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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

DOL Docket No. ETA-2020-0006

RIN 1205-AC00

Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States

ACTION: Interim Final Rule; request for comments.

SUMMARY: The Department of Labor (DOL or the Department) is amending Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, or E-3 nonimmigrant visas. Specifically, DOL is amending its regulations governing permanent labor certifications at 20 CFR part 656 and Labor Condition Applications (LCAs) at 20 CFR part 655, subpart H to incorporate 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 primary purpose of these changes is to update the computation of prevailing wage levels under the existing four-tier wage structure to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers. This update will allow DOL to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers.

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DATES: This interim final rule is effective on [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER – **NO DELAYED EFFECTIVE DATE**]. Written comments and related material must be received on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You must submit comments, identified as DOL Docket No. ETA-2020-0006, via <https://beta.regulations.gov>, a Federal E-Government website that allows the public to find, review, and submit comments on documents that agencies have published in the *Federal Register* and that are open for comment. Simply type “1205-AC00” (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Docket: For access to the docket and to read background documents or comments received, go to the Federal e-Rulemaking Portal at <https://beta.regulations.gov>, referencing DOL Docket No. ETA-2020-0006. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 C.F.R. parts 655 and 656, contact Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Avenue, NW, Washington, DC 20210, telephone: (202) 513-7350 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

SUPPLEMENTARY INFORMATION

I. Background

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A. Legal Framework

The Immigration and Nationality Act (INA or Act), as amended, assigns responsibilities to the Secretary of Labor (Secretary) relating to the entry and employment of certain categories of immigrants and nonimmigrants.¹ This rule deals with the prevailing wage levels used with respect to the labor certifications that the Secretary issues for certain employment-based immigrants and the labor condition applications (LCA) that the Secretary certifies in connection with the temporary employment of foreign workers under the H-1B, H-1B1, and E-3 visa classifications.²

1. Permanent Labor Certifications

The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor:

has determined and certified to the Secretary of State and the Attorney General that (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.³

This “labor certification” requirement does not apply to all employment-based immigrants. The INA provides for five “preference” categories or immigrant visa classes, only

¹ There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons.

² 8 U.S.C. § 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1).

³ 8 U.S.C. 1182(a)(5)(A). Although this provision references the Attorney General, the authority to adjudicate immigrant visa petitions was transferred to the Director of the Bureau of Citizenship and Immigration Services (an agency within the Department of Homeland Security) by the Homeland Security Act of 2002, Pub. L. No. 107–296, § 451(b) (codified at 6 U.S.C. § 271(b)). Under 6 U.S.C. § 557, references in federal law to any agency or officer whose functions have been transferred to the Department of Homeland Security shall be deemed to refer to the Secretary of Homeland Security or other official or component to which the functions were transferred.

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two of which—the second and third preference employment categories (commonly called the EB-2 and EB-3 immigrant visa classifications)—require a labor certification.⁴ An employer seeking to sponsor a foreign worker for an immigrant visa under the EB-2 or EB-3 immigrant visa classifications generally must file a visa petition with the Department of Homeland Security (DHS) on the worker’s behalf, which must include a labor certification from the Secretary of Labor.⁵ Further, the Department of State (DOS) may not issue a visa unless the Secretary of Labor has issued a labor certification in conformity with the relevant provisions of the INA.⁶ If the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary so certifies to DHS and DOS by issuing a permanent labor certification. If the Secretary cannot make one or both of the above findings, the application for permanent employment certification is denied.

2. Labor Condition Applications

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations. “Specialty occupation” is defined by statute as an occupation that requires the theoretical and practical application of a body of “highly specialized

⁴ See 8 U.S.C. §§ 1153(b)(2), (3), 1182(a)(5)(D). Section 1153(b)(2) governs the EB-2 classification of immigrant work visas granted to foreign workers who are either professionals holding advanced degrees (master’s degree or above) or foreign equivalents of such degrees, or persons of “exceptional ability” in the sciences, arts, or business. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the “national interest,” such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. § 1153(b)(2)(B). Section 1153(b)(3), governs the EB-3 classification of immigrant work visas granted to foreign workers who are either “skilled workers,” “professionals,” or “other” (unskilled) workers, as defined by the statute. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

⁵ 8 U.S.C. § 1154(a)(1)(F), 1182(a)(5)(A) and (D).

⁶ 8 U.S.C. §§ 1153(b)(3)(C), 1153(b)(2), 1201(g).

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knowledge,” and a bachelor’s or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the U.S.⁷ Similar to the H-1B visa classification, the H-1B1 and E-3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries: the H-1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore,⁸ and the E-3 visa classification applies to foreign workers in specialty occupations from Australia.⁹ The Secretary must certify an LCA filed by the foreign worker’s prospective U.S. employer before the prospective employer may file a petition with DHS on behalf of a foreign worker for H-1B, H-1B1, or E-3 nonimmigrant classification.¹⁰ The LCA contains various attestations from the employer about the wages and working conditions that it will provide for the foreign worker.¹¹

B. Description of the Permanent Labor Certification Process

The Department’s regulations at 20 C.F.R. part 656 govern the labor certification process and set forth the responsibilities of employers who desire to employ, on a permanent basis, foreign nationals covered by the INA’s labor certification requirement.¹²

⁷ See 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(i).

⁸ 8 U.S.C. § 1101(a)(15)(H)(i)(b1).

⁹ 8 U.S.C. § 1101(a)(15)(E)(iii).

¹⁰ 8 U.S.C. § 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1); 8 C.F.R. § 214.2(h)(2)(i)(E).

¹¹ See generally 8 U.S.C. §§ 1182(n), (t); 20 C.F.R. part 655, subpart H.

¹² The current regulations were issued through a final rule implementing the streamlined permanent labor certification program through revisions to 20 CFR part 656 was published on December 27, 2004, and took effect on March 28, 2005. See *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326 (Dec. 27, 2004). The Department published a final rule on May 17, 2007 to enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to permanent labor certification, commonly known as “the fraud rule.” *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904 (May 17, 2007).

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Prior to filing a labor certification application, the employer must obtain a Prevailing Wage Determination (PWD) for its job opportunity from OFLC's National Prevailing Wage Center (NPWC).¹³ The standards and procedures governing the PWD process in connection with the permanent labor certification program are set forth in the Department's regulations at 20 C.F.R. §§ 656.40 and 656.41. If the job opportunity is covered by a Collective Bargaining Agreement (CBA) that was negotiated at arms-length between a union and the employer, the wage rate set forth in the CBA agreement is considered the prevailing wage for labor certification purposes.¹⁴ In the absence of a prevailing wage rate derived from an applicable CBA, the employer may elect to use an applicable wage determination under the Davis-Bacon Act (DBA) or McNamara-O'Hara Service Contract Act (SCA), or provide a wage survey that complies with the Department's standards governing employer-provided wage data.¹⁵ In the absence of any of the above sources, the NPWC will use the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey to determine the prevailing wage for the employer's job opportunity.¹⁶ After reviewing the employer's application, the NPWC will determine the prevailing wage and specify the validity period, which may be no less than 90 days and no more than one year from the determination date. Employers must either file the labor certification application or begin the recruitment process, required by the regulation, within the validity period of the PWD issued by the NPWC.¹⁷

¹³ 20 C.F.R. § 656.15(b)(1), 656.40(a).

¹⁴ See 20 C.F.R. § 656.40(b)(1).

¹⁵ See 20 C.F.R. § 656.40(b), (g).

¹⁶ See 20 C.F.R. § 656.40(b)(2).

¹⁷ 20 C.F.R. § 656.40(c).

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Once the U.S. employer has received a PWD, the process for obtaining a permanent labor certification generally begins with the U.S. employer filing an *Application for Permanent Employment Certification*, Form ETA-9089, with OFLC.¹⁸ As part of the standard application process, the employer must describe, among other things, the labor or services it needs performed; the wage it is offering to pay for such labor or services and the actual minimum requirements of the job opportunity; the geographic location(s) where the work is expected to be performed; and the efforts it made to recruit qualified and available U.S. workers. Additionally, the employer must attest to the conditions listed in its labor certification application, including that “[t]he offered wage equals or exceeds the prevailing wage determined pursuant to [20 C.F.R. §§ 656.40 and 656.41] and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment.”¹⁹

Through the requisite test of the labor market, the employer also attests, at the time of filing the Form ETA-9089, that the job opportunity has been and is clearly open to any U.S. worker and that all U.S. workers who applied for the job opportunity were rejected for lawful, job-related reasons. OFLC performs a review of the Form ETA-9089 and may either grant or deny a permanent labor certification. Where OFLC grants a permanent labor certification, the employer must submit the certified Form ETA-9089 along with an *Immigrant Petition for Alien Worker*, Form I-140 (Form I-140 petition) to DHS. A permanent labor certification is valid only

¹⁸ Applications for Schedule A occupations are eligible to receive pre-certification and bypass the standard applications review process. In those cases, employers file the appropriate documentation directly with DHS. See 20 CFR §§ 656.5, 656.15.

¹⁹ 20 CFR § 656.10(c)(1).

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for the job opportunity, employer, foreign worker, and area of intended employment named on the Form ETA-9089, and must be filed in support of a Form I-140 petition within 180 calendar days of the date on which OFLC granted the certification.²⁰

C. Description of the Temporary Labor Condition Application Process

The Department's regulations at 20 C.F.R. part 655, subpart H, govern the process for obtaining a certified LCA and set forth the responsibilities of employers who desire to temporarily employ foreign nationals in H-1B, H-1B1, and E-3 nonimmigrant classifications.

A prospective employer must attest on the LCA that (1) it is offering to and will pay the nonimmigrant, during the period of authorized employment, wages that are at least the actual wage level paid by the employer to all other employees with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of intended employment, whichever is greater (based on the best information available at the time of filing the attestation); (2) it will provide working conditions for the nonimmigrant worker that will not adversely affect working conditions for similarly employed U.S. workers; (3) there is no strike or lockout in the course of a labor dispute in the occupational classification at the worksite; and (4) it has provided notice of its filing of an LCA to its employee's bargaining representative for the occupational classification affected or, if there is no bargaining representative, it has provided notice to its employees in the affected occupational classification by posting the notice in a conspicuous location at the worksite or through other means such as electronic notification.²¹

²⁰ 20 C.F.R. § 656.30(b)(1).

²¹ 8 U.S.C. § 1182(n)(1)(A)–(C), (t)(1)(A)–(C); 20 C.F.R. §§ 655.705(c)(1), 655.730(d).

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As relevant here, the prevailing wage must be determined as of the time of the filing of the LCA.²² In contrast to the permanent labor certification process, an employer is not required to obtain a PWD from the NPWC.²³ However, like the permanent labor certification process, if there is an applicable CBA that was negotiated at arms-length between a union and the employer that contains a wage rate applicable to the occupation, the CBA must be used to determine the prevailing wage.²⁴ In the absence of an applicable CBA, an employer may base the prevailing wage on one of several sources: a PWD from the NPWC; an independent authoritative source that satisfies the requirements in 20 C.F.R. § 655.731(b)(3)(iii)(B); or another legitimate source of wage data that satisfies the requirements in 20 C.F.R. § 655.731(b)(3)(iii)(C).²⁵

An employer may not file an LCA more than six months prior to the beginning date of the period of intended employment.²⁶ Unless the LCA is incomplete or obviously inaccurate, the Secretary must certify it within seven working days of filing.²⁷ Once an employer receives a certified LCA, it must file the *Petition for Nonimmigrant Worker*, Form I-129 (“Form I-129 Petition”) with DHS if seeking classification of the alien as an H-1B worker.²⁸ Upon petition, DHS then determines, among other things, whether the employer’s position qualifies as a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position.

²² 20 C.F.R. § 655.731(a)(2).

²³ *Id.*

²⁴ *Id.*

²⁵ 20 C.F.R. § 655.731(a)(2)(ii)(A)-(C).

²⁶ 20 C.F.R. § 655.730.

²⁷ 8 U.S.C. § 1182(n)(1), (t)(2)(C); 20 C.F.R. § 655.740(a)(1).

²⁸ For aliens seeking H-1B1 or E-3 classification, the alien may apply directly to the State Department for a visa once the LCA has been certified.

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D. History and Current Use of the Four-Tiered OES Prevailing Wage Structure

Historically, the Department relied on State Workforce Agencies (SWAs) to determine prevailing wages for purposes of its nonagricultural labor certification programs.²⁹ To determine the prevailing wage for a particular job opportunity, SWAs relied on wage rates that were determined to be prevailing for the occupation and locality under other Federal laws—*e.g.*, wages issued for purposes of the DBA or SCA—or when applicable, wages negotiated in a CBA.³⁰ In the absence of such wage determinations, SWAs determined prevailing wages based on wage information obtained “by purchasing available published surveys or by conducting ad hoc surveys of employers in the area of intended employment.”³¹

Beginning at least as early as the 1990s, users of the H-1B program and permanent program users urged the Department to “create a multi-tiered wage structure to reflect the largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills.”³²

The Department first adopted a multi-tiered system to determine prevailing wages for the nonagricultural labor certification programs in 1995, when it issued General Administration Letter No. 4-95 (GAL 4-95).³³ As relevant here, GAL 4-95 directed SWAs to provide two wage levels—entry and experienced—when they conducted prevailing wage surveys for

²⁹ See, *e.g.*, *Miscellaneous Amendments*, 32 Fed. Reg. 10932 (July 26, 1967).

³⁰ See, *e.g.*, *id.*

³¹ *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 67 Fed. Reg. 30466, 30479 (May 6, 2002).

³² *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3453 (Jan. 19, 2011).

³³ General Administration Letter No. 4-95 (May 18, 1995), *available at* https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485.

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nonagricultural positions.³⁴ Specifically, under this guidance, wage rates issued under the DBA, SCA, or a collective bargaining agreement continued to be controlling, if applicable, and, when they were not, SWAs continued to conduct their own prevailing wage surveys or use published wage surveys.³⁵ However, under GAL 4-95, when SWAs conducted such surveys, they had to distinguish between entry-level positions and positions requiring several years of experience, taking into account factors like the level of education and experience required, complexity of the tasks performed, and level of supervision and autonomy.³⁶

In October 1997, the Department amended its prevailing wage guidance to incorporate the wage component of the recently-expanded OES survey.³⁷ Specifically, pursuant to General Administration Letter No. 2-98 (GAL 2-98), SWAs continued to assign prevailing wage determinations using wage rates issued under the DBA, SCA, or a CBA, where applicable. But in the absence of such wages, the Department now directed SWAs to use the OES survey (rather than conduct their own prevailing wage survey or use other public or private wage surveys).³⁸

As described below, the Department divided OES wage data into two skill levels: a Level I wage

³⁴ *See id.* at 5 (“The job related education, training and experience requirements of an occupation are factors to be considered in making prevailing wage determinations. A prevailing wage survey and/or determination should distinguish between entry level positions and those requiring several years of experience. At a minimum, a distinction should be made based on whether or not the occupation involved in the employer’s job offer is entry level or at the experienced level.”). As the Department later explained, adoption of tiered wages was necessary for the H-1B and permanent labor certification programs because job opportunities in these programs “reflect[] a wide range of experience, skills, and knowledge which appropriately correspond to stratified wage levels.” *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3461 (Jan. 19, 2011).

³⁵ GAL 4-95 at 1-2.

³⁶ *Id.* at 5-6.

³⁷ *Prevailing Wage Policy for Nonagricultural Immigration Programs*, General Administration Letter No. 2-98 (GAL 2-98) (Oct. 31, 1997), available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942.

³⁸ GAL 2-98 at 1. Under this guidance, employers could still make specific requests for prevailing wages based on different (non-OES) wage data, provided it met certain requirements. *Id.* at 8. But where an employer provided data that met applicable requirements, that data was used only to determine the prevailing wage for purposes of that employer’s job opportunity, and not for subsequent prevailing wage requests in that occupation. *See id.* at 9.

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for “beginning level employees” and a Level II wage for “fully competent employees.”³⁹ To determine the prevailing wage level applicable to a particular position, SWAs considered the level of skill required by the employer, identified the appropriate occupation, and selected the appropriate wage level.⁴⁰

GAL 2-98 was accompanied by a Memorandum of Understanding (MOU) between ETA and BLS, wherein BLS agreed to provide, through its cooperative agreements with the SWAs, two wage levels for each occupational classification in areas of intended employment, where available.⁴¹ Because the OES survey does not provide data about skill differentials within Standard Occupational Classification (SOC) codes, ETA established the entry and experienced skill levels mathematically. Specifically, under the MOU, BLS computed a Level I wage calculated as the mean of the lowest paid one-third of workers in a given occupation (approximately the 17th percentile of the OES wage distribution) and a Level II wage calculated as the mean wage of the highest paid upper two-thirds of workers (approximately the 67th percentile). This two-tier wage structure was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage, but the Department did not conduct any meaningful economic analysis to

³⁹ GAL 2-98 at 5.

⁴⁰ *Id.* GAL 2-98 did not change the definition of the skill levels that were first announced in GAL 4-95, but it did direct SWAs to issue a level II wage in several additional contexts, including cases in which state licensure was required for independent performance of all of the duties encompassed by the occupation and the job opportunity required such a worker. *Id.*

⁴¹ Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998).

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test its validity.”⁴² Rather, as the Department explained at the time, it adopted this structure to “insure the use of a consistent methodology by all States” in making prevailing wage determinations.⁴³ The wage structure adopted in 1998, which was developed without notice and comment, has never been codified in the Department’s regulations.

In 2002, the Department issued additional guidance to SWAs regarding the assignment of prevailing wage levels.⁴⁴ In this guidance, the Department stressed that skill levels should not be assigned solely on the basis of the occupational classification because “[a]ll OES/SOC codes encompass both level I and level II positions . . . including managerial and professional jobs at the high end, and assistant or helper codes at the low end.”⁴⁵ Rather, as the guidance emphasized throughout, the employer’s job description and the nature of the work were the primary determinants of a wage level determination. The Department directed SWAs to consider relevant factors, such as “the complexity of the job duties, the level of judgment, the amount [and nature] of supervision, and the level of understanding required to perform the job duties,” and to a lesser extent, factors like licensure requirements or the position’s location in the

⁴² GAL 2-98, available at https://oui.doleta.gov/dmstree/gal/gal98/gal_02-98.htm. See also *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3453 (Jan. 19, 2011); *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 Fed. Reg. 24047, 24051 (Apr. 24, 2013).

⁴³ GAL 2-98; see also *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3464 (Jan. 19, 2011) (explaining that the Department moved to the OES in part due to the “inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used” and because the Department determined that “the OES provides a more reliable and cost-effective means for producing prevailing wage rates on a consistent basis across the country.”).

⁴⁴ Training and Employment Guidance Letter No. 5-02 (TEGL 5-02): Clarification of Level I and Level II Skill Levels for the Purposes of Prevailing Wage Determinations (Aug. 7, 2002), available at https://oui.doleta.gov/dmstree/tegl/tegl2k2/tegl_05-02.htm.

⁴⁵ *Id.* at 2.

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employer's hierarchy.⁴⁶ Job duties alone could necessitate a level II determination where, for example, they indicated the employee would "operate with little supervision, perform advanced [] procedures, and exercise great latitude of independent judgment."⁴⁷ The Department also directed states to consider whether the job opportunity required education or experience exceeding entry-level occupational requirements and, reiterating GAL 2-98, explained that "the wage rate for a job offer that requires an advanced degree (Master's or Ph.D.)" was to be considered level II if a lesser degree was "normally required for entry into the occupation."⁴⁸

That same year, in response to a proposed rule amending the permanent labor certification process, the Department received comments criticizing it "for arbitrarily dividing salary data into two wage levels" and "suggest[ing] existing OES wage data would be more useful if the number of wage levels were expanded to appropriately differentiate among various occupational groupings."⁴⁹ For example, one commenter believed adoption of "[m]ulti-tiered wage levels... set for each occupation [would] better reflect 'real world' experience" and stated that "[a] two-tier wage level is unrealistic where an entry level job by its nature requires considerable independence (*e.g.*, a teacher) or the salary for the second level is markedly higher, *e.g.*, post-doctoral research fellow, medical resident, college instructor, marketing manager."⁵⁰ Similarly, another commenter expressed concern that use of just one upper-bound, level II wage for "all experienced workers create[d] gross inaccuracies at both ends of the spectrum," and

⁴⁶ *Id.*

⁴⁷ *Id.* at 5 (referring to job opportunities for medical residents that might otherwise be considered entry level).

⁴⁸ *Id.* at 4.

⁴⁹ *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77367 (Dec. 27, 2004).

⁵⁰ *Id.* at 77370.

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asserted that “[m]ultiple levels allow for a reasoned wage based upon years of experience and levels of responsibility that reflect real world patterns.”

The Department adopted the four-tier prevailing wage level structure that is currently in effect in response to the H-1B Visa Reform Act of 2004.⁵¹ As relevant here, the H-1B Visa Reform Act of 2004 amended section 212(p) of the INA to provide:

Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.⁵²

To implement this provision, the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (“2005 Guidance”), which expanded the two-tier OES wage level system to provide four “skill levels”: Level I “entry level,” Level II “qualified,” Level III “experienced,” and Level IV “fully competent.”⁵³ The Department applied the formula in the statute to its two existing wage levels to set Levels I through IV, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.⁵⁴

In 2010, the Department centralized the prevailing wage determination process for nonagricultural labor certification programs within OFLC’s NPWC, eliminating SWAs’

⁵¹ *Consolidated Appropriations Act, 2005*, Pub. L. 108-447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

⁵² 8 U.S.C. § 1182(p)(4).

⁵³ ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs 7 (May 2005), available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

⁵⁴ *See id.* at 1.

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involvement in the process.⁵⁵ In preparation for this transition, the Department issued new Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).⁵⁶ This guidance currently governs OFLC's PWD process for the PERM, H-1B, H-1B1, and E-3 visa programs and will continue to govern OFLC's PWD process for these programs.

When assigning a prevailing wage using BLS OES data, the NPWC examines the nature of the job offer, the area of intended employment, and job duties for workers that are similarly employed.⁵⁷ In particular, the NPWC uses the SOC taxonomy to classify the employer's job opportunity into an occupation by comparing the employer's job description, title, and requirements to occupational information provided in sources like the Department's Occupational Information Network (O*Net).⁵⁸ Once the NPWC identifies the applicable SOC code, it determines the appropriate wage level for the job opportunity by comparing the employer's job description, title, and requirements to those normally required for the occupation, as reported in sources like O*Net. This determination involves a step-by-step process in which each job opportunity begins at Level I (entry level) and may progress to Level II (experienced), Level III (qualified), or Level IV (fully competent) based on the NPWC's comparison of the job

⁵⁵ See *Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes*, 73 Fed. Reg. 78020 (Dec. 19, 2008); *Prevailing Wage Determinations for Use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands*, 74 Fed. Reg. 63796 (Dec. 4, 2009).

⁵⁶ Employment and Training Administration; *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Revised Nov. 2009) (hereinafter 2009 Guidance)*, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf

⁵⁷ *Id.* at 1.

⁵⁸ *Id.* at 1-7; see also Occupational Information Network, available at <http://online.onetcenter.org>. O*Net provides information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations and stratifies occupations based on shared skill, education, and training indicators.

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opportunity to occupational requirements, including the education, training, experience, skills, knowledge, and tasks required in the occupation.⁵⁹ After determining the prevailing wage level, the NPWC issues a PWD to the employer using the OES wage for that level in the occupation and area of intended employment.

II. Amendments to Adjust the Prevailing Wage Levels

A. Reasons for Adjusting the Prevailing Wage Levels

A primary purpose of the restrictions on immigration created by the INA, both numerical and otherwise, is “to preserve jobs for American workers.”⁶⁰ Safeguards for American labor, and the Department’s role in administering them, have been a foundational element of the statutory scheme since the INA was enacted in 1952.⁶¹ For the reasons set forth below, the Department has determined that the way it currently regulates the wages of certain immigrant and nonimmigrant workers in the H-1B, H-1B1, E-3, and PERM programs is inconsistent with the text of the INA. A substantial body of evidence examined by the Department also suggests that the existing prevailing wage rates used by the Department in these foreign labor programs are causing adverse effects on the wages and job opportunities of U.S. workers, and are therefore at odds with the purpose of the INA’s labor safeguards. The current wage levels were also promulgated through guidance and without any meaningful economic justification. Accordingly, the Department is acting to adjust the wage levels to ensure they are codified and consistent with the factors the INA dictates must govern the calculation of foreign workers’ wages. In so doing,

⁵⁹ 2009 Guidance at 6.

⁶⁰ *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 893 (1984).

⁶¹ H.R. Rep. No. 1365, 82d Cong., 2d Sess., 50-51 (1952) (discussing the INA’s “safeguards for American labor”).

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the Department expects to reduce the dangers posed by the existing levels to U.S. workers' wages and job opportunities, and thereby advance a primary purpose of the statute.

The modern H-1B program was created by the enactment of the Immigration Act of 1990 (IMMACT 90). Among other reforms, IMMACT 90 established “various labor protections for domestic workers” in the program.⁶² These protections were primarily designed “to prevent displacement of the American workforce” by foreign labor.⁶³ In general, the purpose of the H-1B program is to “allow[] an employer to reach outside of the U.S. to fill a temporary position because of a special need, presumably one that cannot be easily fulfilled within the U.S.”⁶⁴ Using a foreign worker as a substitute for a U.S. worker who is already working in or could work in a given job is therefore inconsistent with the broad aims of the program. Congress has recognized that repeatedly, both in the enactment of IMMACT 90 and when making subsequent changes to the H-1B program.⁶⁵

⁶² *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123, 142 (D.D.C. 2015), judgment vacated, appeal dismissed sub nom. *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 650 F. App'x 13 (D.C. Cir. 2016).

⁶³ *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 199 (3d Cir. 2010).

⁶⁴ *Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187 (N.D. Cal. 2014).

⁶⁵ *See, e.g.*, Pub. L. No. 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 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.”).

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Wage requirements are central to the H-1B program’s protections for U.S. workers.⁶⁶

Under the INA, employers must 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 “the prevailing wage level for the occupational classification in the area of employment.”⁶⁷ By ensuring that H-1B workers are offered and paid wages that are no less than what U.S. workers similarly employed in the occupation are being paid, the wage requirements are meant to guard against both wage suppression and the replacement of U.S. workers by lower-cost foreign labor.⁶⁸

The OES prevailing wage levels that the Department uses in the H-1B program—as well as the related H-1B1 and E-3 “specialty occupation” programs for foreign workers from Chile, Singapore, and Australia—are the same as those it uses in its PERM programs. Through the PERM programs, the Department processes labor certification applications for employers seeking to sponsor foreign workers for permanent employment under the EB-2 and EB-3 immigrant visa preference categories. Aliens seeking admission or adjustment of status under

⁶⁶ See *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models*, 59 Fed. Reg. 65646, 65655 (December 20, 1994) (describing the “Congressional purposes of protecting the wages of U.S. workers” in the H-1B program); H.R. REP. 106-692, 12 (quoting OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, FINAL REPORT: THE DEPARTMENT OF LABOR’S FOREIGN LABOR CERTIFICATION PROGRAMS: THE SYSTEM IS BROKEN AND NEEDS TO BE FIXED 21 (May 22, 1996) (“The employer’s attestation to . . . pay the prevailing wage is the only safeguard against the erosion of U.S. worker’s [sic.] wages.”)).

⁶⁷ 8 U.S.C. § 1182(n)(1)(A).

⁶⁸ See *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80110, 80110 (Dec. 20, 2000) (“The [INA], among other things, requires that an employer pay an H-1B worker the higher of the actual wage or the prevailing wage, to protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.”); *Panwar v. Access Therapies, Inc.*, 975 F. Supp. 2d 948, 952 (S.D. Ind. 2013) (“The wage requirements are designed to prevent . . . the influx of inexpensive foreign labor for professional services.”).

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the EB-2 or EB-3 preference categories are inadmissible “unless the Secretary of Labor has determined and certified... that—(I) there are not sufficient workers who are able, willing, qualified... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”⁶⁹

The Secretary makes this determination in the PERM programs by, among other things, requiring the foreign worker’s sponsoring employer to recruit U.S. workers by offering a wage that equals or exceeds the prevailing wage, and to assure that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage.⁷⁰ In this way, similar to its role in the H-1B program, the prevailing wage requirement in the PERM programs furthers the statute’s purpose of protecting the interests of, and preserving job opportunities for American workers.⁷¹ Effectuating this purpose is the principle objective of the Department’s regulatory scheme in the PERM programs.⁷²

⁶⁹ 8 U.S.C. § 1182(a)(5)(A)(i).

⁷⁰ 20 C.F.R. § 656.10(c)(1).

⁷¹ *Pai v. U.S. Citizenship & Immigration Servs.*, 810 F. Supp. 2d 102, 110 (D.D.C. 2011) (“The plain language of [8 U.S.C. §§ 1182(a)(5)(A) and 1153(b)(3)] reflects a concern to protect the interests of workers in the United States.”); *Fed’n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996) (explaining that the INA’s various limits on immigration, such as in the allocation of visas in the EB-2 and EB-3 preference categories, “reflect a clear concern about protecting the job opportunities of United States citizens.”). See generally *Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015) (quoting *I.N.S. v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 (1991) (“The INA’s careful employment-authorization scheme ‘protect[s] against the displacement of workers in the United States,’ and a ‘primary purpose in restricting immigration is to preserve jobs for American workers.’”).

