The Feasibility and Legality of Experience-Benchmarked Prevailing Wages for the US High-Skilled Immigration System

By Amy M. Nice[1]

The US Department of Labor (hereafter DOL or Department) recently published a Notice of Proposed Rule Making (NPRM) on prevailing wages for the nation's high-skilled immigration system,[2] pursuant to a Presidential Proclamation issued last September.[3] The NPRM's primary proposal would maintain the long-deployed, and current, uniform percentiles approach for determining prevailing wages. This means the Department would continue to assign a fixed percentile to each prevailing wage level but would simply raise those fixed percentiles.[4] Interestingly, however, the Department's proposed rule explores, to some significant detail, an alternative it calls "Experience Benchmarking" that it says it is "open to adopting."[5]

This paper is in response to the Department of Labor's request for comments about the feasibility and legality of the Experience Benchmarking proposal:

> Because this [Experience Benchmarking] alternative would base prevailing wage determinations on the alien worker's actual education and experience rather than the employer's description of the minimum job requirements for the position, the Department invites public comment on whether this approach is more consistent with

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[2] 91 Fed. Reg. 15,454 (Mar. 27, 2026).

[3] Proclamation 10973 of September 19, 2025, 90 Fed. Reg. 46,027 (Sept. 24, 2025). In addition to announcing a $100,000 payment due on certain H-1B petitions, the proclamation announces that "[t]he Secretary of Labor shall initiate a rulemaking to revise the prevailing wage levels to levels consistent with the policy goals of this proclamation." *See id.* at sec. 4.

[4] The Department's primary proposal is to continue to identify level 1-4 wages for a particular occupation and area of employment, each at raised, fixed percentiles (the 34, 52, 70, and 88 percentiles) set by DOL within surveyed wages in the OEWS for that occupation and location.

[5] 91 Fed. Reg. at 15,479.

> the statutory requirements for both the H-1B and PERM programs [and] the administrative feasibility and burden on employers and applicants to provide information about the alien worker's qualifications.[6]

One way for an agency to assess the feasibility and legality of a potential policy shift is to obtain independent input from experts who have drafted, worked with, implemented, and considered the law, practice, and procedure underlying the policy. Having built that expertise through decades of engagement with the prevailing wage concept in the US immigration system — specifically within the H-1B and PERM[7] (permanent employment labor certification) programs — I am writing to share my thoughts about whether an experience-benchmarked prevailing wage approach would be feasible and legal. Ultimately, I believe it is feasible, lawful, and more consistent with controlling statutory authorities.

[6] *Id*. at 15,491.

[7] The Department of Labor last revised the Permanent Employment Certification process required for most employment-based immigrants (green card holders) in regulations published December 27, 2004, *see* 69 Fed. Reg. 77,326 (Dec. 27, 2004) (effective Mar. 28, 2005), and as part of that rulemaking renamed its permanent labor certification process "PERM," standing for the Program Electronic Record Management (PERM).

I. Describing the Department's Experience Benchmarking proposal for prevailing wages

For purposes of this analysis, I first restate the core claims of experience-benchmarked prevailing wage determinations and summarize the realities that would follow if adopted.

As described by DOL in the NPRM, the Experience Benchmarking approach sets a prevailing wage for each combination of education and experience in an occupation and geography to directly compare the wages due the foreign worker with those paid to US workers similarly employed. This means there would be a multitude of prevailing wage levels, far more than four, for each and every occupation and location, reflecting adjustments for every combination of education and experience. Experience Benchmarking relies on the foreign worker's actual education and experience (based on age) instead of the employer-identified minimum job requirements. In some ways, although it is a new construct that would require a short-term period of adjustment, this would make prevailing wage compliance much more straightforward for both the regulated community and government regulators, while better ensuring the integrity of the high-skilled immigration system. As DOL explains it, Experience Benchmarking "essentially ends the practice of wage arbitrage," better selects for top ability, and "reduces the ability of employers to under-classify workers using strategic job descriptions."[8]

To do this, the Department would supplement the Occupational Employment and Wage Statistics (OEWS) survey, which does not include information on the education or experience of workers, with data from the American Community Survey (ACS) of the Census Bureau to identify the returns to education and experience[9] and produce "experience-benchmarked" wage estimates. This approach is important to consider because it would be significantly more accurate in identifying any H-1B workers who are underpaid relative to similar US workers, a policy imperative to protect the integrity of the H-1B program. The enhanced accuracy is achieved because, unlike the uniform percentiles approach, the foundation of Experience Benchmarking would be actual data on the education and experience of similarly employed Americans.

The NPRM explains that, if employing Experience Benchmarking, DOL's Office of Foreign Labor Certification (OFLC) would rely on public-use microdata from the ACS to fit Mincer wage equations for each occupation that would then be used in conjunction with OEWS data to thereby generate figures for the median wages in each occupation and geography for many more than four combinations of education and experience. Mincer equations are the foundational and a well-accepted method in empirical labor economics to identify the

[8] 91 Fed. Reg. at 15,491.

[9] *See* 91 Fed. Reg. at 15,489, 15,490.

relationship between earnings, education level attained, and experience.[10] The result for the Labor Condition Application (LCA) would be a prevailing wage due the foreign worker that reflects what the median American actually earns if they possess the same education, experience, and occupation as the sponsored H-1B professional, and are employed in the same geographic location.[11] The result for PERM would be a prevailing wage that reflects what the median American actually earns with the identified minimum requirements for the job concerning education and experience in the same occupation and location as the foreign worker.

