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Via Regulations.gov

Brian D. Pasternak, Administrator
Office of Foreign Labor Certification, Employment and Training Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
DOL Docket No. ETA-2020-0006

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

On behalf of Americans for Prosperity Foundation[1] and The LIBRE Institute,[2] we write in response to the Department of Labor's ("DOL") proposed rule that will substantially increase the wages that certain guest workers and employment-based immigrants are required to be paid.[3] The visa categories included are the H-1B visa for skilled guest workers as well as similar programs like the H-1B1 visa, which is used to recruit skilled workers from Chile and Singapore, and the E-3 visa, which is used to recruit skilled workers from Australia. The rule will also increase prevailing wage requirements for PERM Labor Certifications, the first step in the process for obtaining an employment based green card.

I. DOL's Interim Rule Harms Both U.S. Employers and Job Seekers

While the Trump Administration claims that the new rule will prevent H-1B workers from being used as "low-cost replacements for otherwise qualified American workers,"[4] current regulations already require businesses to pay H-1B workers at least the average wage made by similarly experienced U.S. employees working in the same occupations and localities.[5] In fact, roughly 80 percent of H-1B employers pay their guest workers above average market wages.[6] Economic research also finds that, on average, H-1B workers reduce overall unemployment and increase earnings growth within the fields they are employed by increasing firm productivity.[7] The

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[1] *See* AMERICANS FOR PROSPERITY FOUNDATION, https://americansforprosperityfoundation.org/.

[2] *See* THE LIBRE INSTITUTE *About*, https://thelibreinstitute.org/about-libre-institute/.

[3] U.S. Dept. of Labor, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020).

[4] U.S. Dept. of Homeland Security, *Department of Homeland Security and Department of Labor Rule Restores Integrity to H-1B Visa Program*, Oct. 6, 2020, https://bit.ly/36loY54.

[5] David J. Bier, *100% of H-1B Employers Offer Average Market Wages—78% Offer More*, Cato Institute, May. 18, 2020, https://bit.ly/2U0Pdbj.

[6] *Id.*

[7] Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce,* National Foundation for American Policy, May 2020, https://bit.ly/2IbDFzg.

gains from these innovations create positive spillover effects to surrounding communities. One analysis reveals that from 1990-2010, every one percent increase of H-1B workers in science, technology, engineering, and mathematics (STEM) professions increased local wages of college educated Americans by 7-8 percent and non-college educated Americans by 3-4 percent.[8]

Rather than using the program as a means of cheap labor, research indicates that employers are more likely to hire H-1B workers after months of struggling to fill job vacancies.[9] This is particularly true for computer science and mathematics occupations, which comprise roughly two-thirds of H-1B holders working in the U.S.[10] Even during the economic distress caused by the COVID-19 pandemic, unemployment in these fields has remained at below 4 percent since January of 2020.[11] Undermining employers' talent pool will likely deprive Americans of future economic gains they would have enjoyed from boosts in firm productivity. According to one estimate, H-1B denials in 2007-2008 due to the H-1B cap prevented as many as 231,224 U.S. tech jobs from being created and slowed wage growth by as much as 4.9 percent.[12] Such restrictions likely impeded the U.S. economy's recovery following the Great Recession.

The blunt restrictions imposed by the new rule will only incentivize companies to outsource their operations abroad in favor of countries where it is easier to attract and retain talent. Recent research that assessed foreign affiliate employment from 1994-2014 found that sharp reductions to the H-1B cap in 2004 caused H-1B reliant firms to outsource at a 27 percent higher rate than non-H-1B reliant firms.[13] According to a survey from immigration services provider Envoy Global, which sampled 433 hiring managers and human resources professionals across various industries, 74 percent of employers consider Canada's immigration system to be more favorable than America's, and 61 percent of respondents reported that they are recruiting and sending more employees to Canada.[14] The barriers that the DOL rule creates for businesses will likely exacerbate these trends, making America less likely to be at the forefront of new innovations.

The new rule will also impact foreign students' ability to seek work after graduating from U.S. universities, which 57 percent of employers say is a primary source of their international

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[8] Giovanni Peri, Kevin Shih, and Chad Sparber, *STEM Workers, H-1B Visas, and Productivity in US Cities*, Journal of Labor Economics, Vol. 33, July 2015, https://bit.ly/353nz3B.

[9] Morgan Raux, *Looking for the "Best and Brightest": Hiring difficulties and high-skilled foreign workers*, The Center for Growth and Opportunity, August 2020, https://bit.ly/2IgUoB6.

