

November 5, 2020

Brian D. Pasternak
Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
Box #12-200
200 Constitution Avenue NW
Washington, DC 20210

RE: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States (DOL Docket No. ETA-2020-0006)

Submitted online via www.regulations.gov.

Dear Administrator Brian D. Pasternak:

On behalf of the National Foundation for American Policy (NFAP), a nonpartisan policy research organization, I submit this comment in response to the interim final rule published in the Federal Register on October 8, 2020, titled Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States (DOL Docket No. ETA-2020-0006).

These comments rely primarily on an October 16, 2020 NFAP Policy Brief entitled “An Analysis of the DOL H-1B Wage Rule.” I have included an extended excerpt of the report and also attached the report in full as part of the comment, along with two other NFAP studies.

SUMMARY

On October 8, 2020, the U.S. Department of Labor (DOL) published a rule that changed the way prevailing wage is determined for H-1B visa holders and employment-based immigrants. Examining the data, one can conclude the purpose of the new rule was to price H-1B visa holders and potential green card recipients out of the U.S. labor market by inflating the salaries employers are required to pay.

Before publishing the new rule, DOL determined the prevailing wage by gathering data from the government’s Occupational Employment Statistics (OES) wage survey and using a mathematical formula to create four levels of wages for each occupation. Under the DOL definitions, the four levels are: Level I “entry level,” Level II “qualified,” Level III “experienced,” and Level IV “fully competent.” The underlying data is based on broad pay band information “education-, experience-, or supervision-based wage differentials are addressed poorly in the current system,” according to a National Foundation for American Policy (NFAP) analysis.

Under the law, to gain approval of an H-1B petition, an employer must pay “*at least*- (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific

employment in question, or (II) the *prevailing wage level for the occupational classification in the area of employment.*”

To inflate the required or “prevailing wage,” in the new rule DOL changed the formula by which the Occupational Employment Statistics data were divided into its four levels. In its rule, DOL set the new wage levels as follows: Level 1: 45th percentile (instead of the previous 17th percentile), Level 2: 62nd percentile (instead of 34th percentile), Level 3: 78th percentile (instead of 50th percentile) and Level 4: 95th percentile (instead of 67th percentile).

It appears DOL searched for a rationale to raise the Level 1 wage significantly – close to 50% or the median wage for an occupation and area – and set the Level 1 “entry level” as equal to an individual with a master’s degree (no experience). Placing the “entry level” (45% in the DOL rule) at close to the median wage (50%) departs from the English language definition of median, which is “the middle number in a given sequence of numbers.”

NFAP research found the wages mandated under the new DOL rule do not reflect market wages or meet the definition of a prevailing wage. “The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment,” according to the Department of Labor.

To examine the impact of the DOL Wage rule, NFAP downloaded the entire DOL wage library used to determine prevailing wage rates as of June 30, 2020, and compared those wages to the new required minimum wages for every occupation and geographic area after the DOL rule went into effect. NFAP also obtained a sample of private wage surveys to compare market wages to the new DOL wages for a selection of common occupations.

The National Foundation for American Policy analysis found:

- The new wage rule increases the required minimum salary by a substantial margin across all wage levels for H-1B visa holders and employment-based green cards. For all occupations and geographic locations, the new minimum salary that employers are required to pay when compared with the system in place prior to the new DOL wage rule is, on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3 and 45% higher for Level 4.
- NFAP examined the impact of the new wage rule on 12 occupations common to H-1B visa holders, based on the U.S. Citizenship and Immigration Services (USCIS) H-1B “characteristics report” for FY 2019.

- Under the new rule, DOL mandates an employer pay a petroleum engineer 99.5% more than the prevailing wage in existence at Level 1 only shortly before the DOL wage rule took effect.
- Computer research scientists, depending on the level, would need to be paid from 42% to 49% more under the new DOL wage system, an increase in the required annual salary of \$36,000 to \$55,000.
- On average, employers would need to increase annual salaries by nearly 50% at Level 1 for computer hardware engineers, over 40% for computer programmers and chemical engineers at all wage levels and more than 35% for electrical engineers, computer network architects, computer systems analysts, mechanical engineers and database administrators at all wage levels. On average, employers would be required to pay software developers at least 45% higher annual salaries under the new DOL wage rule.
- One can find among the data required annual salary increases of more than 100%, or even 200%, for common occupations. The required minimum annual salary (Level 1) for a computer and information systems manager in East Stroudsburg, Pennsylvania increased 206.5% under the new wage rule. A pediatrician in Wichita, Kansas at Level 1 must be paid 177% more a year under the new DOL wage rule.
- The new DOL wage rule appears to be unworkable for employers in another important respect: The new DOL wage system requires employers to pay exactly \$100 an hour, or \$208,000 a year, for over 18,000 combinations of occupations and geographic labor markets, regardless of skill level and position, NFAP research found, because DOL cannot provide prevailing wage data for the occupations under the new system. This takes place for some of the most common high-skilled occupations in America's leading high-tech area.
- If an employer uses the DOL website to check the required minimum wage for the San Jose-Sunnyvale-Santa Clara area for a software developer (systems), the DOL website will read: "Leveled wages cannot be provided in Area 41940 for the occupation code 15-1133 due to limitations in the OES data." The required wage becomes \$208,000 a year for all levels, which is \$137,400 more than a private wage survey shows is the market wage for Level 1 for that occupation and location.
- According to DOL, nearly 40% of all approved PERM labor certifications are for software developers. However, NFAP found the DOL website states that all software developers must be paid \$208,000 a year, regardless of skill level, in San Jose, San Francisco and other U.S. cities,

including Battle Creek, MI, Cape Coral-Fort Myers, FL, Lebanon, PA, Merced, CA, Monroe, MI, Northwest Virginia nonmetropolitan area, Parkersburg-Vienna, WV and Reno, NV.

