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Federal Court Strikes Down H-1B Regulatory Changes

As we [previously reported](#), the U.S. Department of Labor (DOL) and the Department of Homeland Security (DHS) announced significant emergency regulatory changes to the H-1B program in October. The DOL changes went into effect immediately, and dramatically increased the prevailing wage levels. The DHS changes were set to go into effect on December 7, 2020. They would have added uncertainty to what occupations qualify for H-1B status under the new regulatory changes, as well as impose significant penalties on H-1B employers who deploy workers to third-party worksites. The increase in prevailing wages also threw a wrench into employment-based green card sponsorship, as most employment-based green card processes include prevailing wage obligations for the sponsoring employer.

Both sets of changes were implemented without the typical “notice and comment” period required when a federal agency implements new regulations. Only where an agency has a compelling emergency justification for fast-tracking new regulations can the “notice and comment” process be bypassed.

Legal Action

The U.S. Chamber of Commerce and other business groups immediately filed suit against both agencies in the Federal District Court for the Northern District of California, in a case captioned *U.S. Chamber of Commerce v. U.S. Dept. of Homeland Security*, seeking to strike down the regulations. On November 30, the district court agreed the government had lacked sufficient justification to bypass the required notice and comment period and issue the regulations on an “emergency” basis, and struck down both the DOL and DHS regulations.

The government’s main justification for issuing the regulations was that high nationwide unemployment caused by COVID-19 required the measures to be enacted on an emergency basis, and that by curbing the H-1B program, more jobs would open up for potential

U.S. workers.

The District Court was skeptical of the government's rationale, noting that: DOL announcements showed the agency was considering raising wage levels as far back as 2017; the DOL and DHS were aware of high unemployment caused by COVID-19 in March but did not implement the "emergency" regulations until October; the DOL announced in June 2020 President Trump ordered them to raise the wage levels but then took no action until October; and the plaintiffs presented evidence showing relatively low unemployment and even job vacancies in common H-1B occupations, especially software developers.

H-1B occupations require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. By contrast, the court explained, the historic unemployment wrought by the pandemic has fallen primarily on frontline jobs in the tourism, service, retail, and hospitality industries – jobs that for the most part cannot be filled by H-1B workers.

Since October 8, the DOL has been issuing Prevailing Wage Determinations and employers have been relying on the increased prevailing wage levels for H-1B petitions, as well as employment-based green card applications (most of which also include prevailing wage obligations for employers). With the court's decision striking down the regulations, the DOL has re-published the old wage levels. It has also paused the processing of an application for prevailing wage determinations until December 15. In addition, the DOL announced that employers who have been issued a Prevailing Wage Determination based on the increased prevailing wage levels may submit a request for redetermination on or before January 4, 2021.

However, the DOL pushing through the same October 7 regulatory changes before the end of the Trump administration remains a possibility. The DOL and DHS can also appeal the court's decision to the Ninth Circuit, and potentially the U.S. Supreme Court. The uncertainty employers have been living with since October 7 is far from over.

Dealing with Uncertainty

One way for employers to avoid at least one uncertainty is to use private wage survey data, which is typically far more in line with the actual wage market than the DOL's new, artificially inflated wage levels. The option of using private survey data remains a part of the regulations. Employers with access to private wage survey data might do well to continue relying on that until we have some finality on the fate of the H-1B program and employment-based green cards.

Employees May Continue to Use Certain Forms I-797 for Form I-9 Compliance

The U.S. Citizenship and Immigration Services (USCIS) has announced that new or current employees may continue to use certain Forms I-797 to complete their Form I-9 due to the continued delayed production of Employment Authorization Documents (EADs).

Employers must complete a Form I-9 to verify the identity and employment authorization of each new employee (both citizen and noncitizen) to work in the United States. Employees must present documentation that establishes their identity and employment authorization within three business days of starting work for pay. An employer cannot specify which document(s) an employee may present from the Lists of Acceptable Documents. An employee may present one selection from the Form I-9's "List A" documents or a combination of one selection from "List B" and one selection from "List C."