[10] *Id.*

[11] Stuart Anderson, *Tech Employment Data Contradict Need for Quick H-1B Visa Rules*, Forbes, Oct. 13, 2020, https://bit.ly/32htn7N.

[12] Giovanni Peri, Kevin Shih, Chad Sparber, and Angie Marek Zeitlin, *Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, The Partnership for a New American Economy, June 2014, https://bit.ly/3k30Ed3.

[13] Britta Glennon, *How Do Restrictions on High-Skilled Immigration Effect Offshoring? Evidence from the H-1B Program,* National Bureau of Economic Research, Working Paper No. w27538, July 2020, https://bit.ly/2U1WEz5.

[14] Envoy Global, *2020 Immigration Trends*, 2020, https://bit.ly/36k2d1j.

talent recruitment.[15] A major factor that influences where foreign students choose to study is their post-graduation work opportunities, which 62 percent of students list as "very important," according to a 2017 survey by Studyportals.[16] Should international students decide to adjust their status to an H-1B visa after graduating, the employer sponsoring them would be required to pay them close to the median wage for the entire profession for an entry level position, resulting in a nearly 50 percent higher wage than U.S. entry level workers in the same fields.[17] Such requirements will severely restrict long term career prospects for many international students and deter the "best and brightest," from seeking opportunities in the U.S. Research has even found that restricting the availability of H-1B visas lowers the SAT scores and GPA of international undergraduate students applying to the U.S. because more top students are inclined to choose other countries to pursue their studies.[18]

II. The Rule's Economic Impact Is Worsened by Major Errors

Under the current pay regulations, employers are required to pay skilled workers at least the average market wage of similarly employed Americans. This involves paying employees a minimum percentile of what Americans working in the same professions and geographic localities make based on their years of experience. The chart below details how the rule changes the amounts employers must pay guest workers and immigrants they plan to sponsor.

Wage Level	Previous Prevailing Wage	New Prevailing Wage
Level 1 (Entry)	17th percentile	45th percentile
Level 2 (Qualified)	34th percentile	62nd percentile
Level 3 (Experienced)	50th percentile	78th percentile
Level 4 (Fully Competent)	67th percentile	95th percentile

Under the previous wage calculations, DOL assumed that entry level positions generally made between the 0-33rd percentiles of wages in each profession. The agency then averaged the wages in that distribution so that the minimum pay for an entry level worker was in the 17th percentile. For the "fully competent," workers at Level 4 wages, the DOL averaged the remaining 33rd-100th percentiles and arrived at the 67th percentile for minimum pay. The agency then set the Level 2 and Level 3 percentiles to be the equidistant midpoints between Levels 1 and 4.

The new percentile requirements, however, averages the wages made between the 40th-50th percentiles, creating a minimum wage pegged at the 45th percentile. This new requirement dramatically inflates the new minimum entry level wage for skilled guest workers and employer

[15] *Id.*

[16] Carmen Neghina, *International students' changing perceptions of the U.S.*, Studyportals, 2017, https://bit.ly/2IaDB3m.

[17] Isabel Soto and Tom Lee, *Assessing the Department of Labor's Rule Raising Wage Requirements for H-1B Workers*, American Action Forum, November 3, 2020, https://bit.ly/36laty2.

[18] Takao Kato and Chad Sparber, *Quotas and Quality: The Effect of H-1B Visa Restrictions on the Pool of Prospective Undergraduate Students from Abroad*, Colgate University, Economic Faculty Working Papers, 18, June 1, 2011. https://bit.ly/35cbBEV.

sponsored immigrants by not factoring in wages below the 40th percentile. It then inflates the wage for Level 4 workers by averaging wages in the 90th-100th percentile, arriving at the 95th percentile. The range of wages earned for the top 10 percent of workers is too small a sample size and contains numerous outliers, effectively skewing the new prevailing wage for Level 4 workers above the 95th percentile. An analysis from the Cato Institute estimates that, because of these mistakes, DOL has understated the new wage increases by as much as 26 percent.[19] This mistake may be why DOL falsely asserts that the new rule will impose no costs to most employers already paying well above the prevailing wage. But while the rule's stated intent was to affect a minority of employers that paid their workers at or slightly above the previous wage requirements, this error is a likely reason why the rule will impose billions in costs to the top 30 H-1B employers.[20]