- This is a significant problem created by the DOL wage rule. NFAP estimates this DOL-created phenomenon of requiring a minimum annual salary of \$208,000 a year takes place for 18,327 combinations of occupations and geographic labor markets. In the San Jose-Sunnyvale-Santa Clara area, DOL does not have sufficient data to determine wages and defaults to a required minimum annual salary of \$208,000 for several common occupations in Silicon Valley, including software developers (systems), software developers (applications), database administrators, computer and information research scientists and computer network architects.
- NFAP obtained a sample of private wage surveys to compare with the new DOL wage rate and concluded the DOL wage system required under the new regulation mandates that employers pay well above the market wage for H-1B visa holders and employees being sponsored for permanent residence. Private wage surveys are used for establishing compensation policies at companies and the Department of Labor accepts them, if they meet certain standards, as an alternative to the DOL's Occupational Employment Statistics wage system, although DOL states that 92% of employer wage determinations for H-1B visa holders are made through the OES system. Private wage surveys can be expensive, and startups and smaller companies may be unlikely to have access to them.
- Under the new DOL mandated minimum salary, an employer in the San Jose, California area would pay an electrical engineer at Level 4 nearly \$85,000 (or 53%) above the market wage, as indicated by a private wage survey, and 54% above the market wage, or \$41,838, at Level 1.
- The annual salary required by DOL under the new rule for a computer programmer in the Chicago area would be nearly 63% higher or approximately \$86,000 a year more than the market wage at Level 4.
- Under the new DOL rule, an employer would need to pay a financial analyst in New York *more than three times the market wage* (\$208,000 vs. the market wage of \$66,428), according to a private wage survey. That is because the DOL mandated minimum salary of \$208,000 is for all levels for a financial analyst in the New York area.
- Employers in the New York area could expect to pay between \$39,412 and \$48,245 above the market wage for software developers based on Willis Towers Watson survey wage data.

- In the Los Angeles area, under the new DOL wage rule, companies employing H-1B visa holders as software developers (system) would be required to pay 62% more than the market wage at Level 1. Under the new DOL rule, an employer would be required to pay an electrical engineer in the Los Angeles area approximately 40% above the market wage, based on a private wage survey, at Level 1.

The new DOL wage rule appears designed to inflate the salaries of H-1B visa holders and employment-based immigrants to price their services out of the U.S. labor market. The Department of Labor has created a new wage system that compels employers to pay well above market wages if they wish to employ a foreign-born professional in H-1B status or sponsor an individual for permanent residence. By all appearances, the Department of Labor has exceeded its authority by making employers pay salaries that bear little resemblance to market wages or even the wages under the system the Department of Labor operated before publishing its new wage rule.

WHAT DOES THE DOL RULE DO?

On October 8, 2020, the U.S. Department of Labor published a rule that changes the way prevailing wage is determined for H-1B visa holders and employment-based immigrants.¹ DOL issued the rule as “interim final,” allowing it to go into effect immediately without prior notice and comment. The agency claimed one reason for the “good cause” exception to the Administrative Procedure Act (APA) is unemployment created by the coronavirus pandemic. A recent NFAP [analysis](#) of unemployment rates in computer occupations presents data that raises questions about the administration’s claim.²

A copy of the September 2020 NFAP Policy Brief *Employment Data for Computer Occupations For January to September 2020* is attached. Immediately below is a brief summary.

The unemployment rate for individuals in computer occupations changed little from 3% in January 2020 (before the pandemic spread in the U.S.) to 3.5% in September 2020, according to an analysis of the Bureau of Labor Statistics’ (BLS) Current Population Survey by the National Foundation for American Policy (NFAP).³ The unemployment rate was also 3% in January and 3.5% in September for computer and mathematical occupations, according to BLS. Active job vacancy postings advertised online in computer

¹ “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” Department of Labor, Employment and Training Administration, 20 CFR Parts 655 and 656 [DOL Docket No. ETA–2020–0006], RIN 1205–AC00, *Federal Register*, October 8, 2020. <https://www.federalregister.gov/documents/2020/10/08/2020-22132/strengthening-wage-protections-for-the-temporary-and-permanent-employment-of-certain-aliens-in-the->

² *Employment Data for Computer Occupations for January to September 2020*, NFAP Policy Brief, National Foundation for American Policy, October 13, 2020.

