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Department of Labor
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Submitted via www.regulations.gov

Re: DOL Docket No. ETA–2026–0001
Regulatory Information Number (RIN 1205–AC30)

Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) submit the following comments in response to the above-referenced notice and request for comments published by the Department of Labor (Department or DOL) in the Federal Register on March 27, 2026 (the Proposed Rule or the Rule).[1] The notice solicits comments on the Proposed Rule which would revise the DOL Office of Foreign Labor Certification's (OFLC) prevailing wage methodology in the H-1B, H-1B1 and E-3 nonimmigrant processes and the Program Electronic Review Management (PERM) process.

AILA is a voluntary bar association of over 18,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, United States citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of United States immigration laws, including applications submitted to the Department of Labor.

[1] Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States, 91 FR 15454 (Mar. 26, 2026).

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws and protect the legal rights of noncitizens. The Council frequently appears before federal courts and administrative tribunals on issues involving access to immigration benefits.

Our collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government. AILA and the Council oppose this Proposed Rule as it does not offer an accurate assessment of the current prevailing wage methodology and fails to consider less burdensome alternatives to achieve its objectives. Instead, it relies on insufficiently supported logic to justify sweeping changes that will harm, if finalized as proposed, United States employers, as well as foreign and United States workers, as explained in more detail below. We urge the Department of Labor to withdraw this rule in its entirety.

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I. The Current Prevailing Wage Structure's Has Protected Workers and Supported Employers for More than Two Decades

In 2005, the DOL adopted the four-tier prevailing wage level structure that is currently in effect. This was a response to the H-1B Visa Reform Act of 2004, which amended Immigration and Nationality Act (INA) §212(p) to include the following verbiage:

> (4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.

To carry out this provision, the Department issued detailed Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (the "2005 Guidance").[2] This guidance replaced the prior two-tier Bureau of Labor Statistics' (BLS) Occupational Employment and Wage Statistics (OEWS) wage system with four distinct skill levels: Level I (entry level), Level II (qualified), Level III (experienced), and Level IV (fully competent). Using the formula specified in the statute and the original two wage levels (set at the 17th and 67th percentiles, respectively, of the OEWS wage distribution) as a base, the Department set these four levels at roughly the 17th, 34th, 50th, and 67th wage percentiles.

In 2010, the Department consolidated the prevailing wage determination process for nonagricultural labor certification programs in the OFLC's National Prevailing Wage Center (NPWC), removing State Workforce Agencies (SWAs) from this role. To prepare for this shift, the Department issued updated Prevailing Wage Determination (PWD) Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).[3] Since its publication, the 2009 Guidance has governed OFLC's prevailing wage determinations for the PERM, H-1B, H-1B1, and E-3 visa programs. Although the Department reviewed the prevailing wage process as part of the consolidation, the Department did not through this guidance modify the four prevailing wage levels set at roughly the 17th, 34th, 50th, and 67th wage percentiles.

When determining a prevailing wage using OEWS data, the NPWC reviews the job offer's characteristics, the location where the work will be performed, and the duties of workers in comparable positions. It relies on the Standard Occupational Classification (SOC) system to assign the employer's job opportunity to the correct occupation by matching the job title, description, and requirements with occupational information from sources such as the Department's Occupational Information Network (O*NET).

After identifying the appropriate SOC code, the NPWC selects the proper wage level by comparing the employer's job description, title, and requirements to those typically associated with that occupation, as reflected in sources like O*NET. The NPWC follows an approach in which each position is initially placed at Level I (entry level) and may be moved to Level II (experienced), Level III (qualified), or Level IV (fully competent), depending on how the job's requirements for education, training, experience, skills, knowledge, and tasks compare with the standard requirements of the occupation. Once the wage level is set, the NPWC issues a PWD to the employer based on the OEWS wage for that level for the relevant occupation and area of intended employment.

More than 15 years after the current prevailing wage leveling system was created, the Department issued an Interim Final Rule (IFR)[4] in the Federal Register on October 8, 2020 intended to change the way prevailing wage levels are calculated for the H-1B, H-1B1, E-3, and PERM programs. In

[2] ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), *available at* https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

[3] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009), *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

[4] 85 FR 63872 (Oct. 8, 2020).

the IFR, the Department stated its view that the prior wage levels which had been used by stakeholders for more than 15 years did not meet the statutory requirement under INA §212(p), even though there was no change to the statute. The Department argued that the current wage levels were set too low, allowing employers to hire and keep foreign workers at pay rates significantly below those of comparable United States workers. It claimed that this created an improper incentive to favor hiring foreign workers over United States workers and exerted downward pressure on the wages of the domestic labor force, contrary to the statute's intent.

To address this, the Department sought to amend the wage regulations at 20 CFR §655.731 and §656.40 to recalibrate the wage levels, formally adopting the four-level wage structure and updating the methodology used to calculate each level. Level I was to be calculated as the mean of the fifth decile of the wage distribution for the most specific occupation and geographic area available, instead of the previous method of using the mean of the bottom third of the OEWS wage distribution. Level IV would be calculated as the mean of the top decile of the wage distribution for the most specific occupation and area, rather than the prior approach, which used the mean of the upper two-thirds of the distribution. These changes would effectively raise the four wage levels from about the 17th, 34th, 50th, and 67th percentiles to approximately the 45th, 62nd, 78th, and 95th percentiles.

The IFR was challenged in various lawsuits[5] and set aside the IFR based on findings of lack of good cause to forgo notice and comment rulemaking as required by the Administrative Procedure Act (APA).

On January 14, 2021, the Department issued a final rule,[6] which adjusted the wage percentiles to the 35th and 90th percentiles for Level I and Level IV wages, respectively. However, prior to the effective date, the Department delayed the Final Rule multiple times. On April 2, 2021, the Department issued a Request for Information to obtain "sources of data and methodologies for determining prevailing wage levels . . ."[7] Finally, on December 13, 2021, the Department promulgated another final rule[8] effectuating a federal district court vacatur of the January 14, 2021 Final Rule. The Department then continued issuing PWDs based upon the current prevailing wage methodology. However, after another 4 years, the Department is again stating in the current proposed regulation that the methodology which has been used by the Department for approximately 20 years is now considered to be inaccurate and seeks to arbitrarily raise the levels to 34th, 52nd, 70th, and 88th, respectively.

II. The Current Prevailing Wage System Has Shaped the Labor Market for More than Two Decades

[5] *See Chamber of Com. of U.S.* v. *U.S. Dep't of Homeland Sec.,* 504 F. Supp. 3d 1077 (N.D. Cal. 2020) (DOL failed to show good cause to forego advance notice and comment as a matter of law); *Purdue Univ.* v. *Scalia,* Civ. Action Nos. 20-03006 & 20-3175, 2020 WL 7340156 (D.D.C. Dec. 14, 2020) (same). *See also ITServe All., Inc.* v. *Scalia,* No. CV 20-14604 (SRC), 2020 WL 7074391 (D.N.J. Dec. 3, 2020) (preliminary injunction; plaintiffs likely to prevail on merits that the government did not have good cause to forego advance notice and comment.

[6] Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 86 FR 3608 (January 14, 2021).

[7] 86 FR 17343 (Apr. 2, 2021).

[8] 86 FR 70729 (Dec. 13, 2021).

a. Overview of Reliance Interests

The DOL's proposed 2026 revisions to the OEWS-based prevailing wage percentiles for Wage Levels I–IV in the H-1B, H-1B1, E-3, and PERM (EB-2/EB-3) programs would significantly disrupt reliance interests that have developed over more than two decades under the 2005 methodology and subsequent 2009 guidance. Employers and foreign workers have structured their business models, staffing plans, and long-term immigration strategies around the existing four-tier system and its current percentile thresholds (approximately the 17th, 34th, 50th, and 67th percentiles for Levels I–IV). The proposed rule would significantly increase those floors to the 34th, 52nd, 70th, and 88th percentiles, respectively, using OEWS data. In considering whether and how to adopt this proposal, the Department should consider the serious reliance interests it has fostered through long-standing policy and repeated use of the current methodology across multiple programs.

b. Employers' Operational and Financial Reliance

Employers must pay their H-1B, H-1B1, E-3, and PERM employees the required wage, defined as the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question; or ... the prevailing wage level for the occupational classification in the area of employment."[9] Many employers make extensive operational and financial and budgeting decisions in reliance on the prevailing wage methodology introduced in 2005 and maintained, with clarifications, in later guidance. The Department has, for years, applied a unified four-level OEWS-based wage structure to H-1B, H-1B1, and E-3 programs as well as to PERM cases, and employers have relied on this integrated design to build multi-year staffing plans, determine whether to locate or expand operations in the United States, and decide whether and when to sponsor foreign workers for temporary and permanent roles. Wage commitments under LCAs and PERM prevailing wage determinations have been budgeted based on the understanding that Level I through Level IV floors would continue to correspond to the long-established 17th, 34th, 50th, and 67th percentiles of OEWS data. Abruptly raising these floors to the 34th, 52nd, 70th, and 88th percentiles would materially increase labor costs for employers that have structured their compensation systems for both domestic and international workers around the Department's prior policy choices, and would do so after the Department has used this methodology over a period of more than 20 years.

Highlighting operational and financial reliance within just one sector, academia, may help to provide an important example of the damaging effect the proposed rule would produce. As noted, the first Trump Administration sought a similar increase in prevailing wage level percentiles through an IFR.[10] In an amicus brief supporting one of the lawsuits challenging the IFR,[11] several higher education organizations and institutions addressed the devastating effect this rule would have,[12] including the following operational concerns:

[9] 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); *see also* 20 C.F.R. § 655.731(a).
[10] 85 FR 63872 (Oct. 8, 2020).
[11] *Purdue Univ.*. v. *Scalia.,* Civ. Action Nos. 20-03006 & 20-3175, 2020 WL 7340156 (D.D.C. Dec. 14, 2020).
[12] *See* Brief for the American Council on Education and 23 Other Higher Education Organizations as Amici Curae in Support of Plaintiff's Motion for Preliminary Injunction, *available at* https://www.immpactlitigation.com/wp-content/uploads/2021/09/brief.pdf.

- Effects on medical institutions and research budgets: "If the Rule is left standing, university-affiliated medical institutions will be unable to recruit and retain H-1B visa holders with highly sought-after skills and unable to provide specialty care to patients in rural and underserved areas. Postdoctoral research productivity will decline, as universities will have to proportionally cut the duration of employment for postdoctoral employees—leaving them able to perform fewer tasks and, in a best-case scenario, merely a delay in the completion of research projects."

- Situations where H-1B visa holders are funded, wholly or partially, by grants: "Grants are multi-year awards with multi-year budgets that generally tie the funds to specific recipients, making the changes required under the Rule particularly problematic to implement. If the institution can no longer employ those recipients, the research funded by the grants may be put on hold or stopped altogether."

- Budgetary effects throughout American higher education including smaller liberal arts colleges, given that many colleges prioritize the affordability and accessibility of a college degree, and expenditures of this magnitude are simply not feasible.

- The fact that this artificial increase in wages would, in certain cases, increase prevailing wages for H-1B workers far beyond their peer group of similarly situated domestic workers, thereby further compounding the damaging effects of this rule: "The Rule will impact cohorts of employees far broader than holders of H-1B visas, and dramatically increase institutional spending. . . . First off, some states have equal pay laws that require employers to pay comparable wages to all employees within a protected class: sex, race, creed, color, national origin, sexual orientation, gender identity, and disability. . . Colleges and universities would thus have to raise wages for domestic faculty who are within the same protected class. Even in states where no such laws exist, prior pay equity initiatives and more fundamental expectations of pay fairness, will pressure institutions to raise wages for similarly-situated domestic employees. The cumulative effect of such compensation adjustments will pose financial burden on institutions, especially ones that prioritize the affordability of a college degree. . ."

