

New Rules for H-1B's, Prevailing Wage and J-1 Duration of Status

November 5, 2020

Agenda

Welcome: Ravi Shankar, Assistant Vice Provost & Director, International Services

Opening Remarks: Jane Gatewood, Vice Provost, Global Engagement

Specialty Occupation Restricted Definition: Kathy Strout, Associate Director for Scholar Services

Prevailing Wage: Jeff Rodgers, Sr. Immigration Advisor

Duration of Status Elimination: Janet Connor, Sr. Immigration Advisor

J-1 Extensions in November and Rebranding of J EVP: Sumie Jacoby, Sr. Immigration Advisor



Presentation Topics

- Department of Homeland Security rule regarding the revised definition of H-1B specialty occupation effective 12/7/2020
- Impact of Department of Labor Prevailing Wage rule which went into effect on 10/8/2020
- Impact of the elimination of Duration of Status on J Exchange Visitor Program



DHS and DOL H-1B Interim Final Rules

These two new interim final rules impact the calculation of prevailing wages for H-1B workers and a stricter definition of specialty occupation. The higher prevailing wages went into effect on October 8, 2020. The new definition for specialty occupation will go into effect December 7, 2020.



New Definition of Specialty Occupation

A specific specialty or specialties, or its equivalent, provides a body of specialized knowledge directly related to the duties and responsibilities of the particular position...a general degree will not meet the requirement. Specialized studies must be directly related to the position/occupation.



Degree must be directly related to the position/occupation

While an occupation may allow a range of degrees, and apply multiple bodies of highly specialized knowledge, each of those qualifying degree fields must be directly related to the proffered position/occupation. Need to focus on the position complexity or uniqueness. Must show in the petition how each degree is required for the occupation.



H-1B Extensions

DHS notes that each case is decided on its own merits, and simply because a petition was approved previously does not guarantee that a similar position would be approved in the future as prior approvals are not binding on USCIS. The burden of proof remains on the petitioner, even where an extension of stay in H-1B nonimmigrant status is sought. Departments must state specific fields when advertising for positions.



Timing and Cost of H-1B's

- We need to begin the H-1B process 6 to 7 months in advance of the required start date. ISO needs time to prepare the case.
- Premium processing has increased to \$2,500.
- Current H-1B fees are \$460 and expected to increase to \$555 and the fraud detection fee is still \$500.



Department of Labor (DOL)
Interim Final Rule (IFR):

*Strengthening Wage Protections for the
Temporary and Permanent Employment
of Certain Aliens in the United States.*



Overview

- Effective as of 10/8/2020 with no notice period.
- Applies to LCA's filed on or after the effective date.
- It will not apply retroactively.



Overview

- The rule changes how DOL computes Level I through Level IV wage rates to certify LCAs that rely on Occupational Employment Statistics (OES) wage data
- The result is higher prevailing wage determinations in each OES-based wage level.
- These higher prevailing wage determinations impact both the temporary (e.g., H-1B) and permanent residence (PERM) programs



Why is this relevant?

U.S. Department of Labor determines the prevailing wage

Prevailing Wage: The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application.

The employer shall base the prevailing wage on the best information available as of the time of filing the application.



Actual vs Prevailing wage

The University is required by law to pay the H-1B non-immigrant employee either 100% of the prevailing wage or 100% of the actual wage, whichever wage is higher.



Establishing the wage requirement

The University must attest to four statements when filing an LCA:

Wages: Pay non-immigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer non-immigrants benefits on the same basis as U.S. workers.

Working Conditions: Provide working conditions for non-immigrants that will not adversely affect the working conditions of workers similarly employed.

Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.

Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B workers.



Establishing the wage requirement

- The first LCA requirement shall be satisfied when the employer attests that, for the entire period of authorized employment, the required wage rate will be paid to the H-1B



The following tables shows how the interim final rule impacts LCAs filed since October 8, 2020:

Online Wage Library - FLC Wage Search Results

You selected the ACWIA - Education Industry database for 10/8/2020 - 6/30/2021:

| | |
|--------------------------|--|
| Area Code: | 40380 |
| Area Title: | Rochester, NY |
| GeoLevel: | 3 |
| OES/SOC Code: | 19-1042 |
| OES/SOC Title: | Medical Scientists, Except Epidemiologists |
| Level 1 Wage: | \$31.84 hour - \$66,227 year |
| Level 2 Wage: | \$53.23 hour - \$110,718 year |
| Level 3 Wage: | \$74.63 hour - \$155,230 year |
| Level 4 Wage: | \$96.02 hour - \$199,722 year |
| Mean Wage (H-2B): | \$42.58 hour - \$88,566 year |

19-1042.00 Medical Scientists, Except Epidemiologists

Conduct research dealing with the understanding of human diseases and the improvement of human health. Engage in clinical investigation, research and development, or other related activities. Includes physicians, dentists, public health specialists, pharmacologists, and medical pathologists who primarily conduct research.



