June 1, 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

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RIN: 1205-AC00

Dear Mr. Pasternak:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Employment and Training Administration’s Request for Information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States.¹

Established in 1946, the American Immigration Lawyers Association (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 nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, legal permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the information collection request (ICR) submitted to the Office of Management and Budget (OMB) by the Employment and Training Administration (ETA) of the U. S. Department of Labor (DOL). We believe that our members’ collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

I. Introduction

AILA appreciates the opportunity to comment on this request for information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-immigrants in the United States and supports the DOL’s efforts to ensure that prevailing wage levels reflect real-world economic realities. U.S. immigration programs should require employers to pay nonimmigrants and immigrants at the same levels as

¹ 86 Fed Reg. 17343 (April 2, 2021)
their counterparts in the U.S. workforce. Any data source or calculation method should ensure that employers do so. AILA further recommends the rescission of the January 14, 2021 Final Rule (FR) and the issuance of a new rule through notice and comment, reflecting the results of the RFI to ensure that the regulations reflect real-world economic data.

II. **RFI Question 1 - What sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate the wage level within an occupational wage distribution based on the OES wage survey and takes into account education, experience, and level of supervision for U.S. workers similarly employed across industries for specific occupation(s) and geographic area(s)?**

AILA welcomes the opportunity to contribute to DOL’s assessment of which data and methods are appropriate for consideration of Occupational Employment Statistics (OES) wage surveys and leveling. Given our organization’s area of expertise, AILA is focusing our comments on structural recommendations regarding the resulting calculations and data. Specifically, our organization has three recommendations related to the sources of data that DOL should consider.

1. The data collected should contemplate employer-reported wages and other real-world wage sources such as private wage surveys that DOL considers appropriate.
2. For rural and smaller regional markets, DOL should engage with private wage survey companies to identify methodologies for calculating real-world wages in those markets, rather than defaulting to higher wages or figures not directly related to that market.
3. DOL should not consider LCA disclosure data, as compliance with the regulations often results in figures that exceed real market data.

We encourage DOL to broaden the scope of the data sets it currently considers in calculating wages. DOL’s wage guidelines already allow for the use of alternative wage surveys. Still, deeper integration and broader acceptance of such data is needed to bring OES wages in line with market realities and the needs of academic and research communities across the United States. There are several wage survey providers that DOL has historically found acceptable for use in the alternate wage survey context. AILA encourages DOL to review and analyze the various alternative wage surveys, starting with the most frequently used surveys.

As a related matter, in broadening the scope of data that DOL can look to for its OES calculations, it should also revisit its approach to smaller rural and regional markets. The Metropolitan Statistical Area (MSA) has historically been a valuable tool to defining these regional markets. Still, with a more widely distributed and remote workforce, it will be important for DOL to apply creative approaches to wage leveling in these historically underreported markets. DOL should broaden the geographical area within which it will consider data sets.

Finally, we note that the originally issued Interim Final Rule (“IFR”) focused in large part on alleged discrepancies between the employer wages reported on ETA Form 9035, Labor Condition

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Application for H-1B workers and the assigned pre-IFR wage levels in that data set.³ We recognize that DOL has issued this RFI to address many of the substantive concerns raised with respect to the original IFR and welcome the DOL’s thoughtful approach to revisiting the foundation of that proposed rule. That said, we wish to stress to DOL that the LCA public disclosure data is not an appropriate source of wage benchmarking data. Where an employer is compliant with 20 CFR 655.731(a), the offered wages to an H-1B worker must exceed both the prevailing and actual wage offered to similarly situated U.S. workers. This means that the offered wages reported on ETA Form 9035 and recorded in the DOL’s public disclosure data exceed average market data by definition. Otherwise stated, the LCA public disclosure data represents inflated wages by occupation because the law requires it. As a result, it is not an appropriate source of data for consideration of what a true prevailing wage figure would be for each market.

III.  RFI Question 2 - Besides the OES wage survey, what other sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate wage levels, by occupation and geographic area, specifically for U.S. workers similarly employed at institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations and Governmental research organizations?

