FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

June 1, 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-2021-0003: Request for Information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States

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 request for information, as published in the Federal Register on April 2, 2021. *See Request for Information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States* (DOL Docket No. ETA–2021-0003).

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

On January 14, 2021, DOL issued *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3608, (final rule) 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). DOL has since delayed implementing this rule and solicited public input on the methodology for determining prevailing wage rates. While FAIR believes the final rule would make an important first step to reduce wage suppression, unfair employment competition with U.S. workers, and exploitation of foreign workers, FAIR does not believe the rule went far enough to further these interests consistently with Congressional intent and the interests of both U.S. and foreign workers. Accordingly, FAIR urges DOL to update its wage rate methodology to impose higher wage levels for rates 1-4 so that each level meets or exceeds the local median wage for an occupation, or in the alternative, maintain the updated wage rates created by the final rule by implementing it without further delay.

II. Background

Congress has imposed restrictions on immigration, including wage rate requirements for certain foreign workers, in order to "preserve jobs for American workers," and ensure safeguards to the domestic labor market.[1] To further this end, 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."[2] 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."[3] If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.[4] 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. Congress designed this scheme to "protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers."[5]

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[1] Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 893 (1984); see H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50-51 (1952) (discussing the INA's "safeguards for American labor").
[2] 8 U.S.C. § 1182(n)(1)(A).
[3] 8 U.S.C. § 1182(p)(4).
[4] *Id*.
[5] *See, e.g.*, Public Law 105-277 § § 412-13, 112 Stat. 2681, 2981-642 to -650 (1998). *See also* H.R. Rep. No. 101-723(I), 101st Cong., 2d Sess. 44, 66-67 (1990) ("[IMMACT 90] recognizes that certain entry-level workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H-1 category has produced undue reliance on alien workers."); 144 Cong. Rec. S12741, S12749 (daily ed. October 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H-1B provisions of the American Competitiveness and Workforce Improvement Act as being to ensure "that companies will not replace

The principal changes made by DOL's final 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 more consistently with Congress's intent. The rule also applied the new wage rates to 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:

Original wage rate percentiles (pre-rule):

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

Final rule's wage rate percentiles:

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

FAIR generally supports DOL's wage rate methodology encompassed by the final rule but recommends strengthening protections for U.S. workers and mitigating exploitation of foreign workers by raising Level 1's percentile to equal or exceed the prevailing wage, or the median wage, for a certified position.

III. Raise the Prevailing Wage Rates to Protect U.S. and Foreign Workers

DOL's current wage rate levels are inadequate, have caused serious fiscal harm to U.S. workers and resulted in the exploitation of many foreign worker-beneficiaries. Although a substantial step in the right direction, the final rule continues to conflict with the INA and fails U.S. workers by allowing employers to legally pay 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 DOL to provide four wage levels that consider experience, education, and the level of supervision, any wage level less than the prevailing wage for an occupation and location should be invalid for H-1B purposes.

American workers with foreign born professionals, including increased penalties and oversight, as well as measures eliminating any economic incentive to hire a foreign born worker if there is an American available with the skills needed to fill the job.").

FAIR strongly urges DOL to utilize its regulatory authority to come into compliance with the INA and set the Level 1 wage rate for an occupation to the local median wage in order to require that employers pay at least the prevailing wage for all foreign workers they employ under the relevant nonimmigrant visa programs.

FAIR believes that the local median wage for an occupation is the minimum wage rate that should be paid to a foreign worker to safeguard U.S. wage and labor standards and ensure that foreign workers are compensated fairly. By historically setting two of the four wage levels below the prevailing wage, DOL has in effect made wage suppression a selling point of these employment-based visa programs. Changing program rules to require above-median wages for foreign workers would reduce the hiring of H-1B workers as a money-saving tactic, ensuring that companies will use the program only to bring in workers who truly have special skills—rather than using foreign workers as a means to fill entry-level positions at a discount. These changes are urgently needed following the devastating COVID-19 pandemic and resulting economic downturn beginning last year.

1. The current wage rates are inadequate, have caused serious fiscal harm to U.S. workers, and resulted in the exploitation of many of the visa programs' foreign workers beneficiaries.

Criticism of the way in which the prevailing wage rates are currently set is longstanding and exists across the political spectrum.[6] As DOL explained in the Interim Final Rule titled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 43872 (IFR), a primary reason for reforming the manner in which it sets prevailing wage levels in the H-1B and Program Electronic Review Management (PERM) programs is that the old wage rates were never justified through an economic analysis, nor codified in rulemaking through notice and comment, and are in substantial tension with the statutory framework.[7] Failure to update the methodology, however, has resulted in serious fiscal harm to U.S. workers, which rulemaking can remedy.

