



November 9, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Brian D. Pasternak
Administrator
Office of Foreign Labor Certification
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States¹

Dear Secretary Scalia and Administrator Pasternak:

The U.S. Small Business Administration's Office of Advocacy (Advocacy) submits the following comments to the Department of Labor's Employment and Training Administration on its Interim Final Rule (IFR), which immediately increases the prevailing wages for certain employment-based immigrant visas or non-immigrant visas in the H-1B, H-1B1, E-3, EB-2, and EB-3 categories. Advocacy is concerned this Interim Final Rule, which will cost employers over \$198 billion dollars over a 10-year period according to DOL's analysis, will have a disproportionate impact on small businesses.² Small businesses have told Advocacy that that they cannot pay the high wage increases in the IFR, and they may lose their current skilled

¹ Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63872 (Oct. 8, 2020) (hereinafter "IFR").

² IFR, at 63902.

workers and be shut out of this vital program, harming innovation and business growth. Small businesses across the country are already struggling to survive and many are facing record business closures due to COVID-19 related economic difficulties. Advocacy recommends that DOL delay implementation of this Interim Final Rule by a minimum of 30 days to receive comments from small businesses on any negative economic impacts of this regulation and to develop less burdensome regulatory alternatives.

Background

A. The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁶

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁷

B. Interim Final Rule

On October 8, 2020, DOL issued an Interim Final Rule amending the prevailing wage methodology increasing the wages for U.S. employers seeking highly skilled foreign workers, effective immediately. The H-1B visa is a temporary program that allows employers to employ

³ 5 U.S.C. §601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁵ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁶ *Id.*

⁷ 5 U.S.C. Sec. 601 note.

foreign workers in specialty occupations, and requires 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. The H-1B1 visa and the E-3 visa are similar in scope but apply to specific countries. The rule also applies to certain permanent visas such as the EB-2 visa and the EB-3 visa.⁸

To obtain a permanent or temporary labor certification from DOL before filing an immigration petition, an employer must state that there are “not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed working U.S. workers.”⁹ The labor certifications require that the employer obtain a Prevailing Wage Determination (PWD) for the job opportunity from DOL's Foreign Labor Certification National Prevailing Wage Center (NPWC). Alternately, an employer can utilize a wage survey that complies with DOL's standards, a Collective Bargaining Agreement (CBA), or other approved statutory wage determinations.¹⁰

DOL currently sets the prevailing wage for the H-1B visa and related visas as the existing wage levels in the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) government survey at following percentiles of wages earned by all workers in the same occupation and location: Level I “entry level” at the 17th percentile, Level II “qualified” at the 34th percentile, Level III “experienced” at the 50th percentile, and Level IV “fully competent” at the 67th percentile.¹¹ The Interim Final Rule raises the prevailing wages for all of these workers at the following percentiles of wages: Level I at the 45th percentile, Level 2 at the 62nd percentile, Level 3 at the 78th percentile, and Level 4 at the 95th percentile.¹²

I. Small Entity Concerns with the Proposed Rule

Advocacy held conference calls with small businesses, small start-up companies, small staffing companies, immigration attorneys, and other small business representatives to obtain feedback on this proposal. The following comments are reflective of the issues raised in these conversations.

1. DOL Lacks the Basis for a Good Cause Exemption from the Requirements of the Administrative Procedure Act

The Administrative Procedure Act (APA) authorizes an agency to dispense with notice and comment procedures for rules when they find “good cause” to do so, when compliance with

⁸ IFR, at 63873. These classifications refer to temporary foreign workers in specialty occupations in Chile and Singapore (H-1B1), Australia (E-3 visa). These EB-2 and EB-3 visas are permanent immigrant work visas for skilled workers.

⁹ IFR, at 63873.

¹⁰ 20 CFR 656.15(b)(1), 656.40(a), 656.40(b), (g), 655.731(b)(3)(iii)(B), 655.731(b)(3)(iii)(c).

¹¹ IFR, at 63875. U.S. Department of Labor Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (May 2005), available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

¹² IFR at 63897.

those procedures would be “impractical, unnecessary, or contrary to the public interest.”¹³ In this case, the agency has issued an Interim Final Rule with high wages affecting employers effective immediately, without prior public notice or feedback on these consequential changes.

