FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

February 16, 2021

Mr. Brian Pasternak
Administrator, Office of Foreign Labor Certification
Employment and Training Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: DOL Docket No. ETA–2020–0006: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date

Dear Mr. Pasternak,

The Federation for American Immigration Reform (FAIR) submits the following public comment to the U.S. Department of Labor (DOL) in response to the agency's Proposed Delay of Effective Date, as published in the Federal Register on February 1, 2021. *See* ***Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date*** (DOL Docket No. ETA–2020–0006).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. FAIR examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America's environmental, societal, and economic interests today, and into the future.

I. INTRODUCTION

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States (final rule) amended the Department's regulations governing permanent (PERM) labor certifications and Labor Condition Applications (LCAs) to incorporate long overdue changes to the computation of

wage levels under the Department's four-tiered wage structure based on the Occupational Employment Statistics (OES) wage survey administered by the Bureau of Labor Statistics (BLS). The Immigration and Nationality Act (INA) requires employers to pay H-1B workers 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 "prevailing wage level for the occupational classification in the area of employment." 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. The statute provides that, when a government survey is used to establish the wage levels, "such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels. Thus, like the statute's actual wage clause, the prevailing wage requirement, when calculated based on a government survey, makes the qualifications possessed by workers, namely education, experience, and responsibility, an important part of the wage calculation.

The principal changes made by the rule update the four wage levels required in the H-1B, H-1B1, and E-3 visa programs to levels that more adequately reflect market wage rates in the U.S. labor market. The rule also applies the new wage rates to the permanent labor certification requirements for employment-based (EB) green cards in the EB-2 and EB-3 preferences. The previous and new wage levels are as follows:

Previous wage percentiles (pre-rule)

Level 1:	17%
Level 2:	34%
Level 3:	50%
Level 4:	67%

New wage percentiles

Level 1:	45%
Level 2:	62%
Level 3:	78%
Level 4:	95%

FAIR generally supports the substance of this rule and believes the reforms to the wage levels under the Department's four-tiered wage structure are sorely overdue and should be implemented without delay.

II. Effective Date Proposal

FAIR strongly opposes DOL's proposal to delay the effective date of the *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* Final Rule. The current wage structure has resulted in serious fiscal harm to many U.S. workers by allowing employers to underpay foreign workers admitted under these visa programs. Postponing the effective date of this final rule past April 1, 2021 would prevent these protections from being applied to the H-1B visa allocation for at least a full calendar year (assuming DOL implements the rule any time prior to April 2022). Such delay will only reduce job opportunities and suppress wages for U.S. workers at a time when millions of Americans are out of work, resulting in severe fiscal harm to U.S. workers and exploitation for foreign workers benefiting from the above-mentioned visa programs. Additionally, DOL should take immediate action to implement the final rule because the current wage rate methodology conflicts with the INA. This rule will benefit both U.S. workers and foreign workers by bringing hiring practices under these visa programs more closely in line with Congressional intent.

A. The Current Wage Rate Structure Has Resulted in Serious Fiscal Harm to U.S. Workers.

Criticism of the way in which the wage levels are currently set is longstanding and exists across the political spectrum.[1] As DOL explained in the *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* Interim Final Rule (IFR), a primary reason for reforming the manner in which it sets prevailing wage levels in the H-1B and PERM programs is that the old wage levels were never justified through an economic analysis, nor codified in rulemaking through notice and comment, and are in substantial tension with the statutory framework.[2] Failure to update the methodology, however, has resulted in serious fiscal harm to U.S. workers, which only rulemaking can remedy.

Because DOL has no adjudicative power over employer a foreign worker's skill level claim when petitioning for a beneficiary, employers are able to claim that the foreign worker fits any of the skills levels. Regardless of the employee's actual skill level, DOL has no power to challenge that claim.[3] Consequently, the four skill levels mandated by Congress are meaningless for the purposes of labor protection.[4] Only the lowest prevailing wage level has practical significance in deterring unfair employment

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[1] Bipartisan Group of Lawmakers Propose Reforms to Skilled Non-Immigrant Visa Programs to Protect American Worker, (2020),*available at* https://www.grassley.senate.gov/news/news-releases/bipartisan-group-lawmakers-propose-reforms-skilled-non-immigrant-visa-programs (last visited Feb. 15, 2021).
[2] 85 FR 63872.
[3] 8 U.S.C. § 1182(n)(1).
[4] 8 U.S.C. § 1182(p).

competition to U.S. workers.[5] Maintaining the lowest skill level (Level 1) at the 17th percentile undercuts the prevailing wage so drastically that it has shown to provide no protection for U.S. workers whatsoever.[6]