³ Note: “The Current Population Survey (CPS) is a monthly survey of households conducted by the Bureau of Census for the Bureau of Labor Statistics,” according to BLS.

occupations are at 655,386 in the United States as of October 2, 2020, an increase of 4.7% over May 2020, according to Emsi Job Posting Analytics. These economic indicators show that computer occupations have weathered the pandemic well, particularly when compared to occupations connected to travel, leisure and hospitality.

The data indicate stability in the unemployment rate in computer occupations and contradict Trump administration statements in proclamations and regulations that “good cause” exceptions to the rulemaking process and emergency actions are needed to impose new restrictions on H-1B visas for high-skilled foreign nationals due to high unemployment caused by Covid-19. The highest computer and mathematical occupation unemployment rate in 2020 was 4.6% (in August), but since the year 2000 there have been 51 months with an unemployment rate in computer and mathematical occupations higher than 4.6% and no previous president or federal agency viewed those periods as requiring emergency measures to restrict legal immigration.

Table 1
U.S. Unemployment Rate in Computer Occupations

OCCUPATIONS	JANUARY 2020	SEPTEMBER 2020
Computer Occupations	3.0%	3.5%
All Other Occupations	4.1%	7.8%

Source: National Foundation for American Policy estimates using Bureau of Labor Statistics' Current Population Survey, January and September 2020. Not seasonally adjusted. Computer occupations include Computer and information research scientist, Computer and information systems manager, Computer hardware engineer, Computer network architect, Computer programmer, Computer support specialist, Computer systems analyst, Database administrator and architect, Information security analyst, Electrical and electronics engineer, Network and computer systems administrator, Software developer, Software quality assurance analyst and tester, Web and digital interface designer and Web developer.

Table 2
U.S. Unemployment Rate in Computer and Mathematical Occupations

OCCUPATIONS	JANUARY 2020	SEPTEMBER 2020
Computer and Mathematical Occupations	3.0%	3.5%

Source: Bureau of Labor Statistics.

To understand the DOL wage rule and its impact, it is useful to review the law and how the agency changed the requirements for employers. The Immigration and Nationality Act states: “n) Labor condition application (1) No alien may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following: (A) The employer- (i) *is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H–1B nonimmigrant wages that are at least-* (I) the actual wage level paid by the

employer to all other individuals with similar experience and qualifications for the specific employment in question, or (II) the *prevailing wage level for the occupational classification in the area of employment.*"⁴ (Emphasis added.)

When granting DOL a role in the H-1B process, Congress did not anticipate the Department of Labor would distort the term prevailing wage beyond its conventional meaning. "The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment," according to the Department of Labor.⁵

Before publishing the new rule, DOL determined the prevailing wage by gathering data from the government's Occupational Employment Statistics (OES) wage survey and using a mathematical formula to create four levels of wages for each occupation.

In a [June 2017 NFAP Policy Brief](#), Amy Marmer Nice, a policy expert and a former Attorney Advisor in the Office of the General Counsel at Department of Homeland Security headquarters, explained the limitations of the wage system even before the new DOL wage rule.

"The fundamental problem with our current system for determining the prevailing wage is the process requires statistical precision that simply is not available," wrote Nice. "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." Nice added, "The solution to achieving increased

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

⁵ <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage>.

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.”⁶

A formula is less than ideal for two reasons: First, asking employers directly what they pay employees at different levels of education, experience or supervision is more accurate. Second, a government agency can adjust the formula in way that makes the required wages far higher than the market wage. The available evidence indicates that is what the Department of Labor has done in its wage rule.

As background, DOL explained in its rule that Congress required the agency to use four tiers to determine the prevailing wage. “The Department adopted the four-tier prevailing wage level structure that is currently in effect in response to the H-1B Visa Reform Act of 2004,” according to the rule. “As relevant here, the H-1B Visa Reform Act of 2004 amended section 212(p) of the INA to provide where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.”

“To implement this provision,” continued DOL, “the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (‘2005 Guidance’), which expanded the two-tier OES wage level system to provide four ‘skill levels’: Level I ‘entry level,’ Level II ‘qualified,’ Level III ‘experienced,’ and Level IV ‘fully competent.’ The Department applied the formula in the statute to its two existing wage levels to set Levels I through IV, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.”⁷

The background is useful because DOL sets the wages as follows: Level 1: 45th percentile (instead of 17th percentile), Level 2: 62nd percentile (instead of 34th percentile), Level 3: 78th percentile (instead of 50th percentile) and Level 4: 95th percentile (instead of 67th percentile).⁸

⁶ Amy Marmer Nice, *Fixing Prevailing Wage Calculations for High-Skilled Immigrants*, NFAP Policy Brief, National Foundation for American Policy, June 2017.

⁷ “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” Department of Labor, p. 63875.

⁸ *Ibid.*, p. 63892. “Having concluded that the entry-level wage should be adjusted to the 45th percentile, the Department turns to explaining the manner in which the remaining three prevailing wage levels will be modified. The Department has determined that the upper-most level will be adjusted to the mean of the upper decile of the OES wage distribution, or approximately the 95th percentile, to reflect the wages of the most competent, experienced, and skilled workers in any given occupation. The intermediate wage levels will continue to be calculated in accordance with 8 U.S.C. 1182(p)(4), which yields second and third wage levels at the 62nd and 78th percentiles, respectively.”