In 1976, observing that DOL had hampered the efforts of academia to retain outstanding candidates for teaching and faculty positions, Congress amended the Immigration and Nationality Act. The rationale for this amendment was as follows:

The Committee continues to be disturbed by the administration of the labor certification requirement by the Department of Labor and plans to review this entire program during the next Congress. The Committee, however, is particularly troubled by the rigid interpretation of this section of law as it pertains to research scholars and exceptional members of the teaching profession. More specifically, the Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills. As a result, this legislation includes an amendment to section 212(a)(14) which requires the Secretary of Labor to determine that “equally qualified” American workers are available in order to deny a labor certification for members of the teaching profession or those who have exceptional ability in the arts and sciences. (Emphasis added.)⁴

Together, the legislative history, statute, and regulations make it clear that American universities and colleges must be able to attract and retain “outstanding [international] educators or faculty members” to further national education and research priorities set by Congress. This special legislative rule provided colleges and universities with needed flexibility in structuring their

³ 85 Fed. Reg. 63872 (October 8, 2020)

requirements without regard to their baseline qualifications for the job. From then on, an academic employer could choose the candidate who is best qualified for the job opportunity and whose qualifications exceed those of other applicants.

In 2006 and again in 2017, the United States Citizenship and Immigration Services (“USCIS”) reaffirmed the value international educators, faculty, and researchers bring to academia, related nonprofit entities, and research organizations by expanding the exemption from the annual numerical limitations to H-1B workers “employed at” those institutions.\(^5\) In the 2006 memo, USCIS noted that:

> Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.\(^6\)

Undoubtedly, among the key reasons why U.S. colleges and universities retain their reputation as the finest in the world is because of their ability to attract the most talented faculty, researchers, and students from the United States and abroad.\(^7\) Indeed, American colleges and universities “have a mission of ‘global engagement and rely on . . . visiting students, scholars, and faculty to advance their educational goals.”\(^8\)

In other words, the consensus of the past four and a half decades has been that immigrants headed to America’s colleges and universities are vital to preparing the next generation of students, to solving problems of tomorrow while creating true diversity and opportunities to re-examine the status quo.

The American Competitiveness and Workforce Improvement Act (“ACWIA”) resulted in institutions of higher education, a related or affiliated nonprofit entity, or a nonprofit research organization or a governmental research organization, having separate prevailing wages from a database that only take into account employees at such institutions and organizations in the area of employment.\(^9\) This was reaffirmed in the Matter of University of Michigan.\(^10\) We urge DOL to

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\(^8\) See [Washington v. Trump](https://www.fedcircuitbriefs.com/washington-v-trump), 847 F.3d 1151, 1160 (9th Cir. 2017).


recognize as binding the legal proposition that under the regulations, an ACWIA wage for an institution of higher education may sample only other institutions of higher education.

Although there is a general consensus that the OES wage survey is comprehensive and among the best data sources, it is not entirely problem-free. This is particularly true for ACWIA-compliant employers, which Congress has empowered to recruit the best and brightest. The OES survey does not collect actual salary figures from surveyed organizations and instead looks to pay ranges or bands. Specifically, surveyed employers “do not provide data about individual employees” but rather “grouped data responses, categorizing employees into wage groups,” a method relied on for all occupations and in all geographic areas. Critically, the survey does not connect the wage bands to actual education, experience, or, as required by the INA 212(p)(4). Further, because the responses are voluntary, it is doubtful that the resulting wage data accurately reflects the wage levels for all surveyed occupations across all geographic areas.

DOL’s wage guidelines already allow for the use of alternative wage surveys. Still, broader acceptance of such data would bring OES wages in line with market realities and the needs of academic and research communities across the country. For example, the following are specific private data and survey sources widely utilized in ACWIA-compliant employers:

1. College and University Professional Association for Human Resources (CUPA-HR) (e.g., 2021 Faculty in Higher Education Survey)
2. Association of American Medical Colleges (AAMC) (e.g., AAMC Survey of Resident/Fellow Stipends and Benefits)
3. American Dental Education Association (ADEA) (e.g., 2018-19 Dental School Faculty in the United States)

We encourage the DOL to continue to find ways to remove impediments to hiring global talent at American colleges and universities through a broader acceptance of alternate wage surveys in the ACWIA space.