Even during normal global and economic circumstances, the current wage structure results in adverse effects on the wages and job opportunities of U.S. workers because it allows employers to not pay foreign workers the actual prevailing wage, despite the statutory requirement.[7] As DOL demonstrated in both the IFR and final rule, there is significant empirical and statistical evidence that indicates the existing wage level structure has allowed employers to lawfully underpay foreign workers.[8] Approximately sixty percent of H-1B positions certified by DOL are assigned wage levels well below the local median wage for the occupation.[9] GAO reported that between June 1, 2009, and July 30, 2010, 83% of H-1B jobs were certified significantly below the prevailing wage, at Level 1 or Level 2 (which represent wage rates at either the 17th or 34th percentiles, respectively). Just 11% were of corresponding LCAs were certified at the median wage (Level 3) and 6% at a wage above the median. Data shows that even major U.S. firms, including Amazon, Microsoft, Walmart, Google, Apple, and Facebook, fail to pay their H-1B beneficiaries competitive wages.[10]

There is little justification for this phenomenon in the H-1B context specifically. As DOL explained in the IFR, "because H-1B workers are required to possess specialized knowledge and expertise that often exceeds the level of education and experience necessary to enter a given occupation generally, and greater skills are associated with higher earnings, the median H-1B workers should earn a wage that is at least the same, if not more, than the median wage paid to U.S. workers in the occupation. But a variety of studies show that the opposite is occurring."[11] By allowing companies to pay foreign worker beneficiaries significantly below the median wage for open position, the current

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[5] 8 U.S.C. § 1182(n)(1).

[6] It also must be noted that this rule, albeit a substantial step in the right direction, continues to conflict with the INA and fail U.S. workers by allowing employers to legally employee foreign workers below the prevailing wage. Congress has not changed the H-1B-specific labor condition application statutes that require H-1B workers to be paid at least the prevailing wage for the occupation and location. While Congress may require the Department of Labor to provide four wage levels that take into account experience, education, and the level of supervision, any wage level less than the prevailing wage for the occupation and location should be invalid for H-1B purposes. FAIR strongly urges DOL to utilitze its authority to come into compliance with the INA and set the Level 1 wage rate to 50% or otherwise require that employers pay at least the prevailing wage to foreign workers they employ.

[7] 8 U.S.C. 1182(n)(1)(A).

[8] 86 FR 3608; 85 FR 63872.

[9] Daniel Costa and Ron Hira, *H-1B visas and prevailing wage levels: A majority of H-1B employers—including major U.S. tech firms—use the program to pay migrant workers well below market wages*, Economic Policy Institute, May 4, 2020, *available at* https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/ (last visited Feb. 15, 2021).

[10] *Id.*

[11] 85 FR 63872.

wage structure creates an incentive to prefer foreign workers to U.S. workers, an incentive that is at odds with the statutory scheme and causes downward pressure on the wages of the domestic workforce.

Additionally, even where employers are required by law to use prevailing wages to affirmatively recruit U.S. workers for open positions before they are permitted to employ foreign works (which is true in the EB-2 and EB-3 context, as well in some cases, for hiring H-1B workers), U.S. workers with appropriate levels of education and experience are unlikely to even apply for these the positions because the first two wage levels are set so far below actual prevailing wages under the current framework. This is a "race to the bottom" tactic that is easy to employ because of DOL's practical inability to challenge a worker's purported skill level certified by a prospective employer on an LCA. Consequently, the current wage level structure allows employers to degrade labor conditions so significantly that their recruitment efforts are ineffective at attracting U.S. workers.

The old wage rate methodology has caused U.S. workers serious fiscal harm caused by unfair employment competition and wage suppression, and allowed employers to detriment labor conditions by underpaying foreign workers significantly below the market rates. Accordingly, failing to implement the final rule without delay would be an abdication of the government's duty to serve the American people and implement existing laws meant to protect the interests of U.S. workers and prevent employers from exploiting foreign workers.

B. Economic Conditions Caused by the COVID-19 Crisis Necessitate Immediate Implementation of the Rule to Prevent Further Harm to U.S. Workers.

It is uncontroversial that the COVID-19 pandemic continues to cause tremendous human suffering and economic hardship across the United States and around the world. DOL must implement the rule without delay in order to mitigate the serious fiscal harm that will result by continued unfair labor competition caused by the current wage level structure.

While economic activity and employment rates have recovered modestly since the beginning of the crisis in early 2020, the economic downturn has affected nearly all industries and occupations in the United States, resulting in mass layoffs and business closures. The nonpartisan Congressional Budget Office has predicted that the U.S. labor market will take over a decade for conditions to return to pre-pandemic levels.[12] DOL data shows that the U.S. currently has more than 9.8 million fewer jobs than it did just a year ago, and has only recovered less than half of the jobs that were lost just during the

[12] Congressional Budget Office, *An Overview of the Economic Outlook: 2021 to 2031*, Feb. 2021, *available at* https://www.cbo.gov/system/files/2021-02/56965-Economic-Outlook.pdf (last visited Feb.15, 2021).

first few weeks of the pandemic.[13] Although DOL reported an unemployment rate of 6.3 percent for January 2021, the Federal Reserve Chair Jerome H. Powell explained that the true unemployment rate for January, after misclassification errors were analyzed, was more likely "close to 10 percent."[14]