Advocacy believes that DOL fails to establish an emergency need that necessitates the good cause exemption of the APA in this case, as the agency has had ample time to go through notice and comment rulemaking, taking over ten months to issue these regulations. On January 31, 2020, the Secretary of Department of Health and Human Services declared a public health emergency in response to COVID-19.¹⁴ In the meantime, the Administration has issued multiple proclamations in reaction to COVID-19, including a declaration of a National Emergency due to COVID-19 (March 13), a proclamation limiting immigration of EB-2 and E-B3 (April) and a proclamation lifting H-1B, EB-1 and EB3 visas until December 31, 2020 (June).¹⁵

In the IFR, DOL argues that H-1B employees earn wages that are much lower than their U.S. workers similarly employed, adversely harming the wages and job prospects of U.S. workers. DOL claims that these economic impacts are exacerbated by the recent mass layoffs and widespread unemployment from the coronavirus cases. DOL’s IFR cites multiple studies “that H-1B employees in information technology (IT) occupations earn wages that are about 25 percent to 33 percent less than U.S. workers.”¹⁶ In a recent court filing in *ITServe Alliance v. Eugene Scalia*, Professor Madeline Zavodny, an expert in labor and immigration economics, concludes that “none of the studies that DOL cites provide evidence supporting the claim that H-1B workers are paid far below what their U.S. worker counterparts are paid.”¹⁷ The employment website Glassdoor analyzed sample salaries from H-1B visa applications, and found that “across the 10 cities and roughly 100 jobs we examined, salaries for foreign H-1B workers were about 2.8 percent higher than comparable U.S. salaries on Glassdoor.”¹⁸

DOL cited high unemployment rates at the height of the COVID-19 crisis as a rationale to increase H-1B wages and protect U.S. jobs, citing an unemployment high of 14.7 percent in April 2020¹⁹ and 20 million jobs lost between February and April of 2020.²⁰ However, the DOL

¹³ 5 U.S.C. 553(b)(B).

¹⁴ U.S. 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 viewed Jan. 31, 2020).

¹⁵ Proclamation No. 9994, 85 FR 15337 (Mar. 18, 2020), Proclamation No. 10014 (Apr. 22, 2020), Proclamation 10052 (June 25, 2020).

¹⁶ IFR, at 63882, Footnote 121.

¹⁷ *ITSERVE Alliance v. Scalia*, et al, D.N.J., No.3:20-14604 15 (Oct. 16, 2020).

¹⁸ Dr. Andrew Chamberlain, *Dispelling Myths: What H-1B Visa Workers are Really Paid*, Glassdoor, Apr. 3, 2017, <https://www.glassdoor.com/research/h1b-workers/>.

¹⁹ IFR, at 63899. U.S. Bureau of Labor Statistics, Labor Statistics from the Current Population Survey, <https://perma.cc/GJ6R-EYL2>.

²⁰ Proclamation 10052, 85 FR 38263, 282-264. The 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.”

rule should consider that the September 2020 national unemployment rate dropped to 7.9 percent.²¹ Additionally, unemployment rates are still relatively low for industries that utilize the H-1B visa. For example, the unemployment rate in computer occupations was 3.0 percent in January 2020 (before the COVID-19 impacts) and now is 3.5 percent in September 2020.²² There is still a high number of active job postings in computer occupations. As of October 2, there were 655,386 job vacancy postings advertised online in the previous 30-day period for jobs in the most common computer occupations that require at least a bachelor's degree; which was a 4.7 percent increase for vacancy postings since May 2020.²³ Job vacancies in the health care industry are essentially unchanged from August 2019 (1.2 million) to August 2020 (1.1 million).²⁴

2. IFR's Immediate Wage Increases Are Too High and May Shut Small Businesses Out of the H-1B Visa Program

According to DOL's Initial Regulatory Flexibility Analysis, there are 26,354 small entities using the H-1B visa program, which constitutes 77.1 percent of all users. The most utilized industrial codes by small businesses in the H-1B visa program include software publishers, computer programming services, offices of physicians, and engineering services.²⁵

