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*FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.*



FEDERATION FOR AMERICAN IMMIGRATION REFORM

March 10, 2021

Mr. Charles L. Nimick  
Chief, Business and Foreign Workers Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

**RE: DHS Docket No. USCIS-2020-0019: Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions: Delay of Effective Date**

Dear Mr. Nimick,

The Federation for American Immigration Reform (FAIR) respectfully submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the agency’s request for comments, as published in the Federal Register on February 8, 2021. *See Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions: Delay of Effective Date* (DHS Docket No. USCIS-2020-0019).

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**

*Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676 (Jan. 8, 2021) (final rule) amended the Department's regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H-1B registrations for the filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the



registration requirement is suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area of intended employment. The proffered wage is the wage that the employer intends to pay the beneficiary.

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.”<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.<sup>4</sup> 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 current wage levels are set to the following percentiles and are meant to correlate to a worker’s skill level:

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

It is important to note that both Level 1 and Level 2 are set significantly below actual prevailing (or average) wages (set at Level 3). DHS data shows that the majority of H-1B registrations proffer wages at Level 1 and Level 2, with only 28.53 percent of H-1B petitions received in fiscal years 2018 and 2019 were filed for Level 4 and 3 wages.<sup>5</sup>

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<sup>1</sup> 8 U.S.C. § 1182(n)(1)(A).

<sup>2</sup> 29 C.F.R. § 1.2.

<sup>3</sup> 8 U.S.C. § 1182(p)(4).

<sup>4</sup> *Id.*

<sup>5</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, H1B Petitions for Non Immigrant Worker (I-129) Summarized by IT (SOC code 15) and Other by Wage Level As of August 28, 2020, Database Queried: Aug. 28, 2020, Report Created: Aug. 28, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (reflecting total received H-1B petitions categorized by wage levels as follows: 13.2% for level I, 46.23% for level II, 17.85% for level III, 10.68% for level IV, and a combined 12.03% for N/A and blank wage levels).

Current DHS policies require USCIS to select registrations on a purely random basis, utilizing a lottery system, when demand for H-1B visas exceeds the numerical limit set by statute.<sup>6</sup> All petitioners seeking to file an H-1B cap-subject petition must first submit a registration for each beneficiary on whose behalf they seek to file an H-1B cap-subject petition to USCIS. The current selection process also allows for selection based solely on the submission of petitions in any year in which the registration process is suspended by the agency. In such case, USCIS would also utilize a random selection process for any year in which the number of petitions received on the final receipt date exceeds the applicable numerical limitation.<sup>7</sup>

The new selection process created by the final rule does not alter any numerical limit or change the prevailing wage levels associated with a given position for U.S. Department of Labor (DOL) purposes. The final rule also does not affect the order of selection as between the regular cap and the advanced degree exemption or otherwise effect substantive H-1B eligibility requirements.

## II. LEGAL AUTHORITY

USCIS has the legal authority to modify the H-1B selection process consistent with the final rule. The methodology for the selection of H-1B registrations (or petitions, in years registration is suspended) is a matter that Congress left to USCIS discretion. The INA states that “aliens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status.”<sup>8</sup> The term “filing” is ambiguous, however, and the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand. Additionally, because of excess demand and limited registration and filing periods, USCIS often receives multiple submissions simultaneously.<sup>9</sup>

Accordingly, DHS may rely on its general statutory authority to implement the H-1B statute and proposes to revise the regulations to redesign the selection system to more effectively, efficiently, and faithfully administers the cap selection process.<sup>10</sup> “Congress left to the discretion of USCIS how to handle simultaneous submissions.”<sup>11</sup> Prioritizing selections on the basis of wages proffered is a reasonable interpretation of the statute that furthers Congress’ primary purposes in creating the H-1B program to help U.S.

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<sup>6</sup> 8 C.F.R. § 214.2.

<sup>7</sup> *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 85 Fed. Reg. 69,236 (Nov. 2, 2021).

