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Employment and Training Administration  
United States Department of Labor  
200 Constitution Ave NW, Washington, DC 20210

**Re: Notice of Proposed Rule Making Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States**

RIN 1205-AC30

DOL Docket No. ETA-2026-0001

Dear Administrator Pasternak,

We appreciate the opportunity to comment on the proposed rule from the Department of Labor (DOL) to update the prevailing wage system applying to various temporary and permanent employment-based visa programs. As a science and innovation think tank interested in accelerating American scientific, technological, and industrial progress, IFP believes that requiring employers to pay foreign workers prevailing wages commensurate with education, experience, and level of supervision will both prioritize for visas those foreign nationals offering scarce, valuable skills and protect American workers from the potential costs of immigration.

Based on our analysis of the rule, we believe that only the Department's Alternative 1 proposal, "Experience Benchmarking," can meet the Department's goal of ensuring prevailing wage levels prevent employers from paying foreign nationals less than similarly qualified Americans. If the Department were to adopt its primary proposal in its final rule, our research finds that thousands of visas every year will be issued under the H-1B program to foreign workers paid less than similarly qualified Americans. In other words, the Department's main proposal cannot properly address the problem of "wage arbitrage." DOL's Experience Benchmarking proposal, as the Department says, would "essentially end the practice of wage arbitrage." We urge the Department to adopt Experience Benchmarking in its final rule, the only method that accomplishes the Department's goals of reducing misclassification, is based on sound evidence, and is consistent with the statutory design to protect US workers by prevailing wages commensurate with worker characteristics, including education and experience.

In the comment that follows, we make the following arguments:

- The Department's primary proposal allows substantial underpayment to persist, allowing American wages to be undercut by cheaper labor. This is largely because it preserves elements of the flawed status quo prevailing wage framework that sets four uniform, percentile-based prevailing wage thresholds in every occupation that make it fundamentally incapable of meeting the Department's goal of ending the "wage gap"

between foreign workers and similarly qualified Americans, regardless of how high the Department sets those four percentiles.

- The Department’s primary proposal cannot end underpayment. In the H-1B program, for example, thousands of visas every year will continue to be approved for workers earning less than Americans in the same geography and occupation with the same levels of education and experience.
- The Department’s “Experience Benchmarking” alternative is much better designed to root out the underpayment of foreign workers than the primary proposal. Experience Benchmarking reduces employers’ ability to misclassify and underclassify jobs at lower wage levels by requiring objective information about the individual worker instead of a self-evaluation of job requirements that is intrinsically hard to verify and enforce.
- Experience Benchmarking is based on the best available data and the best available methods in labor economics, used and validated by other parts of the US government, and by other governments. Experience Benchmarking is also eminently feasible to implement and more consistent with the statutory basis of prevailing wages, which require prevailing wages be set commensurate with experience and education..
- The empirical analysis used to justify the Department’s primary proposal is fatally flawed.

We are also submitting our detailed analysis of both the Department’s primary proposal and the Experience Benchmarking alternative. The Department’s main proposal incorrectly identifies whether an H-1B worker earns a positive or negative wage premium 30.8% of the time. Further, it allows 17.2% of visas to go to foreign workers making less than comparable US peers. While the exact inaccuracy rate and underpayment rate depend on particular methodological assumptions, we tested many different assumptions and find our results of substantial inaccuracy and continued underpayment under the main proposal hold robustly under all of them. We ask that the Department carefully consider the arguments and evidence in the attached report, some but not all of which are summarized here.

## Table of contents

<b>Table of contents.....</b>	<b>2</b>
The Department’s primary proposal allows substantial underpayment to persist, allowing American wages to be undercut by cheaper labor.....	4
The primary proposal does not address major flaws undermining the integrity of the prevailing wage system.....	4
The Department’s primary proposal is not accurate at identifying when foreign workers are paid more or less than comparable Americans.....	6
The Department’s primary proposal disproportionately excludes high-skilled workers making above the occupational median, while it disproportionately approves less-skilled workers making below the occupational median.....	6
The Department’s main proposal will impose steep costs on startups and small businesses.	7
Experience Benchmarking would more effectively protect American workers than the Department’s main proposal.....	7

Experience Benchmarking addresses each of the four major flaws associated with uniform percentiles, enabling it to accurately identify which workers are paid more and less than comparable Americans.....	7
Experience Benchmarking is better designed to combat employer “misclassification” than the Department’s main proposal.....	8
Experience Benchmarking is more robust to strategic reclassification of SOC (occupation) codes than the Department’s primary proposal.....	8
Independent analysis finds Experience Benchmarking would raise the pay of H-1B visa recipients by more than the Department’s primary proposal.....	9
The best available evidence suggests early-career Americans face more undercutting from underclassified and underemployed mid-career workers than from early-career foreign workers. The primary proposal is ill-equipped to identify and root it out.....	9
Experience Benchmarking creates an incentive to hire more highly-skilled workers, better screening for exceptional talent and ability.....	10
Experience Benchmarking does not create any disincentive to hire less experienced workers over more experienced ones beyond the existing market incentive that already exists for US workers.....	10
Unlike the Department’s primary proposal, Experience Benchmarking forces employers to keep pace with labor market trends and raise wages over time.....	11
Experience Benchmarking is a practical, legal, and evidence-based alternative to the primary proposal.....	11
Experience Benchmarking is a perfectly feasible alternative to the primary proposal that can be readily operationalized.....	11
Experience Benchmarking is more consistent with the statute and poses less legal risk than the Department’s primary proposal.....	12
Experience Benchmarking will reduce, rather than increase, the enforcement burden on the Department.....	14
A shift to Experience Benchmarking is not particularly burdensome for employers and the regulated community.....	15
The Department should adopt Experience Benchmarking and use the comments filed to implement it with the best possible methodological choices to ensure that Experience-Benchmarked prevailing wages accurately reflect market-rate pay.....	15
The Department should carefully consider all comments with methodological advice about how to initially implement Experience Benchmarking and also use the best methods already validated within government, for example, by the team responsible for labor composition adjustments at BLS.....	16
Experience Benchmarking would not reduce geographic or occupational coverage of OEWS wage level data.....	17
The Department should use ACWIA-specific Mincer equations to measure returns to education and experience in ACWIA industries.....	17
“Potential Experience” is a fair and accurate way to capture experience for the purpose of calculating prevailing wage rates.....	17
Remaining imperfections in Experience Benchmarking could eventually be addressed by exploring the use of administrative data in setting prevailing wage rates.....	19
The economic justification behind the Department’s primary proposal is fatally flawed.....	20
The Department’s use of its calculated “Benchmark Value” effectively abandons the statutory	

goal of the prevailing wage system to set prevailing wages that are commensurate with experience, education, and level of supervision..... 20

The Department argues that an average gap between prevailing and offered wages implies that prevailing wages are too low. That makes no sense..... 21

**Conclusion..... 22**

The Department’s primary proposal allows substantial underpayment to persist, allowing American wages to be undercut by cheaper labor.

