

FIXING PREVAILING WAGE CALCULATIONS FOR HIGH-SKILLED IMMIGRANTS

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EXECUTIVE SUMMARY

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. 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. 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. However, rather than correcting the flaws in the current system, 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.

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, 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,

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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 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.

BACKGROUND

When U.S. employers want to hire foreign-born professionals, one required element of the process is determining what wage the worker will earn, and how that wage compares to similarly-employed U.S. workers. This is to ensure that employers do not take advantage of foreign workers or undercut U.S. workers.

There are two principal ways U.S. employers request authorization to employ a foreign-born professional to fill a job in the United States: 1) the H-1B Petition for Nonimmigrant Worker and 2) the Application for Permanent Employment Certification (PERM Labor Certification Process, or PERM).¹ The H-1B classification allows a foreign professional to work in the U.S. for a period of time in no more than three year increments, but not indefinitely without an employer sponsoring the individual for lawful permanent resident status. For example, employers recruiting on U.S. college campuses and hiring either newly minted undergraduate degree-holders or new graduates from the nation's graduate schools may hire those foreign-born students filing an H-1B petition. As a prerequisite to filing an H-1B petition, the sponsoring employer must attest that it will pay the foreign worker the higher of: 1) at least as high as the prevailing wage in that occupation or 2) the employer's actual, internal wages paid to similarly situated workers already employed by the employer.²

When a U.S. employer seeks to employ a foreign-born professional indefinitely, the employer must file a PERM to start the process to seek lawful permanent resident (LPR, or "green card") status for the foreign professional. As part of the PERM process, an employer must confirm that filling a job with a foreign national will not negatively impact the wages of similarly employed U.S. workers in the geographic area of employment. This is done by offering wages that are equal to or greater than the prevailing wage for the offered job.

Thus, determining the relevant prevailing wage is important to both H-1B petitions and PERM requests. The prevailing wage paradigm is sensible as an underlying theory of high-skilled immigration. Knowing that the H-1B petitioning employer or PERM sponsoring employer was offering the same wages to both similarly situated foreign high-skilled workers and U.S. workers would mean that U.S. employers were choosing to hire a foreign professional because of his or her skill set or ability to contribute to the employer's organization. However, as this paper will discuss, there are major problems with the way the federal government calculates prevailing wage for immigration purposes.

¹ When the Department of Labor last revised the Permanent Employment Certification process in regulations published December 27, 2004 (69 Fed. Reg. 77326, effective March 28, 2005), the process was renamed the "PERM" process standing for the Program Electronic Record Management (PERM) system for Labor Certification.

² Section 212(n)(1) of the Immigration and Nationality Act.

THE FUNDAMENTAL PROBLEM WITH PREVAILING WAGE DETERMINATIONS

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. As the Bureau of Labor Statistics itself has explained, “no BLS program publishes occupational wage data by level.”³ Even more troublesome, prevailing wage determinations for immigration applications are based on data not meant at all for this purpose.

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 wage averages. Then, the Office of Foreign Labor Certification (FLC) uses a formula created by Congress in 2004 to create four wage levels.⁴ (See Appendix: Levels 1, 2, 3 and 4, with Level 1 for “beginning level” workers performing routine or moderately complex assignments and Level 4 for “fully competent” workers that use advanced skills.) A look at the statute demonstrates the formula mandated by Congress is contrived: “Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level,” according to the law.⁵

The issue is not the Occupational Employment Statistics survey and the National Compensation Survey but the federal government using the surveys for unintended purposes and a formula that implies precision without providing any precision. Both the OES and NCS are utilized for a number of substantive and noteworthy purposes across the public sector, such as federal pay regional adjustments, measurement of economic indicators for monetary policy, changes to Medicare reimbursement, employment projections, and occupational participation inputs for illness and injury reports, among others.

For example, the OES survey is an important source of occupational information assembled by the Bureau of Labor Statistics. It surveys about 200,000 establishments twice a year, with an approximate 80% response rate, intending to provide a broad-range of occupational employment information across many locales and regions, but does not collect occupational wage level estimates. The NCS is also a useful source of information assembled by BLS, but it, likewise, does not provide wage leveling data. The NCS canvasses about 18,000 establishments annually with

³ “The Relevance of Occupational Wage Leveling” (published BLS in April 2012 <https://www.bls.gov/opub/mlr/cwc/the-relevance-of-occupational-wage-leveling.pdf>), available on the BLS.gov website.

