National Foundation for American Policy

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New Research: System for Determining Prevailing Wage for High-Skilled Immigrants is "Deeply Flawed"

Report Urges Congress to Make Reforms by Utilizing Selected Private Sector Wage Data to Increase Accuracy and to Avoid Proposed Solutions Compelling Employers to Pay Foreign Nationals More Than Their American Counterparts

Arlington, Va. – The system for determining the prevailing wage for H-1B and employment-based green card requests is deeply flawed, based on data not meant for this purpose and using a formula devised by Congress, according to a new report from the National Foundation for American Policy(NFAP), an Arlington, Va.-based policy research group.

"The system provides wage determinations lacking a direct data connection to the education, experience, and level of supervision required to perform the job underlying the H-1B or green card request, despite the fact that Congress intended that prevailing wages be commensurate with such characteristics," writes Amy M. Nice, a Research Fellow at the National Foundation for American Policy and an independent Immigration Policy Advisor. "While compensation surveys conducted in the private sector that are used by many companies to set corporate salaries reflect the education and experience required to perform a job, government prevailing wage data, quite remarkably, do not."

The report, "Fixing Prevailing Wage Calculations for High-Skilled Immigrants," is available at www.nfap.com.

Rather than correcting the flaws in the current system, Nice notes, some members of Congress have proposed making the process even less accurate by, in effect, inflating the salaries required to be paid to high-skilled foreign nationals. "Such actions would either price worthy professionals out of the labor market, particularly international students, or create inequities in the workplace by compelling U.S. employers to pay higher salaries to foreign nationals than to comparable U.S. workers in the same company or organization," the report concludes.

Nice was an Attorney Advisor in the Office of the General Counsel at DHS headquarters from September 2015 to December 2016, working on employment-based immigration regulations. She practiced immigration law for more than 20 years, including at the Washington, D.C. firm of Dickstein Shapiro LLP.

The report notes regulation allows many employers to use private wage surveys in place of the typically unrepresentative prevailing wage determinations from the U.S. Department of Labor. However, private wage surveys are not available for all occupations and geographic locations, and their use is governed by regulation and discretionary agency action, rather than statute, providing less legal protection to U.S. employers when filing immigration applications, even though private sector wage surveys generally provide the best available information on wages.

The issue of prevailing wage determinations is important, since all high-skilled immigration status requests rely on such determinations, involving well over 100,000 applications a year. The Trump administration has proposed using prevailing wage levels as a way to prioritize which foreign nationals receive consideration of H-1B petitions filed on their behalf when the annual cap is reached (in place of the current system that uses a lottery). Legislation in Congress would adopt a similar approach. The problem with such an approach is it results in Congress requiring employers to pay foreign nationals more favorable wages than their similarly situated U.S. worker counterparts, mandating wages for foreign nationals dramatically above market rates, or inserting the federal government in the hiring processes of private sector employers that are engaging in the normal recruiting and selection of professionals in the U.S. labor market to fill jobs to be performed in the United States.

In particular, the report notes this approach could lead international students, who like their American counterparts are new to the labor force and, therefore, less likely to demand a high salary, to be blocked from receiving H-1B status. Moreover, this approach could favor employers located in high-paying geographic locations, while, for example, employers at manufacturing companies in the Midwest would be disadvantaged when applying for new workers.

The fundamental problem with our current system for determining the prevailing wage is the process requires statistical precision that simply is not available. At present, there is no government survey that collects data within occupations with detailed wage levels, much less a survey that seeks to assemble data to calculate wage levels based on experience, education or level of supervision. The prevailing wage determinations are based on data collected by the Department of Labor's Bureau of Labor Statistics (BLS) in (1) the Occupational Employment Statistics (OES) survey and (2) the National Compensation Survey (NCS). These data generate two average wage figures, neither of which is based on the collection of data connecting compensation to education, experience or supervision levels. Then, the Office of Foreign Labor Certification (FLC) uses a complicated formula devised by Congress in 2004 to create four wage levels. The issue is not the Occupational Employment Statistics survey and the National Compensation Survey, which have important purposes, but the application of data collected by these surveys in our immigration system.

There are three key problems with current prevailing wage determinations. First, the underlying data is based solely on very broad pay band information. Second, there are intrinsic weaknesses in issuing prevailing wage determinations for specific positions offered by an individual employer based on generalized occupational employment statistics. Third, education-, experience-, or supervision-based wage differentials are addressed poorly in the current system.

The report concludes that the solution to achieving increased accuracy of the wage rates calculated by Office of Foreign Labor Certification for immigration purposes based on the OES survey is to combine the far-reaching data collection of the OES survey with certain data from private, independently published compensation surveys. While such authoritative independent surveys are not available for all occupations in all localities, they are available for many high-skilled occupations for which H-1B petitions and PERM Labor Certification are filed. Congress could require the Bureau of Labor Statistics to utilize certain fields of data available from such surveys, and authorize the funds for BLS to purchase access to such data from the private sector organizations that conduct such surveys. BLS economists and statisticians could then layer this additional information over the OES data instead of using NCS data for this wage average calculation process. This should provide all parties involved with more accurate prevailing wage determinations that rely on real world conditions, rather than contrived formulas mandated by Congress.

About the National Foundation for American Policy

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, former U.S. Senator and Energy Secretary Spencer Abraham and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: **@NFAPResearch**

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