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OF THE
UNITED STATES OF AMERICA

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February 16, 2021

Administrator Brian Pasternak
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

By electronic submission: www.regulations.gov

RE: Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States: Proposed Delay of Effective Date
86 Fed. Reg. 7656 (February 1, 2021)
RIN 1205-AC00

Dear Mr. Pasternak:

The U.S. Chamber of Commerce submits the following comments regarding the proposed delay in the effective date governing the Department of Labor (DOL) final rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*.[1] Businesses appreciate the Department's pronounced desire to delay the final rule's effective date for an additional 60 days. However, given the profound changes proposed in the Department's final rule, a May 14, 2021 effective date is unlikely to avoid significant operational disruptions for many businesses that rely upon various immigrant and nonimmigrant workers.

We urge DOL to reconsider the manner it chose to drastically alter prevailing wage requirements under its final rule. DOL's final rule suffers from many critical flaws. Key provisions in this final rule are inconsistent with the statutory requirements under the Immigration and Nationality Act (INA), while others violate the notice-and-comment requirements of the Administrative Procedure Act (APA). DOL should simultaneously delay this final rule's effective date for several additional months to avoid business disruptions and commence the formal process of rescinding the final rule under the APA. In doing so, DOL could begin a new round of proposed rulemaking that takes a more rational, evidence-based approach to rulemaking, which would provide the American business community an adequate amount of time for the American business community to study the proposal, comment on the suggested changes, and provide DOL with further insight to a make a better-informed decision.

[1] 86 Federal Register 3608 (Jan. 14, 2021).

Should DOL decide against rescinding the rule, we urge the Department to significantly delay the implementation of the final rule for several months in order for the agency to ensure that it can implement this new prevailing wage system properly and without any undue disruptions imposed upon the business community.

BACKGROUND

Since 2004, DOL has utilized a 4-tier prevailing wage structure whereby the prevailing wage for each level is commensurate with the experience, education, and level of supervision exercised by the worker in the execution of his/her job duties.[2] DOL implemented this four-level Occupational Employment Statistics (OES) wage system under its Prevailing Wage Determination Policy for Nonagricultural Immigration Programs guidance document in 2005. In doing so, DOL classified the four prevailing wage levels as follows: Level I "entry level," Level II "qualified," Level III "experienced," and Level IV "fully competent."[3]

For each of the prevailing wage levels to be commensurate with the education, experience, and supervisory duties of a given job in given area of the country, DOL assigned a percentile for each of the four wage rates to reflect what an employer would need to pay a particular worker at the relevant wage tier in a specific job in a given Metropolitan Statistical Area (MSA) or Metropolitan Division (MD) in the country.

Prior to DOL's publication of its interim final rule on October 8, DOL utilized the respective percentiles for its prevailing wage levels:

Prevailing Wage Level	**Wage Percentile for Each Level of Worker**
Level I	17th percentile
Level II	34th percentile
Level III	50th percentile
Level IV	67th percentile

DOL's Interim Final Rule (IFR) increased these percentiles substantially. The percentiles for each prevailing wage tier under DOL's October IFR were as follows:

Prevailing Wage Level	**Wage Percentile for Each Level of Worker**
Level I	45th percentile
Level II	62th percentile
Level III	78th percentile
Level IV	95th percentile

[2] 85 Fed. Reg 63872, 63899 (October 8, 2020).
[3] ETA Prevailing Wage Determination Policy, Nonagricultural Immigration Programs, May 2005, available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/policy_nonag_progs.pdf, (accessed November 7, 2020).