IV. RFI Question 3 - Should the Department continue to set wage levels at the same point within the OES distribution for all occupations and geographic areas or, alternatively, set wage levels at different points within the OES distribution for different groups of occupations and/or geographic areas? If the latter, what sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate different wage levels for different groups of

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AILA Doc. No. 21060437. (Posted 6/4/21)
occupations, taking into account education, experience, and level of supervision for U.S. workers similarly employed across industries and geographic areas?

To provide specific and reliable data for prevailing wage data across all occupations and geographies, it is essential that the OES wage levels reflect each position's actual career development path. The RFI highlights a fundamental issue with the current prevailing wage determination process: it assumes a linear progression of occupational development, which is no longer always the case.  

Some occupations, such as those in professions such as medicine or engineering or those in highly sensitive technological areas (e.g., nuclear reactor engineer), may inherently involve a more substantial period of vocational preparation to progress from entry-level to fully competent.

Unfortunately, we are not aware of a simple data source or methodology that provides this level of detail for the vast number of occupations included in the OES wage survey. However, AILA is not recommending supplementing the unscientific assumptions of the current Prevailing Wage Determination (“PWD”) process with another set of approximations, which would likely require significant time and expense and only produce estimated wage data that at best approximates the actual career development path. A better solution requires DOL to re-engineer the PWD process to collect more detailed and specific employer data. This re-engineered process would survey the workforce at multiple occupational levels and for different employer characteristics and report mean salaries for each data set. Collecting this data at multiple levels and regular intervals should address any variance in career development and produce reliable and verifiable actual wage data from which accurate PWDs may be developed. Further, it will prevent the need for manufacturing subjectively derived formulas to estimate adjusted wage levels to address occupational preparation variances.

In the interim period, while more detailed and accurate data is obtained, DOL should allow for expanded use of alternate, privately published wage surveys to leverage available data relating to wage levels and occupational development. These surveys provide accurate and reliable data that is probative to employee compensation levels for broad segments of the economy. Over time, the volume, depth, breadth, and quality of these surveys have increased, and they have become integral components of compensation determinations in the private sector. Authoritative, independent surveys are available for many occupations for which H-1B petitions and applications for permanent employment certification are filed. These surveys collect information on the education and experience of surveyed employees and specific salary figures.

Until DOL can re-engineer the PWD process to collect more accurate, detailed, and specific employer data, particularly related to the proper wage level distributions for different occupations, the PWD process should be modified to integrate the OES survey data with relevant data from private, independently published surveys. At a minimum, any modified PWD process must include an expanded option for providing private survey data, as it enjoys under the current regs, as these


15 A sample list of authoritative surveys may be found at: Salary/Compensation Surveys (hr-guide.com).
surveys are used for a myriad of business purposes, unlike the OES data, which is used by the private sector primarily for immigration matters.

In connection with this suggestion, the premise that the nature of the employer is generally not relevant to wage determinations should be discarded as it does not reflect the reality of the present compensation process. It would seem evident that the nature of the employer impacts its compensation structure. For decades, larger employers with greater financial resources have offered larger salaries to employees to attract and retain needed talent. For example, recent survey data of the legal profession indicates a median 2021 first-year associate base salary of $130,000 for firms with 100-250 lawyers, while firms with over 700 lawyers paid a median salary of $190,000 to their first-year associates, a statistically significant disparity of over 30%. The technological capability exists to collect wage data of much greater depth and complexity than currently provided. We recommend that DOL expand its survey methodology so that OES wage data can more accurately report wages with respect to similarly employed workers.

Further, we fundamentally and respectfully disagree with the premise that the PWD determination process should discount any component of the survey population for professional occupations. The PWD process is most accurate and valuable when it is based solely on an analysis of the job requirements as described by all employers responding to the survey rather than the qualifications of the workers who accept an employer’s job offer. The discounting concept also fundamentally distorts the purpose of the PWD process, which was created to ensure that a level playing field exists between domestic and foreign workers by verifying that foreign workers are not paid less than U.S. workers. While the statute prohibits foreign workers from being paid less than their domestic worker counterparts, there is no statutory basis for implementing a process that would require employers to pay foreign nationals a substantially higher wage than their U.S. worker counterparts. Nevertheless, DOL’s FR attempts to manipulate and distort the PWD process. It requires employers to pay foreign nationals significantly more than domestic workers, effectively denying access to critically needed talent.

