USCIS To Increase Filing Fees While The Latest Executive Order Demands H-1B Compliance

Insights
8.05.20

In the midst of the COVID-19 pandemic, the Trump administration continues to install stringent measures that will impact employers hiring foreign national temporary workers.

Fee Increases
On July 31, the Department of Homeland Security (DHS) announced a final rule to increase filing fees across the board for certain immigration and naturalization benefit requests with a weighted average increase of 20%. It will also add new fees and establish multiple fees for nonimmigrant worker petitions. DHS indicated that the fee increase is needed for its operational needs and efficiency improvement.

For example, the base filing fee for an H-1B specialty occupation petition will increase 21% (from $460 to $555). The base filing fee for an L-1 multinational company transfer petition will increase by a whopping 75% (from $460 to $805). The fee for Application for Employment Authorization, the document that is especially important to spouses of many nonimmigrant visa holders as it allows them to work in the United States, will increase by 34% (from $410 to $550).

A little bit of silver lining is that the I-140 immigrant petition, a key element of the green card application process, will receive a fee reduction by 21% (from $700 to $555). One of the more egregious – and telling – increases is the fee for filing and I-881, Application for Suspension of Deportation or Special Tule Cancellation of removal. That fee is increasing from $285 for an individual facing deportation, or $570 for families, to a whopping $1,810 for either circumstance. While those in facing deportation might reasonably be able to pull together $285 to file the I-881, this enormous new fee will no doubt be a deterrent to those seeking to fight their extradition.

Two other provisions in the final rule are of interest. The final rule indicates that USCIS will require employers with a high proportion of H-1B and L-1 employees to pay additional border security fees. Currently, employers with more than 50 employees that have a workforce consisting of 50% or more in H-1B or L-1 status are required to pay an additional $4,000 when petitioning for an initial or change of employer H-1B, or $4,500 for an initial L-1. Under the final rule, employers in this category will have to pay the applicable fee with every extension, in addition to the fee due with the initial filing.

The final rule also lengthens the timeline for Premium Processing from 15 calendar days to 15 business days. This means that the timeframe for the government to respond to petitions submitted with Premium Processing will essentially be increased by up to one week.

Of note, in the final rule preamble, the agency admits that "immigrants make significant contributions to the U.S. economy." It also agrees that "immigrants are an important source of labor in the United States and contribute to the economy; immigrants are crucial for agriculture, construction, healthcare, hospitality, almost all industries; and immigrants are a source of future U.S. labor growth." These concessions were immediately seized upon by the plaintiffs in an ongoing lawsuit challenging the presidential proclamation issued in June. That proclamation suspends visa issues in several nonimmigrant worker classes, such as H, L, and J, claiming that they take jobs from Americans and threatens economy recovery from COVID-19. The plaintiffs in that case filed a motion for preliminary injunction, citing DHS' concession that immigrants are an important source of labor in the United States and contribute to the economy.

Executive Order

On August 3, the White House issued an Executive Order demanding federal government branches review federal contractors to assess whether their nonimmigrant workers negatively impact U.S. workers. One section of this order requires the Department of Labor and Department of Homeland Security to act within 45 days to ensure all employers of H-1B visa holders comply with the H-1B requirements set out in the immigration laws. The language does not appear to limit such action only on those federal contractors. It is yet to be seen whether the White House will amend the order to clarify such ambiguity, which it has done in the past several executive orders that appear to contain hastily drafted provisions.

It is unclear how these two agencies can, within a mere 45 days during a national health emergency, "ensure all employers of H-1B visa holders" comply with H-1B rules. For compliance review, the agencies typically use site visits or audits. Because H-1B is worksite-specific, site visits often involve different worksites. When a big portion of the nation's workforce is working from home during COVID-19, the number of "worksites" become astronomical.

Regardless of the practicality of this executive order, the takeaway is that you should review or self-audit your H-1B compliance, such as public access files and labor condition application filing notifications. While increased filing fees are destined to arrive, compliance violation findings and their severe penalties need not occur if you take proactive measures.

Related People

Ralph Hua
Partner - In Memoriam

Service Focus

Immigration