<sup>8</sup> 8 U.S.C. § 1184(g)(3).

<sup>9</sup> See *Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017).

<sup>10</sup> See INA section 103(a), 214(a) and (c)(1), 8 U.S.C. 1103(a), 1184(a) and (c)(1).

<sup>11</sup> See *Walker Macy*, 243 F.Supp.3d at 1176 (finding that USCIS' rule establishing the random-selection process was a reasonable interpretation of the INA).

employers fill actual labor shortages in positions requiring highly skilled or highly educated workers, without undermining labor conditions or otherwise suppressing wages in the domestic labor market.

### III. IMPROVEMENTS TO THE H-1B SELECTION PROCESS

FAIR strongly supports the substance of the final rule and urges DHS to implement the rule without delay. As DHS has reiterated throughout the rulemaking process, prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled aliens that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition.<sup>12</sup> Similarly, it discourages abuse of the H-1B program to fill lower-paid, lower-skilled positions, which has caused severe fiscal harm to U.S. workers and H-1B beneficiaries under the current selection system.<sup>13</sup> As a result, the final rule will:

- Protect both U.S. workers from unfair employment competition and wage suppression caused by the inadequate wage level structure currently employed by DOL;
- Promote productivity, innovation, and development in the U.S. economy; and
- Benefit high-skill H-1B beneficiaries, and discourage further wage stagnation generally.<sup>14</sup>

While sorely overdue, the protections created by the final rule are especially important to implement without delay given the severe economic crisis caused by the COVID-19 pandemic.

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<sup>12</sup> *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676 (Jan. 8, 2021).

<sup>13</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2018, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 161,432 of the 189,963 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages); I-129 Petition for H-1B Nonimmigrant Worker (Cap Subject) Wage Levels for H-1B Petitions filed in FY2019, Database Queried: Aug. 17, 2020, Report Created: Aug. 17, 2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2018, 2019 (showing that, for petitions with identifiable certified labor condition applications, 87,589 of the 103,067 (or approximately 85%) H-1B petitions for which wage levels were reported were for level I and II wages).

<sup>14</sup> See Hal Salzman, Daniel Kuehn, and B. Lindsay Lowell, Economic Policy Institute, *Guestworkers in the High-Skill U.S. Labor Market: An analysis of supply, employment, and wage trends*, (Apr. 24, 2013), at 27, available at <https://files.epi.org/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf>. (“In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce.”) (last visited Mar. 9, 2021).

### **A. The Final Rule Will Benefit U.S. and Foreign workers by Mitigating Unfair Employment Competition and Wage Suppression.**

The final rule makes significant improvements to the H-1B process by mitigating the severe fiscal harm to U.S. workers caused by the current wage level methodology used by DOL.<sup>15</sup> Criticism of the way in which the wage levels are currently set is longstanding and exists across the political spectrum.<sup>16</sup> As DOL explained its recent rulemaking, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, there is significant empirical and statistical evidence that indicates the existing DOL wage level structure has allowed employers to lawfully underpay foreign workers.<sup>17</sup> Approximately sixty percent of H-1B positions certified by DOL are assigned wage levels well below the local median wage for the occupation.<sup>18</sup> 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 a 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.<sup>19</sup>

DOL's adequate wage structure, combined with DOL's inability to challenge an employer's claim regarding a worker's skill level,<sup>20</sup> creates a great incentive for employers to prefer hiring a foreign worker over a U.S. worker and makes it easy to game the system, contrary to Congressional intent. The following tables demonstrate the H-1B "prevailing wages" for various cities and the substantial average annual savings (relative to the median) the H-1B prevailing wage system generates for employers hiring an H-1B worker compared to hiring an American:

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<sup>15</sup> 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 Mar. 9, 2021).

<sup>16</sup> Press Release, *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 Mar. 9, 2021).

<sup>17</sup> See *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3,608 (Jan. 14, 2021); *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020).