In attempting to justify its dramatic revision to the OES prevailing wage levels, DOL’s FR was premised on a faulty assumption. It determined, based on an unsubstantiated review of the requirements for H-1B workers as well as those for foreign workers with advanced degrees who are in the permanent residence process, that those workers “often” possess greater skills than the least qualified in the profession and that the lower portion of the OES survey data, therefore “should be discounted” for prevailing wage calculation purposes. By eliminating from consideration foreign workers who qualified for their professional positions based on their bachelor’s degrees, the FR effectively weaponizes the PWD process by creating a virtually

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17 8 U.S.C. 1182(a)(5)(A) bars the admission of employment-based immigrants, inter alia, if the employment of such immigrants will not adversely affect the wages and working conditions of workers in the United States similarly employed. Employers of H-1B workers are required to pay the greater of “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question,” or the “the prevailing wage level for the occupational classification in the area of employment.” 8 U.S.C. 1182(n)(1)(A).
insurmountable wage scale barrier preventing employers from beginning immigration sponsorship for these otherwise statutorily eligible workers. The best and most straightforward solution is to survey employers in a more sophisticated manner to obtain actual information about wage levels across the entire spectrum of the occupational classification system.

AILA commends the DOL’s Office of Foreign Labor Certification (OFLC) for addressing the issue with the OES default wage of $100 per hour (or $208,000 annually) in the FR. Although the DOL has delayed (and will hopefully withdraw) this FR, it should commit to ensuring that no default wages are issued in the future in the DOL’s Online Wage Library (“OWL”).

In the preamble of the FR, DOL indicated that there are more than 6,000 occupations that have the default wage within the OWL. DOL indicated that it is its standard practice to use the default wage when DOL’s Bureau of Labor Statistics (“BLS”) does not report a Level 4 prevailing wage to OFLC. However, OFLC noted that it was likely not appropriate for OFLC to be using the default wage for a number of occupations. Therefore, OFLC indicated that upon the effective date of the FR, when BLS is able to report a Level 1 wage, OFLC will only use the default wage as the Level 4 wage and will provide separate Level 1, 2, and 3 wages (not the default wage for these other levels). OFLC stated that this change will ensure that entry-level wages are not improperly inflated.

AILA encourages OFLC to immediately implement this change with the next OWL update on July 1, 2021, and not wait for the implementation of a new prevailing wage rule. Although OFLC indicated in the preamble of the FR that it expects this change will result in far fewer instances of OFLC being unable to provide leveled wages, OFLC does acknowledge that there will still be occupations that will result in the default wage being used for all four levels when BLS is not able to provide a Level 1 entry-level wage. AILA would encourage OFLC to reach out to BLS to obtain a broader geographic level (GeoLevel) wage in these instances. Instead of a GeoLevel 1 or 2 wage, OFLC should request BLS to provide a GeoLevel 3 or 4 Level 1 wage. There should not be any occupation for which BLS cannot provide a Level 1 entry-level wage on a GeoLevel 4 national scale. However, if there is an occupation for which BLS cannot provide a Level 1 entry-level wage on a GeoLevel 4 national scale, OFLC should then use private wage surveys to supplement the data being provided by BLS. OFLC’s National Prevailing Wage Center should be able to identify private wage surveys provided by employers in the past for the occupation in the geographic area when the OWL has previously assigned the default wage for all four wage levels. OFLC should then use the information from the private wage survey to establish the four prevailing wage levels.

V. RFI Question 4 - Other than computation of an arithmetic mean or specific percentile within an occupational wage distribution based on the OES wage survey, are there any other statistical approaches or estimation techniques the Department should consider when computing the wage level(s) for occupation(s) and geographic area(s)?

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22 Id.
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.”23 This definition means that the prevailing wage is ultimately supposed to be a mathematical and statistical calculation. We appreciate DOL exploring other mathematical and statistical methods to ensure an accurate calculation of the prevailing wage for occupations and geographical areas. Ultimately, prevailing wages should reflect just that – the prevailing wage. To protect both U.S. and foreign national workers from underpayment of wages and to grow the U.S. economy, one simple principle should govern any prevailing wage rule: the market should determine wage levels, and employers should neither be permitted to nor mandated to pay higher or lower wages simply based on a worker’s immigration status.

