November 9, 2020

Brian D. Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor, Box #12-200
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Submitted via *https://beta.regulations.gov*
Docket ID No. ETA-2020-0006
RIN: 1205-AC00

Re: Interim Final Regulation: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced request for comments on the Interim Final Rule ("IFR"), *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*.[1]

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 interim rule and strongly recommend that after reviewing these comments and others made by stakeholders, your office will withdraw the IFR. The rule as currently drafted and implemented not only violates the Administrative Procedure Act ("APA") by not going through a notice-and-comment period, but more importantly creates artificially high wage requirements as a result of an inherently flawed methodology that ultimately has the effect of blocking the intent of Congress when it created the H-1B visa. The

[1] 85 Fed. Reg. 63872 (October 8, 2020)

IFR so fundamentally distorts and raises required wages for the H-1B and PERM labor certification process that employers are effectively unable to hire or continue to employ H-1B workers without running afoul of a variety of other laws, including those that prohibit discrimination on the basis of national origin. It is simply an abuse of agency power and authority for DOL to attempt to invalidate a Congressionally created nonimmigrant program through the implementation of a regulation, particularly as they are based on unsubstantiated rationale. This is precisely what the IFR does, and as such, it is *ultra vires.*

The result is a set of requirements that cannot be implemented properly, undermine its stated purpose, inflicts more harm than benefit to U.S. employers, and invalidates a Congressionally created visa program. As such, and for the reasons stated below, we recommend that the IFR be withdrawn immediately.

II. Comments

a. The Interim Final Rule should be withdrawn because it violates the Administrative Procedure Act.

In issuing its IFR, the U.S. Department of Labor (DOL) chose to eschew notice-and-comment rulemaking, while claiming that it may invoke the "good cause" exception within the Administrative Procedure Act ("APA").[2] The IFR became effective immediately upon publication on October 8, 2020, impacting hundreds of thousands of U.S. employers of all sizes across a vast array of industries including, healthcare, technology, higher education, charitable foundations, manufacturing, and logistics. Every one of these U.S. employers who rely on skilled workers to fill needed roles both on a temporary and permanent basis was placed in the position of having to assess a massive and acute adjustment to their pay scales for which they were given no time to prepare.

As explained in detail in this comment, the cost of this immediate change is incalculable – not only will these employers have to make immediate and substantial upward wage changes that are unsupported by market data as explained in section II.B, but DOL did not even consider the cost to these employers of the work that is now being undertaken by human resources and compensation staff to bring their companies into compliance with the rule, nor did it analyze the staffing changes that might need to occur if employers determine that they will not be able to support wages at the levels put forth in the new rule. Additionally, even DOL was unprepared for a rule of this significance to take immediate effect. The implementation of the rule has been plagued by numerous technical problems inherent in the DOL's new wage system, as explained in subsection II.C.. Nonetheless, the agency did not afford stakeholders, many of them U.S. businesses, a period to comment on, and prepare for, a rule of this magnitude.

[2] 5 U.S.C. § 553(b)(B)

Good Cause Exception

Notice-and-comment is such a critical component of rulemaking that Congress only allows an agency to forego this procedure in the narrowest circumstances when the agency, for good cause, finds that it is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates this finding and reasons therefor in the rules issued.[3]

First, a notice and comment period is "impracticable" when an agency finds that timely execution of its functions would be impeded by such procedure, as when a safety investigation reveals an immediate need for a new safety rule.[4]

Second, notice-and-comment is "unnecessary" only in "situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[5]

Finally, notice-and-comment is "contrary to the public interest" when the interest of the public is defeated by providing notice and comment.[6] The public interest prong is invoked "only in the rare circumstance" where ordinary procedures meant to serve public interest would harm that interest.[7] The D.C. Circuit has "repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'"[8]

Here, DOL claims that it has "good cause" to skip the required notice and comment period because of the current COVID-19 global pandemic, a situation that started more than six months ago. First, DOL claimed, without citing evidence, that "the shock to the labor market caused by the widespread unemployment resulting from the public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers."[9] As such, DOL alleged, that the delay a notice and comment period would create in issuing the rule would make it "impracticable for the Department to fulfill its statutory mandate and carry out the 'due and required execution of [its] agency functions' to protect U.S. workers."[10]

This rationale is nonsensical and without an evidentiary basis. While it may be true that the COVID pandemic has caused increased unemployment, the evidentiary piece that is glaringly missing from the DOL's justification for the "good cause" exception is the data that shows that this rule, if immediately implemented without notice and comment, will solve that problem. DOL advances

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[3] Id.
[4] *See Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (citing U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 30-31 (1947)).
[5] *See Util. Solid Waste Activities Grp*., 236 F.3d at 755.
[6] *Id.* (citing U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947))
[7] *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012) (noting "The question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest.").
[8] *See Mack Trucks, Inc*., 682 F.3d at 93 (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d at 754).
[9] 85 Fed. Reg. at 63898
[10] Id.

no reliable information whatsoever that this is the case. Importantly, the need to urgently address the unemployment situation is undermined by the Trump Administration's own statements that the unemployment rates were falling significantly and that the U.S. was recovering faster than expected from the pandemic.[11] As such, it is clear that the rationale for promulgating such a rule without notice and comment is a false cover for an administration trying to restrict legal immigration.

