February 16, 2021

Brian D. Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
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Submitted via https://beta.regulations.gov
Docket ID No. ETA-2020-0006
RIN: 1205-AC00

Re: Final Rule: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced request for comments on the, ***Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date***. (86 FR 7656, 2/1/21). DOL proposes to delay the effective date of its final rule (FR) issued on January 14, 2021. (86 FR 3608 1/14/21)

Established in 1946, AILA is a voluntary bar association of more than 15,000 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 naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

I. Introduction

We appreciate the opportunity to provide comments on this proposed delay and the related Final Rule (FR) and strongly recommend that after reviewing these comments and others made by stakeholders, your office take additional time before implementing the FR and consider amending it as well. The FR continues to violate the notice-and-comment requirements of the Administrative Procedure Act (APA) and its implementation must be further delayed to provide proper notice to the regulated public. AILA also believes that more time is needed for your office to consider the impact of the proposed changes to prevailing wage levels and whether such changes will achieve

the proffered purposes stated in the Interim Final Rule (IFR) issued on October 8, 2020 (85 FR 63872 10/8/20) and whether such impact is consistent with this Biden Administration's recognition of the benefits brought by immigrant workers to the U.S. economy. Furthermore, more time is needed to allow for practical and systematic changes necessary to implement the FR without resulting in chaos and confusion for U.S. businesses and their employees. As such, AILA recommends that the implementation of the FR be delayed at least until July 1, 2022, such that DOL can rescind the faulty FR and issue new proposed rulemaking that is evidence-based. This will allow U.S. businesses and affected stakeholders proper opportunity to comment on any changes and to provide the Department time to prepare accordingly.

II. Comments

a. The terms of the FR are substantially different from the IFR. Thus, the holding of *Little Sisters* does not apply and a proper notice-and-comment period consistent with the APA dictates further delaying the effective date of the FR.

Four different plaintiff groups filed lawsuits challenging the October 2020 IFR upon which DOL asserts its January 2021 FR is based, and in each of these cases, the IFR was enjoined. In *Chamber of Commerce, et al. v. DHS, et al.*, 20-cv-07331 (N.D. Cal. Dec.1, 2020), the court set aside the IFR, concluding that DOL had not established "good cause" to excuse the notice-and-comment period required under the APA. Judge White made clear in that decision that the record did not support a connection between the type of unemployment caused by the pandemic and the particular occupations impacted by DOL's IFR, and therefore DOL could not establish "good cause" to avoid its APA obligations with respect to the rule. In *Purdue University, et al. v. Scalia, et al.,* 20-cv-03006 (D.D.C. Dec. 14, 2020) (consolidated with *Stellar IT, et al. v. Scalia et al.*, 20-cv-03175 (D.D.C)), the District Court for the District of Columbia also set aside the IFR. It concluded that DOL did not establish good cause to eschew notice and comment on its IFR. In reaching that decision, Judge Sullivan stated, inter alia, "The DOL simply has not provided record support establishing that there is imminent 'serious fiscal harm' to U.S. workers in connection with H-1B nonimmigrant visas and EB-2 and EB-3 immigrant visas." In the fourth lawsuit, *ITServe Alliance et al. v. Scalia*, et al., 20-cv-14604 (D.N.J. Dec. 3, 2020), yet another district court enjoined the IFR, finding that plaintiffs were likely to prevail on their claim that DOL lacked "good cause" to avoid notice-and-comment and finding that "the Department's invocation of good cause does not pass muster even under the highly deferential arbitrary and capricious standard."

With the FR, DOL has attempted to do an "end-run" around these decisions. Citing the Supreme Court decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S. Ct. 2367 (2020) (Hereinafter *"Little Sisters"*), DOL claims that it can issue a final rule based on its IFR even if that IFR is "procedurally flawed." DOL's reading of *Little Sisters* is problematic and does not support DOL's action in issuing this FR.