In FY 2025 alone, educational services institutions (primarily comprised of higher education institutions) filed more 45,530 LCAs.[13] Thus, the above-mentioned severe effects need to be understood within the context of their impact on thousands of institutions and individuals. As noted in the higher education amicus brief, "The Supreme Court has long recognized the common-sense principle that, to "'fulfill[] [their] mission[s],'" colleges and universities must be able to recruit students—and, by extension, scholars and faculty—who will "contribute the most to the 'robust exchange of ideas.'"[14] But candidates in highly specialized fields are few and far between, and sometimes, the best ones come from abroad." By artificially increasing prevailing wages, universities and other employers may be forced to lay off highly skilled employees engaged in

[13] *See* 2026 Active Hiring by NAICS Industry (H-1B LCA) *available at* https://www.myvisajobs.com/reports/h1b/industry/.
[14] *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

cutting-edge research, for example, and prevented from making future hires due to massive expenses that will come with employing H-1B workers.

In turn, contracts will be severed, institutional reputations will be harmed, grant-funded research initiatives will be halted, students and patients will go without access to top-tier international faculty and providers, and entire areas of study and research may be eliminated.

Higher education is simply one industry of many, and the proposed rule focuses on data related to positions within the technology sector (specifically software developers and computer systems analysts) without examining the broader severe impacts within that industry and various others. The proposed rule fundamentally upsets the H-1B visa program, which, according to 2019 Department of Homeland Security (DHS) statistics, employs over 580,000 individuals in the United States.[15] This includes individuals working in technical fields, manufacturing, finance and insurance, healthcare, among other sectors. As noted in the preamble to the proposed rule, "In FY 2024, the Department certified 502,374 H-1B applications, accounting for the vast majority of temporary labor certifications."[16] The Department also states in the preamble that the proposed rule, if finalized, would result in an annualized cost of $3.53 million and a total 10-year cost of $24.59 million at a discount rate of 7 percent in 2024 dollars.[17] These are truly consequential numbers, and the significant reliance interests within various industries have not been thoroughly considered.

c. Foreign Workers' Long-Term Immigration Planning Reliance

Foreign nationals in H-1B, H-1B1, and E-3 status, and those pursuing permanent residence through PERM, also have substantial reliance interests rooted in the Department's existing prevailing wage methodology. Many foreign workers and their employers have embarked on multi-year immigration strategies—often spanning well beyond the initial nonimmigrant period—on the assumption that if the employer offers at least the greater of the actual and prevailing wage as determined under the current methodology, the worker will remain eligible for nonimmigrant extensions and permanent labor certification. PERM recruitment and ETA Form 9089 filings are sequenced around prevailing wage determinations issued under the long-standing wage-level framework. A sudden upward recalibration of wage floors could render some ongoing or planned PERM cases economically infeasible, disrupt the ability of employers to continue extending H-1B status under provisions that depend on pending or approved labor certifications, and remove the ability for workers, who reasonably expected continuity in the Department's approach, to extend H-1B, H-1B1, and E-3 status given significantly higher wage requirements that employers cannot meet.

In addition, foreign workers have made concrete personal and professional decisions—such as purchasing homes, moving families, and specializing in particular occupations or geographic labor markets—on the expectation that the long-applied wage-setting rules would remain relatively stable or, at minimum, would change in a gradual and clearly signaled way. The Department's use of the prevailing wage methodology for more than 20 years has reasonably led workers and

[15] *See* U.S. Citizenship & Immigration Services, H-1B Authorized-to-Work Population Estimate 1 (Sept. 30, 2019), *available at* https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf.
[16] 91 FR at 915455.
[17] *Id.* at 15480.

employers to anticipate that increases would be phased in and carefully coordinated with pending immigration processes. Even though there was one unsuccessful attempt to revise the methodology, for more than two decades, employers and foreign workers have become accustomed to annual increases in prevailing wages each July 1st when OFLC implements the most recent OEWS prevailing wage data provided by BLS.

As noted, under the H-1B program alone, about 580,000 individuals are employed in the United States, according to 2019 DHS statistics. This number includes many who uprooted their lives, created long-term careers in the United States, and became essential to their employers and integral parts of their communities. An abrupt shift to much higher percentile benchmarks with corresponding extreme and unanticipated prevailing wage increases, without robust protections for in-process cases or existing employees, would significantly upset settled expectations.

III. The Department Should Withdraw the Proposed Rulemaking As It Is Arbitrary and Capricious

The DOL has not provided sufficient evidence for key premises concerning alleged underpayment of H-1B workers and employer incentives, relies on outdated and one-sided studies, fails to reconcile its claims with the statutory and regulatory "higher of the prevailing or actual wage" requirement, fails to build on or explain departure from prior occupation-based wage methodology, and does not reasonably assess the likely effects of higher wage levels on United States workers, including potential discrimination and displacement. For the reasons outlined below, the proposed rule is arbitrary and capricious under the APA and should be withdrawn by the Department.

a. *Lack of Sufficient Evidence that H-1B Foreign National Workers are Generally Underpaid or that Employers are Systematically Using H-1B Status to Undercut Wages*

A central premise of the proposed rule is that H-1B and other foreign workers are routinely paid less than comparable United States workers and that employers are therefore incentivized to hire foreign nationals to reduce labor costs. The rule cites broad, generalized concerns and selective academic studies, but does not provide specific evidence sufficient to support that sweeping conclusion.

The proposed rule does not provide systematic data comparing wages paid to H-1B workers with those paid to similarly situated United States workers - matched by occupation, geographic area, experience level, employer type (for-profit, nonprofit, or public sector), and job duties. Nor does it break down any alleged underpayment by sector. For example, alleged abuses by a limited subset of IT staffing or consulting firms are treated as if they reflect the entire H-1B labor market, including universities, non-profit research institutes, teaching hospitals, and other cap-exempt or public-interest employers that operate under very different compensation structures. Moreover, the proposed rule does not demonstrate that for the past 20 years, the current prevailing wage methodology has in fact produced systematic wage suppression or displacement in most of the occupations and sectors subject to this rule.

Instead, the Department appears to rely on selective, often dated, sources that are not shown to be representative of the current regulatory structure or labor market. An agency must "examine the

relevant data and articulate a satisfactory explanation for its action."[18] Reliance on anecdotal or narrow studies to justify a sweeping methodological overhaul without robust, current empirical support across the affected labor markets is arbitrary and capricious.

b. *Failure to Reconcile the Asserted Underpayment Problem with the Existing "higher of the prevailing wage or actual wage" Requirement*

Current regulations, specifically 20 CFR 655 Subpart A, already require employers to pay the higher of 1) the prevailing wage for the occupational classification in the area of intended employment, or 2) the actual wage paid by the employer to other individuals with similar experience and qualifications for the specific employment in question. This dual requirement is designed precisely to prevent underpayment of foreign workers and to ensure that employers cannot lawfully use H-1B or other foreign workers as a cheaper substitute for similarly situated United States workers.

The proposed rule does not credibly explain how pervasive underpayment could occur if these existing protections are properly applied and enforced by the Department. If an employer is paying United States workers at wage X for a given role, it must pay the foreign worker at least wage X, even if the prevailing wage is lower. If the prevailing wage is higher than the employer's internal rate, the employer must raise the foreign worker's wage to match the prevailing level.

If the Department believes that some employers evade these requirements, the rational response under the APA would be targeted enforcement by the Department of existing rules, improved guidance and audits, and/or focused adjustments in specific occupations or sectors where it believes that employers are not complying with statutory wage requirements.[19] Instead, the proposed rule presumes widespread structural underpayment and proposes across-the-board wage methodology changes. The Department does not provide a reasoned analysis bridging the gap between the existing, relatively stringent dual wage standard and its conclusion that the entire prevailing wage structure must be overhauled to combat alleged underpayment. That unexplained leap is arbitrary and capricious.

c. *The Proposed Rule Relies on Outdated and Non-Representative Evidence While Ignoring Recent H-1B Reforms*

The proposed rule's premise that employers are broadly incentivized to hire foreign workers at lower wages appear to rely heavily on a limited set of reports and research that predate significant regulatory and market changes, including DHS reforms to the H-1B lottery that materially alter employer incentives. In particular, the beneficiary-centric lottery rule[20] and subsequent policy changes favoring higher-wage H-1B registrations[21] reduce the advantage of multiple registrations and create stronger incentives for employers to offer higher wages, classify positions at higher OEWS levels, and use competitive compensation to demonstrate bona fide, high-skill need. Yet the proposed rule does not meaningfully analyze how this revised allocation framework already

[18] *Motor Veh. Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto Ins. Co. ("State Farm")*, 463 U.S. 29, 43 (1983).
[19] The Department has already indicated that it will be further increasing wage safeguards in the LCA program through DOL Secretary-certified LCA investigations. *See* US Department of Labor launches Project Firewall to protect America's highly skilled workforce | U.S. Department of Labor.

[20] 89 FR 7456 (Feb. 2. 2024).
[21] 90 FR 60864 (Dec. 29, 2025).

advances many of the wage-protection objectives the Department cites. Instead, it relies on historical critiques and older studies tied to the prior system as though they still fully apply.

The supporting reports also focus on limited segments of particular industries, such as certain IT consulting models, rather than the full spectrum of H-1B and employment-based immigrant hiring, including cap-exempt and nonprofit employers, public hospitals, universities, and high-wage occupations such as physicians, whose salaries often exceed OEWS prevailing wage levels because of persistent labor shortages.[22] By failing to account for both the non-representative nature of the evidence and the effect of recent lottery reforms on employer wage behavior, the Department overlooks important aspects of the problem. Under *State Farm*, that failure renders the rulemaking rationale incomplete and supports the argument that the proposed rule upending a well-settled and relied upon wage methodology is arbitrary and capricious.[23]

IV. The Proposed Rule Assigns Prevailing Wage Levels to Occupations in a Manner that is Inconsistent with the DOL's Own Prior Rules and Record

The proposed rule fails to rationally reconcile its treatment of occupations and wage levels with the prior IFR issued October 8, 2020, the January 14, 2021 FR, and the extensive feedback DOL solicited and received concerning occupation- and level-based wage setting for PERM, H-1B, H-1B1, and E-3 positions.

The DOL's 2020 IFR[24] and 2021 FR[25] were both expressly aimed at reforming the prevailing wage methodology for the Permanent Employment Certification, H-1B, H-1B1, and E-3 visa programs because presumably the existing wage structure and level assignments could lead to potential abuses and wage deflation and stagnation for United States workers. Those rules focused on how prevailing wage levels are computed, using OEWS data, "commensurate with experience, education, and level of supervision for a specific occupation and geographic area."[26] After courts set aside the IFR for APA defects, including lack of notice and comment, the Department itself initiated a Request for Information (RFI) in 2021[27] to reconsider and possibly revise the final wage rule and the underlying computation of prevailing wage levels in a way that more effectively protects United States workers. The RFI expressly sought detailed input on how specific occupations were mapped to OEWS data, and how education, experience, and supervision were reflected in each wage level for each occupation and area. Although initially the IFR adjusted the four-tiered prevailing wage levels to the 45th, 62nd, 78th, and 95th percentiles of the OES wage data;[28] the FR adjusted the four-tiered prevailing wage levels to the 35th, 53rd, 72nd, and 90th

[22] *See* e.g., https://www.doximity.com/reports/physician-compensation-report/2025 and https://usafacts.org/articles/how-much-money-do-doctors-make-in-the-us/.

[23] *State Farm*, 463 U.S. at 43.
[24] 85 FR 63872 (Oct. 8, 2020).
[25] 86 FR 3608 (Jan. 14, 2021).

