DOL and DHS Publish Interim Rules Regarding Wage Requirements and Regulatory Criteria for H-1B

Oct 8, 2020 | [General Immigration](https://www.swlgpc.com/eng/category/general-immigration/), [General News](https://www.swlgpc.com/eng/category/general-news/), [H-1B](https://www.swlgpc.com/eng/category/h-1b/), [Immigration News](https://www.swlgpc.com/eng/category/immigration-news/), [Non-Immigrant Visas](https://www.swlgpc.com/eng/category/non-immigrantp-visas/), [Visas](https://www.swlgpc.com/eng/category/visas/)

The Department of Labor (DOL) and Department of Homeland Security (DHS) have published two new interim rules, changing wage requirements for employment-based visas as well as regulatory criteria for adjudicating H-1B petitions.

The first (wage requirements) will be effective October 8, 2020 – ***for both new and pending wage determinations***.  The second (H-1B rules) will be effective December 7, 2020 (60 days later) for new petitions submitted on or after that date (but current rules will still govern petitions that are pending adjudication by USCIS at that time).

Thus, these changes are to be implemented without the standard review and comment period required under the Administrative Procedure Act.  DOL and DHS justify making these imminent changes (and disregarding the requirement for administrative review) by citing the pandemic as an “economic cataclysm” which necessitates immediate action.  The ostensible goal of these changes is to protect American workers and bring the H-1B program more in alignment with its historical and statutory intent and purpose.

**Changes to Prevailing Wage Levels for Temporary and Permanent Employment-Based Visas**

The DOL is raising the required prevailing wage rates for both permanent and temporary employment-based visas which require a Prevailing Wage Determination (PWD) or Labor Condition Application (LCA).  For these visas, DOL delineates salaries into four tiers of “wage levels” based on surveys of wages for specific occupations in a particular geographic area.

Until now, a job offer for an employment-based visa could be based on a minimum “entry-level” wage which is at the 17th percentile of wages for that occupation.  With this new rule, the minimum entry-level wage will be required to be at the 45th percentile of surveyed salaries for that occupation.  This means that the minimum wage required for an employment-based visa will now be nearly the median wage for that occupation in that geographic area.

Likewise, the other three wage levels will be raised for H-1B, H-1B1, E-3 and I-140 petitions as follows:

* Prevailing Wage Level (PW) 1:  17% to 45%
* PW2:  34% to 62%
* PW3:  50% to 78%
* PW4:  67% to 95%

**Changes to the Definition of Specialty Occupation (and Employer-Employee Relationship) for H-1B Visas**

The second new rule also makes some important changes to USCIS’ regulatory definition of “specialty occupation.” This rule is mainly aimed at Information Technology (IT) workers, and placements of workers at third-party sites.  The rule states that 56% of approved H-1B petitions in 2019 were “IT industry related,” while in 2004 it was only 32%.  Notably, the rule does not define “IT industry related,” and it specifically discusses adjudication of petitions for “Software Development” roles.  Therefore, it appears that “IT industry” seems to include a very broad category of petitions.

Some of the changes aimed toward the IT industry in the new rule are listed below.

* It removes the word, “contractor” from USCIS’ regulation for H-1B specialty occupations.
* It clarifies that the job must be non-speculative; i.e., that the petitioner is not hiring a foreign worker to fill potential or future work contracts.
* It defines an Employer-Employee relationship much more strictly, stating: “DHS agrees with the Fifth Circuit’s statement in *Defensor [v. Meissner]*that the conjunctive interpretation, where ‘hire, pay, fire, supervise’ are read together as one prong of the test and ‘otherwise control the work’ is…viewed as an independent prong of the test.” The new rule, DHS claims, “accords better with the commonsense notion of employer.”  Practically, this means that to establish an Employer-Employee relationship, the petitioner must show that that they will do all of the following: “hire, pay, fire, ***and***supervise” the employee, not merely show evidence that they will do one of these.

As a brief summary of overall changes, DHS is making the following amendments to the H-1B regulations:

1. Revising the regulatory definition and criteria for determining whether the job the H-1B beneficiary will be employed in is in a specialty occupation, so they align more closely with the statutory definition of the term;
2. Requiring corroborating evidence of work in a specialty occupation. The new rule places the burden of proof on the petitioner to demonstrate that there is a direct relationship between the required degree in a specific specialty and the duties of the position;
3. Codifying in regulations existing authority to conduct site visits and other compliance reviews, and consequences for failure to allow a site visit;
4. Eliminating the general itinerary requirement for H-1B petitions;
5. Limiting maximum validity period for third-party placements to one year;
6. Providing a written explanation for certain H-1B approvals (where less than the requested term of employment is approved).

The new rule will require evidence of a direct relationship between the required degree field(s) and the duties of the position.  Even though this was not explicitly stated in USCIS’ regulations before now, **we at SW Law noticed that this has been the adjudicative trend for several years and have been providing this information with H-1B petitions.**

Another notable change is the removal of the words “normally,” “common,” and “usually” (to the industry) from the regulations, because they are not in the Immigration and Nationality Act.   Petitioners will have to establish that a bachelor’s degree in a specific specialty or its equivalent is a minimum requirement for entry into the occupation in the U.S.  Therefore, the new rule changes USCIS’ adjudicative standard for this issue.  Under the new rule, this must be done by showing that a bachelor’s degree in a specific specialty is ***always***the requirement for the occupation as a whole.  A petitioner may alternatively establish that a position meets other adjudicative criterion or “prongs.”  These include the occupational requirement within the relevant industry, the petitioner’s particularized requirement, or because the position is so specialized, complex, or unique that it is necessarily required to perform the duties of the specific position.

However, in practice, USCIS seems to rely first and foremost on the first criteria/prong of these regulations. In other words, USCIS looks to the Department of Labor’s *Occupational Outlook Handbook* as the authoritative resource in determining if a bachelor’s degree in a specific specialty is ***always***the requirement for the occupation as a whole, and issues a Request For Evidence (and possibly a denial) primarily based on this criterion.

**SW Law Observed this Trend and Adapted Long Ago**

SW Law noticed this trend in adjudication of H-1B petitions well over a year ago, and we have been preparing petitions in accordance with these trends for some time (even though they were not explicitly stated in regulations).

This, of course, does not guarantee future results, but we have been fully prepared to meet USCIS’ adjudicative trends, which are now codified in regulations.

**Effective Dates, and Moving Forward**

As noted above the two rules take effect at different times, as follows:

* The new Prevailing Wage Determination rule will be effective October 8, 2020 – for both new and pending wage determinations.
* Changes to H-1B rules will be effective December 7, 2020 (60 days later) for new petitions submitted on or after that date, but current rules will still govern petitions that are pending adjudication by USCIS at that time.

We expect that there will be many legal challenges (lawsuits) to these rules very soon.  We will continue to monitor these changes, as well as USCIS’ implementation and adjudicative trends, and also any litigation, and we will post updates accordingly.