As a preliminary matter, *Little Sisters* concerned a complex set of interim final rules (IFRs) promulgated by the Departments of Health and Human Services, Labor, and Treasury pursuant to the Affordable Care Act (ACA) relating to religious exemptions from the ACA's mandate that health plans provide coverage for all Food and Drug Administration-approved contraceptives. Pennsylvania challenged the rules, alleging that the IFRs were procedurally and substantively

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invalid under the APA. After the Departments issued final rules, responding to post-promulgation comments but leaving the IFRs largely intact, New Jersey joined Pennsylvania's suit. Together they filed an amended complaint, alleging that the rules were procedurally defective because the Departments failed to comply with the APA's notice-and-comment requirements. Concerning the APA notice-and-comment issue, Justice Thomas, writing the opinion of the court, essentially held that the Departments' IFRs had effectively satisfied the requirements of the APA in terms of offering "fair notice" of a rulemaking, notwithstanding the fact the rules were issued as IFRs rather than a Notice of Proposed Rulemaking.

In *Little Sisters*, however, there was little difference between the IFR and the final rule. Here, however, rather than modifying its prior October 2020 rule as a result of public comments, DOL has essentially issued an entirely new rule as a FR, with no meaningful opportunity for the public to comment on its starkly different provisions. Specifically, concerning DOL's four-tiered wage system, the FR now introduces four brand new wage levels. While the slight lowering of each wage level from the drastically increased percentiles of the IFR is welcomed, DOL's further action appears completely arbitrary. It underscores the fact that there seems to be no rational relationship between its wage methodology and market data on compensation for various occupations, just as there continues to be no data supporting DOL's premise that its action is protective of U.S. workers.

In addition, for the first time, in its FR DOL introduces a set of "transition provisions" to address economic uncertainty for both employers and foreign workers, allowing for a two-step transition over a year and a half for most workers, and a four-step, three-and-a-half-year transition period for workers in the green card process. Here, DOL asserts that it has added these provisions to avoid the economic disruption that would surely have resulted from the immediate implementation of a new wage system. However, by announcing these changes for the first time in a FR DOL has cut off the ability of the public to provide meaningful input as to whether these transition provisions are sufficient, whether they are genuinely viable from a business perspective, and whether they will have the effect that DOL intends them to have and that the statute mandates.

While the *Little Sisters* decision certainly affords an agency flexibility when the major requirements of the APA have effectively been met in the rulemaking process, it does not allow an agency to evade APA requirements and legitimate concerns raised in court decisions by promulgating new and markedly different provisions in the form of a FR. Here, even where those changes are purportedly helpful, they were sufficiently significant to warrant a further period of notice-and-comment for the public.

For this reason, the Little Sisters decision is distinguishable from the current set of circumstances, and the APA requires a proper notice-and-comment period for the FR as published.

b. Whether the FR brings about its stated purpose and whether it is consistent with the current Administration's immigration policy requires more time to investigate. Therefore, the effective date of the FR should be delayed.

The revised rule promulgated by DOL should be further delayed allowing the current Administration to thoroughly evaluate whether the rule ultimately achieves its purpose. The October 2020 IFR states:

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> A substantial body of evidence examined by the Department also suggests that the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers, and are therefore at odds with the purpose of the INA's labor safeguards. (85 FR 63872, 63876) (Oct. 8, 2020)

Unfortunately, the rule continues to be based upon the flawed presumption that the employment of foreign nationals negatively impacts wages and job opportunities for American workers. The overwhelming data is just the opposite, as acknowledged by experts who study these topics and the current Administration.

A study completed by the non-partisan National Foundation for American Policy in May 2020 entitled "The Impact of H-1B Visa Holders on the U.S. Workforce" (https://nfap.com/wp-content/uploads/2020/05/The-Impact-of-H-1B-Visa-Holders-on-the-U.S.-Workforce.NFAP-Policy-Brief.May-2020.pdf) demonstrates that H-1B workers cause an increase in the overall level of employment, including for U.S. workers in H-1B occupations – not a decrease. The study found:

- An increase in the share of workers with an H-1B visa within an occupation, on average, reduces the unemployment rate in that occupation;
- The presence of more H-1B visa holders leads to faster earnings growth for U.S. workers;
- There is no evidence that recent college graduates have worse labor market outcomes if there are more H-1B visa holders in jobs closely related to their college major; and
- The presence of H-1B visa holders increases innovation, productivity, and profits at H-1B employers and boosts total productivity and innovation in the United States.

A rule that artificially creates a significant increase in required wage rates has the effect of destroying the very innovation, productivity, and economic growth that the H-1B program fosters. Therefore, DOL should further pause and reconsider the underlying basis of this rule and whether it is ultimately helpful or harmful to the United States economy and American workers.