[26] *See* https://www.dol.gov/agencies/eta/foreign-labor/news#:~:text=BLS%20informed%20OFLC%20that%20updated,be%20available%20in%20July%202025.&text=commensurate%20with%20experience%2C%20education%2C%20and,specific%20occupation%20and%20geographic%20area.
[27] *See* https://www.dol.gov/agencies/eta/foreign-labor/news.
[28] 85 FR 63872 (October 8, 2020).

percentiles of the OES.[29] Even then, the Department provided a transition period before the full wage levels would take effect.

The 2026 proposed rule again proposes to "revise . . . regulations governing the prevailing wages for employment opportunities" for the same set of permanent (EB-2/EB-3 via PERM) and temporary (H-1B, H-1B1, E-3) jobs. Yet the proposed rule does not transparently explain why the Department is assigning materially different wage levels for the same or similar occupations than those embedded in the methodology defended in 2020–2021. The proposed rule seeks to randomly adjust the prevailing wage levels to the 34th, 52nd, 70th, and 88th percentiles. It also does not explain how the proposed wage levels reflect differences in education, experience, and supervision for each occupation, as opposed to across-the-board adjustments that ignore occupational content. Absent that explanation, the proposed rule reflects the same kind of unattributed outcome that courts have condemned as arbitrary and capricious.[30] These internal contradictions in occupational wage assignments, over a relatively short period and with no corresponding shift in occupational content, demonstrate that the proposed rule's specific occupation-level wage proposals are the product of shifting policy preferences rather than a stable, evidence-based methodology. That is precisely the kind of unjustified inconsistency and disregard of empirical evidence that renders an agency rule arbitrary and capricious under 5 U.S.C. § 706(2)(A).

a. *Failure to Adequately Assess the Effect of Higher Mandated Wages on United States Workers, Including Potential Discrimination and Displacement*

The proposed rule focuses almost exclusively on the hypothesized benefit to United States workers from higher mandated wages for foreign workers, but it does not reasonably address significant, foreseeable negative effects on United States workers including:

1) Risk of discrimination against foreign-born or perceived-as-foreign workers

By forcing employers to pay significantly higher minimum wages for positions filled by foreign workers, regardless of the employer's normal salary scale, the proposed rule creates powerful incentives for employers to avoid sponsoring or hiring foreign workers altogether, including those who are already in the United States as students, trainees, or postdocs; and prefers United States citizens or permanent residents even when the foreign candidate is more qualified, simply to avoid the additional wage and compliance burdens. Although the statute prohibits national origin and citizenship discrimination, economic incentives matter. The proposed rule does not analyze how its proposed wage methodology may increase de facto discrimination against foreign-born workers, particularly in early-career roles.

2) Reduction of positions that benefit United States workers and communities

The Department assumes that raising wage levels for foreign workers will raise wages for United States workers. In many settings, such as nonprofits, cap-exempt institutions, and

[29] 86 FR 3608 (January 14, 2021).
[30] *E.g.*, *State Farm*, 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

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budget-constrained public employers, that assumption is unrealistic. Employers that cannot feasibly raise wages across the board have limited options. They could either eliminate positions entirely (both foreign and United States); reallocate funds away from training and junior roles into a smaller number of mid-career slots; or shift programs and services to jurisdictions or models that do not require United States based hiring.

These responses can reduce the total number of opportunities including those that would go to United States workers. Such actions can shrink critical training pipelines such as postdoctoral fellowships, residencies, and junior research positions that ultimately feed the United States workforce; and even limit public access to services (e.g., medical care, research advances, and community programs) that depend on mixed teams of United States and foreign workers. The proposed rule does not provide any credible quantitative analysis of these likely effects, nor does it weigh them against the speculative wage-suppression concerns it emphasizes.

3) Potential displacement of incumbent United States workers

Significantly raising minimum wages for new foreign hires may also affect internal pay structures. Employers facing sharply higher required wages for new foreign hires may compress or freeze wages of incumbent United States workers, creating internal inequities and morale problems. Alternatively, to avoid creating internal compression, employers may need to raise wages for entire job families which not many smaller or non-profit employers can do. Where that is not feasible, the more likely outcome is to cancel planned positions, reduce future hiring, or outsource positions, which harms United States workers seeking entry-level or career-progression opportunities. The proposed rule does not grapple with these dynamics and instead treats higher required wages as a benefit for United States workers. The failure to fully consider important, foreseeable consequences is arbitrary and capricious.

V. If the Department Proceeds to Modify the Current Prevailing Wage System, It Must Revise Its Methodology for Levels I and IV Percentiles Prior to Implementation

Since 1997, the Department has classified an entry-level, Level I prevailing wage at the 17th percentile of the OEWS wage distribution.[31] Within DOL, BLS (not OFLC) is the principal fact-finding agency in the broad field of labor economics and statistics that collects, calculates, analyzes, and publishes data essential to the public, employers, researchers, and government organizations. The BLS has said that entry level positions should be[32] between the 10th and 25th percentile.[33] The

[31] Prevailing Wage Policy for Nonagricultural Immigration Programs, General Administration Letter No. 2-98 (GAL 2-98) (October 31, 1997) available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/GAL/1997/GAL2-98_attach.pdf.

[32] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment and Wage Statistics*, https://www.bls.gov/oes/earnings.htm (last accessed on April 4, 2026). See also Beyond Averages: Other ways to look at Occupational Wages, BLS Occupational Outlook Quarterly, Winter 2007-2008 - ttps://www.bls.gov/careeroutlook/2007/winter/art02.pdf (the 10th percentile is sometimes used as an estimate of starting salaries).

[33] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Employment and Wage Statistics*, https://www.bls.gov/oes/earnings.htm (last accessed on April 4, 2026). See also Beyond Averages: Other ways to look at Occupational Wages, BLS Occupational Outlook Quarterly, Winter 2007-2008 -

proposal to use the 34th percentile for Level 1 wages is arbitrary as it is inconsistent with this industry standard, historical practice, and fails to account for the wide variety of positions and their requirements.

Approximately one year after the Department implemented the Level 1 entry-level prevailing wage at the 17th percentile, Congress passed legislation which changed other aspects of the prevailing wage system, including mandating a four-level prevailing wage system instead of the two-level system DOL initially implemented.[34] Notably, even though Congress was aware of the percentiles DOL used, Congress did not include any changes to the percentiles in this legislation and allowed DOL to continue to use the 17th percentile for Level 1 entry-level prevailing wages. Subsequent to this legislation, other bills have been introduced to require a median wage to be paid for all workers in the same occupation and geographic area or that a minimum wage had to be paid to all United States workers. However, none of these bills to modify the current wage system in the H-1B program have passed Congress.[35]

Although Congress has repeatedly considered additional modifications to the wage system and has rejected these modifications, DOL decided that the system had to be modified in 2021 (more than 23 years after the last modifications to the system) because it is "an outmoded method for calculating prevailing wage rates" that "has never [been] tied to the relevant statutory factors."[36] Initially, "after consulting with various authoritative sources," DOL sought to increase the Level 1 entry-level prevailing wage from the 17th percentile to the 45th percentile. After receiving public comment on the IFR, DOL indicated in the FR that it "continues to believe that, at least in some cases [which appears to indicate less than a majority], the old prevailing wage methodology resulted in harm to United States workers" but decided to lower the proposed 45th percentile to the 35 percentile for Level 1 entry-level prevailing [37] This was still at least 10 percentiles above the top of the range for entry-level positions as by BLS. After a court ruling, DOL withdrew it on December 13, 2021.[38]

Moreover, DOL now proposes to set the Level 1 entry level prevailing wage at the 34th percentile without a discussion as to why this new level is a more correct level than the 35th percentile set in the 2021 FR. DOL also does not explain why the Level I entry-level prevailing wage should exceed the 25th percentile which is the top of the entry-level percentile determined by BLS. Without such justification or rationale, the proposal is arbitrary and makes it difficult for the public to properly comment on the proposal.

ttps://www.bls.gov/careeroutlook/2007/winter/art02.pdf (the 10th percentile is sometimes used as an estimate of starting salaries).

[34] American Competitiveness and Workforce Improvement Act (ACWIA) of 1998, Title IV of P.L. 105-277 (https://www.govinfo.gov/content/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf).

[35] Prevailing Wage Requirements for the H-1B, H-1B1 and E-3 Workers in Specialty Occupations, Congressional Research Service, January 30, 2025 (https://www.congress.gov/crs-product/IF12892).

[36] 85 FR 63888 (October 8, 2020).

[37] 86 FR at 3618, 3640.

[38] *Chamber of Commerce. v. Dep't of Homeland Sec.,* No. 20-cv-07331 (N.D. Cal. June 23, 2021).

In the proposed rule, the Department indicates that the prevailing wage needs to be raised because employers are paying more than the prevailing wage.[39] In compliance with the statutory requirements of the H-1B program,[40] employers are required to offer the greater of the actual wage paid to all other individuals with similar experience and qualifications for the offered position ***or*** the prevailing wage for the occupational classification in the area of employment, whichever of the two wages is higher. In the 2021 FR that the agency withdrew, DOL acknowledged that consistent with the statute, there can be a difference between the actual wage and prevailing wage and DOL provided examples of when this could potentially occur.[41] However, in the proposed rule, the Department indicates that their analysis suggests that there is a wide discrepancy between the actual wage and prevailing wage.[42] While many would argue that this evidences that the current system is working because employers are following the statutory mandate and paying in excess of the prevailing wage industry average when warranted, the Department instead concludes that the prevailing wage system is failing because both the prevailing wage and actual wage are not the same. DOL reaches this conclusion even though Congress, when passing the underlying legislation, created a separate actual wage and a separate prevailing wage requirement because they knew that the two would not always be the same.[43]

After concluding, without evidence, that the prevailing wage system is failing, the Department then attempts to justify a proposed Level 1 percentile increase from the 17th percentile to the 34th percentile based upon the opinion that market forces are "commanding very large premiums" for entry-level actual wages over the prevailing wages.[44] The DOL also attempts to justify the proposed change based upon the unemployment rate among United States recent college graduates.[45] However, prevailing wage percentiles have never been dynamic--they have never changed based upon unemployment rates. This justification cannot support a final regulation unless it also indicates parameters as to when the percentiles will change based upon increases or decreases in the unemployment rate. DOL also attempts to justify the proposed change based upon supposed mass layoffs of United States workers. Similar to the unemployment rate argument, percentiles have never been dynamic based upon employment levels and cannot justify finalizing this rule as proposed. Finally, prevailing wage percentiles have never been used as a type of enforcement tool. Instead, the DOL's Wage and Hour Division has numerous enforcement tools[46] if it is determined that an employer is not complying with the terms of the program.

[39] 91 FR 15470 (March 27, 2026).
[40] 8 USC 1182(n)(1)(A).
[41] 86 FR at 3621.
[42] 91 FR 15471. Of note, the DOL calculated that the average wage rate paid to H-1B beneficiaries between FY2020-2025 is $121,908. In 2026, the average wage being paid to U.S. workers is $64,505. See https://www.forbes.com/advisor/business/average-salary-by-state/. Therefore, employers are paying their H-1B workers approximately double the national average which further evidences that the wage protections within the program are working.
[43] See INA§212(n). The statute is designed to **protect U.S. workers from adverse wage effects** by requiring employers to offer H-1B workers compensation that is at least equal to the prevailing wage for the occupation in the geographic area or the actual wage paid to similarly qualified employees, whichever is higher.
[44] 91 FR 15473 (March 27, 2026).
[45] *Id.*
[46] *See* https://www.dol.gov/agencies/whd/immigration/h1b (last accessed on April 4, 2026).