Further, DOL asserts, again without citing any evidence in support, that "[a]dvance notice of the intended changes would create an opportunity, and the incentive to use it, for employers to attempt to evade the adjusted wage requirements," which would run contrary to the public's interest.[12] This determination is based on an invalid assumption, for which DOL has not provided any hard data. There are numerous reasons why employers could not simply rush in to access the pre-existing wage system if they had advance notice of the rule. First, the majority of new cap-subject H-1B cases may not be filed until next April 2021 for an October 2021 start date, eliminating much of the "rush" that DOL imagines might happen. Secondly, concerning H-1B change of employer petitions or extensions, such petitions and the requisite Labor Condition Applications (LCAs), may only be filed no more than six months prior to the anticipated start date. Therefore, there is a limited universe of nonimmigrant visa matters for which employers would or could seek wage information under the pre-existing wage system.

Concerning prevailing wage determinations in advance of PERM filings, DOL again makes an invalid assumption, i.e., that the decision of an employer as to whether to initiate a PERM labor certification on behalf of an employee is essentially driven by what the prevailing wage might be. Had DOL conducted sufficient research, it may well have found that a rather high number of U.S. employers, if not a majority, base these decisions at least in part on employee longevity and performance, as well as the ongoing inability to fill the position with a qualified U.S. worker. As such, the agency's citations to cases relating to price increases such as *DeRieux v. Five Smiths, Inc*., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974), *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) and *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 n.15 (5th Cir. 1979) are completely inapplicable.

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[11] *See* e.g., "Unemployment fell once again last month, with job gains in EVERY private sector industry and EVERY historically disadvantaged group! This faster-than-expected recovery is great news for American workers!11.4 million jobs added to the economy in the last five months." WH Tweet 10/11/2020; "We just broke a record on jobs, an all-time record," [Pence] said. "There's never been three months when we've put more people to work. We're just about ready to break the all-time stock market record." Business Insider 08/24/2020; "Moments ago, the numbers for America's economic growth —or GDP —were just released. And I am thrilled to announce that, in the second quarter of this year, the United States economy grew at the amazing rate of 4.1 percent. We're on track to hit the highest annual average growth rate in over 13 years. And I will say this right now, and I'll say it strongly: As the trade deals come in one by one, we're going to go a lot higher than these numbers. And these are great numbers. White House Briefings Statement on Economy, 07/27/2020.

[12] 85 Fed. Reg. at 63898.

Moreover, the administration has been announcing its intention to revamp the prevailing wage system at least since June 2020. On June 22, 2020, in a press call announcing Presidential Proclamation 10052[13], a senior administration official stated as follows:

> *The Department of Labor has also been instructed by the President to change the prevailing wage calculation and clean it up, with respect to H-1B wages. It has really – it's an old, crazy system from the Clinton era, with four tiers, and the prevailing wage calculation is done in a variety of bases. And the Department of Labor is going to fix all that, with the idea of setting the prevailing wage floor at the 50th percentile so these people will be in the upper end of earnings.*

Similarly, on August 3, 2020, the President announced that the government was finalizing new regulations to ensure that H-1B workers are "highly paid."[14]

DOL cannot now claim as a policy reason for evading a notice-and-comment period that an advance announcement would cause employers to rush to access the pre-existing system when the agency and the Trump Administration made such announcements in public over three months prior to the posting and implementation of this IFR and have provided no evidence of a rush to filing prevailing wage determinations since the initial announcement

There appears to be no justifiable reason for the agency to invoke the good cause exception to notice and comment rulemaking. Rather they used this mechanism simply because the Administration ran out of time to publish the rule under the appropriate APA process before the Presidential Election, less than one month from the publication of the IFR. Thus, DOL sought to brush these significant procedural requirements aside.

OMB and OIRA Review

That the administration determined to run roughshod through the guardrails of the APA with respect to this rule is also clearly demonstrated by the highly unusual actions of the Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB). Prior to the publication of the rule, OIRA made the surprise, unexplained decision to waive statutory review of the regulation.

Under Executive Order 12866, any rulemaking that "is likely to result in a rule that may . . . have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" requires further review by OIRA.[15]

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[13] *See* DOL Claimed Need To Keep H-1B Visa Rule Secret, But Held A Press Call, available here: https://www.forbes.com/sites/stuartanderson/2020/10/27/dol-claimed-need-to-keep-h-1b-visa-rule-secret-but-held-a-press-call/?sh=541b44e56666

[14] Id.

[15] 58 Fed. Reg. 51735 (1993) (directing agencies to follow certain principles in rulemaking, such as consideration of alternatives and analysis of benefits and costs and describing OIRA's role in the rulemaking process).

As part of this review process, OIRA or the rulemaking agency must disclose certain elements of the review process to the public, including the changes made at OIRA's recommendation.[16] Typically, OIRA reviews regulations to understand its economic impact and for compliance with legal and procedural requirements.

