

UPDATED ANALYSIS: THE IMPACT OF IMMIGRATION LEGISLATION ON SALARIES AND COMPETITIVENESS

EXECUTIVE SUMMARY

Immigration legislation in the House and Senate would artificially inflate the wage required to be paid to skilled foreign-born professionals.¹ This would have the effect of distorting the labor market for both U.S. and foreign skilled workers and would provide the U.S. Department of Labor enhanced power to set wage rates at many of America's companies. Under the premise that H-1B visa holders are generally paid less than their U.S. professional counterparts, which is a premise not supported by research, bills in Congress would require skilled foreign nationals to be paid substantially more – sometimes \$20,000 more per year – than U.S. professionals in similar positions. These new mandated minimum wages for skilled foreign nationals will make it more difficult for U.S. companies to compete in the global marketplace and to increase jobs and investment in the United States.

The core problem is bills in the House and Senate would mandate H-1B visa holders be paid wages based on a Congressional formula, using OES data collection, that does not involve surveying employers on the wages paid to individual employees based on their education, experience or other factors. Surveys of individual employees based on education, experience and other factors are inherently more accurate than a statistical formula, whether or not they result in a higher or lower required wage. That is the central issue. Instead, the U.S. Department of Labor's Foreign Labor Certification (FLC) unit, a part of the Employment and Training Administration, uses data collected from the Occupational Employment Statistics (OES) program and then creates four levels of wages based on a formula.² That formula is inherently less accurate than a survey of the wages paid to individual employees at different levels of education and experience. The government formula, for example, may designate the average wage in an occupation as Level 3 whether or not individuals who are considered Level 3 typically earn that wage in that occupation and region. In short, House and Senate bills would require companies to use a methodology that neglects to take into account the salaries of individuals based on education and experience.

Current bills in Congress would make the wage levels provided by the Foreign Labor Certification unit even less reflective of real world market wages by reducing the current four levels down to three levels, mandating a minimum wage paid for every H-1B worker that is no less than 80% of the mean wage for the occupation, and generally not allowing the use of nongovernmental wage surveys, which are currently permitted under Department of Labor regulations.

Nongovernmental (private) surveys collect data from individuals at different education and experience levels, often 6 levels, and are used by companies to set compensation levels in the labor market. Companies consider nongovernmental wage surveys the "market" wage for individuals based on the job, the location and worker's

¹ This analysis takes into account legislative changes made after the publication of *A Minimum Wage of \$128,000?: The Impact of Immigration Legislation on Salaries and U.S. Competitiveness*, National Foundation for American Policy, NFAP Policy Brief, June 2013.

² Section 212(p) of the INA lays out the Congressionally devised formula.

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education and experience. Importantly, nongovernmental or “private” surveys are used to help set compensation at companies more generally, not primarily for immigration purposes.

In June 2013, the U.S. Senate passed S. 744, while at about the same time the House Judiciary Committee passed H.R. 2131. (The House bill has not moved to the floor for action.) An examination of the proposed mandated minimum wage rates for skilled personnel in H-1B status in different cities under the House and Senate bill finds:

- Under S. 744 and H.R. 2131, an employer would need to pay an entry level (Level 1) financial analyst in New York in H-1B status an annual wage premium of \$38,900 over the private survey market wage, a 72 percent mandated salary increase.³
- The mandated minimum wage for a software developer (systems software) in the San Jose, California area would be \$128,294 per year for a Level 2 professional (some experience) under S. 744 and H.R. 2131 – both \$19,156 above current Department of Labor (DOL) Level 2 wages – or an 18 percent wage premium.
- In the Chicago area, under S. 744 and H.R. 2131, the new required Level 2 wage for a software developer (applications) would be 29 percent above the private survey market wage measured by Towers Watson Data Services (an increase of \$21,313).
- In the Roanoke, Virginia area, the annual wage premiums compared to current law for H-1B visa holders under the new Level 2 wages under S. 744 and H.R. 2131 would be \$12,210 (+22 percent) for electrical engineers, \$12,106 (+19 percent) for software developers (applications), and \$20,800 (+23 percent) for software developers (systems software) in Roanoke based on DOL data.

Both H.R. 2131 and S. 744 include increases in H-1B visas and employment-based green cards. However, the proposed new minimum wage requirements for H-1B visa holders in the House and Senate immigration bills would introduce significant distortions in company compensation policies and in the U.S. labor market. The fundamental problem is that both the House and Senate bills assume it is valid to compel employers to pay skilled foreign nationals mandated wages that are generally unconnected from the actual wage levels employers pay to similarly situated Americans.

³ All the annual wage rates are as of June 2013. At the time of publication of this report, wage data that could compare occupations and geographic location for both the DOL OES data and private surveys for 2014 were not available. However, it is unlikely the 2014 data would paint a different picture than the 2013.

