May 23, 2021

Brian Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW, Room N–5311
Washington, DC 20210

Re: Employment and Training
Administration 20 CFR Parts 655 and 656 [Docket No. ETA–2021–0003]
RIN 1205–AC00 Request for Information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States

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 to provide information to the Department's soliciting of "public input on the available sources of data and methodologies that can be used in computing different levels of wages based on the OES wage survey, commensurate with experience, education, and level of supervision for a specific occupation and geographic area."

As part of the comment, I have attached two studies produced by the National Foundation for American Policy that would help inform revisions to the sources of data and methodologies.

Parts of both studies are excerpted here.

A June 2017 NFAP analysis by Amy Marmer Nice (*Fixing Prevailing Wage Calculations for High-Skilled Immigrants*) provides a balanced critique of the shortcomings of the current DOL system for calculating prevailing wage. Nice was an Attorney Advisor in the Office of the General Counsel at DHS headquarters from September 2015 to December 2016.

The second analysis points out the current DOL system, despite its shortcomings, is preferable to the Trump administration's regulation that was designed not to address problems, an objective observer would conclude, but an attempt to price out of the U.S. labor market H-1B visa holders and applicants for employment-based immigrant visas.

Excerpt from *Fixing Prevailing Wage Calculations for High-Skilled Immigrants* by Amy Marmer Nice (June 2017). (Note: Some of the references to actions "Congress" should take may be applicable to actions DOL could take):

EXECUTIVE SUMMARY

The system for determining the prevailing wage for H-1B and employment-based green card requests is deeply flawed, based on data not meant for this purpose and using a formula devised by Congress. The system provides wage determinations lacking a direct data connection to the education, experience, and level of supervision required to perform the job underlying the H-1B or green card request, despite the fact that Congress intended that prevailing wages be commensurate with such characteristics. While compensation surveys conducted in the private sector that are used by many companies to set corporate salaries reflect the education and experience required to perform a job, government prevailing wage data, quite remarkably, do not. However, rather than correcting the flaws in the current system, some members of Congress have proposed making the process even less accurate by, in effect, inflating the salaries required to be paid to high-skilled foreign nationals. Such actions would either price worthy professionals out of the labor market, particularly international students, or create inequities in the workplace by compelling U.S. employers to pay higher salaries to foreign nationals than to comparable U.S. workers in the same company or organization.

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

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

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

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

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

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

THE FUNDAMENTAL PROBLEM WITH PREVAILING WAGE DETERMINATIONS

The fundamental problem with our current system for determining the prevailing wage is the process requires statistical precision that simply is not available. At present, there is no government survey that collects data within occupations with detailed wage levels, much less a survey that seeks to assemble data to calculate wage levels based on experience, education or level of supervision. As the Bureau of Labor Statistics itself has explained, "no BLS program publishes occupational wage data by level."[1] Even more troublesome, prevailing wage determinations for immigration applications are based on data not meant at all for this purpose.

The prevailing wage determinations are based on data collected by the Department of Labor's Bureau of Labor Statistics (BLS) in (1) the Occupational Employment Statistics (OES) survey and (2) the National Compensation Survey (NCS). These data generate two wage averages. Then, the Office of Foreign Labor Certification (FLC) uses a formula created by Congress in 2004 to create four wage levels.[2] (See Appendix: Levels 1, 2, 3 and 4, with Level 1 for "beginning level" workers performing routine or moderately complex assignments and Level 4 for "fully competent" workers that use advanced skills.) A look at the statute demonstrates the formula mandated by Congress is contrived: "Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level," according to the law.[3]

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

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

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[1] "The Relevance of Occupational Wage Leveling" (published BLS in April 2012 https://www.bls.gov/opub/mlr/cwc/the-relevance-of-occupational-wage-leveling.pdf), available on the BLS.gov website.
[2] See infra, in the text associated with footnotes 25-32.
[3] See section 212(p)(4) where the four-level calculation method is codified.

source of information assembled by BLS, but it, likewise, does not provide wage leveling data. The NCS canvasses about 18,000 establishments annually with the intent of providing reliable national indices, specifically on national compensation cost trends and national trends in employer-provided health care and retirement benefits.