It appears DOL searched for a rationale to raise the Level 1 wage significantly – close to 50% or the median wage for an occupation and area – and decided the best way to accomplish this would be to argue that a Level 1 “entry level” is equal to an individual with a master’s degree (no experience).⁹

Placing the “entry level” (45% in the DOL rule) at close to the median wage (50%) does not economic sense and departs from the plain English language definition of median, which is “the middle number in a given sequence of numbers.”¹⁰ “Forty-five percent is nearly the same as the median wage of 50% and to be almost the same as the entry wage is incorrect by the definition of the word median,” said Mark Regets, a labor economist and senior fellow at the National Foundation for American Policy who examined the DOL rule. “Entry level workers cannot be both at the bottom quarter of the wage scale and at almost median of the wage scale at the same time.”

Regets also does not believe it is defensible to assume that a master’s degree (with no experience) is the appropriate place to set the entry level for occupations when many of the workers within those occupations, including those at which H-1B visa holders work, possess less than a master’s degree. “While a particular Level I worker may deserve more money because of a master’s degree or other specialized knowledge, that higher salary should not be used as a minimum for all other Level I workers in the same broad occupation,” according to Regets.

The prevailing wage is “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment,” according to the DOL website.¹¹ “That means statistics, not politics, should control the prevailing wage, said Kevin Miner of Fragomen. “Unfortunately, by randomly setting entry-level wages at 45% of the average wage for an occupation, the new DOL regulation artificially pushes the prevailing wage well above what the data shows it to be.”¹²

DOL justified the change, in part, by pointing to instances of employers paying an “actual” wage higher to individual H-1B visa holders higher than DOL wage for that level. However, as Kevin Miner notes, “Because some employers choose to pay above market wages for competitive reasons for some H-1B visa holders does not change the market wage, as DOL implies.”¹³

⁹ Ibid. p. 63889. “...the Department has determined that an individual with a master’s degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department’s PERM and specialty occupation programs for purposes of estimating the percentile at which such workers’ wages fall within the OES wage distribution.”

¹⁰ <https://www.dictionary.com/browse/median>.

¹¹ <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevaling-wage>.

¹² Interview with Kevin Miner.

¹³ Ibid.

HOW MUCH DOES THE RULE CHANGE SALARY REQUIREMENTS?

To examine the impact of the DOL Wage rule, NFAP downloaded the entire DOL wage library used to determine prevailing wage rates as of June 30, 2020, and compared those wages to the new required minimum wages for every occupation and geographic area after the DOL rule went into effect.

First, we found the new wage rule dramatically increases the required minimum salary by, on average, 39% to 45% across all four levels, and by more in many occupations for which employers petition for H-1B professionals or sponsor employees for employment-based green cards.

Second, we found DOL created enormous distortions in the labor market by mandating employers pay a wage of exactly \$100 an hour, or \$208,000 a year, for any occupation and geographic area that the agency says it lacks sufficient information to designate a wage. This occurs for some of the most common high-skilled occupations in America's leading high-tech area and inflates salaries by as much as \$130,000 or more a year. We estimate this DOL-created phenomenon takes place for 18,327 combinations of occupations and geographic labor markets.

Third, we found the new wages mandated by DOL bear little relationship to the current market wage rates reflected in private wage surveys that are widely used by employers and considered valid by the Department of Labor for determining the appropriate wage. We obtained a sample of private wage surveys to compare with the new DOL wage rate.

The following sections provide additional details in these three areas.

LARGE INCREASES IN REQUIRED SALARIES ACROSS LEVELS AND OCCUPATIONS

The National Foundation for American Policy downloaded the Department of Labor's wage library the agency used to determine prevailing wage rates as of June 30, 2020 and compared those wages to the new required minimum wages for every occupation and geographic area after the DOL rule went into effect. Below are our findings.

For all occupations and geographic locations, the new minimum salary that employers are required to pay when compared with the system in place prior to the new DOL wage rule is, on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3 and 45% higher for Level 4. (See Table 1.)

Table 1
Increases in Required Minimum Wage by Level

LEVEL	Average Increase in Required Minimum Salary Between Old and New DOL Wage System
Level 1	+39%
Level 2	+41%
Level 3	+43%
Level 4	+45%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage system on October 8, 2020.

