be challenged too as there is no basis in to calculate prevailing wages to such high levels as the DOL has done. Prevailing wages must reflect the market wages that are ordinarily paid to U.S. workers in the same occupation." https://bit.ly/3ip3tWD

Mr. Mehta was quoted by Forbes in "DHS and DOL Team Up on H-1B Visas Against IT Services Companies." Mr. Mehta said he believes both the DOL memo and the DHS rule could be legally vulnerable due to the Supreme Court's opinion in Kisor v. Wilkie. "While the need for a 'secondary employer' to file an H-1B petition was suggested in the preamble to the DHS rule, it is not stated in the actual rule, which essentially defines the employer but does not include any definition of 'secondary employer' and the need to file an H-1B petition. DOL's interpretation of its rule can also be similarly challenged under Kisor. Agencies no longer have unbridled discretion to interpret their own regulations under Auer v. Robbins. If the new interpretation of the ambiguous rule has never been the authoritative position of the DHS and DOL, and it has taken stakeholders by unfair surprise, it should be held to be an unreasonable interpretation under Kisor." Mr. Mehta said the regulation is also vulnerable "because this is not a de minimis change at all. Through sleight of hand, both DHS and DOL have used the expanded definition, which they term innocuous, to deem client companies as employers and force them to file LCAs and H-1B petitions when they do not pay the wages or have no direct knowledge of the wages paid or other details required under the LCA. This would also interfere in contractual relations and force the vendor to divulge confidential data." https://www.forbes.com/sites/stuartanderson/2021/01/18/dhs-and-dol-team-up-on-h-1b-visas-against-it-services-companies/?sh=417c765547e9

Mr. Mehta was quoted by Bloomberg Law in "Trump's Executive Orders on Immigration Could Be Tough to Undo." Those who support President Trump's policies could argue that potential harm could ensue from President-elect Biden's future executive actions, such as to U.S. workers, Mr. Mehta noted. He also commented on a recent Ninth Circuit decision that he noted could give the President more latitude to overturn previous actions. https://news.bloomberglaw.com/daily-labor-report/trumps-executive-orders-on-immigration-could-be-tough-to-undo

Mr. Mehta's views on the DOL wage rule are reflected in an India West article, "Labor Department Raises Mandatory Wages for H-1B Workers." He said, "They

have skewed prevailing wages and artificially inflated them so that employers will have to pay higher than market wages." As an example, Mr. Mehta said the pay hike for entry-level workers was "an unjustified entry-level wage." https://bit.ly/2LXflD9

Mr. Mehta was quoted by the Times of India in "Trump Admin Fires Again: Customers of IT Service Companies to Meet H-1B Filing & Other Obligations Under New Rule." He said, "This Trump rule, issued in the waning days of a failed presidency, has been designed to kill the India heritage IT industry. However, it will also hurt corporate America that relies on this IT industry to keep humming away and remain competitive in the global economy. The change will also do significant harm to other sectors as well that involve third-party placements, including nursing, consulting, audit, engineering services, among many others." https://bit.ly/3iymypH

Back to Top