Explainer: The Trump Administration's New Rules Restricting H-1B Visas

The Trump administration has issued a number of rules designed to restrict the H-1B nonimmigrant visa program for high-skilled "specialty occupations." On October 6, the Department of Labor (DOL) and the Department of Homeland Security announced two interim final rules which would, among other restrictions, significantly raise minimum wage requirements and limit eligibility for prospective H-1B employers and employees.

The DOL wage rule went into effect on October 8, while the DHS restrictions are not set to go into effect until December 7. According to the senior official performing the duties of the deputy secretary of the Department of Homeland Security (DHS), Ken Cuccinelli, the new rules will affect about one-third of all H-1B petitions. Both rules were the subject of immediate legal challenges.

On November 2, U.S. Citizenship and Immigration Services (USCIS) published a notice of proposed rulemaking for a third restriction to the H-1B program, this one seeking to end the H-1B visa lottery and replace it with a ranking system based on salary-level.

Background

According to statute, H-1B visas are available to those with a bachelor's degree or equivalent and who have a job offer in a "specialty occupation," meaning one that requires at least a bachelor's degree or requires application of a specialized body of knowledge. H-1B visas are three years in length and can be extended to six years, or indefinitely if an applicant has an approved green card petition but is waiting in the backlog. H-1B visas are numerically capped, and each year a lottery process winnows all applicants to just 85,000 accepted.

Typical workers approved for H-1B visas include physicians, software engineers, architects, and teachers, and the influx of these workers makes for a more innovative and dynamic economy. An American Enterprise Institute report found that at least 1.8 jobs are created for every additional H-1B worker who enters the country, and a 2015 study found that across 218 U.S. cities, increases in the use of the H-1B program was associated with significant wage gains for all workers, regardless of educational attainment or economic status.

The DHS, DOL, and USCIS rules are three of a number of changes and attempted reforms the current administration has made to the H-1B visa program since 2017. The Trump administration has implemented a series of nonregulatory policy changes and memoranda to restrict eligibility for the program, causing overall H-1B petition denial rates to quintuple from 6% in 2015 to 32% in 2019.

On June 22, 2020, in response to the economic effects of the COVID-19 pandemic, President Trump issued a proclamation suspending numerous immigration categories, which included a ban on H-1B visa issuances for those outside the U.S. The ban included a number of exceptions for H-1B workers, which were later expanded on August 13 in updated guidance from the State Department. On October 1, a federal judge in California blocked the proclamation from

impacting employees of companies that are members of the plaintiff organizations, the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and Technet.

The proclamation also directed DHS and DOL to consider regulations to further restrict the H-1B program. The recent rules may be in part the result of these directives, but additional H-1B restrictions have been on the administration's agenda long before 2020. The DHS rule, entitled "Strengthening the H-1B Nonimmigrant Visa Classification Program," has been on the administration's regulatory agenda since Spring 2018.

Department of Labor Prevailing Wage Rule

The DOL wage rule, titled "Strengthening Wage Protections for Temporary and Permanent Employment of Certain Aliens," amends regulation governing minimum wages for all visa categories that require labor certifications, including H-1B nonimmigrant specialty occupation visas and EB-2 and EB-3 permanent employment-based visas.

Currently, minimum wages for H-1B, EB-2 and EB-3 visas are determined based on a Prevailing Wage Determination (PWD) that must be obtained by prospective employers from the Office of Foreign Labor Certification (OFLC). The PWD is meant to determine the average (or "prevailing") wage paid to similarly employed workers in the same occupation, industry, and geographic area. The OFLC often relies on the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey to construct a PWD, which it divides into four tiers, or levels, based on the potential employee's "experience, education, and the level of supervision."

The new DOL wage rule dramatically raises the minimum required wages for each of the four wage levels. Junior level positions, for example, would rise from the 17th percentile of the relevant OES data to the 45th percentile. Level II, for "qualified" workers, would see wages rise from the 34th percentile to the 62nd, and so on. For all positions for which DOL is unable to construct a prevailing wage, the rule would set the mandatory minimum wage to $100 an hour, or $208,000 a year.

Table: Impact of the DHS Wage Rule

Level	OES Wage Percentile	New Percentile from DOL Rule	Average Increase in Required Salary
Level I (Entry)	17th percentile	45th percentile	39%
Level II (Qualified)	34th percentile	62nd percentile	41%
Level III (Experienced)	50th percentile	78th percentile	43%
Level IV (Fully Competent)	67th percentile	95th percentile	45%

Source: DOL Wage Rule, Forbes

While the above table shows the average increase in wages across levels, some industries would see even larger spikes. "Experienced" H-1B biochemists and biophysicists, for example, would see their required wages rise by 64.8%. Entry level H-1B petroleum engineers would have their wages increase by $82,991, or 99.5%. Junior software developers on H-1Bs in San Jose, an occupation/location combination that DOL cannot categorize using its new system, would see wages almost triple from a minimum of $70,600 to $208,000. The rule would apply to new H-1B, EB-2, and EB-3 applicants and to all those seeking to renew their H-1B status, resulting in a number of employers suddenly unable to afford to pay workers on whom they have relied for many years.

The DOL rule was issued as an interim final rule (IFR), without undergoing the standard notice and comment process, and went into effect on October 8. The administration said that "exigent circumstances" created by the coronavirus pandemic is the primary reason the agency bypassed the notice and comment process. As of October 20, three lawsuits have been filed against the rule, asserting that DOL did not have "good cause" to bypass the notice and comment period and highlighting the reliance interests of industries and universities on immigrant employees in the affected categories. The rule has also been criticized for erroneously understating the extent it would increase required wages.

