

Government Delivers One-Two Punch to H-1Bs

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On October 8, the Department of Labor (DOL) and Department of Homeland Security (DHS) issued an Interim Final Rule on Computation of Prevailing Wage Levels and Strengthening the H-1B Nonimmigrant Visa Classification Program, respectively.

The first rule affects employers budgets. The DOL changed how it calculates the four wage levels of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES). This has increased wages across the board for each wage level as indicated below:

	Previous Percentile	Interim Rule Percentile
Level I	17	45
Level II	34	62
Level III	50	78
Level IV	67	95

For example, an entry level Electrical Engineer in Cincinnati with a Level I wage was $60,674. Under the new formula, that Level I wage is now $89,128. This change impacts employers who rely on the government's OES to determine the prevailing wage for H-1B petitions and green cards. Labor condition applications for H-1B petitions filed on or after October 8 which rely on the OES wage survey must use the new wage levels. On or after October 13, any Application for Prevailing Wage Determinations that are filed or were pending as of that date will also use the new wage levels. Labor Condition Applications and Applications for Prevailing Wage Determinations that rely on Collective Bargaining Agreements or Employer-provided wage survey will not be impacted by this change.

The DHS then baffled many by changing the definition of specialty occupation and not defining certain key terms that are part of the change. Under the DHS's interim rule, specialty occupation means an occupation that requires:

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(1) The theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor, such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, or the arts; and

(2) The attainment of a U.S. bachelor's degree or higher in a **directly related** specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The required specialized studies must be directly related to the position. A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. While a position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, **each of those qualifying degree fields must be directly related to the proffered position**. (**emphasis added**)

DHS does not define what it considers to be directly related. DHS also changed the language of the criteria as follows:

- A U.S. baccalaureate or higher degree in a **directly related** specific specialty, or its equivalent, is the minimum requirement for entry into the particular occupation in which the beneficiary will be employed;
- A U.S. baccalaureate or higher degree in a **directly related** specific specialty, or its equivalent, is the minimum requirement for entry into parallel positions at similar organizations in the employer's U.S. industry;
- The employer has an established practice of requiring a U.S. baccalaureate or higher degree in a **directly related** specific specialty, or its equivalent, for the position. **The petitioner must also establish that the proffered position requires such a directly related specialty degree, or its equivalent, to perform its duties**; or
- The specific duties of the proffered position are so specialized, complex, or unique that they can only be performed by an individual with a U.S. baccalaureate or higher degree in a **directly related** specific specialty, or its equivalent. * * *

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Previously, the first and third criteria set the standard that a degree was "normally" required. The "normal" standard has been removed. Criteria two previously indicated that a degree was "common to the industry" and had an alternative: "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree" which have both been removed. The fourth criteria is similarly restricted by removing a reference to "usually associated with the attainment of a baccalaureate or higher degree."

Another puzzling addition to the interim regulations is the requirement that "[t]he petitioner must 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". The regulation lists appropriate documentation to be provided when a beneficiary will be placed at third-party worksites, but not for employers who will not be placing at third-party worksites.

DHS also makes a change in the regulations with respect to on-site inspections. The evidentiary standard that employers must meet is a "preponderance of the evidence". The preponderance of the evidence standard requires that the evidence demonstrate the petitioner's claim is "probably true," where the determination of truth is made based on the factual circumstances of each individual case.[1] ***Even if the director has some doubt as to the truth***, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'more likely than not' or 'probably' true, the applicant or petitioner has satisfied the standard of proof."[2] (Emphasis added). Despite the evidentiary standard, under the new regulation, USCIS may decide to conduct "pre-approval inspections". Furthermore, the regulation indicates that satisfactory completion of the inspection will be a condition for approval of the petition.

Interested parties may submit comments to the DOL rule on or before November 9, 2020 and DHS rule on or before December 7, 2020.

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[1] *Matter of E-M-*, 20 I & N Dec. 77, 79-80 (Comm'r 1989).

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[2] *Matter of Chawathe*, 25 I & N Dec. 369 (AAO 2010) (emphasis added); *see also INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

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