OIRA may waive review on a planned regulatory action designated by the agency as significant. This waiver is discretionary. However, historically, such a waiver has not been employed for DOL rulemaking. Even as late as October 31, 2019, in guidance issued related to Executive Order 13891, entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents" OIRA discussed the limits on granting such a waiver[17]:

> Q33: Is it possible to waive the need for a significance determination or EO 12866 review in the event of an emergency?
>
> A: Agencies may request that a significance determination or review be waived due to exigency, safety, or other compelling cause. ***A senior policy official must explain the nature of the emergency and why following the normal clearance procedures would result in specific harm.*** The OIRA Administrator will review and make a determination as to whether granting such a request is appropriate.

On September 30, 2020, the OIRA website was updated to show that OIRA had concluded its review of DOL's IFR and that DOL withdrew its rule from OIRA consideration. It was later found that this was a result of OIRA waiving its review pursuant to Section 6(a)(3)(A) of Executive Order 128666. No explanation for the use of this waiver has been provided, contrary to current Administration policy, as discussed above. Aside from the information on its website, OIRA does not publicly provide information on rules that have been withdrawn from OIRA review or the basis of any waivers OIRA provides.

DOL's deeply flawed invocation of the "good cause" exception, the agency's casting about for conclusory and unsupported rationales to excuse a rush to publish in advance of the election and a possible change in administrations, and the failure of OIRA to explain its reasoning for waiving review are critical in demonstrating the invalidity of the IFR. DOL should withdraw the rule and follow the appropriate APA process, should the agency wish to reissue it.

b. The Interim Final Rule should be withdrawn because it does not even achieve its self-stated purpose.

The DOL declared that the "primary purpose of [the IFR] is to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by

[16] Id.
[17] *See* Document M-20-2, dated October 31, 2019, issued by the OMB, available here: https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf

U.S. workers similarly employed to foreign workers."[18] Underlying this purpose is the agency's concern "to guard against both wage suppression and replacement of U.S. workers by lower-cost foreign labor." Its approach through this rule to changing the prevailing wage levels actually expands the wage disparity further from what U.S. workers are earning and against regulatory guidance. Given that the IFR does not accomplish its self-stated goals, it should be withdrawn.

The term "prevailing wage" shows up in two regulations: 20 CFR Section 655.731 regarding wage requirements for the H-1B, H-1B1, and E-3 programs associated with the filing of a Form ETA-9035, Labor Condition Application (LCA), and 20 CFR Section 656.40 regarding wage determinations for filing Form ETA-9089, Application for Permanent Employment Certification.

The regulations at 20 CFR Section 655.731 require an employer to pay the foreign national 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."[19] Where there is no collective bargaining agreement, an employer has three sources for the prevailing wage: the DOL[20], an independent authoritative wage source[21], or another legitimate source of wage information.[22] 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 specifically indicate that "the employer is not required to use any specific methodology to determine the prevailing wage and may utilize any of these options."[23] As shown by the data included below that demonstrates the impact of this new IFR for several occupations, there is a clear disparity between the wages listed in alternative wage surveys and the new DOL mandated minimum salary. Therefore, it appears that the DOL's prevailing wage calculations are, in practice, contrary to the alleged purpose of the IFR.

Section 656.40 of Title 20 of the CFR 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 agency's Occupational Employment Statistics (OES) survey, a collective bargaining agreement, statutory determination under the Davis-Bacon Act or the McNamara-O-Hara Service Contract Act, or an employer-provided survey.[24] 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, section 212(n)(1) of the Immigration and Nationality Act (INA) requires employers wishing to sponsor an H-1B worker for admission to the United States to obtain a certified LCA from the Secretary of Labor. Among the attestations made on that LCA is that the H-1B worker

[18] 85 Fed. Reg. at 63872, 63876
[19] 20 CFR § 655.731
[20] 20 CFR § 655.731(A)(2)(ii)(A)
[21] 20 CFR § 655.731(A)(2)(ii)(B)
[22] 20 CFR § 655.731(A)(2)(ii)(C)
[23] 20 CFR § 655.731(a)(2).
[24] 20 CFR § 656.40

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."[25] In addition, INA Section 214(g) sets the annual quota on the number of new H-1Bs that can be admitted each fiscal year, and INA 214(g)(3) mandates that H-1B nonimmigrants meeting the requirements of the statute "shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status."[26] Note that the statute makes the issuance of the H-1B visa or nonimmigrant status mandatory. Therefore, DOL is not able to issue regulations imposing a requirement that prevents an H-1B petition from being granted when the statutory requirements are met.

The IFR violates two aspects of section 212(n) of the INA. 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."[27] This is particularly evident when we compare 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 U.S. immigration purposes and not regularly relied upon by employers for setting salaries for their workforce.[28] 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 or H-1B visas 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 Office of Foreign Labor Certification in the past 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 routinely pay thousands of dollars 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, very few employers would ever consult the Online Wage Library.

The degree to which the IFR inflates "prevailing" wages well above the actual market wage was explained in detail in an analysis completed by the National Foundation for American Policy (NFAP).[29] In that analysis, the NFAP compared current data reported by the Willis Towers-Watson survey to what is now reported in the Online Wage Library under the Interim Final Rule.

