

# EPI comment on DOL proposed rule to update the prevailing wage methodology for the H-1B, H-1B1, and E-3 visa programs, and EB-2 and EB-3 green cards

**Public Comments** • By Daniel Costa and Ron Hira • May 26, 2026

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<https://www.federalregister.gov/documents/2026/03/27/2026-06017/improving-wage-protections-for-the-temporary-and-permanent-employment-of-certain-foreign-nationals>

Brian D. Pasternak,  
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Employment and Training Administration  
Department of Labor  
Room N-5311  
200 Constitution Avenue NW  
Washington, DC 20210

**RE: Department of Labor, Employment and Training Administration, *Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States*, Notice of Proposed Rulemaking, DOL Docket No. ETA-2026-0001, RIN 1205-AC30 (March 27, 2026)**

Dear Brian Pasternak:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank established in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers—regardless of immigration status—and assesses policies with respect to how well they further those goals. EPI submits these comments on the Department of Labor’s (DOL) Notice of Proposed Rulemaking (NPRM) regarding the updated four-tiered wage structure for H-1B, H-1B1, and E-3 nonimmigrant workers and DOL permanent labor certifications for employment-based permanent immigrant visas (i.e. green cards) in the second and third employment-based preference categories (EB-2 and EB-3). EPI has researched, written, and commented extensively on the U.S. system for labor migration, including in particular, the H-1B program and other temporary work visa programs and green cards. EPI has published extensively on H-1B wage levels and employer usage and abuse of H-1B and other visa programs.<sup>1</sup>

EPI generally supports the main substance of the NPRM

## SECTIONS

1. The NPRM is an improvement on the status quo but DOL should amend the proposal to better protect workers • 2
  2. Analysis of the NPRM: “Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States” • 4
  3. Conclusion • 24
-

and believes it is an improvement as compared to the status quo for the current four-tiered wage structure for H-1B, and will also improve H-1B1 and E-3 nonimmigrant visas, and permanent labor certifications in EB-2 and EB-3, because the NPRM will make incremental progress towards ensuring that the wages of U.S. workers are safeguarded and that the Labor Condition Application (LCA) and PERM programs are not hijacked by employers as a loophole to underpay migrant workers according to U.S. wage standards. The proposal will also help disincentivize firms from using H-1B visas as a primary tool to outsource professional jobs and send them overseas.

However, as we will detail in this comment, we believe DOL should go beyond what the NPRM proposes by setting the wage floor—i.e. the Level I wage—at the 50<sup>th</sup> percentile so that no H-1B, H-1B1, E-3, EB-2, or EB-3 jobs are ever certified at a wage that is below the local median wage for the occupation. If DOL implements such a rule in the final version of the regulation, the rule would address a major critique EPI has long held about the program, and which Members of Congress from both major parties have attempted to address through repeatedly proposed legislation that was first introduced nearly two decades ago.

It must also be noted at the outset of these comments that recent actions taken by DOL with respect to wages for migrant workers in temporary work visa programs have been inconsistent and confusing. While DOL is considering action proposed in this NPRM that will raise wage rates closer to true market rates for migrant workers in the H-1B, H-1B1, and E-3 visa programs, as well as those with labor certifications for EB-2 and EB-3 green cards, it is important to note that in October of 2025, DOL issued a new wage rule for the H-2A program that will cut wages dramatically for the migrant farmworkers in that program and unfairly charge them for lodging<sup>2</sup>—which, as EPI has estimated—will lead to a pay cut of roughly \$2 billion for H-2A farmworkers and \$3 billion for U.S. farmworkers per year.<sup>3</sup> DOL should issue regulations that lead to improved labor standards and fair wages for all work visa programs, and not treat workers differently based on their education levels, occupations, and nationalities. All temporary migrant workers deserve to be paid fairly for their work, and no work visa programs should operate as loopholes that allow employers to legally underpay migrant workers.

## **The NPRM is an improvement on the status quo but DOL should amend the proposal to better protect workers**

In general, the NPRM improves upon the current wage structure but should be further enhanced to better protect workers and align the program with congressional intent and the goals of the H-1B statute. The principal change made by the NPRM is to update the four prevailing wage levels required in the H-1B, H-1B1, and E-3 visa programs—temporary work visa programs for college-educated migrant workers—setting levels at higher percentiles in the Occupational Employment and Wage Statistics (OEWS) survey distribution of wages, in order to more adequately reflect market wage rates in the U.S.

Table 1

## Proposed changes to wage percentiles

	Current wage percentiles	NPRM proposed wage percentiles
Level I	17th	34th
Level II	34th	52nd
Level III	50th	70th
Level IV	67th	88th

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labor market. The NPRM also applies the new wage rates/percentiles to the permanent labor certification requirements for employment-based (EB) green cards in the EB-2 and EB-3 preference categories (sometimes referred to as the PERM process).<sup>4</sup>

The current and newly proposed wage level percentiles are as follows:

As we have detailed in published research,<sup>5</sup> the two lowest wage levels in the current wage computation method are below the local median wage according to the occupation and local area based on DOL wage survey data in the OEWS, allowing employers to undercut U.S. wage standards. The NPRM sets the lowest wage level at the 34<sup>th</sup> percentile, previously the Level II wage, thereby continuing to permit employers to pay H-1B workers at below-market wage rates—but not at the absurdly low levels allowed by the current Level I wage at the 17<sup>th</sup> percentile.

DOL's faulty prevailing wage computation has cost foreign-born workers at least \$6.56 billion annually (see NPRM Exhibit 1). Even that is likely to be a serious underestimate for two reasons. First, it does not account for the losses suffered by U.S. workers and students who have had their wages, job opportunities, and career development suppressed and undermined as a result of the current wage methodology. Second, it does not estimate the costs incurred due to foreign-born workers' weakened bargaining power vis-à-vis their employment through nonimmigrant visa programs. Employers exert much more control over visa workers than U.S. workers and permanent residents. Foreign-born workers on nonimmigrant visas have less opportunity to, and are far less likely to, switch jobs. Switching jobs, or the threat of switching jobs, is fundamental to any worker's ability to demand higher wages and better working conditions. Professor George Borjas estimates that, in fiscal year (FY) 2024, visa holders had an annual separation rate of 9.4%, less than half of comparable U.S. workers.<sup>6</sup> Workers also face dire circumstances should they be terminated. They must find a new job within 60 days or else leave the United States. All these conditions place foreign-born workers in the H-1B, H-1B1, and E-3 visa programs in a much weaker position than similarly situated U.S. counterparts when bargaining for wages and working conditions. Simply put, foreign-born visa workers have fewer employment rights than U.S. citizens and permanent residents, and employers rationally take advantage of their relatively weak position when setting employment terms. Further, the agency has never enforced the Labor Condition Application's (LCA) *Working Conditions* attestation, where employers promise to "not adversely affect the working conditions of

workers similarly employed,” so employers disregard it.

In addition, the ability of H-1B workers to become lawful permanent residents and remain in the United States is entirely up to the whims of their employers. Even after working for an employer for six years in H-1B status, the employer has the power to decide if an H-1B worker can remain in the country—in many cases after an H-1B worker has established firm roots in the United States. That power keeps H-1B workers from complaining and asserting their employment rights. That leaves H-1B workers in a difficult position where they might decide, rationally, to abandon any demands for higher wages and better working conditions in exchange for the possibility of being sponsored for lawful permanent residence.