Because the INA has restricted DOL's adjudicative authority to challenge an employer's claim regarding a foreign worker's skill level, employers are easily able to claim that a foreign worker fits any of the skills levels without concern. Regardless of the worker's actual skill level, DOL has no power to challenge that claim.[8] Consequently, the four skill

[6] 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 May 30, 2021).
[7] 85 Fed. Reg. 63872 (Oct. 8, 2020).
[8] 8 U.S.C. § 1182(n)(1).

levels mandated by Congress are meaningless for the purposes of labor protection.[9] Only the lowest prevailing wage level has practical significance in deterring unfair employment competition with U.S. workers.[10] Maintaining the lowest skill level (Wage Rate 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.

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.[11] Approximately sixty percent of H-1B positions certified by DOL are assigned wage levels well below the local median wage for the occupation.[12] 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.[13]

Analysis of approved labor certifications also suggests that petitioners are utilizing employment visa programs for the sole purpose of keep labor costs low. For example, during fiscal year 2020, DOL approved LCA certifications for the employment of:

- A nuclear engineer in Illinois at just a $33,592 annual salary;
- A genome sequencing analyst in Tennessee at just a $32,094 annual salary;
- An tenure-track assistant engineering professor in Texas at just a $19,200 annual salary;
- A director of eSports in Florida at just a $21,260 annual salary; and
- An engineer in Texas at just a $27,040 annual salary.

It stands to reason that the petitioning employers were only unable to find willing and qualified U.S. workers to take these positions because the pay offered is significantly below market wages or, in some cases, even living wages for U.S. workers in these locations. While these examples only represent a small sample of the thousands of LCA

[9] 8 U.S.C. § 1182(p).
[10] 8 U.S.C. § 1182(n)(1).
[11] See, e.g., 86 Fed. Reg. 3608 (Jan. 14, 2021); 85 Fed. Reg. 63872 (Oct. 8, 2020).
[12] 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).
[13] *Id*.

certifications that are approved annually, there is significant evidence to suggest that this phenomenon is occurs regularly within the H-1B and PERM employment programs.[14]

There is little justification for this phenomenon in the H-1B context specifically. As DOL explained in its rulemaking, "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."[15] By allowing companies to pay foreign worker beneficiaries significantly below the median wage for an open position, the current wage structure creates an incentive to prefer foreign workers over 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 workers (which is true in the EB-2 and EB-3 context, and 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 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.[16] 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.

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[14] See, e.g., Atlantic Council, Reforming US' High-Skilled Guestworker Program, (2019), available at https://www.atlanticcouncil.org/in-depth-research-reports/report/reforming-us-high-skilled-immigration-program/; The Impact of High-Skilled Immigration on U.S. Workers: Hearing before the Senate Committee on the Judiciary (February 25, 2016) (testimony of John Miano, representing Washington Alliance of Technology Workers, Local 37083 of the Communications Workers of America, the AFL-CIO); Norman Matloff, On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations, 36 U. Mich. J.L. Reform 815 (2003).

[15] 85 Fed. Reg. 63872 (Oct. 8, 2020).

[16] 8 U.S.C. § 1182(n)(1).

2. Failure to Adequately Raise Wage Rate Levels Only Harms Foreign Workers.

Foreign workers participating in the above-mentioned visa programs stand to benefit from FAIR's recommendation to raise H-1B and PERM program wage rates to levels that meet or exceed the prevailing wage. Because this rule makes no change to the number of visas allocated for each category, and because of the exceedingly high demand demonstrated year after year for visas in these categories, there is little reason to believe that updating the wage levels to require employers pay foreign workers at least the prevailing wage for the profession will result in fewer visas issued under these visa programs.[17] Foreign workers should be paid competitive wages compared to their American counterparts. Likewise, DOL should strip employers of incentives to mischaracterize a foreign worker's actual skill and experience level to circumvent safeguards Congress created to protect U.S. workers.

As DOL has 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.[18] Specifically, raising the wage rate for Level 1 employees from 17 percent to at least 50 percent, however, will result in a significant and more equitable pay increase for foreign workers selected for these visa programs.