The prevailing wage increases made by the IFR were divorced from the economic realities in the American labor markets and caused a significant amount of concern for stakeholders. The Chamber and many other groups filed lawsuits seeking to enjoin the IFR. In all these suits, the plaintiffs prevailed against the federal government. The Federal District Court for the Northern District of California in *Chamber of Commerce, et al. v. DHS, et al.*, 20-cv-07331 (N.D. Cal. Dec.1, 2020) set aside the IFR, concluding that DOL had not established "good cause" to excuse the notice-and-comment period required under the APA. In explaining his decision, Judge White was clear in that the record did not support a connection between the type of unemployment caused by the pandemic and the occupations impacted by the IFR,

Similarly, in *Purdue University, et al. v. Scalia, et al.*, 20-cv-03006 (D.D.C. Dec. 14, 2020) (consolidated with *Stellar IT, et al. v. Scalia et al.*, 20-cv-03175 (D.D.C)), the District Court for the District of Columbia set aside the IFR and ordered DOL to reissue any prevailing wage determination issued on or after October 8. Lastly, the Federal District Court for the District of New Jersey set aside the IFR in *ITServe Alliance et al. v. Scalia*, et al., 20-cv-14604 (D.N.J. Dec. 3, 2020).

On January 14, 2021, DOL published its final rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*. DOL's final rule made several material changes from the IFR. The Final Rule modified how OES prevailing wage rates would be calculated in a manner where the increases to the wage levels would be slightly lower than what they were under the IFR. In addition, the Final Rule creates a phased implementation plan in which wage level increases would not begin until July 1, 2021, and the increases in the percentiles for each wage tier would be gradually phased-in thereafter. Of critical importance is the fact that even though the final wage percentiles would be lower than what was suggested under the October interim final rule, the Final Rule's percentiles are still significantly higher than what they were under OES's original construct. Once the Final Rule's multi-year phase-in period is exhausted, the percentiles for each prevailing wage tier would be as follows:

Prevailing Wage Level	**Wage Percentile for Each Level of Worker**
Level I	35th percentile
Level II	53rd percentile
Level III	72nd percentile
Level IV	90th percentile

THE FINAL RULE'S WAGE LEVELS ARE INCONSISTENT WITH THE INA

In the October 8 IFR, DOL reasonably claimed that a well-functioning system for prevailing wages determinations would find that the wages that need to be paid for foreign national workers subject to these requirements "generally should approximate the going wage for workers with similar qualifications and performing the same types of job duties in a given labor

market."[4] Unfortunately, DOL's Final Rule, much like its IFR, set the required prevailing wage levels for companies to hire critical immigrant and nonimmigrant workers at levels that are significantly higher than what would approximate the going wages for workers with similar qualifications performing the same duties.

With regard to the nonimmigrant workers impacted by the final rule, the Immigration and Nationality Act (INA) requires the employer to pay these types of worker 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."[5] By significantly and artificially inflating the wages of these types of workers in a manner that is does not reflect the economic realities of the U.S. labor market, DOL's final rule fails to accomplish what the law requires , which is to have a prevailing wage methodology that accurately reflects the wage levels in the marketplace.

Specifically, DOL explained in its final rule that in studying this issue prior to the IFR's October issuance, it decided to set the prevailing wage level for entry level workers based on an internal review of the INA's qualification requirements for H–1B and EB–2 workers, as well as its analysis of the demographic characteristics of workers in the H–1B program.[6] This led DOL to conclude that, for the purposes of identifying an entry-level wage under the OES system, it should look to the wages paid to U.S. workers who possess a master's degree and limited work experience as its entry-level baseline for OES Wage Level 1.

DOL's approach completely ignores that Congress crafted many employment-based visa classifications with the idea of allowing bachelor's degree recipients to obtain these visas, including the EB-3, H-1B, and E-3 classifications contemplated in the final rule. The language in the INA governing the EB-3 classification is clear these types of immigrant workers do not possess master's degrees.[7] Similarly, the term "specialty occupation" under the H-1B and E-3 nonimmigrant visa classifications is defined as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge and…attainment of a ***bachelor's or higher degree***…as a minimum for entry into the occupation in the U.S." (emphasis added).[8]

It stands to reason that Congress intended for the prevailing wage system governing these visa classifications would fairly approximate the wages for many immigrant and nonimmigrant workers that do not possess a master's degree. Unfortunately, DOL's approach in its final rule

