NATIONAL FOUNDATION FOR AMERICAN POLICY

NFAP POLICY BRIEF » FEBRUARY 2021

AN ANALYSIS OF THE DOL FINAL RULE'S IMPACT ON H-1B VISA HOLDERS AND EMPLOYMENT-BASED IMMIGRANTS

EXECUTIVE SUMMARY

A Trump administration regulation will require employers to pay salaries far above market wages for employment-based immigrants and H-1B visa holders, making it difficult for many, including recent international students, to be employed in the United States, according to a new analysis from the National Foundation for American Policy (NFAP). Under a Department of Labor (DOL) final rule published shortly before Donald Trump left office, employers must pay 23% to 41% higher salaries than under the current system across a range of occupations if they want to employ high-skilled foreign nationals in America, concludes the NFAP analysis. The Biden administration may delay the rule and must decide how to address a regulation at odds with its pro-immigration positions.

The Department of Labor's final rule, published on January 14, 2021, contradicts President Biden's pro-immigration executive order on "Restoring Faith in our Legal Immigration Systems." The nation's leading anti-immigration group has applauded the final rule. Departing Trump administration officials designed the rule to price out of the U.S. labor market H-1B visa holders and employment-based immigrants. President Biden revoked Trump's controversial anti-immigration "Buy America and Hire America" executive order that DOL cited to justify the final rule. U.S. Citizenship and Immigration Services (USCIS) also rescinded a memo on computer programmers that DOL used to set the salaries under the rule. DOL used the memo in the final rule even though a U.S. Court of Appeals for the 9th Circuit decision found the memo to be unlawful. DOL published an earlier version of the rule on October 8, 2020, as an interim final regulation, but three courts blocked the rule on the grounds it violated the Administrative Procedure Act.

The arguments put forward in the Department of Labor's final rule make sense only if one understands the objective of the Trump administration's immigration policy was to admit as few foreign-born individuals as possible to the United States.

Employers typically must obtain a prevailing wage determination from the Department of Labor for individuals sponsored for employment-based green cards or H-1B petitions. DOL determines the prevailing wage, which is the minimum a foreign national can be paid, 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 and location.

To engineer a higher wage requirement, Trump officials altered the formula used to compute the required minimum wage for permanent residence and temporary visas. In effect, the final rule pushes the current salaries for Level 1 ("entry level") up to the equivalent of the current Level 2 ("qualified") and moves up the other levels as well.

With a 10-year transfer cost imposed on employers of $105 billion, the DOL final rule is one of the costliest rules in the history of modern regulation, according to the U.S. Chamber of Commerce.

Among the findings in this analysis:

- The Department of Labor provided the public with no information on the new minimum salaries for H-1B visa holders and employment-based immigrants in specific occupations and geographic areas once the final rule takes effect. DOL only published new salary percentiles. This and other examples of a lack of transparency should call into question the final rule.

- To provide the public with information on the final rule's impact, the National Foundation for American Policy estimated the new required minimum salary levels based on available data. NFAP found there will be significantly higher salaries required for employers under the Department of Labor's final rule compared to the current DOL wage system. NFAP performed a similar analysis in an October 2020 report.

- For all occupations and geographic locations, the new minimum salary that employers will be required to pay when compared with the current system is, on average, 24% higher for Level 1 positions, 23% higher for Level 2, 27% higher for Level 3 and 25% higher for Level 4.

- Under the final rule, DOL mandates an employer pay a computer hardware engineer a 26.8% higher salary at Level 1 than under the existing DOL system. The average increase is similar at the other three levels. For software developers, the average increase in the required minimum salary is 29.2% at Level 1, 26.9% at Level 2, and 29.7% at Level 3 and 26.5% at Level 4. For electrical engineers, the average increase in the required minimum salary is 23.5% at Level 1, 22.5% at Level 2, 25% at Level 3 and 25.2% at Level 4.

- The DOL final wage rule will make it much more difficult to employ individuals to educate more U.S. students in computer science. The average increase in the required minimum salary for computer science teachers, which includes primarily professors at universities and community colleges, would be 41% at Level 1. That could make it difficult or impossible for many educational institutions to employ an H-1B visa holder or employment-based immigrant to teach computer science to U.S. students.

- The current DOL wage system is much more accurate in reflecting market wages than the DOL final rule would be if implemented, according to an NFAP analysis. NFAP obtained private wage survey data for the top 10 occupations for which labor certifications were selected in cities for the top 10 states and compared the current DOL wage system to the salaries under the final rule. In 53% of the city-occupation

combinations, the salaries for Level 1 under the current system were within 10% of the salaries in the private wage survey (Willis Towers Watson), compared to only 18% under the DOL final rule.

- Private wage surveys are more likely to reflect market wages and are accepted by the Department of Labor for immigration purposes if they meet agency standards. In 35% of the city-occupation combinations under the current system, the salary was within 5% of the salary listed for the private wage survey—7 times more accurate using this measurement than the city-occupation combinations under the DOL final rule, according to the NFAP analysis. In 61% of the city-occupation combinations the salaries under the current DOL system were either within 10% of the private wage survey or the salaries were higher. Under the DOL final rule, in 100% of the city-occupation combinations, the salary was higher than in the private wage survey.

- The Department of Labor made what appears to be a false statement in its final rule when it claimed no matter how inaccurate its new salary requirements might be under the DOL final rule employers would still be able to obtain private wage surveys. NFAP found that in about 25% of the top ten city-occupations examined, a private survey salary was not available from Willis Towers Watson. The availability of private wage surveys for less common occupations and in smaller metropolitan areas is even scarcer, according to attorneys.

- In the Atlanta metro area, software developers (applications) earn $65,169 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 4% of the salary in that location and occupation under the current DOL wage system. However, the DOL final rule would raise the minimum required salary for software developers (applications) at Level 1 in Atlanta to $86,645, more than $21,400 or 33% higher than the private wage survey.

- In the New York-Newark metro area, computer systems analysts earn $69,050 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 2% of the salary in that location and occupation under the current DOL wage system. The DOL final rule would raise the minimum required salary for computer systems analysts at Level 1 in New York-Newark to $92,517, about $23,400 or 34% higher than the private wage survey.

- In the Seattle metro area, operations research analysts earn $70,484 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 3% of the salary in that location and occupation under the current DOL wage system. The DOL final rule would raise the minimum required salary for computer systems analysts at Level 1 in Seattle to $88,555, about $18,000 or 26% higher than the private wage survey.

- The final rule stated that the new entry level salary for H-1B visa holders and employment-based immigrants would be based on individuals with a master's degree—even though immigration law states that a foreign national only needs a bachelor's degree for an H-1B visa. In addition, the Department of Labor stated it used National Science Foundation (NSF) survey data in its analysis, but according to the NSF survey data, 66% of individuals in computer occupations had a bachelor's degree as their highest degree.