The primary proposal does not address major flaws undermining the integrity of the prevailing wage system.

The status quo prevailing wage system has at least four major problems that make it fundamentally incapable of accurately calculating prevailing wage rates that are commensurate with education, experience, and level of supervision across occupations and geographies. Each of these flaws is preserved under the Department’s primary proposal.

First, the Department has historically set prevailing wage rates according to employer evaluations of their own job descriptions, rather than the qualifications of foreign workers themselves. Employers evaluate their job requirements according to DOL guidance to determine whether the job for which they are sponsoring a foreign worker is categorized as Level I, II, III, or IV. This system has led to widespread “misclassification,” whereby foreign workers are sponsored for jobs with requirements far below their actual qualifications and experience. Misclassification results in foreign workers being assigned much lower prevailing wages than what would be commensurate with their actual education, experience, and level of supervision.

Second, the data source DOL has historically relied on to calculate prevailing wage rates, the Occupational and Employment Wage Statistics (OEWS), does not collect the requisite information to calculate prevailing wage rates that are commensurate with education, experience, and level of supervision. Instead, DOL defines four combinations of education and experience in each occupation: “entry-level,” “qualified,” “experienced,” and “fully qualified.” The Department has historically assumed that workers whose jobs require these combinations of education and experience earn salaries at the 17th, 34th, 50th, and 67th percentiles, respectively, for their occupation and geography. However, because OEWS does not provide the Department with data on the education and experience of US workers, it has no way to validate these wage levels, or any other four, uniform, percentile-based thresholds that it might choose.

Third, the Department’s primary proposal assumes that seniority is distributed uniformly across hundreds of different occupations and geographies. For example, the Department implicitly assumes that “fully qualified” workers earn wages that are approximately at the 67th percentile for their occupation. Yet in the real world, the distribution of seniority varies dramatically across

occupations. In some occupations, a majority of workers might be very senior, such as SOC code 11-1011 (Chief Executives). In these cases, the 67th percentile may be above market-rate pay for those whose jobs would be considered Level IV under DOL's guidance. Other occupations may be more junior-heavy, where younger, entry-level workers make up an outright majority of the occupation. In these cases, the 67th percentile is likely to be set below what workers in jobs classified as Level IV under DOL's guidance actually earn in the labor market. Without bringing in data sources that have direct information about US workers' levels of education and experience, any prevailing wage system will be left flying blind.

Fourth, the Department of Labor's four-tiered, uniform, percentile-based prevailing wage system is nowhere near granular enough to account for how earnings actually vary according to education, experience, and level of supervision. Within each of the Department's four levels are many different combinations of education, experience, and level of supervision, each of which commands its own market-rate wage in the US labor market. As long as the Department continues to use just four wage thresholds set according to occupation-wide earnings percentiles, it will be incapable of making granular comparisons necessary to ensure foreign workers do not earn less than similarly qualified US workers in the same occupation and geography.

The Department's primary proposal addresses none of the major problems with the status quo prevailing wage system:

- If the Department adopts the primary proposal, prevailing wage rates that apply to foreign workers will still be set according to employer-provided job descriptions rather than according to an apples-to-apples comparison of US workers with the same qualifications.
- The primary proposal still relies exclusively on OEWS, which does not include data on earnings by education and experience level, which are necessary to set prevailing wage rates commensurate with education and experience.
- The primary proposal also maintains the existing system of four-tier, uniform, percentile-based wage thresholds, which wrongly assume that the distribution of seniority is the same in every occupation and is not granular enough to prevent underpayment.

Because the Department's primary proposal does not address longstanding flaws in the prevailing wage system, it will still allow employers to sponsor foreign workers for lower wages than what similarly qualified US workers actually earn in the American labor market. Backtesting against fiscal year 2022 through fiscal year 2024 H-1B petition data, **we estimate that approximately one in six H-1B visas (17.2%) would have been issued to foreign workers earning less than the median US worker with the same levels of experience and education in the same occupation and geography had DOL's primary proposal been in place.**

The Department's primary proposal is not accurate at identifying when foreign workers are paid more or less than comparable Americans.

In fact, the Department's primary proposal will be highly inaccurate both at identifying foreign workers who are underpaid (paid less than the median American worker in the same area and occupation with the same occupations and experience levels) and those who earn a positive wage premium over similar US workers. Calculating an "accuracy rate" — the share that a policy correctly excludes from eligibility workers earning less than similar Americans and including workers earning more — we estimate that the Department's primary proposal will get more than 3 in 10 H-1B cases wrong. In other words, if the Department adopts its primary proposal, it will maintain eligibility for thousands of underpaid H-1B workers every year while excluding thousands of foreign workers from the H-1B program who would earn more than comparable US workers. This high failure rate suggests that the Department's primary proposal would not meet its statutory goal of accurately setting prevailing wages commensurate with education, experience, and level of supervision.

The Department's primary proposal disproportionately excludes high-skilled workers making above the occupational median, while it disproportionately approves less-skilled workers making below the occupational median.

The primary proposal would exclude precisely the wrong workers. Workers sponsored using Level I and II petitions are paid less in absolute terms than those sponsored using Level III and IV petitions, and they also typically earn less than comparable Americans with the same occupation, geography, age, and education, while Level III and IV petitions typically earn more than comparable Americans. However, a greater share of those Level III and IV petitions are screened out under the primary proposal than the share of Level I and II petitions.

Measured against the median wage of US workers with the same occupation, education, experience, and location, the average wage premium rises sharply with each wage level. Level I workers are paid, on average, \$22,598 below that benchmark (-18.5%), and Level II workers \$7,581 below (-4.0%). But Level III workers are paid \$12,514 above it (+15.9%), and Level IV workers are paid \$40,215 above it (+44.2%).<sup>1</sup>

Nevertheless, despite being filled by workers earning the largest positive wage premia, it is Level IV jobs, those demanding the highest levels of education and experience above the usual requirements, which are screened out the most under the primary proposal. We estimate that the median Level IV worker sits at the 72nd percentile of their occupational earnings distribution. Among only those with a positive wage premium, it is only slightly higher, at the 73rd percentile. The median Level IV petition thus falls well short of the new 88th percentile threshold and is screened out, despite Level IV H-1B petitions having salary offers 44% higher than the median American with the same occupation, geography, education, and experience. We calculate that a total of 88% of Level IV initial cap-subject petitions filed from fiscal year 2022 through fiscal year

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<sup>1</sup> IFP analysis of FY2022-2024 H-1B cap-subject petition data

2024 would be ineligible under the primary proposal, more than any other wage level, when these are the very people with the most experience, the most education, and the most compensation—the very people the Department should want to exclude *least*. By contrast, Level I petitions, despite having the lowest wage premia (-18.5%) relative to comparable Americans, would be approved at higher rates than any other wage level under the primary proposal.