Prevailing wages must be raised sufficiently to compensate for this government-created labor market distortion, to protect both foreign-born workers with nonimmigrant visas and U.S. workers who already reside in the United States.

DOL’s proposal to increase the wage-level percentiles is the best approach. It is straightforward and understandable to implement. The effects are easily modeled. Employers can respond to it predictably and effectively. It will improve the quality and skill mix of the pool of workers who are issued visas, pay those workers fairer salaries, and have fewer adverse impacts on the domestic workforce and labor supply. Recent results reported by United States Citizenship and Immigration Services (USCIS), from the fiscal year (FY) 2027 H-1B lottery, the first to use the new wage-level weighting process, show that a large majority of H-1B registrations selected met at least the 34th percentile threshold, 82%, while also increasing the share of F-1 advanced degree graduates selected from 57% to 71.5%.<sup>7</sup> The latter demonstrates that concerns about this proposal shutting off the foreign student pipeline are overblown and misguided.

However, as noted above, the increases don’t go far enough. We believe that the Level I wage should be set no lower than the median (50th percentile) to effectively adjust for the non-compensated effects of limited job-switching, an absent or ineffective labor market test, weaker bargaining position, and non-enforcement of the actual wage requirement. Recent college graduates, especially those earning degrees in computer science and computer engineering, are facing the highest unemployment rates amongst all majors according to analysis by the New York Federal Reserve Bank, and the worst job market in recent memory according to dozens of media accounts.<sup>89</sup> Most analysts and executives predict that artificial intelligence (AI) will only make that labor market segment even worse. Major firms have laid off thousands of workers, citing AI the reason they need fewer workers. Many of those same firms employ thousands of H-1B workers. AI is predicted to reduce labor demand especially of recent graduates, the very U.S. workers competing for Level I jobs. The rules should ensure that workers assigned at Level I wages have truly special skills and will not undercut opportunities for recent university graduates.

## Analysis of the NPRM: “Improving Wage Protections for the Temporary

# and Permanent Employment of Certain Foreign Nationals in the United States”

## 1. Raising wages for H-1B workers and permanent labor certifications will benefit migrant workers and protect wage standards for U.S. workers

For years, H-1B employers have been allowed to pay their H-1B workers at wage rates that do not reflect local market rates, by having an option to pay them at the two lowest permitted wage levels. Our 2020 report discusses the available data, the mechanics of the current rule, and why it is important to modify the H-1B wage levels to adequately reflect market wages and ensure that H-1B workers are paid fairly, and to preserve U.S. wage standards.<sup>10</sup> In the report, we recommend that DOL prohibit any H-1B job from being certified at a wage that is below the local median for the occupation and region. In that respect, by proposing to set the lowest wage level (Level I) at the 34<sup>th</sup> percentile, DOL’s NPRM fails to do enough to protect wage standards in H-1B jobs. In the report we also recommend that DOL prohibit downward pressure on wages at the national level by requiring that every H-1B job be certified at a wage that is no lower than the national median wage for the occupation.

Many commentators on this NPRM, especially from the business community, including universities, are likely to claim that raising wages for migrant workers and safeguarding U.S. wage standards will harm the U.S. economy. When the misleading rhetoric is stripped away, the employers who oppose higher wage percentiles for H-1B, H-1B1, and E-3 visas, and EB-2 and EB-3 green cards, are simply claiming, in essence, that employers will only hire workers in the LCA and PERM programs if they are underpaid relative to similarly situated U.S. workers, and portray higher wages as an obstacle to migration or to the hiring of adequate talent that will prevent them from being successful and innovating.

Accepting this argument leads to a race to the bottom in terms of labor standards and excuses the co-optation of the immigration system in order to pad corporate profits. And such a line of argumentation is not supported by the available evidence. In fact, many advocates on all sides of the current H-1B debate now agree that the current H-1B wage rules are undercutting U.S. wage standards and should be updated. Even previous staunch defenders of the status quo, such as those representing or funded by the tech industry, as well as representatives of major employer associations, now admit that U.S. wages and U.S. workers are being undercut via the current prevailing wage rule.<sup>11</sup>

Adequate labor standards are never a barrier to migration or economic success—instead, they are a prerequisite to fair treatment for the migrant workers who are recruited by employers into the U.S. labor market and similarly situated U.S. workers.

Under the current rule, the wages of H-1B workers are being kept artificially low. The higher wage levels in DOL's NPRM are more reasonable and closer to reflecting market wages in particular occupations and specific geographic regions. In other words, DOL's proposal will push wage levels *toward* market wages, meaning it will *increase* labor market efficiency. It will also improve the quality and skill mix of the pool of foreign-born workers who are hired, increasing the productivity and innovation spillovers that skilled immigration promises.

## **2. DOL should raise the wage percentiles so that Level I is set no lower than the 50<sup>th</sup> percentile of total wages surveyed in an occupation and region and prohibit any LCA or PERM approval for a wage that is lower than the national average for the occupation**

The purpose of the H-1B and related programs is to “help employers who cannot otherwise obtain needed business skills and abilities from the U.S. workforce.”<sup>12</sup> Specialized skills should command high wages; such skills are typically a function of inherent capability, education level, and experience. It would be reasonable to expect that these workers should receive wages higher than the local median wage. One would therefore expect most H-1B positions to be assigned as Level IV (the only current wage level above the median), but as DOL and USCIS data show, H-1B employers as a whole assign only a very small minority of H-1B positions as Level IV, usually roughly 15% or less in recent fiscal years, while as DOL notes in the NPRM, 63% of H-1B positions were assigned at Levels I and II. For all LCA programs, DOL notes in the NPRM that in FY 2024, 16% of all LCA positions were certified at Level IV. At the USCIS petition level, Level IV wages are even less common: data disclosed by USCIS shows that in 2019 and 2020, only 4% of approved petitions for new employment under the regular cap were assigned at Level IV and only 2% of approved new H-1B petitions under the advanced degree exemption cap were assigned at Level IV.<sup>13</sup> We also know from more recent data from DHS that the five-year average of H-1B registrations at Level IV was just 5% over the FY 2020 to 2024 period.<sup>14</sup>

The data presented in our reports over the past decade and a half and more recently, the data reported by USCIS on the distribution of H-1B petitions by wage level, all point to the obvious fact that nearly all H-1B employers, but especially the largest employers, use the H-1B program *either* to hire relatively lower-wage workers (relative to the wages paid to other workers in their occupation) who possess ordinary skills *or* to hire skilled workers and pay them less than the true market value of their work. Either possibility raises important policy questions about the use and allocation of H-1B visas.

By setting two of the H-1B prevailing wage levels so low relative to the median and not requiring that firms pay at least market wages to H-1B workers, DOL has incentivized firms

to earn extraordinary profits by legally hiring much-lower-paid H-1B workers instead of workers earning at least the local median wage. The fact that firms earn those profits through poorly crafted wage rules and by underpaying H-1B workers—instead of by offering a better or more innovative product or service—means DOL has, in effect, made wage arbitrage a feature of the H-1B program. And as the wage-level data we have reported on and cited here clearly shows, nearly all H-1B employers are exploiting these H-1B wage rules in order to pay below-median wages.<sup>15</sup> We believe the evidence is clear that these firms are not using the H-1B program sparingly to hire truly specialized workers, nor are they using it only when U.S. workers are unavailable. Given the business models and occupations, it is likely that the H-1B1 and E-3 programs are being abused similarly.

So how should DOL set a wage rule that guards against this and complies with the statutory requirement to prevent adverse effects on wages and working conditions?