⁴ See *infra*, in the text associated with footnotes 25-32.

⁵ See section 212(p)(4) where the four-level calculation method is codified.

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the intent of providing reliable national indices, specifically on national compensation cost trends and national trends in employer-provided health care and retirement benefits.

KEY ISSUES WITH PREVAILING WAGE

There are three sets of issues surrounding how a current Prevailing Wage Determination is issued in our high-skilled immigration system: 1) the underlying data is based solely on very broad pay band information⁶; 2) there are intrinsic weaknesses in issuing prevailing wage determinations for specific positions offered by an individual employer based on generalized occupational employment statistics; and 3) education-, experience-, or supervision-based wage differentials are addressed poorly.

1) CURRENT SYSTEM RELIES ON PAY BAND DATA AND PAY BANDS NOT SPECIFIC TO HIGH-SKILLED OCCUPATIONS

Ideally, prevailing wage data for the H-1B or PERM program would be narrowly tailored to H-1B and PERM-relevant occupations. However, the OES is a survey of wages of workers in nearly all occupations in every labor market area. The OES survey collects information for over 840 detailed occupations in 380 metropolitan areas and 170 non-metropolitan areas.⁷ Because data for these over 174,000 combinations of detailed occupations and labor market areas is collected using one survey instrument, the survey uses *particularly wide pay bands* as the means to identify wage information.

It is crucial to note: Employers that respond to the OES survey do not provide data about individual employees. No employer is asked how it pays a particular employee. Instead, participating employers provide grouped data responses, categorizing employees into 12 broad pay bands.⁸ Each establishment indicates how many employees in a detailed occupation are included in each of 12 wage bands, ranging from under \$9.25 per hour to over \$100 per hour. For example, if an establishment in Silicon Valley employs both entry-level software developers and administrative assistants, all of the entry-level software developers might be in Range H to I while none of the administrative assistants will likely be in these same ranges.⁹ In the OES survey, the employer would report the

⁶ “Pay bands” is terminology used to lump together broader ranges of pay levels or pay grades. See, Jessica Miller-Merrell, “Pay Bands, Pay Scales, and Other HR Jargon You Don’t Know But Should,” PayScale, November 12, 2012.

⁷ See supra footnote 3 for a summary of the classification system used by BLS for grouping jobs as part of detailed occupations, broad occupations, minor groups of occupations, and major groups of occupations.

⁸ The 12 pay bands are: Range A, under \$9.25 per hour (under \$19,240 annual salary); Range B, \$9.25 to \$11.74 (\$19,240 to \$24,439); Range C, \$11.75 to \$14.74 (\$24,440 to \$30,679); Range D, \$14.75 to \$18.74 (\$30,680 to \$38,999); Range E, \$18.75 to \$23.99 (\$39,000 to \$49,919); Range F, \$24.00 to \$30.24 (\$49,920 to \$62,919); Range G, \$30.35 to \$38.49 (\$62,820 to \$80,079); Range H, \$38.50 to \$48.99 (\$80,080 to \$101,919); Range I, \$49.00 to \$61.99 (\$101,920 to \$128,959); Range J, \$62.00 to \$78.74 (\$128,960 to \$163,799); Range K, \$78.75 to \$99.99 (\$163,800 to \$207,999); Range L, \$100.00 and over (\$208,000 and over). See BLS Methodology at p. 4, accessible at https://www.bls.gov/oes/current/methods_statement.pdf (the pay bands were last updated in 2013).

⁹ Id. for salaries associated with Ranges A to L.

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number of software developers and administrative assistants utilizing the same 12 wage intervals. But if an accurate picture of software developer compensation or administrative assistant compensation was the goal then differentiated pay bands be used for these very different occupations. A survey of only H-1B or PERM occupations would likely be contained to a narrow scope of wage intervals. The wide wage intervals make the OES survey less precise and less likely to accurately identify the central tendency (average) in wages in any particular occupation and geographic area of employment.

Moreover, using pay bands at all, as opposed to collecting wage information for specific employees dilutes the accuracy of the wage rates calculated for particular geographies. In order to report estimates of average hourly wage rates for each detailed occupation in each geography, OES must supplement its survey with data from the NCS.¹⁰ The OES uses NCS to convert reported information about groups of individuals in pay *ranges* to an average hourly *wage rate* computed to the nearest cent. The NCS, like OES, is a general survey that is not focused on particular occupations or geographic areas. By definition, the NCS will have a limited number of observations of individual hourly wage rates in the occupations key to the H-1B program and PERM sponsorship, and those limited observations are distributed nationally, providing very little insight into wages in a particular geographic area of employment.