In the proposed rule, the Department uses the Software Developer occupation as an example of why a change to the entire prevailing wage system is necessary.[47] The DOL correctly notes that the highest number of LCAs filed are for the Software Developer occupation.[48] The Department then refers to its Occupational Outlook Handbook (OOH)[49] to note that Software Developers "typically" have a bachelor's degree. The DOL then states "in other words, while typical, a Bachelor's Degree-level education, or its equivalent, is not always a prerequisite" and thus "the baseline qualifications to enter the occupation based upon the OOH do not match the statutory requirements for H-1B workers." The Ninth Circuit rejected a similarly distorted use of "typically" when considering the OOH entry for Computer Programmers: "There is no daylight between typically needed in the OOH and normally required, per the [H-1B] regulatory criteria."[50]

Since releasing its prevailing wage guidance in 2009, the DOL has never relied upon the OOH when determining prevailing wages.[51] Instead, it relies upon the O*NET in the prevailing wage program.[52] There are multiple reasons why DOL does not use the OOH. First, the OOH only provides "broader insights into occupational trends and educational requirements" (such as using the word "typical" when indicating entry-level requirements in its occupational summaries) while the O*NET provides more "detailed information about job indicators".[53] Second, the OOH combines SOC occupations into its summaries while O*NET provides an individualized assessment of more than 900 occupations.[54] For example, the OOH combines the summary for Software Developers with the SOC occupation of Quality Assurance Analysts and Testers.[55] Therefore, the information provided by the OOH is not as accurate for prevailing wage purposes as the O*NET.

If the DOL had referenced the O*NET for the Software Developer occupation for its analysis, the O*NET indicates that at least a bachelor's degree is not just "typical" for the occupation but is required by just about all positions.[56] DOL justifies the increase in the percentile for Level I entry-level positions because "it would be inappropriate to consider the wages of the least educated and

[47] 91 FR 15464 (March 27, 2026).
[48] *See* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/LCA_Selected_Statistics_FY2026_Q1.pdf.
[49] *See* https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm (last accessed on April 4, 2026).
[50] *Innova Sols., Inc. v. Barran*, 983 F.3d 428, 432 (9th Cir. 2020).
[51] *See* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.
[52] Prevailing Wage Policy for Nonagricultural Immigration Programs, General Administration Letter No. 2-98 (GAL 2-98) (October 31, 1997) available at https://www.dol.gov/sites/dolgov/files/ETA/advisories/GAL/1997/GAL2-98_attach.pdf. In the preamble of the proposed regulation, DOL indicates that it is not relying upon the O*NET to support its arguments to change the prevailing wage system because the O*NET does not "differentiate between jobs that require bachelor's degree in specific specialties and those they accept a general bachelor's degree." 91 FR 15465 (March 27, 2006). However, the OOH is similarly broad because even though it may state a major field of study, it also states "or related field" with some broad categories as "engineering" or "mathematics" after the or related field. See https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-4. In response to a lawsuit challenging a denial of an H-1B petition, USCIS presented a similar argument in support its refusal to consider O*NET data and only relying upon O*NET data. The U.S. District Court for the District of Columbia ultimately dismissed this argument. See 3Q Digital Inc. vs. U.S. Citizenship and Immigration Services, Case No. 1:19-cv-579-RCL (March 6, 2020).
[53] *See* https://brainly.com/question/55024704.
[54] *See* https://www.onetcenter.org/overview.html.
[55] *See* https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm.
[56] *See* https://www.onetonline.org/link/summary/15-1252.00.

experienced workers in these occupational classifications in setting the prevailing wage levels."[57] However, if the occupational classification does not include the least educated and experienced workers, the current prevailing wage percentile is appropriate (and actually may be overstated).

Another example is the third top LCA occupation, Occupational Therapists.[58] According to O*NET, all Occupational Therapist positions require a Bachelor's Degree or Master's Degree, with a supermajority requiring a Master's Degree.[59] Therefore, according to the O*NET, the wages paid to all H-1B workers in this classification are ***not*** set "based upon a calculation that takes into account wages paid to workers who almost certainly would not qualify to work in a specialty occupation as defined by the INA" because the O*NET confirms that all Occupational Therapists are required to possess credentials that would qualify them for H-1B classification.[60]

According to OFLC performance data, the occupational classifications of Software Developer and Occupational Therapist account for 40% of the LCAs filed in Q1 of FY2026.[61] According to the O*NET, almost all of the positions within these occupations require at least a bachelor's degree and thus qualify as a specialty occupation. If 40 percent of the LCAs, comprised from only 2 occupations, clearly do not meet the Department's underlying premise, it is clear that DOL should have undertaken a more sophisticated review of all impacted positions to determine where in the prevailing wage percentile range the position should fall. One size should not fit all occupations in the prevailing wage system and clearly choosing one occupation to change the system for all wages is arbitrary. Occupations that require H-1B caliber workers for all (or almost all) of their positions should not be penalized by increased prevailing wage percentiles due to the fact that other occupations may include less educated and experienced workers in their occupational classifications.

As previously discussed, BLS has repeatedly indicated that the entry-level percentile range should be between the 10th and 25th percentile.[62] In its FR, which was ultimately withdrawn, the Department indicated that the "lower end of the entry-level range would be a more appropriate point to place the first wage level."[63] Therefore, if the occupation just about always requires a bachelor's degree to perform the duties of the specialty occupation and an entry-level percentile according to the BLS is between the 10th and 25th percentile, the DOL should reduce the Level I prevailing wage percentile from the 17th percentile to closer to the 10th percentile. For those occupations that do not just about always require a bachelor's degree according to O*NET, the DOL could establish criteria to set those occupations between the 17th percentile and 25th percentile based upon the percentage of positions within the occupation indicated in the O*NET which do not require a bachelor's degree. OFLC should incorporate the O*NET data into the OEWS data

[57] 91 FR 15465.
[58] *See* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/LCA_Selected_Statistics_FY2026_Q1.pdf.
[59] *See* https://www.onetonline.org/link/summary/29-1122.00.
[60] 91 FR 15465.
[61] *See* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/LCA_Selected_Statistics_FY2026_Q1.pdf.
[62] In this proposed regulation (and previous iterations of the regulation), DOL has not opined as to why the 10th to 25th percentile definition from BLS, its principal agency in the development of labor economics, is not accurate when applied to this program and how an inconsistent interpretation could affect broader interpretations beyond this program, as discussed below.
[63] 86 FR 3639 (January 14, 2021). In part, the DOL reached this conclusion in order to "account for small businesses and rural employers that use the H-1B and PERM programs."

that it receives from BLS normally in May so that more accurate percentiles based upon occupational requirements are provided to stakeholders when the OFLC prevailing wage data is updated on July 1st of each year.

a. Level IV Prevailing Wage Percentiles Should be Set Based on Reasoned Analysis and Supported by BLS Data

At the core of the proposed rule is the random decision to set the Level IV wage at the 88th percentile of the OEWS wage distribution. While the Department characterizes this as better reflecting workers with the highest levels of experience, education, and supervisory responsibility, the rule does not provide a principled empirical basis for selecting this specific percentile. Rather than being derived from observable labor market segmentation or validated occupational distinctions, the 88th percentile appears to be a discretionary policy choice that is subsequently used to generate the remainder of the wage structure through the statutory formula. As a result, the methodology is effectively back-solving: the Department selects a high-end anchor and then relies on the statutory spacing mechanism to propagate that choice across Levels II and III. This structure does not independently validate the underlying assumption that the selected percentile corresponds to "similarly employed" workers at the highest level.

The selection of the 88th percentile is based on the Department's determination of a "Benchmark Value," which is methodologically flawed because it is outcome-driven rather than grounded in the statutory framework. The proposed rule defines the Benchmark Value as an aggregate average of OEWS wages across occupations and locations and then calibrates the wage percentiles to reproduce that target through optimization. Instead of identifying percentiles that correspond to workers with similar levels of experience, education, and supervision, the Department selects a target average wage and adjusts the model until it reaches that result. In doing so, the methodology substitutes numerical alignment for statutory compliance. As a result, the target itself is not an appropriate comparator for the population the statute is intended to protect. Further, the calculation assumes that H-1B workers, on average, hold the same average experience, education and training as United States workers. If the typical H-1B worker is in their early to mid-30s (i.e., not at the very top of their career), then anchoring Level IV to a high percentile like the 88th risks benchmarking against a much older, more experienced subset of the workforce, rather than "similarly employed" workers. Available government data indicate that H-1B workers are, on average, relatively early- to mid-career, reflecting the program's pipeline from recent graduates into specialty occupations. For example, the median age of approved H-1B beneficiaries in FY 2024 was 34 years old,[64] whereas the median age of all workers in "[m]anagement, professional, and related occupations" in the United States in 2024 was 43.5. [65]

Underpinning the rationale for the Benchmark Value is the following statement: "Using these data, the Department calculated that the average prevailing wage, for all LCAs from FY2020–2025, was

[64] *See*, e.g., U.S. Department of Homeland Security, *Characteristics of H-1B Specialty Occupation Workers* https://www.uscis.gov/sites/default/files/document/reports/ola_signed_h1b_characteristics_congressional_report_FY24.pdf.

[65] U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, Employed persons by detailed occupation and age https://www.bls.gov/cps/data/aa2024/cpsaat11b.pdf.

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$111,717. The Department also calculated that the average wage rate paid to the beneficiaries of the same LCAs was $121,908.162. In other words, the average LCA-program employee was paid an actual wage, and thus commanding, a $10,191 premium over the prevailing wage level offered—a gap that indicates that the prevailing wage is set below the market value of comparable United States workers."[66] However, this is a meaningless fact. An employer may not file an LCA for an H-1B *unless* the H-1B worker will be paid at least the prevailing wage. As such, there can be no LCAs with actual wages listed below the prevailing wage and all would be at or above the prevailing wage.

This approach also introduces circular reasoning and lacks independent empirical validation. The proposed rule treats the observed gap between prevailing wages and OEWS averages as evidence that wage levels must be increased, then defines the Benchmark Value based on those same OEWS averages and finally validates the revised percentiles by showing that they close the gap. This reasoning assumes its conclusion and does not demonstrate that the selected benchmark corresponds to any identifiable group of workers defined by the statutory criteria. In addition, the methodology conflates overall wage averages with the wages of "similarly employed" workers, despite acknowledging that OEWS data do not encode differences in experience, education, or supervisory responsibility. Because the entire wage structure is calibrated to match a single, unvalidated parameter, small changes in that parameter would materially alter all wage levels. The result is a policy-driven calibration rather than a statistically or legally grounded determination of appropriate prevailing wages.

As indicated above, the most current available labor market data indicates that the median age of all "Management, professional, and related occupations" is approximately 43.5, implying that the typical worker has well over a decade of experience.[67] In such a workforce, individuals with five to seven years of experience—commonly classified as "senior-level"—represent a substantial portion of the occupation rather than an upper-tail outlier. Because OEWS percentiles reflect a mixed population and do not isolate experience levels, workers with this level of experience are likely distributed throughout the middle of the wage distribution rather than concentrated near the top.[68] Setting Level IV at the 88th percentile therefore risks systematically misclassifying ordinary senior-level roles as belonging to the highest tier of the labor market.

Moreover, the Department's reasoning appears to conflate policy objectives with methodological justification. While concerns about wage suppression or labor market impacts are certainly relevant policy considerations, they do not substitute for a rigorous explanation of how the selected percentile accurately maps to the statutory requirement that wages reflect those of "similarly employed" workers. The rule does not demonstrate that the 88th percentile consistently corresponds to a definable group of workers meeting Level IV criteria across occupations and regions.