3. Economic Conditions Caused by the COVID-19 Crisis Necessitate Swift Regulatory Action to Raise Wage Rate Levels.

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 raise wage rates to require employers pay foreign workers at least the local median wage without delay in order to mitigate the serious fiscal harm and unfair labor competition caused by the current wage level structure. In the interim, DOL should implement the final rule which has already been completed to instill significant improvements in the labor-force from the status quo.

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

[17] 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 May 30, 2021).
[18] 85 Fed. Reg. 63872, 63878 (Oct. 8, 2020).

industries and occupations in the United States, resulting in mass layoffs and business closures. The nonpartisan Congressional Budget Office (CBO) has predicted that the U.S. labor market will take over a decade for conditions to return to pre-pandemic levels.[19] 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 first few weeks of the pandemic.[20] Despite the fact over half of Americans have received a COVID-19 vaccine, the unemployment rate has not changed substantially since January 2021, and remains at approximately 6.1 percent.[21] In January, however, 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."[22]

In April, the number of U.S. workers not in the labor force who currently want a job was estimated to be 6.6 million, up by 1.6 million since February 2020.[23] These individuals are not counted as unemployed because they were not actively looking for work during the last 4 weeks or were unavailable to take a job.[24] Of the overall 10 million people currently counted as 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 7.9 percent of Hispanics, 9.7 percent of Black people, and 5.7 percent of Asians are unemployed domestically.[25] Additionally, nearly 60 percent of people who left the workforce since February 2020 are women.[26]

This crisis has been so severe that Congress has passed and continues to consider trillion-dollar stimulus packages to provide emergency funding to unemployed persons and struggling businesses.[27] The government has both a moral and legal obligation to ensure

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[19] 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 May 30, 2021).
[20] U.S. 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 May 30, 2021).
[21] U.S. Bureau of Labor Statistics, U.S. Department of Labor, The Employment Situation – April 2021 (May 7, 2021) *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited May 30, 2021).
[22] 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).
[23] U.S. Bureau of Labor Statistics, U.S. Department of Labor, The Employment Situation – April 2021 (May 7, 2021) *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited May 30, 2021).
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Coronavirus Aid, Relief, and Economic Security* (CARES) Act, Pub.L. 116–136; *American Rescue Plan Act of 2021*, Pub. L. No. 117-2 (2021).

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 raise the wage rate levels without delay because U.S. workers cannot afford to wait another full calendar year for them to address the improper and unfair competition in the labor market.

4. There is No Labor Shortage in the United States that Justifies Increasing Immigration Levels or Reducing Wage Rates.

The United States is not experiencing a labor shortage that justifies increasing immigration levels to fill positions at lower-than-average wages.[28] Rather, the myth of a labor shortage is a fabrication that has been perpetuated by both business and mass-immigration lobbyists, benefitting only profit-collectors at the expense of labor conditions and workers' employment security. The labor shortage myth serves two primary objectives: 1) keeping labor costs artificially low, thereby increasing businesses' and immigration attorneys' bottom lines; and 2) providing an argument to increase immigration levels to benefit special interest groups and political elites.

There are far more unemployed people than available jobs in the current labor market.[29] In the latest data on job openings, there were nearly 40% more unemployed workers than job openings overall, and more than 80% more unemployed workers than job openings in the leisure and hospitality sector.[30]

Rather, recent data indicates that there are only signs of short term labor shortages directly resulting from the COVID-19 crisis in just two sectors: the leisure and hospitality sectors.[31] Significant evidence suggests that these limited shortages are not a result of a lack of unwilling or unqualified Americans to do these jobs, but rather a combination of factors specific to the COVID-19 crisis and the low-paying conditions in these sectors.[32] Wages in leisure and hospitality equate to annual earnings of just $20,628, and total

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[28] https://www.epi.org/blog/u-s-labor-shortage-unlikely-heres-why/

[29] U.S. Bureau of Labor Statistics, U.S. Department of Labor, *Job Openings And Labor Turnover – March 2021* (May 11, 2021) *available at* https://www.bls.gov/news.release/pdf/jolts.pdf (last visited May 30, 2021).

[30] U.S. Bureau of Labor Statistics, U.S. Department of Labor, The Employment Situation – April 2021 (May 7, 2021) *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited May 30, 2021).