To provide real world examples, NFAP analyzed the difference in salary under the previous DOL wage system and under the new system that inflates salaries under a new formula. We chose 12 occupations common to H-1B visa holders. U.S. Citizenship and Immigration Services (USCIS) published an H-1B "characteristics report" for FY 2019. According to the USCIS report, 66% of H-1B beneficiaries in FY 2019 were in computer-related occupations.¹⁴

Table 2
Average Increase in Required Minimum Salary Under New DOL Wage Rule By Occupation

OCCUPATION	Level 1	Level 2	Level 3	Level 4
Biochemists and Biophysicists	+57.6%	+60.9%	+64.8%	+67.9%
Chemical Engineers	+40.4%	+40.7%	+41.5%	+42.3%
Computer Hardware Engineers	+47.6%	+43.4%	+41.1%	+39.7%
Computer and Information Research Scientists	+48.9%	+44.6%	+42.7%	+41.8%
Computer Network Architects	+40.3%	+39.6%	+39.7%	+40.0%
Computer Programmers	+42.8%	+42.3%	+42.7%	+43.2%
Computer Systems Analysts	+36.5%	+40.7%	+43.7%	+45.9%
Database Administrators	+44.5%	+42.1%	+41.0%	+40.5%
Electrical Engineers	+35.7%	+36.5%	+37.2%	+37.8%
Mechanical Engineers	+34.4%	+38.4%	+41.2%	+43.4%
Petroleum Engineers	+99.5%	+60.6%	+39.5%	+26.2%
Software Developers	+46.0%	+45.1%	+45.1%	+45.3%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage system on October 8, 2020. All geographic areas.

¹⁴ Table 8B, *Characteristics of H-1B Specialty Occupation Workers Fiscal Year 2019 Annual Report to Congress October 1, 2018 – September 30, 2019*, USCIS, March 5, 2020. NFAP included electrical and electronics engineers in the analysis of government unemployment rate data. Other occupations eligible for H-1Bs, such as accountants, appear in much lower numbers in the USCIS report.

The significant increases in the mandated minimum salaries would lead a rational observer to conclude the purpose of the DOL wage rule is to price foreign nationals out of the U.S. labor market. The increases for common occupations in technical fields are so large that complying with the rule would likely create havoc for any company. If companies paid foreign nationals these wages well above the market wage they may feel compelled also to pay similar U.S. employees vastly inflated salaries. U.S. employees would know the salaries of their fellow H-1B employees, since there is a legal requirement to post the wages of H-1B visa holders at a worksite.

Under the rule, DOL mandates an employer pay a petroleum engineer at Level 1 \$82,991 more – a 99.5% increase – than the prevailing wage in existence only shortly before the DOL wage rule took effect. Level 2 would represent an increase of more than 60% for a petroleum engineer. Employers would be required to pay a biochemist and biophysicist 67.9% more under the new DOL wage system at Level 4, an increase in salary of nearly \$74,000 a year.

Computer research scientists would need to be paid from 42% to 49% more under the new DOL wage system, an increase in the required annual salary of \$36,000 to \$55,000. On average, employers would need to increase annual salaries by nearly 50% at Level 1 for computer hardware engineers, over 40% for computer programmers and chemical engineers at all wage levels and more than 35% for electrical engineers, computer network architects, computer systems analysts, mechanical engineers and database administrators at all wage levels. On average, employers would pay software developers at least 45% higher annual salaries under the new DOL wage rule.

One can find among the data required annual salary increases of more than 100% or even 200% for common occupations in particular locations. That provides additional evidence the new rule does not work in a reasonable manner and that DOL's claim appears to be untrue that it is simply requiring the prevailing wage (i.e., "the average wage paid to similarly employed workers in a specific occupation in the area of intended employment").

NFAP analyzed the new required salaries for Level 1 in occupations across the country. (See Table 3) The required minimum annual salary (Level 1) for a computer and information systems manager in East Stroudsburg, Pennsylvania increased 206.5% under the new wage rule. An employer in Florence, South Carolina must pay an electronics engineer 160.8% more in annual salary when compared to the old DOL system under Level 1. A pediatrician in Wichita, Kansas must be paid 177% more a year under the new DOL wage rule. A nuclear engineer in Abilene, Texas must be paid 168% more annually under the new DOL requirements at Level 1.

Table 3
Required Minimum Salaries (Level 1) Under New DOL Wage Rule In Specific Occupations and Locations

OCCUPATION	LOCATION	Increase in Required Minimum Salary
Computer and Information Systems Managers	East Stroudsburg, PA	206.5%
Pediatricians	Wichita, KS	177.0%
Physicians	Northwest Lower Peninsula of Michigan (nonmetropolitan area)	153.0%
Nuclear Engineers	Abilene, TX	168.1%
Electronics Engineers	Florence, SC	160.8%
Pharmacists	West Northwestern Ohio (nonmetropolitan area)	126.7%
Petroleum Engineers	Cape Coral-Fort Myers, FL	107.7%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the increase in required minimum salary between the Department of Labor's system in place on June 30, 2020 and after the new wage system on October 8, 2020.

MANY EMPLOYERS MUST PAY \$208,000 ANNUAL SALARIES BY DEFAULT

The new DOL wage rule appears to be unworkable for employers in another important respect that has gained little attention: The new DOL wage system requires employers to pay exactly \$100 an hour, or \$208,000 a year, for over 18,000 combinations of occupations and geographic labor markets, regardless of skill level and position, because DOL cannot provide prevailing wage data for the occupations under the new system. NFAP found this takes place for some of the most common high-skilled occupations in leading high-tech area.