⁷² See, e.g., *Durable Mfg. Co. v. U.S. Dep’t of Labor*, 578 F.3d 497, 502 (7th Cir. 2009) (“The point remains that the new § 656.30(b) advances, to some degree, the congressional purpose of protecting American workers.”); *Rizvi v. Dep’t of Homeland Sec. ex rel. Johnson*, 627 F. App’x 292, 294–95 (5th Cir. 2015) (unpublished) (“Viewed in the proper context, the challenged regulation serves purposes in accord with the statutory duty to grant immigrant status

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While the prevailing wage levels the Department sets in the H-1B, H-1B1, E-3, and PERM programs are meant to protect against the adverse effects the entry of immigrant and nonimmigrant workers can have on U.S. workers, they do not accomplish that goal – and have not for some time. For starters, the Department has never offered a full explanation or economic justification for the way it currently calculates the prevailing wage levels it uses in these foreign labor programs.⁷³ The INA requires that a government survey employed to determine the prevailing wage provide wage levels commensurate with experience, education, and level of supervision. However, it is clear that the Department’s current wage levels are not sufficiently set in accordance with the relevant statutory factors. Further, the Department’s analysis of the likely effects of H-1B and PERM workers on U.S. workers’ wages and job opportunities shows that the existing wage levels are not advancing the purposes of the INA’s wage provisions. As explained below, under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts – meaning U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility – make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce. The need to fix this problem and ensure the wage levels are set in a manner consistent with the INA is

only where the interests of American workers will not be harmed; showing the employer’s ongoing ability to pay the prevailing wage is one reasonable way to fulfill this goal.”).

⁷³ See *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 Fed. Reg. 24047, 24051 (Apr. 24, 2013) (“Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption...”).

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especially pressing now, given the elevated unemployment and economic dislocation for U.S. workers caused by the COVID-19 pandemic. The Department is therefore acting to adjust the existing wage levels to ensure the levels reflect the wages paid to U.S. workers with levels of experience, education, and responsibility comparable to those possessed by similarly employed foreign workers.

1. The Relationship between the Prevailing Wage Levels, the OES Survey, and the Statutory Framework Governing the Department’s Foreign Labor Programs

As noted, the 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.”⁷⁴ The statute further 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.”⁷⁵ If an existing government survey produces only two levels, the statute provides a formula to calculate two intermediate levels.⁷⁶ 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. Put slightly differently, both clauses yield wage calculations that in similar fashions are designed to approximate the rate at which workers in the U.S. are being compensated, taking into account the area in which they work, the types of work they perform, and the qualifications

⁷⁴ 8 U.S.C. § 1182(n)(1)(A).

⁷⁵ 8 U.S.C. § 1182(p)(4).

⁷⁶ *Id.*

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they possess; and the statute requires employers to pay the rate of whichever calculation yields the higher wage. In this way, the statutory scheme is meant to “protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.”⁷⁷ 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 significantly diminished incentives to prefer H-1B workers over U.S. workers, and U.S. workers’ wages will not be suppressed by the presence of foreign workers in the relevant labor market.

To set an appropriate prevailing wage for an H-1B worker in a given occupation, it is therefore appropriate to identify what types of U.S. workers in the occupation have comparable levels of education, experience, and responsibility to H-1B workers. To answer this question, the place to start is the INA itself, which sets the minimum qualifications an alien must have to obtain an H-1B visa. While the INA makes clear that the prevailing wage levels must be set commensurate with education, experience, and level of supervision, it leaves assessment of those factors to the Department’s discretion. How the Department exercises that discretion is informed by the legislative context in which the four-tier wage structure was enacted, which indicates that the wage levels are primarily designed for use in the Department’s high-skilled and PERM foreign labor programs.⁷⁸ Other provisions in the INA relating to the education and experience requirements of those programs—and in particular the statutory definition of “specialty

⁷⁷ *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80110, 80110 (Dec. 20, 2000).

⁷⁸ *See Consolidated Appropriations Act, 2005*, Pub. L. 108-447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

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occupation”—therefore serve as critical guides for how wage levels based on experience, education, and level of supervision should be formulated.

A review of this statutory framework and its interplay with the BLS OES survey data that the Department uses to calculate prevailing wages demonstrates that, while the OES survey is the best source of wage data available for use in the Department’s foreign labor certification programs, it is not specifically designed for such programs, and therefore does not account for the requirement that workers in the H-1B program possess highly specialized knowledge in how it gathers data about U.S. workers’ wages. This fact necessarily shapes how the Department integrates the OES survey into its foreign labor programs and also demonstrates the existing wage levels’ inconsistency with the INA.

At the outset, the Department notes that much of its assessment of how best to adjust the prevailing wage levels gives special attention to the H-1B program. The H-1B program accounts, by order of magnitude, for the largest share of foreign workers covered by the Department’s four-tier wage structure. Upwards of 80 percent of all workers admitted or otherwise authorized to work under the programs covered by the wage structure are H-1B workers.⁷⁹ This, in combination with the fact that, as explained below, the risk of adverse effects to U.S. workers posed by the presence of foreign workers is most acute where there are high

⁷⁹ See DEPARTMENT OF HOMELAND SECURITY, 2017 YEARBOOK OF IMMIGRATION STATISTICS, TABLE 7. PERSONS OBTAINING LAWFUL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2017, available at <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2017 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2016 – SEPTEMBER 30, 2017, (2020), available at https://www.uscis.gov/sites/default/files/document/foia/Characteristics_of_H-1B_Specialty_Occupation_Workers_FY17.pdf.

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concentrations of such workers, supports the Department’s determination to focus on the H-1B program. Because the wage structure governs, and, for reasons explained below, will continue to govern wages for hundreds of thousands of workers across five different foreign labor programs and hundreds of different occupations, no wage methodology will be perfectly tailored to the unique circumstances of every job opportunity.⁸⁰ Advancing the INA’s purpose of guarding against displacement and adverse wage effects against this statutory backdrop therefore means, in the Department’s judgment, that particular weight should be given in the Department’s analysis to those aspects of the problem this rule is meant to address where there is the greatest danger to U.S. workers’ wages—hence the added focus on the H-1B program. For the same reasons, and as elaborated on below, the Department’s analysis focuses on those occupations in which the vast majority of H-1B workers are employed.

Relatedly, the Department notes that the H-1B program is closely linked to the PERM programs that are also covered by the Department’s wage structure. A very substantial majority of workers covered by PERM labor certification applications are already working in the U.S. as H-1B nonimmigrants, and there is significant overlap in the types of occupations in which H-1B and PERM workers are employed.⁸¹ It is also clear that H-1B status often serves as a pathway to

⁸⁰ *Cf. Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3461 (Jan. 19, 2011) (justifying wage methodology designed for lower-skilled workers that was adopted in the H-2B program on grounds that the program “is overwhelmingly used for work requiring lesser skilled workers,” while also acknowledging that “not all positions requested through the H-2B program are for low-skilled labor.”).

⁸¹ In FY2019, 68.2 percent of all PERM labor certification applications filed were for H-1B workers already working in the United States. OFFICE OF FOREIGN LABOR CERTIFICATION, PERMANENT LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 19, *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.

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employment-based green card status for many foreign workers.⁸² The programs have thus long been regulated in connection with one another.⁸³ For these reasons, giving particular attention to the H-1B program in determining how to adjust the wage levels is entirely consistent with also ensuring that how the wage levels are applied in the PERM programs is properly accounted for in the Department's analysis.

Under the INA, H-1B visas can, in most cases, only be granted to aliens entering the U.S. to perform services "in a specialty occupation."⁸⁴ The statute defines "specialty occupation" as an occupation that requires theoretical and practical application of a body of "highly specialized knowledge" and the "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."⁸⁵ An alien may be classified as an H-1B specialty occupation worker if the alien possesses "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation," "completion of [a bachelor's or higher degree in the specific specialty (or its equivalent)]," or "(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty."⁸⁶ DHS regulations further clarify the requirements for establishing that the position is a specialty occupation and that the beneficiary of an H-1B petition must be qualified for a

⁸² See Sadikshya Nepal, *The Convoluting Pathway from H-1B to Permanent Residency: A Primer*, BIPARTISAN POLICY CENTER (2020).

⁸³ See 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p) "spells out how [the prevailing] wage is to be calculated in the context of both the H-1B program and the permanent employment program in two circumstances."); *Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers*, 81 Fed. Reg. 82398 (November 18, 2016).

⁸⁴ 8 U.S.C. § 1101(a)(15)(H)(i)(b).

⁸⁵ 8 U.S.C. § 1184(i)(1).

⁸⁶ 8 U.S.C. § 1184(i)(2).

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specialty occupation.⁸⁷ The Department’s regulations restate the statute’s definition of specialty occupation essentially verbatim.⁸⁸

A few features of the definition bear emphasizing. First, the statute sets the attainment of a bachelor’s degree in a specific specialty, or experience that would give an individual expertise equivalent to that associated with a bachelor’s degree in the specific specialty, as the baseline, minimum requirement for an alien to qualify for the classification. Of even greater importance, having any bachelor’s degree as a job requirement is not sufficient to qualify a job as a specialty occupation position—the bachelor’s degree or equivalent experience required to perform the job must be “in the specific specialty.” In other words, the bachelor’s degree required, or equivalent experience, must be specialized to the particular needs of the job, and impart a level of expertise greater than that associated with a general bachelor’s degree, meaning a bachelor’s degree not in some way tailored to a given field.⁸⁹ These aspects of the definition play an important role in how the Department will use data from the BLS OES survey to set appropriate prevailing wage levels.

The Department has long relied on OES data to establish prevailing wage levels. That is because it is a comprehensive, statistically valid survey that, in many respects, is the best source

⁸⁷ 8 C.F.R. § 214.2(h)(4)(iii)(A) and C).

⁸⁸ See 20 C.F.R. § 655.715.

⁸⁹ See *Chung Song Ja Corp. v. U.S. Citizenship & Immigration Servs.*, 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015) (“Permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers.”); *Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187–88 (N.D. Cal. 2014) (“A position that requires applicants to have any bachelor's degree, or a bachelor's degree in a large subset of fields, can hardly be considered specialized.”).

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of wage data available for satisfying the Department’s purposes in setting wages in most immigrant and nonimmigrant programs. As the Department has previously noted:

The OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over 1 million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The features described above are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference.⁹⁰

Put simply, the OES survey’s quality and characteristics have made it, and continue to make it, a useful tool for setting prevailing wage levels in the Department’s foreign labor programs. There are no alternative surveys or sources of wage data that would provide DOL with wage information at the same level of granularity needed to properly administer the H-1B and PERM programs.

That said, the OES survey is not specifically designed to serve these programs. For one thing, “the OES survey captures no information about differences within the [occupational] groupings based on skills, training, experience or responsibility levels of the workers whose wages are being reported”⁹¹—the factors the INA requires the Department to rely on in setting

⁹⁰ *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3463 (Jan. 19, 2011).

⁹¹ *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 Fed. Reg. 24146, 24155 (Apr. 29, 2015).

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prevailing wage levels.⁹² Relatedly, “there are factors in addition to skill level that can account for OES wage variation for the same occupation and location.”⁹³ Further, the geographic areas used by BLS to calculate local wages do not always match up exactly with the “area of employment” for which wage rates are set, as that term is defined by the INA for purposes of the H-1B program.⁹⁴ So while the OES survey is the best available source of wage data for the Department’s purposes, it is not a perfect tool for providing wages in the H-1B, H-1B1, E-3, and PERM programs—a fact that the Department must take into consideration in how it uses the OES data.

Similarly, the INA’s definition of “specialty occupation” should be accounted for in how the Department fits the OES survey into its foreign labor programs. The survey categorizes workers into occupational groups defined by the SOC system, a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.⁹⁵ An informative source on the duties and educational requirements of a wide variety of occupations, including those in the SOC system, is the Department’s Occupational Outlook Handbook (OOH), which, among other things, details for various occupations the baseline qualifications needed to work in each occupation. A review of the OOH shows that only a portion of the workers covered by many of the occupational classifications used in the OES survey likely have levels of education and experience similar to those of H-1B workers in the same occupation. Some share of workers in these classifications

⁹² 8 U.S.C. § 1182(p)(4).

⁹³ *Id.* at 24159.

⁹⁴ 8 U.S.C. § 1182(n)(4)(A).

⁹⁵ U.S. BUREAU OF LABOR STATISTICS, STANDARD OCCUPATIONAL CLASSIFICATION, <https://www.bls.gov/soc/>.

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likely do not have the education or experience qualifications necessary to be considered similarly employed to specialty occupation workers. Because the INA requires the prevailing wage levels for H-1B workers to be set based on the wages of U.S. workers with levels of experience and education similar to those of H-1B workers, the Department must take this into account when using OES data to determine prevailing wages.

For example, a common occupational classification in which H-1B nonimmigrants work is Computer Programmers.⁹⁶ The OOH's entry for Computer Programmers describes the educational requirements for the occupation as follows: "Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree."⁹⁷ In other words, while common, a bachelor's degree-level education, or its equivalent, is not a prerequisite for working in the occupation. United States Citizenship and Immigration Services (USCIS) and at least one court have reasoned from this that the mere fact that an individual is working as a Computer Programmer does not establish that the individual is working in a "specialty occupation."⁹⁸ Because a person without a specialized bachelor's degree can still be classified as a Computer Programmer, some portion of Computer Programmers captured by the

⁹⁶ OFFICE OF FOREIGN LABOR CERTIFICATION, H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM – SELECTED STATISTICS, FY2019, *available at* https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf.

⁹⁷ BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, COMPUTER PROGRAMMERS, *available at* <https://www.bls.gov/ooH/computer-and-information-technology/computer-programmers.htm>.

⁹⁸ *See Innova Sols., Inc. v. Baran*, 399 F. Supp. 3d 1004, 1015 (N.D. Cal. 2019).

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OES survey are not similarly employed to H-1B workers because the baseline qualifications to enter the occupation do not match the statutory requirements.⁹⁹

The same is true for other occupational classifications in which H-1B workers are often employed. For example, the Medical and Health Services Manager occupation, as described by the OOH, does not in all cases require a bachelor's degree as a minimum requirement for

⁹⁹ As noted throughout, under the INA a bachelor's degree is not an absolute prerequisite for obtaining an H-1B visa. Work experience imparting comparable levels of expertise will also suffice. Indeed, as the President has noted in other contexts, focusing on possession of a degree to the exclusion of work experience ignores important considerations about how merit and qualifications should be assessed. *See* Exec. Order No. 13932, 85 Fed. Reg. 39457 (2020). The Department's focus on the OOH's description of degree requirements here is not meant to suggest otherwise, but rather simply accounts for the fact that, within the H-1B program, nearly all nonimmigrants hold a degree. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), *available at* https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf. Further, under the INA, EB-2 and EB-3 immigrants are, in many cases, required to possess a degree. And, in any event, the Department's assessment of the OOH's descriptions of education requirements and how they demonstrate that, for the most common H-1B occupations, there is some portion of workers who would not qualify as working in a specialty occupation holds true for the OOH's description of various occupations' experience requirements. The mere fact that OOH describes many workers in an occupation as having several years of experience in or skills relevant to their respective fields does not necessarily mean that they possess "highly specialized knowledge," or that all workers in the occupation have such experience. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). *See also* BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, COMPUTER SYSTEMS ANALYSTS, *available at* <https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm>; BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, FOOD SERVICE MANAGERS, *available at* <https://www.bls.gov/ooh/management/food-service-managers.htm>. Whether discussing education or experience requirements, the fact remains that OOH's description of the occupational classifications used in the BLS OES are, in most cases, not limited to workers who would qualify as working in a specialty occupation.

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entry.¹⁰⁰ USCIS has therefore concluded that the fact that an individual works in that occupational classification does not necessarily mean that he is working in a “specialty occupation.”¹⁰¹ USCIS and its predecessor agency, the Immigration and Naturalization Service, have long emphasized that the term “specialty occupation” does not “include those occupations which [do] not *require* a bachelor’s degree in the specific specialty.”¹⁰² In other words, if an occupation does not require a specialized bachelor’s degree or equivalent experience, under the INA other evidence is needed to show that a worker will be performing duties in a specialty occupation beyond whether the job opportunity falls within a particular SOC classification.¹⁰³

A review of the OOH entries for the occupations in which H-1B nonimmigrants most commonly work demonstrates that most H-1B workers fall within SOC classifications that

¹⁰⁰ See *Ajit Healthcare Inc. v. U.S. Dep’t of Homeland Sec.*, 2014 WL 11412671, at 4 (C.D. Cal. Feb. 7, 2014); see also BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, MEDICAL AND HEALTH SERVICES MANAGERS, available at <https://www.bls.gov/oooh/computer-and-information-technology/computer-programmers.htm>. The Department notes that some courts and USCIS have concluded that the fact that an occupation does not in all cases require a bachelor’s degree as a minimum qualification does not necessarily preclude the occupational classification from serving as evidence that a particular job qualifies as a “specialty occupation.” See, e.g., *Taylor Made Software, Inc. v. Cuccinelli*, 2020 WL 1536306, at 6 (D.D.C. Mar. 31, 2020); see also 8 CFR 214.2(h)(4)(iii). That said the INA ultimately does not admit of any exceptions to the rule that a job must require a bachelor’s degree in a specific specialty, or its equivalent, to qualify as a specialty occupation, meaning, whatever its relevance to determining whether a particular job is in a “specialty occupation,” the fact that many SOC classifications contain workers that would not meet the statutory definition is highly relevant to how OES data for an entire occupational classification is used in setting prevailing wage levels. Put another way, as the court in *Taylor Made* acknowledged, the fact that a bachelor’s degree is not required in all cases for a given occupation means that some number of workers within the occupation are not performing work in a specialty occupation. *Id.* Because such workers are almost certainly captured within OES data, and the Department calculates prevailing wages by taking into account the actual wages reported for broad swaths of workers in the OES data, the presence of these workers in the survey data directly relates to how prevailing wage levels are set, even if it does not have a great deal of significance for how a single, specific job in an occupation is determined to be or not to be in a “specialty occupation.”

¹⁰¹ See *Ajit Healthcare*, 2014 WL 11412671, at 4.

¹⁰² *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 56 Fed. Reg. 61111, 61113 (December 2, 1991) (emphasis added).

¹⁰³ 8 U.S.C. § 1184(i); see *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

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include some number of workers who would not qualify for employment in a specialty occupation. For instance, the OOH entries for Software Developers—an occupation accounting for over 40 percent of all certified LCAs¹⁰⁴—provides that such workers “usually have a bachelor’s degree in computer science and strong computer programming skills.”¹⁰⁵ For Computer Systems Analysts, which make up approximately 8.8 percent of all certified LCAs,¹⁰⁶ “a bachelor’s degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.”¹⁰⁷ Similarly, the O*Net database, which surveys employers on the types of qualifications they seek in workers for various occupations, shows that, on average, over 13 percent of all jobs in the occupations that H-1B workers are most likely to work in do not require workers to have even a bachelor’s degree.¹⁰⁸ Moreover, the O*Net does not differentiate between jobs that require bachelor’s degrees in specific specialties and job for which a general bachelor’s degree will suffice. It is therefore a reasonable inference that the percentage of jobs in these occupations that would not qualify as specialty occupation positions for purposes of the INA is almost certainly even higher.

¹⁰⁴ OFFICE OF FOREIGN LABOR CERTIFICATION, H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM – SELECTED STATISTICS, FY 2019, *available at*

https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf

¹⁰⁵ BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, SOFTWARE DEVELOPERS, *available at* <https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm>.

¹⁰⁶ OFFICE OF FOREIGN LABOR CERTIFICATION, H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM – SELECTED STATISTICS, FY 2019, *available at* https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf

¹⁰⁷ BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, COMPUTER SYSTEMS ANALYSTS, *available at* <https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm>

¹⁰⁸ *See* OFFICE OF FOREIGN LABOR CERTIFICATION, H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM – SELECTED STATISTICS, FY 2019, *available at* https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-1B_Selected_Statistics_FY2019_Q4.pdf; O*NET ONLINE, <https://www.onetonline.org/>.

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Simply put, the universe of workers surveyed by the OES for some of the most common occupational classifications in which H-1B workers are employed is larger than the pool of workers who can be said to have levels of education and experience comparable to those of even the least skilled H-1B workers performing work in a specialty occupation. Because the statutory scheme requires the Department to set the prevailing wage levels based on what workers similarly employed to foreign workers make, taking into account workers' qualifications and, as noted, the large majority of foreign workers are H-1B workers, it would be inappropriate to consider the wages of the least educated and experienced workers in these occupational classifications in setting the prevailing wage levels. To conclude otherwise would place the Department at odds with one of the purposes of the INA's wage protections—to ensure that foreign workers earn wages comparable to the wages of their U.S. counterparts.

This consideration also demonstrates the inconsistency of the existing wage levels with the statutory and regulatory framework. As noted above, the Department's first wage level is currently set by calculating the mean of the bottom third of the OES wage distribution. That means the wages for many H-1B workers are set based on a calculation that takes into account wages paid to workers who almost certainly would not qualify to work in a "specialty occupation," as defined by the INA. The Department has noted previously that "workers in occupations that require sophisticated skills and training receive higher wages based on those skills."¹⁰⁹ As a worker's education and skills increase, his wages are expected to as well.¹¹⁰ For

¹⁰⁹ *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 Fed. Reg. 24047, 24051 (Apr. 24, 2013).

¹¹⁰ See BUREAU OF LABOR STATISTICS, LEARN MORE, EARN MORE: EDUCATION LEADS TO HIGHER WAGES, LOWER UNEMPLOYMENT, available at <https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm>.

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that reason, it is likely that workers at the lowest end of an occupation's wage distribution generally have the lowest levels of education, experience, and responsibility in the occupation. In consequence, if the occupation by definition includes workers who do not have the level of specialized knowledge required of H-1B workers, the very bottom of the wage distribution should be discounted in determining the appropriate baseline along the OES wage distribution to establish the entry-level wage under the four-tiered wage structure. Yet the existing wage structure makes such workers a central component of the prevailing wage calculation.¹¹¹

Similarly, the current Level IV wage is set by calculating the mean of the upper two-thirds of the wage distribution. That means that the wage level provided for the most experienced and highly educated H-1B workers is determined, in part, by taking into account a sizeable number of workers who do not even make more than the median wage of the occupation. Given the correlation between wages and skills, this calculation also would appear inconsistent with the statutory and regulatory framework. Common sense dictates that workers making less than the median wage of the occupation cannot be regarded as being similarly qualified to the most competent and experienced members of that occupation.

The same reasons for discounting a portion of the workers at the bottom of the OES wage distribution in order to compute appropriate entry-level wages—because such workers are not

¹¹¹ For example, the occupation of Software Developers, which accounts for a large number of H-1B workers, does not, as explained above, require the same degree of specialized knowledge as a baseline entry requirement as does the INA's definition of "specialty occupation." Yet approximately 10 percent of all LCAs filed with the Department for software developer positions classify those positions as entry-level, meaning that under the current wage levels the wages paid to such specialty occupation workers are calculated based, at least in part, on the wages paid to some workers who do not have comparable specialized knowledge and expertise. This outcome directly contravenes the INA's requirement that H-1B workers be paid wages commensurate with the wages paid to U.S. workers with similar levels of education, experience, and responsibility.

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similarly employed to even the least skilled H-1B workers—also apply to the wages for the EB-2 immigrant visa preference classification and the E-3 and H-1B1 nonimmigrant programs, for which the Department also uses the four-tier prevailing wage structure.

The E-3 and H-1B1 visa classifications, like the H-1B classification, have as a prerequisite for obtaining a visa that the alien work in a specialty occupation.¹¹² Thus those programs' relation to the OES wage data is essentially identical to that of the H-1B program.

As for the EB-2 classification, the reasons for discounting the lower end of the OES wage distribution for setting the baseline to establish an entry-level wage for the classification are even more apparent than they are for the specialty occupation programs. Under the INA, the EB-2 classification applies to individuals who are “members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.”¹¹³ USCIS regulations, in turn, define an “advanced degree” as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.¹¹⁴

¹¹² See 8 U.S.C. § 1184(i).

¹¹³ 8 U.S.C. § 1153(b)(2)(A).

¹¹⁴ 8 C.F.R. § 204.5(k)(2).

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The regulation goes on to define “exceptional ability” to mean “a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.”¹¹⁵

As is the case for H-1B nonimmigrants, the baseline, minimum qualifications that an EB-2 immigrant must possess exceed the educational and experiential requirements the OOH describes as generally necessary to enter some of the most common SOC occupational classifications in which EB-2 immigrants work. For example, the most common occupation in which PERM labor certifications—of which applications for EB-2 immigrants represent a substantial share—are sought is Software Developers, which accounts for nearly 40 percent of all approved PERM applications. As already noted, according to the OOH, Software Developers “usually have a bachelor’s degree in computer science and strong computer programming skills.”¹¹⁶ A master’s degree, generally a prerequisite for receiving an EB-2 visa, is therefore substantially above the typical, baseline qualifications needed to work as a Software Developer. Similarly, a Software Developer who satisfies the regulatory definition of “exceptional ability” would be, *ipso facto*, more highly skilled than the typical entry-level worker in that occupation. This pattern holds for most of the top occupations into which PERM applications fall.¹¹⁷

In sum, the eligibility criteria established by the INA for most of the immigrant and nonimmigrant programs to which the Department’s prevailing wage levels apply set a higher

¹¹⁵ *Id.*

¹¹⁶ BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, SOFTWARE DEVELOPERS, *available at* <https://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm>.

¹¹⁷ See OFFICE OF FOREIGN LABOR CERTIFICATION, PERMANENT LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 19, *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf; BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/ooh/>.

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baseline for the minimum qualifications an alien must possess than the minimum qualification requirements that exist for workers generally in the most of the occupations in which these aliens most commonly work. The H-1B, H-1B1, E-3, and EB-2 classifications are for workers with specialized knowledge and skills and/or advanced degrees.¹¹⁸ Because the INA requires that these workers be paid at least as much as U.S. workers similarly employed—taking into account the experience, education, and level of supervision of such workers—the prevailing wage rates should be formulated based on the wages paid to U.S. workers who similarly possess specialized knowledge and skills in their occupations. Given that not every worker in a given OES occupation is likely to meet that standard, and that workers at the lower end of the wage distribution are also likely to be the workers with the lowest levels of education and experience, the Department has determined it is appropriate to discount the lower portion of the OES distribution in setting the wage levels. The Department should instead identify where within the distribution workers are to be found who possess the same kinds of specialized education and experience possessed by aliens working in the H-1B, H-1B1, E-3, and EB-2 classifications. The wages paid to those U.S. workers can serve as the basis for appropriately adjusting the prevailing wage levels to ensure the employment of foreign workers does not adversely affect the wages and job opportunities of U.S. workers.

2. Adverse Effects of Current Prevailing Wage Levels

¹¹⁸ The Department notes that its assessment of the appropriateness of adjusting the prevailing wage levels in the manner described by this rule with respect to the EB-3 classification is governed by distinct considerations, which are described more fully below.

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Beyond their inconsistency with the statutory scheme, the Department has also evaluated evidence on how the existing prevailing wage levels affect U.S. workers, and has concluded that the current levels are harming the wages and job opportunities of U.S. workers, and thus failing to serve the purposes of the INA's wage protections. This is a separate and independent reason justifying the Department's decision to adjust the existing levels. It also demonstrates that whatever assumptions or analyses, left unarticulated, that may have underlay the manner in which the current levels are set were seriously flawed.

First, a number of studies indicate that many H-1B workers are likely paid less than similarly employed U.S. workers in fields with high H-1B utilization. Where the wages of foreign workers are lower than those of U.S. workers, at least two harmful consequences to U.S. workers are likely to follow. In particular, employers will, in some instances, use H-1B workers to displace U.S. workers, and U.S. workers will experience wage suppression. Anecdotal evidence and academic research suggests that both consequences are being experienced by U.S. workers because of the H-1B program, which further substantiates the conclusion that wages for H-1B workers are, in some cases, materially lower than they would be if the prevailing wage levels actually resulted in H-1B wages commensurate with the wages paid to similarly employed U.S. workers with comparable levels of education, experience, and responsibility. Further demonstrating that the current prevailing wage levels do not in many cases reflect market wage rates, data on the actual wages paid by H-1B employers show that some firms do in fact pay H-1B workers wages well above the prevailing wage rates generated through application of the Department's four-tier wage structure. If the prevailing wage levels were correctly approximating the wages commanded by workers in the relevant labor markets, such significant

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disparities between actual wages and the prevailing wage levels would likely be less common. Such disparities also suggest that firms to which the statute's actual wage clause does not apply can pay wages well below what U.S. workers in the same labor market are paid. The Department also considered various studies that suggest the employment of H-1B workers has positive effects on the wages and job opportunities of U.S. workers. While the Department agrees that this is true in some instances, it is also clear that the current prevailing wage levels often result in adverse effects, and that adjustments to the wage levels are needed to ensure that the positive effects of the program will be enjoyed more widely. Finally, the Department notes that the evidence of the adverse effects of the existing prevailing wage levels in the H-1B program also likely applies to the PERM programs.