- The Department of Labor cannot identify actual harm to U.S. workers or inaccuracies in the current wage system except for anecdotes and generalized statements. Economist Madeline Zavodny found little evidence for the Department of Labor's central claim to justify higher salary requirements. "To sum up, in my opinion, the citations given in the IFR [interim final rule] fail to provide support for the claim that workers who hold an H-1B visa are paid less than other U.S. workers," according to Zavodny.

- The Department of Labor final rule is also based on a significant provision in a bill, S. 2266, sponsored by Senator Charles Grassley (R-IA), that failed to pass Congress. As in the DOL final rule, S. 2266 eliminated Level 1 and effectively made it Level 2. The current Level 2 wage is set at the 34th percentile, and the new Level 1 is at the 35th percentile. That means the final rule eliminates the entire Level 1 wage level and pushes everything else higher. Key Grassley staff later took important immigration policy positions in the Trump administration.

The Department of Labor stated in its final rule that the revised version of the rule would have a less extreme impact for employers than the interim final rule, and that changes would "address commenters' concerns that wages under the IFR [interim final rule] were inappropriately high." Setting "inappropriately high" wages in an interim final rule and publishing a final rule that contains wages levels that are only somewhat less "inappropriately high"—and also do not reflect market wages—is damaging economically and not acceptable as public policy. In short, not being as harmful as an earlier version of a rule found to be unlawful is not a reasonable standard for policymaking. DOL ignored comments in the interim final rule on the fundamental problems with the agency's approach to calculating wages under the rule.

"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. The DOL final rule has not implemented a "prevailing wage" as DOL defines it, but a new wage standard that goes beyond the statute and is designed to price out of the U.S. labor market many H-1B visa holders and employment-based immigrants.

By requiring H-1B visa holders and employment-based immigrants to be paid well above the market wage for their services, the final rule makes it much more difficult for employers to sponsor high-skilled foreign nationals, including recent international students. As economists know, when you raise the price of something, you get less of it. Given the substantial contributions made by employment-based immigrants, if the final rule goes into effect, it will mean America will get fewer jobs and startup companies, and less innovation.

AN ANTI-IMMIGRATION AGENDA

The arguments put forward in the Department of Labor's (DOL) final rule make sense only if one understands the objective of the Trump administration's immigration policy was to admit as few foreign-born individuals as possible to the United States. By requiring H-1B visa holders and employment-based immigrants to be paid well above the market wage for their services, the rule makes it much more difficult for employers to sponsor high-skilled foreign nationals. As economists know, when you raise the price of something, you get less of it.

In July 2020, the National Foundation for American Policy projected that legal immigration would fall by 49% (or 581,845) between FY 2016 and FY 2021 due to Trump administration policies if the policies were maintained. That included reductions in the admission of refugees, an April 2020 proclamation suspending the entry of nearly all categories of immigrants, a "public charge" rule that would eliminate many family-based immigrants, a proclamation barring the admission of immigrants from several majority-Muslim countries and other policies.

The final rule must be understood in the context of policies to restrict legal immigration and the culmination of a four-year effort against employment-based immigration that included a pattern of improperly interpreting the Immigration and Nationality Act. Under the Trump administration, the denial rate for H-1B petitions for initial employment (cases that count against the annual limit) was 24% in FY 2018 and 21% in FY 2019, significantly higher than the 6% denial rate in FY 2015 under the Obama administration.

The denial rate for H-1B petitions for initial employment dropped to 1.5% in the fourth quarter of FY 2020 after the Trump administration was compelled to enter into a legal settlement following court decisions that found the administration's H-1B visa policies to be unlawful, including its interpretations of the definitions of an employer-employee relationship and a specialty occupation.[1]

Fitting the pattern of the past four years, the Trump administration used the Department of Labor final rule to restrict immigration. In other words, a decision was made to restrict the immigration of high-skilled foreign nationals and a method was chosen to accomplish it.

The DOL final rule makes two arguments to attempt to "reverse engineer" higher required salaries. First, the final rule stated that the new entry level salary for H-1B visa holders and employment-based immigrants would be based

[1] *H-1B Denial Rates for FY 2020 and the Impact of Court Decisions*, NFAP Policy Brief, National Foundation for American Policy, January 2021. https://nfap.com/wp-content/uploads/2021/01/H-1B-Denial-Rates-For-FY-2020-and-the-Impact-of-Court-Decisions.NFAP-Policy-Brief.January-2021-2.pdf.

on individuals with a master's degree—even though immigration law states that a foreign national only needs a bachelor's degree for an H-1B visa.

To obtain H-1B status, according to the Immigration and Nationality Act, a foreign national must be in a specialty occupation, which "means an occupation that requires—(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[2]

However, according to the final rule, "The Department's review of the INA's qualification requirements for H–1B and EB–2 workers, in combination with an analysis of the demographic characteristics of workers in the H–1B program, led the Department to determine that, for purposes of identifying an entry level wage, it should look to the wages paid to U.S. workers who possess a master's degree and limited work experience."[3]

In addition to ignoring that a bachelor's degree, not a master's degree, is listed in the statute as the minimum entry level for a foreign national in a specialty occupation for H-1B status, DOL also ignores the permanent labor certification program (PERM) program applies to the EB-3 (employment-based third preference) category. (See the sentence above from the final rule.) EB-3 is listed on the Department of Labor's website as requiring labor certification.[4] It is likely DOL chose to exclude the EB-3 category from its review of the "INA's qualification requirements" because the EB-3 category does not require a master's degree and including it would further undermine the claim that a master's degree is the "entry level" for salary purposes, despite the evidence to the contrary.

Although the Department of Labor stated it used National Science Foundation (NSF) survey data in its analysis, according to the NSF survey data, 66% of individuals in computer occupations had a bachelor's degree as their highest degree. As discussed in a section below, that further undermines DOL's claim that a master's degree is appropriate to set the entry level salary for H-1B visa holders and employment-based immigrants.[5]

---

[2] INA Section 214(i)(1).
[3] See "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, January 14, 2021. https://www.federalregister.gov/documents/2021/01/14/2021-00218/strengthening-wage-protections-for-the-temporary-and-permanent-employment-of-certain-aliens-in-the, p. 3614.
[4] https://www.uscis.gov/working-in-the-united-states/permanent-workers.
[5] National Foundation for American Policy tabulation of the National Science Foundation 2017 National Survey of College Graduates.

"There is not a good reason that a starting wage should be set at a master's degree level for everyone even if a master's were the most common credential," according to labor economist Mark Regets, a NFAP senior fellow. "When it is not the most common credential, there is no justification at all."[6]

Second, the Department of Labor cannot identify actual harm to U.S. workers or inaccuracies in the current wage system except for anecdotes and generalized statements, even though the DOL final rule is one of the costliest rules in the history of modern regulation—a 10-year transfer cost imposed on employers of $105 billion.[7]

Madeline Zavodny, an economics professor at the University of North Florida and a former economist at the Federal Reserve Band of Atlanta (and Dallas), analyzed the Department of Labor's interim final rule (IFR) and found it lacked evidence for its assertions about wages and harm to U.S. workers.

