CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

KILLING THE H-1B VISA ALSO KILLS THE US ECONOMY

Posted on October 12, 2020 by Cyrus Mehta

By Cyrus D. Mehta & Kaitlyn Box

Last week the Department of Labor (DOL) and the Department of Homeland Security (DHS) each issued new rules aimed at further attacking the H-1B visa program. The DOL rule, which was issued without affording the public an opportunity for notice and comment, significantly raises the minimum required wage that employers must pay to H-1B employees. The new rule could increase prevailing wages for some positions by as much as 40% or more. The rule goes into effect immediately. The rule's stated purpose is to ensure that U.S. workers are not forced out of their jobs by cheap foreign labor, but it advances no support for the outdated notion that H-1B workers are systematically underpaid. It was promulgated without any notice and comment as required under the Administrative Procedures Act. The DOL's spurious justification for this unfair surprise was to prevent employers from rushing to filing Labor Condition Applications under the old wage rates that would have been valid for three years.

The rule, which was likely aimed at making H-1B employees too costly for U.S. employers to hire, poses several legal quandaries. As pointed out by Stuart Anderson in a Forbes article, U.S. employers, for example, could be forced to pay H-1B employees significantly higher wages than their American counterparts, causing them to run afoul of equal pay laws that require employees who are in a protected class, including nationality, to be paid wages that are equivalent to those earned by employees who are not members of the protected class. Take, for example, New York's New York State's Pay Equity Law, which prohibits employers from paying an employee who is a member of one of the protected classes less than a worker without protected status for equal

or substantially similar work. N.Y. Labor Law art. 6, § 194 (1) (2019). "Protected Class" is defined to include gender, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim.

By promulgating this latest rule, the DOL could also be forcing employers to violate its own rules regarding the payment of wages to H-1B workers. Under 20 CFR § 656.731(a), employers must pay H-1B workers the higher of the prevailing or the actual wage. The actual wage is the wage paid to all other individuals with similar experience and qualifications for the specific employment in question. An employer could be forced to pay new hires significantly higher wages than those paid to existing H-1B workers holding the same position, resulting in the existing employees being paid less than the actual wage in violation of 20 CFR § 656.731(a). Employers could raise wages across the board to avoid this situation, but increasing wages substantially and with little warning is unlikely to be feasible for most, and could ultimately result in layoffs and damage to the U.S. economy.

The DHS rule, which goes into effect on December 7, 2020, makes it more difficult yet for U.S. employers to win H-1B approvals by imposing language requiring a direct relationship between the specialized degree and the occupation. Under the new rule, a position does not qualify as a "specialty occupation" unless:

"(1) 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;

(2) 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 United States industry;

(3) 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

(4) 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."

(emphasis added)

Among the DHS rule's most significant changes is the reduction of the H-1B visa validity period from the current three years to just one year when the H-1B worker will work at a third-party worksite. Additionally, the rule inserts the requirement that only positions requiring education or experience in a "directly related specific specialty" will qualify as specialty occupations, greatly limiting the number of individuals who can successfully qualify for an H-1B visa. Employees in IT-related fields, who often hold general degrees in engineering or computer science, are likely to have particular difficulty meeting this new requirement.

The rule also imposes burdens on employers who send H-1B workers to third-party worksites, apparently reviving some of the onerous requirements struck down in *IT Serve Alliance v. Cissna*. In assessing whether an employer-employee relationship exists, the new rule encourages closer scrutiny as to whether the requisite level of employee supervision exists when the employee is stationed at a third-party worksite. Additionally, employers who employ H-1B workers at third-party worksites must submit additional evidence such as "contracts, work orders, or other similar corroborating evidence showing that the beneficiary will perform services in a specialty occupation at the third-party worksite(s), and that the petitioner will have an employer-employee relationship with the beneficiary".

These new rules pose the potential for serious harm to both H-1B workers and the U.S. companies who employ them. Employers must file an extension for an H-1B worker whose status is expiring, but if they are not able to pay the employee the new, artificially inflated wages imposed by the DOL rule, the request for an extension may not be filed. Limitations in OES data have resulted in wages for some positions being entirely unavailable. For example, no wage data has been listed for a Software Developer, Systems in San Francisco since the new rule was promulgated on October 8, 2020. The default wage for Software Developer, Systems is $208,000. Similarly, little wage data is listed for physicians so they too must be paid the $208,000 default wage. Employers are forced to either pay the default wage, an exorbitant salary for

many positions, or wait until wage data is available, potentially risking an untimely filing of the employee's H-1B extension. If an extension is not filed, the H-1B employee would then be forced to rapidly depart the United States in the midst of a pandemic. Employers, particularly those in IT-related fields who employ numerous H-1B workers, who are unable to pay the new, substantially higher wages could be forced to lay off workers, or move their operations overseas. Foreign students graduating from US schools will not be hired by US employers if the entry level wage is ridiculously high. This will result in foreign students paying tuition fees to universities in other countries if their career prospects in the US will be diminished by these rules. Nonprofits and startups will also find it impossible to pay these artificially inflated wages, which have no bearing whatsoever on the prevailing market wage.

Although litigation may soon challenge the new rules, putting U.S. employers in this difficult position for the time being does not bode well for the American economy's chances of recovering from the effects of COVID-19. Forcing U.S. companies to reduce their workforce or move overseas to keep costs down also threatens the employment prospects of American workers who look to these same companies for jobs – ironic, as this is the very group whose interests the new rules are aimed at protecting. Aspiring immigrants desire to come to America to succeed, and this in turn also benefits the US economy as they innovate and start or lead great companies. This is America's secret sauce. Nobody is denying that some aspects of the H-1B visa program should not be reformed, such as providing more job mobility to H-1B workers and providing them with a faster path to the green card, but these two new rules poison the secret sauce that keeps America so successful.

Kaitlyn Box graduated with a JD from Penn State Law in 2020, and works as a Law Clerk at Cyrus D. Mehta & Partners PLLC.