To begin, a variety of studies and analyses demonstrate that the current wage levels allow employers to pay H-1B workers wages far below what their U.S. counterparts are paid.¹¹⁹ Most of these studies compare median H-1B worker earnings in an occupation to median U.S. worker earnings in the same occupation, without directly comparing workers with the same levels of education, experience, and responsibility. To some extent this limits the conclusions that can be drawn from the comparison. That being said, if H-1B workers were truly being used as a supplement to the U.S. workforce, then the wages H-1B workers typically earn would likely not be significantly lower than the wages of U.S. workers in these occupations. Indeed, because H-

¹¹⁹ 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).

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IB 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.

Studies on the subject often focus on the wages paid to H-1B workers in computer-related occupations, in which nearly two-thirds of all H-1B workers are employed.¹²⁰ According to some estimates, H-1B employees in information technology (IT) occupations earn wages that are about 25 percent to 33 percent less than U.S. workers' wages, a gap that appears to have persisted for more than two decades.¹²¹ Another analysis estimates that H-1B employees in computer science occupations earn 9 percent less than U.S. workers.¹²² Although the precise findings of wage differences are not uniform, the results generally show meaningful wage differences in fields with high proportions of H-1B workers. Notably, as would be expected, the

¹²⁰ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf, (showing 66 percent of H-1B petitions approved in FY2019 were for computer-related occupations).

¹²¹ SEAN McLAIN & DHANYA ANN THOPPIL, BULGING STAFF COST, SHRINKING MARGINS, CRISIL RESEARCH, (2019), available at <https://www.crisil.com/en/home/our-analysis/reports/2019/05/bulging-staff-cost-shrinking-margins.html>; Sean McLain & Dhanya Ann Thoppil, *U.S. Visa Bill 'Very Tough' for Indian IT*, THE WALL STREET JOURNAL, April 18, 2013, available at https://blogs.wsj.com/indiarealtime/2013/04/18/u-s-visa-bill-very-tough-for-indian-it/?mod=wsj_streaming_latest-headlines; The State of Asian Pacific America," Paul Ong (ed.), LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179-180; CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS, (1996).

¹²² Youyou Zhou, *Most H-1B workers are paid less, but it depends on the job*, ASSOCIATED PRESS, April 18, 2017, available at <https://apnews.com/afs:Content:873580003/Most-H-1B-workers-are-paid-less,-but-it-depends-on-the-type-of-job>.

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same phenomenon of markedly lower wages for H-1B workers are generally not found in fields with lower proportions of H-1B workers.¹²³

One negative consequence that would be expected to occur if H-1B workers could be paid less than their U.S. counterparts is that some employers would use H-1B workers as a low-cost labor alternative to displace U.S. workers—a result at odds with the purpose of the statutory scheme. A significant body of research on how H-1B workers are used by some firms suggests that is exactly what is occurring.¹²⁴ Anecdotal evidence also demonstrates that H-1B workers are used as a low-cost alternative to U.S. workers doing similar jobs. Media accounts of U.S. workers being required to train their H-1B replacements abound.¹²⁵ In these cases, evidence that

¹²³ See, e.g., AMERICAN IMMIGRATION COUNCIL, THE H-1B VISA PROGRAM: A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY (2020), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf; NATIONAL FOUNDATION FOR AMERICAN POLICY, H-1B VISAS BY THE NUMBERS: 2017-18,, (2018), available at <https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf>.

¹²⁴ See, e.g., John Miano, STUDIES, WAGES AND SKILL LEVELS FOR H-1B COMPUTER WORKERS, 2005 LOW SALARIES FOR LOW SKILLS, CENTER FOR IMMIGRATION STUDIES, (2007), available at <https://cis.org/Report/Wages-and-Skill-Levels-H1B-Computer-Workers-2005>; Patrick Thibodeau & Sharon Machlis, *U.S. law allows low H-1B wages; just look at Apple*, COMPUTERWORLD, May 15, 2017, available at <https://www.computerworld.com/article/3195957/us-law-allows-low-h-1b-wages-just-look-at-apple.html>; Park, Haeyoun, “How Outsourcing Companies Are Gaming the Visa System,” THE NEW YORK TIMES, November 10, 2015, <https://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h-1b-visas.html>; NATIONAL RESEARCH COUNCIL, BUILDING A WORKFORCE FOR THE INFORMATION ECONOMY, (2001), available at <https://www.nap.edu/catalog/9830/building-a-workforce-for-the-information-economy>.

¹²⁵ “Visa Abuses Harm American Workers,” *The New York Times*, June 16, 2016, available at <http://www.nytimes.com/interactive/opinion/editorialboard.html>; Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, THE NEW YORK TIMES, June 3, 2015, available at <https://www.nytimes.com/2015/06/04/us/last-task-after-lay-off-at-disney-train-foreign-replacements.html>; Julia Preston, *Toys ‘R’ Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, THE NEW YORK TIMES, September 29, 2015, available at <https://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html>; Michael Hiltzik, *A loophole in immigration law is costing thousands of American jobs*, LOS ANGELES TIMES, February 20, 2015, available at <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150222-column.html>; Daisuke Wakabayashi & Nelson Schwartz, *Not Everyone in Tech Cheers Visa Program for Foreign Workers*, THE NEW YORK TIMES, February 5, 2017, available at <https://www.nytimes.com/2017/02/05/business/h-1b-visa-tech-cheers-for-foreign-workers.html>.

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U.S. workers were required to train their foreign replacements calls into question the rationale for bringing in H-1B workers to fill the respective skilled positions given that the positions were already filled. One likely motivation for the replacement of U.S. workers with H-1B workers in these cases is cost savings, as detailed in the reporting on the topic. When that is the case, the displacement of U.S. workers by H-1B workers provides further evidence that the current prevailing wage levels are set materially below what similarly employed U.S. workers earn. If prevailing wages were placed at the appropriate levels, the incentive to prefer H-1B workers over U.S. workers would be significantly diminished, and the practice of replacing U.S. workers with H-1B workers would likely not be as prevalent as the reporting suggests it is.

Another likely harmful consequence for U.S. workers in cases where H-1B workers can be paid below what comparable workers in the same labor market are paid is wage suppression. Academic research indicates that the influx of low-cost foreign labor into a labor market suppresses wages, and this effect increases significantly as the number of foreign workers increases.¹²⁶ In particular, some research suggests that a substantial increase in the labor supply due to the presence of foreign workers reduces the wages of the average U.S. worker by 3.2 percent, a rate that grew to 4.9 percent for college graduates.¹²⁷ More generally, though the economics literature is mixed on the effects of higher-skilled foreign workers on overall job creation, economic theory dictates that increasing the supply of something above similar demand

¹²⁶ GEORGE BORJAS, IMMIGRATION ECONOMICS (2014). Borjas's research generally focuses on low-skilled immigrant labor, but the basic economic conclusions his research draws, principally that increases in labor supply lower wages, are applicable outside of the context of low skilled immigration.

¹²⁷ George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, *The Quarterly Journal of Economics* Vol. 118, No. 4 (Nov., 2003), pp. 1335-1374, available at <https://www.jstor.org/stable/25053941?seq=1>.

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growth lowers prices. As a result, while employing foreign workers at wages lower than their U.S. counterparts may increase firms' profitability, a result that is not surprising if current prevailing wage levels allow firms to replace domestic workers with lower-cost foreign workers, such a practice also results in lower overall wages, particularly in occupations where there are high concentrations of foreign workers. A significant body of research demonstrates that this phenomenon is likely occurring in the H-1B program.

For starters, H-1B workers make up about 10 percent of the IT labor force in the U.S.¹²⁸ In certain fields, including Software Developers, Applications (approximately 22 percent); Statisticians (approximately 22 percent); Computer Occupations, all other (approximately 18 percent); and Computer Systems Analysts (approximately 12 percent), H-1B workers likely make up an even higher percentage of the overall workforce.¹²⁹ This high prevalence of H-1B

¹²⁸ The Department estimated the share of H-1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H-1B workers are ineligible, and dividing the total by the total number of H-1B workers likely working in computer occupations, based on data and reports issued by USCIS. See BUREAU OF LABOR STATISTICS, EMPLOYMENT BY DETAILED OCCUPATION, <https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm>; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, H-1B AUTHORIZED-TO-WORK POPULATION ESTIMATE, (2020), *available at* <https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf>; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), *available at* https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.

¹²⁹ These findings come from an analysis of data on H-1B beneficiaries in FY19 from the United States Citizenship and Immigration Services and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics.

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workers in these fields far exceeds the supply increase in the research described above that found substantial increases in the labor supply lower U.S. workers' earnings.¹³⁰

One study compared winning and losing firms in the FY2006 and FY2007 lotteries for H-1B visas by matching administrative data on these lotteries to administrative tax data on U.S. firms.¹³¹ The study found that winning additional H-1B visas causes at most a moderate increase in firms' overall employment that does not usually exceed the number of H-1B workers hired, meaning that H-1B workers essentially crowd out firms' employment of other workers. It also found evidence that additional H-1B workers lead to lower average employee earnings and higher firm profits.¹³² On the whole, the study concluded that the current results of the H-1B program run counter to the program's purpose, which is to allow for a limited number of workers with specialized skills to work in the U.S. while ensuring that U.S. workers' wages are not adversely affected.

Similarly, other studies have found that an influx of foreign computer science workers suppresses wages for computer science workers across the board.¹³³ These lower wages crowd

¹³⁰ George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, THE QUARTERLY JOURNAL OF ECONOMICS Vol. 118, No. 4 (2003), pp. 1335-1374, available at <https://www.jstor.org/stable/25053941?seq=1>.

¹³¹ Kirk Doran et al., *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, (2016), available at <https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf>.

¹³² Supporting the argument that H-1B dependence increases firms' profit margins is evidence showing that firms that rely on H-1Bs can generate net profit margins of 20 percent to 25 percent in a sector. Normal expected margins are 6 percent to 8 percent. See *Immigration Reforms Needed to Protect Skilled American Workers: Hearing before the Senate Committee on the Judiciary* (March 17, 2015) (testimony of Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY), available at <https://www.judiciary.senate.gov/imo/media/doc/Hira%20Testimony.pdf>.

¹³³ John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.*, NBER Working Paper No. 23153 (2017), available at <https://www.nber.org/papers/w23153.pdf>. Additionally, some argue that H-1B visas are in such high demand because it is often cheaper to hire an H-1B employee than an American worker. *The Border Security, Economic Opportunity, and Immigration Modernization Act, S.744: Hearing before the Senate*

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out U.S. workers into non-computer science-based fields. In particular, the findings of these studies “imply that for every 100 foreign [computer science] workers that enter the US, between 33 to 61 native [computer science] workers are crowded out from computer science to other college graduate occupations.”¹³⁴

Other sources dispute the conclusion that existing prevailing wage levels disadvantage U.S. workers.¹³⁵ The Department acknowledges that H-1B workers can and do, in many instances, earn the same or more than similarly employed U.S. workers. However, the evidence described above appears to contradict that this claim is universal across firms and industries. The Department in its expertise views the studies, data, testimony, and anecdotal evidence showing displacement and lowered wages for U.S. workers in many cases as sufficient to demonstrate that the H-1B prevailing-wage levels are in need of reform, even if in other instances some firms do in fact pay H-1B workers wages comparable to those of U.S. workers.

Committee on the Judiciary (April 22, 2013) (testimony of Neeraj Gupta, CEO of Systems in Motion, to the Senate Judiciary Committee), available at <https://www.judiciary.senate.gov/imo/media/doc/04-22-13GuptaTestimony.pdf>. Furthermore some studies show that heavy users of H-1Bs workers pay their workers less than the median wages for the jobs they fill. Daniel Costa and Ronil Hira, *H-1B Visas and Prevailing Wage Levels*, ECONOMIC POLICY INSTITUTE, (2020), available at <https://www.epi.org/publication/h-1b-visas-and-prevailing-wage-levels/>.

¹³⁴ John Bound et al., *Understanding the Economic Impact of the H-1B Program on the U.S.*, NBER Working Paper No. 23153 (2017), available at <https://www.nber.org/papers/w23153.pdf>. The authors find that, in the absence of high-skilled immigrants (mostly H-1B workers), wages for U.S. computer scientists would have been 2.6 percent to 5.1 percent higher and employment in computer science for U.S. workers would have been 6.1 percent to 10.8 percent higher in 2001.

¹³⁵ See, e.g., David Bier, *100% of H-1B Employers Offer Average Market Wages—78% Offer More*, CATO INSTITUTE, (2020), available at [https://www.cato.org/blog/100-h-1b-employers-offer-average-market-wages-78-offer-more#:~:text=2020%209%3A37AM-,100%25%20of%20H%2D1B%20Employers%20Offer%20Average,Market%20Wages%E2%80%9478%25%20Offer%20More&text=The%20Economic%20Policy%20Institute%20\(EPI,foreign%20workers%20in%20specialty%20occupations;Robert%20Atkinson,H-1B%20Visa%20Workers%20Lower-Wage%20Substitute,or%20Higher-Wage%20Complement?,INFORMATION%20TECHNOLOGY%20&%20INNOVATION%20FOUNDATION,\(2010\),available%20at%20https://itif.org/publications/2010/06/10/h-1b-visa-workers-lower-wage-substitute-or-higher-wage-complement](https://www.cato.org/blog/100-h-1b-employers-offer-average-market-wages-78-offer-more#:~:text=2020%209%3A37AM-,100%25%20of%20H%2D1B%20Employers%20Offer%20Average,Market%20Wages%E2%80%9478%25%20Offer%20More&text=The%20Economic%20Policy%20Institute%20(EPI,foreign%20workers%20in%20specialty%20occupations;Robert%20Atkinson,H-1B%20Visa%20Workers%20Lower-Wage%20Substitute,or%20Higher-Wage%20Complement?,INFORMATION%20TECHNOLOGY%20&%20INNOVATION%20FOUNDATION,(2010),available%20at%20https://itif.org/publications/2010/06/10/h-1b-visa-workers-lower-wage-substitute-or-higher-wage-complement).

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Relatedly, some sources suggest that attracting foreign workers with specific, in-demand skills helps firms innovate and expand, driving growth and higher overall job creation, which in turn leads to more work opportunities for U.S. workers.¹³⁶ The Department does not dispute that allowing firms to access skilled foreign workers can lead to overall increases in innovation and economic activity, which can, in turn, benefit U.S. workers. However, H-1B workers' earnings data and other research indicate that, in many cases, the existing wage levels do not lead to these outcomes.¹³⁷ Even though some employers pay H-1B workers at rates comparable to what their U.S. counterparts are paid, that does not change the conclusion that the existing prevailing wage levels set a wage floor substantially below what similarly employed U.S. workers make in many instances, which allows some firms to use H-1B workers as a low-cost alternative to U.S. workers. And regardless, while the Department is certainly in favor of measures that increase economic growth and job creation, such outcomes are not the immediate objectives of the INA's wage protections, and, in any event, must be achieved in a manner consistent with the statute, which here requires the Department to focus on ensuring that the H-1B program does not impair wages and job opportunities of U.S. workers similarly employed. In short, the fact that some firms use the program as intended and pay H-1B workers the same or higher rates than similarly

¹³⁶ See AMERICAN IMMIGRATION COUNCIL, *THE H-1B VISA PROGRAM: A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY*, (2020), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf; NATIONAL FOUNDATION FOR AMERICAN POLICY, *H-1B VISAS BY THE NUMBERS: 2017-18*, (2018), *available at* <https://nfap.com/wp-content/uploads/2018/04/H-1B-Visas-By-The-Number-FY-2017.NFAP-Policy-Brief.April-2018.pdf>.

¹³⁷ See, e.g., Sarah Pierce and Julia Gelatt, *Evolution of the H-1B: Latest Trends in a Program on the Brink of Reform*, MIGRATION POLICY INSTITUTE, (2018), *available at* <https://www.migrationpolicy.org/research/evolution-h-1b-latest-trends-program-brink-reform>; CENTER FOR IMMIGRATION STUDIES, *H-1Bs: STILL NOT THE BEST AND BRIGHTEST*, (2008), *available at* <https://cis.org/Report/H1Bs-Still-Not-Best-and-Brightest>.

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employed U.S. workers does not reduce the Department's need to act to ensure that this practice becomes more common, lessening the harms to U.S. workers caused by the existing prevailing wage levels.

Furthermore, given the annual numerical cap on some H-1B workers, a level that is frequently exceeded by the number of petitions each year, raising the prevailing wage levels to more accurately reflect what U.S. workers with levels of education, experience, and responsibility comparable to H-1B workers are paid should lead to more highly skilled H-1B nonimmigrants entering the U.S. labor market, and thus enhance the benefits of the program for U.S. workers identified by some studies. This is because, if firms are required to pay H-1B workers wages that accurately reflect what their U.S. counterparts earn, the firms would be more likely to sponsor foreign workers whose value exceeds this increased compensation. Given that workers' compensation tends to reflect the value provided from skills demanded by a firm, higher compensation should lead to workers with more specialized knowledge and expertise receiving the limited number of H-1B visas. Because this change in H-1B worker composition would limit applications to those with the skills necessary to command higher compensation, it would likely increase innovation and economic growth.

Some also argue that the presence of H-1B workers, even those with wages lower than similarly employed U.S. workers, raises income for U.S. workers because in some fields there is an apparent shortage of U.S. Science, Technology, Engineering, and Math (STEM) workers.¹³⁸

¹³⁸ See, e.g., *The Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), available at <https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf>.

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If there are no available U.S. workers to fill a position, then a firm's labor need goes unmet without substantial investment in worker recruitment and training. Accordingly, importing needed workers allows companies to innovate and grow, creating more work opportunities and higher-paying jobs for U.S. workers.

While there are usually fewer U.S. graduates in STEM fields than there are open positions in the fields, this simple observation tends to ignore key characteristics of STEM workers, especially those in IT. As some researchers have noted, in recent years, for every two students who graduate from a U.S. university with a STEM degree, only one is hired into a STEM job.¹³⁹ This finding, along with other research on U.S. workers' skills,¹⁴⁰ calls into question, in some cases, the scarcity of U.S. STEM workers that some claim drive employers' use of H-1B workers.¹⁴¹

As noted above, there are high concentrations of H-1B workers in many STEM-related fields. The high number of H-1B workers in fields for which U.S. workers study but in which they either choose not to work or cannot find jobs suggests that H-1B workers are not being used where no domestic workers can be found for the market rate, but rather are being used to fill jobs

¹³⁹ Questions for the Record submitted by Ronil Hira, Associate Professor of Public Policy Rochester Institute of Technology, Rochester, NY, to the Senate Judiciary Committee, April 2013, <https://www.judiciary.senate.gov/imo/media/doc/042213QFRs-Hira.pdf>.

¹⁴⁰ The Bureau of Labor Statistics studied the STEM skills gap and found varied results depending on geography, field, and other factors. Though some fields clearly face a shortage of qualified workers, this shortage is far from universal. See Yi Xue & Richard C. Larson, *STEM crisis or STEM surplus? Yes and yes*, MONTHLY LABOR REVIEW, U.S. BUREAU OF LABOR STATISTICS, (2015), available at <https://doi.org/10.21916/mlr.2015.14>.

¹⁴¹ Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment*, IZA, Discussion Paper No. 8884 (2015), available at <http://ftp.iza.org/dp8884.pdf>; Thijs van Rens, *The Skills Gap: Is it a myth?* SOCIAL MARKET FOUNDATION AND COMPETITIVE ADVANTAGE IN THE GLOBAL ECONOMY, (2015), available at <http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf>.

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with workers paid below the market rate.¹⁴² Further, while the wage effects from a lower cost labor alternative may be minimal where the alternative only makes up a very small share of the labor pool, the effects can become negative and more pronounced as concentrations of foreign workers increase.¹⁴³ Thus, the fact that 10 percent of the IT workforce consists of H-1B workers, in combination with the fact that many U.S. IT graduates do not work in IT jobs, supports the notion that firms use H-1B workers as low-cost labor, and that this practice likely has a substantial harmful effect on U.S. workers. Moreover, insofar as the H-1B program suppresses wages for U.S. IT workers, it discourages U.S. students from entering the IT field in the first place, thus perpetuating the “skills gap.” Basic economic theory dictates that more U.S. students would likely enter the IT field if IT jobs paid more.

In short, contrary to the H-1B program’s goals, prevailing wage levels that in many instances do not accurately reflect earning levels of comparable U.S. workers have permitted some firms to displace rather than supplement U.S. workers with H-1B workers. While allowing firms to access high-skilled workers to fill specialized positions can help U.S. workers’ job opportunities in some instances, the benefits of this policy diminish significantly when the prevailing wage levels do not accurately reflect the wages of similarly employed workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers, which is counter

¹⁴²Benedikt Herz & Thijs van Rens, *Accounting for Mismatch Unemployment*, IZA, Discussion Paper No. 8884 (2015), available at <http://ftp.iza.org/dp8884.pdf>; Thijs van Rens, *The Skills Gap: Is it a myth?*, SOCIAL MARKET FOUNDATION AND COMPETITIVE ADVANTAGE IN THE GLOBAL ECONOMY, (2015), available at <http://www.smf.co.uk/wp-content/uploads/2015/12/SMF-CAGE-Policy-Briefing-Skills-Gap-Myth-Final.pdf>.

¹⁴³ George Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, THE QUARTERLY JOURNAL OF ECONOMICS Vol. 118, No. 4 (2003), pp. 1335-1374, available at <https://www.jstor.org/stable/25053941?seq=1>.

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to the purpose of the INA’s wage protections, and also lead to wage suppression for those U.S. workers who remain employed.

That the existing prevailing wage levels likely do not reflect actual market wage rates in many cases is further demonstrated by the fact that some firms already pay wages to their H-1B workers that are well above the applicable prevailing wage level. For example, Microsoft’s General Counsel testified before the Senate Judiciary Committee in 2013 that at the company’s headquarters, software development engineers had a starting salary that was typically more than 36 percent above the Level I wage, meaning they were being paid wages slightly above the Department’s Level III wage at that time.¹⁴⁴ More recently, in Q3:2020, the Department’s data show that many of the largest users of the H-1B program pay in many cases wages well over 20 percent in excess of the prevailing wage rate set by the Department for the workers in question.¹⁴⁵ Table 2 below shows this trend with respect to top H-1B employers.

Table 1: Top 20 H-1B Employers by LCAs filed: Average Rate at which the Wage Offered exceeds the Prevailing Wage

Top Employers	Total LCAs Filed/Worker Positions Requested	Average Rate at which the Wage Offered exceeds Prevailing Wage	Percentage of Worker Positions where Wage Offered Exceeds Prevailing Wage by Over 20 Percent

¹⁴⁴ See, e.g., *The Border Security, Economic Opportunity, and Immigration Modernization Act, S.744: Hearing before the Senate Committee on the Judiciary* (April 22, 2013) (testimony of Brad Smith, General Counsel of Microsoft), available at <https://www.judiciary.senate.gov/imo/media/doc/04-22-13BradSmithTestimony.pdf>.

¹⁴⁵ “Top 20 LCA/H-1B Employers based on Certifications, as of 6/30/2020,” Employment and Training Administration, accessed August 2020.

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Qualcomm Technologies, Inc.	701 / 38,533	5.74%	9.70%
Infosys Limited	7,615 / 21,627	6.53%	11.08%
Cognizant Technology Solutions US Corp.	20,192 / 20,192	0.24%	0.32%
Deloitte Consulting, LLP	7,316 / 16,567	61.62%	44.16%
Amazon.com Services, LLC	9,175 / 12,560	93.93%	68.38%
Oracle America, Inc.	543 / 12,269	0.48%	0.55%
Tata Consultancy Services Limited	8,595 / 9,388	2.95%	4.90%
Zensar Technologies, Inc.	130 / 9,207	1.03%	0.77%
NVIDIA Corporation	396 / 8,977	4.69%	8.33%
Google, LLC	8,669 / 8,669	71.73%	58.60%
Ernst & Young U.S., LLP	8,170 / 8,170	88.59%	71.79%
Facebook, Inc.	3,583 / 7,674	24.71%	47.92%
Cisco Systems, Inc.	925 / 7,121	8.88%	16.65%
Qualcomm Atheros, Inc.	115 / 7,110	6.05%	15.65%
Apple, Inc.	2,983 / 6,889	117.89%	61.25%
Microsoft Corporation	6,544 / 6,631	31.48%	68.61%
Western Digital Technologies, Inc.	267 / 6,621	12.30%	21.72%
ServiceNow, Inc.	359 / 6,383	0.00%	0.00%
Computer Sciences Corporation	231 / 6,034	0.44%	1.30%
Kforce, Inc.	584 / 5,786	1.16%	1.71%

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Percent of National LCA/H-1B Totals	19.2% / 31.6%		
Simple Average for the Top 20		27.02%	25.67%

Source: “Top 20 LCA/H-1B Employers based on Certifications, as of 6/30/2020,” Employment and Training Administration, accessed August 2020.

If the Department’s current prevailing wage levels accurately reflected earnings for similarly employed U.S. workers, then these major differences between actual wages paid to some H-1B workers and the otherwise applicable prevailing wage levels would not be as common. As noted previously, the INA takes a belt-and-suspenders approach to protecting U.S. workers’ wages. Employers must pay the higher of the actual wage they pay to similarly employed workers or the prevailing wage rate set by the Department. Both possible wage rates generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor market as H-1B workers. It is therefore a reasonable assumption that, if both of the INA’s wage safeguards were working properly, the wage rates they produce would, at least in many cases, be similar. Where the Department’s otherwise applicable wage rate is significantly below the rates actually being paid by employers in a given labor market, it gives rise to an inference that the Department’s current wage rates, based on statistical data and assumptions about the skill levels of U.S. workers, are not reflective of the types of wages that workers similarly employed to H-1B workers can and likely do command in a given labor market. There is a mismatch between what the Department’s prevailing wage structure says the relevant cohort of U.S. workers are or should be making and what employers are likely actually paying such workers, as demonstrated by the actual wage they are paying H-1B workers. Put another way, when many of the heaviest users of the H-1B

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program pay wages well above the prevailing wage, it suggests that the prevailing wages are too low, and thus can be abused by other firms to replace U.S. workers with lower-wage foreign workers in cases where those firms do not have similarly employed workers on their jobsites whose actual wages would be used to set the wage for H-1B workers.

In the PERM programs, recent Employment and Training Administration data shows that the heaviest users of the programs also typically pay wages well above the prevailing wage levels. Whereas the simple average of the top 20 employers' wage offers over the prevailing wage is 27.02 percent for H-1B, it is 16.77 percent for PERM. And while the simple average of cases with wages more than 20 percent above the prevailing wage is 25.67 percent for H-1B, it is 30.59 percent for PERM, as shown in Table 3.¹⁴⁶

Table 2: Top 20 PERM Employers Average of Wage Offered over Prevailing Wage

PERM Employers			
Top Twenty Employers	Total Applications Certified	Average Rate at which the Wage Offered exceeds Prevailing Wage	Percentage of Certified Cases where Wage Offered exceeds Prevailing Wage by over 20 Percent
Amazon.com Services, Inc.	2,389	3.27%	6.86%
Google LLC	2,167	19.50%	34.06%
Facebook, Inc.	1,204	40.57%	68.11%

¹⁴⁶ “Top 20 LCA/H-1B Employers based on Certifications, as of 6/30/2020,” Employment and Training Administration, accessed August 2020; “Top 20 PERM Employers based on Certifications, as of 6/30/2020,” Employment and Training Administration, accessed August 2020.

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Microsoft Corporation	1,114	27.71%	48.56%
Intel Corporation	939	2.08%	2.88%
Tata Consultancy Services Limited	923	0.00%	0.00%
Cognizant Technology Solutions US Corporation	808	0.00%	0.00%
Apple, Inc.	697	37.85%	69.30%
HCL America, Inc.	557	0.01%	0.00%
Capgemini America, Inc.	502	6.12%	7.97%
Ernst Young U.S. LLP	426	13.71%	27.00%
Cisco Systems	325	9.95%	19.69%
Amazon Web Services, Inc.	316	2.81%	5.70%
Deloitte Consulting LLP	303	39.29%	67.99%
LinkedIn Corporation	282	40.74%	72.34%
Nvidia Corporation	276	26.53%	56.16%
Salesforce.com	265	32.72%	67.17%
Oracle America, Inc.	263	14.96%	28.52%
VMWare, Inc.	258	12.43%	21.71%
Qualcomm Technologies	254	5.18%	7.87%
Percent of National PERM Totals	21.6%		
Simple Average for the Top 20		16.77%	30.59%

Source: “Top 20 PERM Employers based on Certifications, as of 6/30/2020,” Employment and Training Administration, accessed August 2020.

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Beyond the similarities between wages offered above the prevailing wage levels in the H-1B and PERM programs, the Department notes that the volume of research and literature on the wage effects of the PERM programs is scant compared to that on the wage effects of the H-1B program. That said, there are reasonable grounds to conclude that adverse wage effects similar to those found in the H-1B program are also caused in some instances by the employment of EB-2 and EB-3 immigrants.