2) CURRENT SYSTEM RELIES ON DATA NOT PRECISE ENOUGH FOR IMMIGRATION PURPOSES

OES attempts to present average wage rates across 840 detailed occupations¹¹ in 380 metropolitan and 170 non-metropolitan areas. Not all of the resulting 174,000 average wage rates in the OES are reported with the same accuracy. The exactitude of the estimated average wage depends on the sample size (the number of establishments in the labor market area that employ workers in the occupation and participate in the survey). Despite the goal of the OES survey to be comprehensive, for many combinations of occupations and areas there

¹⁰ According to the OES technical documentation: "The mean hourly wage rate for all workers in any given wage interval cannot be computed using grouped data collected by the OES survey. For the mean wage rate formula, we assume that we can calculate the average wage rate for workers in each interval. This value is calculated externally using data from BLS's National Compensation Survey (NCS). Although smaller than the OES survey in terms of sample size, the NCS program, unlike OES, collects individual wage data for private sector and state and local government employees. With the exception of the highest wage interval, mean wage rates for each panel are calculated using NCS data for the panel's previous reference year, since this is the latest data available." See, technical documentation from the Bureau of Labor Statistics' Occupational Employment Statistics Survey, http://www.bls.gov/oes/oes_doc.htm, and detailed data from the Bureau of Labor Statistics' Occupational Employment Statistics Survey, <http://www.bls.gov/oes/tables.htm>.

¹¹ BLS uses a Standard Occupational Classification (SOC) system that divides all occupations in the U.S. labor market into 23 major group occupations, 97 minor groups of occupations, 460 broad occupations and 840 detailed occupations. A process is underway to reassess these SOC codes for reference year 2018, with the expectation of retaining the 23 major group occupations alongside revisions resulting in 98 minor groups of occupations, 457 broad occupations and 869 detailed occupations with about 246 detailed occupations experiencing some change in code, title or explanation. See 81 Fed. Reg. 48306 (July 22, 2016) at 48309.

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are too few workers in the OES sample to report an average wage. In these instances, DOL relies on either a state-wide or national average wage rate for the prevailing wage determination. To be clear, the OES combines data from NCS to estimate all of the average wage rates provided, even those where a state-wide or national average wage rate is not utilized as the base OES figure.

Change over time. Each reported OES average wage estimate is based on the six most recent “panels” of the survey spanning 2.5 years. For example, wage data from survey panels in May 2016, November 2015, May 2015, November 2015, May 2014, and November 2013 were used to calculate the May 2016 OES average wage rate estimates. Using six “panels” of data means that information from up to 1.2 million establishments (200,000 x 6) is reflected. But this also means that wage data from different survey periods are not equivalent in real-dollar terms due to inflation and changing compensation costs. Consequently, wage data collected prior to the current survey reference period have to be updated or “aged” to approximate the current period. Aging factors are developed from the Employment Cost Index (ECI) and then used to adjust OES wage data in previous panels to the current survey reference period. The ECI survey measures the rate of change in compensation for ten major occupation groups on a quarterly basis. The procedure used by the BLS assumes that there are no differences in wage growth by geography, industry, or detailed occupation within each broad occupational division.

Variation among employers. When reporting average wages by occupation and labor market area, the OES assumes that all types of employers pay the same wage on average for the same occupation. This assumption is clearly false; in many occupations, different types of employers pay higher or lower wages. For example, it is well understood that there are differences in most locales between universities, not-for-profits, government, and for-profit private sector entities, along with differences between entity size and industry, among other factors, within these sectors.

3) CURRENT SYSTEM DOES NOT REFLECT EDUCATION, EXPERIENCE AND SUPERVISION IN DATA

Attempting to integrate consideration of education, experience, and supervision levels into the prevailing wage determination, as required by Congress,¹² is problematic in the current system.

The *data* in government surveys do not take education, experience, or supervision into account. No questions are asked in the OES survey about the education, experience or supervision associated with any individual in each pay band. The OES survey cannot collect information about the skills, training, education, experience, or supervision provided or received for individual employees because it is not feasible given the wide scope and large size of the

¹² See discussion *infra*, in the text associated with footnotes 24 to 29.