To accommodate the new H-1B weighted lottery system,[12] if Experience Benchmarking was adopted then an H-1B employer would still be required to confirm that proffered wages exceed either the Level 1, 2, 3, or 4 OEWS Wage Level as shared by the Department of Labor pursuant to a new 20 C.F.R.656.40(b)(2)(i) and (ii). Although those wage levels would be applicable for purposes of the H-1B lottery, the minimum prevailing wage for the first LCA requirement would need to be the median wage for workers with the same education, experience, occupation, and location. In other words, the required minimum wage offered an H-1B professional would be the median wage paid an American in the same locality and occupation and with the same level of education and experience as the H-1B worker. The OFLC Administrator would provide a searchable system that nevertheless generates four resulting experience-benchmarked OEWS wage levels for purposes of the H-1B weighted lottery, representing increasing skill levels and wage premia: OEWS Level 1 (Typical), OEWS Level 2 (Specialized), OEWS Level 3 (Demanding), OEWS Level 4 (Highly Demanding).[13]

This would mean that, for H-1B professionals, employers would continue to utilize the Foreign Labor Application Gateway (FLAG) system and the Office of Foreign Labor Certification (OFLC) Wage Search function (long called the wage wizard) to confirm the minimum prevailing wage (by selecting the Level 1 OEWS Wage) for the given occupation and area of employment based on the education and experience of the sponsored worker. A formal prevailing wage determination from DOL is not required for H-1B, H-1B1, and E-3 sponsorship, but should an employer seek one by filing the ETA-9141 form, then DOL's

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[10] *Id.*

[11] *Cf.* 91 Fed. Reg. at 15,490 (confirming that the prevailing wage due the H-1B worker under Experience Benchmarking would be labeled as the new OEWS Level 1 Wage that reflects what the average American earns with the same education, experience, occupation, and geographic location).

[12] A new selection process for cap-subject initial H-1B petitions recently went into effect, when there is demand in excess of the 65,000 numerical limit or 20,000 exemption from that limit for individuals with a Master's or higher degree from a US institution of higher education, *see* 8 U.S.C. 1184(g)(1) and (g)(5), that assigns lottery entries based on the wages offered to the prospective H-1B worker, as identified by the employer, relative to the appropriate OEWS Wage Level, by providing one lottery entry for registrations that exceed OEWS Wage Level 1, two entries for registrations that exceed Level 2, and so forth. 90 Fed. Reg. 60,864 (Dec. 29, 2025)(effective Feb. 27, 2026). *See* new 8 C.F.R. 214.2(h)(8)(iii)(A)(*4*)(*i*).

[13] *See* 91 Fed. Reg. at 15,490 for DOL's description of the four experience-benchmarked wage levels for purposes of the H-1B weighted lottery.

National Processing Center would select the Level 1 OEWS Wage for the given occupation and area of employment and the actual education and experience of the worker. FLAG would also list new Levels 2-4 OEWS Wages, available through the OFLC Wage Search. Thus, for purposes of the H-1B weighted lottery of cap-subject, initial H-1B petitions, employers would be able to identify the OEWS Wage Level associated with their proffered wage for each registered H-1B petition.

For PERM applications, where a formal prevailing wage determination directly from DOL is always required, DOL's Experience Benchmarking alternative would establish the prevailing wage as the median wage paid Americans with the same combination of education and experience minimally required to perform the job in the locality in question, with an integrity measure added to compare that wage to the prevailing wage already confirmed by the Department if the PERM beneficiary holds H-1B status. Thus, for PERM, the prevailing wage would be the higher of (1) the OEWS Level 1 corresponding to the minimum education and experience requirements of the position, and (2) if the foreign worker is an H-1B worker, the prevailing wage rate identified on the certified Labor Condition Application listed on the H-1B petition approved for that foreign worker (which would reflect the prevailing wage that the noncitizen worker has been due in her current employment as compared to the median wage off an American worker with the same occupation, job location, education, and experience).

The following analysis assumes new experience-benchmarked prevailing wages would operate in a similar fashion to the above description.

II. Experience Benchmarking is practical for employers

Experience-benchmarked prevailing wages would be practical for the regulated community under practices already in place. Here's why: employers already nearly always know the beneficiary and her credentials when identifying prevailing wages for H-1B and always know them for PERM. This is the case for all types of US employers, in any sector, of any size, and in any area of employment – and whether subject to or exempt from H-1B numerical caps.

For the H-1B nonimmigrant classification, almost all LCAs (Form ETA-9035) currently are filed with a specific H-1B professional in mind[14] based on a "prevailing wage obtained independently from the Occupational Employment and Wage Statistics program."[15] For

[14] DOL recognizes that the INA does not mandate that each LCA describe only one H-1B worker, *see* 20 C.F.R. 655.730(c)(5), on Multiple Positions And/Or Places of Employment. Nothing in Experience Benchmarking bars employers from using multiple-slot LCAs for future hiring or securing an LCA for a worker not yet identified - it would remain permissible, and employers could use knowledge of typical credentials to file LCAs in advance of identifying a specific worker if that is desirable.

[15] Most H-1B employers select Question 13 in Section F. Employment and Wage Information on the Form ETA-9035, that allows them to independently confirm the prevailing wage. The LCA form currently still refers

PERM, employers have long been required to have an identified beneficiary when filing the required Form ETA-9141 Application for Prevailing Wage Determination required as a predicate for the PERM submission.

Experience Benchmarking would only be burdensome for employers who do not know the particular beneficiary at the LCA stage of the H-1B process. Currently, this is both uncommon and manageable in the H-1B program. This is in sharp contrast to the H-2B process for non-agricultural workers, in which employers are not required to and typically do not know who the specific workers will be at the time of confirming a prevailing wage.[16]

It is, therefore, abundantly feasible to require that employers know and provide beneficiary information during both the H-1B and PERM prevailing wage processes, as further detailed below.

A. Experience Benchmarking is not procedurally or operationally challenging for initial H-1B petitions

The practice and process for initial H-1B petitions, whether cap-subject or cap-exempt, would accommodate Experience Benchmarking's beneficiary-credential comparison requirement.

For initial cap-exempt H-1Bs, universities and their affiliates, nonprofit research organizations, and government research entities can pursue H-1B status at any time of the year and thus as a matter of practice would have no difficulty in preparing an LCA immediately preceding their petition once they have identified the beneficiary.