Critically, the PERM programs and the H-1B program are closely linked in both how they are regulated and used by employers. Unlike most nonimmigrant visas, H-1B visas are unusual in that they are “dual intent” visas, meaning under the INA H-1B workers can enter the U.S. on a temporary status while also seeking to adjust status to that of lawful permanent residents.¹⁴⁷ One of the most common pathways by which H-1B visa holders obtain lawful permanent resident status is through employment-based green cards, and in particular EB-2 and EB-3 visas.¹⁴⁸ USCIS has estimated that over 80 percent of all H-1B visa holders who adjust to lawful permanent resident status do so through an employment-based green card.¹⁴⁹ This is reflected in data on the PERM programs. In recent years, more than 80 percent of all individuals granted lawful permanent residence in the EB-2 and EB-3 classifications have been aliens adjusting status, meaning they were already present in the U.S. on some kind of nonimmigrant

¹⁴⁷ *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 593 (N.D. Iowa 2003).

¹⁴⁸ See Sadikshya Nepal, *The Convoluted Pathway from H-1B to Permanent Residency: A Primer*, BIPARTISAN POLICY CENTER (2020); CONGRESSIONAL RESEARCH SERVICE, *THE EMPLOYMENT-BASED IMMIGRATION BACKLOG* (2020) (“A primary pathway to acquire an employment-based green card is by working in the United States on an H-1B visa for specialty occupation workers, getting sponsored for a green card by a U.S. employer, and then adjusting status when a green card becomes available.”).

¹⁴⁹ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *H-1B AUTHORIZED-TO-WORK POPULATION ESTIMATE* (2020).

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status.¹⁵⁰ Given that the H-1B program is the largest temporary visa program in the U.S. and is one of the few that allows for dual intent, it is a reasonable assumption that the vast majority of the EB-2 and EB-3 adjustment of status cases are for H-1B workers. This is corroborated by the Department's own data, which shows that, in recent years, approximately 70 percent of all PERM labor certification applications filed with the Department have been for H-1B nonimmigrants.¹⁵¹

Because of how many H-1B visa holders apply for EB-2 and EB-3 classifications, Congress has repeatedly adapted the INA to account for the close connection between the programs. For example, while H-1B nonimmigrants are generally required to depart the U.S. after a maximum of six years of temporary employment, Congress has created an exception that allows H-1B nonimmigrants who are beneficiaries of PERM labor certification applications with the Department, or who are beneficiaries of petitions for an employment-based immigrant visa with DHS that have been pending for longer than a year, be exempt from the 6-year period of authorized admission limitation if certain requirements are met.¹⁵² Similarly, as noted above, Congress established the INA's prevailing wage requirements in section 212(p) with specific reference to the fact that they would apply in both the H-1B and PERM programs.¹⁵³

¹⁵⁰ See DEPARTMENT OF HOMELAND SECURITY, 2017 YEARBOOK OF IMMIGRATION STATISTICS, TABLE 7. PERSONS OBTAINING LAWFUL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2017, available at <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>.

¹⁵¹ OFFICE OF FOREIGN LABOR CERTIFICATION, PERMANENT LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY19, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.

¹⁵² See Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

¹⁵³ See 144 Cong. Rec. S12741, S12756 (explaining that 8 U.S.C. 1182(p) “spells out how [the prevailing] wage is to be calculated in the context of both the H-1B program and the permanent employment program in two circumstances.”).

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The various features of the statutory framework governing the programs, working in combination, have further tightened the relationship between them. In particular, because H-1B workers can have dual intent and, if they have a pending petition for an employment-based green card, can remain in the U.S. beyond the 6-year period of authorized stay limitation, many workers for whom an employer has filed a PERM labor certification application are already working for that same employer on in H-1B status.¹⁵⁴ And because the method by which employment-based green cards are allocated can result in significant delays between when an alien is approved for a green card and when the green card is actually issued, the period during which a worker can, in some sense, have one foot in each program, is often protracted.¹⁵⁵

This system results in an immense demographic overlap between the H-1B and PERM programs. For instance, 71.7 percent of all H-1B petitions approved in FY2019 were for individuals born in India.¹⁵⁶ Similarly, the vast majority of individuals waiting for adjudication of EB-2- and EB-3-based adjustment of status applications are Indian nationals.¹⁵⁷ Relatedly, LCAs and applications for PERM labor certifications often are for job opportunities in the same occupations. Data from the Department's OFLC shows that of the ten most common

¹⁵⁴ See CONGRESSIONAL RESEARCH SERVICE, THE EMPLOYMENT-BASED IMMIGRATION BACKLOG (2020).

¹⁵⁵ See 8 U.S.C. § 1152(a)(2); Abigail Hauslohner, *The employment green card backlog tops 800,000, most of them Indian. A solution is elusive.*, WASHINGTON POST (December 17, 2019), available at https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html; U.S. DEPARTMENT OF STATE, VISA BULLETIN FOR SEPTEMBER 2020, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-september-2020.html>.

¹⁵⁶ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf, (showing 66 percent of H-1B petitions approved in FY2019 were for computer-related occupations).

¹⁵⁷ CONGRESSIONAL RESEARCH SERVICE, THE EMPLOYMENT-BASED IMMIGRATION BACKLOG (2020).

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occupations in which H-1B workers are employed, seven are also among the ten most common occupations in which PERM workers are employed.

The upshot is that the H-1B and PERM programs are, in a variety of ways, inextricably conjoined. The rules governing them and how employers use them mean that, in many instances, workers in the PERM programs and workers in the H-1B program are often the exact same workers doing the same jobs in the same occupations for the same employers. And their wages are set based on the same methodology. It is therefore a reasonable inference that evidence that the Department's current wage levels under the four-tier structure result in inappropriately low wage rates in some instances for H-1B workers also holds true for the PERM programs.

3. Identifying the Appropriate Entry Level Wage

Having determined that the existing wage levels are not set based on the wages paid to U.S. workers with the education, experience, and levels of supervision comparable to those of similarly employed foreign workers and are likely harming the wages and job opportunities of U.S. workers, the Department must assess how the wage levels should be adjusted. While the INA provides the relevant factors and general framework by which the wage levels are to be set, it leaves the precise manner in which this is accomplished, including the types of data and evidence to be used and how such data and evidence is weighed, to the Department's discretion and expert judgment. In exercising that discretion, the Department's decision on how to adjust the wage levels is informed by the statute's purpose of protecting the wages and job opportunities of U.S. workers. This means the Department has focused its analysis on those areas where the risk to U.S. workers is most acute, taken into account how the foreign labor

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programs are actually used by employers, and, where appropriate, resolved doubts in favor of refining the wage calculations so as to eliminate to the greatest extent reasonably possible adverse effects on U.S. workers caused by the employment of foreign workers.

For the reasons explained above, the Department has determined BLS's OES survey remains the best source of wage data to determine prevailing wages in the H-1B, H-1B1, E-3, and PERM programs. However, because the OES survey does not capture the actual skills or responsibilities of the workers whose wages are being reported, it is appropriate for the Department to rely on data outside the OES survey to establish the wage levels applicable to these immigrant and nonimmigrant visa programs, which encompass varying populations working in hundreds of different occupational classifications. The Department has therefore undertaken a comprehensive analysis concerning the types of U.S. workers in the most common occupations in the programs that have comparable levels of education, experience, and responsibility to the foreign workers in these programs, and estimated how much those U.S. workers earn. To identify the proper comparators, the Department looked not only to the INA itself, which sets the minimum qualifications foreign workers in the H-1B, H-1B1, and E-3 programs must have to qualify for these visas, but, in order to draw a more accurate comparison, demographic data about the types of workers who actually work in the programs as well.

The Department has concluded, in its discretion, that the Level I wage should be established based on the wages paid to workers in those occupations that make up a substantial majority of the applications filed in the H-1B, H-1B1, E-3, and PERM programs. This ensures that the Department appropriately takes into account the size and breadth of the programs

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covered by the four-tier wage structure by giving special attention to those areas where the risk to U.S. workers' wages and job opportunities is most acute. To make this determination, the Department has identified what it considers to be an analytically appropriate proxy for approved entry-level workers for the specialty occupation and EB-2 programs; consulted various, authoritative sources to determine what similarly qualified workers in the U.S. who fit this profile are paid; and identified where within the OES wage distribution these U.S. workers' wages fall. That point in the distribution, which the Department has estimated to be at approximately the 45th percentile, serves as the appropriate entry-level wage for purposes of the Department's four-tier wage structure.

In order to reach this estimate, the Department first identified an analytically usable definition of the prototypical entry-level H-1B and EB-2 workers. More specifically, the Department identified the education and experience typically possessed by such workers, which, in turn, was used to identify the wages paid to U.S. workers with similar levels of experience and education. Looking to the wages of such U.S. workers to adjust the entry-level wage paid to foreign workers is highly consistent with the statutory scheme.

After consulting the statutory criteria for who qualifies for the relevant visa classifications, as well as the demographic characteristics of actual H-1B nonimmigrants, the Department has determined that an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution.

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To begin with, the statutory criteria for who can qualify as an EB-2 worker provides a clear, analytically useable definition of the minimum qualifications workers within that classification must possess. Even the least experienced individuals within the EB-2 classification are likely to have at least a master's degree or its equivalent.¹⁵⁸ Possession of an advanced degree is thus a meaningful baseline with which to describe entry-level workers in the EB-2 classification.

As noted above, the baseline qualifications needed to obtain entry as an H-1B worker are different. An individual with a bachelor's degree in a specific specialty, or its equivalent, may qualify for an H-1B visa; a master's degree is not a prerequisite.¹⁵⁹ However, the bachelor's degree or equivalent must be in a specific specialty. A generalized bachelor's degree is insufficient to satisfy the requirement that H-1B workers possess highly specialized knowledge.¹⁶⁰ Further, the statute requires that the individual be working in a job that requires that application of "highly specialized knowledge."¹⁶¹ Again, this means that for the H-1B program the possession of a bachelor's degree is not the baseline qualification criterion for admission. Something more is needed. The ultimate inquiry rests also on whether the individual can and will be performing work requiring highly specialized knowledge.

As with aliens in the EB-2 classification, looking to the earnings of individuals with a master's degree provides an appropriate and analytically useable proxy for purposes of analyzing

¹⁵⁸ See 8 U.S.C. § 1153(b)(2)(A) ("Visas shall be made available... to qualified immigrants who are members of the professions holding advanced degrees or their equivalent...").

¹⁵⁹ 8 U.S.C. § 1184(i).

¹⁶⁰ See *Chung Song Ja Corp. v. U.S. Citizenship & Immigration Servs.*, 96 F. Supp. 3d 1191, 1197–98 (W.D. Wash. 2015).

¹⁶¹ 8 U.S.C. § 1184(i).

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the wages of typical, entry-level workers within the H-1B program. For one thing, master's degree programs are, generally speaking, more specialized courses of study than bachelor's degree programs. Thus, while the fact that an individual possesses a bachelor's degree does not necessarily suggest one way or another whether the individual possesses the kind of specialized knowledge required of H-1B workers, the possession of a master's degree is significantly more likely to indicate some form of specialization. Although a master's degree alone does not automatically mean an individual will qualify for an H-1B visa, possession of a master's degree—something that is surveyed for in a variety of wage surveys—is thus a better proxy for specialized knowledge than is possession of a bachelor's degree for purposes of the Department's analysis. This is because, while possession of a bachelor's degree is also commonly surveyed for, mere possession of a bachelor's degree is not nearly as reliable an indicator that the degree holder possesses specialized knowledge.

Further, the demographic characteristics of H-1B workers suggests that many entry-level workers in the program are master's degree holders with limited work experience. A review of data from USCIS about the characteristics of individuals granted H-1B visas in fiscal years 2017, 2018, and 2019 indicates that H-1B workers with master's degrees tend to be younger and less highly compensated than H-1B workers with bachelor's degrees. On average, individuals with master's degrees in the program are approximately 30 years old, whereas bachelor's degree holders are, on average, 32 years old. This suggests that, while possessing a more advanced degree, master's degree holders in the program are likely to have less relevant work experience

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than their bachelor's degree counterparts.¹⁶² Relatedly, H-1B master's degree holders make, based on a simple average, \$86,927, whereas bachelor's degree holders make on average \$88,565.¹⁶³ Given that differences in skills and experience often explain differences in wages, this gap in average earnings and age suggests that, while possessing a more advanced degree, master's degree holders in the H-1B program tend to be less skilled and experienced—and are therefore more likely to enter the program as entry-level workers—than are bachelor's degree holders.¹⁶⁴

This conclusion is further bolstered by the fact that master's degree holders have, in recent years, been the largest educational cohort within the program. In FY2019, for instance, 54 percent of the beneficiaries of approved H-1B petitions had a master's degree—whereas only 36 percent of beneficiaries had only a bachelor's degree.¹⁶⁵ These facts, in combination with the age and earnings profiles of master's degree holders in the program, strongly suggest that a significant number of entry-level H-1B workers are individuals with a master's degree and very limited work experience.

The Department notes that its description of individuals with master's degrees and little-to-no work experience as appropriate comparators for entry-level workers in the Department's

¹⁶² Age is a common proxy for potential work experience. See, e.g., Rebecca Chenevert & Danial Litwok, *Acquiring Work Experience with age*, UNITED STATES CENSUS BUREAU, (2013) available at <https://www.census.gov/newsroom/blogs/random-samplings/2013/02/acquiring-work-experience-with-age.html>.

¹⁶³ This analysis is based on data from U.S. Citizenship and Immigration Services about the demographic characteristics of H-1B workers.

¹⁶⁴ ELKA TORPEY, SAME OCCUPATION, DIFFERENT PAY: HOW WAGES VARY, BUREAU OF LABOR STATISTICS (2015), available at <https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm>.

¹⁶⁵ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.

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foreign labor programs for purposes of setting the proper Level I wage is not inconsistent with how the Department makes prevailing wage determinations under its 2009 Guidance. Many job opportunities that result in a Level I wage determination of course do not require a master's degree as the minimum qualification for the position. The Department is not changing that aspect of its guidance. Rather, the Department has decided, for the reasons given above, to rely on master's degree holders as an analytically useable proxy for the types of workers who actually fill many entry-level positions in the H-1B and PERM programs and who likely satisfy the key, baseline statutory qualification requirements for entry into the programs – namely the possession of specialized knowledge or an advanced degree – in order to identify where the first of four levels should fall along the OES wage distribution. This reflects how employers actually fill jobs for which workers are sought, not necessarily how job descriptions are used to assign wage levels for each individual job opportunity to provide a prevailing wage determination at the beginning of the labor certification process, which often occurs before the identity and actual qualifications of the worker who will fill the position are known. Giving some weight to the actual characteristics of entry-level workers in the programs furthers the purpose of the statute, which is designed to ensure that foreign workers make at least as much as similarly employed U.S. workers with comparable levels of education, experience, and responsibility.

Further, practice in the H-1B program shows that a significant number of H-1B workers are placed at the first wage level, which demonstrates that the Department's focus on specialty occupation requirements in setting an entry-level wage is also consistent with how workers are presently classified for prevailing wage purposes under the 2009 Guidance. In FY2019, 14.4 percent of all worker positions on LCAs were for entry-level positions. This cohort includes

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LCAs filed for some of the most common H-1B occupations, including Software Developers, 19.4 percent of which were placed at the first wage level; Computers Systems Analysts, 4.8 percent of which were placed at the first wage level; and Computer Occupations, 7 percent of which were placed at the first wage level. As discussed previously, these occupations, as described in the OOH, likely include some workers at the lower end of the OES distribution who are not performing work that would fall within the INA’s definition of “specialty occupation.” Thus, many workers in the H-1B program that have master’s degrees or some other qualification that satisfies the INA’s baseline, specialized knowledge requirement—a level of expertise that makes them more highly skilled than a portion of workers at the bottom end of the OES distribution for many occupations—also work in positions that fit within the entry-level classification as currently administered by the Department under its 2009 Guidance.

To determine the wages typically made by individuals having comparable levels of education, experience, and responsibility to the prototypical entry-level H-1B and EB-2 workers and working in the most common H-1B and PERM occupations, the Department consulted a variety of data sources, most importantly wage data on individuals with master’s degrees or higher and limited years of work experience from the 2016, 2017, and 2018 Current Population Surveys (CPS)¹⁶⁶ conducted by the U.S. Census Bureau, and data on the salaries of recent graduates of master’s degree programs in STEM occupations garnered from surveys conducted by the National Science Foundation (NSF) in 2015 and 2017. Both of these surveys represent the

¹⁶⁶ The Current Population Survey (CPS), sponsored jointly by the U.S. Census Bureau and BLS, is the primary source of labor force statistics for the population of the U.S. See UNITED STATES CENSUS BUREAU, CURRENT POPULATION SURVEY, available at <https://www.census.gov/programs-surveys/cps.html>.

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highest standards of data collection and analysis performed by the federal government. Both surveys have large sample sizes that have been methodically collected and are consistently used not just across the federal government for purposes of analysis and policymaking, but by academia and the broader public as well.

In the case of the CPS survey, the Department used a wage prediction model to identify the wages an individual with a master's degree or higher and little-to-no work experience (based on age) would be expected to make and matched the predicted wage with the corresponding point on the OES wage distribution. Using the NSF surveys, the Department calculated the average wage of individuals who recently graduated from STEM master's degree programs and matched the average wage against the corresponding point on the OES distribution.

These analyses located three points within the OES wage distribution at which the wages of U.S. workers with similar levels of education and experience to the prototypical entry-level workers in specialty occupations and the EB-2 program are likely to fall. In particular, the 2015 NSF survey data indicate that workers in some of the most common H-1B and PERM occupations with a master's degree and little-to-no relevant work experience are likely to make wages at or near the 49th percentile of the OES distribution.¹⁶⁷ The 2017 NSF survey suggests that these workers are likely to make wages at or near the 46th percentile of the OES distribution.

¹⁶⁷ For the CPS data, the Department looked at the wages of workers in all occupations that account for 1 percent or more of the total H-1B population. These occupations also account for the majority of PERM workers. For the NSF data the Department examined the wages of workers in 11 of the most common (in the top 17) occupational codes for H-1B workers that were convertible to the occupational code convention of the NSF, which account for approximately 63 percent of all H-1B workers, according to data from USCIS.

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On the low end, the CPS data suggest that such individuals make wages at or near the 32nd percentile.

The Department thus identified a range within the OES data wherein fall the wages of workers who, while being relatively junior within their occupations, clearly possess the kinds of specialized education and/or experience that the vast majority of foreign workers covered by the Department's wage structure are, at a minimum, required to have.¹⁶⁸ Put another way, through an assessment of the experience and education generally possessed by some of the least skilled and least experienced H-1B and EB-2 workers—workers who are likely entry-level workers within their respective programs—the Department determined what U.S. workers with similar levels of education and experience are likely paid. Accordingly, it is appropriate for the wages paid to such U.S. workers to govern the entry-level prevailing wage paid under the Department's wage structure.¹⁶⁹

Translating the identified range into an entry-level wage for the Department's use in the H-1B and PERM programs could be accomplished in a number of ways. One option would be to simply calculate the average wage of all workers that fall within the range, meaning those workers whose reported wage falls between the 32nd and 49th percentiles, which would place

¹⁶⁸ The Department notes again by way of clarification that it is not suggesting that possession of a master's degree is required to work in a specialty occupation. Rather, as explained above, possession of a master's degree by someone with little-to-no relevant work experience is being employed as a useable proxy, for analytical purposes, of the level of education and experience that approximates the baseline level of specialized knowledge needed to work in the H-1B and EB-2 programs and that many entry-level workers in those programs actually possess.

¹⁶⁹ See 8 U.S.C. § 1182(a)(5)(A) (requiring the Secretary to certify that the employment of immigrants seeking EB-2 classification "will not adversely affect the wages and working conditions of workers in the United States similarly employed" (emphasis added); 8 U.S.C. § 1182(n)(1)(A)(i) (requiring prospective H-1B employers to offer and pay at least the actual wage level or "the prevailing wage level for the occupational classification in the area of employment").

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the entry-level wage at just above the 40th percentile. An alternative would be to identify a subset of wages within the range—either on the lower end or the higher end of the range—and calculate the average wage paid to workers within such subset. Because of the greater suitability of the NSF data for the Department’s purposes, likely distortions in the wage data of both surveys caused by the presence of lower-paid foreign workers in the relevant labor markets, and the purposes of the INA’s wage protections, the Department has decided that the most appropriate course is to set the entry-level wage by calculating the average of a subset of the data located at the higher end of the identified wage range. This results in the entry-level wage being placed at approximately the 45th percentile.

As between the two data sources and the manner in which they were analyzed, the NSF data are better tailored to the Department’s purposes in identifying an entry-level wage for the H-1B program. The NSF surveys provide data on the wages of individuals with degrees directly relevant to the specialized occupations in which they are working, namely degrees in STEM fields. By contrast, the CPS data only show whether a person does or does not have a master’s degree, and does not identify what field the master’s degree or the individual’s undergraduate course of study was in. It is therefore likely that some of the wage data relied on in generating the CPS estimate were based on the earnings of individuals who possess degrees not directly related to the occupation in which they work. Given that the CPS data used only accounted for persons with little-to-no experience, such individuals would therefore be unlikely to have the qualifications needed to work in a “specialty occupation,” as that term is defined in the INA. Having neither a specialized degree nor experience, and therefore lacking in specialized skills or expertise, at least with respect to the occupations in which they work, such individuals would not

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qualify as similarly employed to even the least skilled H-1B workers and are thus not appropriate comparators for identifying an entry-level wage in the H-1B program. Because of these workers' relative lack of skill and expertise, they are likely to command lower wages, and thus decrease the predicted wage below what would be an appropriate entry-level wage for the Department's foreign labor programs.

Relatedly, the Department's method for approximating experience in the CPS data is also not as closely tailored to the goal of determining what U.S. workers similarly employed to the prototypical entry-level H-1B and EB-2 workers are paid as is the NSF data. The CPS analysis relied on potential experience as a proxy for actual experience, which was calculated using a standard formula of subtracting from individuals' ages their years of education and six, based on the common assumption that most individuals start their education at the age of six.¹⁷⁰ While a standard measure for potential experience, this method of approximation is imprecise because it shows each individual of the same age and education level as having the same level of work experience. In reality, such individuals may vary significantly in their levels of experience.

For one thing, the approximation does not take into account the possibility of a worker temporarily exiting the workforce, and would count the time spent outside the workforce as work experience. It also does not account for gaps between when a person received his or her bachelor's degree and when he or she enrolled in a master's degree program. In such cases, the work experience captured by the proxy of potential experience may thus not be directly relevant

¹⁷⁰ For example, under this metric, a 30 year old individual with 18 years' worth of education would be counted as having six years of work experience.

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to the work a person performs after he or she graduates from a master's degree program since in some cases the work experience in question was likely acquired before the individual enrolled in a master's degree program. In consequence, the sample used in the CPS analysis almost certainly includes some individuals who have no relevant experience in the specialized occupations in which they are working, which likely decreases the wage estimate calculated using the CPS data and makes it a less precise and reliable estimation of the wages of U.S. workers with similar levels of education and experience to the prototypical, entry-level H-1B and EB-2 workers. In other words, the CPS data allows for only a rough approximation of experience—a key factor the Department must take into account in adjusting the prevailing wage levels. This, in combination with the fact that some workers contained within the CPS dataset likely also lack specialized education relevant to the occupations in which they work, means that CPS data is, in some degree, distorted by wage earners who should be discounted in identifying the appropriate entry-level wage because they likely possess neither the type of specialized experience nor the education in their field that is comparable to that possessed by entry-level H-1B and EB-2 workers.

The NSF survey data, by contrast, are uniquely suited to the Department's purposes. The NSF surveys in 2015 and 2017 capture wage data about exactly the sort of workers the Department has determined serve as the appropriate comparators for entry-level H-1B and EB-2 workers. They surveyed individuals with master's degrees in STEM fields who are working in STEM occupations, including some of the most common H-1B and PERM occupations, and who are approximately three years or less out of their master's degree programs. In other words, the NSF surveys report wage data for individuals with specialized knowledge and expertise working

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in the occupations in which H-1B and PERM workers are most often employed and who are relatively junior within their respective occupations. The NSF data therefore provide a more accurate wage profile of workers similarly employed to entry-level H-1B and EB-2 workers. While both data sources are useful in helping determine a wage range for entry-level H-1B and PERM workers, of the two, the NSF surveys provide information more relevant to the Department's assessment of what is the appropriate entry-level wage. Therefore, the Department's analysis relies more on the NSF surveys. This suggests that the entry-level wage should be placed higher up in the identified wage range given that is where the NSF survey results fall.

Beyond the relative weight of each data source, the Department also takes into account in identifying the appropriate entry-level wage the fact that both sources are likely distorted to some degree by the presence, in both the surveyed population and the labor market as a whole, of the very foreign workers the Department has determined are, in some instances, paid wages below the market rate. As noted above, various studies and data demonstrate that some H-1B workers are paid wages substantially below the wages paid to their U.S. counterparts, and that this has a suppressive effect on the wages of U.S. workers. Further, these adverse effects are most likely to occur and be severe in occupations with higher concentrations of foreign workers. It is therefore relevant to how the Department weighs the data that many of the occupations examined in the analyses of the NSF and CPS datasets have very high concentrations of H-1B workers. As noted previously, H-1B nonimmigrants make up about 10 percent of the total IT labor force in the

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U.S.¹⁷¹ In certain fields, including software developers, applications (22 percent); statisticians (22 percent); computer occupations, all other (18 percent); and computer systems analysts (12 percent), H-1B workers likely make up an even higher percentage of the overall workforce.¹⁷²

From this, the Department draws two conclusions. First, the respondents reporting wages in the CPS and NSF surveys are likely in some cases H-1B or PERM workers, given that both surveys contain responses from both U.S. citizens and noncitizens and the surveyed occupations have high concentrations of such foreign workers. The reported wages are thus in some instances likely not the market wage paid to U.S. workers similarly employed to H-1B and PERM workers, but rather the wages of the foreign workers themselves, which, as discussed previously, will be likely lower than the wages of U.S. workers in some cases. Second, even the reported wages of respondents who are not H-1B and PERM workers are likely not perfectly accurate reflections of what the market rate would be absent wage suppression given that high

¹⁷¹ The Department estimated the share of H-1B workers in the IT sector by tallying the total number of computer occupation workers in the U.S., subtracting those workers that fill positions for which H-1B workers are generally ineligible, and dividing the total by the total number of H-1B workers likely working in computer occupations, based on data and reports issued by USCIS. See BUREAU OF LABOR STATISTICS, EMPLOYMENT BY DETAILED OCCUPATION, <https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm>; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, H-1B AUTHORIZED-TO-WORK POPULATION ESTIMATE, (2020), available at <https://www.uscis.gov/sites/default/files/document/reports/USCIS%20H-1B%20Authorized%20to%20Work%20Report.pdf>; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS: FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019, (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf

¹⁷² These findings come from data provided by USCIS and the 2017 Occupational Employment Statistics survey from the Bureau of Labor Statistics. They are based the total number of H-1B workers according the FY19 USCIS tracker data within a SOC code divided by the 2017 OES estimate of total workers in a SOC code.

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concentrations of lower-paid foreign workers likely decrease the overall average wage paid in the relevant labor market, as detailed above.

The need to account for these distortions weighs in favor of the Department’s decision to set the entry-level wage at the higher end of the identified wage range. To do otherwise would mean that, far from ensuring that the adjusted wage levels guard against adverse effects on U.S. workers caused by the presence and availability of lower-cost foreign labor, the Department would, to some degree, be basing its regulations on a preexisting distortion caused by the current, flawed wage rates.¹⁷³

Finally, the purpose of the relevant INA authorities, particularly the prevailing wage requirement, also weighs in favor of adjusting the entry-level wage higher up within the identified wage range. As emphasized throughout, the guiding purpose of the INA’s prevailing wage requirements is to “protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.”¹⁷⁴ This consideration supports the Department’s decision about how the entry-level wage should be set. Giving due weight to the purpose of the statutory scheme means, in the Department’s judgment, resolving uncertainties so as to eliminate the risk of adverse effects on U.S. workers’ wages and job opportunities. That means favoring the higher end of the wage range.

¹⁷³ *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3453 (Jan. 19, 2011) (acknowledging the Department did not conduct “meaningful economic analysis to test [the] validity” of its “assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage”); see also *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2*, 78 Fed. Reg. 24047, 24051 (Apr. 24, 2013).

¹⁷⁴ *Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80110, 80110 (Dec. 20, 2000).

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The Department therefore concludes that, within the portion of the OES wage distribution identified as likely consisting of U.S. workers with levels of education and experience similar to prototypical entry-level H-1B and EB-2 workers, the first wage level should be placed at the higher end. Each of the considerations described above—the relative strength of the NSF surveys as compared to the CPS data in serving the purpose of the Department’s analysis; the likely distortion of both survey datasets caused by the presence of lower-paid foreign workers in the relevant labor markets; and the purposes of the INA’s wage protections—alone would strongly countenance in favor of using the higher end of the identified wage range. In combination, they make the option of focusing on the upper portion of the range particularly compelling.