Moreover, in the February 2, 2020 "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans," the current Administration acknowledges the tremendous economic contributions made by immigrants to this country. That Executive Order states:

> New Americans and their children fuel our economy, working in every industry, including healthcare, construction, caregiving, manufacturing, service, and agriculture. They open and successfully run businesses at high rates, creating jobs for millions, and they contribute to our arts, culture, and government, providing new traditions, customs, and viewpoints. They are essential workers helping to keep our economy afloat and providing important services to Americans during a global pandemic. They have helped the United States lead the world in science,

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technology, and innovation. And they are on the frontlines of research to develop coronavirus disease 2019 (COVID-19) vaccines and treatments for those afflicted with the deadly disease.

Given this strong endorsement of the economic value of immigration to the United States, we encourage DOL to make a more detailed assessment of whether the revised rule achieves its intended outcome.

On a related note, the IFR upon which the current FR is based also challenges the methodology currently in place by saying, "For starters, the Department has never offered a full explanation or economic justification for the way it currently calculates the prevailing wage levels it uses in these foreign labor programs." (85 FR 63877). For this very same reason, we ask that DOL take the time to reexamine and justify the new levels set forth in the FR. We do not see sufficient justification for redefining the wage levels set forth in the FR without explaining the calculation suggested.

DOL should take more time for a more thorough evaluation of wage leveling to ensure that the wage levels reflect what they are supposed to reflect – the actual prevailing wage for the four wage levels mandated by the statute. It should follow by providing satisfactory justification for where wage levels are set and ensuring compliance with the statutory purpose and the current Administration's immigration policy. Only after this data-based, in-depth assessment is completed should DOL consider moving forward with modifications to the existing rules on prevailing wage levels. As such, DOL should withdraw the faulty FR and issue new proposed rulemaking to make further modifications to the prevailing wage system.

c. The implementation dates included in the FR should be delayed to allow for practical and systematic changes necessary to implement the FR without chaos and confusion.

If the DOL does not withdraw the FR and allow stakeholders to provide comment on what is in effect a new rule, it should, at a minimum, delay the implementation of the FR until July 1, 2022 (not July 1, 2021) to allow DOL to implement the FR's policy and procedural changes fully and to provide stakeholders with detailed information and training on the changes. The implementation of the October 2020 IFR with a lack of sufficient notice caused chaos and confusion within the legal immigration system for employers. It is also assumed that it caused significant disruption internally within DOL as multiple courts ordered DOL to re-issue prevailing wage determinations issued between the IFR's effective date, October 8, 2020, and December 4, 2020. The number of redeterminations that have to be issued appears to be causing significant delays in the orderly operations of the Office of Foreign Labor Certification (OFLC) of the DOL, specifically those involved with the prevailing wage determination function. The six-week period between May 14, 2021, which is the currently scheduled effective date of the FR, to July 1, 2021, which is the date on which the new prevailing wage methodology is presently scheduled to become effective, is not sufficient time for DOL to properly implement the most sweeping changes to the prevailing wage system in more than a decade.

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Below are some of the procedural issues which DOL will have to rush to address if it does not delay the implementation of the final rule to at least July 1, 2022:

1. OFLC is already scheduled to make substantial changes to the prevailing wage system on July 1, 2021. OFLC will be incorporating the BLS 2018 SOC Codes into the prevailing wage system on July 1, 2021. O*Net has already implemented the 2018 SOC Codes into its system, resulting in confusion among many stakeholders and U.S. employers. AILA recommends that OFLC, in conjunction with O*Net, conduct educational forums, such as webinars, for employers regarding the new SOC codes and how the new codes will change the FLC Data Center. If OFLC also has to simultaneously introduce changes to the prevailing wage system based upon the FR, these multiple changes will create more confusion within the legal immigration system, especially for smaller employers and universities.

2. The current processing time for PERM prevailing wage requests is at a record high 157 days (https://flag.dol.gov/processingtimes). Therefore, an employer that submits a prevailing wage request today will not be issued a prevailing wage determination until after the FR methodology is in effect, which effectively means this rule is live and actionable even before the comment period closes. Additionally, the FR's terms may require the analyst to seek additional information not currently requested on Form ETA-9141. This will practically require the OFLC's National Prevailing Wage Center (NPWC) to issue more than 50,000 Requests for Information (RFI) on pending prevailing wage requests to obtain the missing information to correctly issue a prevailing wage determination based upon the methodology contained in the FR. This additional step will only cause OFLC's processing times to increase further and make the prevailing wage system even more untenable for employers.