The existing statutory language that sets out the H-1B prevailing wage requires four H-1B wage levels, but it does not prescribe specific percentiles, and no law requires DOL to set any of these prevailing wage levels below the local median wage. To ensure that H-1B workers possess specialized skills and are fairly paid, and to protect local wage standards and eliminate wage arbitrage as a feature of the H-1B program, **DOL should issue a final rule that sets the lowest (Level I) wage for the LCA programs and EB-2 and EB-3 green cards at the 50th percentile for the occupation and local area, at least, and require that wage offers to workers in the LCA and EB-2 and EB-3 programs never be lower than the national median wage for the occupation, in order to prevent downward pressure on wages nationwide.**

Requiring and enforcing above-median wages for H-1B and other LCA and PERM program workers would disincentivize the hiring of workers with nonimmigrant visas and green cards as a money-saving exercise, ensuring that companies will use the program as intended—i.e., to bring in workers who have special skills—instead of using them as a way to hire underpaid indentured workers for jobs that require at least a college degree.

### **3. DOL should set the updated wage percentiles at the 50<sup>th</sup>, 62<sup>nd</sup>, 75<sup>th</sup>, and 90<sup>th</sup> percentiles according to the total surveyed wages for the occupation and local area in the OEWS**

As noted and discussed above, the lowest wage level, Level I, should be set no lower than at the 50<sup>th</sup> percentile. Instead of the proposed four wage levels in the NPRM, DOL should set the lowest wage level, Level I, at the median wage (at the 50<sup>th</sup> percentile), Level II at the 62<sup>nd</sup> percentile, Level III at the 75<sup>th</sup> percentile, and Level IV at the 90<sup>th</sup> percentile—according to the overall distribution of OEWS wages for each occupation and region. (See table below.)

These levels would ensure that no LCA or EB-2 or EB-3 positions are certified at a wage that is below the overall local median wage for an occupation, which in turn will prevent

Table 2

**EPI recommended wage percentiles**

	Current wage percentiles	NPRM proposed wage percentiles	EPI recommended wage percentiles
Level I	17th	34th	50th
Level II	34th	52nd	62nd
Level III	50th	70th	75th
Level IV	67th	88th	90th

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downward pressure on U.S. wage rates in such occupations. An additional benefit of using the 50<sup>th</sup>, 62<sup>nd</sup>, 75<sup>th</sup>, and 90<sup>th</sup> percentiles, as DOL points out, is “that they are close to dividing the upper half of the distribution equally.”<sup>16</sup>

## 4. DOL’s experience benchmarking proposal is inferior to the NPRM’s core proposal on wage levels and should not be implemented

The NPRM requests comments on ‘experience benchmarking’ as an alternative computational method to the core proposal of Level I at the 34<sup>th</sup> percentile, Level II at the 52<sup>nd</sup>, Level III at the 70<sup>th</sup>, and Level IV at the 88<sup>th</sup> percentile, based on the overall OEWS wages by occupation and region. **We believe that this experience benchmarking alternative is significantly inferior to the core proposal and urge DOL to reject it for four main reasons.** First, the methodological description is insufficient to evaluate, with just two pages of text. This is especially troublesome since it is an entirely novel method of setting prevailing wages that has never been rigorously tested or examined. It will impact literally millions of workers and hundreds of thousands of employers. To our knowledge, Mincer equations have never been used to this large an extent for setting wages in any government program. Second, the data necessary to calculate prevailing wages do not exist; they must be synthesized through estimation procedures after marrying two distinct surveys that were never designed for these purposes. Are the sample sizes sufficient? There’s no exploration of these potential flaws in the NPRM. Third, the method biases against women. The method does not directly measure experience; instead, it estimates experience by the age of the candidate. Women are more likely than men to have gaps in their labor force participation. The agency does not provide a method for adjusting the calculations based on gender. Fourth, this method would surely fuel age discrimination by allowing firms to legally pay younger H-1B workers less than U.S. workers doing the same job. Professor Norman Matloff, one of the leading scholars of the H-1B program, has repeatedly expressed concerns that firms prefer to hire H-1B workers because they are younger, and therefore lower-paid, than equivalent Americans.<sup>17</sup> The government would

be endorsing such behavior by adopting experience benchmarking.

More broadly, adopting benchmarking to set prevailing wages rests on the assumption that labor markets are highly segregated by age and educational attainment. Is it true that a 28-year-old does not compete with a 35-year-old? Is it true that someone with a master's degree does not compete with someone with a bachelor's degree? The DOL provides no evidence to test this hypothesis with a single occupation or example, let alone whether it would hold across the roughly 400 occupations eligible for visa programs covered by this NPRM.

The example provided in the NPRM, of an accountant working in Dayton, Ohio, illustrates the difficulty for anyone to assess the accuracy of the procedure.

If ACS data and Mincer wage equation estimated that U.S. accountants with 10 years of experience and a master's degree typically earn 20 percent more than the median accountant nationwide, the Experienced Benchmarked ratio for that education-experience combination in accounting would be expressed as a wage premia factor of 1.2. Then, to compute the Level I prevailing wage for an employer seeking visa labor certification to employ an alien worker as an accountant in Dayton, Ohio, with 10 years of experience and a master's degree, the Department would take the OEWS 50th percentile for accountants in the Dayton MSA (currently \$78,710) and multiply it by 1.2, yielding an experience-benchmarked Level I prevailing wage of \$94,452. The Level II prevailing wage would apply the same 1.2 ratio to the OEWS 62nd percentile; Level III to the 75th percentile; and Level IV to the 90th percentile.<sup>18</sup>

This hypothetical example presents several shortcomings.

First, we encounter problems with identifying the data. The NPRM reports the OEWS 50<sup>th</sup> percentile wage in Dayton MSA of \$78,710. We are unable to validate this wage using the OFLC Wage Search page.<sup>19</sup> The OEWS 50<sup>th</sup> percentile wage (current Level III) for the occupation is shown below, with the results listed for three different years of data available in the database:

Occupations: *SOC 13-2011.00 – Accountants and Auditors*  
Location: *Dayton OH BLS Areas Montgomery County*  
Series: *All Industries*

7/2023-6/2024 Level III Wage: **\$77,251.00**  
7/2024-6/2025 Level III Wage: **\$82,576.00**  
7/2025-6/2026 Level III Wage: **\$86,403.00**

Further, based on the absence of data and sparse description of the methodology, there's no way for us, or anyone else, to test or examine the method used to calculate the wage premia/discount using the Mincer equations. The "hypothetical" example claims a premia of 20%, but it is unclear whether this result comes from real calculation or if it's a fabrication created to illustrate a point. If it is the latter, that raises serious questions about the agency's ability to implement experience benchmarking across hundreds of

occupations, thousands of locations, four skill levels, and a half-dozen educational levels.

More importantly, is the example, and its wage outcomes, representative of the universe of covered workers and the U.S. workers they compete with? The evidence shows that this hypothetical example is neither typical of H-1B workers nor their U.S. counterparts. The description of experience benchmarking does not investigate its implications, but such testing is fundamental to validating the method across occupations, locations, and skill levels. The hypothetical worker has 10 years of experience, which, if they had no gaps in labor force participation, would put them at 34 years old. A 34-year-old worker is older than most new H-1B workers approved for initial employment, ranking near the 68<sup>th</sup> percentile by age.<sup>20</sup> We also know that this worker is not typical of U.S. accountants. Most practicing accountants hold no more than a bachelor's degree, 59%, and are older—with a median age of 45—than this candidate.<sup>21</sup> The example raises many more questions than it answers.