While AILA’s area of expertise is immigration law, our organization’s members regularly advise clients on compliance with prevailing wage rules. As such, we have broad exposure to many of the challenges with identifying an accurate prevailing wage for various occupations and geographical areas. Based upon this knowledge, we suggest that DOL consider two principles in computing wage levels for occupations and geographic areas.

First, in setting wage levels, DOL should ensure that Level 1 accurately reflects what entry-level workers for the occupation are paid. One of the most significant flaws that continues to exist even in the FR is that it sets the entry-level wage – or Level 1 under the OES Wage Survey – at the 35th percentile of wage data gathered.24 While this is an improvement from the 45th percentile in the IFR that was then revised, it still suffers from the same problem: it simply ignores and disregards more than 1/3 of all workers in a given occupation when setting the entry-level wage.

This is entirely contrary to a Level 1 wage description in the Employment and Training Administration’s 2009 Prevailing Wage Determination Policy Guidance. That guidance explains a Level 1 wage as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.25

In light of this description of a Level 1 wage, it is not mathematically or statistically justifiable to simply eliminate the precise real-world wages that are applicable to these jobs. When the BLS

gathers wage data, it does not request level information. Instead, it simply asks employers what they pay workers performing a particular occupation in a particular geographic area, and the FR noted above would then just throw out the lowest 35% of this data. That is setting prevailing wages based on political policy – not math or statistics. We urge DOL to identify a legitimate mathematically and statistically based mechanism to identify wages consistent with the entry-level into an occupation described by the 2009 Prevailing Wage Policy Guidance. Workers in training, those performing internships, and those who are closely monitored and supervised are unlikely to be paid wages in the upper 2/3 of all wage data gathered for an occupation, and simply eliminating the bottom 35% of wage data gathered has the effect of deleting the very wage data that indicates the market wage paid to entry-level workers. There is not, under any circumstances, a mathematical or statistical justification for a policy that arbitrarily ignores and disposes of more than 1/3 of all data gathered.

Second, it is of critical importance that DOL implement systems to ensure that the data for an occupation represents workers with the skill set and qualifications that are similar to those workers who will be governed by the resulting prevailing wages in a particular location. Because DOL relies on voluntarily completed surveys from employers in a given area to gather wage data, that data can easily be skewed by the responses received. For instance, in a smaller town or city, if a handful of large employers who pay well above-market wages are the employers who respond to the survey, the resulting wage data gathered by DOL will end up being much higher than the actual market conditions. To guard against this, we urge DOL to have other mechanisms to confirm the accuracy of its prevailing wage calculations, much like many commercial salary benchmarking companies routinely do. This may, for instance, include comparing the wages indicated by the wage data to regional or national data and applying a cost-of-living adjustment (“COLA”) to determine accuracy for a specific location. Where this calculation shows a disparity with the raw data gathered, DOL should reassess the actual prevailing wage rather than just relying upon what may be skewed data.

To this end, we would encourage DOL to analyze and consider the methodology used by other widely used commercial salary benchmarking surveys and apply the same methodology to formulating the OES wages. Many large and small employers across the United States use major commercial surveys such as PayScale, ERI Economic Research Institute, and Salary.com for salary benchmarking to ensure that they are paying competitive wages. These surveys are not created for purposes of immigration but rather are sold to employers who rely on them for setting salaries across their organization and geographies. Some of these surveys use techniques such as COLA to more accurately set market rates where limited survey data is available for a particular geography. While AILA is not endorsing any particular survey, we would encourage DOL to explore the methodology used by these major commercial surveys and adopt similar methodology and techniques to ensure that the OES Wage Survey provides fully accurate wage data.

We believe that DOL can produce wage data that accurately and fairly reflect prevailing wage levels that are consistent with the market by following these two guiding principles. This should be the single and only goal of DOL in calculating and publishing prevailing wage rates. In so doing, DOL can ensure that foreign national workers and U.S. workers are protected and treated fairly and consistently with one another. Data, and data alone, should govern prevailing wage calculations.
VI. Conclusion

AILA appreciates the opportunity to provide this response. AILA looks forward to working with DOL moving forward and to continued engagement on these and any other issues that arise.

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