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[25] INA § 212(n)(1)
[26] INA § 214(g)(3)
[27] INA § 212(n)
[28] *See* Foreign Labor Certification Data Center Online Wage Library, available here: https://www.flcdatacenter.com/
[29] *See* NFAP Policy Brief – An Analysis of the DOL H-1B Wage Rule dated October 2020 available here: https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf

The NFAP study provided the below comparisons, and these readily demonstrate just how inflated the wages reported in the Online Wage Library are as a result of the IFR:

Annual Salary for Electrical Engineers, San Jose-Sunnyvale-Santa Clara

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	$77,908	$119,746	+$41,838
4	$161,069	$245,939	+$84,870

Annual Salary for Computer Programmers, Chicago-Naperville-Elgin

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	$71,657	$91,062	+$19,405
4	$136,553	$222,394	+$85,841

Annual Salary for Software Developers (Systems), New York-Newark-Jersey City

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	$76,839	$116,251	+$39,412
4	$169,281	$217,526	+$48,245

Annual Salary for Electrical Engineers, Los Angeles-Long Beach-Anaheim

Levels	Private Wage Survey	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	$77,908	$108,909	+$31,001
4	$161,069	$200,034	+$38,965

If we do a similar comparison between the wages listed on the Online Wage Library and an easily accessible commercial site, we see a similar result. Below is a similar comparison with wage information from the website www.salary.com.

Annual Salary for Electrical Engineers, San Jose-Sunnyvale-Santa Clara

Levels	www.salary.com	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	$89,923	$119,746	+$29,823
4	$130,643	$245,939	+$115,296

Annual Salary for Computer Programmers, Chicago-Naperville-Elgin

Levels	www.salary.com	New DOL Mandated Minimum Salary	Difference Between New DOL Mandated Minimum Salary and Private Wage Survey
1	$63,500	$91,062	+$27,562
4	$96,646	$222,394	+$125,748

Annual Salary for Software Developers (Systems), New York-Newark-Jersey City

Levels	www.salary.com	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	$83,790	$116,251	+$32,461
4	$160,550	$217,526	+$56,976

Annual Salary for Electrical Engineers, Los Angeles-Long Beach-Anaheim

Levels	www.salary.com	New DOL Mandated Minimum Salary	Difference Between Private Wage Survey and New DOL Mandated Minimum Salary
1	$81,043	$108,909	+$27,866
4	$117,733	$200,034	+$82,301

It is important to note that one critical difference between a commercial wage survey like Willis Towers-Watson or a publicly available salary website like salary.com and the Online Wage Library is that the commercial surveys and websites 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. Under the IFR, the methodology employed by the Department of Labor's Bureau of Labor Statistics (BLS) and the Online Wage Survey does not come close to accurately measuring what companies are paying employees at various levels. By gathering general data without regard to experience levels, and then setting in the IFR a mathematical formula to distribute the wages from entry-level to experienced, the rule in no way is reflective of the market. It is arbitrary to simply "decide" that entry-level is approximately the 45th percentile of wages surveyed, and assuredly does not result in obtaining the "best information available" as required by INA Section 212(n). For this reason, and many others noted in this comment, the Interim Final Rule is *ultra vires* and should be withdrawn.

In fact, in justifying its arbitrary choice of setting the Level 1 wage at the 45th percentile[30], DOL dismisses one-third of the wages of individuals who are "similarly employed" as the H-1B or the U.S. worker and essentially sets a minimum education level for entry as those with at least a master's degree in most professions.

[30] 85 Fed. Reg. at 63889

The DOL looks to sources such as its own Occupational Outlook Handbook (OOH) where it is reported that there are some occupations where a bachelor's degree is not "always" required.[31] Based on that, the DOL draws the sweeping conclusion that wage data for the bottom third must therefore consist of wage data for those without bachelor's degrees and discounts all of that data. Using the OOH descriptions for determining the educational requirements for entry into a profession has been challenged in several venues, including those of its sister agency, the U.S. Citizenship and Immigration Services, and also in court.[32] That said, there are many other occupations where not only a bachelor's degree, but an advanced degree is the only path of entry and therefore the bottom third of wages do indeed capture qualified and eligible H-1B individuals. BLS publishes projections for 790 of the 867 detailed occupations included in the SOC.[33] The OOH provides detailed information for 561 occupations in 324 OOH profiles.[34] A search for those that require at least a master's degree for entry yields 36 occupations. These include acupuncturists, different types of counselors and therapists, and educational administrators. A search to see how many occupations require at least a doctoral degree or a professional degree for entry yields 63 occupations. These include dentists, doctors, lawyers, biochemists and biophysicists, physicists, and a range of postsecondary subject-matter teachers.

Further, in changing its prevailing wage levels, the DOL has indicated that it has determined that "an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution." This is a violation of the regulatory provisions of the requirements of the H-1B program which explicitly sets the minimum as one who has a bachelor's degree.[35]

On the other end of the wage spectrum, by setting the Level 4 wages as "the mean of the upper decile of the OES distribution, or approximately the 95th percentile"[36], the wages capture more of the outliers of workers, as opposed to those who are "similarly employed" as required by the regulations governing "prevailing wages." Additionally, this decision has caused many occupations to report an insufficiency of data, which has led to a defaulted wage being provided for all four levels at $208,000 regardless of the amount of experience or skills required. This has been confirmed by the DOL itself in its response to Question 4 of its "Prevailing Wage Level FAQs Round 2" published on October 29, 2020.[37] Such a wage is not what other similarly employed U.S. workers are earning.