The median age of all H-1B workers approved for initial employment is approximately 31, whereas the median age of an American worker in an H-1B eligible occupation is approximately 40, even in STEM occupations.<sup>22</sup> H-1B workers are generally significantly younger than the typical U.S. worker with whom they compete. Experience benchmarking would favor H-1B workers by offering them a significant wage discount, based on the Mincer method, over the U.S. workers with whom they compete. The upshot is that experience benchmarking would surely fuel age discrimination in these labor markets.

It is likely that experience benchmarking would yield substantial wage discounts (premia ratios <1.0) for H-1B workers, compared with the NPRM's core approach. But we simply do not know because DOL has not compared the wage outcomes between experience benchmarking and raising the wage level percentiles. DOL has not published experience benchmarking wage tables for every occupation, geography, skill level, experience, and education.

One think tank, the Institute for Progress (IFP), a supporter of the experience benchmarking alternative, attempted to simulate the method using FY 2024 approved petitions and found that experience benchmarking wages for most H-1B workers are substantially lower than the NPRM's core proposal. **Contrary to IFP, we believe experience benchmarking should be rejected, in part for that reason.** See its report, specifically the scatterplot chart “Blind Benchmarking misses underpaid H-1B workers” on page 20, where the number of red dots (i.e., experience benchmarking yields a lower prevailing wage than NPRM core proposal) far outnumbers the green dots (i.e., experience benchmarking yields a higher prevailing wage than NPRM core proposal).<sup>23</sup> Even these analysts admit they don't know whether their calculations are consistent with DOL's sparse description of experience benchmarking. If this think tank's analysis is roughly correct or on the right track, then experience benchmarking will yield much lower prevailing wages than the core NPRM proposal. If this is true, then the experience benchmarking method undermines the goals of this rulemaking.

In its justification for considering experience benchmarking, the NPRM states that “the methodology employed under the current rule may allow positions to be classified at

wage levels that are less comparable to the actual education and experience of the alien worker.” Experience benchmarking, on the other hand, would “address this limitation by comparing the sponsored alien worker’s wage to the wages earned by U.S. workers with comparable education and experience...”<sup>24</sup>

But elsewhere, the NPRM undermines the case for experience benchmarking by noting that educational attainment is often a poor determinant of wages:

an examination of the top end of the wage distribution within the H-1B program shows that, for H-1B nonimmigrants with graduate and bachelor’s degrees, the association between education and income level begins to break down to some extent. An analysis of the highest earners within the H-1B program reveals that H-1B workers—particularly those with bachelor’s and graduate degrees—can be among the most skilled and capable in their fields. Interestingly, at this top end of the wage distribution, the typical link between education level and income begins to weaken. *Among the most highly compensated H-1B workers, the higher the income level, the more likely the alien worker only has a bachelor’s degree.*<sup>25</sup>  
(Emphasis added.)

While skill-level misclassification is a major problem, experience benchmarking is the wrong solution because it creates new, unnecessary loopholes. Instead, as we describe below, we recommend that you require employers document their Prevailing Wage Determination (PWD) aligned with the National Prevailing Wage Center (NPWC) guidance and provide it for inspection.

The NPRM’s core proposal—the 34<sup>th</sup>, 52<sup>nd</sup>, 70<sup>th</sup>, and 88<sup>th</sup> percentiles based on the overall OEWS wages by occupation and region—coupled with skill classification oversight and accountability, better achieves the program goals than the experience benchmarking proposal discussed in the NPRM.

## **5. DOL should calculate an additional amount of compensation based on available data on the cost of benefits for workers in private industry and add a reasonable amount to the required prevailing wage**

While we believe utilizing the OEWS data set and wage percentiles within the distribution is reasonable and preferable to other data sources and methods, the OEWS falls very short in terms of providing a holistic and realistic picture of what U.S. workers earn in H-1B occupations, as well as those in other LCA programs and PERM programs, by virtue of not including fringe benefits. We urge that DOL also calculate an additional amount of compensation based on available data on the cost of benefits for workers in private industry. If employers do not have to provide fringe benefits to the college-educated migrant workers they recruit or reasonable compensation that accounts for those fringe benefits, that will result in employers underpaying or undercompensating workers with

visas vis-à-vis their U.S. worker counterparts, thereby causing adverse effects on workers in occupations covered by H-1B and the other LCA programs. The fissuring of the U.S. workforce has been abetted in part by employers practicing benefits' arbitrage—in other words, employers seeking a workforce they do not need to provide benefits for—the H-1B, H-1B1, E-3, EB-2, and EB-3 program should not facilitate it.

Davis Bacon and Service Contract Act wage determinations—which are both valid wage sources for determining H-1B wage rates under current H-1B rules—include an additional hourly monetary value that is owed to the worker in “fringe benefits.” Under both Acts, the employer must pay the fringe benefits either in the form of a permissible fringe benefit listed by the applicable Act, or any combination of benefits thereof, or with an equivalent cash payment.<sup>26</sup> The lack of any fringe benefits in OEWS prevailing wage determinations<sup>27</sup> constitutes a severe deficiency in the OEWS wage data that conflicts with and undermines the statutory requirement that the H-1B prevailing wage will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Reliance on the OEWS to determine prevailing wages—without an adjustment for fringe benefits—is not an adequate method to set prevailing wages for LCA and PERM programs. If the prevailing wages and benefits for a particular occupation in a particular Metropolitan Statistical Area (MSA) are, for example, \$30 per hour plus \$10 per hour in leave, pension, and health benefit costs, but DOL determines the prevailing wage to be simply \$30, U.S. workers will be adversely impacted. Employers will be encouraged to hire H-1B workers instead of U.S. workers, saving themselves \$10 in benefit costs per hour and putting downward pressure on the locally prevailing compensation. Hiring H-1B workers at \$30 an hour for example, with no benefits, would allow employers to underprice labor by 30%—which is the average benefit share of total compensation costs for private industry workers<sup>28</sup>—and it could encourage employers to replace U.S. workers with H-1B workers, or hire H-1B workers instead of U.S. workers, since employers are not required to recruit and hire U.S. workers before hiring H-1B workers. H-1B workers and those employed through other LCA programs cannot be expected to complain about this or have the bargaining power to negotiate adequate fringe benefits, because their employers control and have near-total power over their immigration status, and some workers will be also willing to accept the lower compensation, because it will likely be far more than they could earn in their country of origin.

BLS already collects the necessary data to determine the appropriate amount of fringe benefits that should be required as a supplement to the OEWS wages used to set a prevailing wage. The *Employer Costs for Employee Compensation* (ECEC) report from the Bureau of Labor Statistics (BLS) “provides the average employer cost for wages and salaries as well as benefits per employee hour worked” for workers in the civilian economy.<sup>29</sup> The ECEC reports the total average wages and benefits paid by employers and lists these data as they correspond to broad occupational employment categories. These data are also differentiated according to the average amount paid for the major categories of fringe benefits: paid leave, supplemental pay, insurance, retirement and savings and legally required benefits. The ECEC also reports the average total compensation, wages and salaries, and total costs of fringe benefits paid by employers, broken down by geographic region, census division, and locality.<sup>30</sup>

Using the aforementioned data sets from the ECEC, DOL can determine the appropriate level of fringe benefits that must be offered and paid to LCA and PERM program workers. The ECEC provides data on health and retirement benefits, and wages and wage-related pay such as paid leave and supplemental pay. The wages reflected in the OEWS survey capture the wages and wage-related parts of total compensation. Employers paying wages will already be paying the ‘legally required’ payroll taxes. Therefore, the compensation missing from the OEWS wage rates is the cost of retirement and health benefits, which are about 11% of private sector compensation. The amount of pay reflecting these benefits that employers of LCA and PERM program workers should pay can easily be determined by taking the ratio of the sum of health and retirement benefits to the wages paid (the sum of wages, paid leave and supplemental pay). This can be determined for a broad occupational grouping and perhaps done at a regional level as well. This ratio when multiplied by the OEWS wage shows the amount of benefits that would be comparable to that earned in the private sector or civilian sector.

