

THE IMPACT ON INTERNATIONAL STUDENTS OF ENDING THE H-1B LOTTERY

EXECUTIVE SUMMARY

A regulation published in the final weeks of the Trump administration will make it less likely that international students would receive H-1B petitions, according to a new analysis by the National Foundation for American Policy (NFAP). The new regulation would end the H-1B lottery and instead award H-1B petitions from highest to lowest salary level. By making it more difficult to work after graduation, the rule would provide a disincentive to study in the United States at a time when new enrollment of international students has [fallen significantly](#) at U.S. universities. The Trump administration designed a series of measures to discourage international students from coming to the United States and working after graduation, making it fair to conclude the regulation to end the H-1B lottery was intended to disadvantage international students. The Biden administration has [delayed implementation of the rule](#), but has signaled support for a regulatory change that would award petitions based on salary level.

Selecting H-1B petitions by salary level would favor those with the most experience in the labor market over those with the least experience, something not present under the current lottery system, which awards H-1B petitions by random selection when more applications (or “registrations”) are received than the annual limit allows.

The National Foundation for American Policy found that an international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system than under the Trump administration’s regulation that would end the H-1B lottery, based on an NFAP analysis of actual cases of recent international students and filings for H-1B petitions obtained from an immigration law firm. The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition.

The law firm Curran, Berger & Kludt provided NFAP with 170 cases of F-1 students with applications for H-1B cap selection for FY 2018, FY 2019, FY 2020 and FY 2021. Under the current system that randomly selects H-1B petitions, 60% of the F-1 students were chosen through the H-1B lottery. However, the law firm provided information on the pay levels (Level 1 through 4) for the students’ H-1B applications, and NFAP found if the new regulation had been in effect, only 39% of the students’ H-1B petitions would have been selected.

The main reason the rule harms students is most international students are paid at the Department of Labor’s Level 1 or Level 2 salary level due to their lack of labor market experience while the rule favors those with years of experience over new entrants to the labor market, preventing people at Level 1 and many at Level 2 from obtaining an H-1B petition.

According to the Department of Homeland Security (DHS), which performed an analysis of the rule, under the new regulation, *no individuals paid Level 1 wages would be selected for H-1B petitions* (either the regular cap or the advanced degree exemption), while *only about half of the people paid at Level 2 wages would get H-1B petitions*.

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Individuals with little work experience would expect to be paid at Level 1 or Level 2 wages. In contrast, under the new regulation, all H-1B applicants paid at Level 3 and Level 4 wages (generally people with most experience in the labor market) would be able to obtain an H-1B petition under the regular cap and the advanced degree exemption, according to DHS.

Because some employers may choose to boost salaries artificially to Level 3 to improve an applicant's chance at being selected, it may be even more difficult for international students to obtain an H-1B petition under the new rule than the NFAP analysis indicates. Many more individuals paid at Level 2 could be shut out entirely from obtaining an H-1B petition. (More than 300,000 H-1B registrations were filed for cap selection for FY 2022, [according to USCIS](#).)

Based on the law firm's cases, designing a system that prevents people at Level 1 (entry level) from receiving H-1B petitions would likely exclude most international students who apply for H-1B petitions. Among the firm's cases for the four cap years examined (FY 2018 to FY 2021), 53% of international students were paid at level 1 and 37% were paid at Level 2 (i.e., 90% combined). As noted, DHS states in the rule that under its simulation no one at Level 1 would receive an H-1B petition and only about half the individuals paid at Level 2 wages would be selected for an H-1B petition.

NFAP also found other problems with the regulation. The new rule shifts H-1B petitions away from people in many higher-skilled occupations into jobs that 1) require less skill and training and 2) actually pay less, defeating the stated intention of the regulation.

NFAP discovered 11 occupations, including physicians, internists, pediatricians, dentists and computer and information systems manager, for which the individuals paid Level 1 salaries would be unable to obtain an H-1B petition under the rule even though their Level 1 salaries are higher than the median salary for Level 3 for all occupations (\$109,886).