"The claim in the IFR [interim final rule] that many nonimmigrants working in the United States on an H-1B temporary visa 'are likely paid less than similarly employed U.S. worker' is not well supported in the IFR," writes Zavodny. "Indeed, I believe this claim is not true. This claim appears to form much of the basis for the Department's proposed changes to the prevailing wage determination process for the H-1B nonimmigrant visa program and the EB-3 permanent resident visa program. . . . [E]mpirical evidence compiled by economists and other academic researchers indicates that workers who hold an H-1B visa are typically paid at least as much as similarly employed U.S.-born workers.[8]

A lawsuit against the interim final rule cited Zavodny's analysis. "DOL further claims that four other studies show H-1B workers make 25% to 33% lower wages than U.S. workers, *but upon review of those studies, Professor Zavodny concludes that none of the studies provide support for DOL's position*," write the plaintiffs in the lawsuit against DOL. "One of the studies provides no data source for its analysis; another study does not provide a comparison to domestic born workers; and a third study does not appear to have any analysis of wages of H-1B workers. The fourth cited study from a newspaper blog post is not locatable. Similarly, the Associated Press article that DOL cites is based on an unclear and problematic methodology."[9] (Emphasis added.)

---

[6] Mark Regets.
[7] Ibid., p. 3658. "The final rule will result in annualized transfer payments of $14.97 billion and total 10-year transfer payments of $105.16 billion at a discount rate of 7 percent in 2019 dollars.
[8] Report of Madeline Zavodny, Ph.D., "Opinion regarding Department of Labor's Interim Final Rule, "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States." Exhibit C. *ITServe Alliance v. Eugene Scalia, Secretary of Labor*. Zavodny is also a Research Fellow at the National Foundation for American Policy.
[9] Plaintiffs motion for a preliminary injunction, *ITServe Alliance v. Eugene Scalia, Secretary of Labor*.

Zavodny found little evidence for the Department of Labor's central claim to justify higher salary requirements. "To sum up, in my opinion, the citations given in the IFR fail to provide support for the claim that workers who hold an H-1B visa are paid less than other U.S. workers," writes Zavodny.[10]

"The IFR presents an incomplete and, in my opinion, incorrect picture of the earnings of workers who hold an H-1B visa," according to Zavodny. "The IFR does not cite the above-mentioned studies that all reach a conclusion at odds with the conclusion reached in the IFR. These are all high-quality studies conducted by well-trained Ph.D. researchers. Two of the studies were published in peer- reviewed journals that are considered A* (the highest rank) journals within their disciplines." Zavodny pointed out that DOL ignored many studies that show the benefits of H-1B visa holders, and did not include research showing that restrictions on H-1B visa result in multinational companies offshoring work out of the United States.[11]

Additional Background to Understand the Rule

The Department of Labor published its final rule on January 14, 2021. On October 8, 2020, DOL published an earlier version of the rule as an interim final regulation, but three courts blocked the rule on the grounds it violated the Administrative Procedure Act by claiming a "good cause" exception to allow the regulation to go into effect immediately without notice and comment. (Judges cited, among other things, a National Foundation for American Policy analysis that showed the unemployment rate for computer occupations had not increased during the pandemic.)[12]

Employers typically must obtain a prevailing wage determination from the Department of Labor for individuals sponsored for employment-based green cards or H-1B petitions. 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*."

DOL determines 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 are based on broad pay band information.

[10] Report of Madeline Zavodny, Ph.D.
[11] Ibid.
[12] See Stuart Anderson, "DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants," *Forbes*, January 13, 2021, from which parts of this background summary are adapted.

As part of its efforts to restrict employment-based immigration, Trump officials altered the formula used to compute the required minimum wage for permanent residence and temporary visas in both the final rule and the interim final rule.

To inflate the required or "prevailing wage" in the final rule, DOL changed the formula by which the Occupational Employment Statistics data were divided into four levels. In the final rule, DOL set the new wage levels as follows: Level 1: 35th percentile (instead of the previous 17th percentile), Level 2: 53rd percentile (instead of 34th percentile), Level 3: 72th percentile (instead of 50th percentile) and Level 4: 90th percentile (instead of 67th percentile).[13]

In the interim final rule, "the wage levels were increased, respectively, from approximately the 17th, 34th, 50th, and 67th percentiles to approximately the 45th, 62nd, 78th, and 95th percentiles," according to DOL.

"The revisions to the rule don't change the fact that it still fails to do what the law requires—to reflect the actual, prevailing wage for workers in that geographical area doing similar work," said Kevin Miner, a partner at Fragomen. "The fact that Level 1 wages are now tied to around the 35th percentile rather than the 45th percentile doesn't change the fact that it is artificially inflating required wages. Prevailing wage data published by DOL should reflect the actual wages paid in the market. It should be math, not politics. If Congress wants to make changes to the H-1B statute, it can do so. But DOL shouldn't be trying to do that through rulemaking."[14]

The new rule has the same defects as the earlier version, even if the wage effects are slightly less extreme, according to an analysis by the National Foundation for American Policy. In effect, at the 35th percentile, the new rule would require employers to pay an entry level employee the same or more than 35% of the people working in the same occupation and geographic location, even if those individuals have much more experience. The final rule also includes a phase-in period.[15]

---

[13] See "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, January 14, 2021. https://www.federalregister.gov/documents/2021/01/14/2021-00218/strengthening-wage-protections-for-the-temporary-and-permanent-employment-of-certain-aliens-in-the.

[14] Anderson, "DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants," *Forbes.*

[15] https://www.fragomen.com/insights/alerts/dol-issues-revised-rule-increasing-perm-and-h-1b-wage-minimums. According to the Fragomen law firm, "**"Phase 1, Rule Effective Date through June 30, 2021:** LCAs [labor condition applications] filed and PWDs [prevailing wage determinations] issued during this timeframe are to remain subject to current wage levels, with Level I at the 17th percentile, Level II at the 34th percentile, Level III at the 50th percentile and Level IV at the 67th percentile. **Phase 2, July 1, 2021 through June 30, 2022:** The new wage levels will take effect, however, they are to be adjusted downward as follows – Levels I and IV are to be set at the higher of either 90% of the wage value calculated at the 35th and 90th percentile or the mean of the lower one-third of the current OES wage distribution. Levels II and III are to be set using the wage calculations outlined in the Immigration and Nationality Act (INA), which rely on the amounts listed in Levels I and IV. **Phase 3, July 1, 2022 and after:** The new wage levels are to take effect without any adjustments, with Level I at the 35th percentile, Level II at the 53rd percentile, Level III at the 72nd percentile and Level IV at the 90th percentile."