Advocacy is concerned that these high wage floors will have a significant economic impact on a substantial number of small businesses. In its Executive Order 12866 analysis the agency estimates that the IFR will result in annualized wage transfer payments from employers to employees of \$24.79 billion dollars and total 10-year transfer payments of \$198.2 billion dollars at a discount rate of three percent.²⁶ In the Initial Regulatory Flexibility Act (IRFA) section, the agency estimates that this rule will have average wage impacts per affected small entity of \$216,187 in 2020 and \$212,130 in 2021. This analysis shows that this rule would have devastating effects on small businesses; up to 28 percent of these small businesses would have incremental compliance costs of more than 3 percent of their total revenue in 2020 and 2021.²⁷

Advocacy believes that DOL may have underestimated these economic impacts. For this wage estimate, the agency calculated that each H-1B visa worker would have an average of \$4,825 to

²¹ U.S. Bureau of Labor Statistics, Labor Statistics from the Current Population Survey, <https://perma.cc/GJ6R-EYL2>.

²² National Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 2-3 (Oct. 2020); Chamber of Commerce of the United States of America v. DHS; DOL, et al, N.D. Cal. Civ. Case No. 20-CV-7331 (Oct. 19, 2020).

²³ Stuart Anderson, *Tech Employment Data Contradict Need for Quick H-1B Visa Rules*, FORBES, Oct. 13, 2020, <https://www.forbes.com/sites/stuartanderson/2020/10/13/tech-employment-data-contradict-need-for-quick-h-1b-visa-rules/?sh=5ded0ef05ca2>.

²⁴ U.S. Bureau of Labor Statistics, Table 1. Job openings levels by industry and region, seasonally adjusted, <https://www.bls.gov/news.release/jolts.t01.htm>.

²⁵ IFR, at 63911. The analysis lists the most utilized codes under the North American Industry Classification System (NAICS).

²⁶ IFR, at 63902.

²⁷ IFR, at 63912.

\$9,651 increase in wages.²⁸ DOL’s own online wage library shows higher wages increases. For example, the prevailing wages under this IFR for the occupation Computer Programmer in Bucks County, Pennsylvania increased between \$32,000 to \$42,000 per worker. A Level 1 worker will go from \$61,298 to \$93,454; at Level 4 a worker will go from \$111,176 to \$153,982.²⁹ According to an analysis of DOL’s IFR by the National Foundation for American Policy, “for all occupations and geographic locations, the new minimum salary that employers are required to pay when compared with the system in place prior to the new DOL wage rule is, on average, 39 percent higher for Level 1 positions, 41 percent higher for Level 2 positions, 43 percent higher for Level 3 positions and 45 percent higher for Level 4 positions.”³⁰ These examples illustrate that DOL’s figures may underestimate the impact on small entities and need to be updated to show the full impact.

Advocacy believes that the wage increases in DOL’s IFR are too high for small businesses, and would result in a sharp reduction in participation by small businesses from the H-1B visa and related programs. Small businesses have spent considerable resources to search for and secure current H-1B visa workers in specific occupations where there are staffing shortages and often hire workers permanently to grow their businesses. Small businesses have told Advocacy that since this Interim Final Rule is effective immediately, they now must decide whether to incur these higher wages or fire these workers when the position is renewed. They face the same choice when there is an adjustment in the position (such as a location change), or if they are going to be made permanent workers. Small businesses would be shut out of the H-1B visa program for new workers, making it difficult to innovate and grow their operations. Small businesses are concerned because there is a shortage of U.S. workers in STEM fields. Small businesses commented that U.S. companies may lose new projects and business to offshore companies who have more access to qualified labor.

For example, Advocacy spoke to one small IT firm in Oregon, who sought to permanently hire a valuable H-1B worker who worked on a specialized medical device app; it had taken the firm over six months to find this worker. This company could not afford the increase in this worker’s wages from this IFR, from \$120,000 to \$170,000 a year. Additionally, this company would have had to pay similar higher wages to other H-1B workers and corresponding U.S. workers, as required by a pay equity law in their state.

3. IFR’s New Wage Methodology Lacks Adequate Data

Advocacy is concerned that DOL’s OES data does not have enough data for certain occupations, skills levels and regions under this new wage methodology, and these positions default to

²⁸ IFR, at 63906. Advocacy calculation using data from Exhibit 5- Prevailing Wage Under the IFR and Exhibit 6- Current Prevailing Wage.