This produces an outright inversion of the statute's and the Department's purpose.

The Department's main proposal will impose steep costs on startups and small businesses.

The NPRM's primary proposal will severely curtail the ability of startups and small businesses to access foreign-born talent with unique skills and who they will offer above-market compensation through the H-1B program. Backtesting cap-subject H-1B petitions approved between fiscal years 2022 through 2024, we estimate that nearly 9 out of every 10 H-1B petitions filed by companies with under 500 employees would have been excluded from eligibility had the Department's primary proposal been in place in those years.<sup>2</sup> This impact is substantially more burdensome than the impact on large businesses, putting startups and small businesses at a further disadvantage against larger, more established competitors. The impact of the proposal on small businesses recruiting senior, expert-level employees will be no less severe, as we estimate that 9 in 10 Level IV petitions from small businesses in fiscal years 2022 through 2024 would have been made ineligible by the primary proposal. Notably, this result is not because small businesses systematically underpay senior H-1B workers. Rather, the opposite is true: we estimate that more than 8 in 10 H-1B Level IV petitions approved for small businesses in fiscal years 2022 through 2024 offered wages at or above the median wage for Americans in the same occupation and geography with the same education and experience.

Experience Benchmarking would more effectively protect American workers than the Department's main proposal.

Experience Benchmarking addresses each of the four major flaws associated with uniform percentiles, enabling it to accurately identify which workers are paid more and less than comparable Americans.

Experience Benchmarking resolves each of these four flaws directly. First, in place of the employer's self-assessment of its own job requirements, it sets the prevailing wage according to the foreign worker's actual education and experience, removing the discretion that produces misclassification. An employer can no longer secure a lower wage by writing up a demanding role as an entry-level one, because the floor is fixed by the worker's credentials rather than by the job description. Second, it cures the data deficiency by supplementing OEWS with American Community Survey microdata, which, unlike OEWS, records the education and experience of

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<sup>2</sup> In our analysis, we exclude petitions where Part 5, Field 14 ("Current Number of Employees in the United States") is zero or one.

US workers, giving the Department for the first time an empirical basis to set wage levels that reflect those characteristics rather than merely assuming them. Third, because it fits a separate Mincer earnings equation to each occupation, it measures the actual relationship between earnings, education, and experience within that occupation instead of imposing a single seniority distribution on all of them. Fourth, it abandons the four-tier structure entirely, generating a distinct prevailing wage for every combination of education and experience in each occupation and geography, the granularity required to compare a foreign worker against similarly qualified Americans rather than against a coarse occupation-wide percentile.

In consequence, Experience Benchmarking can accurately identify underpayment.

Experience Benchmarking is better designed to combat employer “misclassification” than the Department’s main proposal.

Employer “misclassification” of foreign workers has been a longstanding problem in the H-1B visa and permanent labor certification programs. Foreign workers are misclassified when they are sponsored for roles and given a DOL wage level substantially below their actual levels of education and experience (e.g., a 40-year-old with 15 years of experience and a master’s degree sponsored for a Level I “Entry-Level” job). As the Economic Policy Institute writes:

*While each skill/wage level is intended to correspond to the H-1B worker’s education and experience, in practice the employer gets to choose the wage level and DOL does not verify that a prevailing wage is appropriate unless a lawsuit or a complaint is filed by a worker.<sup>3</sup>*

The Department’s primary proposal is structurally unable to address this problem. Employers will continue to effectively choose which wage level applies to a foreign worker they sponsor by controlling the contents of the job description and the list of job requirements.

Only the Department’s Experience Benchmarking proposal — which would set a foreign worker’s prevailing wage rate according to his actual qualifications and experience, not minimum job requirements — can reduce misclassification.

Experience Benchmarking is more robust to strategic reclassification of SOC (occupation) codes than the Department’s primary proposal.

Employers have historically been able to misclassify foreign workers by sponsoring them for roles with much lower job requirements than their actual experience and qualifications. An additional way that employers can obtain lower prevailing wage requirements for a foreign worker is to classify a job as belonging to a similar but lower-paying occupation (SOC code) on

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<sup>3</sup> Daniel Costa and Ron Hira, "[EPI comments on DOL Request for Information on determining prevailing wage levels for H-1B visas and permanent labor certifications for green cards](#)," Economic Policy Institute, June 1, 2021.

an LCA. While changes to prevailing wage calculations may raise the average pay of visa holders, those increases can be eroded by employers strategically classifying their workers into lower-paying occupations, thus obtaining a lower prevailing wage. Independent analysis from the Penn Wharton Budget Model finds that Experience Benchmarking is more robust to strategic occupational reclassification. Reclassification offsets only 12.3% of the compensation gain from Experience Benchmarking in the H-1B program, compared with 18.9% of the gains under the Department's primary proposal. In other words, the Department's primary proposal is more gameable on multiple dimensions — more vulnerable to both through rewriting job descriptions to appear more junior and through employers selecting lower-paying occupation codes — than Experience Benchmarking.<sup>4</sup>

Independent analysis finds Experience Benchmarking would raise the pay of H-1B visa recipients by more than the Department's primary proposal.

The analysis from the Penn Wharton Budget Model also finds that under Experience Benchmarking, the median foreign worker awarded a new, cap-subject H-1B visa would earn \$10,074 more than under the Department's primary proposal.<sup>5</sup> Salaries for new, cap-subject H-1B workers would also be higher under Experience Benchmarking than the Department's primary proposal at the 25th percentile, the mean, and the 75th percentile. In setting prevailing wage rates at the median for US workers with the same geography, occupation, education, and experience, the Department would be selecting for higher-skilled, higher-paid workers than under its primary proposal.

The best available evidence suggests early-career Americans face more undercutting from underclassified and underemployed mid-career workers than from early-career foreign workers. The primary proposal is ill-equipped to identify and root it out.