[66] 91 FR 15454 at page 15471.
[67] U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, Employed persons by detailed occupation and age (https://www.bls.gov/cps/cpsaat11b.htm).
[68] U.S. Bureau of Labor Statistics, *Occupational Employment and Wage Statistics (OEWS)*, https://www.bls.gov/oes/ (OEWS wage percentiles do not report or control for experience, education, or supervisory level).

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For example, more than half of the O*NET professional occupations are assigned a Job Zone 4 with a Specific Vocational Preparedness (SVP) of 7.[69] According to the DOL's Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* ("2009 Guidance"),[70] if the Job Zone 4 occupation requires a bachelor's degree and 5 or more years of experience, the position will be assigned a Level IV prevailing wage. If the position requires 6, 10, 15, 20 or more, of experience, it will still be assigned the same prevailing wage. Currently, the Level IV prevailing wage level is assigned the 67th percentile and the proposed rule would increase this to the 88th percentile. BLS has reported that the median years of experience with the same employer for United States workers is 3.9 years.[71] Within the OEWS wage system, the BLS median is the 50th percentile.[72] Therefore, if the median amount of employment with the same employer is 3.9 years and a Level IV prevailing wage can be assigned with just 5 years of experience, the Level IV prevailing wage should be closer to the 50th percentile. A significantly higher percentile, such as the 88th percentile DOL proposes, is not supported by BLS data.

In sum, the overall framework is not empirically grounded and would not serve the stated policy goals. The selection of the 88th percentile is not supported by evidence showing that it corresponds to "similarly employed" workers as defined by statute. To the contrary, BLS data indicates that a Level IV prevailing wage for professional occupations may be closer to the 50th percentile than the significantly higher 88th percentile. A more robust approach would require transparent, data-driven validation linking percentile thresholds to factors consistent with BLS data, rather than relying on unsupported assumptions alone.

VI. Alternative/Private Wage Surveys Are an Important Part of the Prevailing Wage System

The term "prevailing wage" appears in two regulations: 20 CFR 655.731 regarding wage requirements for the H-1B, H-1B1, and E-3 programs associated with the filing of an ETA Form 9035, and 20 CFR 656.40 regarding wage determinations for filing ETA Form 9089, Application for Permanent Employment Certification. The regulations at 20 CFR 655.731 require an employer to pay the foreign worker a "required wage" which is the higher of the "actual wage," where the actual wage is the wage paid "to all other individuals with similar experience and qualifications for the specific employment in question," or the "prevailing wage." Where there is no collective bargaining agreement, an employer has three sources for the prevailing wage: the DOL, an independent authoritative wage source, or another legitimate source of wage information.[73] Implicit in this regulatory scheme is that all three sources have equal weight and that all three should yield prevailing wages that are comparable. In fact, the regulations specify that when there is no collective bargaining agreement "the employer is not required to use any specific methodology to determine the prevailing wage and may utilize any of these options."[74] If the proposed rule's higher prevailing wage percentiles were to go into effect, there would be a large

[69] *See* https://www.onetonline.org/link/summary/15-1252.00; https://www.onetonline.org/help/online/svp. and https://www.onetonline.org/find/zone?z=4.
[70] *See* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.
[71] *See* https://www.bls.gov/news.release/tenure.nr0.htm.
[72] *See* https://www.bls.gov/oes/earnings.htm.
[73] 20 C.F.R. 655.731(a)(2).
[74] 20 CFR 655.731(a)(2).

disparity between the wages listed in alternative wage surveys and the DOL's wage. Therefore, the DOL's proposed prevailing wage calculations would become contrary to the asserted purpose of the proposed rule.

20 CFR 656.40 discusses acceptable sources for prevailing wages which are similar to the options for an employer under 20 CFR 655.731. Here, while an employer must obtain a prevailing wage determination from the DOL, the DOL's options are the same: wage data from the Department's OEWS survey, a collective bargaining agreement, a statutory determination under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, or an employer-provided survey. Again, the idea is that the data from each of these sources would be equally acceptable and that they yield a wage that would be considered a "prevailing wage." Moreover, INA §212(n)(1) requires employers wishing to sponsor an H-1B worker to obtain a certified LCA from the Secretary of Labor. Among the attestations made on that LCA is that the H-1B worker will be paid wages that are "at least the prevailing wage level for the occupational classification in the area of intended employment" and that this should be "based on the best information available as of the time of filing the application."

The proposed rule violates two aspects of INA §212(n). First, in incorrectly setting the way data is leveled it prevents employers from obtaining from the Foreign Labor Certification Online Wage Library (Online Wage Library) a wage that is in fact "the prevailing wage" for the occupational classification in the area of intended employment. Second, it ensures that the data in the Online Wage Library is not "the best information available as of the time of filing the application" as required by INA §212(n).

This is particularly evident when comparing the data in the Online Wage Library to that which is readily available from commercial wage surveys used by companies for organization-wide salary benchmarking. The Online Wage Library is a federal government database created for United States immigration purposes and not regularly relied upon by employers for setting salaries for their workforce.

Instead, when setting salary benchmarking, private employers look to commercial compensation surveys that are created for this specific purpose. Such surveys have nothing to do with immigration and instead look to the market to identify what employers pay their workers. These commercial compensation surveys follow strict statistical methodologies and many of them have been regularly accepted by the Department for decades as valid evidence of the prevailing wage. Such acceptance is consistent with the regulatory provisions regarding determining the prevailing wage. Indeed, as evidence of their value and reliability, employers pay annually for access to surveys such as Willis Towers-Watson, Mercer, and Radford. Smaller organizations that want to check market rates look to websites such as salary.com or glassdoor.com to set wage rates. Outside of the context of immigration, few employers consult the Online Wage Library.

BLS's survey data collection presents as a government demand and provides no benefit to survey participants. By contrast, alternative wage surveys must be accurate to compete in the marketplace and provide the benefit to survey participants of access to accurate and specific wage data. Further, some wage surveys provide wage architecture and leveling in granular detail that is superior to

BLS survey data. The proposed rule itself [75] recognizes the value of alternative wage surveys, noting that they are useful when "government data sources do not fully capture" relevant information. It further acknowledges that, for some employers, "private surveys may provide the most accurate reflection of market wages"[76] when OEWS data is insufficient or unavailable. However, unlike the previous IFR and FR, the proposed rule indicates that DOL is now considering eliminating alternative wage surveys as an option altogether and states that alternative wage surveys are valuable in "limited circumstances."[77] This limitation is contrary to the current regulatory structure at 20 CFR 655.731 and 656.40, which provides that alternate wage surveys are an equally legitimate source for prevailing wage data in all cases and undermines the purpose of the proposed rule to ensure that wages are an accurate representation of the market.

There are several reasons to not only preserve but expand DOL's acceptance of alternative wage data. These include the fact that DOL's four wage level structure is not as precise as the leveling that can be provided by alternative wage surveys. BLS surveys are also incomplete, often resulting in missing data or the use of a generic prevailing wage for a significant share of occupations[78] - particularly for highly compensated roles and in ACWIA wage determinations. Also, DOL's leveling guidance, as provided in its 2009 Guidance has multiple descriptive terms that are subject to interpretation, yielding disparate results both in the context of employers conducting their own prevailing wage analyses in preparing ETA Form 9035, as well as in the context of the NPWC issuing PWDs.

Rather than the percentile system implemented by OEWS, using the four-level minimum provided for in INA §212(p)(4), one alternate wage survey features six levels for professional individual contributors, each based on degree level and range of years of experience (with wage levels ranging from a position requiring a bachelor's degree and no experience, to a position requiring a master's and 10 or Ph.D. and 8 years of experience), rather than the four wage levels implemented by DOL, that are only approximately correlated to education and experience levels. Given the higher level of detail and an explicit correlation to education and experience levels, this alternate wage data is often more accurate than DOL's data. Notably, despite minor variances, the current DOL percentiles are much closer to alternate wage data results than they would be under the proposed rule's inflated percentiles.

While less accurate than alternate wage surveys, DOL's current prevailing wage percentages more accurately reflect market based prevailing wage data than DOL's proposal, as demonstrated by comparing alternative wage data for SOC code 15-1252 Software Developers. For example, one alternative wage data source provides that the prevailing wage for a Software Developer position requiring a bachelor's degree and 5 years of work experience in Chicago, Illinois is $147,127. This is consistent with DOL's OEWS prevailing wage data which provides that the prevailing wage for a Software Developer in Chicago, Illinois requiring 5 years of work experience (Prevailing Wage Level IV) is $153,317. This comparison demonstrates how the inflated percentages in the proposed rule will increase OEWS wages to well above what are truly "prevailing" wages.

[75] 91 FR 15479 (March 27, 2026).
[76] *Id.*
[77] *Id.*
[78] *See* https://www.mheducation.com/highered/blog/2025/09/when-the-numbers-are-off-with-economic-data.html.

One critical difference between an alternative wage survey and the OEWS is that commercial surveys ask employers what they pay employees at different levels. As a result, those surveys gather real market data for what companies are paying employees at various experience levels. As acknowledged in the proposed rule, the methodology employed by the BLS and the OEWS does not accurately measure what companies are paying employees at various levels, as they request insufficient information to be accurate.

By gathering general data without regard to education and experience levels and then setting a mathematical formula to distribute the wages from entry-level to experienced, the proposed rule in no way is reflective of the market. It is arbitrary to simply "decide" that entry-level is now the 38th percentile (not 17th percentile) of wages surveyed and assuredly does not result in obtaining the "best information available" as required by INA §212(n).
Further, BLS does not collect, and therefore OFLC does not provide, wage data for thousands of occupations located across the United States, and simply sets those occupations, regardless of whether at level I or IV, at the OES default wage of $115 per hour.

For these reasons, the percentages proposed in the proposed rule should be withdrawn, and the existing percentiles which align with alternative wage survey data should be maintained.

Until more detailed and accurate data is obtained, rather than limiting the role of alternative wage surveys, the Department should embrace the expanded use of alternate, privately published wage surveys (when available) to leverage available data relating to wage levels and occupational development. These surveys provide accurate and reliable data that is probative on employee compensation levels for broad segments of the economy. Over time, the volume, depth, breadth, and quality of these surveys have increased,[79] and they have become integral components of compensation determinations in the private sector. Authoritative, independent surveys are available for many occupations for which H-1B petitions and PERM labor certifications are filed. These surveys collect information on the education and experience of surveyed employees and specific salary figures. If the Department's assessment that the role of these surveys should be "limited" is based on the administrative complexity of reviewing and validating these surveys, DOL could contract with private wage survey providers to obtain direct access to these surveys.

The problem with relying on BLS survey data is compounded by the fact that this data is recurringly incomplete. As indicated in DOL's technical release notes, DOL aggregates detailed occupations into broad occupations, has no wage data to report due to data limitations, and may instead provide prevailing wage data for outside the geographic area, including state or national level wage data, or may assigns the wage data for a closely aligned occupation, or may default to a single prevailing wage for all levels due to the wages being "too high to provide an estimate."[80]

[79] *See* https://www.hr-guide.com/data/043.htm for a sampling of such surveys.

[80] Office of Foreign Labor Certification Technical Release Notes for the Occupational Employment and Wage Statistics Update Wage Year 2025-26 (Effective July 1, 2025) *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Technical%20Release%20Notes%20for%20July%202025%20through%20June%202026%20Wage%20Year.pdf.

Until the Department can re-engineer its prevailing wage data collection process to collect more accurate, detained, and specific employer data, particularly related to the proper wage level distributions for different occupations, the prevailing wage process should be modified to integrate the OEWS survey data with relevant data from private wage surveys. Integrating private wage data could enable DOL to review alternate wage data from a macro level, rather than the current inefficient process of requesting voluminous underlying data for each individual prevailing wage request, even if it had already been provided in simultaneous virtually identical requests. At a minimum, any modified prevailing wage process should include an expanded option for providing private survey data. These surveys are used for a myriad of business purposes, unlike OEWS data, which the private sector uses primarily for immigration processes.