<sup>18</sup> Costa and 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 Mar. 9, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> See 8 U.S.C. § 1182(n)(1).

**Table:****New York Salt Lake City San Francisco Minneapolis Hartford**

**Level 1:** \$58,053.00 \$47,861.00 \$66,518.00 \$54,038.00 \$59,010.00

**Level 2:** \$74,714.00 \$63,627.00 \$85,634.00 \$67,330.00 \$70,533.00

**Level 3:** \$91,395.00 \$79,373.00 \$104,770.00 \$80,642.00 \$82,035.00

**Level 4:** \$108,056.00 \$95,139.00 \$123,885.00 \$93,933.00 \$93,558.00

**Average H-1B Employer Savings:**

\$21,342.48 \$20,164.08 \$24,484.94 \$17,030.22 \$14,732.22<sup>21</sup>

To make matters worse, H-1B petitioners are generally not required to demonstrate a shortage of U.S. workers as a prerequisite for obtaining H-1B workers. Employers who petition foreign workers for the H-1B program are only required to check a box on the Labor Condition Application affirming they recruited U.S. workers in good faith if they seeking to hire an alien earning less than \$60,000 and without a graduate degree.

There is little justification for this phenomenon in the H-1B context. As DOL explained in the *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States* Interim Final Rule, “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.”<sup>22</sup> By allowing companies to pay foreign worker beneficiaries significantly below the median wage for open position, the current wage structure creates an incentive to prefer foreign workers to U.S. workers, an incentive that is at odds with the statutory scheme and depresses the wages of the domestic labor market.

The final rule promulgated by DHS, however, will substantially mitigate fiscal harm to U.S. workers caused by this wage structure. By requiring USCIS to prioritize registrations (or petitions) with proffered wages equaling or exceeding Level 4 to Level 1, in descending order, this rule creates a significant incentive to pay foreign workers higher wages. 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

<sup>21</sup> *The Impact of High-Skilled Immigration on U.S. Workers*, Hearing before the Senate Committee on the Judiciary, 113<sup>th</sup> Cong. (2016), Testimony of John M. Miano, J.D., available at <https://www.judiciary.senate.gov/imo/media/doc/02-25-16%20Miano%20Testimony.pdf> (last visited Mar. 9, 2021).

<sup>22</sup> *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 6,3872 (Oct. 8, 2020).

with similar levels of education, experience, and responsibility as the H-1B beneficiaries, employers will have little reason to prefer potential H-1B beneficiaries 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.<sup>23</sup>

Conversely, a purely random selection process does not serve the H-1B program, further Congressional intent, nor protect U.S. workers. Rather, the purely random selection process fosters a “race to the bottom” labor market, resulting in unfair competition to U.S. workers and wage suppression within industries that participate in the H-1B program by allowing employers to offer workers’ wages that fall significantly below average domestic wages. These tactics benefit only profit-collectors and undermine the H-1B program’s primary purposes.

### **B. Economic Conditions Caused by the COVID-19 Crisis Necessitate Swift Implementation of the Final Rule.**

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. DHS must implement the final rule without delay to mitigate the serious fiscal harm that will result from continued use of the current, inadequate H-1B selection process.

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.<sup>24</sup> DOL data shows that the United States 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 first few weeks of the pandemic.<sup>25</sup> Although DOL reported an unemployment rate of 6.3 percent for February 2021,<sup>26</sup> the Federal Reserve Chair Jerome H. Powell explained that the true unemployment rate, after misclassification errors were analyzed, was more likely “close to 10 percent.”<sup>27</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> 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 Mar. 9, 2021).

<sup>25</sup> Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation – February 2021*, Mar. 5, 2021, available at <https://www.bls.gov/news.release/pdf/empsit.pdf> (last visited Mar. 9, 2021).

<sup>26</sup> *Id.*

<sup>27</sup> 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).