If an employer uses the DOL website to check the required minimum wage for the San Jose-Sunnyvale-Santa Clara area for common computer-related positions, in this example a software developer (systems), the information on the DOL website reads: *“Leveled wages cannot be provided in Area 41940 for the occupation code 15-1133 due to limitations in the OES data. Employer provided surveys may be considered under the appropriate regulation, unless the provision of a survey is not permitted. The wage data may be at least: \$100.00 hour, \$208,000 year.”*¹⁵

A private wage survey from Willis Towers Watson shows a software developer (systems) at the equivalent of Level 1 should earn \$70,600 in annual salary in the San Jose-Sunnyvale-Santa Clara area. However,

¹⁵ <https://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1133&area=41940&year=21&source=3>.

because no wage data are available for that position and location an employer would now be required under the DOL wage \$208,000 a year. It is unclear in this instance whether DOL would accept a private wage survey, but many startups and smaller employers do not obtain such surveys due to cost. The \$208,000 mandated wage *is \$137,400 over the private wage survey* and illustrates the distortion that exists between the actual market wage and the wages DOL has mandated employers pay under the new wage rule.

The DOL website states that all software developers must be paid \$208,000 a year, regardless of skill level, in San Jose, San Francisco and several other U.S. cities, including Battle Creek, MI, Cape Coral-Fort Myers, FL, Lebanon, PA, Merced, CA, Monroe, MI, Northwest Virginia nonmetropolitan area, Parkersburg-Vienna, WV and Reno, NV, based on NFAP research.

According to a passage from the DOL wage rule, the Department of Labor is aware of how significant software developers are as an occupation,: *“For example, the most common occupation in which PERM labor certifications – of which applications for EB-2 immigrants represent a substantial share – are sought is Software Developers, which accounts for nearly 40 percent of all approved PERM applications.”*¹⁶

This is not a small problem. We estimate this DOL-created phenomenon of requiring a minimum annual salary of \$208,000 a year takes place for 18,327 combinations of occupations and geographic labor markets.

In the San Jose-Sunnyvale-Santa Clara area, DOL mandates an annual salary, regardless of experience, of \$208,000 – stating *“leveled wages cannot be provided”* – for software developers (systems), software developers (applications), database administrators, computer and information research scientists and computer network architects.

Relevant questions raised by this aspect of the DOL wage rule include: Why did DOL go forward with a wage rule and system that creates such significant distortions in the labor market? How can DOL claim it is accurately presenting the prevailing wage for occupations when the required wage is exactly \$100 an hour or \$208,000 a year for over 18,000 occupation/geographic areas around the United States at all different skill levels? Is it arbitrary that DOL is mandating a wage of exactly \$100 an hour? How was the \$100 an hour wage calculated as the appropriate wage for over 18,000 combinations of occupations and geographic labor markets? As noted earlier, the DOL website states: “The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.”

¹⁶ “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” Department of Labor, p. 63881.

PRIVATE SURVEYS DEMONSTRATE NEW DOL WAGES NOT MARKET WAGES

The private wage surveys employers use to evaluate the appropriate compensation for jobs in different geographic locations show the new minimum salaries mandated in the DOL wage rule to do not reflect market wages. Note that private wage surveys are used for a variety of purposes. The Department of Labor also accepts them, if they meet certain standards, as an alternative to the DOL's OES wage system. "Private wage surveys are created by survey companies using precise methodologies and a wide range of data gathering to ensure that the surveys accurately reflect market wages for a variety of occupations and career levels," said Kevin Miner. He notes the surveys are used by employers for company-wide salary benchmarking and are a primary way that employers set their company-wide wage scales.¹⁷

NFAP obtained a sample of private wage surveys to compare with the new DOL wage rate and concluded the DOL wage system required under the new regulation mandates employers pay well above the market wage for H-1B visa holders and many employees being sponsored for permanent residence. The surveys were done by [Willis Towers Watson](https://www.willistowerswatson.com/en-US/About-Us/overview), a publicly traded advisory company with "45,000 employees serving more than 140 countries and markets."¹⁸ Employers, law firms and other others can purchase these private wage surveys, which are generally most available in larger employment markets.

In the Willis Towers Watson survey data, the best matches to the DOL OES (Occupational Employment Statistics) system are at Level 1 and Level 4, which is why we have confined our analysis of the difference between the market wage and the new DOL mandated minimum wage to those two levels. A private wage survey, such as Willis Towers Watson, has more granular detail between the top and bottom levels than the DOL OES system, notes Miner.¹⁹ For that reason, we decided a more conservative approach would be to limit the analysis to Level 1 and Level 4, entry level and advanced.

After reviewing the tables below, one might conclude the new wages employers are required to pay for H-1B visa holders are arbitrary and not reflective of market wages.

Under the new DOL mandated minimum salary, an employer in the San Jose, California area would pay an electrical engineer at Level 4 nearly \$85,000 (or 53%) above the market wage, as indicated by a private wage survey, and 54% above the market wage, or \$41,838, at Level 1. (See Table 4).

While it is possible an employer might be allowed by DOL to use a private wage survey instead of the system mandated by the new DOL wage rule, DOL indicates 92% of employers have used the Department

¹⁷ Kevin Miner.

¹⁸ <https://www.willistowerswatson.com/en-US/About-Us/overview>.