The wage range spans from the 32nd percentile to the 49th percentile. What accounts for the upper half of this range is approximately the fifth decile of the OES distribution. The arithmetic mean of the wages of workers similarly employed to entry-level H-1B and EB-2 workers, taking into account the experience and education of the types of workers who actually fill entry-level positions in these programs, is thus the mean of the fifth decile, or approximately the 45th percentile. This point within the distribution will govern the wages of workers placed at the first wage level and allows for a statistically meaningful calculation.

4. The Second, Third, and Fourth Wage Levels

Having concluded that the entry-level wage should be adjusted to the 45th percentile, the Department turns to explaining the manner in which the remaining three prevailing wage levels will be modified. The Department has determined that the upper-most level will be adjusted to

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the mean of the upper decile of the OES wage distribution, or approximately the 95th percentile, to reflect the wages of the most competent, experienced, and skilled workers in any given occupation. The intermediate wage levels will continue to be calculated in accordance with 8 U.S.C. § 1182(p)(4), which yields second and third wage levels at the 62nd and 78th percentiles, respectively.

The highest wage level should be commensurate with the wages paid to the most highly compensated workers in any given occupation because such workers are also generally the workers with the most advanced skills and competence in the occupation, and therefore the type of workers who are similarly employed to the most highly qualified H-1B and PERM workers.¹⁷⁵ Again, as noted above, it is generally the case that, as a worker's education and experience increase, so too do his wages. Further, while the INA places baseline, minimum skills-based qualifications on who can obtain an H-1B or EB-2 visa, it does not place any limit on how highly-skilled a worker can be within these programs. Thus, while the Department necessarily discounted the lower end of the OES wage distribution in determining the entry-level wage, full consideration must be given to the uppermost portion of the distribution in adjusting the Level IV wage.

H-1B workers can be, and at least in some cases already are among the most highly paid, and therefore likely among the most highly skilled workers within their respective

¹⁷⁵ Edward P. Lazear, *Productivity and Wages: Common Factors and Idiosyncrasies Across Countries and Industries*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 11/2019, Working Paper 26428, available at <http://www.nber.org/papers/w26428>; David H. Autor & Michael J. Handel, *Putting Tasks to the Test: Human Capital, Job Tasks and Wages*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 6/2009, Working Paper 15116, available at <http://www.nber.org/papers/w15116>.

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occupations.¹⁷⁶ This is demonstrated by a review of the highest salaries paid to H-1B workers in the most common occupations in which H-1B workers are employed. In FY19, for example, the most highly compensated H-1B nonimmigrants employed as Computer Systems Analysts command annual wages as high as \$450,000. That figure was \$357,006 for H-1B workers in other Computer Occupations. The wages of workers at the 90th percentile of the OES distribution for these occupations, by contrast, are significantly lower. Computer Systems Analysts at the 90th percentile in the OES distribution make approximately \$142,220. That figure is \$144,820 for workers in other computer occupations. In other words, H-1B workers in some instances make wages far in excess of those earned by 90 percent of all U.S. workers in the same occupation. Indeed, a review of the wages of the top five percent highest earners among H-1B nonimmigrants in the 16 occupational classifications that account for one percent or more of all approved H-1B petitions in FY2019 shows that such workers make wages that are, on average, at least 20 percent higher than those made by workers at the 90th percentile in the OES wage distribution.

Further demonstrating that H-1B workers can be and sometimes are among the most skilled and competent workers in their occupations, an examination of the top end of the wage distribution within the H-1B program shows that, for H-1B nonimmigrants with graduate and bachelor's degrees, the association between education and income level begins to break down to some extent. Among the most highly compensated H-1B workers, the higher the income level,

¹⁷⁶ Data on the actual wages paid to H-1B workers shows that in some cases such workers are paid at or near the very top of the OES wage distribution.

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the more likely the foreign worker beneficiary only has a bachelor's degree.¹⁷⁷ This strongly suggests that individuals at the fourth wage level truly possess the most advanced skills and competence—the only remaining parameters that can reasonably account for significant wage differentials—within their occupations, as additional years of education are largely irrelevant in explaining wages among top earners. The U.S. workers who are similarly employed to the most highly qualified H-1B workers are, therefore, also likely to be among the most highly skilled, and, therefore, the most highly compensated workers within the OES wage distribution.

The high levels of pay that the most skilled H-1B workers can command is also shown by the fact that, due to their advanced skills, diversified knowledge, and competence, workers placed at the fourth wage level are likely to be far more productive than their less experienced and educated peers. Whereas experience itself generally increases on a linear basis, as a function of age and time spent in an occupation, productivity and an individual's supervisory responsibilities, as a function of experience and skills, do not. For example, the nature of senior management or supervisory roles, in particular, means workers who serve as productivity multipliers are more likely to fill such positions, which in turn translates to higher wages. Perhaps even more relevant to the Department's assessment of the wages paid to H-1B workers is the nature of the work these individuals do, which is highly specialized and typically in computer or engineering-related fields. In such occupations, experience and abilities can result in exponentially divergent levels of productivity, which in turn means that workers with the most

¹⁷⁷ This analysis is based on data provided by U.S. Citizenship and Immigration Services and 2019 OFLC Disclosure Data.

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advanced skills and competence can command wages far above what other workers in those occupations do.¹⁷⁸

All of these considerations strongly indicate that U.S. workers similarly employed to the H-1B and PERM workers with the most advanced skills and competence are themselves among the most highly skilled workers in any given occupation, and therefore the most highly compensated. The uppermost wage level should, in accordance with the INA, therefore be calculated by taking the arithmetic mean of the wages paid to the most highly paid workers in the OES distribution. In consequence, the Department has determined that the fourth wage level should be calculated as the mean of the upper decile of the OES distribution, or approximately the 95th percentile. This calculation ensures that the fourth wage level is based on the wages paid to workers with the most advanced skills and competence in an occupation, while using a sample of workers to identify an average wage sufficiently large to allow for a statistically meaningful calculation.

The Department will continue to calculate the two intermediate wage levels in accordance with 8 U.S.C. § 1182(p)(4), which provides that, in establishing a four-tier wage structure, “[w]here an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.”¹⁷⁹ The BLS OES

¹⁷⁸ ANDY ORAM & GREG WILSON, MAKING SOFTWARE: WHAT REALLY WORKS, AND WHY WE BELIEVE IT (2010).

¹⁷⁹ 8 U.S.C. § 1182(p)(4).

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survey is, as provided in the statute, an existing survey that has long provided two wage levels for Department's use in setting the prevailing wage rates.¹⁸⁰

The statutory formula was designed by Congress specifically for use in the Department's high-skilled immigrant and nonimmigrant programs, and provides for an efficient way of calculating evenly-spaced, intermediate wage rates between the lower bound and upper bound of the Department's wage structure.¹⁸¹ Creating new wage levels, as opposed to adjusting the field values within the existing levels produced by BLS (as the Department is doing here) would potentially result in less reliable statistical data and be unlikely to yield intermediate wage rates meaningfully different from those generated by operation of the statute. Further, the adjustments the Department is making to the two existing wage levels provided by the BLS OES survey preserve the same segmentation as the previous first and fourth wage level values—meaning they will continue to fall approximately 50 percentiles apart within the OES distribution and will thus preserve the intermediate level segmentation contemplated by the statute. Using the INA's formula to generate intermediate wage levels therefore continues to be, in the Department's judgment, the appropriate method to complete the prevailing wage structure.

The Department applies the statutory formula as follows: the difference between the two levels provided by the OES survey data is 50 percentiles. Dividing this by three yields a quotient of 16.67. This quotient, added to the value of the Level I wage at the 45th percentile, yields a

¹⁸⁰ BLS also produces data for the public from the OES survey that is divided into five different wage levels. However, the public data BLS produces is not broken down with the level of granularity by area of employment needed to administer the Department's immigrant and nonimmigrant programs, which is why BLS has also long produced a separate dataset with two wage levels for the Department's use.

¹⁸¹ See *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 FR 3452, 3462 (January 19, 2011).

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Level II wage at approximately the 62nd percentile. When subtracted from the value of the Level IV wage at the 95th percentile, the quotient yields a Level III wage at approximately the 78th percentile of the OES distribution.

The Department acknowledges that the existing wage levels – set at approximately the 17th, 34th, 50th, and 67th percentiles – have been in place for over 20 years, and that many employers likely have longstanding practices of paying their foreign workers at the rates produced by the current levels. Adjusting the levels to the 45th, 62nd, 78th, and 95th percentiles represents a significant change, and may result in some employers modifying their use of the H-1B and PERM programs. It will also likely result in higher personnel costs for some employers, as detailed below. However, to the extent employers have reliance interests in the existing levels, the Department has determined that setting the wage levels in a manner that is consistent with the text of the INA and that advances the statute’s purpose of protecting U.S. workers outweighs such interests and justifies such increased costs.

5. The EB-3 Immigrant Classification

As noted previously, the Department’s four-tier wage structure is used to set the prevailing wage in five different immigrant and nonimmigrant programs. Having explained the Department’s reasoning for how the adjusted wage levels are appropriate for the programs that consist of more highly skilled workers with advanced degrees and/or specialized knowledge – namely the EB-2 immigrant classification and the H-1B, E-3, and H-1B1 nonimmigrant programs—the Department now turns to explaining the appropriateness of using those same wage levels for the EB-3 classification, which consists of lower-skilled workers, professionals

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with bachelor's degrees, and individuals capable of performing unskilled labor. The Department concludes that the adjusted wage levels under the four-tiered structure also satisfy the statutory requirement that the wage levels be set based on experience, education, and level of supervision with respect to the EB-3 classification, taking into account the statutory and regulatory purposes of protecting U.S. workers from displacement and adverse wage effects.

At the outset, the Department notes that the close connections between the EB-3 classification and the other programs covered by the Department's wage structure make it inadvisable and impractical to treat the EB-3 classification differently. As detailed above, many H-1B workers adjust status to that of lawful permanent residents through EB-3 classification, and the manner in which the programs operate means that, in many cases, foreign workers can, in some sense, have one foot in each program simultaneously for extended periods of time. Using different wage methodologies in the programs would therefore result in the incongruous possibility of a worker doing the same job for the same employer suddenly receiving a different wage upon adjusting status. Similarly, while having somewhat different eligibility criteria, the EB-2 and EB-3 classifications are not mutually exclusive – many workers that satisfy the eligibility criteria for one would also do so for the other.¹⁸² Applying the same wage methodology in both classifications is therefore important to ensure consistent treatment of similarly situated workers and prevent the creation of incentives for employers to prefer one classification over the other because different wage methodologies yield different wages.¹⁸³

¹⁸² See *Musunuru v. Lynch*, 831 F.3d 880, 885 (7th Cir. 2016) (describing a person applying for both EB-2 and EB-3 status).

¹⁸³ See *Comite' De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 185 (3d Cir. 2014) (noting loopholes that can be created if employers are able to use different methodologies to calculate wages for the same types of workers).

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These considerations make it important to treat the EB-3 classification the same as the EB-2 and H-1B programs. The question then devolves to whether the EB-3 classification is properly accounted for by the adjusted wage levels. The Department believes it is.

The Department acknowledges that applying the four-tier wage structure in five different immigrant and nonimmigrant programs with varying populations, and across hundreds of different occupational classifications presents inherent challenges. The breadth of occupations to which the wage levels apply means that the prevailing wages established by the wage structure will not be perfectly tailored to the circumstances of each individual job opportunity.¹⁸⁴ The Department has sought to address this challenge by focusing much of its analysis on the programs and occupations that represent the largest share of the immigrant and nonimmigrant populations covered by the four-tier wage structure. Doing so is, in the Department's judgment, the approach to addressing variations across the programs that is most consistent with the INA. The wage protections in the H-1B and PERM programs are designed to guard against the displacement of, or adverse effect on U.S. workers caused by the employment of foreign labor.¹⁸⁵ As noted above, the risk that the presence of lower-wage foreign workers in a labor market will undercut U.S. workers' wages and job opportunities is greatest when there are larger concentrations of such workers.¹⁸⁶ Adjusting the wage levels with particular attention to those occupations and visa classifications with the largest numbers of foreign workers therefore puts

¹⁸⁴ *Cf. Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 Fed. Reg. 3452, 3461 (Jan. 19, 2011).

¹⁸⁵ *See, e.g., Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 199 (3d Cir. 2010).

¹⁸⁶ GEORGE BORJAS, IMMIGRATION ECONOMICS, 2014.

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the focus on addressing the danger the statutory scheme is intended to guard against – adverse effects on U.S. workers – where it is most acute.

Thus, as previously explained, in ascertaining the wages paid to U.S. workers similarly employed to H-1B workers, the Department’s analysis focused, to the greatest extent possible, on those occupations that account for 1 percent or more of the total H-1B population, and which also account for a significant share of the PERM population.¹⁸⁷ Similarly, the Department has given due weight in its analysis of where to set the prevailing wage levels to the fact that the EB-3 classification represents an exceedingly small share of the overall foreign worker population covered by the wage structure. The H-1B program is America’s largest guest worker program.¹⁸⁸ In FY2017, the Department of Homeland Security approved 365,682 H-1B petitions.¹⁸⁹ That same year, 19,432 workers were admitted for lawful permanent residence in the EB-2 classification.¹⁹⁰ A total of only 18,115 EB-3 immigrant workers were admitted that year. Thus, the EB-3 program accounts for, at most, approximately 5 to 10 percent of the total immigrant and nonimmigrant population governed by the four-tier wage structure that is admitted or otherwise provided status in any given year.¹⁹¹ That does not mean that the

¹⁸⁷ In some instances, particularly when analyzing the NSF data, the Department was constrained in its ability to analyze wages for all top H-1B occupations because of discrepancies between how the NSF and BLS surveys classify workers by occupation.

¹⁸⁸ Nicole Torres, *The H-1B Debate, Explained*, HARVARD BUSINESS REVIEW (May 4, 2017), available at <https://hbr.org/2017/05/the-h-1b-visa-debate-explained>.

¹⁸⁹ https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2018.pdf.

¹⁹⁰ DEPARTMENT OF HOMELAND SECURITY, 2017 YEARBOOK OF IMMIGRATION STATISTICS, TABLE 7. PERSONS OBTAINING LAWFUL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2017, available at <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>.

¹⁹¹ The Department notes that the total number of approved H-1B petitions “exceeds the number of individual H-1B workers sponsored because of the different types of petitions that can be filed (e.g., requests for concurrent employment with another employer, requests for extension of stay, amended petitions).” U.S. CITIZENSHIP AND

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Department has not given full consideration to the EB-3 classification in assessing how best to adjust the wage levels. It only means that the Department has appropriately weighed the size of the program, and therefore the risk it poses to U.S. workers, in identifying a solution to the adverse effects caused by the existing wage levels—an approach the Department regards as the best way to take into account the variations across the programs covered by the wage structure in effectuating the purpose of the INA’s wage protections.

After assessing the nature of the EB-3 immigrant population, the Department has determined that the adjusted wage levels under the four-tiered structure adequately take into account the experience, education, and level of supervision of EB-3 workers, in light of the purpose of the INA’s wage safeguards. The EB-3 program consists of three discrete classifications: “skilled workers,” defined as aliens who are “capable... of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States;” “professionals,” defined as aliens “who hold baccalaureate degrees and who are members of the professions;” and “other workers,” defined as aliens who are “capable... of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”¹⁹² For

IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2018 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2017 – SEPTEMBER 30, 2018, (2020), *available at* https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2018.pdf. The filing of these types of petitions means that some nonimmigrants are counted multiple times in the total number of approved petitions. The total number of petitions for initial employment in FY17 was 108,101. However, that number does not account for the petitions filed on behalf of H-1B nonimmigrants to extend their status, and thus undercounts the total number of actual H-1B workers who were authorized to work in FY17.

¹⁹² 8 U.S.C. § 1153(b)(3); 8 C.F.R. § 204.5(l).

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each of these classifications, the revised wage levels, set at approximately the 45th, 62nd, 78th, and 95th percentiles, provide an appropriate method for calculating the prevailing wage.

As to the lower-skill classifications, the Department has previously recognized that lower-skilled workers are less likely to vary in the wages they are paid based on differences in skill levels.¹⁹³ This is because skill levels themselves are less likely to vary in such occupations. A job that requires limited skills, such as can be acquired through two years of training or less, can likely be performed with similar proficiency by someone with lower levels of education and experience as by someone with greater experience and education.¹⁹⁴ Meaningful differentiation between workers based on skills in such occupations is therefore reduced. From this, the Department has previously concluded that setting prevailing wages for lower-skilled workers closer to the mean of the overall OES wage distribution is a more appropriate way of guarding against adverse wage effects.¹⁹⁵ Since most workers in lower-skilled occupations have similar levels of skill, a wage that approximates the average wage for all workers in the occupation is more likely to ensure that similarly employed workers make similar wages.

That reasoning holds true for the lower-skilled classifications in the EB-3 immigrant visa preference category, which include workers whose jobs are unskilled or require two years of training. These workers are far more likely to fall within the lower two wage levels given their relative lack of education and experience. Under the new wage levels, they will thus likely be placed at either the 45th or the 62nd percentiles of the OES wage distributions. Both levels,

¹⁹³ See *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 FR 3452, 3461 (January 19, 2011).

¹⁹⁴ *Id.* at 3458.

¹⁹⁵ *Id.* at 3459.

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while not perfectly tailored to the lower-skilled component of the EB-3 classification, fall near the middle part of the wage distribution, and are therefore generally appropriate for lower-skilled workers.

For separate reasons, the Department concludes that the newly adjusted wage levels also adequately satisfy the Department's obligations in setting the wage levels under the INA with respect to EB-3 professionals. Unlike lower-skilled EB-3 workers, professionals with bachelor's degrees in the EB-3 classification do possess a level of skill that allows for greater differentiation within the occupation. It is also the case that such workers will likely generally have lower levels of education and experience than EB-2 workers, who are required to possess a master's degree or higher. An entry-level wage at the 45th percentile, while more closely tailored to the education and experience of an EB-2 or H-1B worker, may be on the higher end for an EB-3 professional in some cases.¹⁹⁶ But other considerations demonstrate the appropriateness of the 45th percentile of the OES wage distribution as the entry-level wage for such workers.

The Department emphasizes that the labor certification process in the PERM programs is designed to ensure that there are not available and willing U.S. workers and that the wages and the wages and working conditions of U.S. workers will not be adversely affected by the employment of the immigrant worker(s). From when the INA was first enacted, its labor certification provisions were designed "to provide strong safeguards for American labor and to

¹⁹⁶ The Department also notes that, in some cases, EB-3 workers may in fact have higher levels of formal education than H-1B workers, given that H-1B workers can demonstrate specialized knowledge through experience and training, whereas possession of a bachelor's degree is required for all EB-3 immigrants. *See Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

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provide American labor protection against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.”¹⁹⁷ The availability of U.S. workers to fill jobs for which foreign workers are sought, being a guiding consideration behind the INA’s wage protections, is also an appropriate consideration in determining the adequacy of the prevailing wage levels for EB-3 professionals.

Within the U.S. workforce, the credentials associated with the EB-3 professional classification are significantly more common than the credentials associated with the EB-2 classification. As of 2019, 36 percent of people age 25 and older in the United States possessed a bachelor’s degree or higher.¹⁹⁸ That is compared to only 13.4 percent of native-born Americans and 14.1 percent of the foreign born population who possess an advanced degree, such as a master’s degree or doctorate.¹⁹⁹ It follows that employers seeking to recruit individuals with only a bachelor’s degree should be more likely to find qualified and available U.S. workers than if they are recruiting for a position that requires a master’s degree. The pool of available workers in such cases is significantly larger.

As noted above, the Department is required to determine and certify that “there are not sufficient workers who are able, willing, qualified” and available to fill the position for which an

¹⁹⁷ *Econo Inn Corp. v. Rosenberg*, 145 F. Supp. 3d 708, 713 (E.D. Mich. 2015) (quoting H.R. Rep. No. 1365, 82nd Cong. 2nd Session (1952)).

¹⁹⁸ UNITED STATES CENSUS BUREAU, U.S. CENSUS BUREAU RELEASES NEW EDUCATIONAL ATTAINMENT DATA, available at <https://www.census.gov/newsroom/press-releases/2020/educational-attainment.html>

¹⁹⁹ *Id.*

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EB-3 worker is sought.²⁰⁰ This requirement is critical to the INA’s “core objective[] [of] balanc[ing] certain industries’ temporary need for foreign workers against a policy interest in protecting U. S. workers’ jobs, salaries, and working conditions.”²⁰¹ How to strike that balance turns on a variety of considerations, including the likely availability of U.S. workers for a given position. Where the nature of the labor market is such that U.S. workers are more likely to be readily found, it is appropriate that the Department have extra assurance that no qualified U.S. workers are available to fill a position before certifying as much. In the case of EB-3 professionals, the adjusted wage levels, which may in some cases place a slight premium on the wages paid to professionals with bachelor’s degrees, are thus appropriately tailored to the circumstances of the EB-3 immigrant visa preference category. Because U.S. workers with bachelor’s degrees are more common, placing some premium on the wage offered for these kinds of workers during the labor certification recruitment process helps advance the purpose of the INA’s wage protections and provides the necessary extra assurance to the Department that U.S. workers with comparable levels of education, experience, and responsibility are not available. This approach is also entirely consistent with the Department’s authority to prevent adverse effects on similarly employed U.S. workers.²⁰²

Finally, the Department notes that continuing to employ the same wage structure in this manner across both the H-1B and PERM programs advances the Department’s interest in

²⁰⁰ 8 U.S.C. § 1182(a)(5)(A)(i)(I).

²⁰¹ *Comite de Apoyo a los Trabajadores Agrícolas v. Solis*, 933 F. Supp. 2d 700, 712 (E.D. Pa. 2013).

²⁰² *Cf. Williams v. Uesery*, 531 F.2d 305, 306 (5th Cir. 1976) (“Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. His authority is limited to making an economic determination of what rate must be paid all workers to neutralize any ‘adverse effect’ resultant from the influx of temporary foreign workers.”).

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administrative consistency and efficiency. As noted already, there is significant overlap between the H-1B and PERM programs. In FY2019, 68.2 percent of all PERM applications were for aliens that at the time the applications were filed were already working in the U.S. on H-1B visas.²⁰³ Further, the top ten most common H-1B occupations include seven of the ten most common PERM occupations. Through the third quarter of FY2020, 80 percent of PERM cases were for jobs in Job Zones 4 and 5²⁰⁴ – the most highly skilled job categories, which also account for 94 percent of all H-1B cases.²⁰⁵ In sum, the close connection between the types of jobs and aliens that are covered by the two programs further supports using the same wage structure for both the PERM and H-1B programs.

For these reasons, the Department has concluded that using the adjusted wage levels for the EB-3 preference category is in keeping with the relevant statutory considerations that govern how the Department sets prevailing wage levels.

B. Explanation of Amendments to Adjust the Prevailing Wage Levels

In light of the foregoing, the Department is amending its regulations at part 20, sections 656.40 and 655.731 to reflect the new wage level computations the Department will use to determine prevailing wages in the H-1B, H-1B1, E-3, EB-2, and EB-3 classifications. These

²⁰³ OFFICE OF FOREIGN LABOR CERTIFICATION, PERMANENT LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 19, *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/PERM_Selected_Statistics_FY2019_Q4.pdf.

²⁰⁴ Under the O*Net system a job zone is a group of occupations that are similar in the amount of education, experience, and on the job training that is required for a worker to fill a position in the occupation. Job Zone 4 includes occupations that require considerable preparation; Job Zone 5 includes occupations that require extensive preparation. *See* <https://www.onetonline.org/help/online/zones>.

²⁰⁵ This information is based on data collected by the Department's Office of Foreign Labor Certification on LCAs filed between March 1, 2020, and August 14, 2020.

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amendments are in accordance with the President’s Executive Order (E.O.) 13788, “Buy American and Hire American,” which instructed the Department to “propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system.”²⁰⁶ The amendments are also consistent with the aims of the Presidential “Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak” (Proclamation). This Proclamation found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications “presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak.”²⁰⁷ Section 5 of the Proclamation directed the Secretary of Labor to, “as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB-2 or EB-3 immigrant status or an H-1B nonimmigrant visa does not disadvantage United States workers.”

Although the amendments discussed below will extend beyond the duration of the Proclamation, the threats described in the Proclamation highlight the urgent need for strengthening wage protections in these programs to support the economic recovery. A core part of the Department’s mission is to promote opportunities for profitable employment and ensure fair wages and working conditions for U.S. workers. This responsibility includes ensuring that U.S. workers similarly employed to foreign workers are not adversely affected by the

²⁰⁶ See Exec. Order 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017).

²⁰⁷ See Proclamation No. 10052, 85 Fed. Reg. 38263 (June 22, 2020).

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employment of foreign workers on a permanent or temporary basis in the U.S., as required by the INA.

This rule will only apply to applications for prevailing wage determination pending with the NPWC as of the effective date of the regulation; applications for prevailing wage determinations filed with the NPWC on or after the effective date of the regulation; and LCAs filed with the Department on or after the effective date of the regulation where the OES survey data is the prevailing wage source, and where the employer did not obtain the PWD from the NPWC prior to the effective date of the regulation. The Department will not apply the new regulations to any previously-approved prevailing wage determinations, permanent labor certification applications, or LCAs, either through reopening or through issuing supplemental prevailing wage determinations or through notices of suspension, invalidation, or revocation.

1. Amending the Computation of the Wage Levels Based on the OES in the Permanent Labor Certification Program (20 C.F.R. § 656.40)

The Department is revising paragraphs (a), (b)(2), and (b)(3) of 20 C.F.R. § 656.40. The most substantial changes are those made to (b)(2). First, the Department has amended § 656.40(b)(2) by adding new paragraphs (b)(2)(i) and (ii) to codify the practice of using four wage levels and to specify the manner in which the wage levels are calculated. Specifically, new paragraph (b)(2)(i) stipulates that “The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area,” and goes on to specify the four new levels (Levels I through IV) to be applied.

New paragraph (b)(2)(i)(A) describes the Level I Wage. This first wage level—currently calculated as the mean of the bottom third of the OES wage distribution—will now be calculated

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as the mean of the fifth decile of the wage distribution for the most specific occupation and geographic area available. Roughly speaking, this means that the first wage level will be adjusted from the 17th percentile to the 45th percentile of the relevant OES wage distribution.

Next, new paragraph (b)(2)(i)(D) provides that the Level IV Wage—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the distribution for the most specific occupation and geographic area available. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile of the relevant OES wage distribution.

For the two intermediate levels, II and III, the Department will continue to rely on the mathematical formula Congress provided in the INA.²⁰⁸ Thus, new paragraph (b)(2)(i)(B) states that the Level II Wage shall be determined by first dividing the difference between Levels I and IV by three and then adding the quotient to the computed value for Level I. The Level III Wage is defined in new paragraph (b)(2)(i)(C) as a level determined by first dividing the difference between Levels I and IV by three and then subtracting the quotient from the computed value for Level IV. This yields second and third wage levels at approximately the 62nd and 78th percentiles, respectively, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

The newly created paragraph (b)(2)(ii) states that the OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage rates produced under the new paragraph (b)(2)(i) of section 656.40 as a notice

²⁰⁸ See 8 U.S.C. § 1182(p)(4) (“Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level.”).

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posted on the OFLC website. This continues the Department's practice of having the OFLC Administrator to announce, via a notice of implementation, updates to OES wage data.

Currently, OFLC publishes a routine announcement each year implementing updated OES prevailing wages for the new wage year and discussing any other significant related updates, including changes to OES survey areas and relevant updates to the SOC system. These announcements also serve as notice to employers of changes they need to make to the wage information on applications to reflect the changes to the OES. This IFR codifies the current publication practice in the regulations at section 656.40(b)(2)(ii).

The new regulation aligns with OFLC's current practice for notifying employers directly, rather than through the *Federal Register*, because the administrative burden of contacting employers directly is less than publishing multiple prevailing wage rates in the *Federal Register*. The Department has determined that the increased transparency resulting from publishing these updates via a notice on OFLC's website, at least once in a calendar year, will provide clear expectations for employers to meet their prevailing wage obligations in the coming year, prior to filing an application for permanent employment certification.

Further revisions to paragraph (b)(2) provide greater precision in the language used by changing the term "DOL" to "BLS" when describing which entity administers the OES survey and eliminate redundancy by deleting the language "except as provided in (b)(3) of this section." Because the Department is now specifying within the regulation exactly how the prevailing wage levels are calculated, the revised text also removes the existing reference to how the levels are calculated—namely the reference to the "arithmetic mean"—and will instead read: "If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall

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be based on the wages of workers similarly employed using the wage component of the OES survey, in accordance with subparagraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.”

Revisions to paragraph (a) remove an out-of-date reference, explained further below, to SWAs’ role in the prevailing wage determination process. The changes to paragraph (b)(3) account for the elimination of the reference to the “arithmetic mean” in (b)(2).

2. Amending the Wage Requirement for LCAs in the H-1B, H-1B1, and E-3 Visa

Classifications (20 CFR 655.731)

The Department amends section 655.731 by making technical revisions to paragraph (a)(2)(ii)(A) to remove another out-of-date reference to SWAs’ role in the prevailing wage determination process. Non-agricultural PWD requests are no longer processed by SWAs; since 2010 they have solely been processed by the Department at a National Processing Center (NPC). PWD requests are primarily adjudicated by the NPWC, located in Washington, D.C., but through interoperability, they may be processed by any regional NPC. The regulatory text is amended to reflect the current practice and to provide for operational flexibilities in the future with respect to where PWD requests are processed.