The DOL also lacks the data to adequately determine wages for a combination of 18,000 different professions and geographical labor markets under the new method for calculating prevailing wages.[21] As a result, the website has required these employers to pay sponsored workers $100 an hour, $208,000 a year, regardless of local conditions and worker experience because "leveled wages cannot be provided."[22] For example, private wage surveys indicate that a software developer in the San Jose-Sunnyvale-Santa Clara area makes an average of $70,600 annually. Because of this oversight in the new rule, employers in less populated areas are required to pay professionals thousands of dollars above the private wage.[23] While it is possible that employers may use private wage surveys in lieu of DOL data, smaller businesses and startups are unlikely to have the resources to conduct such surveys. Currently, about 92 percent of employer wage determinations are made through the DOL system.[24]

III. DOL Fails to Meet the Good Cause Requirements to Forgo Notice and Comment Rulemaking

DOL tries to have it both ways by arguing it meets the good cause criteria to justify bypassing rulemaking via regular notice and comment and, instead, publishing an interim final rule. The first prong of the argument states that the COVID-19 emergency requires a swift response to protect the public interest because of the "extraordinary circumstances brought about by the unique confluence of a public health emergency of a kind not experienced in living memory."[25]

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[19] David J. Bier, DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent, Cato Institute, Oct. 9, 2020, https://bit.ly/3n4kcQ3.

[20] David J. Bier, DOL Said Its H-1B Wage Rule Should Cost Many Employers $0 But It Imposed Billions in Costs Anyway, Cato Institute, Oct. 15, 2020, https://bit.ly/35fggWW.

[21] National Foundation for American Policy, *An Analysis of the DOL H-1B Wage Rule*, October 2020, https://bit.ly/3eKSF3z.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

DOL cites the fact that the country has been under a public health emergency since January 21, 2020. More than eight months passed before DOL published this interim final rule on October 8, 2020. Unemployment dropped below 10 percent in August after a peak of over 14 percent in April. Only in government can an emergency that began 261 days earlier still be used as an excuse to feign urgency and bypass 30 days of public input on a major policy change that will have enormous impact on business owners, legal residents and their families, and the economy writ large.

The second part of DOL's good cause argument for bypassing notice and comment undermines the first part—that is, the reliance on the COVID-19 public health emergency. DOL openly admits that it believes these changes should have been made years ago (emphasis added):[26]

> 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 ago**—have therefore become urgently needed.

DOL's years of inaction, including almost four in this Administration, is not good cause to bypass notice and comment now. If DOL can wait for years and nearly eight months during a public health emergency to make these changes, then its argument on the need to push them through without allowing 30 or 60 days for public comment before the rule is implemented falls apart. This faulty reasoning shows that DOL violated the Administrative Procedure Act with this interim final rule.

IV. The Interim Final Rule Contradicts Administration Efforts to Support Economic Recovery with Regulatory Relief

Despite citing the public health emergency as a reason for this rule, DOL's last minute regulatory change without fair notice for affected parties conflicts with the Administration's approach to address the COVID-19 crisis. Executive Order 13924 ("Regulatory Relief To Support Economic Recovery") empowers agencies to combat the economic consequences of the COVID-19 public health emergency by "rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery."[27] The President has charged agencies with providing businesses regulatory relief in the face of this pandemic, yet DOL burdens employers with great costs associated with this rule.

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[26] *Id.*

[27] Exec. Order 13924, 85 C.F.R. 31353 (2020).

This rule is a marked contrast to DOL's November 5, 2020 final rule regarding wages for agricultural workers under H-2A visas.[28] U.S. Secretary of Agriculture Sonny Perdue praised the H-2A rule (emphasis added):[29]

> This rule shows once again President Trump's commitment to America's farmers by delivering lower costs when they need it the most. Over the past several years farm wages have increased at a higher pace than other industries, which is why this DOL rule could not come at a better time. This is an example of good government that **will ensure greater stability** for farmers and **help them make long term business decisions** rather than facing uncertainty year after year.

DOL is providing certainty and stability for farmers that participate in a visa program for workers while taking the opposite approach with employers that participate in the H-1B, H-1B1, E-3 and PERM Labor Certification programs.

We stand ready to work with anyone to improve our immigration system and ensure it is focused on promoting opportunities for individuals to participate fully and contribute to our great nation. If you have any questions about this comment, please contact Kevin Schmidt by e-mail at KSchmidt@afphq.org. Thank you for your attention to this matter.

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[28] U.S. Dept. of Labor, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 Fed. Reg. 70,445 (Nov. 5, 2020).

[29] U.S. Dept. of Agriculture, *Secretary Perdue Statement on DOL's H2A Wage Rule* (Nov. 2, 2020), https://bit.ly/3p4HSpp.