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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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 admitted to the United States are paid fairly. Accordingly, FAIR strongly urges DHS to implement the final rule without delay. U.S. workers cannot afford to wait another calendar year for DHS to address the improper and unfair competition in the labor market.

### **C. The Final Rule Will Promote Productivity, Development, and Innovation Within the U.S. Economy.**

Prioritizing wage levels in the registration selection process incentivizes employers to offer higher wages, or to petition for positions requiring higher skills and higher-skilled foreign workers that are commensurate with higher wage levels, to increase the likelihood of selection for an eventual petition because salary is a reasonable proxy for skill level.<sup>31</sup> It is uncontroversial that when the skill level required for a position increases relative to the occupation, so should the position's wage level. Even where some employers choose to offer a higher wage for a certain worker beyond the required prevailing wage relative to the worker's relative skill level, the higher wage is still a reasonable reflection of the value the employer places on that particular worker, if not for skill level per-se, then for other sought-after qualities that worker could bring to the business.

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<sup>28</sup> 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 Mar. 9, 2021).

<sup>29</sup> *Id.*

<sup>30</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub.L. 116–136; Clifford Colby, *Stimulus Bill Poised to Pass Wednesday Morning, When Will Biden Sign*, Mar. 9, 2021, available at <https://www.cnet.com/personal-finance/stimulus-bill-poised-to-pass-wednesday-morning-when-will-biden-sign/> (last visited Mar. 9, 2021).

<sup>31</sup> See *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872, 63874 (Oct. 8, 2020) (it is a “largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.”).



For over a decade, the number of H-1B cap-subject petitions has exceeded the annual H-1B numerical allocations.<sup>32</sup> Prioritizing the admission of higher-skilled workers “would benefit the economy and increase the United States' competitive edge in attracting the ‘best and the brightest’ in the global labor market,” enhance productivity in industries that utilize the program, and be more likely to encourage innovation, consistent with the goals of the H-1B program.<sup>33</sup> Accordingly, FAIR agrees with DHS’s conclusion that the changes made by the final rule would better ensure that the H-1B cap prioritizes relatively higher-skilled, higher-valued, or higher-paid foreign workers rather than continuing to allow limited cap numbers to be allocated to workers in lower-skilled or lower-paid positions, for which U.S. workers may be available.<sup>34</sup>

FAIR disagrees with commenters who allege that professions that typically pay less than others that utilize the H-1B program to fill vacancies will be disadvantaged. Because the final rule requires USCIS to rank and select registrations (or petitions) based on the highest OES prevailing wage level that the proffered wage equals or exceeds for the relevant SOC code, the method of ranking will take into account wage variations by occupation. In other words, registrations (or petitions) will be ranked by the percentile of the proffered wage rates, not the actual dollar amount of wages. Accordingly, registrations (or petitions) will compete against workers similarly situated professions, and not against professions with the highest paid employees.

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<sup>32</sup> Total Number of H-1B Cap-Subject Petitions Submitted FYs 2016-2020, USCIS Service Center Operations (SCOPS), June 2019. Total Number of Selected Petitions data, USCIS Office of Performance and Qualify (OPQ), Performance Analysis and External Reporting (PAER), July 2020.

<sup>33</sup> See Muzaffar Chrishti and Stephen Yale-Loehr, Migration Policy Institute, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later* (July 2016), available at [https://www.migrationpolicy.org/sites/default/files/publications/1990-Act\\_2016\\_FINAL.pdf](https://www.migrationpolicy.org/sites/default/files/publications/1990-Act_2016_FINAL.pdf) (“Sponsors of [the Immigration Act of 1990 which created the H-1B program as it exists today] believed that facilitating the admission of higher-skilled immigrants would benefit the economy and increase the United States' competitive edge in attracting the ‘best and the brightest’ in the global labor market.”) (last visited Mar. 9, 2021).

