



April 20, 2021

Brian D. Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW
Room N-5311
Washington, DC 20210
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Submitted via <https://beta.regulations.gov>
Docket ID No. ETA-2020-0006
RIN: 1205-AC00

Re: Proposed Delay: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Proposed Delay of Effective and Transition Dates

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) submits the following comments in support of the *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States: Proposed Delay of Effective and Transition Dates* (86 FR 15154, 3/22/21), which proposes to further delay the effective date of its final rule (FR) issued on January 14, 2021. (86 FR 3608, 1/14/21) which was recently extended to May 14, 2021. (86 FR 7656, 2/1/21).

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), also referred to herein as the “Wage Rule,” and are in support of the Department of Labor’s (DOL) proposal to further delay its implementation. Moreover, we strongly recommend that after reviewing these comments and others made by stakeholders, your office further delay

the implementation of the rule in order to rescind the FR and issue new rulemaking that is consistent with the notice-and-comment requirements of the Administrative Procedure Act (APA) and is evidence-based.

AILA 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 Final Rule (IFR) issued on January 14, 2021 (86 FR 3608 1/14/2021) and whether such impact is consistent with the current 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, 2023, such that DOL can rescind the faulty FR, and issue new proposed rulemaking that is evidence-based which is implemented consistent with the current annual wage update implementation schedules to avoid major system updates to wage levels during peak filing windows. Further delaying the FR will allow U.S. businesses and affected stakeholders a proper opportunity to comment on any changes and change any business practices in advance of implementation of any changes and provide DOL time to prepare accordingly.

II. Comments

A. DOL should further delay the effective date of the Wage Rule to perform a complete analysis of the science underlying the prevailing wage system and determine whether it achieves its goal of ensuring that American and foreign national workers are protected.

AILA commends the DOL for its proposal to further delay the effective date of the Wage Rule, as it is necessary to provide the Administration with time to evaluate thoroughly whether the Wage Rule ultimately achieves its purpose to protect both American and foreign national workers from underpayment of wages and to grow the U.S. economy. If this is the Administration's goal, then a straightforward principle should govern any prevailing wage rule: the market should determine wage levels, and employers should neither be permitted to pay lower wages or mandated to pay higher simply based on a worker's immigration status.

One of the very first actions of the Biden Administration was to introduce "a slate of scientific advisers . . . with the promise that they would summon 'science and truth' to combat the coronavirus pandemic, climate crisis, and other challenges."¹ This fact-based approach should not be limited to just the pandemic or combatting the climate crisis. It should be applied to other government areas driven by science, which includes rules determining prevailing wages, as is recommended in President Biden's Memorandum on Restoring Trust in Government through Scientific Integrity and Evidence-Based Policymaking (Jan. 27, 2021).²

¹ See Biden Says His Advisors Will Lead With 'Science and Truth' (Jan. 18, 2021), available here: <https://www.usnews.com/news/politics/articles/2021-01-16/biden-science-will-be-at-forefront-of-his-administration>

² See "Restoring Trust in Government through Scientific Integrity and Evidence-Based Policymaking," 86 FR 8845 (Feb. 10, 2021).

The prevailing wage rate is defined as “the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.”³ Objective scientific and mathematical calculations can generate such wages. Prevailing wages should not reflect political priorities or desires. Congress's role is to make or modify laws affecting the country’s approach to immigration preferences, not that of the federal agencies. We urge DOL to take the time necessary to ensure that its prevailing wage system, like other policy areas, is guided by “science and truth,” and not to resort to political expediency.

Unfortunately, the Wage Rule continues to be based upon the flawed presumption that the amount a worker is paid, and that element alone, determines the value that worker brings to the United States. To this end, the Wage Rule attempts to increase required wages for foreign national workers well above what science shows the market indicates, thus changing the prevailing wage calculation from a mathematical one to a political one. DOL should use the delayed effective date of the Wage Rule and whatever additional time is needed to ensure that it examines and addresses this flawed presumption and issues a prevailing Wage Rule that ultimately ensures that both American and foreign national workers are paid the same and in accordance with the market. While this may take time, we believe that achieving this is possible.

In the February 2, 2021 “Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,” this Administration acknowledged 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, 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.

Nowhere in this Executive Order did this Administration state that, to ensure that immigrants can contribute to this country, employers must pay foreign national workers wages above what the market requires or even what employers pay the American counterparts. Given this strong endorsement of the economic value of immigrants to the United States, we encourage DOL to take the time needed to make a more detailed assessment of whether the FR achieves its intended outcome and ultimately reflects the math and science indicated by the data gathered by DOL.

A rule that artificially creates a significant increase in required wage rates such that employers who rely on highly skilled foreign national workers to supplement their workforce has the effect of destroying the very innovation, productivity, and economic growth that the Administration has

³ See Prevailing Wages (PERM, H-2B, H-1B, H-1B1 and E-3), available here: <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage>

recognized that immigration provides. DOL should, therefore, further pause and reconsider the underlying basis of this Wage Rule and whether it is ultimately helpful or harmful to the United States economy and American and foreign national workers.