For initial cap-subject H-1B petitions, employers are already required by the government to identify a specific beneficiary (by name, birthdate, country of nationality, and passport number) in order to register a petition for possible selection that would allow petition filing. Cap-subject employers have, since the March 2020 registration for fiscal year (FY) 2021, been encouraged not to engage in petition preparation, including the LCA, until a registered petition is selected. Thus, it is expected that cap-subject employers know the individual beneficiary at the time of the LCA, which now occurs in the normal course after registration.[17] By binding regulation, DHS affords employers a 90-day period following H-1B

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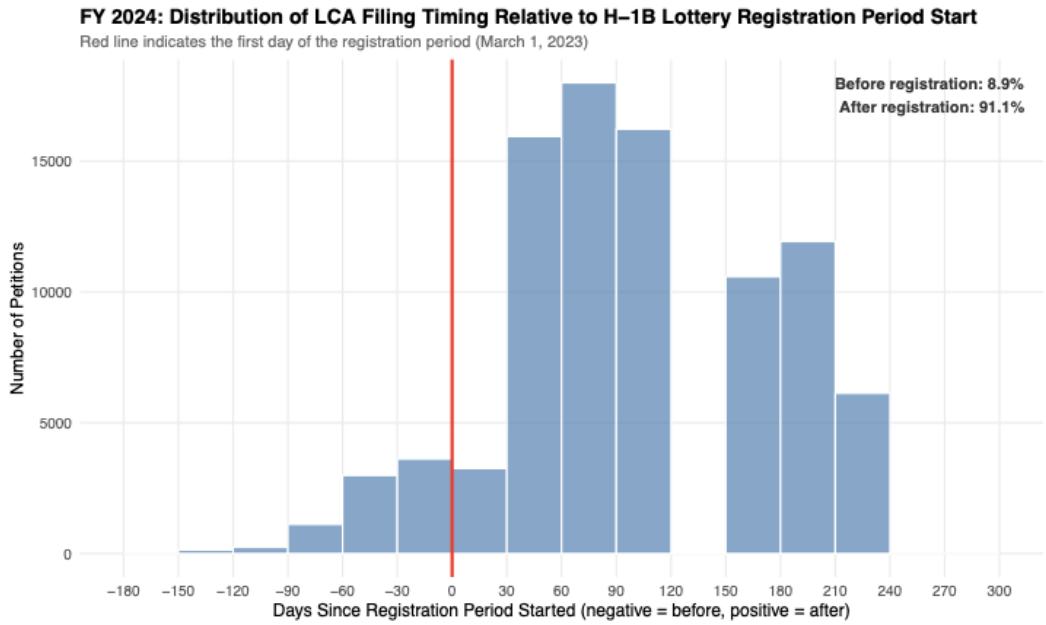
to the Occupational Employment Statistics (OES) program because the form has not been updated since the program was changed to OEWS in 2021.

[16] The H-2B program requires an ETA-9141 Application for Prevailing Wage Determination from DOL for all H-2B workers to establish prevailing wages before the employer files the ETA-9142B Application for Temporary Employment Certification. There is no option to independently obtain prevailing wages from OEWS as with H-1B filings.

[17] When DHS first proposed an H-1B registration process at the end of 2018, the agency confirmed it does not expect LCA filings before registration selection and explained that "[t]he electronic registration process would start before April 1, in advance of the period during which H-1B petitions can be filed for a new fiscal year. A registrant therefore could wait until they have been notified of selection before submitting the LCA to

registration lottery selection to file an H-1B petition, more than enough time to secure a certified LCA from DOL and assemble supporting documentation to make the filing.

In FY2024, over 91.1% of cap-subject initial H-1B petitions were accompanied by LCAs filed after the registration period started.[18] In other words, the government correctly anticipated that LCAs would primarily be filed after the employer had already provided specific identifying information about the beneficiary in the H-1B registration.



Source: I-129 data on initial H-1B cap-subject petitions and accompanying LCA data[19]

DOL for approval and preparing the corresponding H-1B petition on behalf of the beneficiary named in the selected registration." 83 Fed. Reg. 62,406, 62,413 (Dec. 3, 2018). Moreover, in detailing the new registration system for H-1B nonimmigrants, the agency established that the "LCA is not required for registration" and identified the expected benefit for petitioners as a huge cost savings because "petitioners whose registrations are not selected would … no longer hav[e] to complete and file H-1B cap-subject petitions," including that they would no longer need to "complete and file Form I-129 along with a certified DOL Labor Condition Application (LCA)" for all potential H-1B beneficiaries, and instead would do so only for selected registrants. *Id.* at 62,410, 62413; *see also id.* at 62,419 (DHS further suggests DOL may experience cost savings because there would be fewer LCAs filed, since they would only be filed for selected registrants).

[18] USCIS Freedom of Information Act (FOIA) data from Bloomberg for registrations and cap-subject petitions filed for FY24, *available at* GitHub - BloombergGraphics/2024-h1b-immigration-data: US H-1B Visa Lottery and Petition Data FY 2021 (last visited May 9, 2026), and DOL Employment and Training Administration, Performance Data, Historical Case Disclosure Data for LCA Programs, *available at* Performance Data | U.S. Department of Labor (last visited May 9, 2026).

[19] *Id.*

Even LCAs filed before registration typically represent a specific individual on whose behalf a petition will be registered and who has a bona fide job offer in place with their credentials known to the employer at the time the prevailing wage is identified and LCA filed.

Accordingly, adopting an Experience Benchmarking requirement leading employers to provide beneficiary information in the LCA would not be burdensome at all for the vast majority of cap-subject employers, because they are already collecting that information in anticipation of the registration. Among the remaining 8.9% of petitions with pre-registration LCAs, employers can easily adapt by adopting the registration-related filing practices that are already the norm. Moreover, these 8.9% of early LCA filings are highly concentrated among relatively few employers. The top 10 employers account for 70% of all early filings and includes large tech companies (like Amazon, Google, Apple, and Intel) and large consulting firms (like EY and McKinsey).[20] This indicates that early LCA filing is not only rare but concentrated among sophisticated and large employers who are best positioned to adapt. Moreover, given the volume of cap-subject filings by employers filing early LCAs, it is most likely they are filing before registration as a matter of operational readiness given their anticipated filing volume.

Furthermore, even the rare early LCA filings usually represent a known beneficiary. In those situations where an employer may anticipate a time sensitivity or any other case-specific or employer-preference reason to pursue an LCA before knowing if a registered beneficiary is selected in the lottery, they still know the credentials of each H-1B beneficiary whose petition is or will be registered and thus could readily choose to pursue an LCA "early" under the experience-benchmarked prevailing wage approach.

B. Experience Benchmarking is not unduly burdensome for H-1B extensions or changes of employer

The process for filing either extensions or changes of employer would also accommodate Experience Benchmarking with little burden.

When an H-1B extension is filed without a change of employer, the individual H-1B beneficiary is always known by the employer because, by definition, they are already employed as an H-1B nonimmigrant. In most situations, employers or their lawyers diligently track when extensions need to be filed, and they could readily begin the extension process a little earlier to accommodate the filing of an individual LCA under an Experience Benchmarking paradigm if the organization has previously been using multiple-slot LCAs (i.e., LCAs filed for multiple workers) in seeking H-1B extensions.