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survey (the relevant education, experience and supervision ranges that apply to each of the over 800 occupations in the OES survey vary widely). The OES survey only reports wage interval information, and does not attempt to tie these pay bands to experience or skill levels. The OES reports information about pay ranges and then estimates different percentiles in the pay distribution.

It is only possible to satisfy the statutory mandate that reported wages be “commensurate” with education, experience and supervision through employing inferences. Because wage rates are *related to* experience, economists can make inferences about the wage rates of more experienced and less experienced workers in an occupation based on the pay ranges observed in the OES. Similarly, because wage rates are *related to* skills, economists can make inferences about the wage rates of more skilled and less skilled workers in an occupation based on the pay ranges in the OES. Such inferences by staff at DOL’s Office of Foreign Labor Certification as part of the placement of a particular job description at level 1, 2, 3, or 4 are necessarily less precise than those made by professional economists, such as those at BLS, or those made through a compensation survey conducted by asking employers direct questions about salaries paid to employees based on those workers’ education and experience and assigned job duties. By having the only review of education, experience and supervision by FLC staff it is a stretch to conclude that the reported wage determinations are “commensurate” with education, experience and supervision.

HOW DID WE GET THE CURRENT SYSTEM?

The H-1 visa category was first created in 1952 to allow foreign-born workers of “distinguished merit and ability” in any field to come to the United States to work temporarily in a temporary job, and was utilized as the means for university educated professionals, among others, to be hired by a sponsoring U.S. employer.¹³ Wage requirements were not attached to the H-1 category until 1990.

The idea that immigrants should be offered the same terms of employment as Americans and not have a negative impact on the wages or working conditions of similarly employed U.S. workers was also codified in the Immigration and Nationality Act (INA) in 1952, but only for certain employment-based “green card” holders.¹⁴ Initially, the “labor certification” process for new “green card” holders entailed only an optional authority that the Department of Labor (DOL) could choose to exercise.¹⁵ The statute barred certain foreigners from obtaining Lawful Permanent Resident

¹³ See section 101(a)(15)(H) of the Immigration and Nationality Act (Pub. L. No. 82-414, June 27, 1952). In the 1970 amendments to the INA the “double temporary” requirement was eliminated, such that a qualifying H-1 alien had to be entering the U.S. for a temporary period but could be filling a job that itself was permanent, or indefinite. See Immigration Act of 1970 (Pub. L. No. 91-225, April 7, 1970).

¹⁴ See section 212(a)(14) of the Immigration and Nationality Act (Pub. L. No. 82-414, June 27, 1952).

¹⁵ Id. The 1952 Act provided a “negative” authority the Department of Labor might elect to exercise, by establishing that an alien entering the country as an immigrant seeking to perform skilled or unskilled labor was inadmissible if the Secretary of

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(LPR) status if the DOL found that such entry would have a negative impact. But the DOL was not required to evaluate the question for any individual immigrant or occupation.

In 1965, Congress made amendments to the INA that converted this labor certification process into an affirmative requirement for most employment-based immigrants obtaining LPR status, mandating that such immigrants obtain confirmation that their employment in the U.S. would not have a negative impact.¹⁶ In implementing this new affirmative labor certification requirement, the Department of Labor relied on state Employment Security offices to determine if the wage level offered to the foreign workers was regarded as prevailing in the industry and location, and if American resident workers were available in sufficient numbers.¹⁷

While the affirmative certification approach was a new procedure, the expectation in 1965 was that it would not be difficult for the DOL to fulfill since its Bureau of Employment Security and affiliated State Employment Security Agencies were already responsible for assessing the availability of U.S. workers and their working conditions.¹⁸

In enacting the Immigration Act of 1990 (IMMACT90), Congress revised what was by then re-labeled the H-1B visa category, primarily for foreign professionals working in jobs requiring the knowledge typically obtained through a university degree.¹⁹ Pursuant to IMMACT90, the H-1B classification was amended to include, for the first time, labor market protections. It included a new wage safeguard mechanism and established a numerical cap for the H-1B classification, restricting access to when U.S. employers would be allowed to hire foreign professional workers.²⁰

For the first time, U.S. employers would only be allowed to hire H-1B workers if they first met certain wage requirements. While Congress did not want the federal government micromanaging hiring decisions, it did want to ensure that H-1B workers were not being taken advantage of, and that employers would not undercut U.S. workers.

