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DHS Proposes Weighted H-1B Lottery Favoring Higher Wage Levels

Yesterday, the U.S. Department of Homeland Security (DHS) published a *proposed regulation in the Federal Register* that aims to fundamentally reshape the annual H-1B cap lottery process. Under the current lottery system, each lottery registration carries the same chance of being selected, regardless of the wage offered for the position. The proposed rule would, instead, prioritize candidates based on wage levels as determined by the U.S. Department of Labor's four-tier prevailing wage system. If the published version of the proposed rule becomes final, these changes to the H-1B lottery system could significantly affect employer sponsorship and hiring strategies, particularly for early career professionals and entry-level roles.

As noted above, the selection process used in the existing H-1B lottery system is entirely random. In the proposed rule, the DHS introduces a weighted system whereby the number of times a beneficiary is entered into the lottery would depend upon the wage level associated with the offered position. For example, beneficiaries offered a Level IV wage – the highest wage level identified in the DOL's Occupational Employment and Wage Statistics (OEWS) framework, would receive four (4) entries. Those individuals offered a wage at the Level III rate would receive three (3) entries, while Level II beneficiaries would receive two (2) entries and Level I beneficiaries only a single entry, respectively. This approach aims to provide beneficiaries with higher wage offers significantly greater odds of selection, thereby shifting the H-1B lottery process away from a purely random allocation model.

Under the proposed rule, employers would be required to identify the standard occupational classification (SOC) code, the prevailing wage level, and the area of intended employment at the time of the H-1B lottery registration. When a petition is ultimately filed, the U.S. Citizenship and Immigration Services (USCIS) would also require supporting documentation to confirm the accuracy of the wage level claimed. According to the proposed rule, the USCIS would reserve the right to deny or revoke an H-1B petition if the agency determines that an employer misrepresented a position's wage level to increase a beneficiary's selection odds in the lottery, or if the wage offered in the H-1B petition is lower than the offered wage identified during the H-1B lottery registration process. At the same time, the proposed rule provides the USCIS with flexibility to acknowledge and recognize that legitimate business reasons may necessitate wage changes between the H-1B lottery registration and subsequent H-1B petition filing, such as a shift in the intended worksite. In such cases, the proposed rule would permit the agency to accept changes when and where consistent with a bona fide job offer.

The Sept. 24th proposed rule also contains specific guidance for situations involving multiple H-1B worksites or multiple employers. Where a position requires an H-1B beneficiary to work in more than one location, the employer must use the lowest corresponding wage level when registering for the H-1B lottery. If multiple employers submit registrations on behalf of the same candidate, the

candidate will be entered into the lottery according to the lowest prevailing wage level submitted. The USCIS acknowledges the possibility that some employers may decide to offer higher wages to certain candidates / intended H-1B beneficiaries to increase their chances of selection. In those situations, the agency takes the position that those wage offers serve as a reflection of the employer's valuation of the individual's skills and contributions, even where the wage is not strictly tied to the formal skill level of the role.

The DHS will accept public comments on this proposed rule for a 30-day period. The proposed rule will not be finalized until the federal rulemaking process is complete. Typically, the rulemaking process requires several months and often involves revisions based on stakeholder feedback. The earliest possible implementation of this proposed rule would be during the FY 2027 H-1B cap season, which is expected to open in March 2026. Court challenges to a final rule remain a strong possibility and could delay or prevent implementation of these proposed changes to the H-1B lottery selection process.

If the proposed rule is finalized as currently drafted, employers may face restricted access to entry-level talent. Candidates offered Level I wages – often recent graduates or junior professionals – would be at a considerable disadvantage as compared to their peers who may receive higher wage offers. Employers may also experience pressure to raise wages as a means to improve lottery selection chances, potentially altering internal compensation strategies. At the same time, organizations should anticipate a heightened compliance burden, as they will need to ensure that prevailing wage levels are carefully determined, documented and defensible in the event of government scrutiny.

The changes set forth in the proposed rule raise important questions about how employers prepare for the upcoming H-1B lottery season and/or whether to reassess their hiring strategies. For example, employers should begin reviewing their anticipated candidate pools for the FY 2027 season, including the assessment of potential prevailing wage levels for upcoming roles and the evaluation of potential wage adjustments, if any, to improve the chances of selection.

The proposed rule proffered by the DHS signals a significant departure from the H-1B lottery system that employers have relied upon for decades. Organizations that depend on the H-1B work visa program, particularly those who hire large numbers of entry-level workers, should closely follow developments and prepare to adapt accordingly if this current version of the proposed rule is finalized.

If you have any questions or would like additional information, please contact any member of our **Immigration Practice Group** or the Bond attorney with whom you are regularly in contact.