Another significant problem with the rule is it would make it more difficult for physicists, microbiologists and medical scientists (among others) to gain H-1B petitions, since more than half of the of the labor condition applications for those occupations in FY 2019 were for Level 1, and close to 90% were paid at Level 1 or Level 2. Under the rule, many schools also would be unable to hire teachers on H-1B petitions in middle school or high school, since around 90% are paid at Level 1 or Level 2. Unlike universities, middle schools and high schools must compete for the 85,000 H-1B petitions subject to the annual limits.

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Before the pandemic, fewer international students were enrolling at U.S. universities. Immigration and Customs Enforcement [reported](#) a 72% drop in new international student enrollment in calendar year 2020 due to the coronavirus pandemic. This rule would make it more challenging for universities to regain international students.

An amended complaint from the U.S. Chamber of Commerce, other business groups and education organizations has challenged the legality of the regulation to eliminate the H-1B lottery. Two years earlier, in the final rule establishing a system of submitting registrations rather than full H-1B applications, DHS stated that it did not possess the legal authority to select petitions based on salary or other criteria without a change in the law.

Instead of imposing new restrictions on who can receive an H-1B petition, a better solution is to increase the annual number of H-1B temporary visas and employment-based green cards.

If the Biden administration defends the rule in court, or argues on its behalf publicly, it will need to explain why making it more difficult for international students to work in the United States after graduation is a sound policy objective.

Although a Biden administration National Security Guidance called for an immigration policy that “incentivizes the world’s best and brightest to study, work, and stay in America,” the regulation to end the H-1B lottery is incompatible with that policy objective.

TRUMP ADMINISTRATION RULE TO END THE H-1B LOTTERY

On January 8, 2021, the Department of Homeland Security (DHS) published as a “final rule” a [regulation to end the H-1B visa lottery](#) and replace it with a system that awards petitions from highest to lowest salary level.¹ The Biden administration [delayed the effective date](#) of the rule until December 31, 2021. However, the Biden administration appears sympathetic to the rule as evidenced by a provision in the U.S. Citizenship Act, the legislation it developed, that authorizes the Department of Homeland Security to select H-1B petitions based on salary level.

Critics have raised two primary objections to the rule: 1) the rule violates the statute; and 2) the rule would make it more difficult for international students to receive an H-1B petition.

“H-1B visas are important because they generally represent [the only practical way for high-skilled foreign nationals, including international students, to work long-term in the United States](#) and have the chance to become employment-based immigrants and U.S. citizens,” according to *Forbes*. “In short, without H-1B visas nearly everyone from the [founders of billion-dollar companies](#) to the [people responsible for the vaccines](#) and medical care saving American lives would never have been in the United States.”²

Congress set the annual limit on H-1B petitions at 65,000, with an additional 20,000 petitions exempted from that limit for foreign nationals with an advanced degree from a U.S. university. For the past several years, U.S. Citizenship and Immigration Services (USCIS) has awarded petitions by lottery when employers filed enough applications (or, in the past two years, filed enough electronic “registrations”) that exceed the 65,000 and 20,000 limits.

“The statute mandates visas be issued in the order in which they are received,” said Brad Banias of Wasden Banias. “While a lottery may be a fair interpretation of that mandate when 250,000 applications show up on the same day, the same cannot be said of prioritizing those applications based on wages. A regulation is an interpretation of an ambiguous statutory provision. This interpretation is wholly unmoored from the statute and likely *ultra vires* (beyond one’s legal authority). The statute provides interpretive jumping off point for this final rule. It will be interesting to see if the new administration even defends it.”³

¹ Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, USCIS, Department of Homeland Security, Final Rule, January 8, 2021, CIS No. 2679-21 DHS Docket No. USCIS-2020-0019. <https://www.federalregister.gov/documents/2021/01/08/2021-00183/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions>.