Labor certified there were sufficient workers or the employment such an alien would negatively impact the wages and working conditions of similarly employed Americans.

¹⁶ The 1965 Act provided that an alien entering the country as an immigrant seeking to perform skilled or unskilled labor was inadmissible unless issued a certification from the Secretary of Labor that there are not sufficient workers and the employment such an alien will not negatively impact the wages and working conditions of similarly employed Americans. See section 10 of the Immigration and Nationality Act of 1965 (Pub. L. No. 89-236, October 3, 1965). The INA continues to contain this identical language, now codified at 212(a)(5)(A).

¹⁷ These state agencies are where unemployment programs are housed, along with other job services, and where prevailing wage determinations were made until December 2009 when the Department of Labor established the National Prevailing Wage Center (NPWC). While termed Employment Security offices in the 1950s, these were later called State Employment Security Agencies (SESAs) and are now called State Workforce Agencies (SWAs).

¹⁸ See S. Rep. 89-748, in reporting out from the Senate Judiciary Committee S. 500, that later became the Immigration and Nationality Act of 1965.

¹⁹ The H-1 category had been split into H-1A for nurses and H-1B for aliens of distinguished merit and ability in 1989 by the Immigration Nursing Relief Act of 1989 (Pub. L. No. 101-238, December 18, 1989).

²⁰ See section 205(a)(H-1B numerical limits) and section 205(c)(H-1B wage requirement) of the Immigration Act of 1990 (IMMACT90)(Pub.L. No. 101-649, November 29, 1990).

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The labor market protection was to ensure that H-1B workers were offered the same wages, and terms and conditions of employment, as similarly situated U.S. workers.

The labor certification requirement for green card holders in the 1965 Act was meant to ensure that employment-based lawful permanent residents were not admitted if their employment would “adversely affect the wages” of similarly employed U.S. workers. IMMACT90 took a slightly different approach for H-1Bs; Congress did not ask DOL to make an adverse effect determination for H-1Bs and instead established that “the bill requires the payment of wages that are not less than those prevailing in the occupation in the recruitment area, or the employer’s actual wage level, whichever is higher.”²¹ Congress had for the first time focused on and codified a “prevailing” wage measure as a condition for allowing an employer to hire a high-skilled foreign national outside of offering indefinite employment.

In order to impose such a requirement, data and information were necessary to confirm what wages were indeed prevailing. The House had great confidence that the Bureau of Labor Statistics (BLS) would be able to provide an indication of the prevailing wages in the geographic area of employment. The House Judiciary Committee explained that:

The bill requires the Bureau of Labor Statistics to make determinations on prevailing wages and this information is to be made readily available to employers and workers . . . BLS has the capability to analyze these labor markets and provide assessments as to prevailing wages in particular occupations and areas . . . The Committee intends and expects the BLS to have prevailing wage information readily available.²²

It was quickly observed that relying solely on BLS to satisfy the new prevailing wage requirements could be problematic, and that BLS did not need to be the sole or primary purveyor of prevailing wage data. As each the Republican and Democratic Senate leaders shepherding through immigration reform explained when Congress made technical changes to IMMACT90 in 1991:

When an employer seeks to hire an H-1B worker, the employer is not required to use any specific methodology to determine that the alien’s wage complies with the wage requirements of the Act and may utilize a State agency determination..., *an authoritative independent source*, or other legitimate sources of

²¹ H.R. Rep. No. 101-723, pt. 1, at 64 (September 19, 1990), in reporting the Family Unity and Employment Opportunity Immigration Act of 1990 out of the House Judiciary Committee, which after amendment by the Senate and the House became the Immigration Act of 1990 (IMMACT90)(Pub.L. No. 101-649, November 29, 1990).

²² Id. At 63.

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wage information. Employers are known to use a variety of legitimate methods for determining appropriate wages, and we do not intend to mandate any specific change to these practices.²³

Indeed, prevailing wage guidance from the DOL following implementation of IMMACT90 made clear that the prevailing wage determination could be based on a survey conducted by a state agency or by any published survey that was specific enough to the occupation and locale, with the idea that published, publicly available surveys were preferred.²⁴ Later, early in fiscal year 1998 the DOL concluded that “the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the BLS Occupational Employment Statistics (OES) program.”²⁵ Thus, relying on BLS data became the primary means to establish prevailing wages.