[31] *Id.*

[32] *See, e.g.*, Josh Bivens and Heidi Shierholz, Economic Policy Institute, Restaurant Labor Shortages Show Little Sign of Going Economywide (May 11, 2021), *available at https://www.epi.org/blog/restaurant-labor-shortages-show-little-sign-of-going-economywide-policymakers-must-not-rein-in-stimulus-or-unemployment-benefits/* (last visited May 30, 2021); Heidi Shierholz, Economic Policy Institute, *U.S. labor shortage? Unlikely. Here's why*, (May 4, 2021) *available at* https://www.epi.org/blog/u-s-labor-shortage-unlikely-heres-why/ (last visited May 30, 2021).

wages in leisure and hospitality account for just 4% of total private wages in the U.S. economy.[33]

Since the beginning of the pandemic, many of these jobs have become inherently more stressful and potentially dangerous to workers with health concerns. Millions of Americans continue to cite health concerns and child care difficulties as a reason for reluctance to return to work.[34] Additionally, many positions in these sectors are overworked and stretched thin to make up for layoffs of former colleagues. Jobs that have become more difficult and more dangerous should require higher rates of pay.

Further, the recent stimulus bills passed by Congress have allowed many unemployed workers to receive additional unemployment benefits. This extra income has allowed some to delay returning to work in low-pay sectors. A true labor shortage would necessitate employers to offer higher wages, but there is little evidence of that happening across these industries.[35] What has resulted is not a true labor shortage, but rather, as economists from the Economic Policy Institute explained, "that's the market functioning."[36]

Additionally, the notion that there are certain essential jobs that "Americans won't do" is a similarly fictitious and harmful myth.[37] Analysis of Department of Commerce data shows that of the 474 uniquely identified occupations in the United States, just six occupations are held by a majority of foreign workers.[38] For example, many occupations stereotypically believed of being held by non-native workers (including both legal immigrants and illegal aliens) are in fact held by majority native-born employees. These occupations include:

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[33] U.S. Bureau of Labor Statistics, U.S. Department of Labor, Economic News Release, *Table B-8: Average hourly and weekly earnings of production and nonsupervisory employees on private nonfarm payrolls by industry sector, seasonally adjusted*, (May 7, 2021) *available at* https://www.bls.gov/news.release/empsit.t24.htm (last visited May 30, 2021).

[34] Gwynn Guilford, Wall Street Journal, *The Other Reason the Labor Force Is Shrunken: Fear of Covid-19* (Apr. 11, 2021) *available at* https://www.wsj.com/articles/the-other-reason-the-labor-force-is-shrunken-fear-of-covid-19-11618163017?mod=djemMoneyBeat_us (last visited May 30, 2021). As further evidence of this, vaccination rates correlate positively with increased employment across states.

[35] The White House, *The Pandemic's Effect on Measured Wage Growth* (April 19, 2021) *available at* https://www.whitehouse.gov/cea/blog/2021/04/19/the-pandemics-effect-on-measured-wage-growth/ (last visited May 30, 2021).

[36] Heidi Shierholz, Economic Policy Institute, *U.S. labor shortage? Unlikely. Here's why*, (May 4, 2021) *available at* https://www.epi.org/blog/u-s-labor-shortage-unlikely-heres-why/ (last visited May 30, 2021).

[37] Steven A. Camarota, Jason Richwine, and Karen Zeigler, Center for Immigration Studies, *There Are No Jobs Americans Won't Do, A Detailed Look at Immigrations (Legal and Illegal) and Natives Across Occupations* (Aug. 2018) *available at* https://cis.org/Report/There-Are-No-Jobs-Americans-Wont-Do (last visited May 30, 2021).

[38] *Id.*

- Maids and housekeepers: 51 percent native-born
- Taxi drivers and chauffeurs: 54 percent native-born
- Butchers and meat processors: 64 percent native-born
- Grounds maintenance workers: 66 percent native-born
- Construction laborers: 65 percent native-born
- Janitors: 73 percent native-born[39]

Even in the six occupations held by a majority of foreign workers, U.S. workers account for at least 46 percent of workers.[40] Further, these occupations do not represent a large share of the U.S. economy, and only employ less than 1 percent of all U.S. workers and 3 percent of foreign workers in the United States.[41]

Even outside of the immigration-debate, experts have characterized the labor shortage as a myth.[42] As the *New York Times* recently opined in an article discussing labor conditions, employers should raise wages if they claim to be experiencing a labor shortage, stating, "[c]apitalism has the answer."[43] Employers should raise wages to attract able workers. There are no jobs Americans will not do; only wages and labor conditions they will not accept. DOL must not be complicit in "race to the bottom" labor tactics that restrict economic opportunity and labor conditions for both U.S. and foreign workers.

