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Higher Costs for Highly Skilled Foreign Workers in Store for Employers?

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Despite the absence of new regulations or policies enacted following the President's "Buy American and Hire American" Executive Order, a recent shift in the adjudication of H-1B visas indicates the Administration's policy initiatives are already being accomplished behind the scenes. Employers should be aware that U.S. Citizenship and Immigration Services is exercising greater scrutiny over H-1B petitions, issuing requests for evidence that are more challenging both in terms of number and tone. The greatest area of concern for USCIS: H-1B wage levels.

Issued on April 18, 2017, President Trump's Executive Order requires the Secretary of State, the Attorney General, the Secretary of Labor and the Secretary of Homeland Security to execute the "immediate enforcement and assessment of domestic preferences" in the administration of the immigration process. According to the Executive Order, this latest effort is intended to preserve the "integrity" of the immigration system by authorizing the executive branch to "rigorously enforce and administer the laws governing entry into the United States of workers from abroad" and encourage employers to "Hire American." The order calls on federal agencies to ensure that "H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." The H-1B is currently reserved for professional specialty occupations and allotted to

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foreign nationals according to a random lottery selection.

The order directs agency officials to issue new rules, guidance and policies "to create higher wages and employment rates for workers in the United States, and to protect their economic interests." Although such rules, guidance and policies have not yet been issued, a recent shift in the processing of H-1B petitions by the U.S. Citizenship and Immigration Services indicates the President's executive order is already being implemented. Employers report that they are receiving an exponentially higher rate of Requests for Evidence (or "RFEs") from USCIS in response to H-1B and other highly skilled worker visa petitions. These requests ask visa seekers to give the agency more information on certain topics before a decision on the visa is rendered. Employers are typically given 84-87 days to respond to the government's request.

Under the Immigration and Nationality Act, when applying for an H-1B visa, employers must choose one of four wage levels to pay an H-1B worker, depending on skill level, and obtain the approval of the Department of Labor. Federal statutes require the Department of Labor's wage surveys to "provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." INA §212(p)(4). That includes entry-level, or level one, wages. Typically, when hiring a new foreign worker for an entry position, employers want to offer level one wages.

Now, USCIS is putting visa seekers in a tough spot. Despite having obtained DOL approval of the level one wage selected on the H-1B labor application, USCIS is undercutting that approval by issuing employers requests for evidence on the grounds that a level one wage – one of the four levels expressly established by the DOL – does not correspond with an H-1B specialty occupation. As a result, employers looking to hire H-1B hopefuls must not only prove to USCIS that the offered position is complex enough to

qualify as an H-1B “specialty occupation,” but now, employers must also justify paying only entry-level wages for such complex occupations.

No basis exists in federal immigration law for the contention that entry-level wages are unsuitable for specialty occupations; the fact that entry level wages are included as one of four DOL-approved levels clearly indicates that they are suitable. Some observers believe USCIS is sidestepping the formal rule-making process and, instead, implementing the President’s Executive Order through the visa adjudication process. This could explain the recent uptick in requests for evidence since April 2017 and the increased scrutiny of temporary worker visas.

While it’s too early to tell whether USCIS will also be denying petitions at a higher rate, employers are advised to speak with experienced immigration counsel prior to filing an H-1B petition to determine whether the offered wage level is appropriate. Increasing H-1B workers’ pay may be exactly what the Administration wants employers to do.

Akerman’s team of attorneys specializing in Immigration and Nationality Law will continue to closely monitor USCIS’s activities, as well as those of the Department of Homeland Security, in order to keep clients timely informed of current developments.