KEY ISSUES WITH PREVAILING WAGE

There are three sets of issues surrounding how a current Prevailing Wage Determination is issued in our high-skilled immigration system: 1) the underlying data is based solely on very broad pay band information[4]; 2) there are intrinsic weaknesses in issuing prevailing wage determinations for specific positions offered by an individual employer based on generalized occupational employment statistics; and 3) education-, experience-, or supervision-based wage differentials are addressed poorly.

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

Ideally, prevailing wage data for the H-1B or PERM program would be narrowly tailored to H-1B and PERM-relevant occupations. However, the OES is a survey of wages of workers in nearly all occupations in every labor market area. The OES survey collects information for over 840 detailed occupations in 380 metropolitan areas and 170 non-metropolitan areas.[5] Because data for these over 174,000 combinations of detailed occupations and labor market areas is collected using one survey instrument, the survey uses *particularly wide pay bands* as the means to identify wage information.

It is crucial to note: Employers that respond to the OES survey do not provide data about individual employees. No employer is asked how it pays a particular employee. Instead, participating employers provide grouped data responses, categorizing employees into 12 broad pay bands.[6] Each establishment indicates how many employees in a detailed occupation are included in each of 12 wage bands, ranging from under $9.25 per hour to over $100 per hour. For example, if an establishment in Silicon Valley employs both entry-level software developers and administrative assistants, all of the entry-level software developers might be in Range H to I while none of the administrative assistants will likely be in these same

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[4] "*Pay bands*" is terminology used to lump together broader ranges of *pay* levels or pay grades. See, Jessica Miller-Merrell, "Pay Bands, Pay Scales, and Other HR Jargon You Don't Know But Should," PayScale, November 12, 2012.

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

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

ranges.[7] In the OES survey, the employer would report the number of software developers and administrative assistants utilizing the same 12 wage intervals. But if an accurate picture of software developer compensation or administrative assistant compensation was the goal then differentiated pay bands be used for these very different occupations. A survey of only H-1B or PERM occupations would likely be contained to a narrow scope of wage intervals. The wide wage intervals make the OES survey less precise and less likely to accurately identify the central tendency (average) in wages in any particular occupation and geographic area of employment.

Moreover, using pay bands at all, as opposed to collecting wage information for specific employees dilutes the accuracy of the wage rates calculated for particular geographies. In order to report estimates of average hourly wage rates for each detailed occupation in each geography, OES must supplement its survey with data from the NCS.[8] The OES uses NCS to convert reported information about groups of individuals in pay *ranges* to an average hourly *wage rate* computed to the nearest cent. The NCS, like OES, is a general survey that is not focused on particular occupations or geographic areas. By definition, the NCS will have a limited number of observations of individual hourly wage rates in the occupations key to the H-1B program and PERM sponsorship, and those limited observations are distributed nationally, providing very little insight into wages in a particular geographic area of employment.

2) Current System Relies on Data Not Precise Enough for Immigration Purposes

OES attempts to present average wage rates across 840 detailed occupations[9] in 380 metropolitan and 170 non-metropolitan areas. Not all of the resulting 174,000 average wage rates in the OES are reported with the same accuracy. The exactitude of the estimated average wage depends on the sample size (the number of establishments in the labor market area that employ workers in the occupation and participate in the survey). Despite the goal of the OES survey to be comprehensive, for many combinations of

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[7] Id. for salaries associated with Ranges A to L.

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

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

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

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

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

3) Current System Does Not Reflect Education, Experience and Supervision in Data

Attempting to integrate consideration of education, experience, and supervision levels into the prevailing wage determination, as required by Congress,[10] is problematic in the current system.

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

[10] See discussion infra, in the text associated with footnotes 24 to 29.