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When companies are forced to pay artificially high wages they will either pay those wages and be left with fewer available resources to invest in the United States, or they will be encouraged to invest more resources overseas and perform more work outside of the United States. Neither would benefit the U.S. economy or U.S. workers overall.

Many companies would be faced with difficult choices: Do without skilled foreign nationals, hire them only outside the United States, pay U.S.-born employees well above the market wage, or pay U.S.-born employees much less than the mandated minimum wage they must pay to foreign nationals. All of this to attempt to solve a problem that reliable research shows does not exist, while giving the U.S. Department of Labor significant authority to establish wage rates in the technology industry and other sectors. In sum, the current proposals would cause the United States to be a less attractive place for growth and investment, make U.S. companies less competitive and produce other unintended consequences.

The most logical way to fix this problem in both bills is to allow employers to use private nongovernmental salary surveys and allow the use of at least four levels based on OES data, rather than exacerbating the current inaccuracies in the government wage system by reducing it to three levels. It would be better for the market to determine wages for both U.S. and foreign-born professionals, rather than a (quirky) statistical formula created by the federal government.

BACKGROUND

Under current law, when hiring an H-1B professional, employers must pay the higher of the prevailing wage or the actual wage paid to “all other individuals with similar experience and qualifications for the specific employment in question.”⁴ Companies must also comply with other rules, including the placement of H-1B employees at off-site facilities. H-1B temporary visas are often the only practical way for a skilled foreign national to work in the United States.⁵ These visas are used to hire professionals for short-term projects, for longer-term work or as a prelude to permanent residence (a green card). H-1B status is generally good for up to 6 years (with a renewal after three years).

Under current law and regulations, employers can demonstrate they are meeting the minimum wage requirements for H-1B professionals by utilizing either private wage surveys or the U.S. Department of Labor’s Occupational Employment Statistics (OES) program as mandated by Congress. In general, employers typically use private wage surveys to determine compensation. These surveys are not created solely for immigration purposes and must be approved as valid surveys by the Department of Labor if used for immigration purposes. (Companies also pay thousands of dollars in government and legal fees to petition for H-1B professionals.)

Even before Congress sought to change current wage requirements for H-1B visa holders, employers did not believe that DOL’s wage levels based on OES data accurately reflected market conditions. “For many occupations and areas of the country, independent authoritative nongovernmental wage surveys provide a better and more accurate picture of the market wage – and reflect what employers pay to employees with varying levels of education and experience – compared to using the government’s Occupational Employment Statistics (OES) wage data to calculate prevailing wages,” according to Kevin Miner, partner, Fragomen, Del Rey, Bernsen & Loewy. “While the current OES data is used to provide four levels of wages for each occupation, it creates those levels through a mathematical formula, not by asking employers what they actually pay employees with varying levels of experience.”⁶ (See Appendix.)

As noted in the executive summary, House and Senate bills would require H-1B visa holders be paid wages based on a government formula and data collection that does not involve surveying employers on the wages paid to employees based on education, experience or other factors. Instead, the U.S. Department of Labor utilizes data collected from the Occupational Employment Statistics (OES) program to create four levels of wages based

⁴ Section 212(n)(1) of the Immigration and Nationality Act.

⁵ While other visa categories exist, they carry significant restrictions that limit their applicability to most skilled foreign nationals, such as an L-1 visa, which requires working abroad for a company for at least a year and then qualifying as a manager, executive or an employee with “specialized knowledge” under USCIS regulations to reenter the United States.

⁶ See Appendix for Kevin Miner, “Understanding Independent Nongovernmental Wage Surveys.”

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on a formula devised by Congress.⁷ The four levels under current law do not reflect the wages of individual employees based on their education and experience and reducing the formula down to three levels, as proposed in the House and Senate, would make the system even less reflective of the labor market.

The requirement in current law that employers pay skilled foreign nationals the same market wage as U.S. workers in similar positions is intended to prevent the undercutting of wages, although an H-1B visa holder who is underpaid relative to his or her skills could change jobs. H-1B professionals switching to another employer for a new opportunity happens frequently in the competitive U.S. labor market for skilled talent, note attorneys.⁸

Table 1
Median Reported Salaries of H-1B and U.S. Workers: Systems Analysis, Programming, and Other Computer-Related Occupations

Age Group	H-1B	U.S. Workers
20-29	\$60,000	\$58,000
30-39	\$70,000	\$70,000

Source: *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011, Table 1. Salaries are 2008.