The following table shows how the interim final rule impacts LCAs filed since October 8, 2020:

| Wage Level | Percentile Starting 10/08/20 | Prior Percentile |
|------------|------------------------------|------------------|
| Level I | 45th percentile | 17th percentile |
| Level II | 62nd percentile | 34th percentile |
| Level III | 78th percentile | 50th percentile |
| Level IV | 95th percentile | 67th percentile |



Example: Level 1 changes (Rochester, NY)

| SOC | Field | PW Now | PW (Prior to October 8, 2020) |
|---------|---|--|----------------------------------|
| 17-2031 | Biomedical Engineers | \$92,498 year | \$66,082 year |
| 19-1042 | Medical Scientists, Except Epidemiologists | \$66,227 year | \$54,392 year |
| 19-2012 | Physicists | \$73,362 year | \$55,702 year |
| 25-1021 | Computer Science Teachers, Postsecondary | Leveled wages cannot be provided in [this area] in this occupation code due to limitations in the OES data....wage data may be at least: \$100.00 hour, \$208,000 year | \$51,970 year |



Alternatives

- Use of other temporary work classifications:
 - TN (Canadian and Mexican citizens only).
 - J Exchange Visitor (No staff or tenure-track positions).
 - O-1 (for people with considerable post graduate experience).
Requires preparation by an immigration attorney.



Duration of Status (D/S) Proposed Rule: Impact on J-1/J-2 Exchange Visitors

Department of Homeland Security (DHS) proposed regulatory changes:

Elimination of D/S admission for J nonimmigrant visa holders

What is D/S Duration of Status?

How does it relate to an exchange visitor's presence and activity in the USA?



Overview: Notice of Proposed Rulemaking (NPRM)

September 25, 2020 – Notice of Proposed Rulemaking was published for public review

- Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media (*DHS Docket No. ICEB-2019-0006*)
- **Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS)** Concerns over a “lack of predetermined points in time for ... immigration officers to directly evaluate whether J, F and I nonimmigrants are maintaining their status”

30-day Public Comment Period ended Monday, October 26th (NAFSA reported 32,000)

Implementation of the Final Rule: Uncertainty about scope and timing

- DHS must review comments & prepare any revisions; Final Rule will be published maybe as early as December 1, 2020

****Today’s Discussion is limited to effects on J-1 Research Scholars and Professors; Short-term Scholars and Alien Physicians sponsored by ECFMG (Education Commission of Foreign Medical Graduates) through UR’s GME (Graduate Medical Education Office.)**



Overview: Basic Concepts

CURRENT: Admission to the US for Duration of Status (D/S)

- For eligible visa categories, travelers may be admitted to the country for a flexible period of stay, provided they continue to maintain their immigration status
- J-1 Exchange Visitors, & Dependents
Reflected on **Form I-94** or **US Port of Entry stamp**
- Permission to remain in the US is based on the unexpired DS-2019, and adhering to all requirements and permissions of that category
- Changes in SEVIS extend/shorten period of stay!

U.S. Customs and Border Protection
Securing America's Borders

Most Recent I-94

Admission (I-94) Record Number : 51415565885
Most Recent Date of Entry: 2017 July 25
Class of Admission (F1)
Admit Until Date : D/S
Details provided on the I-94 Information form

Last/Surname :
First (Given) Name :



FUTURE: Admission to the US for a Fixed Period of Stay (Date Certain)

- Travelers are admitted through a specific expiration date, calculated on eligibility criteria for their visa category
- Prior to the Form I-94 expiration date, they must prepare to depart the US or apply for an *Extension of Stay*



Overview: Extension of Stay

Extension of Stay (EOS), via travel & reentry *OR* application to USCIS (currently Form I-539)

- Customs and Border Protection (CBP) determines a traveler's eligibility for admission to the US from outside the country, including any relevant period of stay
- US Citizenship and Immigration Services (USCIS) determines an applicant's eligibility to extend or change status from within the country, along with other immigration benefits
- Action to depart the US or file an EOS must be taken PRIOR to the status expiration date
 - Fixed period of stay is based on Form I-94 expiration, plus any relevant grace period
 - [D/S has relied on additional data (SEVIS, DS-2019, etc.), without requiring EOS]