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[31] Id. at 63880
[32] Relx, Inc. v. Baran, 397 F.Supp.3d 41, 53-54 (D.D.C. 2019)
[33] *See* OOH FAQs, available here: https://www.bls.gov/ooh/about/mobile/ooh-faqs.htm and Standard Occupational Classification, available here: https://www.bls.gov/soc/.
[34] *See* OOH FAQs, available here: https://www.bls.gov/ooh/about/mobile/ooh-faqs.htm
[35] 8 CFR § 214.2(h)(4)(iii)(A)(1)
[36] 85 Fed. Reg. at 63892
[37] *See* Prevailing Wage Level FAQs Round 2, available here: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-1B-Wage-Protection-FAQ-Round-2-10-29-20.pdf

For all of the reasons set forth above, the recalculating of the prevailing wage levels contradicts existing regulatory definitions and provisions and disregards the wages that employers are offering and paying both U.S. workers and foreign nationals. Therefore, while proffering wage levels that are not "prevailing wages" the IFR undermines its very own reason for existence.

c. The Interim Final Rule should be withdrawn because it is technically flawed and cannot be implemented properly by the OFLC.

DOL's Office of Foreign Labor Certification's (OFLC) IFR has inoperable flaws. Employers have encountered at least two critical issues with the implementation of the IFR: (1) how OFLC has calculated the new percentiles of wages; and, (2) that OFLC is not reporting any wage data for thousands of occupations.

OFLC attempted to answer questions about these issues by issuing an FAQ titled "Prevailing Wage Level FAQs – Round 2" dated October 29, 2020.[38] While this FAQ acknowledges and discusses the issues, it does not address how DOL is going to resolve the on-going issues being encountered by employers due to its inherent flaws.

BLS collects wage data via (1) the Occupational Employment Statistics (OES) survey and (2) the National Compensation Survey (NCS).[39]This data generates two wage averages. Then, OFLC uses a formula to create four wage levels. BLS provides its data to OFLC in March of each year and OFLC uploads it with the four wage levels into its FLC Data Center on July 1st of each year. In the preamble to the IFR, OFLC confirmed that it will continue to use the wage data provided by BLS, and instead of creating new wage levels, it would only adjust the existing levels produced by BLS. OFLC re-confirms this fact in response to Question Number 1 in its "Prevailing Wage Level FAQs – Round 2."[40] Therefore, if wage data was previously provided in the FLC Data Center before the implementation of the IFR on October 8, 2020, this wage data should also appear in the FLC Data Center after October 8, 2020, but with different values. This, however, is not the case for a significant number of occupations located across the United States.

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[38] Id.

[39] In 1990, Congress modified the Immigration and Nationality Act (INA) to require employers to pay H-1B nonimmigrants the greater of the actual wage or prevailing wage for the offered position. When considering this modification, the House Judiciary Committee stated that:

> The bill requires the Bureau of Labor Statistics (BLS) to make determinations on prevailing wages and this information is to be made readily available to employers and worker . . . The Committee intends and expects the BLS to have prevailing wage information readily available.

H.R. Rep. No. 101-723, pt. 1 at 64 (September 19, 1990).
However, as discussed below, DOL is not providing prevailing wage data under the new rule for a significant number of occupations (more than 18,000) and thus DOL is now failing to meet the expectations of the House Judiciary Committee in this program by providing employers with the required prevailing wage data so that they can ensure compliance in the H-1B program.

[40] *See* Prevailing Wage Level FAQs Round 2, available here:
https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-1B-Wage-Protection-FAQ-Round-2-10-29-20.pdf

A review of data in the FLC Data Center indicates that OFLC is not providing wage data for approximately 18,000 occupations located across the United States.[41] In its "Prevailing Wage Level FAQs – Round 2," OFLC states that "the circumstances where the Online Wage Library and FLAG system display no leveled wages for an occupation and/or geographic area constitute a very small proportion of all prevailing wage records calculated by BLS...".[42] 18,000 occupations is not a "very small" number of occupations; this is a significant increase in the number of prevailing wages that are now not being provided in the new prevailing wage system after October 8th that were previously provided under the former prevailing wage system before the implementation of the IFR, just the day before. Notably, these 18,000 occupations include the most common occupations in some of the country's largest economic markets, such as San Francisco, Seattle, New York, and other major metropolitan areas. For these occupations, the FLC Data Center for wage levels 1 to 4 is indicating "N/A" and a note indicates that the wage that will be assigned to each of the four wage levels will be $100 per hour "due to limitations in the OES data." For most of these occupations, however, wage data existed prior to the implementation of the IFR on October 8, 2020, and because OFLC acknowledges in the IFR's preamble and its "Prevailing Wage Level FAQs – Round 2" that the data has not changed, this data should still be available after implementation of the IFR. Additionally, DOL has not explained how it has determined the appropriateness of a default wage at the amount of $100 per hour for any occupation with any skill set regardless of where it is located when there are supposedly limitations in the OES data.