Whether due to market wages, the legal requirement or a combination of the two, the evidence from at least four studies shows H-1B professionals are paid the same or more than their U.S. counterparts with similar experience. According to the Government Accountability Office, the median annual salary for H-1B visa holders age 20-39 was \$80,000, but is \$75,000 for U.S. workers in Electrical/Electronics Engineering; and for Systems Analysis/Programming, the median annual salary is \$60,000 for H-1B professionals age 20-29, but is \$58,000 for U.S. workers.⁹ Other studies, including by University of Maryland economists Sunil Mithas and Henry C. Lucas, Jr., find H-1B professionals in information technology (IT) earned somewhat higher wages than their native counterparts with similar experience and do not harm the prospects of U.S.-born workers.¹⁰ In short, the evidence indicates there is not a measureable problem with H-1B visa holders generally being paid less than U.S. professionals with similar experience in similar positions.

⁷ Section 212(p) of the INA.

⁸ Interview with Warren Leiden. "H-1B workers switch employers all the time," according to Warren Leiden, partner, Berry Appleman and Leiden. "They are eligible to switch as soon as the filing receipt is received from USCIS."

⁹ *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011.

¹⁰ S. Mithas and H.C. Lucas, "Are Foreign IT workers Cheaper? U.S. Visa Policies and Compensation of Information Technology Professionals," *Management Science* (56:5) 2010. See also Madeline Zavodny, "The H-1B Program and Its Effects on Information Technology Workers," Federal Reserve Bank of Atlanta, *Economic Review*, Third Quarter 2003; Magnus Lofstrom and Joseph Hayes, "H-1Bs: How Do They Stack Up to U.S. Workers?" IZA Discussion Paper #6259, December 2011; and Giovanni Peri, Kevin Shih and Chad Sparber, "STEM workers, H-1B Visas and Productivity in U.S. Cities," January 29, 2013.

BILLS WOULD REQUIRE PAYING HIGHER THAN MARKET WAGES

The Senate has passed and the House has voted out of Committee immigration legislation that would significantly increase the required minimum wage paid to H-1B visa holders. This would be done by, in practice, eliminating the use of private wage surveys and mandating the Department of Labor's Foreign Labor Certification unit to change its current formulation of OES wage data from the current four levels down to three levels, effectively raising the required minimum wage to be paid to H-1B visa holders. Note that the federal government's Occupational Employment Statistics already falls short of accuracy for this purpose since it does not collect salary data on individuals based on their experience and qualifications.

Section 4211 of the Senate immigration bill (S. 744) states:

The Secretary of Labor shall make available to employers a governmental survey to determine the prevailing wage for each occupational classification by metropolitan statistical area in the United States. Such survey, or other survey approved by the Secretary of Labor, shall provide 3 levels of wages commensurate with experience, education, and level of supervision. Such wage levels shall be determined as follows:

"(i) The first level shall be the mean of the lowest two-thirds of wages surveyed, but in no case less than 80 percent of the mean of the wages surveyed.

"(ii) The second level shall be the mean of wages surveyed.

"(iii) The third level shall be the mean of the highest two-thirds of wages surveyed."¹¹

The House SKILLS Visa Act (H.R. 2131) contains virtually identical language to S. 744 on wage requirements with some differences. First, the Senate bill would require companies with a larger percentage of their workforce on H-1B visas to use the new Level 2 wages even if the individual qualifies for Level 1 based on their work experience. Second, the House language also would impose the new wage requirements on other categories, including Optional Practical Training and TN visas under the North American Free Trade Agreement.

Another difference is that the House made an effort to retain the use of private (nongovernmental) surveys but did so in a way unlikely to help employers. "The amendment that allows the use of nongovernmental independent wage surveys essentially incorporates existing regulatory language on private wage surveys into the statute," explains Kevin Miner. "In making this amendment, however, the House Judiciary Committee did not change the underlying language of the SKILLS Visa Act, which continues to state that only a survey matching the criteria and methodology of how FLC uses the OES wage program (i.e., the new three level system, Level 1 not being less than 80% of the mean, etc.) may be approved by the Secretary of Labor. This conflicting language might be read to substantially restrict what private wage surveys can be accepted, effectively eliminating this option because there are no independent wage surveys that follow the government's nonscientific method of translating raw wage data into three wage levels."¹²

¹¹ Section 4211 of S. 744 as amended by the Senate Judiciary Committee.

¹² Kevin Miner, "Understanding Independent Nongovernmental Wage Surveys."