One way of looking at the new rule is since the current Level 2 wage is set at the 34th percentile, and the new Level 1 is at the 35th percentile, the new rule eliminates the entire Level 1 wage level and pushes everything else upwards. "That is one of the ways the rule violates the statute," said Miner.[16]

DOL Makes Little Effort to Address Reliance Issues

The Department of Labor final rule fails to provide protection for almost any of the approximately 900,000 individuals waiting in the employment-based immigrant backlog, most of whom are in H-1B status, or their employers. The final rule states that the employers of individuals waiting in the employment-based backlog who have reached the six-year limit on their H-1B status would pay 85% of the new, higher salary rate for an extension from July 1, 2021, through June 30, 2022, 90% of the new rate for July 1, 2022, through June 30, 2023, 95% of the new rate from July 1, 2023, through June 30, 2024, and 100% of the new salary requirements beginning July 1, 2024.[17]

The DOL "transition" provides little to no help for those with reliance issues because the majority of those waiting in the employment-based backlog will still be waiting after the transition period ends and their employers will likely be forced to pay higher mandated salaries during the transition as well. Of the approximately 900,000 individuals Congressional Research Service states are currently waiting in the employment-based immigrant backlog, it is likely only a small percentage would gain their green cards over the next few years due to the per-country limit.

"Given current trends, the analysis projects that by FY2030, the EB1 backlog would grow from an estimated 119,732 individuals to an estimated 268,246 individuals; the EB2 backlog would grow from 627,448 to 1,471,360 individuals; and the EB3 backlog, from 168,317 to 456,190 individuals," according to the Congressional Research Service. "The total backlog for all three categories would increase from an estimated 915,497 individuals currently to an estimated 2,195,795 individuals by FY2030."[18]

The transition does not apply to anyone who is waiting in the employment-based backlog and has not reached 6 years in H-1B status. If such individuals require an extension earlier than 6 years, the transition rules will not apply to them.

Moreover, given how much the final rule will increase the required minimum salaries, it is likely even during the first year of the transition an employer would be forced to pay a higher salary for an H-1B visa holder. An example: If an individual earns $80,000 a year under the current system and the DOL final rule compels an employer to pay a new

[16] Anderson, "DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants," *Forbes.*
[17] Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3673.
[18] William A. Kandel, *The Employment-Based Immigration Backlog*, Congressional Research Service, R46291, March 26, 2020.

salary that is 25% higher, $80,000 x 125% x 85% would mandate a salary of $85,000 the first year of the transition, and even higher in later years.[19]

Now-Rescinded Trump Executive Order Cited as Authority for DOL Rule

In the final rule, the Trump administration's "Buy American and Hire American" executive order is cited as a primary authority for issuing the rule. It is cited in the "Need for Regulation" and the "Objectives of and Legal Basis for the Final Rule" and also as the justification for the "Amendments to the Computation of Prevailing Wage Levels Created by the Final Rule." For the justification, the rule states, **"**In light of the foregoing, this final rule amends the Department's regulations . . . These amendments are in accordance with the President's Executive Order (E.O.) 13788, "Buy American and Hire American."[20]

However, on January 25, 2021, President Biden revoked Trump's "Buy American and Hire American" executive order. In other words, the authority cited for the DOL final rule by the Trump Department of Labor no longer exists.

In contrast, the executive order on "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans," issued by President Biden on February 2, 2021, is a pro-immigration document that contradicts the DOL's final wage rule and its objective to restrict immigration to the United States.[21] "New Americans and their children fuel our economy, working in every industry, including healthcare, construction, caregiving, manufacturing, service, and agriculture," according to the February 2, 2021, executive order. "They open and successfully run businesses at high rates, creating jobs for millions, and they contribute to our arts, culture, and

[19] See NFAP estimates on impact of salaries under the DOL final year in this report.
[20] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3658. "1. Need for Regulation: The Department has determined that this rulemaking is needed to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers, eliminate economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States, and further the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The "Hire American" directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs Federal agencies, including the Department, to propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers." And "1. Objectives of and Legal Basis for the Final Rule: The Department has determined that new rulemaking is needed to better protect the wages and job opportunities of U.S. workers, minimize incentives to hire foreign workers over U.S. workers on a permanent or temporary basis in the United States under the H-1B, H-1B1, and E-3 visa programs and the PERM program, and further the goals of Executive Order 13788, Buy American and Hire American. Accordingly, this final rule revises the computation of wage levels under the Department's four-tiered wage structure based on the OES wage survey administered by the BLS to ensure that wages paid to immigrant and nonimmigrant workers are commensurate with the wages of U.S. workers with comparable levels of education, experience, and levels of supervision in the occupation and area of employment."
[21] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-restoring-faith-in-our-legal-immigration-systems-and-strengthening-integration-and-inclusion-efforts-for-new-americans/.

government, providing new traditions, customs, and viewpoints. They are essential workers helping to keep our economy afloat and providing important services to Americans during a global pandemic. They have helped the United States lead the world in science, technology, and innovation."[22]

"Consistent with our character as a Nation of opportunity and of welcome, it is essential to ensure that our laws and policies encourage full participation by immigrants, including refugees, in our civic life; that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them. . . . Our Nation is enriched socially and economically by the presence of immigrants, and we celebrate with them as they take the important step of becoming United States citizens."[23]

The executive order asks the Secretary of State, the Attorney General and the Secretary of Homeland Security to "review existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that may be inconsistent with the policy set forth in section 1 of this order." They should "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law; and identify any agency actions that fail to promote access to the legal immigration system . . . and recommend steps, as appropriate and consistent with applicable law, to revise or rescind those agency actions."[24]

It would be difficult to find a recent regulation as restrictive in intent and application as one that compels an employer to pay a foreign-born individual far more than the market wage paid to U.S. workers. The objective of the DOL final rule contradicts the intent of Biden's executive order asking to "identify barriers that impede access to immigration benefits."

Salaries In Final Rule Based on DHS Computer Memo Withdrawn After Court Decision

To justify a significant departure in how DOL sets minimum salary levels for H-1B visa holders and employment-based immigrants, the final rule cites a controversial computer programmer memo that the Biden administration withdrew following a loss in the 9th Circuit on the definition of a specialty occupation. In short, the DOL final rule was based on an executive order (see above) and a policy memo that were both withdrawn. The Biden administration and the Department of Labor should no longer consider either one.

[22] Ibid.
[23] Ibid.
[24] Ibid.

The DOL final rule justified its decision to base salaries on master's degrees by citing the memo on computer programmers that USCIS rescinded on February 3, 2021.[25]

On February 3, 2021, USCIS issued a statement announcing its rescission of the 2017 Policy Memorandum PM-602-0142. "On December 16, 2020, the U.S. Court of Appeals for the 9th Circuit issued a decision in *Innova Solutions v. Baran,* No. 19-16849 (9th Cir. 2020) where the court overturned USCIS' denial of an H-1B nonimmigrant visa petition as arbitrary and capricious," according to a USCIS statement. "The court's opinion noted that while USCIS did not explicitly rely on PM-602-0142 "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions'" in the denial, the denial followed its logic. In order to ensure consistent adjudications across the H-1B program, USCIS is rescinding PM-602-0142."[26]

In other words, in its final rule published on January 14, 2021, DOL used as a justification for its wage rates a controversial DHS interpretation of an H-1B specialty occupation *after* a U.S. Court of Appeals for the 9th Circuit rejected that interpretation in a decision on December 16, 2020.