Overview: General

General Implications: J visa holders will face less flexibility, greater costs, uncertainty

- Explicit DHS authorization would be required for any continuation or change of program
- Increased financial burden for travel and/or USCIS application fees at regular intervals
- Delayed EOS processing times *vs.* Scheduling challenges for travel & campus obligations
- ISO asks that Extensions of stay for J-1 renewal begin 7 or 8 months in advance of expiration. ISO advises that extensions be submitted to the USCIS 6 months in advance for processing
- Discretion & Scrutiny: DHS to evaluate program objectives/progress (despite SEVIS!)
- Currently there is NO CLEAR GUIDANCE to Responsible Officers on this matter



Provisions of the Proposed Rule

Focusing on impact to J-1 Exchange Visitors

- **Eliminate Duration of Status (D/S); Establish a Fixed Period of Stay**
- **Changes to the J extension process will require timely filing with USCIS and must be approved by them**
- **Impact to work permissions while Extension of Stay is pending**
- **Final Rule effective date is unknown but may be as early as December 1**



Proposed Rule: Replace D/S with Fixed Period of Stay

Admission to the US will be limited to a fixed period of stay, per Form I-94 Record

- Period of stay will align with DS-2019 completion date or up to maximum period allowed
- Maximum admission period cannot exceed 2 years at the University of Rochester for:
 - Nationals of designated State Sponsors of Terrorism
Currently – Iran, North Korea, Sudan, Syria (but subject to change)
 - Citizens of countries with a Nationwide, recent F/M/J Overstay Rate greater than 10% **
 - Programs that do not participate fully in the DHS E-Verify system
 - Any criteria deemed a matter of US national interest – sensitive fields, fraud, etc.

** *Per 2019 DHS Entry/Exit Overstay Report: 58 countries would be impacted by this rule*

Afghanistan, Benin, Bhutan, Burkina Faso, Burma, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo-Brazzaville, Congo-Kinshasa, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Guyana, Haiti, Iraq, Kenya, Kosovo, Kyrgyzstan, Liberia, Libya, Malawi, Mali, Mauritania, Moldova, Mongolia, Nepal, Niger, Nigeria, Papua New Guinea, the Philippines, Rwanda, Samoa, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Syria, Tajikistan, Tanzania, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vietnam, Yemen and Zambia



Proposed Rule: Replace D/S with Fixed Period of Stay

Example: Upon admission to the US, J visa holders will receive a date-specific Form I-94

- Research Scholar: Citizen of Ireland, with valid Form DS-2019 & unexpired J-1 visa sticker
- *Program Dates:* 1/17/2021 to 1/16/2026
- *J-1 Visa Validity:* Multiple entry, 12/15/2020 through 12/14/2023
- *Upcoming entry to US:* 1/16/2021
- *Form I-94 Expiration:* 1/15/2023 (2-year period of stay)
- Plan to remain in US *without travel* therefore I would be required to work with ISO to file an EOS 6-8 months prior to the I-94 expiration date!



Proposed Rule: DHS adjudication for a Change in Program

Updates reported in SEVIS (DS-2019) may require review by DHS for approval

- Changes that fall within the current authorized period of stay would not require review, such as *Site of Activity, salary increase, dependent follows to join unexpectedly, etc.*
- Changes that result in additional time would likely need EOS or travel: *Program Extension, Transfer to a different institution, etc.*
- Action in SEVIS by ISO designated or alternate responsible officer will be viewed as a RECOMMENDATION, but not necessarily approval.

Application preparation, Timing, and Processing considerations

| Extension of Stay (EOS) application to USCIS | Travel abroad for an extension of stay |
|---|--|
| Apply to USCIS (I-539) before Form I-94 expiration date | Departure from US with a valid DS-2019 |
| Subject to fees (\$370) & Biometric collection (\$85) | Must have valid visa or time to renew while abroad |
| Failure to timely file may result in status violation | Overstay > Accrual of Unlawful Presence each day |



Proposed Rule: DHS “adjudication” for a Change in Program

DHS intends to evaluate merits of “making reasonable efforts toward a program objective”

- Extensions for additional time to complete a program of study/research due to:
 - Compelling program reasons (i.e. unexpected research problems)
 - Documented illness or medical condition (substantiated by doctor/psychologist)
 - Exceptional circumstances beyond the individual’s control (natural disaster, crisis)
- NOT able to continue program objective
- Evidence to support grounds for the extension will be needed: Letters describing circumstances; other appropriate and related proof, etc.