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Another amendment during the House Judiciary Committee markup of H.R. 2131 would, in theory, allow employers to pay foreign workers to be paid the same as U.S. workers performing similar duties and with similar qualifications. But as Kevin Miner points out there are limitations to this measure:

First, the SKILLS Act as amended would still set a floor for this wage, such that regardless of what the company pays its U.S. workers, a foreign worker could not be paid a wage that is less than the average of the bottom 50% of wages in that occupation paid by other employers. This would create a “wage floor” that would be somewhat above the current entry-level wage under the existing 4 level FLC program using OES wage data. Second, an employer could only rely on this provision if 80% of its employees in that occupation are U.S. workers. For smaller employers in particular, this could eliminate this option. For instance, if a small software development company employs 100 workers, and if 10 of those workers are Software Engineers, this option would become unavailable as a means of setting the prevailing wage if just 3 of those employees are on H-1Bs, since this would exceed the 20% threshold in that occupation. Third, this method of arriving at the prevailing wage assumes that the company already has equally qualified U.S. workers performing substantially the same job duties. For an H-1B worker hired to perform a more unique role, however, there may not be comparable U.S. workers at the company, eliminating this option for that employer.¹³

In general, it is unclear how many employers would meet the criteria of 80 percent of workers being “U.S. workers” in a particular occupation for a simple reason: the labor market includes a high percentage of well-qualified foreign nationals in the occupations for which H-1B visas are often sought. Fewer than 30 percent of the fulltime graduate students in electrical engineering at U.S. universities (and fewer than 40 percent in computer science) are U.S. citizens or lawful permanent residents.¹⁴ And that does not include all the potential qualified professionals who received their degrees outside the United States.

WHAT WOULD BE THE PRACTICAL IMPACT OF HOUSE AND SENATE BILLS?

To comply with the law, U.S. employers would have to pay H-1B visa holders no less than the required salary indicated under the House and Senate legislation. To better understand the impact, one can examine how much the new requirements would artificially increase salaries for skilled foreign nationals over both current law and current market wages. To some extent, several of the examples provided in different occupations and areas of the country could underestimate the likely increase in required salaries, since, as noted earlier, the Department of Labor’s methodology already appears to inflate salaries even prior to the changes contemplated by Congress.

To review what the House and Senate legislation would do: “The proposed three-level OES program in the House and Senate bills will continue to ignore what employers actually pay to employees based on the job requirements,” notes immigration attorney Kevin Miner. “The levels of the new three-level OES wage program

¹³ Ibid.

¹⁴ National Science Foundation; Stuart Anderson, *The Importance of International Students to America*, NFAP Policy Brief, National Foundation for American Policy, July 2013.

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proposed in S.744 and the SKILLS Visa Act are intended to reflect entry-level wages, mid-level wages, and wages for fully competent workers. To do this, however, the government will continue to simply collect data on occupations generally, without asking employers what they pay workers with varying levels of education and experience. The government will then artificially set the prevailing wage for entry-level workers at no less than 80% of the average wage for the occupation; the prevailing wage for mid-level workers at the average; and the wage for fully competent workers at the average of the highest two-thirds of wages reported. None of this truly reflects what the market dictates for workers at varying levels of responsibility – it is instead simply a government-imposed formula for setting wages.”¹⁵

On the pages that follow, NFAP used available data, including private surveys, on level 1 and level 2 positions to illustrate the potential impact of the bills. In not all cases for positions around the country would a nongovernmental wage survey be available or be the required wage or would the levels indicated (level 1 and level 2) match up precisely with the government levels, but the examples allow for policymakers and others interested in immigration policy to evaluate the likely impact of House and Senate legislation.

Under S. 744 and H.R. 2131, an employer would need to pay an (entry level) level 1 financial analyst in New York at least \$93,000 compared to the current \$54,100 private survey market wage listed by Towers Watson Data Services for an entry level financial analyst in New York. That would represent a government-mandated increase of \$38,900, a 72 percent salary increase.¹⁶ (See Table 2.) That is also an increase of over \$29,000 from current DOL Level 1 wages of \$63,898 – a 45 percent increase based on the Department of Labor’s OES data.¹⁷ (As noted above, it would be \$38,900 higher when compared to the current market wage.)

Table 2
Required Minimum Wage for New Financial Analyst on H-1B in New York Under S. 744 and H.R. 2131
Compared to Current Private Survey Market Wage

New Required Wage for Financial Analyst in NYC at Level 1 Wage under S. 744 and H.R. 2131	Amount of Increase Over Private Survey Market Wage
\$93,000	+\$38,900 (+72%)

Source: Towers Watson Data Services; Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

¹⁵ See Appendix for Kevin Miner, “Understanding Independent Nongovernmental Wage Surveys.”

¹⁶ Towers Watson Data Services; Foreign Labor Certification Data Center Online Wage Library.

¹⁷ Ibid.