² Stuart Anderson, “The Story Of How Trump Officials Tried To End H-1B Visas,” *Forbes*, February 1, 2021.

³ Stuart Anderson, “DHS Published Final Rule to End H-1B Lottery,” *Forbes*, January 8, 2021.

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Two years earlier, in the final rule establishing a system of submitting registrations rather than full H-1B applications, DHS stated that it did not have the legal authority to select petitions based on salary or other criteria without a change in the law. “DHS is reversing the cap selection order to prioritize beneficiaries with a master's or higher degree from a U.S. institution of higher education in accordance with congressional intent, as the numerically limited exemption from the cap for these beneficiaries was created by Congress and appears in the INA,” according to the preamble to that earlier rule. “DHS believes, however, that prioritization of selection on other factors, such as salary, would require statutory changes.”⁴

The second concern about the regulation is it will make it more difficult for international students to work in America in H-1B status. Recent international students are new to the U.S. labor market and logically would be expected to earn less money than an individual with more years of experience.

Bo Cooper, a partner at the Fragomen law firm and a former general counsel at U.S. Citizenship and Immigration Services, believes the rule would establish as U.S. government policy a priority for the recruitment of individuals who are already senior professionals, even though nearly all of America's competitors for talent focus on attracting young talent, particularly recent university graduates.⁵

UNDERSTANDING THE NEW SYSTEM

Under the new regulation, if it goes into effect, when USCIS receives more registrations for initial employment than the H-1B limit allows for the next fiscal year, the agency would award H-1B petitions from highest to lowest salary.

“USCIS will rank and select the petitions received on the basis of the highest Occupational Employment Statistics (OES) wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I,” according to the regulation.⁶

On the labor condition application (LCA), most international students are paid at Level 1 (entry level) or Level 2 (qualified) under the DOL wage system due to their relative lack of experience. As a result, many fewer students would be selected for H-1B petitions under the new rule. Level 3 is “experienced” and Level 4 is “fully competent,” according to the Department of Labor. H-1B petitions for individuals paid at Level 3 and Level 4 would do well under the new rule, while others would not fare well.

⁴ <https://www.federalregister.gov/documents/2019/01/31/2019-00302/registration-requirement-for-petitioners-seeking-to-file-h-1b-petitions-on-behalf-of-cap-subject>.

⁵ Stuart Anderson, “International Student Enrollment Plummet: Biden Could Bring it Back,” *Forbes*, November 17, 2020.

⁶ <https://www.federalregister.gov/documents/2021/01/08/2021-00183/modification-of-registration-requirement-for-petitioners-seeking-to-file-cap-subject-h-1b-petitions>.

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USCIS first selects for the 65,000 petitions under the regular cap and then selects for the 20,000-exemption for individuals with an advanced degree from a U.S. university. This order of selection, which started in recent years, increases the chances that an individual with a master’s degree or higher from a U.S. university will be chosen.

Table 1
DHS Estimated Number of Selected Registrations by Wage Level: Regular Cap

Level	Percent Selected	Total Registrations
Level 1 & Below	0%	45,974
Level 2	75%	78,375
Level 3	100%	15,179
Level 4	100%	6,422
Total		145,950

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 2. August 31, 2020 & USCIS Analysis
*Note: Totals are based pm FY 2021 data.

Selecting H-1B petitions by salary level would favor those with the most experience in the labor market over those with the least experience. On Table 13 of the regulation, DHS used data from previous years (“the approximated 2-year average”) to forecast the expected impact of the regulation:

- Under the new regulation, *no individuals paid Level 1 wages would be selected for H-1B petitions* (either the regular cap or the advanced degree exemption);
- *Only about half of the people paid at Level 2 wages would get H-1B petitions.* It could be a lower percentage in future years. (NFAP calculated the approximately 50% rate of individuals selected at level 2 by reviewing the table supplied by DHS that showed under its simulation 71,743 of 143,275 registrations at Level 2 wages would be selected);
- Everyone paid at Level 3 and Level 4 wages (generally people with most experience in the labor market) would obtain an H-1B petition under the regular cap and the advanced degree exemption.⁷