Due to the delayed production of EADs, USCIS initially announced on August 19 that employees may use a Form I-797, Notice of Action, with a notice date on or after December 1, 2019 through August 20, 2020 informing approval of an I-765 Application for Employment Authorization as a Form I-9 List C document that establishes employment authorization, even though the I-797 Notice states it is not evidence of employment authorization. USCIS announced that employees may present this Form I-797 Notice of Action showing approval of their I-765 application as a List C

document for Form I-9 compliance until December 1, 2020. The initial guidance provided that employers must reverify employees who presented this Form I-797 Notice of Action as a List C document by December 1, 2020.

On November 23, USCIS announced that DHS is now extending the period these Form I-797s may be used to complete a Form I-9. Thus, new employees and current employees requiring reverification (who are waiting for their EADs) may continue to present a Form I-797 through February 1, 2021 as a List C document. For the Notice to be acceptable, it still must include a notice date from December 1, 2019 through August 20, 2020 and indicate that USCIS has approved the employee's Form I-765 application.

Employers who entered a December 1, 2020 expiration date on the Form I-9 for employees who presented this Form I-797 as a new hire or for reverification, as directed by USCIS in its initial guidance, must update their employees' forms to document continued employment authorization. To do so, USCIS has instructed employers to write "Employment Authorization Ext Until 02/01/2021" in the Additional Information box in Section 2 of the Form I-9. Employers now must reverify employees who presented this Form I-797 as a List C document by February 1, 2021, and these employees will be required to present their employers with new evidence of employment authorization from either List A or List C.

USCIS Updates Discretionary Factors for Adjustment of Status

USCIS recently provided a non-exhaustive list of positive and negative discretionary factors for consideration in adjudicating adjustment of status applications. Adjustment of status is the process by which an applicant physically present in the U.S. applies for lawful permanent residence (LPR) status (also known as applying for a Green Card). In addition to satisfying eligibility requirements, most adjustment of status applicants also have the burden of demonstrating that an exercise of favorable discretion is warranted. For an adjustment application subject to USCIS discretion to be approved, an officer looking at the totality of the circumstances of a

particular case must find that the positive discretionary factors outweigh the negative factors. Factors may be weighed differently but an officer should consider all the factors cumulatively in making a determination. According to USCIS' [news release](#), this will assist officers when determining whether the grant of LPR status is in the best interest of the U.S. These changes went into effect November 17, 2020.

Job Portability after Applying to Adjust Status

USCIS issued [updated guidance](#), effective November 17, 2020, on the eligibility criteria and process for job portability. Certain beneficiaries of employment-based immigrant petitions (EB-1, 2, or 3) who applied for adjustment of status may transfer to a new job or employer that is in the same or similar occupational classification as the job specified in the immigrant petition and continue the green card process with the new job or employer.

One critical eligibility requirement for requesting portability is that an applicant's adjustment application (Form I-485) must have been pending with USCIS for 180 days or more from the adjustment application's receipt date. Job portability was created in response to the significant time it can take some individuals to complete the green card process due to country limitations on immigrant visas and to provide flexibility to change jobs or employers.

Updated USCIS Guidance for Schedule A Petitions

USCIS [released new guidance](#) for adjudicating petitions for Schedule A occupations. Schedule A occupations, such as registered nurses and physical therapists, are those defined by Congress as occupations that have a shortage, and as a result, do not require a certified Labor Certification which significantly expedites the process for permanent residence. This new guidance does not change any policies, but clarifies how the USCIS should apply regulations when adjudicating Schedule A petitions. This guidance outlines general eligibility requirements, the process for obtaining Prevailing Wage Determinations, the process for posting Notices of Filing, and evidentiary requirements for each

occupational group.

DHS Extends TPS & Automatically renews EADs

On December 9, 2020, DHS issued an [announcement](#) in the Federal Register that it was automatically extending the validity of Temporary Protected Status (TPS)–related documentation for beneficiaries under the TPS (designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal) from January 4, 2021 to October 4, 2021. TPS–related documents include EADs; Forms I-797, Notice of Action; and Forms I-94, Arrival/Departure Record for beneficiaries under these TPS designations. DHS created a [chart](#) to assist employers in identifying which documents TPS beneficiaries may present. Employers are reminded to update the I-9s for existing employees who presented an EAD by entering “EAD EXT 10/04/2021” in the Additional Information field in Section 2. Employers are also reminded that they will need to reverify these same employees on or before **October 5, 2021**.

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