Should either cap-subject or cap-exempt employers prefer multiple-slot LCAs for extensions, because they typically file initial H-1B and extension petitions in certain

[20] *Id*.

occupations with common education and experience credential requirements, they could assemble records in short order detailing the particular combinations of SOC codes, education, and experience of their H-1B staff. In fact, employers that employ numerous H-1B workers might already be capable of confirming the relevant characteristics of their incumbent high-skilled workforce, both US workers and foreign workers. Once an employer that prefers multiple-slot LCAs has reliable records on combinations of education and experience by occupation internal to their workforce, they will be positioned to anticipate those details in any LCA filings that will be needed for extensions.

USCIS data show that for continuation in employment petitions in recent years, about 23% annually are for H-1B workers changing employers.[21] In the case of change of employer petitions, employers often need to file the petition promptly as part of the recruitment process and as an employee-relations issue due to pressure to make the so-called "H-1B portability" filing quickly.[22] The predicate work to prepare an LCA delays the ability to promptly file the new H-1B petition, even though the Department typically certifies LCAs within a week[23] during which time the required 10-day notice period can commence[24] for posting the LCA consistent with DOL regulations. *See* 20 C.F.R. 655.734(a)(1)(ii)(A)(3). To save time, employers would be able to prepare multiple-slot LCAs for common combinations of education and experience in the common SOC codes for which they typically hire laterally through H-1B filings (e.g., Masters plus 1 year of experience, Masters plus 2, PhD plus 0, and so on). In sum, whether a cap-subject or cap-exempt employer has an interest in filing either single-slot or multiple-slot LCAs in anticipation of such H-1B portability filings, there may be additional cost in time, either internally or with outside counsel, to develop a systematic approach to address the new experience-benchmarked approach, but this would be a short-term and achievable undertaking.

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[21] *See* USCIS Reports and Studies, H-1B Program Reports, *available at* https://www.uscis.gov/tools/reports-and-studies (last visited May 9, 2026) (USCIS data reported to Congress annually in the H-1B Characteristics Report show that a share of "continuing employment" petitions from FY20-24 were for those changing employers, in annual ratios of 28.9% (FY20), 22.4% (FY21), 28% (FY22), 20% (FY23), and 16% (FY24) for a 23% average).

[22] H-1B portability refers to the ability of certain H-1B workers to lawfully begin working for a petitioning employer when the employer files an H-1B petition on that worker's behalf, rather than await petition approval. *See* 8 U.S.C. 1184(n); 8 C.F.R. 214.2(h)(2)(i)(H).

[23] DOL confirms the expected 7 working day processing time for LCA review in its LCA program description, *available at* https://flag.dol.gov/programs/LCA (last visited May 9, 2026).

[24] At Section G(4) of the Form ETA-9035, the employer attests when filing the LCA that "This notice was or will be posted for a total period of 10 days." *See also* DOL OFLC FAQ (August 2023), *available at* https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC_H-1B-H-1B1-E-3_FAQs_Round-4_08.24.23.pdf (last visited May 9, 2026); DOL Wage and Hour Division FAQ #62M (August 2009), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs62M.pdf (last visited May 9, 2026).

C. Experience Benchmarking is manageable for LCAs for amended H-1B petitions

Employers filing amended petitions can adapt to Experience Benchmarking.

Outsourcing employers and staffing firms frequently file amended H-1B petitions in order to comply with DHS regulations implementing the USCIS Administrative Appeals Office's precedent decision in Matter of Simeio Solutions.[25] Because such amendments need to be filed any time a worker changes job sites outside the geographical coverage of the earlier-certified LCA(s) that had been filed with the currently valid H-1B petition, it may be that outsourcing and staffing firms regularly rely on multiple-slot LCAs. If so, it may be that an experience-benchmarked prevailing wage system would prove somewhat more burdensome for outsourcers and staffing firms than other organizations whose employees work locations are static because they are required to obtain and post (give notice) of a new LCA and file an amended H-1B petition ***before*** an H-1B worker changes job sites outside of the area of employment covered by the earlier-filed LCA. Given the historical volume of H-1B workers for large outsourcers, especially H-1B dependent firms, adopting the Experience Benchmarking approach may require that such employers develop new systems to track the education and experience of their staff. But the need to routinely file new LCAs to cover new service contract locations for potential amended H-1B petition filings would be nothing new to these employers. So while outsourcing employers and staffing firms might have to dedicate more time to accommodate the Experience Benchmarking approach, the differences would be manageable, and they could readily adapt their practices to create new efficiencies in response.

D. Information collection is workable for Experience-Benchmarked prevailing wages in both the H-1B and PERM programs

As noted, providing the level of detail necessary to ensure prevailing wages reflect a data-based comparison to experience and education of comparable Americans won't be unduly burdensome given the information collection already mandated, including as recently revised.

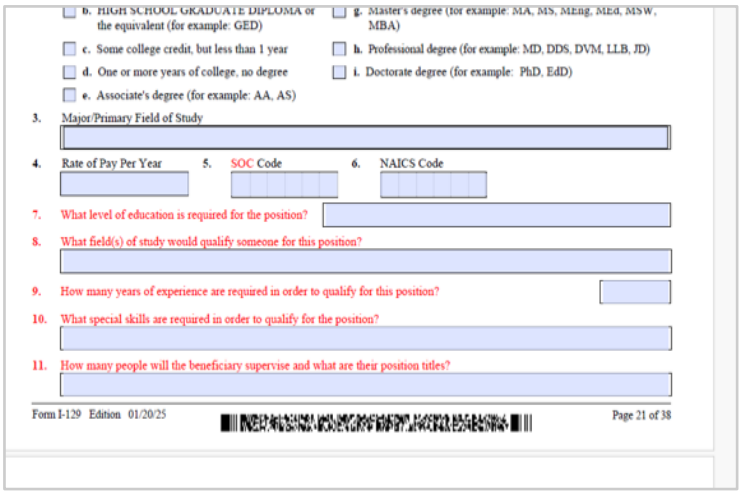
When proposing the new H-1B weighted lottery on September 24, 2025, USCIS announced it intended to revise the Form I-129 form to collect information about the minimum requirements for the job.[26] On February 27, 2026, when the new weighted lottery regulation went into effect, USCIS announced the revised I-129 would indeed proceed – with new

[25] *See* 8 C.F.R. 214.2(h)(9)(ii)(D); *Matter of Simeio Solutions*, 26 I&N Dec. 542 (AAO 2015).