The Department also revises the language in section 655.731 to more clearly explain that it will use BLS’s OES survey to determine the prevailing wages under this paragraph and has added a sentence to specify that these determinations will be made in a manner consistent with the amended section 656.40(b)(2).

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The revised language in paragraphs (a)(2)(ii), (a)(2)(ii)(A), and (a)(2)(ii)(A)(2) also includes technical and clarifying revisions regarding other permissible wage sources (*i.e.*, applicable wage determinations under the Davis-Bacon Act or McNamara-O’Hara Service Contract Act, as well as other independent authoritative or legitimate sources of wage data in accordance with paragraph (a)(2)(ii)(B) or (C)).

The new language also removes the reference to “arithmetic mean” in paragraph (a)(2)(ii) and now states “...the prevailing wage shall be based on the wages of workers similarly employed as determined by the OES survey in accordance with 20 C.F.R. § 656.40(b)(2)(i)...” The revised language also corrects an error referencing “H-2B nonimmigrant(s)” by changing the reference to “H-1B nonimmigrant(s)” in paragraph (a)(2)(ii)(A)(2). The revisions further provide that an NPC will continue to determine whether a job is covered by a collective bargaining agreement that was negotiated at arms-length, but in the event the occupation is not covered by such agreement, an NPC will determine the wages of workers similarly employed using the wage component of the BLS OES, unless the employer provides an acceptable survey. An NPC will determine the wage in accordance with secs. 212(n) and 212(t) of the INA and in a manner consistent with the newly revised section 656.40(b)(2).

III. Statutory and Regulatory Requirements

A. Good Cause to Forgo Notice and Comment Rulemaking

The Administrative Procedure Act (APA) authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.”²⁰⁹ Under the

²⁰⁹ 5 U.S.C. § 553(b)(B).

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APA, notice and comment is deemed “impracticable” when an agency “cannot both follow section 553 and execute its statutory duties,”²¹⁰ while the “public interest” prong “connotes a situation in which the interest of the public would be defeated by any requirement of advance notice.”²¹¹ Generally, the good cause exception for forgoing notice and comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.”²¹² While emergency situations are the most common circumstances in which good cause is invoked, the infliction of real harm that would result from delayed action even absent an emergency can be sufficient grounds to issue a rule without undergoing prior notice and comment.²¹³

Here, two different circumstances are present that satisfy the APA’s good cause criteria. First, the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers. The INA’s wage protections are meant to ensure that the employment of foreign workers does not have an adverse impact on similarly

²¹⁰ *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003); *see also Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (“The existence of the good cause exception is proof that Congress intended to let agencies depart from normal APA procedures where compliance would jeopardize their assigned missions.”); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (“‘Impracticable’ means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings.”).

²¹¹ *Utility Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 755 (D.C. Cir. 2001); *see also N.C. Growers Ass’n v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012).

²¹² *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); *see also U.S. Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979) (“It is an important safety valve to be used where delay would do real harm.”).

²¹³ *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (“[W]e have observed that notice and comment procedures should be waived only when ‘delay would do real harm.’ . . . ‘Emergencies, though not the only situations constituting good cause, are the most common.’”) (citations omitted); *see also Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (“The notice and comment procedures in Section 553 should be waived only when ‘delay would do real harm.’ . . . The good cause exception is essentially an emergency procedure.”) (citations omitted).

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employed U.S. workers. But the flaws in the existing wage levels—which were promulgated through guidance and without meaningful economic justification, are inconsistent with the statute, and serve as the source of adverse labor effects on U.S. workers even under normal economic conditions—can only exacerbate, and severely so, the dangers posed to U.S. workers by recent mass lay-offs unless immediate action is taken. Keeping in place the current levels is untenable, and any delay in issuing this rule is contrary to the public interest. Notice and comment procedures in these circumstances would make it impracticable for the Department to fulfill its statutory mandate and carry out the “due and required execution of [its] agency functions” to protect U.S. workers.²¹⁴

Separately, even absent the emergency labor market conditions caused by the coronavirus pandemic, providing the public an opportunity to comment before the adjustments to the wage levels take effect is contrary to the public interest insofar as it would impede the Department’s ability to solve the problems this interim final rule is meant to address. Advance notice of the intended changes would create an opportunity, and the incentives to use it, for employers to attempt to evade the adjusted wage requirements. This constitutes a situation where the public’s interest is “defeated by any requirement of advance notice” and also justifies the Department’s decision to forgo notice and comment before issuing the rule.²¹⁵

Preventing Fiscal Harm to U.S. Workers

To begin, an agency may invoke the good cause exception where the serious harm to be prevented is fiscal or economic in nature, particularly in cases where the agency is acting to

²¹⁴ *Kollet*, 619 F.2d at 145.

²¹⁵ *Utility Solid Waste Activities Grp.* 236 F.3d at 755.

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prevent fiscal harm to third parties.²¹⁶ In this instance, serious fiscal harm would befall U.S. workers absent immediate action by the Department because the wage and employment risks, already immense, posed to workers by recent mass lay-offs are greatly compounded by the inappropriately low prevailing wage rates.

On January 31, 2020, the Secretary of the Department of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. § 247d) in response to the Coronavirus Disease 2019 (COVID-19) outbreak.²¹⁷ This was followed on March 13th by the President's declaration of a National Emergency concerning the COVID-19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the U.S.²¹⁸

On April 22, 2020, the President issued Proclamation 10014, *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak* (Proclamation 10014).²¹⁹ Proclamation 10014 suspended the entry of aliens in various immigrant classifications, including EB-2 and EB-3 classifications, on the grounds that “the United States faces a potentially protracted economic recovery with

²¹⁶ *Sorenson Commc 'ns, Inc. v. F.C.C.*, 755 F.3d 702, 707 (D.C. Cir. 2014) (explaining that “no particular catechism is necessary to establish good cause...”); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 18 (D.D.C. 2017) (explaining that preventing fiscal harm is most likely to justify good cause when it is harm “to *third parties*, not the government”); *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (finding good cause where “the absence of specific and immediate guidance from the Department [of Agriculture] in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm...”).

²¹⁷ DEPARTMENT OF HEALTH AND HUMAN SERVICES, DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last reviewed Jan. 31, 2020). See also Determination of Public Health Emergency, 85 Fed. Reg. 7316 (Feb. 7, 2020).

²¹⁸ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

²¹⁹ Proclamation No. 10014, 85 Fed. Reg. 23441 (Apr. 22, 2020).

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persistently high unemployment if labor supply outpaces labor demand.”²²⁰ The President found that, once admitted, these immigrants are granted “open market” employment documents, which allow them “immediate eligibility to compete for almost any job, in any sector of the economy,” meaning it is especially difficult to “protect already disadvantaged and unemployed Americans from the threat of competition for scarce jobs from new lawful permanent residents by directing those new residents to particular economic sectors with a demonstrated need not met by the existing labor supply.”²²¹ Based on his findings, the President concluded that the entry of aliens in these immigrant visa categories would be detrimental to the interests of the U.S. given that “[e]xisting immigrant visa processing protections are inadequate for recovery from the COVID-19 outbreak.”²²² Proclamation 10014 further required the Secretary of Labor and the Secretary of Homeland Security, in consultation with the Secretary of State, to review nonimmigrant programs and recommend other measures appropriate to “stimulate the United States economy and ensure the prioritization, hiring, and employment of United States workers.”²²³

On June 22, 2020, the President issued a *Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak*.²²⁴ Subject to certain exceptions, the Proclamation restricts the entry of certain immigrants and nonimmigrants, including certain H-1B nonimmigrants and EB-2 and EB-3 immigrants, into the U.S. through December 31, 2020, as their entry would be detrimental to the interests of the U.S. The

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 23442.

²²⁴ Proclamation 10052, 85 Fed. Reg. 38263 (June 25, 2020); *see also* Proclamation 10054, 85 Fed. Reg. 40085 (July 2, 2020).

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Proclamation notes that “between February and April of 2020 . . . more than 20 million United States workers lost their jobs in key industries where employers are currently requesting H-1B and L workers to fill positions.”²²⁵ It further explained that “American workers compete against foreign nationals for jobs in every sector of our economy, including against millions of aliens who enter the United States to perform temporary work,” and that while, “[u]nder ordinary circumstances, properly administered temporary worker programs can provide benefits to the economy,” because of the “extraordinary circumstances of the economic contraction resulting from the COVID-19 outbreak, certain nonimmigrant visa programs authorizing such employment pose an unusual threat to the employment of American workers.”²²⁶

The Proclamation only suspends and limits new entries into the United States by aliens who did not have valid visas and required travel documents on the effective date of the Proclamation. It does not address potential harms to U.S. workers caused by the employment of foreign workers already in the country. Section 5(b) of the Proclamation, however, directs the Department of Labor:

[A]s soon as practicable . . . [to] consider promulgating regulations or take other appropriate action to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit, or who are seeking admission or a benefit, pursuant to an EB-2 or EB-3 immigrant visa or an H-1B nonimmigrant visa does not disadvantage United States workers in violation of section 212(a)(5)(A) or (n)(1) of the INA (8 U.S.C. 1182(a)(5)(A) or (n)(1)).²²⁷

Accordingly, the issuance of this interim final rule, designed to ensure that U.S workers are not disadvantaged by the employment of aliens already present in the United States as the nation

²²⁵ Proclamation 10052, 85 Fed. Reg. 38263, 38263-264.

²²⁶ *Id.*

²²⁷ *Id.* at 38266.

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continues its economic recovery, is consistent with the aims of the Proclamation, and mitigates aspects of the danger to U.S. workers caused by recent shocks to the labor market and the employment of foreign workers not fully addressed by the Proclamation.

Notwithstanding the ongoing COVID-19 emergency, hiring in the U.S. has increased, with continued hiring across all sectors of the economy anticipated. Despite these gains, unemployment remains significantly above the historically low levels seen prior to the emergence of COVID-19 and the resultant economic emergency. As states continue to reopen their economies and the pace of hiring accelerates, U.S. workers will still face risks to their wages and job opportunities. It is therefore imperative that the Department take immediate action to ensure that U.S. workers' current and future wages and job prospects are protected.

As noted above, a substantial body of evidence shows that the Department's current prevailing wage rates, which govern, in many cases, the wages that employers offer when recruiting for U.S. workers and pay when employing foreign workers, have long been set below the rates at which similarly employed U.S. workers are paid, and that these rates are inconsistent with the statutory scheme. Even during normal economic circumstances this is likely to result in adverse effects on the wages and job opportunities of U.S. workers. Under the high unemployment rates experienced in the U.S. labor market this year, which reached 14.7 percent in April, a rate not seen since the Great Depression, and remain elevated, the existing flawed and arbitrary wage levels pose an immediate threat to the livelihoods of U.S. workers.²²⁸

²²⁸ BUREAU OF LABOR STATISTICS, CIVILIAN UNEMPLOYMENT RATE, <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm>.

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More particularly, if, as the economy recovers, the existing wage levels remain in place, at least two negative consequences for U.S. workers are likely to occur. First, employers seeking to employ EB-2 and EB-3 workers, as well as, in some cases, H-1B nonimmigrants, are required to use prevailing wage rates to recruit U.S. workers before they are permitted to employ foreign workers. The provision of improperly low prevailing wage determinations under the existing wage level computations therefore means that U.S. workers reentering the workforce will not, in some cases, be offered wages commensurate with their education and experience. In such cases where an employer's job advertisement includes a wage rate for a position that does not accurately reflect the wage rate that should be paid, U.S. workers may be less likely to apply for the position.

Relatedly, the current wage level computations may adversely affect the wages and job opportunities of U.S. workers by allowing employers to pay wages to foreign workers at a rate below the market rate for similarly employed U.S. workers. This can result in either employers preferring to hire foreign workers over U.S. workers, or result in wage suppression for U.S. workers. These problems, in turn, can also impede U.S. workers' return to the workforce at income levels comparable to what they were making before the downturn.

Both delays in workers returning to the workforce and their doing so at wages below what they were making before being laid off can have severe immediate and long term adverse effects on workers' wellbeing. Extensive academic research shows that mass lay-offs that occur during times of elevated unemployment have dramatic and persistent consequences for

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individuals' earnings for years following the lay-off event.²²⁹ This is because workers who become unemployed during an economic recession often have to accept employment at lower wages than they were making before the recession, or will remain unemployed for extended periods of time, which exacerbates the negative wage effects, also known as wage scarring, that result from lay-offs.²³⁰ Some studies have found that workers laid off during a recession may experience negative wage effects for as long as 20 years after the lay-off event, and may have average wage growth over their lifetimes that is 14.7 percent lower than what they would have otherwise enjoyed.²³¹

Further, now is a critical moment for mitigating against the threat of these wage scarring effects. Without interventions to help U.S. workers, as many as 8 million individuals laid off earlier this year may reach 27 weeks or more of unemployment starting in October 2020. Unemployment of this duration, known as long term unemployment, is the point at which the risk of wage scarring and other adverse employment effects of unemployment becomes especially acute.²³²

The reforms to the prevailing wage levels that the Department is undertaking in this rulemaking—changes that the Department acknowledges should have been undertaken years

²²⁹ Steven Davis & Till von Wachter, *Recessions and the Costs of Job Loss*, THE BROOKINGS INSTITUTION (2011), available at https://www.brookings.edu/wp-content/uploads/2011/09/2011b_bpea_davis.pdf (finding that

²³⁰ Ben Leubsdorf, *Six Ways the Recession Inflicted Scars on Millions of Unemployed Americans*, WALL STREET JOURNAL (May 10, 2016), available at <https://blogs.wsj.com/economics/2016/05/10/six-ways-the-recession-inflicted-scars-on-millions-of-unemployed-americans/>.

²³¹ Justin Barnette & Amanda Michaud, *Wage Scars and Human Capital Theory*, available at <https://ammichau.github.io/papers/JBAMWageScar.pdf>; Daniel Cooper, *The Effect of Unemployment Duration on Future Earnings and Other Outcomes*, FEDERAL RESERVE BANK OF BOSTON (2014).

²³² See BUREAU OF LABOR STATISTICS, AN ANALYSIS OF LONG-TERM UNEMPLOYMENT (2016), available at <https://www.bls.gov/opub/mlr/2016/article/pdf/an-analysis-of-long-term-unemployment.pdf>.

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ago—have therefore become urgently needed. U.S. workers, in the millions, have already experienced one of the most significant, mass lay-off events in U.S. history.²³³ Ensuring that these workers can quickly return to work at wages equal to or greater than what they were making before being laid off is critical to reducing the long-term wage scarring effects of mass unemployment. In the Department’s expert judgment, and based on its review of the evidence of the effects of the current wage levels, the existing levels are impeding and will continue to impede, to a significant degree, many U.S. workers’ ability to return to well-compensated employment given that the current levels have, in many instances, a suppressive effect on U.S. workers’ wages and allow employers to prefer foreign labor as a lower-cost labor alternative. Preserving the existing levels, a flawed policy even under ordinary economic conditions, is untenable as the U.S. continues through critical stages of its recovery from the labor market shocks of the coronavirus public health emergency. Immediate corrective action is therefore required to ensure that the Department’s regulations are, consistent with their purpose, safeguarding the well-being of U.S. workers at a moment when workers are highly vulnerable to extreme vicissitudes in the labor market. Any delay in taking this action would mean not only that the Department was failing to protect the wages and job opportunities of U.S. workers, but, worse still, that its application of the existing, faulty wage levels during the recovery would be an active source of harm exacerbating the long term consequences of the public health emergency for workers’ livelihoods.²³⁴

²³³ BUREAU OF LABOR STATISTICS, UNEMPLOYMENT RATE RISES TO RECORD HIGH 14.7 PERCENT IN APRIL 2020 (May 13, 2020), available at https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.

²³⁴ See *Nat’l Fed’n of Fed. Emp. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) (finding good cause was properly invoked where under prior regulations “the agency would have been compelled to take action which was not only impracticable but also potentially harmful.”).

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It is of course true that, even with appropriately set wage levels, some degree of wage scarring would occur for U.S. workers in any mass lay-off event. The regulatory changes produced by this rule will not alleviate all the adverse effects associated with the current downturn, and some level of wage scarring is likely to be associated with any recessionary period. The recent shocks to the labor market, however, bring the Department's invocation of good cause well within the admittedly narrow bounds of section 553(b)(B).²³⁵ The Department is not seeking to use section 553(b)(B) as an "escape clause" from notice and comment requirements that would apply whenever, in the Department's view, a regulatory change would advance good policy aims.²³⁶ Rather, the Department finds good cause here under extraordinary circumstances brought about by the unique confluence of a public health emergency of a kind not experienced in living memory, its impact on the labor market, and the aggravating effect the Department's arbitrary current wage levels are likely having on the harms experienced by U.S. workers under current economic conditions.

It is also clear that the change worked by this rule going immediately into effect directly and substantially addresses the harm the Department has determined poses an ongoing and grave danger to U.S. workers. As noted above, the Proclamation temporarily suspends entry of new H-1B and PERM workers, but does not affect those workers currently in the United States pursuant to an earlier admission into the U.S. Yet the presence of such workers in the labor market is substantial and should not be overlooked. For example, in recent years, over 80 percent of all foreign workers granted EB-2 and EB-3 status in a given year are adjustment of status cases,

²³⁵ See *Am. Iron & Steel Inst. v. E.P.A.*, 568 F.2d 284, 292 (3d Cir. 1977).

²³⁶ *United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985).

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meaning they were already present in the U.S. before being granted an employment-based green card. In other words, one of the biggest risks U.S. workers face from having to compete with EB-2 and EB-3 immigrants recruited and paid at inappropriately low wage levels comes from workers who are already present in the U.S. The adjustments the Department is making to the prevailing wage levels will therefore have an immediate and substantial impact as U.S. employers recruit for and employ EB-2 and EB-3 workers even with the Proclamation in place and help mitigate the short and long term adverse wage effects caused by the existing wage levels as the economy recovers.

Similarly, in FY2019, 249,476 of H-1B petitions for continuing employment, i.e. petitions for workers already present in the U.S., were approved out of the 388,403 total approved petitions.²³⁷ Thus, as with EB-2 and EB-3 immigrants, a substantial number of H-1B nonimmigrants who will be affected by the adjusted wage levels are already in the United States. Ensuring that they are paid an appropriate wage, even with the Proclamation in effect, in order to reduce the wage scarring and other adverse employment consequences of the coronavirus public health emergency to U.S. workers is therefore an urgent and important priority for the Department that demands immediate corrective action.

Simply put, millions of U.S. workers, many of whom work in industries that employ large numbers of H-1B and employment-based immigrants, lost their jobs over the past six

²³⁷ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018 – SEPTEMBER 30, 2019 (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf, (showing 66 percent of H-1B petitions approved in FY2019 were for computer-related occupations). Per USCIS, “continuing employment” refers to “extensions, sequential employment and concurrent employment, which are filed for aliens already in the United States.”

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months. This kind of mass lay-off event can and often does result in wage scarring, meaning immediate and long term adverse consequences for workers' wages. The scale of the mass layoffs recently experienced makes the current risk of wage scarring especially acute, which is further compounded by flaws in the Department's existing wage levels for these foreign labor programs. Even under ordinary economic conditions the wage levels likely result, in many instances, in adverse effects on the wages and job prospects of U.S. workers. In light of the recent and unprecedented shocks to the labor market, keeping the existing levels in place is entirely untenable if the Department is to mitigate to the fullest extent possible against the threat to the livelihoods of U.S. workers caused by the pandemic. Immediate action is needed as the economy continues through critical stages of its recovery. Congress charged the Department, and more specifically, the Secretary, with ensuring the employment of foreign workers does not adversely affect similarly employed U.S. workers. Without the issuance of this rule, the Department is hindered in its ability to meet its statutory mandate and thus has appropriately found that notice and comment procedures in this instance would be impracticable and contrary to the public interest.

Preventing Evasion of the New Wage Rates

Beyond the immediate and long term harm to U.S. workers' wages and job opportunities that would result from delay in changes to the wage levels, the Department is also justified in bypassing notice and comment to prevent the evasion by employers of the new wage requirements that would likely result from announcing a change to the levels in advance of the change taking effect. Forgoing notice and comment is permitted under circumstances where advance notice of a rule and its delayed effectiveness would result in significant, changed

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behavior by private parties to evade the rule, or that would otherwise result in harmful market distortions.²³⁸ For example, where a rule would effect a price freeze, invoking good cause to bypass notice and comment has been justified on the grounds that “[h]ad advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct ‘actual transactions’—or avoid them—before the freeze deadline.”²³⁹ Similarly, courts have found good cause was properly invoked where the announcement of a price increase to take effect at a future date would have likely resulted in producers withholding their product “from the market until such time as they could take advantage of the price increase.”²⁴⁰ Advance notice of the new rule in such cases contravenes the public interest because it would result in private parties evading or being able to improperly take advantage of regulatory changes, thereby undermining their effectiveness and exacerbating the very harm the changes are meant to ameliorate.²⁴¹

The same holds true for the Department’s adjustments to the prevailing wage levels. Under the INA, the Department is required to approve an LCA within seven days of when the application is filed.²⁴² Further, employers have discretion as to when they file LCAs with the Department. The only limitation is that they are not permitted to file an LCA earlier than six months before the beginning date of the period of intended employment.²⁴³ The Department

²³⁸ See *Mobil Oil Corp. v. Dep’t of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983) (“On a number of occasions, however, this court has held that, in special circumstances, good cause can exist when the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare.”).

²³⁹ *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

²⁴⁰ *Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975).

²⁴¹ *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 n.15 (5th Cir. 1979) (“Use of the exception has repeatedly been approved, for example, in cases involving government price controls, because of the market distortions caused by the announcement of future controls.”).

²⁴² 8 U.S.C. 1182(n)(1).

²⁴³ 20 C.F.R. § 655.730(b).

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therefore receives LCAs throughout the year in large numbers, at times that are, to some extent, of employers' choosing, including a substantial number during the period that would coincide with the submission of public comment and finalization of this rule if it were not issued as an interim final rule. For example, during the six month periods beginning in September for fiscal years 2017, 2018, and 2019, the Department received, on average, 147,123 LCAs.

The limited discretion the Department has with respect to how quickly it reviews LCAs, in combination with the leeway employers have on when they file, as well as historical filing patterns, show that advance notice of the wage level changes effected by this rule could result in the kind of "massive rush" to evade price changes—in this case changes to the price employers must pay for foreign labor—that have repeatedly been found to justify bypassing notice and comment.²⁴⁴ The scale of the wage change achieved by this rule, and the fact that an LCA, once approved, can be and often is valid for multiple years, means that the incentive for employers to change their filing behavior and, to the greatest extent possible, thereby secure wages at the current low levels for extended periods of time is substantial, and would very likely result in a spate of LCA filings during a comment period.²⁴⁵ Even leaving aside the potential administrative burden this increase in filing may place on the Department's operations, the harm it would cause to the public interest is clear. Allowing employers to lock in for extended periods prevailing wage rates that the Department has determined often result in adverse effects on U.S.

²⁴⁴ *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

²⁴⁵ *Cf. Carpenters 46 Cty. Conference Bd. v. Constr. Indus. Stabilization Comm.*, 393 F. Supp. 480, 501 (N.D. Cal. 1975) (finding that an agency lacked good cause to bypass notice and comment on the grounds that private "parties would not be expected to alter their conduct in such a way as to frustrate the purposes of the Program in response to announcement of the proposed 'Substantive Policies.' Indeed, the improbability of any change in conduct based upon the 'Substantive Policies' underscores the fact that they did not impose any obligations on anybody that could stimulate evasive conduct.").

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workers' wages and job opportunities would prolong the very problem—made exigent by the current state of the labor market—that the Department is seeking to address through this rule.²⁴⁶ This on its own is sufficient reason for the Department to bypass notice and comment in order to safeguard the public interest.

For the foregoing reasons, each of which is independently sufficient to justify bypassing notice and comment, the regulatory change made by this interim final rule is urgently needed. Although the Department acknowledges that the good cause exception is “narrowly construed and only reluctantly countenanced,” the Department has appropriately invoked the exception in this case.²⁴⁷ Both to ensure that the Nation continues through critical stages of its economic recovery without severely disadvantaging U.S. workers or affecting their current or future wages and to avoid creating opportunities for employers to evade the new wage requirements, the Department is issuing this interim final rule without providing a prior opportunity for comment before the rule takes effect.

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay.²⁴⁸ The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking.²⁴⁹ For the same reasons set forth above, the Department also concludes that it has good cause to dispense with the 30-day effective date requirement.

²⁴⁶ See *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983).

²⁴⁷ *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

²⁴⁸ 5 U.S.C. 553(d)(3).

²⁴⁹ *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979).

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In accordance with the above authorities, the Department is bypassing notice and comment requirements of 5 U.S.C. § 553(b) and (c) to urgently respond to the economic crisis resulting from COVID-19. This rule is being issued as an interim final rule, and the Department requests public input on all aspects of the rule. Instead of issuing a notice of proposed rulemaking, the Department is taking post-promulgation comments and will review and consider the public comments before issuing a final rule.

B. Executive Orders 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. *Id.* Pursuant to E.O. 12866, OIRA has determined that this is an economically significant regulatory action. However, OIRA has waived review of this regulation under E.O. 12866,

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section 6(a)(3)(A). Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA has designated that this rule is a “major rule,” as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and qualitatively discuss values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Outline of the Analysis

Section III.B.1 describes the need for the IFR, and section III.B.2 describes the process used to estimate the costs of the rule and the general inputs used to reach these estimates, such as wages and number of affected entities. Section III.B.3 explains how the provisions of the IFR will result in costs and transfer payments, and presents the calculations the Department used to reach the cost and transfer payment estimates. In addition, this section describes the qualitative transfer payments and benefits of the changes contained in this IFR. Section III.B.4 summarizes the estimated first-year and 10-year total and annualized costs, perpetuated costs, and transfer payments of the IFR. Finally, section III.B.5 describes the regulatory alternatives that were considered during the development of the IFR.

Summary of the Analysis

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The Department expects that the IFR will result in costs and transfer payments. As shown in Exhibit 1, the IFR will have an annualized cost of \$3.06 million and a total 10-year cost of \$21.51 million at a discount rate of 7 percent in 2019 dollars.²⁵⁰ The IFR will result in annualized transfer payments of \$23.5 billion and total 10-year transfer payments of \$165.1 billion at a discount rate of 7 percent in 2019 dollars.²⁵¹ When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost of this IFR is \$1.95 million at a discount rate of 7 percent in 2016 dollars.²⁵²

Exhibit 1: Estimated Monetized Costs and Transfer Payments of the IFR (2019 \$ Millions)		
	Costs	Transfer Payments
10-Year Total with a Discount Rate of 3%	\$24.79	\$198,292
10-Year Total with a Discount Rate of 7%	\$21.51	\$165,090
Annualized at a Discount Rate of 3%	\$2.91	\$23,246
Annualized at a Discount Rate of 7%	\$3.06	\$23,505
Perpetuated Costs* with a Discount Rate of 7% (2016 \$ Millions)		\$1.95

The total cost associated with the IFR includes only rule familiarization. The rule is not expected to result in any cost savings. Transfer payments are the result of changes to the

²⁵⁰ The IFR will have an annualized net cost of \$2.91 million and a total 10-year cost of \$24.79 million at a discount rate of 3 percent in 2019 dollars.

²⁵¹ The IFR will result in annualized transfer payments of \$23.25 billion and total 10-year transfer payments of \$198.2 billion at a discount rate of 3 percent in 2019 dollars.

²⁵² To comply with E.O. 13771 accounting, the Department multiplied the initial and then constant rule familiarization costs (initial cost of \$4,709,218; constant costs of \$2,578,885 in 2019\$) by the GDP deflator (0.94242) to convert the cost to 2016 dollars (initial cost of \$4,438,062; constant costs of \$2,430,393 in 2019\$). The Department used this result to determine the perpetual annualized cost (\$2,561,735) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided \$2,561,735 by 1.07⁴, which equals \$1,954,336. This amount reflects implementation of the rule in 2020.

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computation of prevailing wage rates for employment opportunities that U.S. employers seek to fill with foreign workers on a temporary basis through H-1B, H-1B1, and E-3 nonimmigrant visas.²⁵³ See the costs and transfer payments subsections of section III.B.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some transfer payments and benefits of the IFR. The Department describes them qualitatively in section III.B.3 (Subject-by-Subject Analysis). The Department invites comments regarding the assumptions, data sources, and methodologies used to estimate the costs and transfer payments from this IFR. The Department invites public comment on any additional benefits or costs that could result from this IFR.

1. Need for Regulation

The Department has determined that new rulemaking is urgently needed to more effectively protect the recruitment and wages of U.S. workers, eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States, and further the goals of E.O. 13788, Buy American and Hire American. *See* 82 FR 18837. The “Hire American” directive of the E.O. articulates the executive branch policy to rigorously enforce and administer the laws governing entry of nonimmigrant workers into the United States in order to create higher wages and employment rates for U.S. workers and to protect their economic interests. *Id.* sec. 2(b). It directs Federal agencies, including the Department, to

²⁵³ As explained, *infra*, the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program (e.g., EB-2 and EB-3 classifications) because they are expected to be *de minimis*.