Although the occupational groups and geographic areas listed and reported in the ECEC are not as numerous and detailed as those in the OEWS’s occupational categories and geographical areas, this should not deter the DOL from utilizing these data to calculate the percentage of wages that should be added on as fringe benefits to the OEWS wage. Only a percentage to be added on must be determined – not an exact dollar amount.

Thus, the ECEC data are sufficient to provide DOL—by region and broad occupational group—an average level of insurance and retirement benefits received by employees in that job and in that area. Following precedent from the DBA and SCA, the fringe benefits could be paid by the employer through any combination of a variety of options, such as paid leave, health and life insurance, retirement and savings accounts, etc., or the employer could simply pay the benefits in cash.

Unfortunately, there is very little transparency regarding whether employers using the H-1B, H-1B1, E-3, and EB-2 and EB-3 programs are offering fringe benefits, or to what extent. A requirement that these fringe benefits be offered to LCA and PERM program workers would ensure that the wages and working conditions of similarly employed workers are not adversely impacted.

The current DOL compliance guidance on benefits for H-1B workers encourages benefits arbitrage through outsourcing and fissioning. The Wage and Hour Division fact sheet on the subject (#62L) reads, “The employer must offer benefits to H-1B workers on the same basis, and in accordance with the same criteria, as the benefits the employer provides to similarly employed U.S. workers.”<sup>31</sup> By defining *similarly employed* workers as restricted only to those directly employed by the H-1B employer, DOL is encouraging benefits arbitrage by outsourcing firms, which can offer substandard benefits to all its employees and still comply with this interpretation of the H-1B rules.

## **6. DOL should prohibit employer-provided private wage surveys from being used as**

## alternative sources of wage data to set prevailing wages

Under the main H-1B prevailing wage regulation language at 20 C.F.R. §655.731, an employer has a number of options at their disposal to determine a prevailing wage for an LCA. In other words, the OEWS wage levels are just one of the available options. The employer may use one of the following sources to establish a prevailing wage: the OEWS wage, the wage set in an applicable Collective Bargaining Agreement, an applicable wage set by the Davis-Bacon Act or McNamara-O’Hara Service Contract Act, an Office of Foreign Labor Certification National Processing Center prevailing wage determination, or a wage set by an independent authoritative source or another legitimate source of wage data. However, if the employer is paying a higher wage to similarly situated U.S. workers that it already employs, then it must pay the H-1B worker same higher “actual wage,” that it is paying the U.S. worker. (Specifically defined as “the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.”)

Therefore, employers do not need to use the OFLC’s calculated levels from OEWS data to determine a prevailing wage for an LCA or permanent labor certification application. The NPRM would improve the longstanding problems in how the prevailing wage is determined when using the OFLC-generated OEWS wage rates, but in the NPRM, DOL states that it considered whether to prohibit—but ultimately decided to permit—the continued use of an independent authoritative source or another legitimate source of wage data, which includes private wage surveys provided by employers and accepted by DOL. Standards for such alternative sources of wage data are described in 20 CFR § 655.731. In our 2020 report, we showed in Table 1 that in 2019, at least 9% of all certified wages for H-1B positions on LCAs were set by a private wage survey or other source accepted by the OFLC as legitimate.<sup>32</sup>

We strongly urge DOL to eliminate the use of private wage surveys provided by employers for setting wage rates in the LCA programs or for EB-2 and EB-3 green cards. While the share of LCAs approved with wages set by private wages surveys is relatively small at the moment, it is likely that the use, and abuse, of private wage surveys will expand substantially after publication of a final rule that is consistent with the wage level percentiles proposed in the NPRM. This will occur because employers will be motivated to use private surveys as a loophole to avoid paying the new higher wage percentiles.

DOL’s justification for continuing to allow private wage surveys is based on an analysis that is confusing. On the one hand, the agency claims that private surveys yield a wage 20% higher on average than the OEWS equivalent, but also says that wage surveys are necessary for niche or very specialized markets where, “occupations [are] not well represented in OEWS datasets.”<sup>33</sup> The two claims are in contradiction. If a private wage survey is used to establish a wage in a niche job market, presumably not covered by the OEWS, then how can DOL feasibly calculate the differences? Footnote 211 in the NPRM does not provide sufficient detail to test this claim.

If DOL does not immediately eliminate the use of private surveys, it should at least ensure that usage of such surveys are rare and approved in only exceptional cases. Employers should be required to provide extensive documentation and justification for why the OEWS is an inadequate data source for determining the prevailing wage.

The recent history of the use of private wage surveys to set wages in the H-2B visa program—a temporary work visa program for lower-wage jobs outside of agriculture including in landscaping, forestry, hospitality, and construction—is instructive and should inform DOL’s review of wage surveys and other sources of wage data for setting H-1B wages. The evidence is clear in the H-2B context that when employers use private wages surveys, they primarily use them to pay lower wages than would otherwise be required.

In 2013 when DOL raised the minimum H-2B prevailing wage from the 17<sup>th</sup> wage percentile to the mean wage for the occupation and local area, H-2B employers immediately and en masse, shifted their business model to use private wage surveys to set H-2B wage rates at below-average wage rates. Evidence revealed in federal litigation clearly suggests that the shift to the use of private wage surveys was a systematic response to higher wage rates, and one that was clearly successful. Specifically, in the nine months beginning soon after the H-2B wage rule was updated—between July 1, 2013, and March 31, 2014—employers increased their submissions of private wage surveys for H-2B prevailing wage determinations by 3,182%, as compared with the 12 months leading up to the federal court decision that invalidated the previous H-2B wage rule. In 21.1% of those prevailing wage determinations set by private wage surveys, the certified H-2B wage was lower than the previous prevailing wage system where the Level I H-2B prevailing wage was set at the 17th percentile wage by occupation and local area, according to OFLC-generated OEWS wage survey data, and 94.4% of the determinations were for a wage that was lower than the Level II wage, at the 34th percentile.<sup>34</sup> Despite the fact that the H-2B prevailing wage has been set at the local average wage and DOL restricted the use of private wage surveys in 2015, they are still commonly used and successful at lowering wages for H-2B workers. One clear example of this which has been detailed, is a group of H-2B workers employed as crabpickers in Maryland—they earned roughly 25% less per hour than they should have been paid according to the local corresponding OEWS wage.<sup>35</sup>

The downside risk of continuing to allow private wage surveys—creating loopholes and administrative burdens—outweighs the risk to workers that the OEWS prevailing wage results in lower wages. If DOL’s calculations are accurate, employers should welcome the elimination of private wage surveys because the OEWS provides lower wage requirements and reduced costs in terms of purchasing survey data and/or conducting entirely new surveys.