Table 2
DHS Estimated Number of Selected Registrations by Wage Level: Advanced Degree Exemption

Level	Percent Selected	Total Registrations
Level 1 & Below	0%	45,588
Level 2	20%	64,900
Level 3	100%	9,909
Level 4	100%	2,847
Total		123,244

Source: USCIS, Office of Policy and Strategy, Policy Research Division (PRD), Claims 2. August 31, 2020 & USCIS Analysis
*Note: Totals are based pm FY 2021 data.

⁷ Ibid.

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The regulation cautions: “DHS is unable to quantify the actual outcome because DHS cannot predict the actual number of registrations that would be received at each wage level because employers may change the number of registrations they choose to submit and the wages they offer in response to the changes proposed in this rule.”⁸

REAL WORLD EXPERIMENT: FEWER INTERNATIONAL STUDENTS WOULD RECEIVE H-1B PETITIONS

An international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system than under the Trump administration’s regulation to end the H-1B lottery. That is based on a National Foundation for American Policy analysis of actual cases of recent international students and filings for H-1B petitions obtained from the law firm Curran, Berger & Kludt. The main reason is most international students are paid at Level 1 or Level 2, due to their lack of labor market experience, and the rule disadvantages new entrants to the labor market over those with much more experience.

Curran, Berger & Kludt provided NFAP with 170 cases of F-1 students with applications covering H-1B cap selection for FY 2018, FY 2019, FY 2020 and FY 2021. Under the current system that randomly selects H-1B petitions, 60% of the F-1 students were chosen through the H-1B lottery. However, the law firm provided information on the pay levels (Level 1 through 4) for the student H-1B applications, and NFAP found if the new regulation had been in effect, only 39% of the students’ H-1B petitions would have been selected.

The much poorer showing for international students under the new regulation is because no one at Level 1 wages would be expected to receive an H-1B petition, according to DHS, which would exclude more than half of international students (53%) applying for H-1B petitions based on the law firm’s cases. Among the firm’s cases for the four cap years examined (FY 2018 to FY 2021), 37% of the international students were paid at Level 2. DHS states that in its simulation only half the individuals at Level 2 wages would be selected for H-1B petitions.

While 100% of individuals paid at Level 3 and Level 4 would receive H-1B petitions under the new regulation, according to DHS, the law firm’s cases show only about 8% of international students are paid at Level 3 wages and 2% at Level 4 wages.

The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition.

⁸ Ibid.

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The Trump administration did not present any information in its regulation that shows international students would fare better under the rule. To the contrary, the regulation made clear people paid at Level 1 and Level 2 wages would fare poorly under the rule. It is possible the law firm's cases for these four years are not fully representative of international student cases nationwide, but, on the other hand, there is no evidence the cases are not representative. It makes sense that individuals with little work experience would be paid at Level 1 or Level 2 wages.

An [amended complaint](#) from the U.S. Chamber of Commerce and its allies in the business and the education community challenged the legality of the regulation to eliminate the H-1B lottery.⁹ If the Biden administration defends the rule in court, or argues on its behalf in the court of public opinion, it will need to explain why making it more difficult for international students to work in the United States after graduation is a good policy objective.

Because some employers may choose to boost some salaries artificially to Level 3 to improve an applicant's chance at being selected, it may be more difficult for international students to obtain an H-1B petition under the new rule than even the NFAP analysis indicates. DHS concedes this may happen. According to DHS, "employers may change the number of registrations they choose to submit and the wages they offer in response to the changes proposed in this rule."¹⁰ In short, employers may opt to pay some workers higher wages to improve their chances of being selected under the new system. That may shut out more international students since employers may be reluctant to disrupt company compensation scales by paying individuals with no experience higher salaries than current employees.