An intuitive worry is that young foreign graduates typically undercut young Americans entering the same fields, but the evidence does not support this view. Workers in the F-1-to-H-1B pipeline are, by DHS's own data, paid more on average than other H-1B workers, and against comparable early-career Americans, they command premia rather than discounts. The underpayment captured in the negative Level I and Level II premia is the footprint of mid-career workers, often with 10-20 years of experience, being hired from abroad for Level I or II jobs and paid entry-level wages far below what their experience commands. It is these underclassified, underpriced, and underemployed mid-career workers, not foreign graduates paid above the market rate, who compete most directly against entry-level Americans. Experience Benchmarking protects early-career Americans by being well-calibrated at targeting mid-career underclassification and pricing every worker against Americans with comparable education and experience. The primary proposal, by contrast, is ill-equipped to identify this underpayment at all.

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<sup>4</sup> Penn Wharton Budget Model, "[The Experience Benchmarking Alternative to the 2026 H-1B Prevailing Wage Rule](#)," (May 25, 2026).

<sup>5</sup> PWBM report.

Experience Benchmarking creates an incentive to hire more highly-skilled workers, better screening for exceptional talent and ability.

By explicitly controlling for education and experience (as well as occupation and area), the wage premium captures the residual variation in earnings that is attributable to workers' unique skills, talents, and potential, as evaluated by employers in the market. Experience Benchmarking harnesses this in at least three ways, all of which leave the prevailing wage system much more effective at screening for exceptional talent and ability. First, it directly screens out low-skilled workers whom employers would only attempt to sponsor at a discount relative to comparable US workers. If a worker commands a premium because they offer rare or exceptional skills, only then would they remain eligible under Experience Benchmarking. Second, it reduces an important arbitrage channel that makes programs like the H-1B attractive. If employers cannot benefit from using the program to bring in underclassified workers whom they can pay less, then that leaves the program for employers who are recruiting talent for their exceptional skills and abilities. Third, Experience Benchmarking interacts with the weighted lottery by offering more lottery entries for workers who command higher wage premia, explicitly incentivizing the use of the program for the highest-skilled workers who can command the highest wage premia relative to comparable US workers.

Experience Benchmarking does not create any disincentive to hire less experienced workers over more experienced ones beyond the existing market incentive that already exists for US workers.

Some critics of Experience Benchmarking have alleged that it creates an incentive to hire less experienced workers. Experience Benchmarking does not change the relative cost of experienced and inexperienced workers. Rather, it simply makes the immigration system charge employers the same price for experience that the open market already charges them, removing only the below-market discount that the current system uniquely makes available for foreign hires.

Experience Benchmarking creates no disincentive to hire more experienced workers beyond the one the market already imposes on every employer who hires an American. The wage floor for an experienced worker under Experience Benchmarking is simply the median wage that comparable US workers, those with the same education and experience in the same occupation and location, already earn. Requiring an employer to pay that wage is not a disincentive the methodology invents, but it is the ordinary market price of experience, the same price the employer would pay to hire an equally experienced American. Every employer in the labor market already faces exactly this tradeoff: a more experienced worker commands a higher wage than a less experienced one, and the employer weighs whether the added experience is worth the added cost. Experience Benchmarking does nothing more than remove a feature of the immigration system that allows employers to avoid that regular market incentive for US workers by underpaying foreign workers by classifying them as low experience. Experience Benchmarking makes the choice between a more and a less experienced hire turn on precisely the same considerations that govern that choice when the candidate is American.

Unlike the Department's primary proposal, Experience Benchmarking forces employers to keep pace with labor market trends and raise wages over time.

The Department's primary proposal continues to set prevailing wage rates according to job requirements rather than worker characteristics, meaning that foreign workers renewing or extending their visas will not face prevailing wage rates commensurate with the education or experience they have acquired while on the visa. An H-1B worker may accrue three years of experience in a Level I job, yet upon renewal, if the job is still classified as Level I, they will still face a minimum wage at the 34th percentile for their occupation and geography under the Department's primary proposal. Any system that accurately sets prevailing wage rates commensurate with education and experience should compensate this worker for this additional experience, as the market would a native worker who earns three additional years of experience. Only Experience Benchmarking would incorporate this additional experience into prevailing wage calculations. Under the Department's primary proposal, the employer can satisfy the prevailing wage standard without granting raises reflecting additional experience or training.

## Experience Benchmarking is a practical, legal, and evidence-based alternative to the primary proposal

Experience Benchmarking is a perfectly feasible alternative to the primary proposal that can be readily operationalized.

Unlike the Department's primary proposal, Experience Benchmarking is grounded in decades of labor economics research and hundreds of empirical papers, using what is arguably the workhorse tool of modern labor economics, the Mincer earnings equation, which models worker wages as a function of education, experience, and observable characteristics. The methodology has been the standard for estimating returns to human capital since Jacob Mincer's 1974 monograph and has been refined and validated repeatedly over the past five decades. It provides the basis for essentially every credible empirical study of how worker characteristics shape wages, including the recent paper from economist George Borjas that DOL itself cites as motivation for moving beyond an OEWS-only methodology.<sup>6</sup> Standard textbooks describe the Mincer-style regression as the approach used by "the typical study" estimating earnings, with hundreds of published applications estimating returns to schooling using this framework. The methodology and approach of Experience Benchmarking is one of the most tested and repeatedly validated approaches of the field, in sharp contrast to the primary proposal.

The basic methodology is already in operational use within the federal government. BLS already applies a very similar methodology in its other work. Although this technique was not used by BLS when DOL began to calculate prevailing wages, the labor productivity group within BLS has since 2023 begun to use ACS microdata to estimate how wages vary with education and

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<sup>6</sup> George J. Borjas, "The H-1B Wage Gap, Visa Fees, and Employer Demand," NBER Working Paper No. 34793 (March 2026).

experience within granular industry-occupation cells, as part of constructing quality-adjusted labor input measures for total factor productivity estimates. They do this in essentially the same way DOL proposes to do under Experience Benchmarking.<sup>7</sup> Their paper provides further details on their methodology.<sup>8</sup> And they have validated their basic approach of using age to measure experience in the literature.<sup>9</sup>

Furthermore, beyond BLS, the Department of Labor itself, through the Office of Federal Contract Compliance Programs, has for two decades relied on Experience Benchmarking-style multiple regression analysis to identify pay disparities at federal contractors and obtain both back pay and prospective salary adjustments in negotiated settlements. The Equal Employment Opportunity Commission uses the same methodology in Title VII and Equal Pay Act litigation, including in *EEOC v. Morgan Stanley* and *EEOC v. University of Denver*, and federal courts have accepted Experience Benchmarking-style regressions as valid statistical evidence since the Supreme Court's decision in *Bazemore v. Friday* in 1986.