As an example, the wages in the FLC Data Center for Software Developer, Applications (SOC Code 15-1132) in San Francisco, California before the implementation of the IFR were $46.45 per hour or $96,616 per year (Level 1); $58.14 per hour or $120,931 per year (Level 2); $69.83 per hour or $145,246 per year (Level 3); $81.52 per hour or $169,562 per year (Level 4); and $69.83 per hour or $145,246 per year (Mean Wage (H-2B)). After the implementation of the regulation, the wages are now indicated as "N/A" (Level 1); "N/A" (Level 2); "N/A" (Level 3); "N/A" (Level 4); and $69.83 per hour or $145, 246 per year (Mean Wage (H-2B)) with the default of $100 per hour or $208,000 per year being applied for all four levels. Does the data truly indicate that a Software Developer who has just graduated from college and begins working in San Francisco earns, on average, $208,000 per year? Of course not, and the same can be said for thousands of other occupations in so many locations that are defaulting to a $208,000 per year salary.

In 2004, Congress modified the INA to require DOL to provide wage data in four levels.[43] Because BLS has previously provided wage data to OFLC for many of the occupations that are currently indicated as not having data in the FLC Data Center, OFLC is currently providing inaccurate wage data to the public in its Data Center and is issuing faulty prevailing wage determinations with $100 per hour indicated as the prevailing wage, regardless of the wage level assigned to the position. This is the result of technical flaws and the inoperability of the IFR. Therefore, DOL should

[41] *See* NFAP Policy Brief – An Analysis of the DOL H-1B Wage Rule dated October 2020. https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf
[42] *See* Prevailing Wage Level FAQs Round 2, available here: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-1B-Wage-Protection-FAQ-Round-2-10-29-20.pdf
[43] 8 U.S.C. § 1182(p)(4)

immediately withdraw the IFR because it is not complying with 8 U.S.C. 1182(p)(4) in that it is only providing one prevailing wage level for many occupations, even though the data should be available to provide four different levels.

d. This Interim Final Rule is unsupported by current U.S. employment data

To justify this IFR, the DOL extensively discusses the state of the U.S. labor market. It stated that the emergency foundation for immediate implementation of the rule is tied to the elevated unemployment and economic dislocation for U.S. workers caused by the COVID-19 pandemic. Notably, while national unemployment figures in some occupations may be a cause for concern, unemployment in occupations that see the highest levels of H-1B sponsorship remain at historic lows.[44] Furthermore, DOL acknowledged in the IFR that its changes to wage levels could result in a 7.74% reduction in labor demand, an impact that will negatively disrupt our economic growth and COVID-19 recovery.[45] Meanwhile, unemployment rates have reached historic highs in industries that typically do not sponsor H-1B workers where unemployment rates currently exceed 20% in some occupations.[46]

Curiously, though the rulemaking does extensively cite to H-2B wage guidance memoranda, this rulemaking applies only to the H-1B category. Unemployment data for occupations that are eligible for H-1B classification remains very low[47] and employers continue to have a significant need for highly educated and specialized talent. Indeed, H-1B workers are engines of economic growth in other sectors, such as the services industry, positively contributing to hiring practices in other areas. Research supports the fact that H-1B workers often complement U.S. workers and are critical in filling employment needs in industries with low unemployment numbers.[48] Not only this, H-1B workers also expand job opportunities for all.[49] As a result, the implementation of this rule will have a downstream *negative* effect on the U.S. economy and employment of U.S. workers in industries that have been hit especially hard by the pandemic.[50]

The Department of Labor's election to target the high-skilled visa categories for emergency rulemaking despite minimal impact from the pandemic to these occupations lays bare the cognitive dissonance in the approach and calls into question the foundation of the rule. Put simply, the

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[44] *See* NFAP Policy Brief – An Analysis of the DOL H-1B Wage Rule dated October 2020, available here: https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf

[45] 85 Fed. Reg. at 63908

[46] *See* Labor Force Statistics from the Current Population Survey, available here: https://www.bls.gov/web/empsit/cpseea31.htm

[47] *See* NFAP Policy Brief – Employment Data for Computer Occupations for January to September 2020 dated October 2020, available here: https://nfap.com/wp-content/uploads/2020/10/Employment-Data-for-Computer-Occupations-January-to-September-2020.NFAP-Policy-Brief.October-2020.pdf

[48] *See* American Immigration Council Fact Sheet: The H-1B Visa Program, available here: https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet

[49] Id.

[50] *See* NFAP Policy Brief – The Impact of H-1B Visa Holders on the U.S. Workforce dated May 2020, available here: 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

distortion of existing unemployment data to achieve a desired policy result underscores the need for the traditional notice and comment rulemaking process.

e. The Interim Final Rule should be withdrawn because it invalidates a congressionally created program by making it impossible for employers to comply with the Interim Final Rule without violating other federal, state, and local laws.

Congress created the H-1B program to allow U.S. employers to hire high-skilled foreign workers. The implementation of the IFR however undermines this congressional intent because it undermines the statutory program set forth by Congress and it would require employers to act in a way that is at odds with other laws. The IFR forces employers to pay artificially high wages to an H-1B worker, which in turn will preclude the use of the H-1B visa program. Congress specifically created the H-1B visa so that employers could use the visa to employ foreign nationals with specialized skills.[51] The rule thus frustrates the intent of Congress if employers are not able to legitimately use the H-1B visa to avoid violating other laws.