Department of Homeland Security's H-1B Rule

The DHS rule, titled "Strengthening the H-1B Nonimmigrant Visa Classification Program," would restrict which jobs qualify as H-1B "specialty occupations" and limit H-1B applicants who are hired by one company but are contracted out to a second employer.

H-1B visas are currently only available to petitioners who have a job offer in an occupation that requires a bachelor's degree or equivalent and application of a specialized body of knowledge. The DHS rule adds the additional qualification that the degree held by a potential H-1B petitioner must be in a "directly related specific specialty" to the relevant employment opportunity. The rule would exclude high-skilled applicants with general degrees in fields like engineering, computer science, and statistics from a number of positions because those degrees may not constitute a "directly specific related specialty." Instead, for example, a prospective H-1B engineer hoping to work at a port or on a ship would need a degree specifically in "marine engineering" or "naval architecture." A prospective H-1B accountant would need a degree specifically in accounting and would be declared ineligible if they had studied mathematics, statistics, or economics.

Prior to the rule's promulgation, the administration has previously denied numerous H-1B petitions by asserting similar eligibility restrictions. Some of these denials resulted in legal challenges, including three separate cases in which federal judges ruled that the administration was wrong to deny H-1B visa petitions by applying an overly restrictive definition of "specialty occupation."

The DHS rule would also limit and place additional scrutiny on H-1B applicants who are hired by one company but are contracted out to a second employer or work at a third-party worksite. While most H-1B petitions are approved for three years, the new rule would institute a maximum validity period of only one year for H-1B petitions in which the worker would be working at a third-party worksite. Employers in these contexts will also be required to provide significantly more information to USCIS concerning supervision of the employee and the specifics of the employer-employee arrangement. These rules are likely to particularly impact

the information technology (IT) space, as well as an increasing number of other businesses that rely on H-1B workers at third-party worksites.

Like the DOL rule, the DHS rule was instituted as an IFR without a notice and comment period, again with the agency citing again the coronavirus pandemic as justification. This rule, however, is not set to go into effect until December 7. Still, multiple lawsuits have already been filed challenging the legality of the rule.

U.S. Citizenship and Immigration Services H-1B Lottery Rule

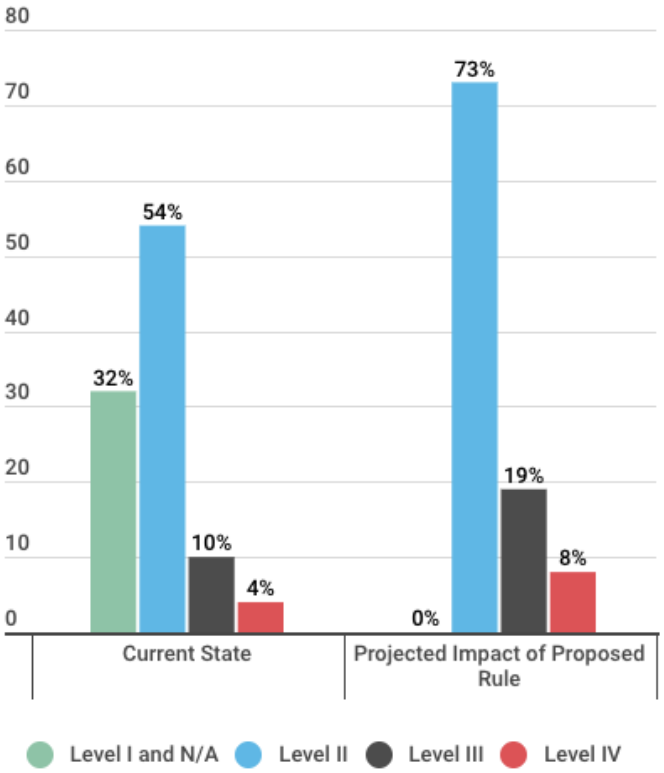
The USCIS proposed rule, titled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions," eliminates the H-1B visa lottery and institutes a ranking system in its place that requires USCIS to select petitions based on salary-level, starting with the highest and working down.

The H-1B lottery occurs each year if there are more H-1B petitions within a given time period than slots available under the annual cap of 85,000 visas. Outside of 20,000 slots reserved for those with advanced degrees, every prospective H-1B worker is on equal footing in the lottery. USCIS received an average of over 205,000 H-1B petitions between fiscal year (FY) 2015 and FY 2020, and the lottery has occurred each of the past eight years. In FY 2021, USCIS received 274,273 registrations for the H-1B lottery.

The USCIS proposed rule eliminates this lottery and adjusts the mechanism by which petitions are selected to prioritize higher salary-levels. Minimum wage-levels for H-1B workers are broken into four tiers based on the relative experience and education of the applicant in the field. Under the proposed rule, USCIS would grant H-1B petitions first to those at the highest wage level (wage level IV) for the most experienced workers, second to those at wage level III, and so on.

Due to its emphasis on high-salaried and highly experienced workers, the rule is likely to exclude a significant number of international students, who rely on the H-1B program as one of the few ways to stay in the U.S. and work after graduation. The rule would also price out employers who need to hire skilled individuals for junior and mid-level positions. Because the overall demand for H-1B visas is so high, USCIS projects that if the rule were to go into effect, every applicant at wage level I would be excluded.

Impact of Proposed Rule on Distribution of Selected H-1B Petitions by Wage Level



Source: [USCIS Projections]

Public comments on the USCIS proposed rule are due December 2, 2020, at which point USCIS and DHS will consider and respond to all of the comments before publishing a final rule.

Conclusion

The three regulations would implement significant restrictions to the H-1B high-skilled visa program. The administration has acknowledged that the rules are likely to price out employers that rely on H-1B workers and cause a number of current workers to lose their jobs. The rules would also likely cut off pathways to status for international students and may result in top talent choosing other countries with comparable institutions but more welcoming immigration policies.