3. DOL may have to change Form ETA-9141, Application for Prevailing Wage Determination (Form ETA-9141) to include additional information to allow OFLC analysts to make prevailing wage determinations consistent with the new FR. According to the January 2021 FR, during the transition period, an analyst must know whether an H-1B beneficiary, as of October 8, 2020, is the beneficiary of an approved I-140 immigrant petition and, therefore, subject to different transition rules. This information will have to be reflected in the form. A previously revised Form ETA-9141 has been approved by the Office of Management and Budget (OMB) but has not yet been implemented. To ensure compliance with the new FR, DOL would have to forward a new Form ETA-9141 to OMB for approval to capture this additional information. Similar to the previously revised Form ETA-9141, DOL should solicit stakeholder comments on the form changes. The time needed to solicit this feedback and get a new form approved by OMB and properly rolled out will likely be greater than is available between now and July 1, 2021.

4. To properly assess the prevailing wage requirements for beneficiaries of an approved I-140 immigrant petition as of October 8, 2020, DOL may have to change the Form ETA-9035 to include additional information so that the prevailing wage calculator assigns correct wages based upon the new FR. The time needed to solicit this feedback and get a new form

approved by OMB and properly rolled out will likely be greater than is available between now and July 1, 2021.

5. After OMB approves the new Forms ETA-9141 and ETA-9035, DOL will have to update the FLAG system. The re-programming of the FLAG system cannot be rushed. Similar to other DOL systems, major changes to the FLAG system should be tested by a sampling of stakeholders before implementation to identify issues that the programmers may overlook. Again, AILA is concerned with whether there is sufficient time for the agency to update multiple forms and then implement major programming changes to FLAG by July 1, 2021.

As discussed in the preamble of the FR, OFLC updates the FLC Data Center one time a year on the first of July. Therefore, to ensure consistency in the prevailing wage system, any additional modifications to the system should continue to occur on July 1 of each year. While AILA strongly recommends that DOL withdraw the FR in its entirety, if it decides not to do so, it should delay the implementation of the FR at least until July 1, 2022.

Lastly, if the DOL rushes to implement the changes to the system on July 1, 2021, the changes will not be consistent with the President's Executive Order dated February 2, 2021, titled "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans." Instead, the rushed changes will continue the chaos within the legal immigration system that employers had to confront with the previous administration. DHS has already acknowledged that a major change in the H-1B quota registration system due to a final regulation that was supposed to become effective on March 7, 2021, could not be implemented without significant disruption to the legal immigration system. Thus, DHS postponed the implementation of the regulation until the end of 2021. AILA strongly recommends that DOL follow suit and acknowledge that the implementation of a new prevailing wage system on July 1, 2021, will cause significant disruption to the legal immigration system and either withdraw the regulation or further postpone the implementation of the regulation until July 1, 2022, to allow DOL sufficient time to properly implement the new system and provide stakeholders with notice and training about the new system and how OFLC will be implementing it.

d. Implementing the FR without further delay is a violation of due process.

Due to the chaos created by the October 2020 IFR and the resulting litigation, prevailing wage processing times are at historic highs. FLAG reports the processing time for PERM prevailing wage requests based on OES prevailing wages to be at 157 days (https://flag.dol.gov/processingtimes). As drafted, the new wage levels that would be in effect on May 14, 2021, the currently proposed effective date of the FR, would determine the prevailing wages requests that were filed 157 or more days ago, that is, filed as early as the first week in December 2020. DOL published the FR on January 14, 2021. To apply prevailing wage methodology to requests filed before any knowledge of the methodology was even announced is a violation of due process. AILA strongly recommends that DOL delay the effective and implementation dates of the FR. However, at a minimum, we recommend that the FR only apply to those prevailing wage requests submitted after the FR methodology has become effective.

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III. Conclusion

AILA appreciates the opportunity to comment on the proposed delay of the FR. For the above reasons, AILA believes that an effective date of May 14, 2021, postponed from March 15, 2021, is not sufficient time. We respectfully recommend that the DOL further delay the implementation of the FR in order to withdraw the FR and issue new proposed rulemaking for the reasons discussed above.

Please address any concerns or questions to AILA Director of Government Relations Sharvari Dalal-Dheini at SDalal-Dheini@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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