Foreign governments also use the same approach to set wage floors for foreign workers. Switzerland's Federal Statistical Office operates a Mincer-style salary estimator (*Salarium*) built on the national Earnings Structure Survey, which Swiss cantonal labor market authorities use as the operational benchmark when determining whether a foreign worker's offered salary meets the "customary wage" requirement of the Federal Act on Foreign Nationals and Integration. Singapore's Ministry of Manpower also benchmarks its Employment Pass qualifying salary to age-graduated percentiles of the local professional workforce wage distribution from the annual labour force survey, with a separate higher schedule for the financial services sector. Both demonstrate that worker-characteristic-conditioned wage floors are administrable at scale and not novel.

It is fair to say that the general approach of Experience Benchmarking is closer to the standard practice of governments and is recognized by the courts than the ad hoc uniform percentiles of the primary proposal.

Experience Benchmarking is more consistent with the statute and poses less legal risk than the Department's primary proposal.

Experience Benchmarking is more consistent with the governing statute because it implements, rather than approximates, what Congress actually requires. Section 212(p)(4) of the INA, added in 2004, mandates that government-provided prevailing wages "shall" be "commensurate with experience, education, and the level of supervision." Experience Benchmarking satisfies this directive directly, calibrating the wage floor to the actual median earnings of US workers who

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<sup>7</sup> U.S. Department of Labor, Bureau of Labor Statistics, "[Productivity Measures: Business Sector and Major Subsectors: Calculation.](#)"

<sup>8</sup> Jon Samuels and Jerin Verghese, "[Introducing Demographic Labor Market Data Into the U.S. National Accounts.](#)" BEA Working Paper Series, WP2023-6, June 2023.

<sup>9</sup> Cindy Zoghi, "Measuring Labor Composition: A Comparison of Alternate Methodologies," in *Labor in the New Economy*, ed. Katharine G. Abraham, James R. Spletzer, and Michael Harper (University of Chicago Press, 2010), 457–485.

share the sponsored worker's education, experience, occupation, and location, using ACS microdata and the Mincer earnings equation, the workhorse tool of empirical labor economics, grounded in five decades of research and hundreds of peer-reviewed papers. It is also much closer to the standard method used throughout the federal statistical system and government enforcement, and by foreign governments such as Switzerland and Singapore to set wage floors for foreign workers. This is not a novel and untested construct for determining wages of comparable workers. Rather, it is the most evidence-based approach available using the best data available.

The Department's primary proposal can only gesture at "commensurate" through two layers of inference: it presumes that skill levels are distributed identically across every occupation (they are not; senior-heavy fields like medical science differ sharply from junior-heavy fields like software development), and it relies on employer self-assessment of how their job requirements compare to the Department's assessment of "usual" requirements under 2009 guidance that has gone unrevised for more than fifteen years. And it uses data that is unfit for the purpose Congress intended: the OEWS does not contain information on the very characteristics 212(p) asks prevailing wages to be commensurate with.

Furthermore, the statute's worker-trait orientation is reinforced elsewhere: section 212(n)(4)(B) defines job equivalence by reference to the qualifications and experience of the worker who held the position, confirming that Congress understood prevailing wages for an "occupational classification" to turn on worker characteristics rather than job descriptions alone. Experience Benchmarking also independently satisfies the requirement to provide "at least 4 levels of wages," producing far more than four, while the statute's intermediate-level arithmetic formula is expressly permissive ("may"), not mandatory, leaving the Department free to adopt a more granular, evidence-based construction.

Experience Benchmarking also carries less legal risk, particularly after *Loper Bright*. Where an agency must adopt the best reading of a statute rather than merely a defensible one, the Department stands on firmer ground defending a methodology grounded in direct, worker-level evidence and an established empirical method than one built on guesswork. Both the section 212(p)(4) command that wages be "commensurate with experience, education, and level of supervision" and the section 212(n)(1)(A)(i) requirement that H-1B attestations rest on "the best available information" point toward a data-based comparison of the foreign worker to similarly credentialed US workers, precisely what Experience Benchmarking supplies and what uniform percentiles structurally cannot, because OEWS collects no information on workers' education or experience. But the case against the Department's primary proposal would be stronger than this structural inability, because as we describe below, the Department's economic justification for its primary proposal is fatally flawed and is in fact premised on the idea that the "Benchmark Value" is a reasonable benchmark to set prevailing wages even though it does not account at all for the different distributions of education and experience between US workers and foreign workers.

That a reviewing court would be evaluating a methodology already accepted as authoritative across economics and government would only strengthen the Department's position. By contrast, the primary proposal is more exposed to challenge on the very ground the 2004

amendment created: a reviewing court could reasonably conclude that fixed percentiles, untethered from any occupation-specific distribution of education and experience, are not "commensurate" with those factors in any meaningful sense, and that simply raising the percentiles does nothing to cure the defect. For PERM, Experience Benchmarking's two-pronged design, anchoring to the median wage of US workers who meet the employer's minimum job requirements, with an integrity check preventing a PERM determination from falling below the wage already certified for the same worker's H-1B employment, implements section 212(a)(5)(A)'s non-adverse-effect mandate more faithfully than a uniform-percentile proxy. Experience Benchmarking is thus the most evidence-based reading available and the one that best matches the statutory text Congress enacted in 1998 and 2004, and adopting it reduces rather than increases the Department's litigation exposure.

Experience Benchmarking will reduce, rather than increase, the enforcement burden on the Department.

The Department should use the final rule preamble to state clearly what Experience Benchmarking is not. EB does not require DOL to evaluate, on a case-by-case basis, educational equivalency, years of experience, occupational comparability, geographic labor-market positioning, compensation expectations for similarly situated workers, or the relationship between a worker's credentials and prevailing compensation norms in any particular industry or region. It introduces no new individualized adjudication into the prevailing wage process. EB is a methodology for constructing wage tables ex ante and publishing the resulting medians for each combination of occupation, geography, education, and experience through the OFLC Wage Search in FLAG, just as the current four uniform-percentile values are published today. Employers (or their counsel) would continue to retrieve a single prevailing wage figure based on the worker's credentials. LCA adjudication would remain automated and continue to operate within the statutory seven-day processing framework.

In short, EB changes only the formula DOL uses to populate the wage tables, not how those tables are consulted, applied, or enforced. The added analytical work is a one-time computational task performed centrally by the Department, not a recurring burden imposed on OFLC staff or employers. We ask the Department to confirm this directly in the final rule preamble, regardless of whether EB is adopted in this rulemaking. The three pages devoted to EB in the NPRM left ample room for misunderstanding, and a clear statement of what EB does and does not entail will matter both for the present record and for any future consideration, particularly given that EB is the only methodology before the Department that would eliminate the ability to hire an H-1B worker at less than the median wage paid to Americans with the same education, experience, occupation, and geography.