Judges had also rejected the incorrect DHS interpretation of an H-1B specialty occupation multiple times in 2020.[27]

[25] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3627. According to the final rule: "Other provisions in the INA [Immigration and Nationality Act] relating to the education and experience requirements of those programs—and in particular the statutory definition of 'specialty occupation'—therefore serve as critical guides for how wage levels based on experience, education, and level of supervision should be formulated . . . The OOH's [Occupational Outlook Handbook] entry for Computer Programmers describes the educational requirements for the occupation as follows: 'Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree.'' In other words, while common, a bachelor's degree-level education, or its equivalent, is not a prerequisite for working in the occupation. USCIS and at least one court have reasoned from this that the mere fact that an individual is working as a Computer Programmer does not establish that the individual is working in a 'specialty occupation.' Because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the OES survey are not similarly employed to H–1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements"

[26] https://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf.

[27] Stuart Anderson, "The Story Of How Trump Officials Tried To End H-1B Visas," *Forbes,* February 1, 2021. "In *India House v. Kevin McAleenan* (March 26, 2020), U.S. District Judge Mary S. McElroy ruled that the USCIS Administrative Appeals Office (AAO) decision to uphold a denial of an H-1B petition for a restaurant manager with a B.S. in Hospitality Management was 'arbitrary and capricious.'" On March 31, 2020, in *Taylor Made Software v. Kenneth T. Cuccinelli*, U.S. District Judge Rudolph Contreras ruled USCIS was wrong to declare that since "many computer systems analysts have liberal arts degrees and gained experience elsewhere . . . the proffered position cannot be" a specialty occupation. Contreras cited the March 6, 2020, decision in *3Q Digital, Inc. v. USCIS*:"[The regulation] does not say that a degree must always be required, yet the agency appears to have substituted the word 'always' for the word 'normally.' This is a misinterpretation and misapplication of the law."

DOL FINAL RULE MODELED ON BILL REJECTED BY CONGRESS

The Department of Labor final rule is also based on a significant provision in a bill, S. 2266, sponsored by Senator Charles Grassley (R-IA), that failed to pass Congress. The wage provision was contained in the first section of "The H-1B and L-1 Visa Reform Act of 2015," which amends the statute for H-1B visas by requiring an employer to pay "the highest of…"(I) the locally determined prevailing wage level for the occupational classification in the area of employment; (II) the median wage for all workers in the occupational classification in the area of employment; and (III) the *median wage for skill level 2 in the occupational classification found in the most recent Occupational Employment Statistics survey*."[28]

As in the DOL final rule, S. 2266 eliminated Level 1 and effectively made it Level 2. The current Level 2 wage is set at the 34th percentile, and the new Level 1 is at the 35th percentile. That means the final rule eliminates the entire Level 1 wage level and pushes everything else higher. In both the DOL final rule and S. 2266, this was done to force employers to pay far higher wages as a way to discourage them from hiring foreign nationals. (The bill contained other provisions aimed at restricting business immigration.)

Grassley introduced the bill on November 5, 2015, and it was rejected by Congress in that it was referred to the Senate Judiciary Committee and never moved. Key Grassley staff moved into the Trump administration in immigration policy positions. Former staff members and others sought to enact the wage provision through regulation after being unable to achieve their objective through legislation. "After Trump's election, the administration filled key immigration policy positions with people who had worked for Sessions, Grassley, anti-immigration organizations and others," according to a history of the Trump administration's policies on high-skilled immigration.[29]

[28] https://www.congress.gov/bill/114th-congress/senate-bill/2266/. Emphasis added.
[29] Stuart Anderson, "The Story Of How Trump Officials Tried To End H-1B Visas."

NATIONAL SCIENCE FOUNDATION DATA SHOW MOST IN COMPUTER OCCUPATIONS HAVE ONLY A BACHELOR'S DEGREE

The Department of Labor claimed in the final rule that it used National Science Foundation (NSF) survey data as a primary authority for setting wages at the master's degree level.[30] However, an analysis of NSF data shows 66% of individuals in computer occupations had a bachelor's degree as their highest degree.[31] Even this data understates the percentage of computer professionals with less than a master's degree, since the National Science Foundation's 2017 National Survey of College Graduates excludes many people with less than a bachelor's degree.

In 12 of the 14 computer occupations, 53% or more of individuals in the NSF survey had a bachelor's degree as their highest degree. That included 82% of web developers, 80% of information security analysts, 78% of network and computer administrators and 72% of computer network architects.

The Department of Labor asserted it used National Science Foundation data but displayed no transparency to the public regarding what data and how it was used. Moreover, DOL did not explain how a master's degree is the default for entry level positions using the NSF survey data when the National Science Foundation's 2017 National Survey of College Graduates shows 66% of individuals in computer occupations had a bachelor's degree as their highest degree.

[30] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States." On page 3615, it states, "Having determined how it would analyze the question of how to set prevailing wage levels, the Department proceeded to review data from various, credible government sources, specifically the surveys from the National Science Foundation (NSF) and the Current Population Survey (CPS), about the wages paid to master's degree holders with limited work experience employed in occupations that account for the vast majority of workers covered by the prevailing wage levels. Based on its analysis of this data, the Department concluded in the IFR that the range within the OES distribution where workers similarly employed and with levels of education and experience comparable to entry-level H–1B and PERM workers fall is between the 32nd and 49th percentiles of the distribution." On page 3634, the final rule states, "Using the NSF surveys, the Department calculated the average wage of individuals who recently graduated from STEM master's degree programs and matched the average wage against the corresponding point on the OES distribution."

[31] National Foundation for American Policy tabulation of the National Science Foundation 2017 National Survey of College Graduates.

Table 1
Percent of Individuals in Computer Occupations with Bachelor's Degree as Highest Degree

OCCUPATION	Percent with Bachelor's Degree as Highest Degree
Computer support specialists	83.5%
Web developers	81.6%
Information security analysts	80.2%
Network and computer systems administrators	78.4%
Other computer information science occupations	73.6%
Database administrators	72.9%
Computer network architect	72.0%
Computer programmers (business, scientific, process control)	69.5%
Computer system analysts	68.4%
Software developers - applications and systems software	61.2%
Computer engineers - software	60.0%
Computer engineer - hardware	54.3%
Computer and information systems managers	53.2%
Computer & information scientists, research	34.9%
Postsecondary teachers -computer science	13.8%
ALL COMPUTER OCCUPATIONS	**65.9%**

Source: National Foundation for American Policy tabulation of the National Science Foundation 2017 National Survey of College Graduates.