**7. If DOL considers permitting the use of employer provided private wage surveys, it should first conduct a detailed analysis of their usage and impact on H-1B wage rates, make the**

## **findings public, and issue a separate NPRM focused solely on private wage surveys**

In order to promote transparency and comport with the statutory requirement that H-1B employers “will provide working conditions for [H-1B workers] that will not adversely affect the working conditions of workers similarly employed,”<sup>36</sup> DOL should immediately prohibit the use of private wages surveys. However if DOL wishes to still consider their usage, DOL should conduct a study to benchmark the use of alternative wage data and especially private wage surveys against the OFLC-generated OEWS prevailing wages, to identify whether there are any systematic biases in such sources. If such biases are found, DOL could propose a new NPRM with additional guidance and safeguards to ensure that the alternative wage sources are not undermining U.S. wage standards. DOL should also conduct an analysis on the occupations that have been approved for wage setting with private wages surveys, to examine which occupations employers are claiming to be so unique that they do not fit within the definitions of over 800 occupations available in BLS’s Standard Occupational Codes, as well as analyze whether private wage surveys have negatively impacted conditions for H-1B workers and similarly situated workers.

It is important to note that, while in the aggregate, the use of private wage surveys is roughly 6.5% according to the NPRM, we know from our own reviews of LCA disclosure data that some firms rely on private wage surveys extensively. DOL should examine how private wage surveys vary across firms, industries, and occupations. Firms that rely on private wage surveys for more than 3% of the positions in their LCAs should be scrutinized and audited to ensure they are not being utilized to undercut the standards set by OEWS wage data.

## **8. DOL must put measures in place that would prevent employer misclassification of H-1B workers at the wrong wage levels**

As noted earlier, the NPRM requires that minimum H-1B, H-1B1, E-3, EB-2, and EB-3 salaries are set at more realistic wage rates that reflect the local market rates for the jobs they fill. While each wage level is intended to correspond to the position description, in practice the employer has substantial discretion choosing the skill level and DOL does not verify that a prevailing wage is appropriate unless a lawsuit or a complaint is filed by a worker. Such complaints are unlikely since it would require a migrant worker to blow the whistle on their own employer, the same employer that controls the worker’s visa status and ability to remain in the United States. We are unaware of any cases in which DOL has investigated an LCA-stage misclassification of an H-1B wage level, but there have been reports of, for example, H-1B employers receiving approval for LCAs that certify they will pay employees at the same prevailing wage level despite having job titles that clearly warrant different wage levels.

Simply put, employer selection of skill levels should be anchored to the actual duties of

the position and verified by DOL and USCIS. There is no reason to allow employers to identify a skill level on a whim. If DOL does not fix this obvious problem, then the NPRM's core objective of eliminating wage arbitrage will be undermined.

Skill level misclassification and inconsistencies undermine good governance of the H-1B program. Even a cursory examination of the LCA and I-129 data shows that such misclassifications, whether purposeful or inadvertent, are common. For example, positions with job titles leading with 'senior' are frequently misclassified as Level I. And even within the same employer, identical job titles are classified under different skill levels.

Yet the effectiveness of this NPRM hinges on ensuring that employers properly and consistently classify their positions at the correct skill level. DOL should take two actions. First, it should update and expand the NPWC's Prevailing Wage Determination Policy Guidance.<sup>37</sup> Second, it must hold employers accountable for their skill level selections.

The policy guidance should be rewritten and expanded so that it not only serves PWD adjudicators but also all employers, whether they use the OEWS or a private wage survey to determine the prevailing wage. The document should clarify skill level classification and serve as compliance guidance for all employers. The most recent NPWC policy guidance, published in 2009, is obviously inadequate and outdated. Employers are not effectively or consistently interpreting and identifying skill levels. The description of each skill level, Levels I through IV, consists of a single paragraph of ambiguous language. For example, how many years of experience should Level II consist of? Can an employer's position that requires two to three years of experience ever be classified as Level I (Entry-Level)? If a worker with a master's degree is filling a position that typically requires only a bachelor's degree, can they be bumped up in skill level?

All employers should be required to follow the five-step Prevailing Wage Determination process outlined on pages 9 through 13 to identify the position's skill level. Employers should be required to document and retain those records for inspection by USCIS when the I-129 petition for the LCA is filed. This will ensure consistent skill level identification within and across companies whether the firm uses the OEWS, private wage survey, a CBA, or requests a PWD.

Then USCIS should ensure that the worker being placed in the position is not overqualified in terms of education and experience for the position's skill level.

Consider this example: A well-known firm received approval for two different LCAs at the same wage level (Level II), even though one LCA had the job title *Senior Software Engineer* and the other had the job title *Software Engineer*.<sup>38</sup> The firm, a major employer of H-1B workers, is not accounting for differences in skill levels as evident from its own job titles when selecting the wage level for the LCA. Both engineers and senior engineers are receiving the exact same salary and wage level, and they are approved by DOL with zero scrutiny. Using the DOL Prevailing Wage Determination Policy Guidance, the LCAs in this case should be instantly flagged by identifying keywords such as senior, head, chief, and lead in job titles, and should be checked to determine whether the prevailing wage levels are appropriate. This example underscores a broader need for DOL to create a more robust compliance system to ensure employers do not misclassify workers at

inappropriate wage levels. Our own cursory review has found hundreds of similar examples.

As a result, the LCA and petition process should be updated so that DOL reviews the qualifications of individual workers before USCIS approves a petition, to ensure that wage levels match up with the age, education, and experience of the workers being hired through the LCA and PERM programs. While USCIS currently performs this role to some extent, its adjudicators lack expertise in wage-and-hour issues and do not have the same mandate to protect labor standards as DOL staff. Therefore, these functions should be undertaken by the proper agency. DOL and USCIS already have a mandate to cooperate on H-1B applications and enforcement; a memorandum of understanding between the Secretaries of Homeland Security and Labor could detail a process where DOL plays a prominent role in ensuring that H-1B workers are classified at the appropriate wage levels. Published guidance from DOL on skill levels that is more detailed, clearer, and more realistic would also be helpful for everyone involved—employers and adjudicators alike.

## **9. DOL has failed to enforce the “actual wage” component of the H-1B prevailing wage rule and should begin enforcing it immediately**

Under the prevailing wage statute, although an employer has several options at their disposal to determine a prevailing wage for an LCA, they must offer the higher of either the prevailing wage or the “actual wage,” which the corresponding regulation at 20 C.F.R. §655.731 defines as “the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.”

DOL has not exercised its authority to enforce the actual wage requirement. This is a wasted opportunity for one of the most important tools DOL has at its disposal to hold employers accountable for required wages. In order to ensure that H-1B employers are not undercutting the wage rates they pay H-1B workers, DOL should immediately begin enforcing this requirement.

In late 2021, we published a report detailing how thousands of skilled migrants with H-1B visas working as subcontractors at well-known corporations like Disney, FedEx, Google, and others appear to have been underpaid by one firm to the tune of at least \$95 million in one single year.<sup>39</sup> The victims likely included not only the H-1B workers but also the U.S. workers who were either displaced or whose wages and working conditions were degraded when employers were allowed to underpay skilled migrant workers with impunity. The workers in question were employed by HCL Technologies, an India-based IT staffing firm that earned \$11 billion in revenue in 2020. HCL is consistently one of the top 20 H-1B employers and appears to have engaged in the systematic and strategic wage theft of its H-1B workers by exploiting the lax to nonexistent enforcement of the actual wage requirement. According to its own internal documents, HCL targeted its new H-1B hires expressly based on the spread between what it paid its own U.S. employees versus what it pays its own H-1B workers.