VII. The Department Should Abandon Consideration of the Regulatory Alternatives Mentioned in the Proposed Rule

a. Alternative 1: Using Experience Benchmarking for Adjusting Wage Levels

The Experience Benchmarking proposal represents a significant departure from the statutory and conceptual foundation of the prevailing wage framework. As described in the proposed rule, the methodology would base prevailing wage determinations on the foreign worker's actual education and experience, rather than on the minimum requirements of the position offered. This shift raises serious concerns regarding statutory consistency, methodological reliability, administrative feasibility, and broader labor market impacts.

At its core, the proposal shifts the prevailing wage system in a more worker-specific direction, rather than one focused primarily on the job. The INA ties prevailing wage obligations to employment in a specific occupation within a defined geographic area, focusing the inquiry on the position and the local labor market in which it exists. By contrast, the Experience Benchmarking approach conditions the required wage on the individual characteristics of the selected worker. This would result in materially different wage obligations for identical positions in the same occupation and geographic area, depending in significant part on the credentials of the beneficiary. Such an outcome is difficult to reconcile with a statutory scheme designed to protect similarly employed United States workers, rather than to regulate individualized earning potential. It also undermines predictability and uniformity, both of which are essential to an administrable regulatory system.

The methodology further relies on layered modeling assumptions that introduce uncertainty rather than improve precision. The Department proposes to estimate wage premia using Mincer earnings equations and American Community Survey (ACS) data and then apply those premia to OEWS wage percentiles. Each component of this process may compound rather than offset one another. The Mincer equation, while commonly used in academic research, is designed to estimate average returns to education and experience across broad populations. It was not developed to determine occupation-specific wage requirements tied to discrete job duties, and the proposed rule does not demonstrate that it can be reliably applied in that context. Applying this type of generalized model in the regulatory context risks imposing assumptions that do not reflect actual labor market conditions.

The proposal also appears to assume compatibility between ACS and OEWS data sources, despite significant differences in how those datasets are constructed. OEWS is an employer-reported survey focused on wages within defined occupations and geographic areas, whereas ACS is a household survey based on self-reported income that may include broader compensation components and is subject to different sampling constraints. The application of ACS-derived wage ratios to OEWS percentiles produces a synthetic wage measure that is not directly observed in either dataset, and which may be difficult to independently validate. Rather than increasing accuracy, this approach risks introducing systematic distortions into prevailing wage determinations.

In addition, the reliance on "potential experience" as a proxy for actual work experience may introduce further imprecision. Because the ACS does not measure actual experience, the methodology estimates it using age and years of education. This proxy generally assumes continuous labor force participation and does not account for career interruptions (such as leaving the workforce to take care of children, to take care of elderly parents, and/or to return to school to obtain a new degree), occupational changes, part-time work, or non-linear career paths. These limitations are particularly pronounced in high-skill labor markets, where such assumptions frequently do not hold. As a result, the model may misestimate experience levels and generate wage adjustments that diverge from actual market wages rather than reflect them.

The proposal also raises significant concerns regarding transparency and administrability. The current prevailing wage system, while not without limitations, is relatively transparent and allows employers to determine applicable wage levels with a reasonable degree of predictability. By contrast, Experience Benchmarking introduces a level of complexity that is not easily replicable or verifiable. Employers would be required to rely, at least in part, on statistical modeling that may not be readily transparent, and small changes in inputs could produce disproportionate changes in wage outcomes. This lack of transparency may increase the likelihood of inconsistent application and could raise due process concerns.

Furthermore, from an economic perspective, the proposal may produce unintended and counterproductive labor market impacts. By tying wage levels directly to education and assumed experience determined based solely on age, the methodology may create disincentives to hire highly qualified workers, as employers would face higher wage floors for those individuals. This dynamic could lead employers to favor less experienced candidates in order to manage costs, undermining the stated goal of attracting highly skilled talent. At the same time, the system may encourage new forms of strategic behavior, including disputes over how qualifications are categorized or efforts to structure positions in ways that minimize wage obligations. In this respect, the proposal does not eliminate wage arbitrage but instead shifts it into less transparent forms.

The administrative burden associated with this approach is also substantial and appears to be underestimated. Employers would likely need to determine prevailing wages only after identifying a specific candidate, rather than at the outset of recruitment, complicating hiring timelines and introducing delays. In addition, employers may need to file multiple ETA Forms 9035 to account for different potential candidate profiles and would be required to collect and document detailed information about worker qualifications. These requirements would increase compliance costs,

particularly for small and mid-sized employers, and introduce additional opportunities for error and inconsistency.

Further, the use of ACS data raises concerns regarding the appropriate comparison group. The dataset may include individuals who do not meet the definition of "United States workers" under the INA. Without clear safeguards to ensure that only the relevant population is included in the analysis, the resulting wage benchmarks may not accurately reflect wages of similarly employed United States workers, as required by statute. For these reasons, the Department's reliance on ACS-based modeling, combined with its assumptions regarding data compatibility and experience measurement, is not sufficient to support adoption of the Experience Benchmarking methodology. The proposal introduces significant legal, methodological, and practical concerns without demonstrating that it would result in more accurate or reliable prevailing wage determinations.

b. *Alternative 2: National Wage Standard for Remote and Distributed Work*

The INA explicitly requires that prevailing wages be determined based on the "area of employment." [81] This language is unambiguous and reflects Congress's intent to tie wage determinations to local labor market conditions. A national wage standard would effectively read this geographic requirement out of the statute.

Prevailing wage determinations are designed to ensure that the employment of foreign workers does not adversely affect similarly employed United States workers in the same geographic area. Labor markets in the United States vary significantly by region due to differences in cost of living, industry concentration, and workforce supply. A national wage standard would distort these realities by inflating wages in lower-cost regions, and potentially underrepresenting wages in higher-cost metropolitan areas.

This alternative would undermine the core purpose of the prevailing wage system, which is to align wages with actual market conditions in the relevant area of employment. A national wage standard would impose significant and uneven burdens across the country. Employers in lower-wage regions, including rural areas and emerging economic hubs, would face substantial cost increases, potentially discouraging hiring, limiting business growth, and reducing participation in visa programs.

At the same time, such a system could create labor market distortions that disadvantage both United States and foreign workers by disconnecting wages from local economic conditions. Rather than promoting fairness, a national standard risks introducing new inequities. While remote work has become more prevalent, it does not eliminate the relevance of geographic location in employment. The "area of employment" remains a meaningful concept for multiple reasons, including:

- Variations in local economic conditions and wage structures;
- The location of the employer and its operations; and

[81] INA §212(n)(1)(A). For H-1B workers, DOL defines the "area of intended employment" as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed." 20 CFR 655.715.

- The potential for remote work arrangements to change over time.

Moreover, many positions classified as "remote" still have a definable employment nexus and can be limited to work in certain geographic areas, and the Department has existing tools to address such scenarios without abandoning the statutory framework. Implementing a national wage standard would introduce significant uncertainty into the immigration system and local economies that may be get outpriced by a national standard. Employers, practitioners, and adjudicators would face new ambiguities regarding compliance, while the likelihood of legal challenges would increase. The current prevailing wage system, while not without flaws, has provided a well-established and legally grounded framework for more than 20 years that stakeholders understand and rely upon.

VIII. The Department Underestimates the Disproportionate Impact that the Proposed Rule Will Have on Small Businesses

The proposed rule provides a grossly inadequate estimate for the cost to small businesses, including small business non-profits, impacted by the proposed changes, which violates the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. Throughout the proposed rule, serious concerns are raised that the Department first determined a final wage level at which it wanted prevailing wages[82] set for PERM, H-1B, H-1B1, and E-3s, and thereafter developed an analysis to try and justify its forgone conclusion. The proposed rule, if adopted, would have a very serious and significant negative impact on small businesses.

a. The Calculation of the Number of Small Businesses Impacted Is Not Adequately Defined

The proposed rule states that, based on the number of H-1B filings in 2024, there were "13,602 unique small H-1B employers with data on the number of employees and annual revenue that met the Small Business Administration's size standards."[83] The data behind this calculation is not provided, and this number is provided as a conclusion. Any final regulation needs to set out the exact criteria that were used to confirm the appropriate revenue and employee numbers that were used to define a small business and then provide more detail on the United States Citizenship and Immigration Services (USCIS) filing information to properly confirm that 13,602 is an accurate sum. While there is a lot of commentary regarding the top 10 to 30 employers who filed for H-1B workers, data from the H-1B Data Hub shows that in 2019 53,377 employers participated in the H-1B program.[84] Based upon the number of small businesses in the United States, it is assumed

[82] Small businesses account for 99.9% of all U.S. businesses. *See* https://www.uschamber.com/small-business/state-of-small-business-now.
[83] 91 FR 15493 (March 27, 2026).

[84] *See* https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/#:~:text=The%20vast%20majority%20of%20H,by%20USCIS%2C%20fiscal%20year%202019&text=Notes:%20H%2D1B%20petition%20approvals,and%20Immigration%20Services%20(USCIS).&text=The%20top%2030%20employers%20accounted,positions%20certified%20in%20fiscal%202019.

that more than 25% of the employers participating in the H-1B program would be classified as small businesses.[85]

b. The Financial Calculation of the Impact of the Rule on Small Entities Is Far Too Low

The proposed rule states that employers would only need to increase the wage paid to a PERM sponsored, H-1B, H-1B1 or E-3 worker.[86] This ignores the realities of small businesses. Specifically, employers cannot simply increase the pay of a foreign worker without also increasing the wages of the similarly situated United States workers. A wage increase for a foreign worker will almost certainly cascade wage increases for other employees of small businesses, which could adversely impact their profitability and potentially their viability.

The proposed rule's statement that "average wage cost per small entities is estimated at $20,298"[87] only factors in the wage increase for the foreign worker and ignores the other federal and state law liability and pay equality issues small employers would immediately encounter.

The proposed rule estimates that a human resource professional's time of one hour, estimated at $60.94, is enough to assess the Rule's impact on wage disparities and necessary changes.[88] This estimate is artificially low. Examining a wage increase for any foreign worker, and any impact on the similarly situated United States workers will clearly take more than one hour. Several hours may be needed, including for evaluating yearly budget implications, and discussing this with senior management and obtaining their approval. At the very least, 20 hours is a far more realistic time requirement, which raises the cost to $1,218. This would be multiplied by the number of foreign workers employed by the employer.

The Proposed Rule states that the revenue impact of 3 percent on small businesses is considered to meet the threshold of a significant economic impact. The Proposed Rule cites a 2014 rule for government contractors, a sex discrimination regulation from 2016, and an H-2A regulation from 2019.[89] In the current high inflation environment, which began after 2019, the proposed rule should set a number lower than 3 percent of revenue as the basis for analyzing which small businesses will be impacted.[90] As a result, the Rule's conclusion that only 15 percent of small entities would experience an impact that exceeds 3 percent, is an artificially low percentage.

The top 10 small business H-1B filers, by NAICS code analysis, as detailed at Exhibits 11 through 23 of the proposed rule, demonstrates the serious financial impact to small businesses, even under the Department's flawed and under-estimated wage analysis. Under NAICS code 541511, for Custom Computer Programming Services, an average cost to employers is calculated at $70,000 to almost $80,000. The remaining NAICS code costs for small businesses range from almost $14,000 to over $72,000. This Rule proposes that this is a one-time cost for employers— but it is not. These wages will continue year after year, plus standard performance and standard of living

[85] Small businesses account for 99.9% of all U.S. firms. *See* https://www.uschamber.com/small-business/state-of-small-business-now.
[86] 91 FR at 15493.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 15494.
[90] *See* https://www.bls.gov/news.release/cpi.nr0.htm.

increases. And as stated above, this will impact the cost of more than just the foreign worker, as similarly situated United States co-workers will also require a wage increase in order to avoid discrimination liability.