SIGNIFICANT LACK OF TRANSPARENCY FROM DOL ON IMPACT OF FINAL RULE

Another area that lacks transparency is the Department of Labor provided the public with no information on the new minimum salaries for H-1B visa holders and employment-based immigrants in specific occupations and geographic areas once the final rule takes effect. This is just one example of a lack of transparency in the final rule. The Department of Labor stated in its final rule that the revised version of the rule would have a less extreme impact for employers than the interim final rule, and that changes would "address commenters' concerns that wages under the IFR were inappropriately high."[32] Setting "inappropriately high" wages in an interim final rule and publishing a final rule that contains wages levels that are merely less "inappropriately high"—and also do not reflect market wages—is damaging economically and questionable as a way to conduct public policy. In short, not being as harmful as an earlier version of a rule found to be unlawful is not a reasonable standard for policymaking. DOL

[32] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3626. On page 3615, the final rule states: "These changes, too, address commenters' concerns that wages under the IFR were inappropriately high."

ignored comments from NFAP in the interim final rule on the fundamental problems with the agency's approach to calculating wages under the rule.

The Department of Labor did not issue wage tables to accompany the final rule. DOL only specified salary percentiles (35th, 53rd, 72nd and 90th percentiles) that would correspond to minimum salaries for Level 1 to Level 4.

To provide the public with information on the impact of the final rule, the National Foundation for American Policy estimated the new required minimum salary levels based on available data. By using three sources of data, NFAP was able to make close estimates of the above-mentioned percentiles for 418,983 occupation/location combinations. The sources are the DOL Online Wage Library (OWL) file released in June 2020, which reports on the 17th, 34th, 50th, and 67th percentiles, OWL file released in October 2020 (reporting on 45th, 67th, 78th, and 95th percentiles), and the public use Occupational Employment Statistics (OES) file released in March 2020 (reporting on the 10th, 25th, 50th, 75th, and 90th percentiles). Despite different release dates and data suppression rules, all three data sets report from the same May 2019 Bureau of Labor Statistics Occupational Employment Statistics survey.

Large Increases in Required Salaries Across Levels and Occupations

The National Foundation for American Policy found employers will be required to pay significantly higher salaries under the Department of Labor's final rule. The analysis compares salaries under the current DOL wage system to the new salaries required under the DOL final rule. NFAP performed a similar analysis in an October 2020 report.[33]

Table 2
Increases in Required Minimum Salary by Level Under DOL Final Rule

LEVEL	Average Increase in Required Minimum Salary Between Current DOL Wage System and DOL Final Rule
Level 1	+24%
Level 2	+23%
Level 3	+27%
Level 4	+25%

Source: National Foundation for American Policy; Department of Labor. Percentages reflect the average increase in required minimum salary between the Department of Labor's current wage system and after the new wage system in final rule. Estimates for the final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

[33] *An Analysis of the DOL H-1B Wage Rule*, NFAP Policy Brief, National Foundation for American Policy, October 2020.

For all occupations and geographic locations, the new minimum salary that employers will be required to pay when compared with the current system is, on average, 24% higher for Level 1 positions, 23% higher for Level 2, 27% higher for Level 3 and 25% higher for Level 4. (See Table 2.)

NFAP found the DOL final rule significantly inflates the required minimum salary employers must pay to H-1B visa holders and employment-based immigrants across a range of occupations. We chose 13 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.[34]

Table 3
Average Increase in Required Minimum Salary Under the DOL Final Rule By Occupation

OCCUPATION	Level 1	Level 2	Level 3	Level 4
Biochemists and Biophysicists	+34.3%	+32.6%	+40.3%	+31.4%
Chemical Engineers	+24.5%	+23.5%	+27.1%	+25.1%
Computer Hardware Engineers	+26.8%	+25.0%	+27.3%	+25.4%
Computer and Information Research Scientists	+25.8%	+24.6%	+27.9%	+21.0%
Computer Network Architects	+26.5%	+24.5%	+26.8%	+25.6%
Computer Programmers	+27.7%	+25.5%	+28.3%	+26.1%
Computer Science Teachers	+41.0%	+35.2%	+39.0%	+31.4%
Computer Systems Analysts	+25.6%	+24.6%	+28.4%	+26.2%
Database Administrators	+29.2%	+26.3%	+25.0%	+27.3%
Electrical Engineers	+23.5%	+22.5%	+25.0%	+25.2%
Mechanical Engineers	+23.7%	+23.2%	+27.0%	+25.4%
Petroleum Engineers	+27.2%	+25.4%	+29.0%	+29.0%
Software Developers	+29.2%	+26.9%	+29.7%	+26.5%

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 under the DOL final rule. All geographic areas.

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 large enough that complying with the rule would be difficult for any company. If

[34] 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.

companies were forced to pay foreign nationals wages well above the market wage, they may feel compelled to pay similar U.S. employees vastly inflated salaries but likely could not afford such across-the-board salary increases, which would encourage less hiring in the U.S. and more offshoring. The salaries of H-1B employees are known to others since there is a legal requirement to post the wages of H-1B visa holders at a worksite.

Under the final rule, DOL mandates an employer pay a computer hardware engineer a 26.8% higher salary at Level 1 than under the existing DOL system. The average increase is similar at the other three levels.

For software developers, the average increase in the required minimum salary is 29.2% at Level 1, 26.9% at Level 2, 29.7% at Level 3 and 26.5% at Level 4.[35]

For electrical engineers, the average increase in the required minimum salary is 23.5% at Level 1, 22.5% at Level 2, 25% at Level 3 and 25.2% at Level 4.

The DOL final wage rule will make it much more difficult to employ individuals to educate more U.S. students in computer science. The average increase in the required minimum salary for computer science teachers, which includes primarily professors at universities and community colleges, would be 41% at Level 1. That could make it difficult or impossible for many educational institutions to employ an H-1B visa holder or employment-based immigrant to teach computer science to U.S. students.

PRIVATE SURVEYS DEMONSTRATE NEW DOL WAGES NOT MARKET WAGES

The National Foundation for American Policy obtained private wage survey data for the top 10 occupations for certified labor condition applications in cities for the top 10 states and compared the current DOL wage system to the salaries under the final rule. Private wage surveys are more likely to reflect market wages and are accepted by the Department of Labor for immigration purposes if they meet agency standards.

The current DOL wage system is much more accurate in reflecting market wages than the DOL final rule would be if implemented, according to a National Foundation for American Policy analysis.

In 53% of the city-occupation combinations, the salaries for Level 1 under the current system were within 10% of the salaries in the private wage survey (Willis Towers Watson), compared to only 18% under the DOL final rule. In 35% of the city-occupation combinations under the current system, the salary was within 5% of the salary listed for the private wage survey—7 times more accurate using this measurement than the city-occupation combinations

[35] Estimates or calculations were not possible for some occupations at Level 4 due to limitations in available DOL data.

under the DOL final rule, according to the NFAP analysis. In 61% of the city-occupation combinations, the salaries under the current DOL system were either within 10% of the private wage survey or the salaries were higher.