Furthermore, because the Department will no longer expect wage levels to be assigned based on evaluations of job requirements but by objective characteristics of people, the enforcement becomes less burdensome on the Department. It is close to impossible to operationally determine whether a company is understating the true minimum requirements of a job. But it is comparatively easy to check whether they are lying about an individual's age.

A shift to Experience Benchmarking is not particularly burdensome for employers and the regulated community

Experience Benchmarking would not create an undue burden on employers, because there is no evidence that a significant share of LCAs are filed without knowing who the individual is. Employers already nearly always know the beneficiary when filing LCAs for H-1Bs (in sharp contrast to the situation for H-2Bs). This is the case for all types of US employers, in any sector, of any size, and in any area of employment. This might not have been true in the more distant past, but has been true since 2020, when DHS adopted electronic registration and instructed employers to wait until after registration to prepare the LCA.

For FY2024, 91.1% of initial H-1B petitions were filed with LCAs filed after the lottery registration window began. This is important because employers are already required during registration to provide information about the specific individual to DHS (including name, date of birth, passport number, etc.). In other words, the vast majority of LCAs are filed after the employer is already required by the government to know who the worker is and provide information about the beneficiary. Therefore, we know that adopting the Experience Benchmarking requirement to provide beneficiary information in the LCA would not be burdensome at all for the vast majority of H-1Bs.

For the remaining 8.9% of petitions with pre-registration LCAs, they can either: 1) switch to a post-registration LCA like most employers already do, 2) keep doing a pre-registration LCA and just share individual info early (many of these 8.9% already know the particular individual well before registration), or 3) if they really have some reason they want to do a pre-registration LCA before they know the beneficiary, they can file LCAs for common combinations of education and experience. We'll note that the 8.9% are heavily concentrated among large sophisticated employers who are able to adapt and comply with new regulations without a significant burden (the top 10 account for 70% of all early filings and include large tech companies like Amazon, Google, Apple, and Intel, and large consulting firms like EY and McKinsey).

For non-initial petitions, employers may need to have an LCA library so that they can be filed quickly, but that is a manageable and practical adaptation that will be more novel under Experience Benchmarking than particularly burdensome.

The Department should adopt Experience Benchmarking and use the comments filed to implement it with the best possible methodological choices to ensure that Experience-Benchmarked prevailing wages accurately reflect market-rate pay.

We are grateful for the extent to which the Department elaborated on its Experience Benchmarking proposal in its NPRM. While there are many remaining methodological choices that the Department has not specified in the NPRM, the Department should finalize its Experience Benchmarking alternative and use the feedback it received in its comments to inform its methodological choices. While we encourage the Department to consider our own analysis carefully, we do not claim the final word or even that our analysis represents the best

practice in all cases when it comes to methodological choices. We do, however, insist that even a suboptimal implementation of Experience Benchmarking is far superior to the primary proposal. Ambiguity about the optimal methodological choice is not an excuse for proceeding with the highly problematic primary proposal that is strictly inferior to even an imperfect implementation of Experience Benchmarking. Experience Benchmarking would be a new methodology for calculating prevailing wages, and it can be improved over time as the Department gains greater experience using it to set prevailing wages.

The Department should carefully consider all comments with methodological advice about how to initially implement Experience Benchmarking and also use the best methods already validated within government, for example, by the team responsible for labor composition adjustments at BLS.

We suggest that when filling in operational details not specified in the NPRM's description of the Experience Benchmarking alternative, the Department should take special care to avoid overfitting and take a balanced course between occupational and geographic granularity on the one hand and underpowered estimates on the other. We expect that other commenters will offer valuable suggestions for concrete ways to do this, including improvements on our own preliminary analysis. In our own analysis, we did not rigorously test for overfitting, but the Department should do so (as BLS has done when validating substantially similar methods). If/when overfitting is suspected, we'd point to a few easy fixes at the Department's disposal:

- Choose larger sample size thresholds before aggregating to a higher level of occupation (e.g., when fitting Mincer equations) or a higher level of geography (when choosing the proper unit for fixed effects, when using OEWS data, etc.).
- Filter the sample used to fit occupation-specific Mincer equations. The Department should clarify how it intends to filter American Community Survey microdata to fit Mincer equations that estimate occupation-specific earnings curves. The Department should ensure that it is properly filtering for full-time US workers in order to make the most accurate comparisons between their wages and those sponsored for employment-based visa programs covered by the prevailing wage system.
- Choose the appropriate ACS sample (balancing any real-time changes in the returns to schooling or age with a larger pooled sample). The Department may also have the option to acquire larger samples through a special tabulation from the Census Bureau.
- Clarify the OFLC vintage: The Department proposes adjusting OFLC-calculated median earnings for different combinations of occupation and area using ratios derived from Mincer equations. However, it has not clarified the vintage of those medians (i.e., whether they would be as of the LCA filing date, the job's start date, or the window of the H-1B lottery, for cap-subject petitions).

The above may sound like a substantial technical challenge, but these are relatively simple tests, and any reasonable approach will yield substantially similar results (especially in comparison with the inaccurate results of the primary proposal). In Appendix 3 of the attached report, we show that any combination of a number of reasonable methodological choices yields

broadly similar results. If the Department has uncertainty about the preferred approach, it should simply pick one or use an ensemble and take an average.

The Department already has significant experience with these methodological approaches and has sufficient expertise to choose among them. We stress that the fact that there may not be one and only one “right” answer is not a good argument against Experience Benchmarking, given that the prevailing wages under Experience Benchmarking are far more accurate under any reasonable assumptions and are less sensitive to those assumptions than the primary proposal is to the multitude of assumptions used to calibrate the correct uniform percentiles.

Experience Benchmarking would not reduce geographic or occupational coverage of OEWS wage level data.

Adopting Experience Benchmarking would not require the Department to sacrifice any geographic or occupational granularity in the prevailing wage system. Since the proposed “Mincer” equations that map labor market returns to different combinations of education and experience are used to adjust occupational-area earnings medians calculated by the Office of Foreign Labor Certification, the Department would still have the same occupation and geographic coverage as would be provided under the Department’s primary proposal or the status quo system. Experience Benchmarking would be additive, allowing the Department to calculate additional, more granular prevailing wage rates for different combinations of education and experience in each occupation and geography.

The Department should use ACWIA-specific Mincer equations to measure returns to education and experience in ACWIA industries.