While detailing the effect to the top 10 NAICS codes for small business that filed an H-1B petition, the Department does not include the impact to the other 7,024 (52.96%) NAICS codes for small businesses that sponsor workers. Additional analysis in a proposed rule, incorporating the real costs listed above, must be provided with a much more detailed explanation of the impact to small businesses with different NAICS codes. This is yet another example of how the Department has undercalculated the very significant cost impact on small businesses.

The proposed rule also does not address all of the small businesses that would be impacted when filing a PERM for a foreign national not in H-1B, H-1B1 or E-3 status. Every year, PERM applications are filed for numerous foreign nationals in other nonimmigrant status, such as E-1, E-2, L, R or TN. These sponsors also represent a significant number of small businesses. Nothing in the preamble factors in the impact on these businesses, that may have never filed an H-1B, H-1B1 or E-3 petition.

The proposed rule does nothing to calculate how increasing multiple employee wages will affect small businesses; inadequately estimates the cost in time and money for a small business to evaluate and integrate new wages; fails to state that these costs are yearly, and not simply a one-year cost; and ignores a significant number of small businesses that file PERMs but do not have any H-1B, H-1B1 or E-3 workers. The proposed rule should be withdrawn until the analysis can be properly explained.

c. Wage Increases on Small Business Non-Profits

In addition, the proposed rule does not list how many small business employers are non-profits. The proposed rule provides no information on what impact wage increases will have on non-profits, many of which also fall under the small business umbrella. As the Department uses USCIS data in its analysis, DOL should also provide the number of non-profits who sponsor workers. USCIS already provides reduced fees for non-profit H-1B and I-140 employers. Specifically, on March 28, 2024, USCIS issued a Small Entity Compliance Guide which confirmed that the Form I-129 fee of $780 is reduced to $460, and the $600 asylum fee is eliminated.[91] Similar fee reductions are available for non-profit Form I-140 filers. Accordingly, USCIS data on the number of non-profit small employers is available to DOL and should be included in the analysis.

d. The Expected Implementation Period of Eight (8) Years Is Far Longer Than Reality

The Department asserts that the full impact of the proposed rule will take eight years. This is an artificially high number and does not reflect the significant and almost immediate consequences of the proposed changes. The proposed rule assumes that foreign workers do not change employers.

[91] *See* https://www.uscis.gov/sites/default/files/document/reports/Fee%20Rule%202024%20%20SBREFA%20-%20Small%20Entity%20Compliance%20Guide_clean_3.28.2024_compliant.pdf.

AILA Doc. No. 26052104. (Posted 5/21/26)

When a foreign worker changes employers, the new employer must follow the O*NET wage levels, which are adjusted every July 1st. The Department's own data confirms this. Exhibit 4 in the proposed rule lists total LCA approvals at 1,285,721 for FY 2024. Each year only 85,000 cap H-1Bs can be approved, along with 10,000 E-3 approvals, and 6,800 H-1B1 approvals. New LCA filings can, in some circumstances, be for foreign nationals who maintain or previously maintained nonimmigrant status. With less than 8% of the total LCAs attributable to new visas or change of nonimmigrant status, and factoring in the long delays for India and China-born foreign nationals due to limited immigrant visa availability, there are still a lot of foreign workers changing employers.

An employer must file an employment based green card application before the end of the employee's fifth year in H-1B status, to be able to extend an H-1B worker's status past six years.[92] Due to the PERM processes mandated pre-filing requirements, this usually needs to start when the H-1B worker has spent three years in H-1B status, if not sooner. The filing of the PERM requires the employer to attest that "The offered wage equals or exceeds the prevailing wage determined pursuant to 20 CFR 656.40 and 656.41, and the wage the employer will pay to the foreign worker to begin work will equal or exceed the prevailing wage that is applicable at the time the foreign worker begins work or from the time the foreign worker is admitted to take up the certified employment."[93] As a result, if a foreign national is working in the offered position contained in the PERM application, and the immigrant visa process will take years to complete, the employer should pay the prevailing wage when the PERM is filed. This also confirms implementation of the proposed rule much sooner than 8 years.

Given the faulty analysis of the impact on small businesses, DOL should withdraw the proposed rule.

IX. If the Department Proceeds to Make Major Changes to the Prevailing Wage System That Has Existed for More than 20 Years, the Department Needs, at a Minimum, a Phased Implementation

As noted in section 2, longstanding agency frameworks have created substantial reliance interests for employers and employees in the existing framework. Recalibrating the percentile thresholds that define each wage level will require extensive re-engineering of those systems, and any final rule should recognize and address the time, cost, and administrative burden associated with redesigning compliance frameworks that were created in direct response to the Department's past policy decisions. At a minimum, this supports the need for clear, detailed implementation guidance and sufficiently long transition periods to allow stakeholders to adjust without jeopardizing ongoing filings or incurring inadvertent noncompliance.

The Department's previous 2021 wage-level FR, which included transition periods and stepwise increases, demonstrates that it recognizes the disruptive potential of sudden changes and the importance of protecting ongoing cases and existing employment relationships.

[92] 8 C.F.R. §214.2(h)(13)(ii)(D).
[93] *See* ETA 9089, page 6, Section I, attestation number 1.

In the preamble to the 2021 FR,[94] the Department stated, "For many job opportunities, the new wage rates will phase in through two steps over a year and a half period. For job opportunities that will be filled by workers on track to become lawful permanent residents, and who therefore have greater reliance interests in the old wage methodology, the new wage rates will phase in through four steps over a three-and-a-half-year period."

This phased-in transition was in response to the Department's acknowledgement of many of the following points raised in the comments to the 2020 IFR:

- Significant wage increases may be difficult for employers to adapt to given how long the old wage methodology has been in place.
- It is necessary to implement the rule in a way that appropriately balances the need to protect United States workers with the Department's obligation to consider reliance interests engendered by its prior methodology.
- Concerns about disruptions to business operations, fairness to foreign workers, and the feasibility of adapting to significant changes to the wage levels in a short period of time are "entitled to weight in how the Department implements adjustments to the levels."
- A "wage increase that is both dramatic and immediate is also undesirable and indeed may be counterproductive to the aims of this rule. For one thing . . . immediate disruptions to business operations, such as might lead to the termination of contracts or the shuttering of offices, may in fact threaten United States workers with job losses or reductions in work. Adopting a rule that eliminates workers' jobs in order to protect their wages advances neither the interests of workers nor the purposes of the INA."
- "Although permitting employers to access temporary foreign labor must be accomplished in a way that works no harm on the wages and job opportunities of United States workers, it is also important to ensure that reforms to the prevailing wage do not unnecessarily limit employers' use of the program."
- "[S]ome employers also have reliance interests in a specific worker or group of workers currently working who were hired on the understanding that they would be employed at wages based on the prior prevailing wage methodology. Immediate changes to the wages employers are required to pay could change the expectations employers had about the cost of employing such workers when they invested in sponsoring them for a visa." Additionally, these individuals "built lives in the United States in reliance on the prior wage methodology, which set the terms of their employment, but their expectation of being able to remain in the country indefinitely has been fostered by congressional enactments specifically designed to treat this group of individuals differently than other H-1B visa holders." If significant wage increases were to result in their layoffs and required departure from the country, this "would work a unique hardship and unfairness on both the workers themselves as well as the employers that have made greater investments in retaining these workers."

The Department determined that a gradual transition to the new wage levels was needed to account for employers' and workers' reliance interests on the prior system. In so doing, it pointed to how Congress and other agencies have instituted similar changes to employers' wage obligations in

[94] 86 FR 3608 (Jan. 14, 2021).

other contexts, including federal minimum wage increases. Without reasoned rationale, the Department now seeks to apply the new wage levels to any prevailing wage request that was pending on the effective date the proposed rule is finalized.[95] This would result in employers who had properly submitted their requests in accordance with the standard that was in effect at the time of filing to have their applications upended in the middle of the process. Moreover, this rule would adversely impact individuals who were already employed and were seeking to extend their status who have already established themselves in their jobs and communities. It is impossible for employers to predict how long it could take the Department to finalize a proposed rule and how it may change its proposals based on comments received and therefore cannot plan in advance for the final rule.

Any final rule should incorporate meaningful mitigation measures even if the Department ultimately now concludes after more than 20 years that higher wage floors are necessary to satisfy its statutory mandate. Such measures could include multi-year transition periods for existing employees and for PERM cases in the pipeline, grandfathering for PERM applications already filed or where recruitment has commenced, and special rules for H-1B, H-1B1, and E-3 extension petitions for workers already in the United States under prevailing wage commitments made in reliance on the current methodology. At a bare minimum, DOL cannot apply a new rule to cases that were pending at the time the rule took effect. These kinds of transitional safeguards would partly reconcile the Department's goal of better protecting United States workers with the legitimate expectations fostered by more than 20 years of agency practice, and they would help ensure that the rule change does not unduly penalize those who have acted in conformity with the Department's prior rules and guidance.

X. The Department Should Update its 2009 Prevailing Wage Guidance

Throughout the proposed rule, DOL references its 2009 Guidance. For almost 17 years, prevailing wages have been calculated based on the step-by-step guidance provided in this Guidance. Issued in November 2009, the agency updated its 2005 Guidance,[96] following the publication of the H-2B regulation and the corresponding changes to PERM, H-1B, H-1B1, and E-3 regulations that affected the prevailing wage determination process.[97] This 2009 Guidance specified that wage "determinations using a government survey shall be made available for each occupation at 4 levels of wages commensurate with experience, education, and the level of supervision." The current prevailing wage determination process predates significant changes in labor markets and occupational structures. While the 2009 Guidance established a framework for wage level determinations, current adjudicatory practices have evolved beyond its text. Therefore, even if the Department does not proceed with finalizing this proposed rule, the Department should modernize the method by which prevailing wages are calculated.

[95] 91 FR 15478.
[96] ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), *available at* https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.
[97] Employment and Training Administration; Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009), *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

a. *The Addition of Wage Level Points Related to Travel and/or Relocation*

While the 2009 Guidance was an important step toward standardizing wage determinations following the centralization of the National Prevailing Wage Center, it predates significant developments in labor markets, remote work arrangements, and evolving job structures that are currently commonplace in the workforce. As a result, stakeholders increasingly encounter inconsistencies between the written guidance and actual adjudicatory practices. Significantly, the 2009 Guidance predates the move from the legacy iCert filing system to the current filing system on the Foreign Labor Application Gateway ("FLAG").[98]

Administrative law principles require that regulated parties have clear notice of the standards applied to them.[99] Where agency practice evolves beyond published guidance, the Department should update that guidance through formal or sub-regulatory means that are accessible, authoritative, and consistently applied. A significant concern arises from the Department's apparent practice of assigning additional wage levels based on factors such as:

- Domestic travel
- International travel
- Relocation requirements

The presence of such considerations may result in the addition of a "point" in wage level analysis, thereby increasing the assigned wage level. However, this practice is not articulated in the 2009 Guidance or other formal policy documents. Significantly, practitioners have been made aware of how such points will be added only after first filing an ETA Form 9141. The only references to such considerations appear to be in the form of communications that have been shared in FAQs, meetings or conversations when the Department was asked about these changes. Such ad hoc changes do not provide binding or transparent standards. [100]

This creates several problems:

- Lack of Notice: Employers cannot reasonably anticipate how job requirements will affect wage level determinations when criteria are not formally published.
- Inconsistent Adjudication: Without adhering to defined methodology, similar job opportunities may receive different wage levels depending on how adjudicators interpret these factors.
- Barrier to Compliance: Employers seeking to comply in good faith lack a predictable framework for structuring job descriptions.