Pending EOS: DHS will grant a period of authorized stay, *versus* valid nonimmigrant status (I-94)

- J-1 exchange visitors may continue all program objectives and activities, *up to 240 days*
- J-2 Dependents **MAY NOT WORK** once the EAD card expires and while the I-539 case is pending. There is also the consideration of the new I-765 filing for a new EAD.



Proposed Rule: Dependents, Grace Periods

Considerations J-2 Dependents

- J-1/J-2 exchange visitors/dependents will retain the current 30-day grace period for departure or action
- Dependents are subject to the same period of stay restrictions as the J-1 principal
- May be included in the same EOS petition to USCIS, or separately if necessary (w/fee)



Proposed Rule: Transitions to a Fixed Period of Stay

Current Exchange Visitors will not be exempted from implementation

- Assuming DHS intends for current exchange visitors already in the US to become subject to the new rule, it is uncertain how this will be generated thru SEVIS as of this writing
- Uncertainty around timing implications

Planning for individuals with a D/S admission, as of Final Rule effective date

- Period of stay to be calculated from DS-2019, the day a Final Rule takes effect
- Up to program end date (max of 2 or 4 years), *plus* 30 days for J-1/J-2
- Resulting period of stay will be in effect automatically, without filing an EOS petition, and applicable only to individuals within the US under D/S admission once effective

Travel and/or changes in program will require explicit DHS determination

- Despite transitional period current scholars may become subject to new rule
- Any departure & reentry, or continued/new program objectives beyond fixed period then ... timely EOS filing or US departure within calculated grace period will be required!
- Due to COVID-19 Travel Bans, closed consulates etc. **ISO RECOMMENDS NO NON-US TRAVEL**



IMPORTANT TO REMEMBER AT ALL TIMES UNDER THESE PROPOSED REGULATIONS

LEAD TIME – LEAD TIME – LEAD TIME

- FIRST: TIMELY COORDINATION BETWEEN THE SUPERVISOR, ADMINISTRATOR, SCHOLAR and ISO
- SECOND: GETTING ACCURATE INFORMATION TO ISO 7-8 MONTHS IN ADVANCE
- THIRD: ISO SUBMISSION TO THE USCIS 6 MONTHS IN ADVANCE
- FOURTH: WORTH REPEATING – ISO RECOMMENDS “NO TRAVEL OUTSIDE OF THE USA” WHILE AN EXTENSION OF STAY IS PENDING



Current vs Proposed Rule

Current Process

Sponsor (UR) has sole authority to extend a J-1 program.

No fee required.

Initiate extension process at least 2 months before program end date.

Single request form and supporting documentation the J-1 and their hiring department submits to ISO

Able to extend for any period of time up to max in category.

USCIS has sole authority to extend a J-1 program.

Non-refundable fees (\$370+\$85 biometric). Fees are subject to change.

Initiate extension process at least 7-8 months before program end date.

Significant amount of paperwork the individual must file (I-539, extended DS2019, letters of support, etc.)

Only able to extend up to 2 years at a time.

D/S Rule Is Finalized



Options in an Uncertain Landscape

EXTEND NOW

- ISO is able to process J program extensions until the rule is made final.
- Scholars who have a DS-2019 is scheduled to expire in next 12 months and may need additional time to complete their program objectives may want to consider this option.
- Can shorten a program if extended for more time than actually needed.
- Additional time (up to 2 years).

LONGER PROGRAM PERIODS FOR NEW J SCHOLARS

- Provides scholar with more flexibility.
- Avoids having to initiate an extension just a few months into their program.
- Recommendation for initial J program lengths: **2 years**.



Extension Next Steps

- **STEP ONE:** Dept. and J-1 scholar together should review end date noted on DS-2019 (box 3) and J category (box 4) to determine how much program participation time remains.
- **STEP TWO:** Discuss whether more time beyond the current program end date noted on the DS-2019 may be needed to complete the program objective(s).
- **STEP THREE:** Submit required paperwork to ISO requesting an extension of program for any time period up to 2 years.

www.iso.rochester.edu/employment/scholars/j-current.html





Connecting global leaders,
creating lasting impact.

- Formerly known as the Exchange Visitor Program
- Still under the jurisdiction of the U.S. Dept. of State
- Same visa category (J-1/J-2)
- New website URL: bridgeusa.state.gov



Additional Questions???