IMPACT ON WAGES IN THE TECHNOLOGY FIELD

Similar wage distortions to those in finance will arise in the technology field if the wage requirements in the House or Senate bills were to become law. On the following pages is an examination of the increases in the minimum wage for H-1B visa holders mandated by legislation in four parts of the country – Silicon Valley, Chicago, Houston and Roanoke. Three occupational categories were analyzed – electrical engineers, software developers (applications) and software developers (systems software). Where readily available, private wage surveys were utilized, since companies today have the option of using such surveys. Employers consider private wage surveys more accurate and a reflection of the market wage for the jobs in their area and the education and experience needed to fill those jobs. “In an internal Fragomen survey of an individual client out of 350 cases we found that approximately 91 percent of the time OES wages were higher than private wages survey.”¹⁸ Employers use these private wage surveys to set compensation for all workers – not just H-1B visa holders – so the companies that prepare and sell the surveys have an incentive to ensure their data is accurate and reflects the market.

In examining the tables it is worth contemplating what human resources departments will do if faced with these wage rules: Do they simply pay any new foreign national far more than a comparable U.S.-born professional already working at the company (or newly hired as well), or do the wage premiums make temporary visas unworkable in certain circumstances for companies? What are the implications of maintaining two wage scales – one of which would be the mandated federal minimum wage for skilled foreign nationals on temporary visas that generally would be far above the market wage for any person based on the role they are filling? The other wage scale would be the market wage for U.S. citizens and permanent residents based on compensation in the real labor market (as opposed to the artificial construct created by legislation) for experience tied to the position held. What would be the impact on morale of maintaining two sets of wages? Are there legal implications for a company that maintains separate wage rates based on citizen/resident/immigrant status?

SILICON VALLEY

Under S. 744 and H.R. 2131, in the San Jose area, an electrical engineer at Level 1 would have a mandated minimum wage of \$89,474 per year, or an increase of \$17,928 (an increase of 25 percent) over current market wages based on a Radford survey.¹⁹ The mandated minimum wage for a software developer (systems software) would be \$128,294 per year for a Level 2 (some experience) under S. 744 and H.R. 2131 – both increases of \$19,156 over current Level 2 DOL wages – an 18 percent wage premium.²⁰ Based on the market wage Level 1, a software developer (systems software) would have to be paid a wage premium over the private survey wage of

¹⁸ Kevin Miner (see Appendix).

¹⁹ Radford.

²⁰ Foreign Labor Certification Data Center Online Wage Library.

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\$22,609, or 22 percent, under S. 744 and H.R. 2131, based on a Radford survey.²¹ Note that under Department of Labor rules only base salaries, not variable bonuses, may be considered in calculating salaries for immigration purposes.

Table 3
New Minimum Wages for H-1B Electrical Engineers & Software Developers in Silicon Valley Under S. 744 and H.R. 2131 Compared to Current Private Survey Market Wage

San Jose/Silicon Valley	New Required Wage for Level 1 Wage under S. 744	Amount of Increase Over Current Level 1 Private Survey Market Wage (Radford)
Electrical Engineers	\$89,474	+\$17,928 (+25%)
Software Developers, Applications	\$93,717	+\$11,114 (+13.5%)
Software Developers, Systems Software	\$102,635	+\$22,609 (+28%)

Source: Radford; Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

Table 4
New Minimum Wages for H-1B Electrical Engineers & Software Developers in Silicon Valley Under S. 744 and H.R. 2131 Compared to Current Department of Labor OES Wage Data

San Jose-Sunnyvale-Santa Clara, CA MSA	New Required Wage for Level 1 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 1 Wage	New Required Wage for Level 2 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 2 Wage
Electrical Engineers	\$89,474	+\$15,176 (+21%)	\$111,842	+\$18,783 (+20%)
Software Developers, Applications	\$93,717	+\$8,915 (+10.5%)	\$117,146	+\$16,162 (+16%)
Software Developers, Systems Software	\$102,635	+\$12,675 (+14%)	\$128,294	+\$19,156 (18%)

Source: Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

²¹ Radford.

CHICAGO

In the Chicago area, under S. 744 and H.R. 2131, the new required Level 1 wages for H-1B visa holders for software developers (applications) would be \$20,710 per year above current private survey market wages, or a 36 percent wage premium above the market wage, as measured by Mercer LLC. The new required Level 2 wage would be 29 percent above the market wage measured by Towers Watson Data Services (an increase of \$21,313).²²

Table 5
New Minimum Wage for H-1B Software Developer in Chicago Under H.R. 2131
Compared to Current Private Survey Market Wage

Chicago-Naperville-Joliet, IL Metropolitan Division	New Required Wage for Level 1 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current Level 1 Private Survey Wage Market Wage (Mercer LLC)	New Required Wage for Level 2 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current Level 2 Private Survey Market Wage (Towers Watson Data Services)
Software Developers, Applications	\$76,810	+\$20,710 (+36%)	\$96,013	+\$21,313 (+29%)

Source: Towers Watson Data Services, Mercer LLC; Foreign Labor Certification Data Center Online Wage Library.