The Department has long recognized that market wages often differ in the for-profit sector and ACWIA industries. The returns to different levels of education and experience also vary substantially across different industries, even within the same occupation. Career earnings trajectories in academia or scientific research may be very different from those in similar, private sector research jobs, for example. If the Department were to adopt Experience Benchmarking as its methodology for setting prevailing wages, it should calculate a series of separate, specific Mincer equations that apply to the calculation of ACWIA prevailing wages. Just as it would for non-ACWIA industries, DOL should adjust OFLC-produced occupational median earnings in each area according to ACWIA-specific experience and education earnings curves. This will better reflect true, market-rate wages and be more accurate in setting prevailing wages that are commensurate with education, experience, and level of supervision in ACWIA industries.

“Potential Experience” is a fair and accurate way to capture experience for the purpose of calculating prevailing wage rates.

"Potential experience" was defined by Mincer (1974) as age minus years of schooling minus the age at which schooling begins (conventionally six) and has been the standard measure of

labor-market experience in empirical economics for more than fifty years whenever direct experience data are unavailable. It is the experience term in the Mincer earnings equation, which remains the foundational specification across the field. Its near-universal use is driven by an unavoidable data constraint: the major wage datasets, including the American Community Survey that DOL proposes to use, do not collect retrospective work histories, so actual experience cannot be observed directly.

Critically, the approach sacrifices little accuracy. Cindy Zoghi, then a BLS economist, directly compared labor-composition indices built from imputed (potential) experience against indices built from simple age groups and found the results "nearly identical," concluding that "it seems reasonable to use the simpler and more transparent age group variable." That finding is embedded in federal statistical practice: BLS's official multifactor-productivity measures classify workers by age, education, and sex, using age as the experience dimension, to construct the labor-composition adjustment that incorporates changes in the workforce's experience and educational attainment into productivity estimates, and the BLS Handbook of Methods expressly notes that "potential experience, which is constructed using age and education," is the alternative some researchers use in its place. The two measures are thus treated as interchangeable within the federal statistical system, and the Bureau already relies on exactly this family of measures in its published products.

The principal fairness objection to potential experience is that because it is computed mechanically from age and schooling, it cannot distinguish workers who changed careers, spent time out of the labor force, or otherwise accumulated fewer years of actual experience than their age implies, and this overstatement tends to be larger for women, who are more likely to have caregiving-related interruptions. That concern is genuine in the contexts where it was developed, but it is substantially overstated as applied to a prevailing-wage floor, for several reasons.

First, potential experience is computed identically for the sponsored worker and for the US workers in the ACS comparison group, and that group already includes substantial numbers of individuals who changed careers, spent time out of the workforce, etc.

Second, the relevant comparison is not between potential experience and some hypothetical perfect measure of actual experience, but between potential experience and the Department's primary proposal, which does not measure worker experience at all. Uniform percentiles rely on employer-described job requirements, the very mechanism that enables wage arbitrage through strategic underclassification, slotting experienced workers into entry-level wage tiers. The risk that genuine experience is laundered out of the determination by employer job descriptions is a far larger and more systematic threat to US workers than the bounded edge cases in which potential experience misstates an individual's history. Measured against the actual alternative, potential experience is dramatically more accurate and fairer, not less.

Third, potential experience is objective and non-manipulable. It is derived from two verifiable facts, date of birth and educational attainment, neither of which an employer can strategically adjust to depress the wage floor. A self-reported actual-experience measure (or a self-reported

measure of required experience) would reintroduce precisely the discretion and gameability that Experience Benchmarking is designed to eliminate. A mechanical measure is fairer in that it cannot be gamed to underpay.

Finally, the affected population makes these edge cases rare. The H-1B and PERM populations skew young, recently credentialed, and continuously employed, moving through F-1/OPT-to-H-1B pipelines or recruited mid-career, so the paradigmatic decade-long career interruption that drives the academic critique is comparatively uncommon relative to the labor force as a whole.

Remaining imperfections in Experience Benchmarking could eventually be addressed by exploring the use of administrative data in setting prevailing wage rates.

While an Experience Benchmarking methodology that uses American Community Survey microdata in conjunction with Occupational and Employment Wage Statistics to calculate and set prevailing wage rates will bring greater accuracy to the system, the Department should also explore how administrative data can be incorporated into prevailing wage calculations in the long run, after first implementing it with the ACS data as described. As discussed above, “potential experience” is fairer and more accurate than the primary proposal. Nevertheless, remaining unfairness in edge cases can be addressed in the long run by augmenting Experience Benchmarking with better data over time.

The Internal Revenue Service collects information on taxpayers’ earnings, location, age, and occupation on 1040s each year. This data can be linked longitudinally (through Protected Identification Keys, or PIKs) and to other administrative and survey datasets that the federal government already collects. Through an agreement with the US Census Bureau, the IRS can confidentially share anonymized tax data that can be used as the basis for calculating prevailing wages. This data can also be linked to Longitudinal Employer-Household Dynamics (LEHD) data, maintained by the Census Bureau, to include education data. Together, these datasets can be used to create earnings tabulations by occupation, geography, experience, and education without needing to create any new data products or imposing new mandates on OEWS that might reduce its response rates.

Using administrative data has a few distinct advantages over the Department’s proposal to use ACS and OEWS data. First, the sample size is potentially far larger, encompassing all US workers filing taxes each year. Second, each record provides much more granular earnings information than OEWS, which collects responses in earnings bins rather than precise values. Third, this approach can directly measure labor market experience. The proposed ACS-based Experience Benchmarking approach instead uses the concept of “potential experience.” This concept has been validated and used for decades in labor economics, but it can be improved upon by using the direct data that 1040s can provide. For the “edge case” workers described in the previous section, those who took career breaks or changed occupations mid-career, tax data may provide more accurate earnings comparisons commensurate with experience.

The economic justification behind the Department's primary proposal is fatally flawed.

The Department's use of its calculated "Benchmark Value" effectively abandons the statutory goal of the prevailing wage system to set prevailing wages that are commensurate with experience, education, and level of supervision.

Central to the Department's economic justification for its primary proposal is a gap between the Department's "Benchmark Value" of \$130,219, representing "the average of all salaries by occupation, state, and fiscal year, that match with the millions of LCAs in the Department's data set," and the average prevailing wage (and the average wage paid) for those wages paid. As the Department explains, this value is called the "Benchmark Value" because it "was used...for setting the prevailing wage levels."