[98] *See* Permanent Employment Certification (PERM) Online Filing Release Notes 6/1/2023 | Flag.dol.gov.
[99] *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012); General Electric Co. v. EPA, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (requiring "ascertainable certainty" of regulatory requirements).
[100] *See* e.g., *East End Rubbish, Inc. dba Santos Rubbish* 2026-TLN-00033 (March 27, 2026), footnote 9: "It is not clear that an agency website Announcement page is the best vehicle to convey any substantive policy change which results in a clear change in the Department's denial of granting of certifications, and especially appears to be inadequate when no clear of highlighted announcement of that policy change is provided, nor the date when the change becomes effective."

If the Department intends to consider travel, relocation, or similar requirements as factors increasing the wage level, it should:

1. Codify or formally incorporate such factors into guidance, rather than relying on informal notifications;
2. Define the methodology by which such factors affect wage levels, including:
    a. Whether each factor independently increases the level;
    b. Whether frequency, duration, or scope of travel is relevant;
    c. Whether distinctions exist between incidental and substantial travel;
3. Provide illustrative examples demonstrating how these factors are applied in practice.

The Department has previously emphasized that prevailing wage determinations are based on the "nature of the job offer" and the duties of "similarly employed" workers. If travel or relocation materially alters the nature of the job, that relationship should be explicitly explained and consistently applied.

Furthermore, the proposed rule's stated objective is to strengthen wage protections for United States workers. That objective is undermined when wage determinations rely on opaque or unpublished criteria. Transparent and well-defined standards would:

- Improve compliance by employers;
- Enhance consistency in adjudications;
- Strengthen confidence in the integrity of the PWD system; and
- Reduce unnecessary disputes, audits, and refilings, thereby creating a more efficient process for both employers and the Department.

The Department should revise and modernize the 2009 Prevailing Wage Determination Policy Guidance to:

- Incorporate all factors currently used in wage level determinations;
- Eliminate reliance on informal FAQs as de facto policy;
- Establish a clear, replicable methodology for assigning wage levels; and
- Ensure that all criteria affecting wage determinations are publicly accessible and consistently applied.

b. Alternative Requirements

Another departure from the 2009 Guidance relates to the Department's issuance of two (2) separate Prevailing Wage Determinations when an employer has flexible alternative requirements for entry into the occupation in which sponsorship is made. Nowhere in the 2009 Guidance does the Department indicate that the use of alternative requirements would result in different Prevailing Wage Determinations. With the implementation on May 3, 2021, of a new ETA Form 9141 Application for Prevailing Wage, the Office of Foreign Labor Certification (OFLC) released a Frequently Asked Questions document in which it provided:

> [w]hen a combination of occupations is assigned, the NPWC compares the wages of each occupation for each additional worksite based on the employer's minimum and alternative

> job requirements. For each worksite listed in Appendix A, the highest wage based on the minimum job requirements is provided as the prevailing wage for the minimum requirements, and the highest wage based on the alternative job requirements is provided as the prevailing wage for the alternative job requirements.[101]

This method for determining the Prevailing Wage is not established in the regulations or the 2009 Guidance and does not allow for an explanation of how much time will be spent by the employee on duties related to each alternative occupation. For example, using the Department's own table from the July 2021 FAQ, the primary occupation of Accountants and Auditors (13-2011) in New Castle, Pennsylvania is assigned a prevailing wage of $57,500 per year, and the alternative occupation of Computer Occupations, All Other (15-1199) is assigned a prevailing wage of $75,000 per year. Under current practice, this requires the payment of the higher prevailing wage of $75,000.00 per year. If, however, the position requires 80% of the duties to be within the occupation of Accountants and Auditors, and only 20% of the duties to be within the occupation of Computer Occupations, All Others, this ad hoc method of assigning a prevailing wage is not only inaccurate, but also arbitrary and capricious.

The Department should consider the details with respect to each potential alternative occupation in order to obtain an accurate understanding of the position itself. In revising and modernizing the method by which prevailing wages are calculated, the Department must factor how alternative requirements for an occupation actually impact the sponsored position and should articulate consistent methods by which employers may provide such information, and how that information will impact a prevailing wage.

c. *Combination of Occupations*

Similar to the issues of wage level points and alternative requirements, the shift from legacy iCert to the current FLAG system and related changes to the ETA Form 9089 Application for Alien Employment Certification created a new process for how the Department would view a combination of occupations. Job opportunities that combine duties of multiple different occupations are generally prohibited by regulation.[102] However, the regulation provides employers with guidance about documenting how a job offer that is a combination of occupations can satisfy one of the three exceptions to the general rule.[103]

1. the employer has normally employed persons for that combination of occupations; and/or
2. that workers customarily perform the combination in the area of employment; and/or
3. the combination job opportunity is based on a business necessity.

Previously, and in accordance with 20 C.F.R. §656.17(h)(3), the ETA Form 9089 contained the question, "[d]oes this application involve a job opportunity that includes a combination of occupations?" In responding to this question, employers were able to select "yes" or "no" depending on the exceptions delineated within the regulation about a Prevailing Wage Determination ("PWD") that had issued a "combination of occupations" finding in error. This

[101] U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center (NPWC): *Round 3: Implementation of the Revised ETA-9141 FAQs* (July 16, 2021).
[102] 20 C.F.R. §656.17(h)(3).
[103] 20 C.F.R. §656.17(h)(3).

allowed them to bypass formal and lengthy redetermination requests while still remaining prepared to justify their response if an audit was initiated.

The Form ETA-9089 no longer asks the employer to state whether or not the job opportunity involves a combination of occupations. The form asks a much more specific question, "Does the job opportunity in Section F of the PWD identified in Question E.1 involve a combination of occupations?" Now, if the PWD indicates a combination of occupations and the employer does not agree, the employer has no opportunity to present information or evidence about how it meets one of the enumerated exceptions to the general rule.

Instead, the employer must first challenge the determination by filing a Request for Redetermination (RFR) and then possibly a Center Director Review (CDR) through the NPWC and then possibly appeal the determination to the Board of Alien Labor Certification Appeals ("BALCA"). If the NPWC (and BALCA, if applicable) determine that the job opportunity involves a combination of occupations or if the employer accepts the determination by not exhausting all review options, the employer is required to answer "Yes" to Question G.7 on the Form ETA-9089 and only then may provide justification based on one of the three exceptions to the general rule. If the employer answers "No" to this question when the underlying PWD indicates a combination of occupations, the ETA Form 9089 may be summarily denied without an opportunity to explain.

This process is unduly burdensome and inefficient for both the employer and the Department. The Department should consider more streamlined methods to determine which duties for the position relate to which occupation and allow employers an opportunity to provide relevant details so that the Department can accurately analyze the prevailing wage related to the position. To do so would enable the Department to make decisions based on the specific facts, rather than generalities or assumptions. This, in turn would serve to alleviate the need for multiple branches of the same Department to review repetitive information.

*d. The End of Job Zone 1 in O*Net*

In October 2025, DOL announced that it would update its Job Zone classification system beginning February 2026.[104] Explaining that "[i]ndividuals with lower levels of education now face a shrinking pool of job opportunities," the National Center for O*NET Development determined that the prior 20 years of using a five-level Job Zone classification system should be updated to a four-level structure because demand for higher-skilled workers has been, and continues to be, rising.

Prior to February 2026, a five level Job Zone system was in place, and expressly included within the 2009 Guidance, to examine preparation requirements for occupations based on education, training, and work experience.[105] The following is the legacy five level Job Zone grouping:

- Job Zone 1 – occupations that need little or no preparation
- Job Zone 2 – occupations that need some preparation
- Job Zone 3 – occupations that need medium preparation

[104] *See* https://www.onetcenter.org/reports/Job_Zone_Transition.html: O*NET Job Zones in Transition: A New Four-Level Framework Reflecting the Increased Skill Demands of Occupations (Oct. 2025) (accessed Apr. 21, 2026).
[105] *See* https://www.onetcenter.org/dl_files/SVP.pdf: Stratifying Occupational Units by Specific Vocational Preparation (SVP) (1999) (accessed Apr. 21, 2026).

- Job Zone 4 – occupations that need considerable preparation
- Job Zone 5 – occupations that need extensive preparation

The five level Job Zone system allowed for the consideration of occupations that required no previous work-related skill, knowledge, or experience and which may require a high school diploma or GED certificate (Job Zone 1), or occupations that required some previous work-related skill, knowledge, or experience that may be helpful in these occupations and which usually require a high school diploma and may require some vocational training or job-related course work (Job Zone 2). For Job Zone 2 positions, in some cases an associate or bachelor's degree could be needed.

As of February 2026, the new four level Job Zone system has merged prior Job Zones 1 and 2 to create "Job Zone 1-2," for which little to some preparation is needed, and which "usually requires a high school diploma or GED, though some occupations may not." Below is the new system:

- Job Zone 1–2 – very little to some preparation needed
- Job Zone 3 – medium preparation needed
- Job Zone 4 – considerable preparation needed
- Job Zone 5 – extensive preparation needed

While on the surface it appears that merging the prior Job Zones 1 and 2 makes no impact to how occupations would be assessed, a closer reading of the 2009 Guidance describes that "[i]nformation contained in the O*NET Job Zones provides guidance in determining whether the job offer is for an entry level, qualified, experienced, or fully competent employee for making the determination of wage level."[106]

Thus, while a new Job Zone system has been implemented, how it is factored into the calculations expressed in the existing 2009 Guidance has not been established. Previously, as directed by the 2009 Guidance, a step-by-step process was given to enable interested parties to calculate appropriate wage levels. Specifically, at page 9 of the 2009 Guidance, Job Zone 1 occupations were carved out from the other three Job Zones in how to calculate the prevailing wage based on the Specific Vocational Preparation ("SVP") generally required for acceptable performance in the particular occupation. No guidance has been provided on how to calculate prevailing wages in instances where the new Job Zone 1-2 is appropriate.

The Department should provide thorough and detailed instructions about how the new Job Zone 1-2 is used in calculating a wage, and what information is needed for an employer to predict whether or not their offered wages are in compliance with prevailing wages.

XI. CONCLUSION

AILA and the Council encourage the Department to withdraw this rule and continue to use the prevailing wage structure that it and employers have relied upon for more than two decades. While we support the Department's goal is to protect United States workers from being cut out of the

[106] Page 8 of 2009 Guidance.

labor market by some unscrupulous employers who underpay foreign workers, we strongly believe that there are more targeted and data driven approaches that should be considered. Upending the entire system for a few bad actors is unsound economic policy. The proposed rule also violates the Administrative Procedure Act as it is arbitrary and capricious. By relying on flawed and misleading data, DOL has failed to provide the public (especially small businesses) with accurate notice of the true costs of the proposal. The proposed rule should be withdrawn for failure to consider the significant economic burdens that would be imposed on the public and to consider how new changes within the H-1B program (including but not limited to the new weighted H-1B lottery registration process and DOL Secretary-certified LCA investigations) will address the Department's concern about the impact of foreign workers on the employment terms of United States workers. If DOL continues to finalize this rule, despite opposition, AILA and the Council strongly urge DOL to adopt regulatory modifications reflective of existing law and current market realities and to provide a reasonable transition period for employers to minimize the negative impact that the rule will have on United States businesses and the overall United States economy.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION and
THE AMERICAN IMMIGRATION COUNCIL