The report discusses our analysis of an internal HCL document, released as part of a whistleblower lawsuit against the firm. The document suggests that HCL—and perhaps other firms with similar business models—are not paying the legally required amount that corresponds to what is being paid to U.S. worker employees at HCL. The HCL document revealed that the large-scale illegal underpayment of H-1B workers that appears to be occurring is a core part of the HCL’s competitive strategy, and likely facilitated \$95 million in stolen wages from HCL’s H-1B employees in just one year. Such abuses are surely widespread among H-1B employers because DOL has done virtually nothing to ensure program integrity by enforcing the H-1B wage rules, in particular the actual wage rule.

DOL could easily begin enforcing the actual wage provision by requiring H-1B employers to submit evidence documenting the wage rates paid to U.S. workers who are similarly employed in occupations for which the employer is also hiring H-1B workers. Employers must already “keep records for how they calculate the actual wages.” To our knowledge, DOL has never initiated an investigation regarding compliance with the “actual wage” provision of the law. The DOL Secretary should exercise their authority to inspect the actual wages paid by H-1B employers. The Secretary can do so without a complaint from a worker, under their authority to certify investigations, and should do so if presented with credible evidence of violations. DOL should provide clear compliance guidance for the actual wage provision and then require that H-1B employers attest to the wage rates they pay similarly situated U.S. workers and include them in the LCA documentation, and DOL should conduct audits of employers on a regular basis to ensure compliance. The audits could begin with the employers that hire large numbers of H-1B workers, for example, those that employ more than 25 H-1B workers, as well as H-1B dependent firms.

Secondary employers should also be required to submit LCAs and evidence documenting the wage rates paid to U.S. workers in the occupations that H-1B workers will be hired for through an outsourcing firm. Otherwise, some H-1B outsourcing firms—which almost exclusively pay H-1B workers at the two lowest wage levels, and employ H-1B and L-1 workers almost exclusively—will be able to game the system by using the actual wage paid to their own employees to meet the requirement, and not the employees of the secondary employer, where the H-1B workers will be placed—and where wages paid to the U.S. workforce are likely to be higher.

## **10. DOL should require secondary employers of H-1B workers to attest that they will not adversely affect wages and working conditions**

Outsourcing companies are using the H-1B program to underpay H-1B workers, replace U.S. workers, and send tech jobs abroad. Typically, in this scenario, H-1B workers do computer and engineering work at the office of a U.S. employer but are employed by an outsourcing company, some of which are based abroad or have major operations abroad.<sup>40</sup> The many reported cases of U.S. workers being laid off and replaced by H-1B workers have all been facilitated by this arrangement. In multiple incidents, the H-1B workers have been hired with annual wages of around \$30,000 to \$40,000 less than the

workers they have replaced. Before they are laid off, the U.S. workers are often forced to train their own H-1B replacements as a condition of their severance packages; this is euphemistically known as “knowledge transfer.” Major, profitable U.S. employers like Disney and Toys “R” Us—as well as public employers and institutions like the University of California and Southern California Edison—have laid off thousands of U.S. workers who were forced to train their own replacements. Eventually, many of the outsourced jobs filled by H-1B workers get moved offshore.<sup>41</sup>

Contrary to the popular narrative proffered by corporations that support expanding and deregulating the H-1B visa program—the staffing firms that use H-1B visas are not using them to keep technology jobs in the United States—instead they are using them precisely to facilitate the offshoring of as many of those jobs as they can. That is in fact, the business model of those firms. News reports, including from the *New York Times* and *Bloomberg*, have shown that outsourcing companies “game the system” in order to obtain a high share of H-1B visas, which leaves fewer available for the firms that directly employ H-1B workers.<sup>42</sup>

The outsourcing/staffing model of employment generally may increase the incidence of labor and employment law violations by separating the main beneficiary of the labor provided by H-1B workers—the third-party firm that hires the outsourcing firm, i.e. the “lead” employer—from the H-1B workers who perform the work. Firms that rely on outsourced H-1B workers are a textbook example of what former DOL Wage and Hour administrator David Weil calls a “fissured” workplace, where the relationship between the worker and the lead employer is fissured, or broken, via the use of a temp agency or subcontractor<sup>43</sup> (in this case the temp agency or subcontractors are the H-1B outsourcing firms). Research shows that fissuring leads to a wage penalty for workers who are subcontracted, employed as temps, and work for staffing firms,<sup>44</sup> in part because the subcontractor keeps a percentage of the wages earned by the workers. It is also common knowledge that employers use this model to avoid paying for benefits like health care, retirement funds, and to avoid liability for labor violations. Because the staffing and outsourcing model contributes to the fissuring of the labor market, it should not be allowed as part of the U.S. immigration system—not in H-1B or in any other temporary or permanent immigration programs.

One way to address the abuses of the outsourcing/staffing firms, which operate as secondary employers, would be to issue policy guidance and update the appropriate DOL ETA application forms so that secondary employers to which H-1B workers are outsourced will be required to file Labor Condition Applications with DOL. Such guidance, which was considered in 2021 but then abandoned,<sup>45</sup> would close the loophole that allows firms like Disney and Southern California Edison to replace its U.S. employees with H-1B workers by employing them through an outsourcing firm.<sup>46</sup> Using Disney as an example, implementing this rule would require client firms like Disney—that benefit and profit from hiring outsourcers—to acknowledge their employment relationship with H-1B workers who are employed by outsourcers like Infosys and Tata, by requiring Disney to file its own LCA. By doing so, Disney would attest that hiring the H-1B worker through the outsourcer is not adversely affecting the wages and working conditions of the Disney workforce.

## **11. DOL should publish Labor Condition Application and permanent labor certification data in real-time on a central database**

DOL publishes detailed LCA and permanent labor certification (PERM) disclosure data, but it is typically lagged by at least one quarter, and often much longer. The agency should publish LCA and PERM public access file applications in real-time to enable U.S. workers to apply for these positions. This would enhance the integrity of the programs and better align them to their purposes by ensuring that workers hired with temporary visas and green cards are filling true labor shortages.

U.S. workers have long complained loudly that employers hide job openings from them, reserving them for visa holders and PERM applicants. Even when those jobs are advertised, as is required by the PERM labor certification process, they are often placed in obscure locations. Workers call such job advertisements “fake job postings.” A recent ProPublica investigation has referred to the practice as “The Tech Recruitment Ruse.”<sup>47</sup>

The agency already collects the data and publishes it regularly on the OFLC disclosure data. But even a one-quarter year lag time renders it useless for job seekers. Publishing it in real-time would unlock enormous value for workers at little or no cost to the government or employers.

## **12. DOL had the requisite legal authority to update the H-1B prevailing wage levels**

As discussed in detail in our 2020 report, DOL has the requisite legal authority to change the H-1B prevailing wage levels to an appropriate rate that protects wage standards and prevents adverse effects on U.S. workers in H-1B occupations. No analyst or commentator has credibly argued otherwise. For far too long, the H-1B wage levels have been set at an artificially low level that undercuts U.S. wage standards, therefore, it is reasonable for DOL to increase the minimum wage levels so that Level I is no lower than the local median wage.