<sup>34</sup> See Daniel Costa and Ron Hira, Economic Policy Institute, *H-1B Visas and Prevailing Wage Level* (May 4, 2020), available at <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/> (explaining that “three-fifths of all H-1B jobs were certified at the two lowest prevailing wages in 2019...., and, “[i]n fiscal year (FY) 2019, a total of 60% of H-1B positions certified by Department of Labor (DOL) had been assigned wage levels [I and II]: 14% were at H-1B Level 1 (the 17th percentile) and 46% per at H-1B Level 2 (34th percentile)”) (last visited Mar. 9, 2021); Norman Matloff, “*Where are the ‘Best and Brightest?’*” (June 8, 2013), available at <https://www.barrons.com/articles/SB50001424052748703578204578523472393388746> (“The data show that most of the foreign tech workers are ordinary folks doing ordinary work.”) (last visited Mar. 9, 2021); Norman Matloff, Center for Immigration Studies, *H-1Bs: Still Not the Best and the Brightest* (May 12, 2008), available at <https://cis.org/Report/H1Bs-Still-Not-Best-and-Brightest> (presenting “data analysis showing that the vast majority of the foreign workers—including those at most major tech firms—are people of just ordinary talent, doing ordinary work.”) (last visited Mar. 9, 2021).

Additionally, FAIR disagrees with commenters who claim that the final rule will significantly impede the ability of foreign health care workers, STEM workers, academics, and recent graduates to obtain work authorization in the United States. While it is true that workers with lower skill or experience levels, such as recent graduates, will be less likely to receive H-1B visas on account of the final rule's selection methodology, these commenters are disregarding the numerous cap exemptions and alternative pathways that Congress created to account for these types of workers.

As DHS explained in the final rule, Congress exempted from the annual H-1B cap foreign workers who are employed or have received offers of employment at institutions of higher education, non-profit entities related to or affiliated with institutions of higher education, non-profit research organizations, or government research organizations.<sup>35</sup> Additionally, workers may be eligible to participate in visa programs designed to address specific labor shortages, such as the commonly-referred to Physician National Interest Waiver Program,<sup>36</sup> which are not subject to the H-1B cap. DHS data showed that in fiscal year 2019, more than 93 percent of H-1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and, thus, not subject to the H-1B cap selection process.<sup>37</sup> Additionally, recent graduates who are unable to secure job offers in the United States with sufficiently high wages to obtain H-1B visas may instead participate in Optional Practical Training (OPT), where graduates can obtain additional skills and experience to warrant higher wages. OPT allows for an additional 24-month extension to STEM graduates.<sup>38</sup>

It is also important to note that there is little evidence supporting the notion that vacancies for entry-level or low-skill STEM workers exist in the domestic job market that U.S. workers and recent U.S. graduates cannot fill. Rather, data shows that more than a third of recent U.S. graduates with STEM degrees are unable to obtain employment in a STEM field following graduation.<sup>39</sup>

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<sup>35</sup> 8 U.S.C. § 1184(g)(5); 8 C.F.R. § 214.2(h)(8)(iii)(F).

<sup>36</sup> See 8 U.S.C. § 1153(b)(2)(B)(ii).

<sup>37</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Policy and Strategy, Policy Research Division, *Wage Level of H-1B Initial Employment Physician Approvals (Cap-Subject and Cap-Exempt)*, Fiscal Year 2019, Database Queried: PETAPP, Report Created: 11/18/2020, Systems: C3 via SASPME, DOL OFLC Performance DATA H1B for 2019 (showing that, in FY 2019, more than 93 percent of H-1B petitions approved for initial employment for physicians, surgeons, and dentists were cap-exempt and not subject to the H-1B cap selection process).

<sup>38</sup> See 8 C.F.R. § 214.2(f)(10)(ii).