RULE ALIGNS WITH OTHER TRUMP ADMINISTRATION STUDENT POLICIES

Given the series of measures during the Trump administration designed to discourage international students from coming to the United States, it is fair to conclude the regulation to end the H-1B lottery was designed to disadvantage international students.

In its final days, the Trump administration established a special investigative unit (later abandoned by the Biden administration) to scrutinize international students working on Optional Practical Training (OPT). This followed years of placing on the regulatory agenda a possible rule to restrict or eliminate OPT. Universities took part in lawsuits against the Department of Labor's wage rule and the Department of Homeland Security H-1B rule, both of which would have made it more difficult for international students to work in the United States after graduation.

A successful university lawsuit was needed to stop a Trump administration memo on "unlawful presence" that would have made it easier to deport international students who did not know they had fallen out of legal status. During the

⁹ Stuart Anderson, "U.S. Chamber of Commerce Lawsuit Looks To Slay H-1B Visa Rules Again," *Forbes*, March 23, 2021.

¹⁰ *Ibid.*

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pandemic, universities also sued to allow existing international students to study on campus even if schools had remote learning. And the Trump administration proposed a rule that universities strongly opposed to require international students to file extension applications to continue studying beyond a two-year or four-year period. The Trump administration never published a final rule on eliminating what is called “duration of status,” perhaps in part due to the strong opposition of the university community.

“Uncertainty is toxic to international students and scholars,” said Dan Berger of Curran, Berger & Kludt. “The Trump Administration provided uncertainty on all levels. Some policies were rolled out with no warning (or training for the officers implementing them), and some guidance and clarification was just never given. Many international students are taking a leap of faith in many cases to leave their homes and their families, and come to study or work in the United States with the hope of being able to get continued immigration status to follow their career plans.”¹¹

RULE WOULD HAVE THE SIGNIFICANT UNINTENDED CONSEQUENCE OF SHIFTING H-1B VISAS AWAY FROM MANY PEOPLE IN HIGHLY SKILLED OCCUPATIONS INTO LESS SKILLED OCCUPATIONS

Government supporters of awarding H-1B petitions from highest to lowest salary failed to perform basic research that would have uncovered additional significant, negative consequences of the rule, specifically that the new rule shifts H-1B petitions away from people in many higher-skilled occupations into jobs that 1) require less skill and training and 2) actually pay less, defeating the stated intention of the regulation. This result illustrates the degree to which the rule was promulgated with little thought to its consequences.

First, NFAP discovered 11 occupations, including physicians, internists, pediatricians, dentists and computer and information systems manager, for which the individuals paid Level 1 salaries would be excluded under the rule even though their Level 1 salaries are actually higher than the median salary for Level 3 for all occupations (\$109,886).¹² In other words, even though the individual is paid at Level 1 for the occupation due to limited experience, he or she earns a higher salary than people who, on average, are paid at Level 3 salaries for more experienced workers. All the H-1B applications for individuals paid at Level 1 in these occupations would be rejected, according to DHS’s analysis of the rule’s impact, as would about half of applicants at Level 2, even though the physicians and others actually earn much higher salaries than applicants for H-1B status chosen in their place. It is another example of how the rule rewards those with more experience in the labor market, not people with more skill or promise.

¹¹ Interview with Dan Berger.

¹² This is based upon the average Level 1 salary cited on Labor Condition Application across all geographic areas.

Table 3
Occupations For Which Level 1 Salaries Are Greater Than Median Salary For All Level 3 Salaries

OCCUPATION
Architectural and Engineering Managers
Business Teachers, Postsecondary
Computer and Information Systems Managers
Dentists, General
Family Medicine Physicians
Health Specialties Teachers, Postsecondary
Lawyers
Physicians, All Other
Psychiatrists
Internists, General
Pediatricians

Source: National Foundation for American Policy estimates from Department of Labor FY 2019 Labor Condition Application data.