Data also shows that, as of January 2021, about 3.5 million people once considered temporarily unemployed are now reported to have permanently lost their jobs.[15] Of the overall 10 million people currently unemployed, about 40 percent have been out of work for more than six months. Additionally, the number of people filling new unemployment claims remains well above pre-pandemic numbers. The pandemic has also had a disproportionate impact on the employment of minorities and women in the U.S. According to labor reports, at least 8.6 percent of Hispanics, 9.2 percent of Black people, and 6.6 percent of Asians are unemployed domestically. Additionally, nearly 60 percent of people who left the workforce since February 2020 are women.[16]

This crisis has been so severe that the United States Congress has passed and continues to consider multiple trillion-dollar stimulus legislation to provide emergency funding to unemployed U.S. citizens and struggling businesses.[17] The government has both a moral and legal obligation to ensure that U.S. workers of all backgrounds are first in line for jobs as the economy reopens and that foreign workers brought to the U.S. are paid fairly. DOL must implement this rule without delay because workers cannot afford to wait another full calendar year for DOL to address the improper and unfair competition in the labor market.

C. Delaying the Effective Date of this Rule Will Harm Both U.S. and Foreign Workers.

Delaying the effective date and implementation of this will only allow employers to circumvent protections that are intended to benefit both U.S. and foreign workers. Foreign workers participating in the above-mentioned visa programs stand to benefit from these changes as well as U.S. workers. Because this rule makes no change to the number of visas allocated for each category and because of the extremely high demand demonstrated year after year for visas in these categories, there is little reason to believe

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[13] Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation – January 2021*, Feb. 5, 2021, *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited Feb. 15, 2021).
[14] Chair Jerome H. Powell, *Getting Back to a Strong Labor Market* (Speech), Feb. 10, 2021, *available at* https://www.federalreserve.gov/newsevents/speech/powell20210210a.htm (last visited Feb. 15, 2021).
[15] Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation – January 2021*, Feb. 5, 2021, *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited Feb. 15, 2021).
[16] *Id*.
[17] Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136; Grace Segers, *Democrats Push Forward with $1.9 Trillion COVID Bill, Clearing Senate Hurdle*, Feb. 3, 2021, *available at* https://www.cbsnews.com/news/stimulus-covid-relief-democrats-1-9-trillion-plan/ (last visited Feb. 15, 2021).

that implementation of this rule will result in fewer visas issued under these visa programs if foreign workers are paid competitively wages compared to their American colleagues.[18]

As DOL has itself explained, if employers are required to pay H-1B workers approximately the same wage paid to U.S. workers doing the same type of work in the same geographic area and with similar levels of education, experience, and responsibility as the H-1B workers, employers will have little reason to prefer H-1B workers over U.S. workers, and U.S. workers' wages will be less likely to be suppressed, and to a lesser degree, by the presence of foreign workers in the relevant labor market. Specifically, raising the wage rate for Level 1 employees from 17 percent to 45 percent, however, will result in a significant, and more equitable, pay increase for foreign workers selected for these visa programs.

It is important to note that DOL reported receiving no comments providing data or analysis demonstrating that the wage rates under the old wage methodology produces wage rates commensurate with the wages paid to U.S. workers similarly employed and with comparable education, experience, and responsibility to H-1B and PERM workers, as required by statute. While some commenters urged the Department to preserve the old wage methodology, they provided no evidence for why that would be appropriate or consistent with the INA.

Any argument by commenters that this rule will hurt the economy by harming business' bottom line or impede employers' ability to hire qualified foreign workers demonstrates only the point that the current wage rate methodology is inadequate and at odds with Congress' clear intent to ensure these visa programs do not reduce labor standards in the U.S. or employment opportunities for U.S. workers. By making these arguments, employers are inadvertently admitting will that they only intend to hire foreign workers if employers are able to underpay them relative to similarly situated U.S. workers. Where true vacancies exist that U.S. workers are unable to fill, however, employers must be required to pay foreign workers competitive wages. DOL should not tolerate a "race to the bottom" job market where the interests of profit collectors outweigh the interests of the workers the INA was written to protect.

III. CONCLUSION

FAIR strongly urges DOL to implement *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* without delay. This final rule will allow DOL to more effectively protect U.S. workers against

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[18] Department of Homeland Security, 2019 Yearbook of Immigration Statistics, Table 25 Nonimmigrant Admissions by Class of Admission: Fiscal Years 2017 to 2019, *available at* https://www.dhs.gov/immigration-statistics/yearbook/2019/table25 (last visited Feb. 16, 2021).

competition from foreign labor at a time when U.S. workers need protection more than ever. The current wage structure has failed to adequately protect U.S. workers from unfair competition and is inconsistent with Congress' intent to ensure workers brought in to fill positions under these visa programs are paid, at minimum, the prevailing wage for similarly qualified U.S. workers. The acute fiscal harm that U.S. workers are facing as a result of the COVID-19 pandemic will only be exacerbated if employers are allowed to continue to underpay beneficiaries under these visa programs because of the outdated and illogical current wage structure.

Sincerely,

Dan Stein
President
Federation for American Immigration Reform (FAIR)