[26] *See* Supporting and Related Material for DHS Docket No. USCIS-2025-0040, Weighted Selection Process for Registrants and Petitioners Seeking To File Cap-Subject H-1B Petitions (NPRM), *available at* https://www.regulations.gov/document/USCIS-2025-0040-0005 (last visited May 9, 2026).

questions on the Data Collection Supplement form, in Section 1:

7. What level of education is required for the position?
8. What field(s) of study would qualify someone for this position?
9. How many years of experience are required in order to qualify for this position?
10. What special skills are required in order to qualify for the position?
11. How many people will the beneficiary supervise and what are their position titles?



Data Collection Supplement form, Section 1[27]

DOL would need to revise its ETA-9035 (LCA form) and ETA-9141 (PWD form) in similar fashion to the DHS changes to collect the information needed to implement Experience Benchmarking, but this would serve to harmonize the information collections between DHS and DOL. For the LCA form, a new information collection for the ETA-9035 would need to identify the specific educational and experience credentials of the nonimmigrant(s) to be hired under the LCA. Moreover, although most LCAs are filed based on a prevailing wage obtained by the employer, or their lawyer, through a direct query in the FLAG system's OFLC Wage Search for OEWS figures, the ETA-9141 Application for Prevailing Wage Determination would nevertheless have to be similarly revised for use by employers that wish to obtain a formal prevailing wage determination from DOL for H-1B purposes or must do so for PERM purposes. A new information collection for the ETA-9141 would include questions relating to the sponsored worker's education and experience. The ETA-9141 would also have to collect information for purposes of the PERM prevailing wages through questions that ask whether the sponsored worker is currently an H-1B nonimmigrant, and if so, the LCA Case Number and prevailing wage rate that is listed on the certified LCA for their current H-1B status.

The information collection for purposes of the new framework would be a consequential shift in perspective for the regulated community, because of the entrenched expectations and standardized practices anchored in four levels of prevailing wages in accordance with DOL guidance that has been on the books since 2009. The new information collection, therefore, would require DOL to seek meaningful input from stakeholders and engage in or provide public-facing training or FAQ materials.

[27] USCIS Form I-129 (ed. Feb. 27, 2026) (effective Apr. 1, 2026), *available at* https://www.uscis.gov/i-129 (last visited May 9, 2026).

E. Experience-Benchmarked prevailing wages are workable for H-1B petitions in ACWIA industries as long as comparisons are not to all industries

Under the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Congress established that prevailing wages for higher education institutions, their affiliated or related nonprofit entities, and nonprofit research and government research organizations "shall only take into account employees at such institutions in the area of employment."[28] Accordingly, for Experience Benchmarking to work, the calculations for every education-experience combination, in every occupation, in every geographic area covered by the OEWS, would have to be computed with separate Mincer equations[29] for the ACWIA industries. This is because, for example, the wage of a faculty member hired as an Assistant Professor in Chemistry, which requires a PhD in Chemistry and limited prior experience, cannot, under the operative statute, be compared to a PhD Chemist with limited experience working at a major pharmaceutical firm, despite having the same education and experience combination. Indeed, DOL already committed in the NPRM to "separately" making the required multiple prevailing wage level calculations for ACWIA industries, should it adopt the Experience Benchmarking alternative.[30]

While Department policy has long applied "all industry" standards (instead of ACWIA industry) for identifying the minimum education requirements for occupations in its Occupational Information Network (O*NET describes minimum education requirements for each of five Job Zones), the minimum education for ACWIA industries in Job Zone 5 would be separately addressed as part of an Experience Benchmarking approach (most ACWIA hiring of high-skilled immigrants occurs in Job Zone 5). In the H-1B program, experience-benchmarked prevailing wages would thus eliminate the need for outdated prevailing wage policy guidance[31] that sets educational minimums for professional jobs for purposes of prevailing wages, because, instead, the actual credentials of the foreign national being sponsored for H-1B status and the comparable Americans similarly employed would instead

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[28] Pub.L. No. 105-277, sec. 415 (Oct. 21, 1998) (enacted in Title IV of Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999) (adding section 212(p)(1) of the INA).

[29] Mincer equations, developed by famed economist Prof. Jacob Mincer, are the method employed throughout the statistical agencies, including at DOL's Bureau of Labor Statistics, to identify the relationship between earnings, education level attained, and experience. *See supra* p.3.

[30] 91 Fed. Reg. at 15490.

[31] The 2009 prevailing wage determination policy guidance including Appendix D. Professional Occupations Education Categories would no longer be relevant to H-1B prevailing wage determinations under experience benchmarking. DOL Employment and Training Administration, Prevailing Wage Determination Policy Guidance (revised Nov. 2009), *available at* https://www.dol.gov/sites/dolgov/files/eta/oflc/pdfs/npwhc_guidance_revised_11_2009.pdf (last visited May 8, 2026).

control the prevailing wage determination. Further, in both the H-1B and PERM programs, the ACWIA-specific Mincers would provide separate adjustments applicable only to and specifically for professionals at higher education institutions and affiliates, nonprofit research organizations, and government research organizations, as required by the governing statute.

For all these reasons—that employers already nearly always know the beneficiary and her credentials, that the burden of adapting is small for the remaining employers who do not already know the individual beneficiary, that the necessary information collection is manageable, and that the methodology can be applied separately for ACWIA industries—the best conclusion is that experience-benchmarked prevailing wages will be feasible from the standpoint of employers and their lawyers.

III. Experience Benchmarking is more consistent with the governing statute than DOL's uniform percentiles primary proposal

Experience Benchmarking for prevailing wages[32] is not only consistent with INA[33] but more consistent than a uniform percentiles approach at achieving the statute's overarching purpose to ensure that employment of foreign workers "will not adversely affect wages and conditions for similar US workers."[34]

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[32] The term "prevailing wages" was first included in the INA as an element of LCA requirements for H-1B nonimmigrants with the enactment of the Immigration Act of 1990 (IMMACT90). *See* Pub.L. No. 101-649, sec. 2015 (Nov. 29, 1990) (enacting INA sec. 212(n) into law).