¹⁹ Kevin Miner.

of Labor system to find a prevailing wage determination for H-1B visa holders.²⁰ Also, private wage surveys can be expensive, and startups and smaller companies may be unlikely to have access to them.

Table 4
Annual Salary for Electrical Engineers, San Jose-Sunnyvale-Santa Clara

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	\$77,908	\$119,746	+\$41,838
4	\$161,069	\$245,939	+\$84,870

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

Table 5 shows the annual salary required by DOL under the new rule for a computer programmer in the Chicago area would be nearly 63% higher or approximately \$86,000 a year more than the market wage at Level 4, and \$19,405 at Level 1.

Table 5
Annual Salary for Computer Programmers, Chicago-Naperville-Elgin

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	\$71,657	\$91,062	+\$19,405
4	\$136,553	\$222,394	+\$85,841

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

Table 6 shows what happens to employers when they check for a wage under the new Department of Labor wage rule and the DOL website reports: “Leveled wages cannot be provided in Area . . . for the occupation code . . . due to limitations in the OES data. Employer provided surveys may be considered under the appropriate regulation, unless the provision of a survey is not permitted. The wage data may be at least: \$100.00 hour, \$208,000 year.” As noted earlier, NFAP identified over 18,000 combinations of occupations and geographic areas in which an employer would be required to pay an annual salary of \$208,000 without regard to an individual’s experience.

Table 6 shows in the New York area, under the new DOL rule, an employer would need to pay a financial analyst more than three times the market wage (\$208,000 vs. the market wage of \$66,428), according to a

²⁰ “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States,” Department of Labor, p. 63905. “In FY 2020, approximately 92 percent of workers associated with H-1B, H-1B1, and E-3 certifications had prevailing wages based on the OES survey.”

private wage survey. That is because the DOL mandated minimum salary of \$208,000 is for all levels for a financial analyst in the New York area. At Level 4, an employer would need to pay \$71,601 above the market wage for a financial analyst.

Table 6
Annual Salary for Financial Analysts, New York-Newark-Jersey City

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	\$66,428	\$208,000	+\$141,572
4	\$136,399	\$208,000	+\$71,601

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

Table 7 shows that even when the new system under the DOL wage rule provides salaries, employers in the New York area could expect to pay between \$39,412 and \$48,245 above the market wage for software developers based on Willis Towers Watson survey wage data. Table 8 shows employers would be required to pay about \$25,000 (or 38%) above the market wage for information security analysts in the Chicago area under the new DOL wage rule.²¹

Table 7
Annual Salary for Software Developers (Systems), New York-Newark-Jersey City

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	\$76,839	\$116,251	+\$39,412
4	\$169,281	\$217,526	+\$48,245

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

Table 8
Annual Salary for Information Security Analysts, Chicago-Naperville-Elgin

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	\$67,409	\$92,893	+\$25,484

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

²¹ There was not a good comparable private wage survey result for Level 4 for this occupation in the Chicago area.

Table 9
Annual Salary for Software Developers (System), Los Angeles-Long Beach-Anaheim

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	\$71,745	\$116,418	+\$44,673
4	\$154,992	\$202,842	+\$47,850

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

In the Los Angeles area, under the new DOL wage rule, companies employing H-1B visa holders as software developers (system) would be required to pay 62% above the market wage (or \$44,673 above) at Level 1. The difference between the new DOL mandated minimum salary and the market wage at Level 4 for software developers in the area is \$47,850. (Table 9.) Under the new DOL rule, an employer would be required to pay an electrical engineer in the Los Angeles area approximately 40% above the market wage, based on a private wage survey, at Level 1, and about \$39,000 above the market wage at Level 4. (Table 10.)

Table 10
Annual Salary for Electrical Engineers, Los Angeles-Long Beach-Anaheim

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	\$77,908	\$108,909	+\$31,001
4	\$161,069	\$200,034	+\$38,965

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson survey wage data.

CONCLUSION

For all occupations and geographic locations, an NFAP analysis found the new minimum salary that employers are required to pay when compared with the system in place prior to the new DOL wage rule is, on average, 39% higher for Level 1 positions, 41% higher for Level 2, 43% higher for Level 3 and 45% higher for Level 4.

If the Department of Labor is correct that it needed to adjust the wage system in order that H-1B visa holders would be paid the prevailing wage received by comparable U.S. workers, then past studies should have found H-1B visa holders were paid significantly less than similar U.S. workers. However, research in recent years shows H-1B visa professionals are paid the same or more than their U.S. counterparts, which helps demonstrate the flaws in the Department of Labor rule. Research has also found that H-1B visa holders are

not associated with lower wages or higher unemployment among U.S. technology professionals, which would not be the case if H-1B visas holders were paid much lower wages than their peers.

After comparing the median reported salaries of U.S. workers and H-1B professionals in the same fields and age groups, the Government Accountability Office (GAO) found H-1B professionals *generally earn the same or more than their U.S. counterparts*.²² In the category Systems Analysis, Programming, and Other Computer-Related Occupations, the median salary for an H-1B professional *is higher* (\$60,000 vs. \$58,000) than for a U.S. professional in the age group 20-29 and the same (\$70,000) in ages 30-39.²³ (See Table 11.) In the category Electrical/Electronics Engineering Occupations, in the age group 20-39, the median salary for an engineer in H-1B status was higher than for a U.S. engineer – \$80,000 vs. \$75,000.²⁴ (See Table 12.)