## **13. DOL should expand the LCA process to include a front-end screening process that reviews the labor and employment law records of employers; those that have violated certain laws in the previous five years should be prohibited from hiring through the H-1B program**

In a previous comment to the Department of Homeland Security (DHS), regarding the

2023 H-1B “modernization” rule,<sup>48</sup> we recommended that DHS should expand the H-1B Registration System to include a front-end screening process that reviews the labor and employment law records of employers. If employers have violated certain laws, they should be prohibited from hiring through the H-1B program. We further recommended that DHS should consult with DOL to develop a list of key applicable laws and operate the system jointly with DOL, and ideally, also operate the updated registration process jointly, with DOL screening employer records through the LCA process. We reiterate that recommendation here and urge DOL to take steps to exclude lawbreaking employers that violate labor, employment, and immigration laws. *While we realize our comment will only be read by DOL, we nevertheless include our discussion about DHS’s role in this process because we believe DOL and DHS should work in tandem to reduce labor and employment violations in the H-1B program.*

In the 2023 proposed rule, *Modernizing H-2 Program Requirements, Oversight, and Worker Protections*,<sup>49</sup> DHS proposed to create or expand several additional bars to approval of new petitions filed by H-2 petitioners who have previously committed legal violations related to the H-2 programs. EPI submitted comments generally supporting the proposed changes, which were adopted as a final rule.<sup>50</sup> Although they fail to go far enough on their own, if adequately implemented the provisions will help curb abusive employers’ exploitation of the H-2 programs and will level the playing field for employers that obey the law. EPI additionally commented that employers that commit serious violations repeatedly should be permanently banned from the H-2 programs, as they have demonstrated their inability or unwillingness to comply with the programs’ requirements.

In those comments EPI further recommended that the DHS strengthen section 214.2(h)(10)(iii)(3), which addresses violations of “any applicable employment-related laws and regulations” by expanding it to include a number of other violations and making denial of petitions mandatory—rather than discretionary—if employers have violated any of those laws in the preceding five years.<sup>51</sup>

We believe DHS should consider similar provisions for employers seeking to hire through the H-1B program because there have been numerous credible accusations of lawbreaking against H-1B employers, as well as investigations and litigation, finding that H-1B employers and recruiters that have been guilty of wage theft, financial bondage, and even human trafficking. The reality is that DOL has limited resources and has interpreted its authority to investigate H-1B employers as constrained, and it is difficult in practice for H-1B workers to come forward and complain themselves about employer lawbreaking—because they could face retaliation and lose their status, and possibly the opportunity to become lawful permanent residents—which means DOL likely receives fewer complaints than they otherwise would. And even when DOL does receive complaints, as numerous reports have shown, DOL often lacks the resources to investigate and take action against lawbreaking employers.<sup>52</sup>

Thus, at a minimum, to keep lawbreaking employers out of the H-1B program, DHS should have its own list of legal violations and deny any petition for an employer that has violated any of the laws on the list in the preceding five years. That would act as a backstop to prevent lawbreaking employers from hiring through the H-1B program. At present, as DHS

rightly points out in the November 2023 Modernizing H-2 Program NPRM, even some of the worst violators of the law are allowed to recruit and hire H-2 workers. We know that this is also the case in the H-1B program. In fact, in the H-1B program, some of the biggest users of the program are also the most egregious violators, receiving thousands of H-1B petition approvals per year. And then after they violate the law, H-1B employees are afraid to complain to authorities because their immigration status is tied to their employer, and even if they are brave enough to lodge a complaint, as noted above, DOL may lack the resources to investigate violations and hold the employer accountable.

As EPI also recommended in the H-2 NPRM, DHS should go further to implement this by also cooperating with DOL to develop a front-end screening process that takes place at the labor condition application (LCA) stage, to vet the labor and employment law records of employers before they can be allowed to hire through the H-1B program. In multiple EPI reports and in comments in response to NPRMs, EPI has made a similar proposal—namely, that a front-end screening process should be created to prohibit employers with track records of wage and hour, labor, immigration, and other legal violations from hiring through the H visa programs.

To make a front-end screening process a reality, ideally, DOL should require employers to register for eligibility to use the H-1B program at the LCA stage, so employer records on compliance with labor and employment laws can be screened up front, before getting to the registration or petition stage. DOL could set up a registration process in which employers list basic information about their business and the purported need for H-1B workers (as is already done via the DOL temporary labor certification forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through the H-1B and other visa programs, that they have not been found to have violated any of the listed labor, employment, wage and hour, immigration, civil rights, disability, anti-trafficking, or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records—and could cooperate with other worker protection agencies like the NLRB and EEOC—and ultimately certify employers that have not violated the applicable laws.

To break established patterns of abuse, employers that have violated any labor, employment, wage and hour, immigration, civil rights, disability, anti-trafficking or anti-discrimination laws should be prohibited from submitting an LCA (or having their LCA approved) and ultimately not be allowed to hire H-1B workers. Employers that have clean records and an LCA approved by DOL could then continue on with the petition process at USCIS.

Given the present and likely future reality that WHD and other worker protection agencies will continue to be vastly underfunded and understaffed,<sup>53</sup> such a screening process on the front end of the H-1B application process could act as a useful and efficient tool to prevent legal violations without WHD having to go through lengthy and costly investigations on the back end, after workers have arrived in the United States and been robbed or otherwise exploited.

At the petition level, if a new screening process at DOL is not created that takes place before or as part of the LCA process, DHS should, at a minimum and as noted above, build on proposed section 8 C.F.R. 214.2(h)(10)(iii)(B) for H-2 petitions by creating a list of key labor, employment, wage and hour, immigration, civil rights, disability, anti-trafficking, and anti-discrimination laws, the violation of which would establish strong evidence that an employer does not treat their employees well and is unlikely to follow employment and immigration laws with respect to their H-1B employees. Although this would work best in tandem with a front-end screening process at the LCA stage, DHS could make significant progress in keeping lawbreaking employers out of the H-1B programs by mandating that any employer that has violated any of the listed laws will be prohibited from having a petition approved for hiring H-1B workers.

Another option would be for DHS to modify the existing H-1B Registration System so that it also screens the records of employers. That way DHS could use it to both manage the annual cap and to assess and certify whether employers are eligible to hire through H-1B based on their past legal violations. Employers could be required to attest, under penalty of perjury and of being banned from hiring through the H-1B and other visa programs, that they have not been found to have violated any of the listed labor, employment, wage and hour, immigration, civil rights, disability, anti-trafficking, or anti-discrimination laws during the past five years. USCIS could work to verify the employer attestation, although ideally DOL should partner with to do this, by cross-referencing DOL enforcement data and other relevant records—preferably also in partnership with other worker protection agencies like the NLRB and EEOC—and would then ultimately certify employers that have not violated the applicable laws, allowing them to continue with the registration process.

## Conclusion

The H-1B visa program is the largest temporary work visa program in the United States and an important pathway into the U.S. labor market for skilled migrants from around the world—but a pathway that has serious deficiencies when it comes to the workplace rights of migrant workers and for preserving U.S. labor standards. While less is known about the other LCA programs, H-1B1 and E-3, they have even fewer applicable rules in place to protect workers, which likely means they are having similar impacts on worker rights and labor standards. By issuing this NPRM, DOL has taken an important first step towards reversing decades of artificially depressed wage rates for H-1B workers, and for making the prevailing wage methodology rules consistent across the other LCA programs and for EB-2 and EB-3 green cards. This will benefit other similarly situated workers and simplify and streamline the prevailing wage determination process. Nevertheless, as our comment recommends, more must be done—in this rulemaking and other executive actions—to improve the effectiveness of the updated prevailing wage rates and on enforcement in the LCA and PERM programs, in order to safeguard U.S. wages and labor standards.

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## Endnotes

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