IV. Additional Reforms to Protect U.S. and Foreign Workers

In addition to raising wage level rates to exceed the prevailing wage, FAIR recommends that DOL make additional reforms to the Labor Condition Application process through rulemaking to further protect U.S. workers from unfair employment competition, reduce exploitation of foreign workers, and mitigate abuse of pertinent visa programs by unscrupulous employers.

First, FAIR recommends that the DOL amend its LCA form to prohibit employers from submitting blanket certifications, and instead, require employers to specifically identify each nonimmigrant worker certified. The practice of allowing employers to use blanket petitions to hire unidentified foreign workers undermines Congress' intent that foreign workers be admitted only when qualified U.S. workers are unavailable.[44] Using

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[39] *Id*.
[40] *Id*
[41] *Id.*
[42] David Leonhardt, New York Times, *Why the Pandemic Labor Shortage is More Myth Than Reality* (May 20, 2021) *available at* https://www.nytimes.com/2021/05/20/briefing/labor-shortages-covid-wages.html (last visited May 30, 2021).
[43] *Id.*
[44] See, e.g., Public Law 105-277 § § 412-13, 112 Stat. 2681, 2981-642 to -650 (1998). See also H.R. Rep. No. 101-723(I), 101st Cong., 2d Sess. 44, 66-67 (1990) ("[IMMACT 90] recognizes that certain entry-level

unidentified foreign worker certifications makes it virtually impossible for the government to enforce this requirement and uncover fraud or abuse in these visa programs.

Second, FAIR recommends the DOL require full-time employment of H-1B workers. If an employer is permitted to petition for the employment of a part-time foreign worker, then employers have an additional opportunity to exploit foreign workers by claiming that periods of nonpayment are due to the foreign worker's part-time status. Employers are thus able to demand full time work but pay the workers only part-time rates or underpay workers for part-time work, without detection from DOL and further undermining Congress' protection against the displacement of U.S. workers.

Third, FAIR urges DOL to amend its regulations to prohibit employers from charging expenses to H-1B and PERM beneficiaries that are not customary for American workers, such as housing expenses.[45] Allowing the employer to serve as a vendor to its employees opens the door to abuse, such as requiring the beneficiaries to use the petitioner's products and services and furthering the unequal power dynamic that prevents foreign workers from reporting an employer's illegal or otherwise abusive practices to the U.S. government. Allowing employers to charge foreign workers for such expenses is another way these visa programs further reduce labor related costs, making hiring U.S. workers less desirable for businesses.

Fourth, FAIR urges DOL to update its regulations to amend the LCA form to require petitioners to provide a government wage source, rather than relying on difficult to verify private wage studies to validate the wage proffered to a foreign worker beneficiary. By allowing employers to use an "independent authoritative source" or "another legitimate source of wage information,"[46] many employers have been allowed to underpay foreign workers by referring to private sources that do not meet this definition and are difficult to verify. Accordingly, DOL should amend 20 CFR § 655.731 to require only government sources and engage in unbiased data collection. This change would promote transparency and strengthen DOL's limited enforcement authority,[47] further protect U.S. workers, and mitigate exploitation of foreign workers.

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workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available. At the same time, heavy use and abuse of the H-1 category has produced undue reliance on alien workers."); 144 Cong. Rec. S12741, S12749 (daily ed. October 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H-1B provisions of the American Competitiveness and Workforce Improvement Act as being to ensure "that companies will not replace American workers with foreign born professionals, including increased penalties and oversight, as well as measures eliminating any economic incentive to hire a foreign born worker if there is an American available with the skills needed to fill the job.").

[45] 20 C.F.R. § 655.731.

[46] 20 C.F.R. §§ 655.715, 655.731.

[47] 20 C.F.R. § 655.740.

V. Conclusion

Congress created certain safeguards to ensure that employers make a good faith effort to recruit and hire U.S. workers before turning to cheap foreign labor. Unfortunately, DOL's current systems fail to enforce these protections. To ensure that employment-based visa programs operate in line with Congressional intent and are not administered to the detriment of U.S. workers' interests while exploiting their foreign counterparts, FAIR supports implementation of DOL's final rule to raise wage rate levels. More must be done, however, to improve the effectiveness of the updated prevailing wage rates. DOL must require that all wage levels conform to the statutory requirement of meeting or exceeding the prevailing wage and should implement additional safeguards to ensure that foreign workers are not exploited and U.S. workers are not unfairly stripped of economic opportunity and high-quality labor conditions in their own country.

Sincerely,

Dan Stein
President
Federation for American Immigration Reform (FAIR)