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DHS Delays Withdrawal of H-1B Lottery Rule Prioritizing Wages

Legal Update

04.14.2021

This article was prepared with the assistance of ABIL, the Alliance of Business Immigration Lawyers, of which Loan Huynh, Fredrikson Immigration Department Chair, is a member.

The Alliance of Business Immigration Lawyers (ABIL) formally submitted a comment asking the Department of Homeland Security (DHS) to withdraw its final rule prioritizing wages in adjudicating H-1B applications.

ABIL said the final rule “would unlawfully and unjustifiably give preference to workers who earn higher wages, despite the fact that these wages are drawn from limited federal data sources” that are “not designed for application to the H-1B visa program, and bear no relation to the value a highly skilled worker adds to the United States.” ABIL stated that because of the wide variety of occupational categories into which H-1B beneficiaries may fall, the use of wage data as a proxy for high skills and qualifications “will not accomplish the outcomes DHS desires” and instead “will unfairly discriminate against and burden law-abiding employers,” particularly small and medium-size businesses that will find the H-1B program unaffordable as a result.

ABIL also warned that the final rule is likely to “cause more work to be commissioned offshore” and thus undermine opportunities for U.S. workers along with the Biden administration’s desire that more work be performed in the United States.

On March 12, 2021, DHS delayed the effective date of the wage rule until May 14, 2021. DHS said the 60-day delay would allow the agency to “review any questions of fact, law or policy.”