Second, another significant problem with the rule is there are many occupations, such as physicist, microbiologist and medical scientist, in which more than half of the of the labor condition applications in FY 2019 were for Level 1. According to DHS, none of the individuals in these occupations at Level 1 would get an H-1B petition under the rule. Moreover, DHS notes many Level 2 H-1B applications also will be rejected under the rule. NFAP’s analysis shows about 90% of biochemists, microbiologists and physicists are paid at Level 1 and Level 2 due to their relative lack of experience in the labor market. Under the rule, many schools would be unable to hire teachers on H-1B petitions in middle schools or high schools, since around 90% are paid at Level 1 or Level 2. Unlike universities, middle schools and high schools must compete for the 85,000 H-1B petitions subject to the annual limits.

Table 4
Occupations For Which Over Half of FY 2019 Salaries Were Level 1 or Level 2

OCCUPATION	Percent Level 1	Percent Level 1 or Level 2
Biochemists and Biophysicists	54%	88%
Microbiologists	55%	87%
Physicists	55%	80%
Art, Drama, and Music Teachers, Postsecondary	55%	91%
Biological Science Teachers, Postsecondary	56%	88%
Health Diagnosing and Treating Practitioners, All Other	57%	84%
Computer Science Teachers, Postsecondary	57%	87%
Middle School Teachers, Except Special and Career	58%	87%
Business Teachers, Postsecondary	58%	86%
Speech-Language Pathologists	59%	92%
Secondary School Teachers, Except Special and Care	59%	82%
Civil Engineers	60%	88%
Architects, Except Landscape and Naval	66%	92%
Landscape Architects	67%	94%
Economics Teachers, Postsecondary	68%	91%
Foreign Language and Literature Teachers, Postsecondary	71%	93%
Engineering Teachers, Postsecondary	73%	93%
Mathematical Science Teachers, Postsecondary	74%	95%

Source: National Foundation for American Policy estimates from Department of Labor FY 2019 Labor Condition Application data.

CONCLUSION: DROP IN INTERNATIONAL STUDENT ENROLLMENT, HARM TO OTHER OCCUPATIONS

U.S. universities have experienced an enormous drop in the new enrollment of international students due to the coronavirus pandemic. Immigration and Customs Enforcement [reported](#) a 72% drop in new international student enrollment in calendar year 2020.¹³

Before the pandemic, fewer international students were enrolling at U.S. universities. New enrollment of international students at U.S. universities was 10.4% lower in the 2018-19 academic year than in 2015-16. Indian

¹³ <https://www.ice.gov/doclib/sevis/pdf/sevisBTN2020.pdf>.

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students enrolled in graduate-level computer science and engineering at U.S. universities [fell by more than 25%](#) between the 2016-17 and 2018-19 academic year.

While some have argued that international students “crowd out” or take spots from U.S. students, a recent study shows those beliefs are unfounded. “Enrolling more international undergraduate students does not crowd out U.S. students at the average American university and leads to an increase in the number of bachelor’s degrees in STEM (science, engineering, computer science, and mathematics/statistics) majors awarded to U.S. students,” according to research by economist Madeline Zavodny for the National Foundation for American Policy. “Each additional 10 bachelor’s degrees—across all majors—awarded to international students by a college or university leads to an additional 15 bachelor’s degrees in STEM majors awarded to U.S. students.”¹⁴

“For students considering a degree abroad, 62% mentioned that being able to work in the country following the degree is very important,” according to [a survey of international students](#) by Studyportals.

“We will expand our science and technology workforce by investing in STEM education, where America is currently losing ground, and restoring our nation’s historic strengths by ensuring our immigration policy incentivizes the world’s best and brightest to study, work, and stay in America,” according to the Biden administration’s [Interim National Security Guidance](#), released in March 2021.

The regulation to end the H-1B lottery is incompatible with a policy that seeks to encourage the world’s best and brightest to study, work and stay in America.

¹⁴ Madeline Zavodny, *The Impact on U.S. Men and Women in STEM Fields of Increases in International Students*, NFAP Policy Brief, National Foundation for American Policy, April 2021.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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