Table 11
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.

Table 12
Median Reported Salaries of H-1B and U.S. Workers: Electrical/Electronics Engineering Occupations

Age Group	H-1B	U.S. Workers
20-39	\$80,000	\$75,000

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.

The employment website Glassdoor, “looked at a large sample of salaries from H-1B visa applications and compared them to similar U.S. salaries reported on Glassdoor. We looked at the most recent year available – federal fiscal year 2016 – and focused on 10 major U.S. cities, comparing pay for U.S. and foreign H-1B workers for the same job titles.” The analysis concluded, “Across the 10 cities and roughly 100 jobs we

²² *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011. To conduct the research, the GAO analyzed Current Population Survey (CPS) data on U.S. workers and information on H-1B salaries from the U.S. Citizenship and Immigration Services (USCIS) CLAIMS database.

²³ Reported salaries in this section can be found at GAO, p. 42, Table 1.

²⁴ GAO stated in some categories it needed to combine age groups to have sufficient sample sizes.

examined, salaries for foreign H-1B workers are about 2.8 percent higher than comparable U.S. salaries on Glassdoor.”²⁵

A study by University of Maryland researchers Sunil Mithas and Henry C. Lucas, Jr., examined the skills and compensation of over 50,000 IT professionals in the United States between 2000 and 2005. The study found foreign-born professionals in information technology (IT) earned more than their native counterparts. “[C]ontrary to popular belief, non-U.S. citizen IT professionals are not paid less compared to American IT professionals. More broadly, the evidence in this study provides indirect evidence that visa and immigration policies so far have not had any adverse impact on the wages of American IT professionals due to any relatively lower compensation of foreign IT professionals.”²⁶

Other economists have made similar findings. “Using unique individual level data, obtained through a FOIA from USCIS, on the holders of H-1B visas issued in 2009, our analysis does not support the notion that H-1B workers are relatively low-skilled or have lower earnings than U.S. born workers,” according to a paper by economists Magnus Lofstrom and Joseph Hayes with the Public Policy Institute of California. “In fact, we find that overall H-1B workers in STEM occupations have higher earnings than their otherwise observationally similar U.S. born counterparts. In our occupation-specific analysis we find that H-1B workers in two of the five occupation groups analyzed (the largest occupation group, IT, and post-secondary education) have higher earnings than their otherwise observationally similar U.S. born counterparts. In the other three occupation groups (health, engineering and math and sciences) we fail to find convincing evidence of lower earnings among H-1B workers.”²⁷ Lofstrom and Hayes concluded, “Overall, the data point towards a picture of comparatively highly skilled workers with earnings at least on par with those of U.S. born workers.”²⁸

Other economic research shows foreign-born professionals do not harm the labor market prospects of Americans. “H-1B visa holders do not adversely affect U.S. workers,” according to a May 2020 National Foundation for American Policy study by Madeline Zavodny, formerly an economist at the Federal Reserve Bank of Atlanta (and Dallas) and a professor of economics at the University of North Florida (UNF) in Jacksonville. “On the contrary, the evidence points to the presence of H-1B visa holders being associated with lower unemployment rates and faster earnings growth among college graduates, including recent college graduates. Further, the results suggest that, if anything, being in a field with more H-1B visa holders

²⁵ Dr. Andrew Chamberlain, *Dispelling Myths: What H1B Visa Workers Are Really Paid*, Glassdoor, April 3, 2017.

²⁶ 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, p. 762.

²⁷ Magnus Lofstrom and Joseph Hayes, “H-1Bs: How Do They Stack Up to U.S. Workers?” IZA Discussion Paper #6259. December 2011, pp. 14-15.

²⁸ *Ibid.*, p. 15.

makes it more likely that U.S.-born young college graduates work in a job closely related to their college major.”²⁹ (A copy of this study is attached to our comments.)

A [study](#) by economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin examined the last recession and found that denying the entry of H-1B visa holders due to the annual limits harmed job growth for U.S.-born professionals. “The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries,” concluded the economists.³⁰

The Department of Labor’s wage rule does not acknowledge the existence of a global market for labor. [Research](#) by Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, found new restrictions on H-1B visas are likely to push jobs out of the United States, concluding, “[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad.”³¹

The new DOL wage rule appears designed to inflate the salaries of H-1B visa holders and employment-based immigrants to price their services out of the U.S. labor market. The Department of Labor has created a new wage system that requires employers to pay well above market wages to employ a foreign-born professional in H-1B status or sponsor an individual for permanent residence. By all appearances, the Department of Labor has exceeded its authority.

Sincerely

[Signature Redacted]

Stuart Anderson
Executive Director
National Foundation for American Policy

²⁹ Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce*, NFAP Policy Brief, National Foundation for American Policy, May 2020.

³⁰ Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin (June 2014), *Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, Partnership for a New American Economy.

³¹ Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, Carnegie Mellon University, May 2019.