<sup>39</sup> See Ron Hira and Bharath Gopaldaswamy, *Reforming US' High-Skilled Guestworker Program*, Atlantic Council (Jan. 2019), at 7, available at [https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming\\_US\\_High-Skilled\\_Guestworkers\\_Program.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf) ("Further examining the career transitions of these graduates, we look at the reasons why a third of computer science graduates, and nearly half of engineering graduates, do not go into a job directly related to their degree (Figure E). For computer science graduates employed one year after graduation (i.e., excluding those unemployed or in graduate school), about half of those who took a job outside of IT say they did so because the career prospects were better

Preserving Congress' intent to help U.S. employers fill actual labor shortages in positions requiring highly skilled or highly educated workers, serves the best interests of U.S. workers, the overall economy, and "the best and brightest" foreign workers outweighs the interests of businesses only willing to hire lower-skilled and lower-paid foreign workers. True vacancies in labor markets should enhance the value hiring foreign workers at least the prevailing (or average) wage (Level 3) in the domestic labor market.

#### **D. The Final Rule Will Benefit High-Skilled H-1B Beneficiaries.**

H-1B beneficiaries will also benefit significantly from implementation of the final rule. As explained above and repeatedly by DHS, the final rule will nearly eliminate all incentives to underpay a foreign worker by offering wages below the prevailing wage for the profession.<sup>40</sup> Because an employer must petition for a foreign worker in order to for the worker to participate in an employment-based visa program and employers have significant power over an H-1B's ability to remain in the United States, many foreign workers have substantially less negotiating power with regards to salary and labor conditions compared to U.S. workers in similar occupations.

The final rule also makes no changes to the number of visas allocated for the H-1B program nor alters substantive eligibility requirements. Accordingly, because of the extremely high demand demonstrated year after year for H-1B visas,<sup>41</sup> there is little reason to believe that implementation of this rule will result in fewer visas issued under the H-1B program. The final rule will, however, will provide both petitioning employers and foreign workers greater predictability in the selection process than a purely random selection lottery. The selection process created by the final rule is also more equitable than the current random lottery system because it is hinged on a factor that correlates closely with the merit and value a potential H-1B beneficiary may provide to a business.

The purely random selection process USCIS currently uses, on the other hand, harms H-1B beneficiaries because it allows employers to offer workers' wages that fall significantly below competitive domestic wages with no consequence. Currently, employers are only required to offer wages equal or exceed a Level 1 wage rate for that profession, which is currently set at the 17<sup>th</sup> percentile of domestic worker's wages in that

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elsewhere, and roughly a third because they couldn't find a job in IT. For engineering graduates, it's about an even split, with approximately one-third each saying they did not enter an engineering job either because of career prospects or they couldn't find an engineering job. In short, of those graduates with the most IT-relevant education, a large share report they were unable to find an IT job while others found IT jobs to be paying lower wages or offering less attractive working conditions and career prospects than other, non-STEM jobs.") (last visited Mar. 9, 2021).

<sup>40</sup> *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1676 (Jan. 8, 2021).

<sup>41</sup> See U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Reports and Studies*, <https://www.uscis.gov/tools/reports-studies/reports-and-studies> (last visited Mar. 9, 2021).

profession. As discussed above, neither a foreign worker nor DOL have the practical ability to challenge an employer's claim regarding the worker's skill level.<sup>42</sup> Accordingly, the current system benefits only profit-collectors and undermines the interests of "the best and brightest" foreign workers seeking to contribute to the U.S. economy.

#### IV. CONCLUSION

FAIR strongly urges DHS to implement this final rule without delay. This final rule will allow DHS to more effectively protect U.S. workers against competition from foreign labor at a time when U.S. workers need protection more than ever. 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 encouraged to continue to underpay H-1B beneficiaries because of the outdated and illogical current wage structure. The final rules will mitigate the harmful impact the current wage level structure puts on the domestic labor market, likely increase productivity, development, and innovation within the U.S. economy, and benefit higher-skilled H-1B beneficiaries from wage suppression.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', written in a cursive style.

Dan Stein  
President  
Federation for American Immigration Reform (FAIR)

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<sup>42</sup> See 8 U.S.C. § 1182(n)(1).