Thereafter, wage determinations issued for H-1B and Labor Certification programs identified two wage levels based on OES survey results. DOL policy established that the OES Level 1 should be utilized for beginning level employees that performed routine or moderately complex tasks. Level 2 was for fully competent employees that used advanced skills.²⁶

Existing publicly available private surveys used to determine prevailing wages typically identified multiple wage levels reflecting different levels of education, experience, and supervision.²⁷ Thus the debate continued as to how to best quantify the prevailing wage requirement and identify only two wage levels.²⁸

In 2004, the Immigration and Nationality Act was amended to require that the “levels of wages [be] commensurate with experience, education, and the level of supervision.”²⁹ The statute was also amended to provide at least four

²³ 137 Cong. Rec. S 18243 (daily ed. November 26, 1991)(statement of Sen. Alan Simpson, R-WY) and at S 18245 (statement of Sen. Ted Kennedy, D-MA), Senators Simpson and Kennedy each made the identical point regarding prevailing wages when discussing the legislation that became the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA)(Pub L. No. 102-232, December 12, 1991). Emphasis added.

²⁴ See, e.g., General Administration Letter (GAL) 4-95, issued May 18, 1995.

²⁵ See General Administration Letter (GAL) 2-98, issued October 31, 1997. Interestingly, the new instructions to State employment security agencies to rely on OES data barred the use of the OES wage data during a 60-day delayed effective date period unless no other sources for a particular occupation and geographic area were available.

²⁶ See *id.* and Training and Employment Guidance Letter (TEGL) 5-02, issued August 7, 2002.

²⁷ Independent compensation surveys such as those published by Radford and Willis Towers Watson, among others, collect data based on the education, experience, and level of supervision of employees hired by the surveyed employers.

²⁸ Continuing the debate as to how to best make a prevailing wage determination, Congress enacted legislation in 1998, for example, governing prevailing wage determinations for universities and non-profit or Government research organizations (212(p)(1)) and for professional athletes (212(p)(2)), added by section 415 of the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)(Pub. L. No. 105-277, October 21, 1998), and legislation in 2004, for a further example, requiring that employers pay 100% of the wage identified in the prevailing wage determination (212(p)(3))(previous Labor Department policy had permitted a 95% compliance), added by section 423 of the L-1 Visa and H-1B Visa Reform Act (Title IV of the Consolidated Appropriations Act of 2005)(Pub. L. No. 108-447, December 8, 2004).

²⁹ Section 212(p)(4) of the INA. The provisions related to requiring prevailing wage determinations to reflect education, experience, and level of supervision (212(p)(4)) were added by section 423 of the L-1 Visa and H-1B Visa Reform Act (Title IV of the Consolidated Appropriations Act of 2005)(Pub. L. No. 108-447, December 8, 2004).

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levels of wages. Since the OES survey resulted in the availability of two wage levels, Congress adopted a congressionally-devised means to construct four levels.³⁰

The four wage levels are created by taking the difference between the two levels available through OES results, dividing by three, taking that dividend and then adding it to the first (lowest) level to create level two, and taking that same dividend and then subtracting it from the fourth (highest) level to create level three.³¹

Thus, these four levels are artificially manufactured by a formula Congress contrived. The leveling is not suggested by a calculation made by BLS economists and statisticians. These same four levels identified by Congress in 2004 are used today. The information on the four levels is publicly available through the DOL Office of Foreign Labor Certification Online Wage Library.³²

POLICY RECOMMENDATIONS

In order to craft an improved prevailing wage system, Congress should not:

- (1) expect employers to pay foreign workers more favorable wages than their similarly situated U.S. worker counterparts;
- (2) mandate wages that are dramatically above market rates;
- (3) facilitate wage rates paid foreign workers that are less favorable than those paid similarly situated U.S. workers;
- (4) impose requirements on all U.S. employers that reflect unique market forces in a handful of locations such as Silicon Valley; or
- (5) insert 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. To ignore these five concerns would result in direct and negative consequences to both the integrity and usability of our immigration system.

Three types of solutions are in play on Capitol Hill in legislative discussions regarding wages, none of which manages to avoid these five concerns:

One is a compressed three-level, DOL data wage system for H-1B petitions was first introduced in the IDEA Act in 2011³³ and was included in the last comprehensive immigration reform bill, in 2013.³⁴ This approach would likely

³⁰ Id. Prior to March 2005 (90 days after enactment of the L-1 Visa and H-1B Reform Act), prevailing wage determinations issued by the Department of Labor for H-1B and Labor Certification programs identified two wage levels, as discussed supra.