Here's the Department's explanation for why that gap is meaningful and how central it is to its choice of percentiles under its primary proposal:

*Given the existence of a variety of skill levels, occupations, and regions, the significant gap between the Benchmark Value and the average prevailing wage and wage paid data should not exist unless the LCA-program itself were causing a discrepancy. In other words, the average U.S. worker in the same occupation and region is commanding a nearly \$19,000 wage premium above what the similarly situated non-U.S. worker is required to be paid using the prevailing wage system, which, in many of the non-immigrant programs, such as the H-1B program, are restricted to individuals seeking to work in specialty occupations that should perhaps be commanding higher, not lower wages.*

*The Department believes that these significant discrepancies between labor market outcomes of U.S. workers, represented by the Benchmark Value, and the labor market outcomes of LCA-program employees specifically, as represented by the actual wages paid, and the prevailing wages that apply, indicates both the existence of a problem—that the wage discrepancy will adversely impact the wages of similarly employed U.S. workers—and the proposed solution—which is to revise the prevailing wage structure to be more in line with the average wages earned by equivalent U.S. workers.*

Notice the explicit assumption that the Department makes about the only possible cause of the Benchmark Value: "the significant gap between the Benchmark Value and the average prevailing wage and wage paid data should not exist unless the LCA-program itself were causing a discrepancy."

But that assumption is plainly incorrect. There is a simple alternative explanation the Department has apparently failed to consider, and that has been long anticipated by Congress:

that the gap is caused by a different distribution of education and experience between these foreign workers and US workers.

The H-1B program is not required to match the existing skills distribution of US workers. And in fact, it skews younger (and therefore less experienced). Targeting a Benchmark Value that only matches workers based on their occupation, state, and year does not account for a different distribution of experience. That makes the resulting prevailing wages systematically incommensurate with experience and therefore much less consistent with the statute than Experience Benchmarking.

The Department must disclose how much of the gap between the Benchmark Value and the wages paid is because of gaps in education and experience vs. how much is a residual gap after accounting for education and experience.

The Department argues that an average gap between prevailing and offered wages implies that prevailing wages are too low. That makes no sense.

The Department also calculates an average gap between the wage offer listed on LCAs filed on behalf of H-1B workers and the prevailing wage that applies to such workers of \$10,191. The Department argues that this gap indicates prevailing wage levels are set too low:

*Using these data, the Department calculated that the average prevailing wage, for all LCAs from FY2020-2025, was \$111,717. The Department also calculated that the average wage rate paid to the beneficiaries of the same LCAs was \$121,908.<sup>[162]</sup> In other words, the average LCA-program employee was paid an actual wage, and thus commanding, a \$10,191 premium over the prevailing wage level offered—a gap that indicates that the prevailing wage is set below the market value of comparable U.S. workers.*

This argument is illogical. The prevailing wage rate sets the *minimum* pay employers must pay foreign workers. Inevitably, every employer will pay foreign workers wages at least the prevailing wage prescribed by the Department of Labor, and given that many pay more than the prevailing wage, the average wage rate paid will necessarily be higher than the average prevailing wage. Further, in the H-1B program, employers are required to pay either the prevailing wage or the “actual wage” paid to workers with similar experience and qualifications for the specific employment in question, whichever is higher. If DOL is at all enforcing the “actual wage” requirement, the average gap between wages paid to foreign workers in the program and their prevailing wage will be non-zero. No matter how high the Department raises its four, uniform prevailing wage thresholds, there will be an average gap between the pay of H-1B beneficiaries and the DOL-prescribed prevailing wage because only those earning at or above the threshold will be eligible for a visa.

The absurdity of this argument can be seen by looking at the likely result of the Department’s primary proposal: it would *increase* the gap, not reduce it. Evaluating the same LCA dataset that

is the basis of the Department's economic arguments, we backtest the Department's primary proposal on LCAs associated with cap-subject H-1B petitions approved from fiscal years 2022 through 2024.<sup>10</sup> We filter out those LCAs with wages below the thresholds that would have applied to each application had the Department's primary proposal been in place at the time. We find that the average gap between wage offers and prevailing wage rates does not disappear. On average, the gap is \$20,678, higher than the original gap that originally justified this proposal! For Level I LCAs that would remain eligible under the new policy, the gap is \$17,425. For Level II LCAs still eligible, it is \$19,546. For Level III, the average gap is \$21,373. And for Level IV LCAs, the average gap between wage offers listed on LCAs and new prevailing wage thresholds under the primary proposal is \$31,236. Even if some employers who would be ineligible at their existing offers raised wages to the new prevailing wage, that could reduce the gap, but could never bring it down to zero. It would remain positive.

Following the Department's logic, after adopting the primary proposal, the continued presence of a gap implies they should raise prevailing wages all over again, and so on.

In truth, this gap is simply a statistical artifact of the fact that prevailing wages are wage floors and wages paid are required to be no less than them.

## Conclusion

The failures of the Department's economic justification behind its primary proposal do not mean that prevailing wages do not need to be raised to better protect US workers and carry out the intent of the statute. Rather, the need to raise prevailing wages is grounded in a more straightforward justification that is more in line with how labor economists typically think about these questions: simply that 1) there is a significant share of H-1B workers paid less than comparable US workers with the same occupation, area, education, and experience and 2) the average wage premium H-1B workers earn over comparable natives is negative. Neither of these should be true. If the prevailing wage system were working as Congress intended to protect US workers, the share of H-1Bs paid less than comparable US workers would be zero

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<sup>10</sup> The Department's economic analysis justifying the rule primarily rests on two findings that it derives from an internal analysis of Labor Condition Application (LCA) data. The Department analyzes LCAs filed on behalf of H-1B workers from fiscal years 2020 through 2025. The analysis includes various filters to clean the data, including converting weekly, bi-weekly, or monthly salaries to annual and filtering out LCAs with salaries below \$20,000 or above \$500,000. Unfortunately, the Department does not include enough detail on its filtering and data cleaning methodology to precisely replicate its results using publicly-available LCA data published on its website. We attempted more than 20 different filtering data cleaning methodologies in an attempt to replicate the Department's main findings, but were unsuccessful. We urge the Department to clarify these discrepancies in the preamble of its final rule and disclose sufficient detail about every methodological choice in its analysis so that its main findings are verifiable and replicable. If the Department's central empirical findings cannot be reproduced, that is a significant defect.

Nevertheless, the differences between our attempts to replicate the Department's analysis and its own estimates are quite small. We will therefore assume that such gaps are due to minor methodological choices that do not materially affect the headline results.,

and the average wage premium of H-1Bs relative to comparable US workers would be large and positive.

Experience Benchmarking, by construction, would bring about exactly that outcome. The Department's primary proposal cannot. We urge the Department to follow the best available economic evidence and adopt Experience Benchmarking.

Sincerely,

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