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

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

POLICY RECOMMENDATIONS

In order to craft an improved prevailing wage system, Congress should not:
(1) expect employers to pay foreign workers more favorable wages than their similarly situated U.S. worker counterparts;
(2) mandate wages that are dramatically above market rates;
(3) facilitate wage rates paid foreign workers that are less favorable than those paid similarly situated U.S. workers; (4) impose requirements on all U.S. employers that reflect unique market forces in a handful of locations such as Silicon Valley; or
(5) insert the federal government in the hiring processes of private sector employers that are engaging in the normal recruiting and selection of professionals in the U.S. labor market to fill jobs to be performed in the United States. To ignore these five concerns would result in direct and negative consequences to both the integrity and usability of our immigration system.

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

One is a compressed three-level, DOL data wage system for H-1B petitions was first introduced in the IDEA Act in 2011[11] and was included in the last comprehensive immigration reform bill, in 2013.[12] This approach would likely *reduce* the accuracy of wage determinations for immigration purposes, given that there would only be three levels instead of the current four levels to cover all education and experience cohorts in professional occupations, and all three wage levels would hover around the mean paid for the occupation as a whole. An April 2014 analysis by the National Foundation for American Policy concluded such a change in the law "would require skilled foreign nationals to be paid substantially more – sometimes $20,000 more per year – than U.S. professionals in similar positions."[13]

A second approach is to "prioritize" H-1B issuance by wage levels in those years when the category is oversubscribed beyond the numerical limit set by Congress. For example, the High-Skilled Integrity and Fairness Act introduced this year applies the compressed, three-level wage system and then prioritizes petitions starting with new level 3 and giving H-1B access to those petitions reflecting 200%, then 150% and then 100% of that level, repeating the tri-furcated approach for level 2 and then level 1 wages.[14] This approach presumes that jobs that require the most experience are more valuable to our national interest than entry- or mid-level jobs in small businesses or entry-level research and development jobs, among others, without regard to huge variations in salary scale and H-1B demand across various geographies.[15] Moreover, this approach ignores the importance of employers engaging in legitimate on-campus recruitment at U.S. universities to hire newly minted graduates, where some selected as the ideal candidate are foreign-born students. Such new hires would generally be entry level professionals earning level 1 wages, and such employers would be at a severe disadvantage in ever selecting a foreign-born student via on-campus recruiting. And, entrusting DHS's U.S. Citizenship and Immigration Services to conduct a nine-part lottery in years when the H-1B demand exceeds the numerical caps seems operationally complicated and not necessarily easily or reliably achieved.

Lastly, another problematic approach is to require all H-1B employers to pay the median or mean[16] wage for the occupation, regardless of the education or experience required for the job. This approach has been

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[11] H.R. 216 in the 112th Congress, section 401.
[12] S.744 in the 113th Congress, section 4211(a)(2).
[13] *Updated Analysis: The Impact of Immigration Legislation on Salaries and Competitiveness*, NFAP Policy Brief, National Foundation for American Policy, April 2014.
[14] H.R. 670 in the 115th Congress, section 6.
[15] If a manufacturer in the Midwest needs entry-level R&D engineers in its Midwest offices in order to compete in the Chinese market and regularly hires both Americans and H-1B professionals to fill these needs, why is this need less valuable than a Wall Street firm that hires a handful of highly experienced and highly compensated analysts as H-1B workers? If a highly-experienced software application developer with a doctorate and research in a specialized subject is needed in a rural area or any city that is not presently considered a leading innovation corridor, why is this need more valuable than an entry-level software application developer who receives significantly higher compensation in Silicon Valley? The H-1B prioritization proposed by H.R. 670 ignores these questions.
[16] While current level 3 wage is identified the occupational *mean*, and the median is sometimes higher *or* lower, a requirement to pay the occupational median roughly equates to requiring all employers hiring an H-1B worker to pay the current level 3 wage (this is the level 2 wage under a compressed, three-level approach).

proposed in the so-called "Durbin-Grassley" legislation.[17] The average wage for the occupation would indicate the arithmetic mean for all professionals in a given occupation, covering both jobs necessitating the use of the most experience and advanced education as well as those requiring only a Bachelor's degree and no employment experience. However, employers do not, and should not, pay the same wage to all new hires in an occupation disconnected from the education and experience required for the position, and do not, and should not, pay at least the occupational average wage to all of its professional staff in an occupation. Moreover, such a mandate would require employers to treat foreign-born workers more favorably than similarly situated Americans, an untenable result.