[4] 85 Fed. Reg. 63872, 63886 (October 8, 2020).
[5] See INA § 212(n)(1)(A)(i). 8 USC § 1182(n)(1)(A)(i), which sets forth these requirements for H-1B workers, and INA §212(t)(first)(1)(A)(i), 8 USC § 1182(t)(first)(1)(A)(i), which states these requirements for H-1B1 and E-3 nonimmigrant workers.
[6] 86 Fed. Reg. 3608, 3614 (Jan. 14, 2021).
[7] See INA § 203(b)(3)(A)(ii), which states, in relevant part, that qualified immigrants in this subcategory of employment-based third preference category hold baccalaureate degrees and are members of the professions.
[8] See INA § 214(i)(1), 8 U.S.C. § 1184(i)(1), and 8 C.F.R § 214.2(h)(4)(ii).

divorces the prevailing wage levels from the economic realities in the labor market by artificially raising prevailing wage levels in a manner that will force employers of bachelor's degree holders to standards for master's degree recipients. This presents a significant risk to many employers, as these misguided wage standards will likely operate in a manner that would functionally rewrite the INA in a manner that Congress never considered. This will severely hamper the ability of employers to hire and continue employing foreign nationals with bachelor's degrees, particularly those companies that hire a significant number of international students with degrees from U.S. universities. This approach is inconsistent with the INA's statutory requirements and should be abandoned by DOL.

FURTHER NOTICE AND COMMENT IS NEEDED, AS KEY TERMS IN DOL'S FINAL RULE ARE MATERIALLY DIFFERENT FROM THE TERMS IN THE IFR

In its final rule, DOL acknowledged that several district courts ordered its October IFR to be set aside on procedural grounds. Nevertheless, DOL cited the U.S. Supreme Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* to rationalize how the Department rectified the procedural flaws it committed in promulgating the IFR such that its final rule meets all of APA requirements.[9] We respectfully disagree with DOL's reading of *Little Sisters* in this context to justify its actions in issuing this final rule.

The circumstances surrounding the issuance of DOL's final rule are materially different than those in the *Little Sisters* case, as in the latter instance, there was little in the way of significant, material differences between the IFRs that were issued in the *Little Sisters* cases and the eventual final rules that were promulgated. DOL's action differs substantially from *Little Sisters* in that DOL's final prevailing wage rule is so different from the IFR such that it is basically a new rule being promulgated with no meaningful opportunity for the public to comment on the novel provisions contained within it.

The new provisions contained in the final rule include the marginal decreases made to the percentiles associated with each prevailing wage level. In addition, DOL's final rule introduced novel provisions to provide a multi-year transition period for DOL to implement all the wage changes contained within the rule, with the idea being that these provisions will make it easier for stakeholders to adapt to the rising prevailing wage levels and avoid potential disruptions.[10] While one can reasonably surmise that a marginal decrease in the percentiles would be a natural outgrowth from the percentiles set forth in the October IFR, the announcement of the transition provisions for the first time in the final rule requires further consideration that calls into question the Department's motive for instituting these changes.

First, DOL's initial announcement of these transition periods in the final rule effectively precluded the public from providing meaningful input on the perceived efficacy of the transition

[9] *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385-86 (2020).
[10] 86 Fed. Reg. 3608, 3615 (Jan. 14, 2021).

provisions. More importantly, the inclusion of the transition provisions in the final rule runs completely counter to DOL's assertions in its IFR that the rule had to be implemented right away without any prior notice because a) the exigent circumstances posed by the COVID-induced rise in unemployment,[11] and b) employers could not be provided with an opportunity to evade the increased prevailing wage requirements, [12] as doing so wouldn't adequately protect struggling American workers. DOL's lack of consistency calls into question whether the Department has a rational basis for making these changes at all, given that DOL offered diametrically opposed rationales between the IFR and the final rule to justify its desired policy changes.

While *Little Sisters* provides federal agencies with flexibility when the major requirements of the APA have effectively been met in the rulemaking process, it does not allow an agency to evade APA requirements raised in litigation involving an IFR simply by promulgating new, materially different provisions in a final rule. The material changes incorporated in the final rule were such that this case is distinguishable from *Little Sisters* and a further period of notice-and-comment is warranted in this situation.