Table 6
New Minimum Wages for H-1B Electrical Engineers and Software Developers in Chicago Under S. 744 and H.R. 2131 Compared to Current Department of Labor OES Wage Data

Chicago-Naperville-Joliet, IL Metropolitan Division	New Required Wage for Level 1 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 1 Wage	New Required Wage for Level 2 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 2 Wage
Electrical Engineers	\$70,970	+\$10,026 (+16.5%)	\$88,712	+\$13,874 (+19%)
Software Developers, Applications	\$76,810	+\$10,895 (+10.5%)	\$96,013	+\$15,039 (+19%)
Software Developers, Systems Software	\$73,715	+\$8,445 (+13%)	\$92,144	+\$13,437 (+17%)

Source: Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

²² Mercer LLC, Towers Watson Data Services. Foreign Labor Certification Data Center Online Wage Library

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S. 744 and H.R. 2131 could require an annual wage premium over current DOL (OES) Level 1 wages of \$10,026 (+16.5 percent) for electrical engineers, \$10,895 (+10.5 percent) for software developers (applications), and \$8,445 (+13 percent) for software developers (systems software).²³ The annual wage premiums above current law for H-1B visa holders under the new Level 2 wages under S. 744 and H.R. 2131 would be \$13,874 (+19 percent) for electrical engineers, \$15,039 (+19 percent) for software developers (applications), and \$13,437 (+17 percent) for software developers (systems software).²⁴

HOUSTON

In the Houston area, the annual wage premiums compared to current law for H-1B visa holders under the new Level 2 wages under S. 744 and H.R. 2131 would be \$14,810 (+19 percent) for electrical engineers, \$16,140 (+21 percent) for software developers (applications), and \$16,536 (+21 percent) for software developers (systems software) above current OES wages. For software developers (applications) a wage premium of \$21,026 (or 29 percent) would exist above the private survey market wage for Level 2, according to Towers Watson, under both bills.²⁵

**Table 7
New Minimum Wages for Level Software Developer in Houston Under H.R. 2131 and S. 744
Compared to Current Private Survey Market Wage**

Houston-Sugar Land-Baytown, TX MSA	New Required Wage for Level 2 Wage under H.R. 2131 and S. 744	Amount of Increase Over Current Level 2 Private Survey Market Wage (Towers Watson Data Services)
Software Developers, Applications	\$92,726	+\$21,026 (+29%)

Source: Towers Watson Data Services; Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

²³ Foreign Labor Certification Data Center Online Wage Library

²⁴ Foreign Labor Certification Data Center Online Wage Library.

²⁵ Towers Watson Data Services; Foreign Labor Certification Data Center Online Wage Library.

Table 8
New Minimum Wages for H-1B Elec. Engineers & Software Developers in Houston in S. 744 and H.R. 2131

Houston-Sugar Land-Baytown, TX MSA	New Required Wage for Level 1 Wage under S. 744	Amount of Increase Over Current OES Level 1 Wage	New Required Wage for Level 2 Wage under S. 744	Amount of Increase Over Current OES Level 2 Wage
Electrical Engineers	\$72,917	+\$11,370 (+18%)	\$91,146	+\$14,810 (+19%)
Software Developers, Applications	\$74,181	+\$13,736 (+23%)	\$92,726	+\$16,140 (+21%)
Software Developers, Systems Software	\$76,228	+\$14,015 (+22.5%)	\$95,285	+\$16,536 (+21%)

Source: Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

ROANOKE

In the Roanoke, Virginia area, under S. 744 and H.R. 2131, the new required Level 1 wage for H-1B visa holders over the current DOL Level 1 would require an annual wage premium of \$10,808 (+25 percent) for electrical engineers, \$9,014 (+17.5 percent) for software developers (applications), and \$19,377 (+28 percent) for software developers (systems software).²⁶ The annual wage premiums compared to current law for H-1B visa holders under the new Level 2 wages under S. 744 and H.R. 2131 would be \$12,210 (+22 percent) for electrical engineers, \$12,106 (+19 percent) for software developers (applications), and \$20,800 (+23 percent) for software developers (systems software).²⁷

Table 9
New Minimum Wages for H-1B Electrical Engineers and Software Developers in Roanoke Under S. 744 and H.R. 2131

Roanoke, VA MSA	New Required Wage for Level 1 under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 1 Wage	New Required Wage for Level 2 Wage under S. 744 and H.R. 2131	Amount of Increase Over Current OES Level 2 Wage
Electrical Engineers	\$54,363	+\$10,808 (+25%)	\$67,954	+\$12,210 (+22%)
Software Developers, Applications	\$60,586	+\$9,044 (+17.5%)	\$75,733	+\$12,106 (+19%)
Software Developers, Systems Software	\$88,891	+\$19,377 (+28%)	\$111,114	+\$20,800 (+23%)

Source: Foreign Labor Certification Data Center Online Wage Library. Salary figures are annual.