[33] The sections of the INA discussed in our assessment of the legality of Experience Benchmarking are as follows:
*INA sec. 212(a)(5), 8 U.S.C. 1182(a)(5) – Labor certification and qualifications for certain immigrants (this is the section of the statute governing the PERM process for most employment-based immigrants);
*INA sec. 212(n), 8 U.S.C. 1182(n) – Labor condition application (this is the section of the statute governing the LCA for H-1B status);
*INA sec. 212(p), 8 U.S.C. 1182(p) – Computation of prevailing wage level (this is the section of the statute governing prevailing wages for noncitizens seeking immigrant (green card) status through PERM or nonimmigrant H-1B, H-1B1, or E-3 status);
*INA sec. 212(t), 8 U.S.C. 1182(t) – Labor attestations for nonimmigrants entering under agreement (this is the section of the statute governing H-1B1 (for some citizens of Singapore and Chile) and E-3 (for some citizens of Australia)).

[34] Kandel, William A., *Permanent Employment-Based Immigration* (Congressional Research Service Report No. IF12555, Dec. 20, 2023), *available at* https://www.congress.gov/crs_external_products/IF/HTML/IF12555.web.html (last visited May 9, 2026). *See also* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models, 59 Fed. Reg. 65,646, 65,651 (Dec. 20, 1994) (DOL final rule implementing the LCA requirement, (recognizing "a general Congressional principle in enacting immigration laws-to provide for the admission of foreign workers under terms and conditions of employment that do not adversely affect the wages and working conditions of similarly employed U.S. workers").

A. Commensurate with education and experience

To begin with, section 212(p)(4) of the INA mandates prevailing wages provided by the government "shall" be "commensurate" with "experience, education, and level of supervision." Historically, DOL has only been able to comply with this requirement, added by Congress in 2004,[35] by employing inferences. The OEWS itself does not ask employers direct questions about salaries paid to employees based on those workers' education and experience and assigned job duties.

Therefore, if not employing Experience Benchmarking, the Department must rely on guesswork in at least two fundamental ways in order to suggest that prevailing wages reflect education, experience and supervision.

First, DOL must presume, incorrectly, that skill levels are evenly and similarly distributed across every occupation. This is not the case - for example, the skill distribution for medical scientists (more senior-heavy) is quite different than for computer programmers (more junior-heavy). In turn, deploying the uniform percentiles approach ignores, among other realities, that some occupations that are key to making progress in critical and emerging fields are skewed to involve extensive hiring at very high compensation levels for advanced degree professionals with deep expertise about complex matters relatively early in their career. In the H-1B program, this cohort represents some of the most highly compensated and most highly educated H-1B workers, typically at Level 4, yet the proposed uniform percentiles approach, in ignoring the education and experience distribution of professionals actually employed in the field, would effectively, as a real-world matter, render individuals in critical occupations ineligible for H-1B classification, because they are not late-career workers and would not satisfy the new Level 4 requirement which assumes a much smaller share of the occupation (12%) is employed in Level 4 jobs than is true in reality.

Further, without Experience Benchmarking, DOL must presume that an employer's self-assessment of the job requirements is sufficient, following DOL's Prevailing Wage Determination Policy Guidance adopted in 2009.[36] The guesswork underpinning the 2009 guidance holds that the Department accurately and reliably determined the "usual" requirements of every job, an accurate and reliable method of inferring the appropriate wage level from a comparison of minimum requirements to usual requirements, and that that guesswork has not needed modification in over 15 years.

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[35] The provisions related to requiring prevailing wage determinations to reflect education, experience, and level of supervision in section 212(p)(4) of the INA were added by section 423 of the L-1 Visa and H-1B Visa Reform Act, Pub. L. No. 108-447 (Dec. 8, 2004) (enacted in title IV of the Consolidated Appropriations Act of 2005).

[36] *Supra* note 31.

In failing to overtly incorporate consideration of education, experience, or supervision in an evidence-based way, any assertion that DOL's existing or proposed frameworks produce wage determinations that are "commensurate" with education, experience and supervision is a stretch. But such evidence would undergird experience-benchmarked prevailing wages, making them more accurate and better-positioned to protect US wages as intended by the statutory directive.

Section 212(p)(4) of the INA establishes DOL's obligation to "provide at least 4 levels of wages" in identifying prevailing wage levels for both H-1B petitions and PERM applications. Under Experience Benchmarking, the prevailing wage is the median wage paid to Americans with the same experience and education, in the same occupation and area as the foreign worker. Even though DOL explains in the NPRM that the binding prevailing wage with Experience Benchmarking will be identified as the new OEWS Level 1 output, each occupation and area will, as a factual matter, have substantially more than four levels of wages by reference to that prevailing wage determination, because there will be a unique level for every combination of education and experience. The Experience Benchmarking approach thus satisfies, and indeed exceeds, the statutory minimum of four wage levels.

Importantly, Section 212(p)(4) also provides a method for DOL to deliver four levels by first identifying the lowest and highest levels, after which the Department "may" derive intermediate levels 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." This provision only applies to existing government surveys and, in any event, is permissive, not mandatory; the statute states DOL "may" use this formula but not that it "shall" or "must". There is no statutory requirement that the Department continue to rely on this particular arithmetic formula when underlying data support a more granular and evidence-based approach to constructing wage levels.

B. Worker traits rather than job descriptions

Section 212(n)(1)(A) of the INA, enacted in 1990, established that prevailing wages for H-1B nonimmigrants were "for the occupational classification," as does Section 212(p)(1), enacted in 1998, with respect to prevailing wages for both PERM applications and H-1B workers. But "occupational classification" simply refers to the occupational code (i.e., the SOC). The anodyne requirement that the prevailing wage level relate to "the occupational classification" does not get us very far; it might be interpreted to mean wages of minimally qualified workers in a given occupation, as it has been, but it just as readily could be interpreted to mean wages applicable to the particular worker who would fill a position in that occupational classification. Either would be reasonable, but certainly it is at least as reasonable, and, I would contend, more reasonable, to compare the prospective wages that are being offered to a foreign worker to fill a position in a particular occupational classification with the wages that would be paid to someone like him or her, rather than to someone who is far less or far more qualified. In any event, Congress has resolved that question.