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

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

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

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

CONCLUSION: A SOLUTION

Determining the prevailing wage is not a straightforward process. In fact, the DOL's instructions to employers on assigning one of the four wage levels run more than 30 pages."[18]

In order to identify the prevailing wage for the PERM process, the employer first files an Application for Prevailing Wage Determination, Form ETA-9141 with the DOL National Prevailing Wage Center (NPWC). [19] In order to identify the prevailing wage for the H-1B process, the employer may file a Form ETA-9141 application and wait for an official determination from NPWC or the employer may select on its own what it believes is the applicable OES wage by looking at the publicly available Online Wage Library and DOL prevailing wage determination instructions.[20]

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

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

A good way to achieve increased accuracy of the wage rates calculated by the Office of Foreign Labor Certification for immigration purposes based on the OES survey is to combine the far-reaching data collection of the OES survey with certain data from private, independently published compensation surveys. While such authoritative independent surveys are not available for all occupations in all

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

[19] https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141.pdf.

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

localities, they are available for many high-skilled occupations for which H-1B petitions and PERM Labor Certification are filed. Congress could require BLS to utilize certain fields of data available from such surveys, and authorize the funds for the Bureau of Labor Statistics to purchase access to such data from the private sector organizations that conduct such surveys. BLS economists and statisticians could then layer this additional information over the OES data instead of using NCS data for this wage average calculation process. This should provide all parties involved with more accurate prevailing wage determinations that rely on real world conditions, rather than contrived formulas mandated by Congress.

The second study excerpted in this comment (the complete study is attached) is a February 2021 NFAP Policy Brief titled *An Analysis of the DOL Final Rule's Impact on H-1B Visa Holders and Employment-Based Immigrants*. The focus of the analysis is the problems with the Trump administration's final rule, published on January 14, 2021 on the prevailing wage for 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.[21]

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 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."[22]

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."[23]

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.[24] 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

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[21] *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.
[22] INA Section 214(i)(1).
[23] 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.
[24] https://www.uscis.gov/working-in-the-united-states/permanent-workers.

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.[25]

"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."[26]

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.[27]

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.[28]

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[25] National Foundation for American Policy tabulation of the National Science Foundation 2017 National Survey of College Graduates.
[26] Mark Regets.
[27] 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.
[28] 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.

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."[29] (Emphasis added.)

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.[30]

"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.[31]

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.)[32]

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

[29] Plaintiffs motion for a preliminary injunction, *ITServe Alliance v. Eugene Scalia, Secretary of Labor*.
[30] Report of Madeline Zavodny, Ph.D.
[31] Ibid.
[32] 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.

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.

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).[33]

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."[34]

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

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[33] 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.

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

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.[35]

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.[36]

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."[37]

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[35] 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."

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

[37] "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."

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.[38] "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 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."[39]

"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."[40]

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."[41]

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[38] 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/.
[39] Ibid.
[40] Ibid.
[41] Ibid.

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.

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.[42]

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."[43]

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.

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[42] "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"

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

Judges had also rejected the incorrect DHS interpretation of an H-1B specialty occupation multiple times in 2020.[44]

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.[45] However, an analysis of NSF data shows 66% of individuals in computer occupations had a bachelor's degree as their highest degree.[46] 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.

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[44] 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."

[45] "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."

[46] 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 Gradu

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

[47] "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."

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.[48]

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.

[48] *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.[49]

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 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

[49] 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.

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.[50]

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 under the DOL final rule, according to the NFAP analysis. In 61% of the

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

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.[51]

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.

[51] 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.[52] 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.

[52] 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."[53]

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.[54] 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."[55] Employers, law firms and others can purchase private wage surveys, which mostly cover larger employment markets.

[53] "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States," p. 3631.
[54] 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."
[55] 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."[56] 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.

Thank you for considering our comment to the solicitation for additional information.

Sincerely,

[Signature Redacted]

Stuart Anderson
Executive Director
National Foundation for American Policy

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