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propose new rules and issue new guidance to prevent fraud and abuse in nonimmigrant visa programs, thereby protecting U.S. workers. *Id.* sec. 5.

In addition, this IFR is consistent with the aims of the Presidential “Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,”²⁵⁴ which determined that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications “presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak.” Section 5 of the Proclamation directs the Secretary of Labor to, “as soon as practicable, and consistent with applicable law, consider promulgating regulations or take other appropriate action . . . to ensure that the presence in the United States of aliens who have been admitted or otherwise provided a benefit . . . pursuant to an EB-2 or EB-3 immigrant status or an H-1B nonimmigrants visa does not disadvantage United States workers.”²⁵⁵

The Department is therefore amending its regulations at Sections 656.40 and 655.731 to reflect the methodology it will use to determine prevailing wages using wage data from the BLS OES survey for job opportunities in the H-1B, H-1B1, E-3, and permanent labor certification programs. The reports discussed and analyses provided in the preamble above expose how the application of the current wage levels for the four-tier OES prevailing wage structure fail to produce prevailing wages at a level consistent with the wages of U.S. workers similarly employed, and has a suppressive effect on the wages of similarly employed U.S. workers. The

²⁵⁴ Proclamation 10052 of June 22, 2020, *Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 FR 38263 (June 25, 2020); *see also* Proclamation 10054 of June 29, 2020, *Amendment to Proclamation 10052*, 85 FR 40085 (July 2, 2020).

²⁵⁵ *Id.*

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Department has a statutory mandate to protect the wages and working conditions of similarly employed U.S. workers from adverse effect caused by the employment of foreign workers in the United States on a permanent or temporary basis. The regulatory changes contained in this IFR are urgently needed as the country continues to recover from the economic crisis caused by the COVID-19 public health emergency in order to more effectively protect the recruitment and wages of U.S. workers and eliminate any economic incentive or advantage in hiring foreign workers on a permanent or temporary basis in the United States through these visa programs.

2. Analysis Considerations

The Department estimated the costs and transfer payments of the IFR relative to the existing baseline (*i.e.*, the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H).

In accordance with the regulatory analysis guidance articulated in OMB's Circular A-4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the IFR (*i.e.*, costs and transfer payments that accrue to entities affected). The analysis covers 10 years (from 2021 through 2030) to ensure it captures major costs and transfer payments that accrue over time. The Department expresses all quantifiable impacts in 2019 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A-4.

Exhibit 2 presents the number of entities affected by the IFR. The number of affected entities is calculated using OFLC performance data from fiscal years (FYs) 2018 and 2019. The

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Department uses them throughout this analysis to estimate the costs and transfer payments of the IFR.

Exhibit 2: Number of Affected Entities by Type (FY 2018-2019 Average)	
Entity Type	Number
Unique H-1B Program Certified Employers ²⁵⁶	64,462
H-1B Program Certified Worker Positions with Prevailing Wage Set by OES ²⁵⁷	965,885
Unique PERM Employers ²⁵⁸	26,226

Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of applicants and the change in burden hours required for rule familiarization in section III.B.3 (Subject-by-Subject Analysis).

Compensation Rates

In section III.B.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with implementation of the provisions contained in this IFR. Exhibit 3 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with the IFR. The Department used the BLS mean hourly wage rate for private sector human resources specialists.²⁵⁹ We adjust the wage rates to reflect total compensation, which includes non-wage factors such as overhead and fringe benefits (e.g., health and retirement benefits). We use an overhead rate of 17 percent²⁶⁰ and a

²⁵⁶ The total unique LCA employers in 2018 and 2019 were 64,875 and 64,049, respectively.

²⁵⁷ The total number of worker positions associated with LCA certifications that use OES prevailing wages in 2018 and 2019 were 1,023,552 and 908,218, respectively.

²⁵⁸ The unique employers in 2018 and 2019 were 28,856 and 23,596, respectively.

²⁵⁹ Bureau of Labor Statistics. (2019). May 2019 National Occupational Employment and Wage Estimates: 13-1071 – Human Resources Specialist. Retrieved from: <https://www.bls.gov/oes/current/oes131071.htm>.

²⁶⁰ Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” June 10, 2002, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005>.

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fringe benefits rate based on the ratio of average total compensation to average wages and salaries in 2019. For the private sector employees, we use a fringe benefits rate of 42 percent.²⁶¹

The Department used the hourly compensation rates presented in Exhibit 3 throughout this analysis to estimate the labor costs for each provision.

Exhibit 3: Compensation Rates (2019 dollars)²⁶²				
Position	Base Hourly Wage Rate (a)	Loaded Wage Factor (b)	Overhead Costs (c)	Hourly Compensation Rate d= a + b + c
HR Specialist	\$32.58	\$13.81 (\$32.58 x 0.42)	\$5.54 (\$32.58 x 0.17)	\$51.93

3. Subject-by-Subject Analysis

The Department’s analysis below covers the estimated costs and transfer payments of the IFR. In accordance with Circular A-4, the Department considers transfer payments as payments from one group to another that do not affect total resources available to society. The regulatory impact analysis focuses on the costs and transfer payments that can be attributed exclusively to the new requirements in the IFR.

Costs

The following section describes the costs of the IFR.

Rule Familiarization

When the IFR takes effect, existing employers of foreign workers with H-1B, H-1B1, E-3 visas, and those employers sponsoring foreign workers for permanent employment, will need to

²⁶¹ BLS. (2019). “2019 Employer Costs for Employee Compensation.” Retrieved from: <https://www.bls.gov/news.release/ecec.toc.htm>. Ratio of total compensation to wages and salaries for all private industry workers.

²⁶² Numbers may slightly differ due to rounding.

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familiarize themselves with the new regulations. Consequently, this will impose a one-time cost for existing employers in the temporary and permanent visa programs in the first year. Each year, there are new employers that participate in the temporary and permanent visa programs. Therefore, in each year subsequent to the first year, new employers will need to familiarize themselves with the new regulations.

To estimate the first-year cost of rule familiarization, the Department calculated the average (90,688) number of unique employers requesting H-1B certifications and PERM certifications in FY18 ($64,875 + 28,856 = 93,731$) and FY19 ($64,049 + 23,596 = 87,645$). The average number of unique H-1B and PERM employers (90,688) was multiplied by the estimated amount of time required to review the rule (1 hour).²⁶³ This number was then multiplied by the hourly, fully loaded compensation rate of Human Resources Specialists (\$51.93 per hour). This calculation results in an initial cost of \$4,709,218 in the first year after the IFR takes effect. Each year after the first year the same calculation is done for the number of new unique employers requesting H-1B and PERM certifications ($34,164$ H-1B + $15,499$ PERM = $49,663$) in FY19.²⁶⁴ This calculation results in a continuing annual undiscounted cost of \$2.58 million in years 2-10 of the analysis. The one-time and continuing cost yields a total average annual undiscounted cost of \$2.79 million. The annualized cost over the 10-year period is \$2.91 million and \$3.06 million at discount rates of 3 and 7 percent, respectively.

Transfer Payments

²⁶³ This estimate reflects the nature of the IFR. As an IFR to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

²⁶⁴ FY19 is the only full year of data with new unique entities. In Q1-Q3 of FY20 has a partial year the same percentage of total employers are new as FY19.

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Quantifiable Transfer Payments

This section discusses the quantifiable transfer payments related to changes to the computation of the prevailing wage levels.

As discussed in the preamble, the Department determined that current wage levels result in prevailing wage rates for H-1B workers that are far below what their U.S. counterparts are likely paid, which has a suppressive effect on the wages of similarly employed U.S. workers. While allowing employers to access high-skilled workers to fill specialized positions can help U.S. workers' job opportunities in some instances, the benefits of this policy diminish or disappear when the prevailing wage levels do not accurately reflect the wages paid to similarly situated workers in the U.S. labor market. The resulting distortions from a poor calculation of the prevailing wage allow some firms to replace qualified U.S. workers with lower-cost foreign workers.

Therefore, the Department is amending § 656.40(b) by codifying the practice of using four prevailing wage levels and the computations of those wage levels. Specifically, new paragraph (b)(2)(i) stipulates that the “prevailing wage shall be provided by the OFLC Administrator at four levels.” This paragraph specifies the four new levels (Levels I through IV) to be applied. Level I—currently calculated as the mean of the bottom third of the OES wage distribution—will be calculated as the mean of the fifth decile of the wage distribution. Roughly speaking, this means that the Level I prevailing wage will be adjusted from the 17th percentile to the 45th percentile. Level IV—currently calculated as the mean of the upper two thirds of the OES wage distribution—will now be calculated as the mean of the upper decile of the

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distribution. This means the fourth wage level will increase approximately from the 67th percentile to the 95th percentile.

Consistent with the formula provided in the INA, Level II will be calculated by dividing by three, the difference between Levels I and IV, and adding the quotient to the computed value for Level I. Level III will be calculated by dividing by three the difference between Levels I and IV, and subtracting the quotient from the computed value for Level IV. This yields a Level II prevailing wage at approximately the 62nd percentile and a Level III prevailing wage at approximately the 78th percentile, as compared to the current computation, which places Level II at approximately the 34th percentile and Level III at approximately the 50th percentile.

Finally, the Department is revising § 655.731 to explain that it will use the BLS's OES survey wage data to establish the prevailing wages in the H-1B, H-1B1, and E-3 visa classifications and added a sentence to explain that these determinations will be made by the OFLC NPC in a manner consistent with § 656.40(b)(2).

The Department calculated the impact on wages that would occur from implementation of the prevailing wage computation changes contained in the IFR. It is expected that the increase in prevailing wages under the IFR will induce some employers to employ U.S. workers instead of foreign workers from the H-1B program, but nonetheless the Department still expects that the same number of H-1B visas will be granted under the annual caps. For many years, the Department has observed that the number of petitions exceeds the numerical cap, as the annual H-1B cap was reached within the first five business days each year from FY2014 through FY2020, and higher prevailing wage levels do not necessarily mean that demand for temporary foreign labor will fall below the available supply of visas. Under existing prevailing wage levels,

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which the Department has shown are too low and do not accurately reflect the wages paid to similarly situated U.S. workers, demand for temporary foreign labor far exceeds the statutory limits on supply. Usually prices rise in a market when demand exceeds supply. However, given the statutory design of the H-1B system, along with the lower wages for comparable work in many other countries and the non-pecuniary benefits of participating in the H-1B program, prices for temporary foreign labor under the H-1B program have stayed too low to depress overall employer demand.

The IFR is still inducing a wage transfer under these cases where U.S. workers are employed instead of H-1B workers and therefore no adjustments to the wage estimates are necessary due to this effect. However, it is possible that prevailing wage increases will induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment but an increase in earnings. It is also possible that prevailing wage increases will induce some employers to not hire a worker at all (either U.S. worker or worker from the H-1B program that is subject to the annual cap or not subject to the annual cap), resulting in a decrease in employment of guest workers. However, given that participation in temporary labor certification programs is voluntary and there exists an alternative labor market of U.S. workers who are not being prevented from accepting work offered at potentially lower market-based wages, there is some reason to doubt whether an increase in prevailing wages will lead to an efficiency loss from decreased labor demand. Due to data limitations on the expected change in labor demand and supply of U.S. workers, the Department cannot measure accurately the efficiency gains or losses to the U.S. labor market created by the new prevailing wage

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system. While the Department discusses this potential impact qualitatively, it welcomes comments on how to estimate changes to efficiency from the new prevailing wage levels.

For each H-1B certification in FY 2018, FY 2019, and FY 2020, the Department used the difference between the estimated prevailing wage level under the IFR and the wage offered under the current baseline to establish the wage impact of the prevailing wage computation changes in each calendar year of the certification's employment period. Under the H-1B visa classification, employment periods for certifications can last for up to three years in length and generally begin up to six months after a certification is issued by the Department. Therefore, a given fiscal year can have wage impacts that start in that calendar year and last up to three years, or could start in the following calendar year and have an end-date up to four calendar years past the fiscal year. For example, an employment start date in March of 2019 may be associated with an H-1B application certified by the Department during FY 2018 and, if that certified application contains a three-year employment period, the wage impacts on the employer will extend through March of 2022. The IFR does not retroactively impact certified wages, so there will be new H-1B applications certified by the Department during FY 2020 that may extend well into the analysis period. Therefore, the first year of the rule will only impact new certifications, the second year new and continuing certifications from year 1 will be impacted, and the third year and beyond both new and continuing certifications from years 1 and 2 will be impacted.

To account for this pattern of wage impacts we classify certifications into three length cohorts and calculate annual wage impacts for each cohort based on FY 2018-FY 2020 data. Those cohorts are: certifications lasting less than 1 year, certifications lasting 1-2 years, and certifications lasting 2-3 years.

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H-1B, H-1B1, or E-3 applications certified by the Department do not necessarily result in employment and employer wage obligations. After obtaining a certification, employers must then submit a Form I-129, Petition for a Nonimmigrant Worker, for approval by U.S. Citizenship and Immigration Services (USCIS). USCIS may approve or deny the H-1B visa petition. USCIS approval data represents approvals of petitions based on both certifications issued by the Department that used OES data for the prevailing wage or that were based on other approved sources to determine the prevailing wage (e.g., Collective Bargaining Agreements, employer-provided surveys). In FY 2020, approximately 92 percent of workers associated with H-1B, H-1B1, and E-3 certifications had prevailing wages based on the OES survey. Therefore, we adjusted the USCIS approvals downward by 8 percent, and then computed the approval rates. Exhibit 4 summarizes FY 2018 and FY 2019 data on H-1B, H-1B1, and E-3 certifications with their prevailing wage based on the OES survey, adjusted USCIS approvals, and approval rate.²⁶⁵ To account for approval rates that may differ by geographic location and whether a certification is new or continuing, we adjust each certification's wage impact by the approval rate of the state of intended employment for the employer's certification and whether it is a new or continuing application.²⁶⁶

²⁶⁵ Form I-129 data for H-1B is obtained from the USCIS H-1B data hub. Retrieved from: <https://www.uscis.gov/tools/reports-and-studies/h-1b-employer-data-hub>

²⁶⁶ Both USCIS H-1B data and LCA data indicate the state for which the work is to be completed. Therefore, approval rates are calculated separately for each state and used in the analysis.

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Exhibit 4: LCA and I-129 H-1B, H-1B1, and E-3 Approvals and Denials							
	FY 2018			FY 2019			Average Percent Approved
	LCA Certified	USCIS Approved⁺	Percent Approved	LCA Certified	USCIS Approved⁺	Percent Approved	
Total	1,023,552	308,147	30%	908,218	368,811	41%	35%
New	423,174	80,855	19%	378,175	132,965	35%	27%
Continuing*	600,378	227,292	38%	530,043	235,846	44%	41%

*Includes: "Continued Employment", "Change Previous Employment", "Change Employer", "Amended Petition", "New Concurrent Employment"

⁺Approval numbers adjusted by 92% to account for approvals with prevailing wages set by sources other than OES.

To estimate the wage impacts of new percentiles contained in this IFR, the Department used publicly available BLS OES data that reports the 10th, 25th, 50th, 75th, and 90th percentile wages by SOC code and metropolitan or non-metropolitan area.²⁶⁷ In order to estimate wages for the new IFR levels of 45th, 62nd, 78th, and 95th percentiles, the Department linearly interpolated between relevant percentiles for reported wages at each SOC code and geographic area combination.²⁶⁸ For the 95th percentile, the Department used OES wages reported for the 90th percentile at each SOC code and geographic area combination.

For an illustrative example in Exhibit 5, to calculate projected wage impacts under the IFR, the Department first multiplied the number of certified workers by the number of hours worked in each calendar year (2,080 hours) and the new prevailing wage for the level the workers were certified at for the particular SOC and the geographic area combination. The

²⁶⁷ BLS OES data for Metropolitan and Nonmetropolitan Areas acquired for each year required for the analysis: May 2016-May 2019. Retrieved from <https://www.bls.gov/oes/current/oesrcma.htm>

²⁶⁸ For example, if OES reports a wage of \$30 per hour at the 25th percentile and \$40 per hour at the 50th percentile then the 45th percentile is interpolated as $\$30 + (\$40 - \$30) * ((45 - 25) / (50 - 25)) = \38 per hour.

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examples in Exhibit 5 set forth how the Department calculated the IFR wage impact for an individual case of each length cohort.

Exhibit 5: Prevailing Wage Under the IFR (Example Cases)											
Length Cohort	Number of Certified Workers (a)	Prevailing Wage (hour) (b)	Number of Hours Worked in 2018 (c)	Number of Hours Worked in 2019 (d)	Number of Hours Worked in 2020 (e)	Total Wages 2018 (a*b*c) = (f)	Total Wages 2019 (a*b*d) = (g)	Total Wages 2020 (a*b*e) = (h)	Total Wages 2018-2020 (f+g+h) = (i)	USCIS Approval Rate (j)	Adjusted Total Wages (i*j)
<1 Year	100	\$39.56	648	1032	0	\$2,563,488	\$4,082,592	\$0	\$6,646,080	19%	\$1,262,755
1-2 Years	100	\$27.13	1048	1032	0	\$2,843,224	\$2,799,816	\$0	\$5,643,040	25%	\$1,410,760
2-3 Years	100	\$27.92	528	2080	1568	\$1,474,176	\$5,807,360	\$4,377,856	\$11,659,392	18%	\$2,098,691

After the total wages for the IFR was determined, the wage calculation under the current offered wage levels was calculated.

The currently offered wage is always equal to or greater than the current prevailing wage because some certifications offer a wage higher than the prevailing wage. The methodology is the same as that used to estimate the projected wages under the IFR: number of certified workers is multiplied by the number of hours worked in each calendar year (based on 2,080 hours in a full year) of certified employment and the actual offered wage for the certified workers (Exhibit 6 provides an example of the calculation of the baseline wages for the same case as in Exhibit 5).

Exhibit 6: Current Prevailing Wage (Example Cases)												
Length Cohort	Number of Certified Workers (a)	Prevailing Wage (year) (b)	Prevailing Wage (b/2080) = (c)	Number of Hours Worked in 2018 (d)	Number of Hours Worked in 2019 (e)	Number of Hours Worked in 2020 (f)	Total Wages 2018 (a*c*d) = (g)	Total Wages 2019 (a*c*e) = (h)	Total Wages 2020 (a*c*f) = (i)	Total Wages 2018-2020 (g+h+i) = (j)	USCIS Approval Rate (k)	Adjusted Total Wages (j*k)
<1 Year	100	\$77,459.00	\$37.24	648	1032	0	\$2,413,146	\$3,843,158	\$0	\$6,256,304	19%	\$1,188,698
1-2 Years	100	\$50,316.00	\$24.19	1048	1032	0	\$2,535,152	\$2,496,448	\$0	\$5,031,600	25%	\$1,257,900
2-3 Years	100	\$48,432.00	\$23.28	528	2080	1568	\$1,229,428	\$4,843,200	\$3,651,028	\$9,723,655	18%	\$1,750,258

Once the baseline offered wage was obtained, the Department estimated the wage impact of the IFR prevailing wage levels by subtracting the baseline offered wage for each calendar year from the IFR prevailing wage. The total wage impact was then multiplied by the average USCIS petition beneficiary approval rate for the state of intended employment. Estimating wage impacts is calculated here for the examples in Exhibits 5 and 6, above. For the length cohort less than 1 year, the impact in 2018 was \$28,565 $((\$2,563,488 - \$2,413,146) * 0.19)$ and \$45,492 in 2019 $((\$4,082,592 - \$3,843,158) * 0.19)$. For the length cohort of 1-2 years, the impact in 2018 was \$77,018 $((\$2,843,224 - \$2,535,152) * 0.25)$, and in 2019 was \$75,842 $((\$2,799,816 - \$2,496,448) * 0.25)$. The example for length cohort 2-3 years had wage impacts in 2018, 2019, and 2020. In the 2018 the wage impact was \$44,055 $((\$1,474,176 - \$1,229,428) * 0.18)$, \$173,549 in 2019 $((\$5,807,360 - \$4,843,200) * 0.18)$, and \$130,829 in 2020 $((\$4,377,856 - \$3,651,028) * 0.18)$.

To base the estimated wage impacts on three years of data, and to include the most recent data (i.e., FY 2020), this process was done for each certification using the FY 2018-FY 2020 certification data. FY 2020 certification data only consists of three quarters of data as of the publication date of this IFR. Therefore, to estimate wage transfers for three full years of data, FY 2020 Q4 data was simulated based on FY 2019 data. The Department used the Employment Cost Index (ECI) to inflate the FY 2019 Q4 total wage impacts by length cohort to be representative of the potential FY 2020 Q4 total wage impacts. The most recent annual growth rate of the ECI, from June 2019 to June 2020 (2.7 percent), was used to inflate the 2019 Q4 total wage impacts. Total wage impacts were inflated in each calendar year for each length cohort, separated by whether the wages in each calendar year and cohort were paid to new workers for the first time in that year, or if the wages were being paid to workers whose employment was continuing from

prior calendar years. The estimated FY 2020 Q4 wage impacts were summed with the FY 2020 Q1-Q3 wage impacts to create an estimate of the total wage impact for the fiscal year.

Existing prevailing wage data from the Foreign Labor Certification (FLC) Data Center, accessible at <http://www.flcdatacenter.com>, contains wage data for each SOC code and geographic area combination that are not readily available in the public OES data used to estimate new prevailing wage levels. For example, when a wage is not releasable for a geographic area, the prevailing wage available through the FLC Data Center may be computed by BLS for the geographic area plus its contiguous areas. Additionally, in publicly available OES data, some percentiles are missing for certain combinations of SOC codes and geographic areas. These two factors result in a small number of certifications having no match with a new prevailing wage level.²⁶⁹ To estimate wage impacts for workers associated with these certifications, the average wage impact per worker, for the given cohort and fiscal year the certification is associated with, is calculated and then applied to the number of workers associated with the certification that does not match. This produces a series of estimated wage impacts for workers that are not matched with new prevailing wages in the public OES data for each calendar year for which they have employment. These wage impacts are then estimated to the calculated wage impact to produce a final total wage impact for each cohort in each calendar year.

The Department determined the total impact of the IFR prevailing wage levels for each length cohort in each calendar year by summing the wage impacts for all certifications in each year and averaging the totals. The wage impacts for each cohort and calendar year are presented in Exhibit 7. Some calendar years do not have values because the cohort, based on FY 2018-FY

²⁶⁹ In FY 2018, 6 percent of certifications do not match, in FY 2019 9 percent, and FY2020 6 percent.

2020 data, does not have a full year of data for those years. For example, calendar year 2021 does have new entries from FY 2020 data but it is not a complete year of data as FY 2021 would also have new entries, and therefore it is not included.

Exhibit 7: Estimated Wage Transfers (FY18-FY20 Data) [Million 2019\$]							
		CY 18	CY 19	CY 20	CY 21	CY 22	Annual Average
<1 Year	New	\$24.8	\$16.8	\$17.2	N/A	N/A	\$19.6
	Continuing	\$7.0	\$13.5	\$8.3	\$4.2	N/A	\$8.3
1-2 Years	New	\$86.2	\$61.7	\$54.0	N/A	N/A	\$67.3
	Continuing	N/A	\$144.6	\$119.6	\$75.4	N/A	\$113.2
2-3 Years	New	\$6,965	\$3,502	\$2,806	N/A	N/A	\$4,424
	Continuing	N/A	\$13,910	\$7,401	\$5,655	N/A	\$8,989
	Continuing 3+	N/A	N/A	\$15,790	\$14,031	\$8,794	\$12,872

The annual average for each length cohort is used to produce the total transfers over the 10-year horizon. Each cohort enters in each year and has continuing wage impacts based on its cohort length. Therefore, in years 3-10 (2023-2030), the annual wage impact is equal to the sum of each cohort's annual average. This series is presented below in Exhibit 8.

Exhibit 8: Total Transfer Payments of the IFR (2019\$ Millions)								
Cohort:	<1		1-2 Years		2-3 Years			Total
	New	Continuing	New	Continuing	New	Continuing	Continuing 3+	
2021	\$19.6	\$0.0	\$67.3	\$0.0	\$4,424	\$0	\$0	\$4,511
2022	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$0	\$13,621
2023	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2024	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2025	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2026	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2027	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2028	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2029	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
2030	\$19.6	\$8.3	\$67.3	\$113	\$4,424	\$8,989	\$12,872	\$26,493
10-year total	\$196	\$74	\$673	\$1,019	\$44,245	\$80,898	\$102,973	\$230,077

The changes in prevailing wage rates constitute a transfer payment from employers to employees. The Department estimates the total transfer over the 10-year period is \$198.29 billion

and \$165.09 billion at discount rates of 3 and 7 percent, respectively. The annualized transfer over the 10-year period is \$23.25 billion and \$23.5 billion at discount rates of 3 and 7 percent, respectively.

With the increases in prevailing wage levels under this IFR, some employers may decide not to hire a U.S. worker or a foreign worker on a temporary or permanent basis. The prevailing wage increase may mitigate labor arbitrage and induce some employers to train and provide more working hours to incumbent workers, resulting in no increase in employment. The Department is unable to quantify the extent to which these two factors will occur and therefore discusses them qualitatively.

The labor economics literature has a significant volume of research on the impact of wages on demand for labor. Of interest in the context of the H-1B program is the long-run own-wage elasticity of labor demand that describes how firms demand labor in response to marginal changes in wages. There is significant heterogeneity in estimates of labor demand elasticities that can depend on industry, skill-level, region, and more.²⁷⁰ A commonly cited value of average long-run own-wage elasticity of labor demand is -0.3.²⁷¹ This would mean that a one percent increase in wage would reduce demand for labor by 0.3 percent. The average annual increase in wage transfers is a 25.8 percent increase in wage payments,²⁷² which would imply a potential reduction in labor demand by 7.74 percent (25.8*.3). It is likely that U.S. employers will pay

²⁷⁰ For a full discussion of labor demand elasticity heterogeneity see Lichter, A., Peichl, A., & Siegloch, S. (2015). The own-wage elasticity of labor demand: A meta-regression analysis. *European Economic Review*, 94-119: Retrieved from: <https://www.econstor.eu/bitstream/10419/93299/1/dp7958.pdf>

²⁷¹ This value is the best-guess in seminal work by Hamermesh, D. H. (1993). *Labor Demand*. Princeton University Press. Values around -0.3 have been further estimated by additional studies including in meta-analysis studies as cited in footnote 10.

²⁷² The average unadjusted total wages paid to employees impacted by the IFR in the FY18-FY20 datasets is \$209.1 billion. The average unadjusted total wages paid to those same employees in the baseline in the FY18-FY20 datasets is \$263.2 billion. This represents a 25.8 percent increase in wages. Not all of these wages are paid due to USCIS approval rates, but the wages would adjust proportionally (i.e., the percentage increase would remain the same).

higher wages to H-1B workers or replace them with U.S. workers to the extent that is possible. However, we can approximate that, if U.S. employers were limited in the ability to pay higher wages and did reduce demand, it would reduce the transfer payment by approximately 7.74 percent. The annual average undiscounted wage transfer estimate of \$23.0 billion would therefore be reduced to \$21.2 billion.

Non-Quantifiable Transfer Payments

This section discusses the non-quantifiable transfer payments related to changes to the computation of the prevailing wage levels. Specifically, the Department did not quantify transfer payments associated with certifications under the Permanent Labor Certification Program because they are expected to be *de minimis*.

The PERM programs have a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification and would have changes to wages under the IFR prevailing wage. Prior to the PERM certification, these beneficiaries are typically working under H-1B, H-1B1, and E-3 temporary visas and wage transfers for these PERM certifications are therefore already factored into our wage transfer calculations for H-1B, H-1B1, and E-3 temporary visas. Below, Exhibit 9 illustrates the percentage of PERM certifications that are on H-1B, H-1B1, or E-3 temporary visas, the percent that are not on a temporary visa and/or are not currently in the U.S. and would therefore enter on an EB-2 or EB-3 visa, and all other visa classes.

Exhibit 9: PERM Certifications by Class of Admission, FY18-FY20				
Category	FY18	FY19	FY20	Average Percent of Total
Not on a temporary visa/not currently residing in the United States	10,047	9,841	5,311	9.7%
H-1B visa	74,454	63,976	44,887	71.7%
H-1B1 visa	109	81	54	0.1%
E-3 visa	471	280	160	0.3%
All other visa classifications*	24,469	12,907	10,520	18.1%

Total	109,550	87,085	60,932	100%
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Other visa classes include: A1/A2, L-1, F-1, A-3, B-1, C-1, TN, C-3, E-2, B-2, D-1, D-2, H-4, O-1, E-1, EWI, J-1, TPS, F-2, L-2, G-4, H-2A, G-1, G-5, H-1A, Parolee, P-1, J-2, H-3, I, M-1, R-1, O-2, M-2, P-3, O-3, VWT, TD, P-2, P-4, Q, VWB, R-2, N, S-6, T-1, V-2, T-2, K-4, U-1

About 10 percent of PERM certifications are issued annually by OFLC to foreign beneficiaries who do not currently reside in the U.S. and would enter on immigrant visas in the EB-2 or EB-3 preference category. Employment-based immigrant visa availability and corresponding wait times change regularly for different preference categories and countries. Foreign workers from countries with significant visa demand consistently experience delays, at times over a decade. Therefore, employers would not have wage obligations until at the earliest, the very end of the 10-year analysis period and the number of relevant certifications is a relatively small percent of all PERM certifications; the Department therefore has not included associated wage transfers in the analysis.