Critically, Congress amended section 212(p) of the INA in 2004 by adding a new paragraph that further clarifies the meaning of prevailing wages applicable to occupational classification for both H-1B and PERM purposes.[37] *See* INA sec. 212(p)(4). In this later-enacted statute, Congress established specific terms to govern the more general ones it previously legislated in enacting section 212(n)(1)(A)(i)(II) in 1990.[38] This new provision explicitly connected the prevailing wages to attributes of individual workers by requiring that prevailing wages "shall" be commensurate with experience, education, and supervision – elements that can be reflected in workers' credentials. With that amendment, Congress clearly indicated that the better interpretation of the prevailing wage statutory construct is one that ensures that a foreign national is not paid more or less to fill a position in an occupational classification than a US worker with equivalent education and experience. It is unlikely that Congressional aims would favor a policy that encourages an employer to hire a foreign national with a given level of education and experience for a given role at a lesser salary than the employer would need to pay to a US worker with like qualities. And it also is unlikely that Congress would prefer using wage supplemented by a dated worksheet-based point system derived from agency guidance[39] as an artificial proxy for education and experience over the actual education and experience associated with an occupational classification and area of employment.

This worker trait-based grounding finds support in the INA's two primary prevailing wage statutes:

- **Section 212(n)(1)** requires employers to pay whichever is greater of: (I) "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or (II) "the prevailing wage level for the occupational classification in the area of employment." Critically, the phrase "prevailing wage level for the occupational classification" does not dictate whether such prevailing wage levels must, should, should not, or must not account for individual characteristics.[40] That the longstanding interpretation of the term fails to

[37] *See supra* note 35.

[38] *See D.B. v. Cardall*, 826 F.3d 721, 735 (4th Cir. 2016) ("[T]he specific terms of a statutory scheme govern the general ones. The general-specific rule is particularly applicable where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,' as it has done in the immigration context." (citing *RadLax Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 646 (2012)) (internal citations omitted); *Detroit Receiving Hosp. and Health Ctr. v. Sebelius*, 575 F.3d 609, 615 (6th Cir. 2009) ("A specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it ha[s] not been expressly amended . . . [We] assume that the implications of a statute may be altered by the implication of a later statute. Here Congress has spoken subsequently and more specifically to the topic at hand, which informs a proper construction of the statutory scheme.") (internal punctuation omitted).

[39] *See* worksheet provided by DOL in its Prevailing Wage Determination Policy Guidance, last updated 2009, *supra* note 31.

[40] Consequently, the Department is authorized to exercise discretion in filling in the details of the statutory scheme. *Loper Bright Enters. v. Raimondo*, 604 U.S. 369, at 395 (2024) ("[T]he statute's meaning may well

account for individual worker qualifications cannot be viewed as an *a priori* restriction on doing so. Rather it is merely one potential interpretation, and one that is not the best interpretation or the one that is most consistent with the overall statutory construct relating to prevailing wage determinations, particularly section 212(p)).[41]

In the actual market, employers will pay wages depending on the qualifications of the worker, even when recruiting for a single job (a more qualified candidate will often get a better job offer in the market than a less qualified candidate, for the same job opening). A prevailing wage that ignores the qualifications of the workers transacting in that market would not be a market rate at all.

- **Section 212(p)(4)** reinforces the legal footing for instituting Experience Benchmark-derived prevailing wages by requiring that any governmental survey used to determine the prevailing wage for either H-1B or PERM provide wage levels "commensurate with experience, education, and the level of supervision." Experience Benchmarking implements this requirement explicitly: it produces a wage floor calibrated to each combination of experience, education, and occupation. Differences in levels of supervision would be reflected in the different wages in the ACS data for workers actually employed in the occupation with comparable credentials. Moreover, in many occupations supervisory responsibilities lead to a distinct occupation under the Standard Occupational Classification system, thus many common promotion paths will involve changes in SOC code reflecting explicit differences in levels of supervision.

In 1998, Congress provided a most straightforward confirmation that the statute establishes that job equivalence relies on worker traits, even before revising the prevailing wages for the occupational classification in 2004 (when Congress said prevailing wages "shall" be commensurate with education and experience).[42] *See* INA sec. 212(n)(4)(B). While not a prevailing wage provision, this paragraph explicitly confirms that the statute clarifies that for non-displacement obligations protecting US workers, the definition of a job in the H-1B program is tied to worker qualifications. Under section 212(n)(4)(B), "[a] job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment." *Id*. In other words, two positions with identical titles and duties are not the same job, for purposes of the

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be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes . . . empower an agency to prescribe rules to fill up the details of a statutory scheme.") (internal quotation marks omitted).

[41] *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted).

[42] Pub.L. No. 105-277, sec. 412(b) (Oct. 21, 1998) (enacted in Title IV of Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999) (adding, *inter alia*, section 212(n)(4)(B) of the INA).

statute, if they were held by workers with substantially different qualifications and experience. Congress therefore understood job identity to be constituted by and dependent on worker characteristics. Although section 212(n)(1) and (p) reference "occupational classification," rather than "job", it would be exceedingly strange if Congress would prefer to divorce the prevailing wage assigned to a specific "job" within a given occupational classification from the job itself, where doing so is unnecessary and will produce a better reflection of the wage that is appropriate to the respective position.[43]

In short, the congressional mandate on prevailing wages is best interpreted as an invitation to look at attributes of individual workers, not of job descriptions.

C. Best information available under the H-1B statute

As a key part of the statutory scheme, Congress required that H-1B employers' obligations to attest to actual wages paid their US workers and the prevailing wages for similar US workers be "based on the best available information available as of the time of filing the [labor condition] application." INA sec. 212(n)(1)(A)(i).

Experience Benchmarking is an evidence-based method to ensure prevailing wages are commensurate with (1) education, (2) experience, and (3) the level of supervision, as required by section 212(p)(4) — providing direct, data-based confirmation of each element by referring to worker qualifications. It captures explicit differences in education and experience by unique Wage Level schedules generated for every combination of education and experience by deploying ACS data and Mincer equations. Remaining variation in the level of supervision within an occupation is one of several factors—including unobservable skills, industry productivity, and the specific duties of a position—that contribute to wage variation among workers with comparable credentials, reflected in the ACS data. And, Experience Benchmarking captures some explicit differences in supervision by the assignment of supervisory occupations often reflected in the most recent (2018) Standard Occupational Classification system, and accounts for remaining differences in earnings (including those caused by differences in supervision) through four OEWS Wage Levels for the H-1B weighted lottery, making it "commensurate with" all three statutory factors.