²⁹ DOL, Foreign Labor Certification Data Center Online Wage Library, at <https://www.flcdatacenter.com/OESQuick.aspx>.

³⁰ National Foundation for American Policy, *NFAP Policy Brief, An Analysis of the DOL H-1B Wage Rule 2* (Oct. 16 2020) (hereinafter “NFAP Policy Brief”). <https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf>

extremely high wage of \$208,000 a year for all skill levels. According to the analysis by the National Foundation for American Policy, “the new DOL wage system requires employers to pay \$100 an hour or \$208,000 for over 18,000 combinations of occupations and geographic labor markets, regardless of skill and position.”³¹ These artificially inflated wages bear no relation to market wages, because small businesses cannot afford to pay \$208,000 for Level 1 entry level workers and new graduates. A small business reported that the wages for an architectural intern increased from \$80,000 to \$208,000 due to the IFR’s high wages, a 160 percent wage increase.

Under DOL regulations, businesses can get a private wage study approved by the agency to provide alternate wages and try to avoid the higher OES wages.³² While small businesses would like this IFR to make clear that private wage surveys would be continue to be allowed and approved by DOL, there are obstacles to using these surveys. The main difficulty is that private wage surveys are based on metropolitan area wages and do not cover many rural or small market areas or less commonly utilized occupations because of data limitations. Small businesses have also stated that private wage studies are more expensive, less frequently utilized and are subject to denials by DOL.³³

Small businesses unable to utilize a private wage survey due to their geography or required occupation are faced with this default rate of \$208,000, shutting them out of these programs and this vital employment source. Small businesses have cited concern with these high wages in rural and smaller market areas may create staffing shortages for doctors, nurses and physical therapists in small hospitals that are trying to fight the COVID-19 virus.

4. IFR Would Harm Small U.S. Staffing Companies and their Small Business Clients

Advocacy spoke to small U.S.-based IT and engineering staffing companies and their representatives who explained that their industry was already paying market competitive wages. According to these businesses, IT and engineering professionals employed by staffing firms are always more expensive. While the typical IT and engineering staffing firm’s workforce may be overwhelmingly composed of U.S. citizens and permanent residents, small businesses often need access to H-1B visas in high demand skill sets to complete U.S.-based project teams. Instead of petitioning themselves, small businesses use staffing companies to hire technical talent for discrete projects because of the costly nature of the H-1B lottery process. However, these small business owners who serve metropolitan areas were concerned that this IFR does not make clear that industry-standard, respected private wage surveys will continue to be approved by DOL. In addition, small business staffing firm owners and the businesses they serve located in rural areas may be severely impacted by the changes to the OES wage system if private wage surveys are not available.

³¹ *NFAP Policy Brief*, at 2.

³² See Note 8.

³³ IFR, at 63905. In FY2020, approximately 92 percent of workers in the H-1B, H-1B1, and E-3 certifications had prevailing wages based on the OES survey. Small businesses report that subscriptions to private wages study subscription are around \$10,000 a year, and each query may cost between \$500-\$1500.

Conclusion

Advocacy is concerned that DOL has issued this Interim Final Rule that will immediately increase the wages of workers in the H-1B visa program at higher rates than they can afford. DOL lacks the basis for a good cause exemption from the requirements of the Administrative Procedure Act, as the agency had ample time to give the public notice and obtain comment on this consequential action. DOL has not provided any justification to immediately adopt such high wage increases for H-1B workers, as there is no evidence that H-1B employees earn wages that are lower than their U.S. counterparts, and unemployment rates are still relatively low for industries that utilize the H-1B visa. According to DOL's analysis, this regulation is estimated to cost businesses over \$198 billion dollars over a 10-year period, and each small business owner over \$200,000 per year. This rule will have a devastating impact on affected small businesses, who will lose current, highly skilled workers and shut them out of this vital employment program. Small businesses across the country are already struggling to survive and many are facing record business closures due to COVID-19 related economic difficulties. Advocacy recommends that DOL delay implementation of this Interim Final Rule by a minimum of 30 days to receive comments from small businesses on any negative economic impacts of this regulation and to develop less burdensome regulatory alternatives.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at Janis.Reyes@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Janis C. Reyes
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Office of Advocacy
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Copy to: Paul Ray, Acting Administrator
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