In 39% of the city-occupation combinations, the salary under the existing DOL system was at least 10% lower than the private wage survey salary. However, this warrants an important caveat: The law requires an employer to pay the higher of the prevailing wage or actual wage paid to other similarly employed U.S. workers when sponsoring an H-1B visa holders. That means even if a DOL wage certification is lower, the employer would need to pay a higher wage if the "actual wage" is higher. Market competition may also lead to higher salaries for foreign nationals.

The problem for employers is if the required minimum wage far exceeds the market wage, an employer may be unable to afford to hire the individual in the United States.

Table 4
Analysis of Top LCA Occupations and Cities:
Comparing Level 1 Salaries in DOL Final Rule and Current DOL Wage System to Private Wage Survey

	DOL Salaries Within 5% of Private Wage Survey	DOL Salaries Within 10% of Private Wage Survey	DOL Salaries Higher Than Private Wage Survey	DOL Salaries At Least 10% Lower Than Private Wage Survey
Salaries Under DOL Final Rule vs. Private Wage Survey	5%	18%	100%	0%
Salaries Under Existing DOL Wage System vs. Private Wage Survey	35%	53%	29%	39%

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson. Estimates for the DOL final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

In 100% of the city-occupation combinations available, the salary that would be required under the DOL final rule was higher than in the private wage survey.

Based on the NFAP analysis, it is clear that 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 final rule generally do not reflect market wages, particularly when compared to the existing DOL wage system. NFAP's

October 2020 report also found that the new wages required by the interim final rule were much less reflective of market wages than the current DOL wage system.

Private wage surveys are used for a variety of purposes. "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 employers set their company-wide wage scales.[36]

Below are examples of common occupations in major cities that illustrate the differences between the existing DOL wage system and the DOL final rule compared to private wage surveys.

In the Atlanta metro area, software developers (applications) earn $65,169 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 4% of the salary in that location and occupation under the current DOL wage system. However, the DOL final rule would raise the minimum required salary for software developers (applications) at Level 1 in Atlanta to $86,645, more than $21,400 or 33% higher than the private wage survey.

Table 5
Software Developers-Applications in Atlanta: Comparing Level 1 Salaries in DOL Final Rule and Current DOL Wage System to Private Wage Survey

Occupation and Location	Private Wage Survey	Current DOL Wage System	DOL Final Rule (Estimated)
Software Developers-Applications (Atlanta)	$65,169	$68,203	$86.645

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson. Estimates for the DOL final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

In the New York-Newark metro area, computer systems analysts earn $69,050 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 2% of the salary in that location and occupation under the current DOL wage system. The DOL final rule would raise the minimum required salary for computer systems analysts at Level 1 in New York-Newark to $92,517, about $23,400 or 34% higher than the private wage survey.

[36] Kevin Miner.

Table 6
Computer Systems Analysts in New York-Newark: Comparing Level 1 Salaries in DOL Final Rule and Current DOL Wage System to Private Wage Survey

Occupation and Location	Private Wage Survey	Current DOL Wage System	DOL Final Rule (Estimated)
Computer Systems Analysts (New York-Newark)	$69,050	$70,470	$92,517

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson. Estimates for the DOL final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

In the Seattle metro area, operations research analysts earn $70,484 at Level 1 salaries, according to a private wage survey (Willis Towers Watson), which is within 3% of the salary in that location and occupation under the current DOL wage system. The DOL final rule would raise the minimum required salary for computer systems analysts at Level 1 in Seattle to $88,555, about $18,000 or 26% higher than the private wage survey.

Table 7
Operations Research Analysts in Seattle: Comparing Level 1 Salaries in DOL Final Rule and Current DOL Wage System to Private Wage Survey

Occupation and Location	Private Wage Survey	Current DOL Wage System	DOL Final Rule (Estimated)
Operations Research Analysts (Seattle)	$70,484	$72,883	$88,555

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson. Estimates for the DOL final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

The metropolitan areas examined were in the 10 top states for the filing of labor condition applications (LCA) electronically through the Department of labor and the top 10 occupational categories.[37] That provided approximately 150 data points to compare the private wage survey to the current DOL wage system and the final rule.

The metropolitan areas examined were Atlanta, Boston, Charlotte, Chicago, Dallas-Fort Worth, Los Angeles, New York-Newark, Philadelphia, San Jose and Seattle.

[37] NFAP used FY 2019 for the top 10 occupational categories due to DOL listing one of the categories in the top 10 in FY 2020 whose SOC code was not available under the existing DOL wage system.

The top 10 occupations were accountants and auditors, computer occupations (all other), computer programmers, computer systems analysts, financial analysts, management analysts, mechanical engineers, operations research analysts, software developers (applications) and software developers (systems).

The Department of Labor made what appears to be a false statement in its final rule by claiming no matter how inaccurate or inflated the new salary requirements might be under the DOL final rule, employers would still be able to obtain private wage surveys. "In the weeks since the publication of the IFR [interim final rule], the Department has received more than 6,900 prevailing wage requests supported by private wage surveys in the PERM program, which is a 335% increase over the same timeframe in 2019," according to DOL. "Again, this increase confirms that such sources of wage data are readily available for use in seeking a PWD [prevailing wage determination] not based on the OES survey if employers believe in anomalous cases that the OES survey does not produce an accurate wage."[38]

While DOL assured employers in the final rule they would be able to use private wage surveys if the DOL final rule provides salaries that are too high (i.e., "such sources of wage data are readily available"), NFAP found that in about 25% of the top ten city-occupations examined, a private survey salary was not available from Willis Towers Watson. The availability of private wage surveys for less common occupations and in smaller metropolitan areas is even scarcer, according to attorneys. That is one reason DOL indicates 92% of employers have used the Department of Labor system to find a prevailing wage determination for H-1B visa holders, rather than private wage surveys.[39] Also, private wage surveys can be expensive, and startups and smaller companies may be unlikely to have access to them.

Willis Towers Watson is a publicly traded advisory company with "45,000 employees serving more than 140 countries and markets."[40] Employers, law firms and others can purchase private wage surveys, which mostly cover larger employment markets.

[38] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3631.
[39] In the interim final rule, on p. 63905, it states, "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."
[40] https://www.willistowerswatson.com/en-US/About-Us/overview.

CONCLUSION

According to the Department of Labor, "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."[41] The evidence indicates the DOL final rule has not implemented a "prevailing wage" as DOL defines it, but a new wage standard that goes beyond the statute and is designed to price out of the U.S. labor market many H-1B visa holders and employment-based immigrants.

In its final rule, the Department of Labor argued that the final version of the rule would have a less extreme impact for employers than the interim final rule, asserting the changes would "address commenters' concerns that wages under the IFR [interim final rule] were inappropriately high." Setting "inappropriately high" wages in an interim final rule and publishing a final rule that contains wages levels that are only somewhat less "inappropriately high"—and also do not reflect market wages—is not sound public policy.

[41] https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage.