Experience-benchmarked prevailing wages therefore better satisfy the statutory standard because, by comparing a foreign worker's credentials to a US worker's using concrete data, it produces the "best available information" on prevailing wages paid to similar US workers.

[43] *See Food and Drug Admin.*, 529 U.S. at 133; *Marx v. Gen. Rev. Corp.*, 568 U.S. 371 (2013) ("We have long held that expressio unius (the negative implication) canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.") (internal quotation marks omitted); *see also* INA sec. 212(n)(1)(A)(i)(I) ("actual wage" requirements similarly considers individuals with similar experience and qualifications for the employment).

D. Protecting US workers under the PERM statute

Since at least 1952, the INA has required DOL to protect the "wages and working conditions of workers in the United States similarly employed" when operationalizing the permanent labor certification program (now called PERM).[44] Despite this statutory mandate, Congress never referred to "prevailing wages" as a statutory term before it amended the H-1B program in 1990 - and, importantly, even then it did not (initially) codify any prescription on how DOL should compute prevailing wages. The Department's expertise and role in validating wage protections for US workers was so well-acknowledged and well-understood, however, that Congress did not see fit to establish specific contours for prevailing wage determinations until 1998 (including through enactment of section 212(p)(1)) and 2004 (including through enactment of 212(p)(4)) that amended the INA to explicitly indicate that DOL would administer prevailing wage determinations in the PERM process and the standards for such determinations.

The principal labor certification statute, section 212(a)(5)(A) of the INA, has long been read as requiring a comparison to the minimally qualified US worker. *See, e.g.*, 20 C.F.R. 656.17(i). Section 212(a)(5) mandates that certain employment-based immigrants are inadmissible unless the Secretary of Labor has determined and certified that, among other things, what is commonly thought of as a minimally qualified worker is unavailable, except that a US worker who is "equally qualified" to the foreign worker must be unavailable in limited circumstances, commonly known as "special handling" (i.e., where a foreign worker will be a member of the teaching profession (currently interpreted to include only university faculty with teaching responsibilities and instructors) or has exceptional ability in the science or arts). *See* INA sec. 212(a)(5)(A)(i)-(ii); 20 C.F.R. 656.18. The focus on minimum requirements is intended to stop employers from tailoring the qualifications for a position to the particular foreign worker they seek to sponsor for permanent resident status.

In order to comply with the existing labor certification mandate concerning minimum qualifications in filling jobs offered to foreign workers, while also ensuring the prevailing wages for PERM are a legitimate proxy for purposes of protecting the terms and conditions of similarly-employed US workers, DOL describes prevailing wage determinations for PERM under Experience Benchmarking as involving a two-pronged evaluation.

The first prong is grounded in 212(a)(5)(A)(i)(I)'s focus on the availability of US workers, while the second prong is grounded in the statutory requirement that permanent residence

[44] *See* INA sec. 212(a)(5)(A)(i)(II). Prior to enactment of IMMACT90, this inadmissibility ground (then referred to as a ground of exclusion) was located at INA sec. 212(a)(14). *See* Pub. L. No. 101-649, secs. 162(e)(1) and 601(a) (Nov. 29, 1990) and Pub. L. No. 82-414, sec. 212(a)(14) (June 27, 1952). DOL has chosen to interpret its permanent labor certification obligations regarding protecting "similarly employed" Americans through a focus on job requirements, looking at jobs requiring a similar level of skills within an area of employment. This view on DOL's general statutory authority is not mandated by the statute and pre-dates by decades the IMMACT90 and post-IMMACT90 amendments where Congress added provisions concerning worker traits. *See supra* Section B on Worker Traits Rather Than Job Descriptions.

of a foreign worker will not adversely affect the wages of similarly employed workers in the United States pursuant to 212(a)(5)(A)(i)(II).

For the first prong, consistent with section 212(a)(5)(A)(i)(I)'s inquiry into whether "qualified" US workers (rather than workers who are equally qualified to a foreign worker) are available, the experience-benchmarked prevailing wage rate for the regular permanent labor certification process (without special handling) would identify the median wage paid to US workers with education and experience satisfying the employer-identified minimum requirements for the occupation in the geographic area of employment. These requirements would be identified in the employer's job offer and job duties on Form ETA-9141, corresponding to the position referenced in the employer's labor certification application on Form ETA-9089.

The experience-benchmarked prevailing wage approach for PERM adds a second prong as an integrity measure. This element of the approach aims to avoid the possibility that the Department might certify a prevailing wage for a permanent labor certification that is lower than the prevailing wage the Department previously certified for that same noncitizen in the labor condition application process when the noncitizen beneficiary is an H-1B nonimmigrant. In that event, the prevailing wage would be the greater of (1) the experience-benchmarked median wage for the minimum education and experience required in the occupation in the locality of the job offer and (2) if an H-1B worker, the prevailing wage already identified by the Department on the controlling LCA for the H-1B beneficiary's current employment.

Because a majority of PERM applications are filed and approved for individuals in H-1B status, this integrity measure would meaningfully and reasonably implement the Department's explicit authority from Congress to determine that the noncitizen beneficiary's indefinite employment in the US "will not adversely affect the wages and working conditions of workers in the United States similarly employed." *See* INA sec. 212(a)(5)(A)(i)(II).

IV. Conclusion

Experience-benchmarked prevailing wages for both PERM and H-1B LCAs are practical in the real-world and permitted under the statute. Indeed, Experience Benchmarking is more consistent with the statute than DOL's uniform percentiles primary proposal.

The best interpretation of the statute is the one that aligns with the best-read of all relevant legislative text, especially where it also is most consistent with the INA's overarching purpose: to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed US workers. The Experience Benchmarking methodology directly compares the foreign worker's pay to data and evidence of the wages of US workers with similar education and experience in the same occupation and geographic area and thus is most-aligned with this critical statutory purpose relative to other contemplated methods.

In NPRMs, agencies commonly share alternative policies with the public to identify a policy shift the agency or department has evaluated but is no longer considering or one that is not taken seriously as a substitute for the proposed policy. Neither circumstance applies to the Experience Benchmarking alternative for prevailing wages that DOL included in its 2026 NPRM on prevailing wages. This new Experience Benchmarking approach should be actively considered because it can be operationalized by both the regulated employers that use the H-1B and PERM programs and their lawyers, and is the best interpretation of the legal authorities Congress delegated to DOL in the relevant provisions of the Immigration and Nationality Act.