For example, the old entry-level wage for a Software Developer, Systems in New York was $78, 811.[52] The entry-level wage for the same Software Developer, Systems under the new rule is $116, 251.[53] If the employer is forced to pay an entry-level H-1B worker a higher wage than a U.S. worker under the rule, the employer may be forced to violate equal pay laws and thus place the employer in great legal peril. A U.S. worker could allege a pay equity claim under Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees based on race, color, religion, national origin, and sex. If an employer is paying a foreign employee much more than the employer is paying a U.S. worker who belongs to a protected class, the employer may be susceptible to a Title VII disparate discrimination claim. Even if this claim is not ultimately successful, an employer would have to spend time and money defending against such a claim. Assuming the DOL contends that the employer raises the wages of all similarly situated workers to avoid risking a Title VII claim, especially in the current pandemic environment, it is simply not feasible to force U.S. employers, especially small businesses, startups, and nonprofits to make such sharp increases in pay across the board without significantly impacting their business. Moreover, as noted earlier, Congress did not mandate that employers pay more than market wages to hire an H-1B worker. Instead, Congress mandated that an employer pay the H-1B worker the prevailing wage. If DOL's solution to the problems created by the IFR is simply to have employers pay much higher salaries across the board, this solution may have devastating impacts on U.S. businesses and is unrelated to the requirements of the H-1B program.

Further, an employer may be more vulnerable to claims under broader state pay equity laws. According to New York State's Pay Equity Law, paying a protected class employee less than an employee that is not within one of the protected classes for equal or substantially similar work is

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[51] *See* INA § 101(a)(15)(H)(i)(b)

[52] *See* wage information between 7/1/2020 and 10/7/2020 for Software Developers, Systems Software in New York, available here: https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=35620&year=21&source=1

[53] *See* wage information between 10/8/2020 and 6/30/2021 for Software Developers, Systems Software in New York, available here: https://www.flcdatacenter.com/OesQuickResults.aspx?area=35620&code=15-1133&year=21&source=3

unlawful.[54] "Protected Class" includes gender, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim. If the IFR makes employers vulnerable to discrimination claims under federal and states laws, it simply makes it impossible for a U.S. employer to hire an H-1B worker, and thus is contrary to Section 101(a)(15)(H)(i)(b) of the INA.

The IFR may even force the employer to violate existing DOL rules governing the H-1B visa program. Under 20 CFR Section 656.731(a), the employer must pay the higher of the prevailing or the actual wage. The "actual wage" is the wage paid to all other individuals with similar experience and qualifications for the specific employment in question. If the employer offered the wage to a Software Engineer at the prevailing wage of $78,811 the day before the rule change and is now forced to offer the higher wage of $116,251 to another H-1B worker the day after the rule change, the employer will be paying less than the actual wage to the first employee and thus in violation of 20 CFR Section 656.731(a).

Although 20 CFR Section 655.731(a)(2)(viii) specifies that a prevailing wage on the later Labor Condition Application (LCA) does not "relate back" to operate as an "update" of the prevailing wage for a previously filed LCA for the same occupational classification, it cautions that "the actual wage component to the required wage may, as a practical matter, eliminate any wage-payment differentiation among H-1B employees based on different prevailing wage rates stated in applicable LCAs. Every H-1B nonimmigrant is to be paid under the employer's actual wage system, and thus is to receive any pay increases which that system provides." Here too, the risk that an employer may face for an actual wage violation if there are two prevailing wage rates for different similarly situated H-1B workers in the same occupational classification would force an employer to stop using the H-1B visa.

Employers, including non-profit hospitals, which hire foreign national physicians on H-1B visas may also be violating the Stark Law.[55] The Stark Law generally prohibits a physician or immediate family member who has a financial relationship with an entity, such as a hospital, from making referrals to that entity for "designated health services" covered by Medicare, unless a specific exception applies. The Stark Act has an exception for bona fide employment arrangements where the physician is paid the fair market value. The Stark Law is a strict liability statute and civil penalties may be imposed for violations. Thus, an employer who is forced to pay a foreign national physician on an H-1B visa a wage of $208,000, that is, the default wage created by the IFR, may not be paying the fair market value and would thus be unable to enjoy the safe harbor provided by the Stark Act and may be dissuaded from using the H-1B visa even though Congress intended that employers may use it to hire foreign physicians, especially in medically underserved areas.

Employers must also be mindful of The Anti-Kickback Statute,[56] which makes it a crime to pay, offer, solicit, or receive remuneration, directly or indirectly, to induce referrals or services of

[54] N.Y. Labor Law art. 6, § 194 (1) (2019). See also Iowa Code § 216.6A (2009), which prohibits paying an employee who is a member of a protected class lower wages than an employee not within a protected class who is performing "equal work" within the same establishment.
[55] 42 USC § 1359nn.
[56] 42 USC § 1320a-7b(b).

Medicare or Medicaid business, unless it is a bona fide employment arrangement. Although the Anti-Kickback Statute requires intent, it is broadly worded, and a violation results in a felony. In this case too, if the employer is forced to pay an artificially high wage to a foreign physician on an H-1B visa, the employer may not be able to rely on a bona fide employment arrangement safe harbor.