APPENDIX

Table 8
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Atlanta-Sandy Springs-Roswell, GA (12060)				
SOC Code (Standard Occupational Classification)	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$57,702	$48,610	$66,655
15-1131	**Computer Programmers**	$64,857	$52,520	$71,926
15-1121	**Computer Systems Analysts**	$62,503	$63,773	$78,953
13-2051	**Financial Analysts**	$64,696	$51,792	$71,004
17-2141	**Mechanical Engineers**	$71,454	$63,565	$75,285
15-2031	**Operations Research Analysts**	$54,745	$45,947	$58,406
15-1132	**Software Developers-Applications**	$65,169	$68,203	$86,645
15-1133	**Software Developers-Systems**	$77,095	$68,203	$86,645
Boston-Cambridge-Nashua, MA-NH (71650)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$59,527	$56,534	$71,138
15-1131	**Computer Programmers**	$72,256	$58,656	$79,430
15-1121	**Computer Systems Analysts**	$71,635	$68,203	$84,692
13-2051	**Financial Analysts**	$59,756	$62,275	$83,669
17-2141	**Mechanical Engineers**	$77,440	$71,053	$87,445
15-2031	**Operations Research Analysts**	$63,241	$57,762	$74,328
15-1132	**Software Developers-Applications**	$75,270	$76,523	$97,743
15-1133	**Software Developers-Systems**	$81,734	$76,523	$97,743

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Charlotte-Concord-Gastonia, NC-SC (16740)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$57,592	$52,416	$69,073
15-1199	**Computer Occupations, All Other**	$63,319	$53,581	$74,494
15-1131	**Computer Programmers**	$64,535	$62,608	$80,076
13-2051	**Financial Analysts**	$60,135	$57,824	$77,119
15-2031	**Operations Research Analysts**	$50,242	$59,654	$77,501
Chicago-Naperville-Elgin, IL-IN-WI (16980)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
15-1199	**Computer Occupations, All Other**	$63,101	$55,931	$77,181
15-1131	**Computer Programmers**	$70,774	$50,045	$74,857
15-1121	**Computer Systems Analysts**	$67,291	$57,075	$74,819
13-2051	**Financial Analysts**	$58,453	$59,925	$76,221
17-2141	**Mechanical Engineers**	$73,124	$61,360	$76,907
15-2031	**Operations Research Analysts**	$63,582	$62,941	$80,876
15-1132	**Software Developers-Applications**	$71,099	$71,074	$88,266
15-1133	**Software Developers-Systems**	$74,028	$71,074	$88,266

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Dallas-Fort Worth-Arlington, TX (19100)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$58,422	$53,747	$68,593
15-1199	**Computer Occupations, All Other**	$62,283	$54,538	$75,718
15-1131	**Computer Programmers**	$68,382	$58,552	$78,359
15-1121	**Computer Systems Analysts**	$63,765	$63,710	$81,579
13-2051	**Financial Analysts**	$60,200	$53,893	$72,044
17-2141	**Mechanical Engineers**	$70,494	$67,350	$86,810
15-2031	**Operations Research Analysts**	$65,341	$53,144	$70,760
15-1132	**Software Developers-Applications**	$67,820	$76,752	$94,619
15-1133	**Software Developers-Systems**	$69,864	$76,752	$94,619

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Los Angeles-Long Beach-Anaheim, CA (31080)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$57,271	$48,173	$65,458
15-1199	**Computer Occupations, All Other**	$66,582	$48,443	$67,727
15-1131	**Computer Programmers**	$75,045	$65,499	$81,803
15-1121	**Computer Systems Analysts**	$72,581	$68,952	$87,681
13-2051	**Financial Analysts**	$67,073	$53,144	$73,727
17-2141	**Mechanical Engineers**	$76,577	$68,765	$87,715
15-2031	**Operations Research Analysts**	$67,890	$61,880	$80,661
15-1132	**Software Developers-Applications**	$79,583	$78,125	$101,158
15-1133	**Software Developers-Systems**	$77,438	$78,125	$101,158

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

New York-Newark-Jersey City, NY-NJ-PA (35620)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$60,921	$62,067	$82,637
15-1131	**Computer Programmers**	$72,273	$57,221	$78,635
15-1121	**Computer Systems Analysts**	$69,050	$70,470	$92,517
13-2051	**Financial Analysts**	$64,835	$72,363	n/a
17-2141	**Mechanical Engineers**	$71,549	$67,080	$83,714
15-2031	**Operations Research Analysts**	$69,804	$62,920	$88,213
15-1132	**Software Developers-Applications**	$81,698	$78,811	$101,956
15-1133	**Software Developers-Systems**	$77,442	$78,811	$101,956

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Philadelphia-Camden-Wilmington, PA-NJ-DE (37980)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$67,657	$54,392	$69,833
15-1199	**Computer Occupations, All Other**	$62,304	$53,934	$75,249
15-1131	**Computer Programmers**	$66,401	$61,298	$79,329
15-1121	**Computer Systems Analysts**	$61,766	$72,072	$88,791
13-2051	**Financial Analysts**	$59,467	$57,117	$76,735
17-2141	**Mechanical Engineers**	$70,338	$62,317	$78,151
15-2031	**Operations Research Analysts**	$62,933	$58,635	$75,776
15-1132	**Software Developers-Applications**	$68,836	$73,715	$90,149
San Jose-Sunnyvale-Santa Clara, CA (41940)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
15-1131	**Computer Programmers**	$87,446	$78,458	$97,647
15-1121	**Computer Systems Analysts**	$81,646	$80,163	$103,026
17-2141	**Mechanical Engineers**	$81,117	$81,786	$104,755
15-1133	**Software Developers-Systems**	$91,874	$95,430	n/a

Table 8 (cont.)
Level 1 Salaries in DOL Final Rule, Current DOL Wage System and Private Wage Survey

Seattle-Tacoma-Bellevue, WA (42660)				
SOC Code	**Occupation**	**Private Wage Survey**	**Current DOL Wage System**	**DOL Final Rule (Estimated)**
13-2011	**Accountants and Auditors**	$61,435	$54,683	$70,809
15-1131	**Computer Programmers**	$72,990	$79,955	n/a
15-1121	**Computer Systems Analysts**	$57,248	$75,400	$91,427
13-2051	**Financial Analysts**	$65,970	$59,530	$80,292
17-2141	**Mechanical Engineers**	$71,405	$66,331	$86,004
15-2031	**Operations Research Analysts**	$70,484	$72,883	$88,555
15-1132	**Software Developers-Applications**	$81,678	$92,102	$115,544
15-1133	**Software Developers-Systems**	$85,443	$92,102	$115,544

Source: National Foundation for American Policy, Department of Labor, Willis Towers Watson. Estimates for the DOL final rule involved NFAP extrapolation of percentiles using the DOL Online Wage Library (OWL) files released in June 2020 and October 2020, as well as the public use May 2019 Occupational Employment Statistics file released in March 2020.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia, focusing on trade, immigration and related issues. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: **@NFAPResearch**