A FURTHER DELAY IN THE RULE'S EFFECTIVE DATE IS NEEDED TO AVOID OPERATIONAL AND LOGISTICAL PROBLEMS FOR STAKEHOLDERS

It is critical that DOL not allow this rule to go into effect on May 14 and incorporate the new OES wage data into its system beginning in July. Not only would DOL have to implement the final rule's policy and procedural changes, but it would also need to effectuate these new requirements in a manner that provide stakeholders with the ability to understand what is expected of them and the know-how to properly meet the new evidentiary burdens so they can meet their critical workforce needs moving forward. Under DOL's proposed effective date delay, the Department will only be providing itself with six-weeks' time to make the necessary changes to implement this new prevailing wage construct. Many businesses have significant concerns that such a truncated time period is woefully insufficient to make these necessary changes in a manner that ensures that the final rule's implementation will not cause significant disruptions for companies.

The operational issues that DOL will have to confront if it does not choose to delay the final rule's effective date beyond its current two month extension include the needed changes to Form ETA-9141, Application for Prevailing Wage Determination, to include additional information to allow OFLC analysts to make prevailing wage determinations consistent with the changes contained in the final rule. This is incredibly important, as the final rule contains multiple transition periods, particularly for nonimmigrant visa holders who, as October 8, 2020, were the beneficiary of an approved I-140 immigrant petition and, therefore, subject to different transition rules. This information must be reflected in the form to avoid confusion for DOL, employers, and for the workers. Similarly, Form ETA-9035, Labor Condition Application for H-

[11] 85 Fed. Reg 63872, 63898 (October 8, 2020).
[12] Id, at 63898.

1B, H-1B1, and E-3 Nonimmigrant Workers, will also need to be updated to solicit further information from the employer about the worker to ensure that the individual is accorded the proper protections owed to him/her under the transition periods created in the final rule.

To ensure compliance with these new requirements, DOL would have to forward a new Form ETA-9141 and a new Form ETA-9035 to OMB for approval to collect this new information from stakeholders. The Paperwork Reduction Act sets forth the process by which public comments must be solicited by the agency, which generally includes a 60-day requirement to seek comment on the proposed information collection and is then typically followed by another 30-day comment period when DOL seeks final OMB approval of the new information collection. In addition, DOL would also need to make changes to the Foreign Labor Application Gateway (FLAG) system to account for the changes made in these information collections, as well as to ensure that the electronic processing of these forms could continue without technical problems caused by the reprogramming of the system.

Given that DOL would need to implement all these changes before the new final rule could take effect, it would be incredibly difficult to accomplish all of this in the next 4 ½ months. The Chamber strongly urges DOL to abandon its effort to finalize all of these processes and continue moving forward with its May 14 effective date. Implementation this new prevailing wage system and updating all of the necessary data by July 1, 2021, as is called for in the final rule, will cause significant disruption to the legal immigration system.

Relatedly, the final rule's regulatory provisions do not provide any meaningful guidance as to how the agency should apply its new prevailing wage methodology to requests filed before the final rule's publication was announced. Moreover, the new regulatory provisions do not provide any guidance for PWD requests or LCAs that were filed at one point in the transition period but due to processing delays, the request is adjudicated at a different point in the transition period where the prevailing wage requirements have increased.[13] While these are two separate concerns, they are similar in that these two situations create significant uncertainty for interested stakeholders that could cause serious business disruptions if companies are being held to a legal standard that they not intend to be judged by. In short, DOL should make it clear to stakeholders that the rules that existed at the time of the form's filing shall be the rules under which that form will be adjudicated. If DOL were to utilize the transition period in a manner where it would adjudicate petitions under rules that didn't exist at the time of the form's filing, such a result would be patently unfair to both the employer and employee alike.

Given these concerns, the Chamber would prefer DOL to begin the process of rescinding the final rule with the idea of replacing it with a rationale, evidence-based approach to reforming the OES prevailing wage system. Alternatively, DOL could further postpone the implementation of the rule until July 1, 2022, to allow DOL enough time to properly implement the new system

[13] See new 20 C.F.R. §656.40, 86 Fed. Reg. 3608, 3672-73 (Jan. 14, 2021).

and inform interested stakeholders on how to utilize the new system in a manner that minimizes potential business disruptions.