²⁶ Foreign Labor Certification Data Center Online Wage Library. No private wage survey for Roanoke was readily available.

²⁷ Foreign Labor Certification Data Center Online Wage Library.

THE CONSEQUENCES OF REQUIRING HIGHER WAGES FOR FOREIGN NATIONALS

As noted in a discussion of another bill, companies could increase U.S. salaries to match the inflated salaries mandated for foreign nationals in the House and Senate bills. However, with only so much compensation within a company to go around, that could result in less hiring overall, which would not be a positive development for U.S. professionals and the overall U.S. economy.²⁸ As George Mason University economist Donald Boudreaux wrote in response to Ralph Nader's call for a 47 percent increase in the minimum wage: "From where comes the money to pay the higher wages . . .? Mr. Nader apparently assumed that it materializes out of thin air, for he doesn't even mention the possibility that firms that are obliged to spend more on wages will spend less on inventory, factory expansion, and other activities."²⁹ Forcing employers to pay artificially higher wages for foreign talent will encourage companies to place more engineers and other skilled foreign nationals abroad, where more investment dollars will flow. That will not benefit U.S.-born professionals in the technology field.

Mandating higher wage rates for skilled foreign nationals on H-1B visas than the market wages paid to U.S. professionals in the same roles (and at the same level of experience) is likely to have numerous consequences, many of them unintended. Such a policy is likely to:

- Discourage the hiring of skilled foreign nationals in the United States. This would conflict with parts of H.R. 2131 and S. 744 to increase the number of H-1B visas and employment-based green cards.
- Harm startup companies needing key personnel but unable to afford the higher wage rates, including the potential impact on the wages of current staff.
- Interfere with company salary structures.
- Complicate and discourage sponsorship for green cards (permanent residence).
- Raise the possibility of legal liability for companies if they pay comparable U.S. professionals less than foreign nationals.
- Lead more employers to move work offshore to avoid the wage rules and the negative impact on their companies.
- Result in higher overall compensation costs, leading to less money available for company investment in the United States.

"These proposals require that H-1B workers be paid more than market wages and more than U.S. workers," said Daryl Buffenstein, author of *Business Immigration: Law & Practice* (AILA, 2011). "Since it would be a bad practice to differentiate, employers will have to either not hire foreign nationals, or make similar upward adjustments for

²⁸ Stuart Anderson, "Requiring Foreigners to be Paid More Than Americans," *Forbes*, March 27, 2013.

²⁹ Donald Boudreaux, Letter to the Editor, *Wall Street Journal*, April 16, 2013 (unpublished).

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U.S. workers, too. The proposals thus effectively give the Department of Labor a mandate to set wages for the private sector – with an artificial system that guarantees that current market wages will be considered too low.”³⁰

While Congress has the authority to legislate on immigration, it would be unwise to use that authority to upend and distort the compensation policies of America’s most innovative companies. In sum, the current proposals will cause the United States to be a less attractive place for growth and investment, make U.S. companies less competitive and result in other unintended consequences. The way to fix this problem is to allow employers to use private nongovernmental salary surveys and allow the use of at least four levels based on OES data, rather than reducing it to three levels. This will help ensure the market, rather than a statistical formula, determines wages for both U.S. and foreign-born professionals.

³⁰ Interview with Daryl Buffenstein.

APPENDIX

UNDERSTANDING INDEPENDENT NONGOVERNMENTAL WAGE SURVEYS

By Kevin Miner, Partner, Fragomen, Del Rey, Bernsen & Loewy

For many occupations and areas of the country, independent authoritative nongovernmental wage surveys provide a more accurate picture of the market wage than the Department of Labor's Occupational Employment Statistics (OES) wage program. The most important difference between nongovernmental wage surveys and the OES wage program is that most nongovernmental wage surveys ask employers to report what they pay workers at various education and experience levels, while the OES wage survey is based on data gathered about salaries in general, without reference to experience or education levels. While the current OES Wage program provides four levels of wages for each occupation, it creates those levels through a mathematical formula, not by asking employers what they actually pay employees with varying levels of experience. A Department of Labor Interim Final Rule states, "... the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported..."³¹

The proposed three-level OES program in the House and Senate bills will continue to ignore what employers actually pay to employees based on the job requirements. The levels of the new three-level OES wage program proposed in S.744 and the SKILLS Visa Act are intended to reflect entry-level wages, mid-level wages, and wages for fully competent workers. To do this, however, the government will continue to simply collect data on occupations generally, without asking employers what they pay workers with varying levels of education and experience. The government will then artificially set the prevailing wage for entry-level workers at no less than 80% of the average wage for the occupation; the prevailing wage for mid-level workers at the average; and the wage for fully competent workers at the average of the highest two-thirds of wages reported. None of this truly reflects what the market dictates for workers at varying levels of responsibility – it is instead simply a government-imposed formula for setting wages.