³¹ See section 212(p)(4) where the four-level calculation method is codified.

³² Foreign Labor Certification Data Center Online Wage Library, accessible at www.flcdatcenter.com.

³³ H.R. 216 in the 112th Congress, section 401.

³⁴ S.744 in the 113th Congress, section 4211(a)(2).

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reduce the accuracy of wage determinations for immigration purposes, given that there would only be three levels instead of the current four levels to cover all education and experience cohorts in professional occupations, and all three wage levels would hover around the mean paid for the occupation as a whole. An April 2014 analysis by the National Foundation for American Policy concluded such a change in the law “would require skilled foreign nationals to be paid substantially more – sometimes \$20,000 more per year – than U.S. professionals in similar positions.”³⁵

A second approach is to “prioritize” H-1B issuance by wage levels in those years when the category is oversubscribed beyond the numerical limit set by Congress. For example, the High-Skilled Integrity and Fairness Act introduced this year applies the compressed, three-level wage system and then prioritizes petitions starting with new level 3 and giving H-1B access to those petitions reflecting 200%, then 150% and then 100% of that level, repeating the tri-furcated approach for level 2 and then level 1 wages.³⁶ This approach presumes that jobs that require the most experience are more valuable to our national interest than entry- or mid-level jobs in small businesses or entry-level research and development jobs, among others, without regard to huge variations in salary scale and H-1B demand across various geographies.³⁷ Moreover, this approach ignores the importance of employers engaging in legitimate on-campus recruitment at U.S. universities to hire newly minted graduates, where some selected as the ideal candidate are foreign-born students. Such new hires would generally be entry level professionals earning level 1 wages, and such employers would be at a severe disadvantage in ever selecting a foreign-born student via on-campus recruiting. And, entrusting DHS’s U.S. Citizenship and Immigration Services to conduct a nine-part lottery in years when the H-1B demand exceeds the numerical caps seems operationally complicated and not necessarily easily or reliably achieved.

Lastly, another problematic approach is to require all H-1B employers to pay the median or mean³⁸ wage for the occupation, regardless of the education or experience required for the job. This approach has been proposed in the so-called “Durbin-Grassley” legislation.³⁹ The average wage for the occupation would indicate the arithmetic mean for all professionals in a given occupation, covering both jobs necessitating the use of the most experience and

³⁵ *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.

³⁶ H.R. 670 in the 115th Congress, section 6.

³⁷ If a manufacturer in the Midwest needs entry-level R&D engineers in its Midwest offices in order to compete in the Chinese market and regularly hires both Americans and H-1B professionals to fill these needs, why is this need less valuable than a Wall Street firm that hires a handful of highly experienced and highly compensated analysts as H-1B workers? If a highly-experienced software application developer with a doctorate and research in a specialized subject is needed in a rural area or any city that is not presently considered a leading innovation corridor, why is this need more valuable than an entry-level software application developer who receives significantly higher compensation in Silicon Valley? The H-1B prioritization proposed by H.R. 670 ignores these questions.

³⁸ While current level 3 wage is identified the occupational *mean*, and the median is sometimes higher or lower, a requirement to pay the occupational median roughly equates to requiring all employers hiring an H-1B worker to pay the current level 3 wage (this is the level 2 wage under a compressed, three-level approach).

³⁹ The “H-1B and L-1 Visa Reform Act,” first introduced in 2007 - the bill has been introduced in every Congress since the 110th. S. 180 in the 115th Congress, section 101(a). The Durbin-Grassley legislation results in all H-1B employers having to pay at least the occupational median wage.

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advanced education as well as those requiring only a Bachelor's degree and no employment experience. However, employers do not, and should not, pay the same wage to all new hires in an occupation disconnected from the education and experience required for the position, and do not, and should not, pay at least the occupational average wage to all of its professional staff in an occupation. Moreover, such a mandate would require employers to treat foreign-born workers more favorably than similarly situated Americans, an untenable result.