The new rule may also jeopardize the status of an H-1B worker, and this too is illustrative of how the rule precludes the ability of an employer to continue to use the H-1B program for an employee who has been employed in H-1B status. If the employer needs to file a petition for an extension of status on behalf of an H-1B worker whose status is expiring, the new wage system may hinder the ability of the employer to do so. For example, upon the implementation of the IFR on October 8, 2020, there is no available wage data, other than a default wage, for a Software Developer, Systems in San Francisco.[57] An employer who may have been planning to file an H-1B extension may no longer be able to do so if it cannot ascertain the appropriate wage.[58] The default wage for Software Developer, Systems is $208,000.[59] If the employer cannot afford to pay this artificially high wage without violating other laws, an H-1B worker's status may be jeopardized if the extension is not filed on time. H-1B workers who are unable to seek extensions will have to abruptly leave the U.S. with their spouse and children to avoid falling out of status. Their ability to leave the U.S. may be impeded by the COVID-19 situation in their home countries thus further exacerbating the unforeseen consequences caused by the IFR. Many of these individuals have been in the United States in lawful H-1B status for many years, if not decades, as they await their immigrant visa number to become available to adjust their status to lawful permanent residence. They have purchased homes, have children who know no other country but the United States, and have other family and financial obligations in the United States, all while complying with the existing laws. Retroactively changing the rules that have applied to them for years is unfair and unreasonable, exacerbated by the fact that individuals and their employers were not given any advance notice of these changes and an opportunity to make life-altering plans. Moreover, their ability to leave the U.S. may be impeded due to travel restrictions and the ability to acquire necessary paperwork by the COVID-19 situation which is worsening around the world thus further exacerbating the unforeseen economic and immigration consequences caused by the IFR.

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[57] *See* wage information between 10/8/2020 and 6/30/2021 for Software Developers, Systems Software in San Francisco, available here: https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=41860&year=21&source=3. The portal provides the following explanation for the lack of data:

Leveled wages cannot be provided in Area **41860** for the occupation code **15-1133** due to limitations in the OES data. Employer provided surveys may be considered under the appropriate regulation, unless the provision of a survey is not permitted. The wage data may be at least: $100.00-hour, $208,000 year. See http://www.bls.gov/oes/ for an explanation of why OES includes the footnote.

[58] Prior to the rule change, the four wage levels in San Francisco were Level 1 - $96,616 per year, Level 2 - $120,931 per year, Level 3 - $145,246 per year and Level 4 - $169,562 per year. See wage information between 7/1/2020 and 10/7/2020 for Software Developers, Systems Software in San Francisco, available here: https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=41860&year=21&source=1

[59] Because the new level 4 is often unable to be calculated in a valid way as a result of few OES responders at this level and instead just outlier wages, there are lots of "missing" wages in the new level 1, 2, 3, 4 reported by OES. See DOL's H-1B Wage Rule Massively Understates Wage Increases up to 26%, available here: https://www.cato.org/blog/dols-h-1b-wage-rule-massively-understates-wage-increases-26

In response to these concerns, the IFR appears to suggest to employers that if you do not like it or are forced to violate other laws, "do not use the H-1B visa." However, Congress created the H-1B visa program for U.S. employers to hire high-skilled professionals in a manner that does not require an employer to engage in legal acrobatics. The IFR results in clear absurdities in applications, which can be highlighted by considering examples of things that other agencies clearly could not do to highlight what DOL has in effect done by implementing the IFR.

For instance:

- The Veteran's Administration would not be able to offer medical care to veterans only if they travel to Sweden to get it.
- The Social Security Administration would not be able to distribute social security checks in rolls of pennies.
- The Department of the Interior would not be able to allow access to national parks only if you have your own helicopter.

Implementation of the DOL's IFR would yield similar absurdities and would undermine the entire purpose of Congress' creation of the H-1B program.

In *FDA v. Brown & Williamson,* 529 U.S. 120 (2000), the Supreme Court held that an administrative agency cannot exercise its authority that is inconsistent with the intent of Congress. Notably the Supreme Court held: [60]

> Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988). And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842—843 (1984). In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

Likewise, as in *FDA v. Brown & Williamson*, Congress could not have possibly intended for DOL to create artificially high prevailing wages rendering it virtually impossible for employers to use the H-1B visa program. The DOL rule is thus contrary to the intent of the statute.

[60] *FDA v. Brown & Williamson*, 529 U.S. 120, 125-126 (2000).

III. Conclusion

The DOL IFR, posted and implemented on October 8, 2020, is unlawful and operationally flawed, and must be withdrawn. The circumvention of a proper notice and comment period under the APA has resulted in a fundamental change to the administration of U.S. immigration programs designed by Congress. Implementation of the IFR undermines its stated purpose of properly calibrating prevailing wages to what U.S. workers are making because it either generates wages that are far above what U.S. workers are earning or there are no wages but a default wage. The IFR, contrary to the government's assertions, is not designed to support U.S. workers and U.S. businesses during a global economic crisis, but rather is a hollow, unsubstantiated excuse for this Administration to target legal immigration.

AILA appreciates the opportunity to comment on the IFR.

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