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Practice Alert: DHS Publishes Final Rule Creating Wage Based Selection System for Cap Subject H-1B Petitions

On January 8, 2021, the Department of Homeland Security (DHS) published a [final rule](#) which will replace the current random selection process by which USCIS selects H-1B registrations for filing of H-1B cap-subject petitions with a wage based selection process. The new system will select registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the offered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. This ranking process will not affect the order of selection as between the regular cap and the advanced degree exemption; the wage level ranking will occur first for the regular cap selection and then for the advanced degree exemption

The rule was originally published as a proposed rule on November 2, 2020, with the public granted 30 days to comment on the proposal. Although DHS received more than 1,400 comments on the proposed rule, DHS declined to make any changes to the rule between the proposed version and final version.

The following summary provides an overview of the main provisions of the rule and how it will change the H-1B registration process:

- If more registrations are received during the annual initial registration period than necessary to reach the applicable numerical allocation, USCIS will rank and select the registrations received on the basis of the highest OES wage level that the proffered wage equaled or exceeded for the relevant SOC code and in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I.
- If the proffered wage falls below an OES wage level I, because the proffered wage is based on a prevailing wage from another legitimate source (other than OES) or an independent authoritative source, USCIS will rank the registration as OES level I.
- After completion of the selection process for the regular 65,000 H-1B cap, USCIS will utilize the same ranking and selection process to meet the advanced-degree exemption if a sufficient number of registrations were submitted during the annual initial registration period to reach the advanced-degree exemption.
- If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS will randomly select from all registrations within that particular wage level to reach the applicable numerical limitation.
- If the H-1B beneficiary will work in multiple locations, USCIS will rank and select the registration based on the *lowest* corresponding OES wage level that the proffered wage will equal or exceed.

- Where there is no current OES prevailing wage information for the proffered position, USCIS will rank and select the registration based on the OES wage level that corresponds to the requirements of the proffered position.
- DHS has proposed changes to the H-1B electronic registration tool and Form I-129 to require petitioners to indicate the highest OES wage level that the beneficiary's proffered wage equals or exceeds for the relevant SOC code in the area of intended employment.
- USCIS may deny or revoke approval of a subsequent new or amended petition filed by the petitioner, or a related entity, on behalf of the same beneficiary, if USCIS determines that the filing of the new or amended petition is part of the petitioner's attempt to unfairly decrease the proffered wage to an amount that would be equivalent to a lower wage level, after listing a higher wage level on the registration to increase the odds of selection.
- USCIS will not deny an amended or new petition solely on the basis of a different proffered wage if that wage does not correspond to a lower OES wage level than the wage level on which the registration was based.
- Notably, DHS estimates in its final rule that under the new wage based selection process, no registrations for individuals who are paid a Level 1 wage will be selected to submit an H-1B cap-subject petition.¹

The rule is scheduled to take effect on **March 9, 2021**. However, the President-Elect's transition team has indicated that the Biden Administration will issue a [memorandum](#) on January 20 delaying implementation of "midnight regulations" (i.e., those issued since the election but not yet effective). It is anticipated that the Biden Administration will adopt a 60 day delayed effective date for such midnight regulations. Depending on how the memorandum is worded, the effective date of this DHS final rule could be delayed either to March 21, 2021 (sixty days from the date of the Presidential memorandum) or May 8, 2021 (sixty days from the regulation's effective date as published in the Federal Register).²

This distinction in terms of how the memorandum is worded is important because although it appears that DHS intends to apply the new rule to the FY 2022 cap season based on the language in its final rule, a sixty day delay of the rule's effective date to May 8, 2021 would make it extremely difficult, if not impossible, for the agency to implement the rule for the upcoming FY 2022 H-1B cap filing season. Alternatively, an implementation delay only to March 21, 2021 could potentially allow DHS to conduct the selection process based on the new rule, though timing would be extremely tight, if not impossible as the regulations require that the registration period begin at least 14 calendar days before the earliest date on which H-1B cap-subject petitions may be filed for a particular fiscal year, and last a minimum of 14 calendar days.³ Thus, if USCIS implements the registration process for the FY 2022 cap filing season, the regulations would require USCIS to open the initial registration period no later than March 18, 2021, which is the minimum 14

¹ 86 FR 1676 (Jan. 8, 2021) at 1723 - 1724.

² Note for example that the 2017 [memo](#) issued by President Trump regarding a regulatory freeze used the following language: "temporarily postpone their effective date for 60 days from the date of this memorandum" whereas in 2009, President Obama issued a [memo](#) using the following language: "Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect . . ."

³ See 8 CFR 214.2(h)(8)(iii)(A)(3).

calendars day before April 1, 2021. Accordingly, it is not immediately clear how the agency might try and implement the new wage-based lottery rule for the upcoming H-1B cap filing season if the rule's effective date is delayed until March 21, 2021.

The final rule is likely to be challenged in federal court on both substantive and procedural grounds, with the possibility of injunctive relief further delaying implementation. As AILA and the American Immigration Council argued in a [joint comment](#) submitted during the comment period, the wage based H-1B selection system is contrary to the plain language of the statute, which provides at section 214(g)(3) of the INA that H-1B cap numbers “shall be issued . . . in the order in which petitions are filed for such visas or status.” In addition, various federal courts across the United States have concluded that Chad Wolf was not lawfully serving as Acting Secretary of Homeland Security and any actions he has taken as Acting Secretary are void,⁴ which could strengthen the legal basis for challenging this regulation in federal court.

Finally, practitioners should not assume the Biden Administration will be conceptually opposed to this rule. In the Biden campaign [platform](#) document on immigration, the President-Elect stated his intention to “work with Congress to first reform temporary visas to establish a wage-based allocation process and establish enforcement mechanisms to ensure they are aligned with the labor market and not used to undermine wages.”

AILA will continue to monitor developments related to this final regulation and will update this practice alert as more information becomes available.

⁴ See e.g., *Batalla Vidal v. Wolf*, No. 16-CV-4756 (NGG) (VMS), 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020); *Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.*, No. CV 19-3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020); *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-CV-05883- JSW, 2020 WL 5798269, at *7 (N.D. Cal. Sept. 29, 2020); *Casa de Maryland, Inc. v. Chad F. Wolf*, Case No. 8:20-cv-02118-PX, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020).