The focus in all three congressional approaches thus far introduced in proposed legislation is on the average wage paid in an occupation, but this is not a viable solution for improving the prevailing wage system for immigration purposes. To take one example, there are many employers across many geographies that hire young professionals as software application developers (Standard Occupational Classification (SOC) code 15-1132) that would *not* qualify under prioritization or occupational average wage mandate. This is because many employers, if not the vast majority of employers, have starting salaries for young professionals *below* the occupational mean or the occupational median. In other words, there are very few employers, even high tech employers filling highly coveted jobs in innovation corridors, that pay salaries for young professionals starting out as software application developers that meet these average wage levels for the occupation as a whole.

A better approach would be to address the underlying flaws in either the calculation of publicly available wage figures, so that they reflect education, experience, and level of supervision, or to revise the statutory wage leveling formula that both protects U.S. workers and allows employers to hire foreign professionals consistent with market rates.

It makes sense that in a country and economy as large and varied as the United States, BLS data need to be carefully utilized to provide accurate and revealing prevailing wage determinations in our high-skilled immigration system. Given what we know about how prevailing wage levels are calculated in the H-1B and PERM Labor Certification programs, is there a better way to use the data publicly available while also integrating reliable data-based information on the education, experience and supervision factors? The answer will determine if there are reforms to the nation's high-skilled immigration system that can both protect U.S. workers and allow U.S. employers to hire foreign-born professionals when such professionals are selected as the ideal candidates for particular U.S. employment opportunities.

CONCLUSION: A SOLUTION

Determining the prevailing wage is not a straightforward process. In fact, the DOL's instructions to employers on assigning one of the four wage levels run more than 30 pages."⁴⁰

In order to identify the prevailing wage for the PERM process, the employer first files an Application for Prevailing Wage Determination, Form ETA-9141 with the DOL National Prevailing Wage Center (NPWC).⁴¹ In order to identify the prevailing wage for the H-1B process, the employer may file a Form ETA-9141 application and wait for an official determination from NPWC or the employer may select on its own what it believes is the applicable OES wage by looking at the publicly available Online Wage Library and DOL prevailing wage determination instructions.⁴²

In either case, the four wage levels used to issue a Prevailing Wage Determination for the H-1B and PERM Labor Certification programs are synthetically manufactured, based on data from other sources that were not meant to provide wage leveling confirmation.

In order to improve the prevailing wage-system the best option is to directly address the underlying wage information itself. Given the nearly 200,000 employers that provide input to OES, twice yearly, it would be difficult and costly to add sufficient questions to the OES survey that would address the educational and experience components of real-world wages. This type of expansion would represent a major conversion of the OES survey to include compensation wage leveling. However, inserting such extensive questioning would – in addition to being perhaps prohibitively costly – raise a concern that the high (80%) response rate OES has consistently enjoyed might decline, affecting the many purposes for which OES data is utilized.

A good way to achieve increased accuracy of the wage rates calculated by the 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

⁴⁰ Employment and Training Administration, Prevailing Wage Determination Policy Guidance (November 2009) accessible at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (a 36-page instruction document for placing jobs in one of the four wage levels based on the tasks, knowledge, skills, education, training, and experience associated with the job). Even the first step of this process is not always straightforward; the first step is to place the offered H-1B or PERM job into a particular detailed occupational code (one of the 840 detailed occupations identified by BLS's SOC system) by comparing the employer's job requirements to the occupational requirements described in the Department of Labor's Occupational Information Network (O*Net), accessible at <http://online.onetcenter.org>, to determine the minimum requirements generally required for acceptable performance in the job being filled by the sponsoring employer.

⁴¹ https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141.pdf.

⁴² It often takes NPWC close to 2 months to issue a prevailing wage determination, so employers often go to www.flcdatacenter.com on their own and secure the OES data. While it remains theoretically possible to rely on an independent authoritative source for H-1B prevailing wages such surveys have fallen in disfavor in recent years at DOL and create a risk for an employer to utilize since access is not protected by statute (section 212(p) does not mention private surveys).

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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 BLS to utilize certain fields of data available from such surveys, and authorize the funds for the Bureau of Labor Statistics 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.

APPENDIX

CURRENT DEPARTMENT OF LABOR OFFICE OF FOREIGN LABOR CERTIFICATION WAGE LEVELS FOR HIGH-SKILLED IMMIGRATION

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Source: Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs*, U.S. Department of Labor, November 2009 (this is the last update to how DOL's Office of Foreign Labor Certification determines wage levels for high-skilled immigration purposes).

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