ECONOMIC DATA AND STUDIES SUGGEST DOL'S APPROACH IN THE FINAL RULE IS MISGUIDED AND WILL HARM U.S. BUSINESSES AND THE ECONOMY

The Chamber has received consistent member feedback from various companies across a host of industries reflecting their concerns over DOL's final rule. The prevailing wage increases, even though marginally smaller than what was suggested in the IFR and phased in over time, remained woefully disconnected from the economic realities in the U.S. labor market. Companies are very anxious about this rule's impact on hindering their ability to meet the current and future workforce of their business, which will cause various types of operational disruptions. These concerns are voiced by manufacturers, health care providers, technology companies, among many others.

Various economic studies support the anecdotal evidence provided by our members. A National Foundation for American Policy study released last month found that unemployment in computer occupations fell from 3% in January 2020 to 2.3% in November 2020, corroborating the consistent information from our members that they continue to struggle to meet their IT workforce needs.[14] Other NFAP studies estimate that the DOL final rule will require employers to pay, on average, 34% higher salaries at the Level 1 wage for biochemists and biophysicists, 29% higher for software developers and database administrators, and 28% more for computer programmers.[15] Similarly, NFAP examined private wage survey data to see the effect DOL's final rule would on specific occupations in a given are. Under DOL's new approach, NFAP found that an employer in the San Jose, California area would have to pay an electrical engineer at the OES Level 4 wage tier more than $41,000 above the market wage.[16] At the Level 1 wage tier, a San Jose employer would have to pay an electrical engineer more than $36,000 above the market wage.[17]

Companies across many industries devised their long-term workforce plans based upon their reliance on DOL's prior prevailing wage system. Many valued employees of our members face an uncertain future because their businesses cannot maintain their current workers under the new wage requirements. Several businesses have indicated their companies would likely move a portion of their operations offshore to better ensure the continuity of their operations, which

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[14] National Foundation for American Policy, *Updated Analysis: Employment Data for Computer Occupations for January to November 2020*, January 2021, available online at https://nfap.com/wp-content/uploads/2021/01/Updated-Employment-Data-for-Computer-Occupations-January-to-November-2020.NFAP-Policy-Brief.January-2021-1.pdf (accessed Feb. 15, 2021).
[15] Stuart Anderson, *DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants*, available online at https://www.forbes.com/sites/stuartanderson/2021/01/13/dol-h-1b-visa-wage-rule-donald-trumps-bad-parting-gift-to-immigrants/?sh=466bf002774f; (Jan. 13, 2021) (accessed on Feb. 15, 2021).
[16] Id.
[17] Id.

would harm the U.S economy in several ways. Simply put, if many talented foreign nationals are forced to leave the U.S. because these new wage requirements make it impractical to continue employing them in our country, the economic activity and U.S. jobs that these highly skilled foreign nationals support will be lost. Research by Britta Glennon, an assistant professor at the Wharton School of Business, suggests that these concerns are becoming more commonplace, as "policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad."[18]

CONCLUSION

The Chamber appreciated DOL delaying the effective date of this final rule. However, we remain very concerned about the significant uncertainty and potential disruption this final rule will have on businesses across the country should it go into effect as is this May. We urge DOL to delay the final rule's effective date for a significant period to avoid the disruption that would be caused by the final rule's changes. In doing so, we implore DOL to consider fa formal rescission of its final rule to provide the Department with the opportunity to begin a new rule-making process that better addresses the concerns of U.S. businesses.

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Executive Director, Immigration Policy
U.S. Chamber of Commerce

[18] Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, available online at https://www.dropbox.com/s/tp4okwocw2pajw5/BGlennon_JMP%20Draft.pdf?dl=0 and at https://www.forbes.com/sites/stuartanderson/2021/01/13/dol-h-1b-visa-wage-rule-donald-trumps-bad-parting-gift-to-immigrants/?sh=466bf002774f; (accessed on Feb. 15, 2021).