Benefits Discussion

This section discusses the non-quantifiable benefits related to changes to the computation of the prevailing wage levels.

The Department’s increase in the prevailing wages for the four wage levels is expected to result in multiple benefits that the Department is unable to quantify but discusses qualitatively. One benefit of the IFR’s increase in prevailing wages is the economic incentive to increase employee retention, training, and productivity which will increase benefits to both employers and U.S. workers. The increase in prevailing wages is expected to induce employers – particularly those using the permanent and temporary visa programs – to fill critical skill shortages, to minimize labor costs by implementing retention initiatives to reduce employee turnover, and/or to increase the number of work hours offered to similarly employed U.S. workers. Furthermore, for employers in the technology and health care sectors, this could mean using higher wages to

attract and hire the industry's most productive U.S. workers and to provide them with the most advanced equipment and technologies to perform their work in the most efficient manner.

This high-wage, high-skill approach to minimizing labor costs is commonly referred to as the "efficiency wage" theory in labor economics; a well-established strategy that allows companies employing high-wage workers to minimize labor costs and effectively compete with companies employing low-wage workers. The efficiency wage theory supports the idea that increasing wages can lead to increased labor productivity because workers feel more motivated to work at higher wage levels. Where these jobs offer wages that are significantly higher than the wages and working conditions of alternative jobs, workers will have a greater incentive to be loyal to the company, impress their supervisors with the quality of their work, and exert an effort that involves no shirking. Thus, if employers increase wages, some, or all, of the higher wage costs can be recouped through increased staff retention, lower costs of supervision, and higher labor productivity.

Strengthening prevailing wages will also help promote and protect jobs for American workers. By ensuring that the employment of any foreign worker is commensurate with the wages paid to similarly employed U.S. workers, the Department will be protecting the types of white-collar, middle-class jobs that are critical to ensuring the economic viability of communities throughout the country.

There is some evidence that the existing prevailing wage levels offer opportunities to use lower-cost alternatives to U.S. workers doing similar jobs by offering two wage levels below the median wage. For example, in FY 2019, 60 percent of H-1B workers were placed at either the first or second wage level, meaning a substantial majority of workers in the program could be

paid wages well below the median wage for their occupational classification.²⁷³ By setting the Level I wage level at the 45th percentile, employers using the H-1B and PERM programs will have less of an incentive to replace U.S. workers doing similar jobs at lower wage rates when there are available U.S. workers. This will increase earnings and standards of living for U.S. workers. It also will level the playing field by reducing incentives to replace similarly employed U.S. workers with a low-cost foreign alternative.

In addition, because workers with greater skills tend to be more productive, and as a result can command higher wages, raising the prevailing wage levels will lead to the limited number of H-1B visas going to higher-skilled foreign workers, which will likely increase the spillover economic benefits associated with high-skilled immigration.

Finally, ensuring that skilled occupations are not performed at below-market wage rates by foreign workers will provide greater incentives for firms to expand education and job training programs. These programs can attract and develop the skills of a younger generation of U.S. workers to enter occupations that currently rely on elevated levels of foreign workers.

4. Summary of the Analysis

Exhibit 10 below summarizes the costs and transfer payments of the IFR. The Department estimates the annualized cost of the IFR at \$3.06 million and the annualized transfer payments (from H-1B, H-1B1, and E-3 employers to workers) at \$23.5 billion, at a discount rate of 7 percent. The Department did not estimate any cost savings. For the purpose of E.O. 13771, the annualized cost, when perpetuated, is \$1.95 million at a discount rate of 7 percent in 2016 dollars.

²⁷³ Costa and Hira (2020), H-1B Visas and Prevailing Wage Levels, Economic Policy Institute: Retrieved August 12, 2020 from <https://files.epi.org/pdf/186895.pdf>

Exhibit 10: Estimated Monetized Costs and Transfer Payments of the IFR (2019\$ Millions)		
	Costs	Transfer Payments
2021	\$4.71	\$4,511
2022	\$2.58	\$13,621
2023	\$2.58	\$26,493
2024	\$2.58	\$26,493
2025	\$2.58	\$26,493
2026	\$2.58	\$26,493
2027	\$2.58	\$26,493
2028	\$2.58	\$26,493
2029	\$2.58	\$26,493
2030	\$2.58	\$26,493
Undiscounted Total	\$27.92	\$230,077
10-Year Total with a Discount Rate of 3%	\$24.79	\$198,292
10-Year Total with a Discount Rate of 7%	\$21.51	\$165,090
10-Year Average	\$2.79	\$23,008
Annualized with a Discount Rate of 3%	\$2.91	\$23,246
Annualized with a Discount Rate of 7%	\$3.06	\$23,505
Perpetuated Net Costs with a Discount Rate of 7% (2016\$ Millions)		\$1.95

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, prevailing wages would be set for Levels I through III at the 45th, 75th, and 95th percentile, respectively. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be

easier for employers and employees to understand due to decreased complexity to matching wage tiers with position experience. A three-tiered prevailing wage structure would maintain the minimum entry-level and fully competent experience levels and simplify the intermediate level of experience by combining the current qualified and experienced distinctions. The Department prefers the chosen methodology over this alternative because the chosen four-tiered prevailing wage structure is likely to produce more accurate prevailing wages than a three-tiered structure due to the ability to have two intermediate wage levels. In addition, creating a three-tiered prevailing wage structure would require a statutory change.

The Department considered a second alternative that would modify the geographic levels for assigning prevailing wages for the SOC code within the current four-tiered prevailing wage structure, which ranges from local MSA or BOS areas to national, to a two-tiered geographic area structure containing only statewide or national area estimates. By assigning prevailing wages at a statewide or, where statewide averages cannot be reported by the BLS, national geographic area, this second alternative would again simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS and provide employers with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. This process would also reduce variability in prevailing wages within a state for the same occupations across time, making prevailing wages more consistent and uniform. However, this method would not account for wage variability that may occur within

states and that can account for within-state differences in labor market dynamics, industry competitiveness, or cost of living.

The Department prefers the chosen methodology because it preserves important differences in county and regional level prevailing wages and better aligns with the statutory requirement that the prevailing wage be the wage paid in the area of employment. The Department also seeks public comments to help us to identify any other regulatory alternatives that should be considered.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. § 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 603, 604. If the determination is that it would, the agency must prepare a regulatory flexibility analysis as described in the RFA. *Id.*

However, if an agency determines that a proposed or final rule is unlikely to have a significant economic impact on a substantial number of small entities, the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required.²⁷⁴ The

²⁷⁴ See 5 U.S.C. § 605.

certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The Department expects that this IFR will likely have a significant economic impact on a substantial number of small entities and is therefore publishing this Initial Regulatory Flexibility Analysis (IRFA), as required by the RFA. The Department invites public comment on all aspects of this IRFA, including the estimates related to the number of small entities affected by the IFR and expected costs. The Department also invites public comment on whether viable alternatives exist that would reduce the burden on small entities while remaining consistent with statutory requirements and the objectives of the IFR.

1. Why the Department is Considering Action

The Department has determined that new rulemaking needed to will better protect the wages and job opportunities of U.S. workers, minimize incentives to hire foreign workers over U.S. workers on a permanent or temporary basis in the United States under the H-1B, H-1B1, and E-3 visa programs and the PERM program, and further the goals of Executive Order 13788, Buy American and Hire American. In addition, this IFR is consistent with the aims of the Presidential “Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak,” which found that the entry of additional foreign workers in certain immigrant and nonimmigrant classifications “presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak.” Accordingly, this IFR revises the computation of wage levels under the Department’s four-tiered wage structure based on the OES wage survey administered by the BLS to ensure that wages paid to immigrant and nonimmigrant workers are

commensurate with the wages of U.S. workers with comparable levels of education, experience, and levels of supervision in the occupation and area of employment.

2. Objectives of and Legal Basis for the IFR

The Department is amending its regulations at Sections 656.40 and 655.731 to reflect the methodology the Department will use to determine prevailing wages based on the BLS's OES survey for job opportunities in the H-1B and PERM programs. The revised methodology will establish the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

The INA assigns responsibilities to the Secretary relating to the entry and employment of certain categories of employment-based immigrants and nonimmigrants. This rule relates to the labor certifications that the Secretary issues for certain employment-based immigrants and to the LCAs that the Secretary certifies in connection with the temporary employment of foreign workers under the H-1B, H-1B1, and E-3 visa classifications.²⁷⁵ The Department has a statutory mandate to protect the wages and working conditions of similarly-employed U.S. workers from adverse effects caused by the employment of foreign workers in the U.S. on a permanent or temporary basis. This, in turn, will protect jobs of U.S. workers as a part of responding to the coronavirus public health emergency, and facilitate the Nation's economic recovery.

3. Estimating the Number of Small Entities Affected by the Rulemaking

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into the H-1B, H-1B1, and E-3 visa

²⁷⁵ See 8 U.S.C. §§ 1101(a)(5), 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i)(b), 1101(a)(15)(H)(i)(b1), 1182(n), 1182(t)(1), 1184(c).

program disclosure data (H-1B disclosure data) for FY 2019.²⁷⁶ This process allowed the Department to identify the number and type of small entities using the H-1B program and their annual revenues. A single employer can apply for H-1B workers multiple times; therefore, unique employers were identified. The Department was able to obtain data matches for 34,203 unique H-1B employers. Next, the Department used the SBA size standards to classify 26,354 of these employers (or 77.1 percent) as small.²⁷⁷ These unique small employers had an average of 75 employees and average annual revenue of approximately \$18.61 million. Of these unique employers, 22,430 of them had revenue data available from Data Axle. The Department’s analysis of the impact of this IFR on small entities is based on the number of small unique employers (22,430 with revenue data).

To provide clarity on the types of industries impacted by this regulation, Exhibit 11 shows the number of unique H-1B small entity employers with certifications in FY 2019 within the top 10 most prevalent industries at the 6-digit and 4-digit NAICS code level. Depending on when their employment period starts and the length of the employment period (up to 3 years), small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023,three.

Exhibit 11: Number of H-1B Small Employers by NAICS Code

6-Digit NAICS	Description	Number of Employers					
		2018	2019	2020	2021	2022	2023
511210	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)

²⁷⁶ The PERM program has a large proportion of certifications issued annually to foreign beneficiaries that are working in the U.S. at the time of certification. Prior to the PERM certification, these beneficiaries are typically working under H-1B, H-1B1, and E-3 temporary visas. Therefore, the Department has not included estimates for PERM employers in the IRFA, consistent with the analysis and estimates contained in the E.O. 12866 section. The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section but did not consider these employers for purposes of cost transfers.

²⁷⁷ Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*. (Aug. 2019), <https://www.sba.gov/document/support-table-size-standards>.

541511	Custom Computer Programming Services	413 (11%)	1,149 (4%)	1,155 (4%)	1,141 (5%)	1,082 (5%)	101 (11%)
621111	Offices of Physicians (except Mental Health Specialists)	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
541330	Engineering Services	94 (3%)	971 (4%)	977 (4%)	964 (4%)	913 (4%)	13 (1%)
611310	Colleges, Universities, and Professional Schools	104 (3%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
541110	Offices of Lawyers	58 (2%)	607 (2%)	606 (2%)	596 (2%)	549 (2%)	13 (1%)
611110	Elementary and Secondary Schools	45 (1%)	625 (2%)	621 (2%)	577 (2%)	509 (2%)	11 (1%)
541310	Architectural Services	24 (1%)	501 (2%)	503 (2%)	499 (2%)	465 (2%)	1 (0%)
541714	Research and Development in Biotechnology (except Nano biotechnology)	53 (1%)	444 (2%)	445 (2%)	437 (2%)	411 (2%)	15 (2%)
541614	Process, Physical Distribution, and Logistics Consulting Services	89 (2%)	394 (2%)	399 (2%)	392 (2%)	369 (2%)	25 (3%)
Other NAICS		2,197 (60%)	17,695 (69%)	17,755 (69%)	17,395 (69%)	15,841 (68%)	556 (59%)
4-Digit NAICS	Description	Number of Employers					
		2018	2019	2020	2021	2022	2023
5112	Software Publishers	468 (13%)	1,570 (6%)	1,578 (6%)	1,557 (6%)	1,477 (6%)	127 (14%)
5413	Architectural, Engineering, and Related Services	128 (3%)	1,677 (7%)	1,687 (7%)	1,667 (7%)	1,572 (7%)	17 (2%)
5415	Computer Systems Design and Related Services	521 (14%)	1,518 (6%)	1,526 (6%)	1,508 (6%)	1,427 (6%)	128 (14%)
5416	Management, Scientific, and Technical Consulting Services	320 (9%)	1,437 (6%)	1,449 (6%)	1,427 (6%)	1,318 (6%)	70 (7%)
6211	Offices of Physicians	138 (4%)	1,092 (4%)	1,097 (4%)	1,082 (4%)	1,004 (4%)	34 (4%)
5417	Scientific Research and Development Services	101 (3%)	660 (3%)	663 (3%)	652 (3%)	606 (3%)	28 (3%)
6113	Colleges, Universities, and Professional Schools	104 (100%)	637 (2%)	644 (2%)	627 (2%)	588 (3%)	39 (4%)
5239	Other Financial Investment Activities	73 (2%)	635 (2%)	638 (2%)	629 (2%)	572 (2%)	21 (2%)
5411	Legal Services	59 (2%)	615 (2%)	614 (2%)	604 (2%)	556 (2%)	13 (1%)

5412	Accounting, Tax Preparation, Bookkeeping, and Payroll Services	41 (1%)	596 (2%)	599 (2%)	589 (2%)	558 (2%)	12 (1%)
Other NAICS		1,730 (47%)	15,248 (59%)	15,285 (59%)	14,925 (59%)	13,530 (58%)	446 (48%)

4. Compliance Requirements of the IFR, Including Reporting and Recordkeeping

The Department has considered the incremental costs for small entities from the baseline (*i.e.*, the current practices for complying, at a minimum, with the regulations governing permanent labor certifications at 20 CFR part 656 and labor condition applications at 20 CFR part 655, subpart H) to this IFR. We estimated the cost of (a) the time to read and review the IFR and (b) wage costs. These estimates are consistent with those presented in the E.O. 12866 section.

5. Calculating the Impact of the IFR on Small Entities

The Department estimates that small entities using the H-1B program, 22,430 unique employers would incur a one-time cost of \$51.93 to familiarize themselves with the rule.^{278 279}

In addition to the total first-year cost above, each small entity using the H-1B program may have an increase in the annual wage costs due to the revisions to the wage structure if they currently offer a wage lower than the IFR prevailing wage levels. For each small entity, we calculated the likely annual wage cost as the sum of the total IFR wage minus the total baseline wage for each small entity identified from the H-1B disclosure data in FY 2019. We added this change in the wage costs to the total first-year costs to measure the total impact of the IFR on the small entity. Small entities with certifications in FY 2019 can have wage obligations in calendar years 2018 through 2023, depending on when their employment period starts and the length of the employment period (up to 3 years). Because USCIS does not approve all certifications, the estimated wage obligations for some small entities may be overestimated. The Department is unable to determine which small entities had certifications approved or not approved by USCIS

²⁷⁸ $\$51.93 = 1 \text{ hour} \times \51.93 , where $\$51.93 = \$32.58 + (\$32.58 \times 42\%) + (\$32.58 \times 17\%)$.

²⁷⁹ The Department considered PERM employers for purposes of calculating one-time costs in the E.O. 12866 section.

and therefore estimates the total wage obligation with no adjustment for USCIS approval rates. As a result estimates of the total cost to small entities are likely to be inflated. The Department seeks public comments on how to best estimate which small entities had certifications approved by USCIS. Exhibit 12 presents the number of small entities with a wage impact in each year, as well as the average wage impact per small entity in each year.

Exhibit 12: Wage Impacts on H-1B Program Small Entities

Proportion of Revenue Impacted	2018	2019	2020	2021	2022	2023
Number of H-1B Small Entities with Wage Impacts	2,790	20,418	20,503	20,158	18,756	717
Average Wage Impact per Small Entity	\$14,664	\$110,504	\$216,187	\$212,130	\$112,563	\$19,044

The Department determined the proportion of each small entity’s total revenue affected by the costs of the IFR to determine if the IFR would have a significant and substantial impact on small entities. The cost impacts included estimated first-year costs and the wage costs introduced by the IFR. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact, and assumed that 15 percent of small entities incurring a significant impact as the threshold for a substantial impact on small entities generally.

The Department has used a threshold of three percent of revenues in prior rulemakings for the definition of significant economic impact.²⁸⁰ This threshold is also consistent with that sometimes used by other agencies.²⁸¹ The Department also believes that its assumption that 15 percent of small entities will be substantially affected experiencing a significant impact to

²⁸⁰ See, e.g., 79 Fed. Reg. 60634 (October 7, 2014, Establishing a Minimum Wage for Contractors), 81 Fed. Reg. 39108 (June 15, 2016, Discrimination on the Basis of Sex), and 84 Fed. Reg. 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H-2A Nonimmigrants in the United States).

²⁸¹ See, e.g., 79 Fed. Reg. 27106 (May 12, 2014, Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

determine whether the rule has a substantial impact on small entities is appropriate. The Department has used the same threshold in prior rulemakings for the definition of substantial number of small entities.²⁸²

Of the 22,430 unique small employers with revenue data, up to 16 percent of employers would have more than 3 percent of their total revenue affected in 2019, 28 percent in 2020 and 2021, and up to 21 percent in 2022. Exhibit 13 provides a breakdown of small employers by the proportion of revenue affected by the costs of the IFR.

Exhibit 13: Cost Impacts as a Proportion of Total Revenue for Small Entities

Proportion of Revenue Impacted	2018	2019	2020	2021	2022	2023
< 1%	2,708 (85%)	15,098 (69%)	11,748 (54%)	11,748 (54%)	12,411 (62%)	737 (94%)
1% - 2%	232 (7%)	2,215 (10%)	2,475 (11%)	2,475 (11%)	2,274 (11%)	18 (2%)
2% - 3%	75 (2%)	1,119 (5%)	1,464 (7%)	1,464 (7%)	1,182 (6%)	10 (1%)
3% - 4%	64 (2%)	615 (3%)	965 (4%)	965 (4%)	730 (4%)	8 (1%)
4% - 5%	29 (1%)	429 (2%)	674 (3%)	674 (3%)	568 (3%)	1 (0%)
> 5%	89 (3%)	2,538 (12%)	4,363 (20%)	4,363 (20%)	2,815 (14%)	10 (1%)
Total > 3%	182 (6%)	3,582 (16%)	6,002 (28%)	6,002 (28%)	4,113 (21%)	19 (2%)

6. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the IFR

The Department is not aware of any relevant Federal rules that conflict with this IFR.

7. Alternative to the IFR

The RFA directs agencies to assess the effects that various regulatory alternatives would have on small entities and to consider ways to minimize those effects. Accordingly, the Department considered two regulatory alternatives to the chosen approach of establishing the prevailing wage for Levels I through IV, respectively, at approximately the 45th percentile, the 62nd percentile, the 78th percentile, and the 95th percentile.

²⁸² See, e.g., 79 Fed. Reg. 60633 (October 7, 2014, Establishing a Minimum Wage for Contractors) and 84 Fed. Reg. 36178 (July 26, 2019, Proposed Rule for Temporary Agricultural Employment of H-2A Nonimmigrants in the United States).

First, the Department considered an alternative that would modify the number of wage tiers from four levels to three levels. Under this alternative, the Department attempted to set the prevailing wages for Levels I through III, respectively, at the 45th, 75th, and 95th percentile. Modifying the number of wage tiers to three levels would allow for more manageable wage assignments that would be easier for small entities and their employees to understand due to decreased complexity to matching wage tiers with position experience. The Department decided not to pursue this alternative because the chosen four-tiered wage methodology is likely to be more accurate than the three-tiered wage level because it has two intermediate wage levels. In addition, creating a three-tiered wage level would require a statutory change. Although the Department recognizes that legal limitations prevent this alternative from being actionable, the Department nonetheless presents it as a regulatory alternative in accord with OMB guidance.²⁸³

The Department considered a second alternative that attempted to modify the geographic levels for assigning prevailing wages for the occupation from the current four-tiered structure, which ranges from local MSA or BOS areas to national, to a two-tiered structure containing statewide or national levels. By assigning prevailing wages at a statewide or national level (depending on whether statewide averages can be reported by BLS), this second alternative attempted to simplify the prevailing wage determination process by reducing the number of distinct wage computations reported by the BLS. It would also provide small entities with greater certainty regarding their wage obligations, especially where the job opportunity requires work to be performed in a number of different worksite locations within a state or regional area. The Department decided not to pursue this alternative because the chosen methodology preserves

²⁸³ OMB Circular A-4 advises that agencies “should discuss the statutory requirements that affect the selection of regulatory approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act.”

important differences in county and regional level prevailing wages, and it would require a statutory change.

The Department invites public comments on these alternatives and other alternatives to reduce the burden on small entities while remaining consistent with the objectives of the proposed rule.

D. *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value equivalent of \$100 million in 1995 adjusted for inflation to 2019 levels by the Consumer Price Index for All Urban Consumers (CPI-U) is approximately \$168 million based on the Consumer Price Index for All Urban Consumers.²⁸⁴

While this IFR rule may result in the expenditure of more than \$100 million by the private sector annually, the rulemaking is not a “Federal mandate” as defined for UMRA purposes.²⁸⁵

²⁸⁴ See U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202003.pdf> (last visited June 2, 2020).

Calculation of inflation: 1) Calculate the average monthly CPI-U for the reference year (1995) and the current year (2019); 2) Subtract reference year CPI-U from current year CPI-U; 3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; 4) Multiply by 100 = [(Average monthly CPI-U for 2019 – Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] * 100 = [(255.657 – 152.383) / 152.383] * 100 = (103.274 / 152.383) * 100 = 0.6777 * 100 = 67.77 percent = 68 percent (rounded)

Calculation of inflation-adjusted value: \$100 million in 1995 dollars * 1.68 = \$168 million in 2019 dollars.

²⁸⁵ See 2 U.S.C. 658(6).

The cost of obtaining prevailing wages, preparing labor condition and certification applications (including all required evidence) and the payment of wages by employers is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.²⁸⁶ This IFR does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DOL has not prepared a statement under UMRA. Therefore, no actions were deemed necessary under the provisions of the UMRA.

E. Congressional Review Act

The Office of Information and Regulatory Affairs, of the Office of Management and Budget, has determined that this IFR is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104– 121, 110 Stat. 847, 868 et seq. In the preceding APA section of this preamble, the Department explained that it has for good cause found that notice and public procedure thereon are impracticable and contrary to the public interest. Accordingly, this rule shall take effect immediately, as permitted by 5 U.S.C. § 808(2).

F. Executive Order 13132 (Federalism)

This IFR would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this IFR does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

²⁸⁶ See 2 U.S.C. 658(7)(A)(ii).

This IFR meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

H. *Regulatory Flexibility Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)*

This IFR does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This IFR does not require a collection of information subject to approval by OMB under the PRA, or affect any existing collections of information.

List of Subjects and Regulatory Amendments

20 CFR Part 655

Administrative practice and procedure, Australia, Chile, Employment, Employment and training, Immigration, Labor, Migrant labor, Wages.

20 CFR Part 656

Administrative practice and procedure, Employment, Foreign workers, Labor, Wages.

DEPARTMENT OF LABOR

Accordingly, for the reasons stated in the preamble, the Department of Labor amends parts 655 and 656 of Chapter V, Title 20, Code of Federal Regulations, as follows:

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), (p), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105-277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114-74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109-423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Amend § 655.731 by revising paragraphs (a)(2)(ii), (a)(2)(ii)(A), and (a)(2)(ii)(A)(2) to read as follows:

§ 655.731 What is the first LCA requirement, regarding wages?

* * * * *

(a) * * *

(2) * * *

(ii) If the job opportunity is not covered by paragraph (a)(2)(i) of this section, the prevailing wage shall be based on the wages of workers similarly employed as determined by the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with 20 CFR 656.40(b)(2)(i); a current wage as determined in the area under the Davis–Bacon Act, 40 U.S.C. 276a et seq. (see 29 CFR part 1), or the McNamara–

O'Hara Service Contract Act, 41 U.S.C. 351 et seq. (see 29 CFR part 4); an independent authoritative source in accordance with paragraph (a)(2)(ii)(B) of this section; or another legitimate source of wage data in accordance with paragraph (a)(2)(ii)(C) of this section. If an employer uses an independent authoritative source or other legitimate source of wage data, the prevailing wage shall be the arithmetic mean of the wages of workers similarly employed, except that the prevailing wage shall be the median when provided by paragraphs (a)(2)(ii)(A), (b)(3)(iii)(B)(2), and (b)(3)(iii)(C)(2) of this section. The prevailing wage rate shall be based on the best information available. The following prevailing wage sources may be used:

(A) *OFLC National Processing Center (NPC) determination.* The NPC shall receive and process prevailing wage determination requests in accordance with these regulations and Department guidance. Upon receipt of a written request for a PWD, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arm's length, and, if not, determine the wages of workers similarly employed using the wage component of the BLS OES and selecting an appropriate wage level in accordance with 20 CFR 656.40(b)(2)(i), unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n), 212(p), and 212(t) of the INA and in a manner consistent with 20 CFR 656.40(b)(2). If an acceptable employer-provided wage survey provides an arithmetic mean then that wage shall be the prevailing wage; if an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination.

(1) * * *

(2) If the employer is unable to wait for the NPC to produce the requested prevailing wage for the occupation in question, or for the CO and/or the BALCA to issue a decision, the employer may rely on other legitimate sources of available wage information as set forth in paragraphs (a)(2)(ii)(B) and (C) of this section. If the employer later discovers, upon receipt of the PWD from the NPC, that the information relied upon produced a wage below the final PWD and the employer was not paying the NPC-determined wage, no wage violation will be found if the employer retroactively compensates the H-1B nonimmigrant(s) for the difference between wage paid and the prevailing wage, within 30 days of the employer's receipt of the PWD.

* * * * *

PART 656—LABOR CERTIFICATION PROCESS FOR PERMANENT EMPLOYMENT OF ALIENS IN THE UNITED STATES

3. The authority citation for part 656 is revised to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A), 1182(p); sec.122, Pub. L. 101-649, 109 Stat. 4978; and Title IV, Pub. L. 105-277, 112 Stat. 2681.

4. Amend § 656.40 by revising paragraphs (a), (b)(2), and (b)(3), and by adding paragraphs (b)(2)(i), (b)(2)(i)(A), (b)(2)(i)(B), (b)(2)(i)(C), (b)(2)(i)(D), and (b)(2)(ii) to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

* * * * *

(a) *Application process.* The employer must request a PWD from the NPC, on a form or in a manner prescribed by OFLC. The NPC shall receive and process prevailing wage determination

requests in accordance with these regulations and with Department guidance. The NPC will provide the employer with an appropriate prevailing wage rate. The NPC shall determine the wage in accordance with sec. 212(p) of the INA. Unless the employer chooses to appeal the center's PWD under §656.41(a) of this part, it files the Application for Permanent Employment Certification either electronically or by mail with the processing center of jurisdiction and maintains the PWD in its files. The determination shall be submitted to the CO, if requested.

(b) * * *

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be based on the wages of workers similarly employed using the wage component of the Bureau of Labor Statistics (BLS) Occupational Employment Statistics Survey (OES) in accordance with subparagraph (b)(2)(i), unless the employer provides an acceptable survey under paragraphs (b)(3) and (g) of this section or elects to utilize a wage permitted under paragraph (b)(4) of this section.

(i) The BLS shall provide the OFLC Administrator with the OES wage data by occupational classification and geographic area, which is computed and assigned at four levels set commensurate with the education, experience, and level of supervision of similarly employed workers, as determined by the Department. Based on this determination, the prevailing wage shall be provided by the OFLC Administrator at four levels:

(A) The Level I Wage shall be computed as the arithmetic mean of the fifth decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(B) The Level II Wage shall be determined by first dividing the difference between Level I and IV by three and then adding the quotient to the computed value for Level I and assigned for the most specific occupation and geographic area available.

(C) The Level III Wage shall be determined by first dividing the difference between Level I and IV by three and then subtracting the quotient from the computed value for Level IV and assigned for the most specific occupation and geographic area available.

(D) The Level IV Wage shall be computed as the arithmetic mean of the upper decile of the OES wage distribution and assigned for the most specific occupation and geographic area available.

(ii) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the prevailing wage levels under paragraph (b)(2)(i) of this section as a notice posted on the OFLC website.

(3) If the employer provides a survey acceptable under paragraph (g) of this section, the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed in the area of intended employment. If an otherwise acceptable survey provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

* * * * *

John Pallasch,
Assistant Secretary for Employment and Training, Labor.