Independent, nongovernmental wage surveys do not use a formula and instead use actual data about what employers pay their employees at various job levels. Towers Watson, for example, surveys employers and asks survey respondents to report salaries based upon six career levels – Entry-Level, Intermediate, Career,

³¹ <http://www.gpo.gov/fdsys/pkg/FR-2013-04-24/html/2013-09723.htm>; see also OES Wage Methodology Technical Explanation http://www.bls.gov/oes/current/oes_tec.htm. ("For each occupation, respondents are asked to report the number of employees paid within specific wage intervals.")

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Specialist, Master, and Renowned Expert.³² As a result, wage data gathered by private surveys such as Towers Watson reflect actual wages paid at varying levels of experience – not a government-formula based on the average wage for the occupation overall. Consequently, for many occupations and many areas of the country, authoritative nongovernmental wage surveys provide a better picture of actual market wages for employees with varying levels of education, experience, and responsibility. In an internal Fragomen survey of an individual client out of 350 cases we found that approximately 91 percent of the time OES wages were higher than private wages survey.

By relying on a mathematical formula, rather than actual survey data, OES data can inadvertently skew wages to well above market rates for some occupations depending upon the data collected. This is an especially significant problem for occupations where more experienced workers earn significantly more than entry-level workers, because the very high wages will tend to bring the average higher overall – even if entry-level workers, in fact, earn less money at the earlier stages of their careers.

Perhaps in recognition of this concern regarding the OES program, the House Judiciary Committee amended the SKILLS Visa Act by adding two additional options for employers to establish the prevailing wage. First, the amendment to the SKILLS Act would expressly allow employers to rely upon certain independent nongovernmental surveys that meet particular criteria. Second, the SKILLS Act would allow certain employers to base the prevailing wage on what that employer pays its U.S. workers performing the same job duties. While these would in theory expand an employer's options for establishing the prevailing wage, there are still flaws with both of these options as currently being proposed.

The amendment that allows the use of nongovernmental independent wage surveys essentially incorporates existing regulatory language on private wage surveys into the statute. These set out certain requirements for an independent wage survey to be acceptable, including considerations such as how recently the data was collected, how recently the survey was published, and the methodology used in evaluating the raw survey data. While only surveys meeting these strict criteria would be permitted, several major nongovernmental wage surveys already meet these criteria, including Towers-Watson, Radford, and Mercer. In making this amendment, however, the House Judiciary Committee did not change the underlying language of the SKILLS Visa Act, which continues to state that only a survey matching the criteria of the OES wage program (i.e., three levels, Level 1 not being less than 80% of the mean, etc.) may be approved by the Secretary of Labor. This conflicting language might be read to substantially restrict what private wage surveys can be accepted, effectively eliminating this option because

³² See <https://www.twdataservices.com/public/static/na/pdf/40646.pdf> ("Survey participants match to career levels and results are presented by career level").

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there are no independent wage surveys that follow the government's nonscientific method of translating raw wage data into a three level program.

The other amendment would allow employers to set the prevailing wage by looking at what they actually pay their U.S. workers who are performing essentially the same duties and who have the same qualifications as the foreign worker. In theory, this would ensure that employers are not required to pay their foreign workers more than their American workers – they would simply have to treat all of their employees the same. However, there are certain concerns even with this approach. First, the SKILLS Act as amended would still set a floor for this wage, such that regardless of what the company pays its U.S. workers, a foreign worker could not be paid a wage that is less than the average of the bottom 50% of wages in that occupation paid by other employers. This would create a “wage floor” that would be somewhat above the current entry-level wage under the existing 4 level OES wage program. Second, an employer could only rely on this provision if 80% of its employees in that occupation are U.S. workers. For smaller employers in particular, this could eliminate this option. For instance, if a small software development company employs 100 workers, and if 10 of those workers are Software Engineers, this option would become unavailable as a means of setting the prevailing wage if just 3 of those employees are on H-1Bs, since this would exceed the 20% threshold in that occupation. Third, this method of arriving at the prevailing wage assumes that the company already has equally qualified U.S. workers performing substantially the same job duties. For an H-1B worker hired to perform a more unique role, however, there may not be comparable U.S. workers at the company, eliminating this option for that employer.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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