B. The FR's effective date should be delayed because the development of an appropriate methodology to replace the existing regime requires careful study, consideration of stakeholder comments, and review of the policy implications of change takes time.

We commend the DOL for acknowledging the serious concerns with the FR's substance and the process through which it was promulgated. As a result, we support the proposed delay of the effective date of the Wage Rule to allow sufficient time for thoughtful deliberation and compliance with the APA's procedural requirements.

More specifically, the recent issuance of a separate Request for Information (RFI) to solicit public input is a welcome element of this delay. Through the RFI, thoughtful consideration of the sources of data and the methodology for calculating wage levels will enable the DOL to implement a rule that reflects the reality that U.S. employers and foreign workers face, is a result of a transparent rulemaking process, and appropriately addresses stakeholder concerns.

Unfortunately, the Wage Rule continues to be based upon the flawed presumption that the employment of foreign national workers 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.

In just one example previously cited by our organization in a comment⁴ related to this rulemaking, 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" 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.⁵ The study found the following:

- 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.

⁴ See AILA Comments on Proposed Delay of the Effective Date of the DOL Final Rule on Computing Prevailing Wage Levels (2/16/21), available here: <https://www.aila.org/infonet/comments-on-proposed-delay-of-the-effective-date>

⁵ See The Impact of H-1B Visa Holders on the U.S. Workforce (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>

Again, as stated above, 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.

In a statement following his confirmation as Secretary of Labor, Marty J. Walsh stressed the importance of immigrants to economic development and policy in the United States. That statement reads, in relevant part:

As the son of immigrants and a former union laborer, I share their deep commitment to building an economy that works for all. I have been a fighter for the rights of working people throughout my career, and I remain committed to ensuring that everyone – especially those in our most marginalized communities – receives and benefits from full access to economic opportunity and fair treatment in the workplace. I believe we must meet this historic moment and, as the nation’s secretary of Labor, I pledge to help our economy build back better.⁶

As Secretary Walsh’s comments make clear, immigrant labor is an essential part of the American economy, and the contributions of our immigrant community are immeasurable. The original Wage Rule threatened the viability of the most frequently utilized visa classification for highly skilled workers and their U.S. employers, jeopardized the immigration status of the hundreds of thousands of H-1B workers who contribute to our society, and, would severely impact our ability to rebuild our economy as we emerge from the COVID-19 global pandemic. For this reason, AILA is heartened to see that DOL is inviting feedback via the RFI.

While we recognize that this comment's scope is to support the DOL’s proposed delay of the implementation of the FR, we welcome the future opportunity to comment on any substantive changes to the existing wage structure. More specifically, consistent with Secretary Walsh’s aspirational comments, the DOL should offer a more thorough evaluation of wage leveling to ensure that the wage levels reflect what they are supposed to reflect, the actual prevailing wage in the labor market for the four wage levels mandated by the statute. Our position is that the current wage leveling structure is a far more accurate picture of this reality than the resulting levels under the FR. Taking just one example from ongoing litigation related to the FR, setting the minimum salary an employer must pay an H-1B entry-level worker at the 35th percentile of wages earned in that occupation defies logic. This would mean, by definition, that 35% of workers in that occupation earn below that minimum, entry-level wage. No credible definition of “entry-level” would exclude the bottom third of all workers in an occupation.

In reviewing subsequent comments and ultimately establishing a new wage leveling regime, the DOL should provide satisfactory justification for where wage levels are set, clearly articulating how those levels are consistent with O*Net data and ensuring compliance of that rule with the

⁶ See Statement by Marty J. Walsh Following Senate Confirmation of his Appointment as 29th Secretary of the U.S. Department of Labor (3/22/21), available here: <https://www.dol.gov/newsroom/releases/osec/osec20210322>

statutory purpose and the current Administration’s immigration policy. It is only after this data-based, in-depth assessment is completed that DOL should consider moving forward with modifications to the existing rules on prevailing wage levels. As such, we recommend that DOL await completion of the RFI process, withdraw the faulty FR, and follow traditional rulemaking procedures if it wishes to make further modifications to the existing prevailing wage system.

C. Conclusion

AILA appreciates the opportunity to comment on the proposed delay of the FR and looks forward to providing additional feedback in response to the recently issued RFI. AILA supports the proposed delay and respectfully requests that it be further delayed until July 1, 2023 as it will allow the DOL time to develop and implement a thoughtful rule that establishes wage levels that are tethered to market reality, recognizes the importance of immigrant workers as positive contributors to our society and economy, and furthers the current Administration’s broader plans to “Build Back Better.” We respectfully recommend that the DOL rescind the faulty 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