

PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

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November 9, 2020

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RE: Comments on Interim Final Rule, “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States”

José Luis Cruz
Executive Vice Chancellor
University Provost
City University of New York

DOL Docket No. ETA-2020-0006

John J. DeGioia
President
Georgetown University

Dear Administrator Pasternak:

Mark H. Erickson
President
Northampton Community
College

On behalf of the Presidents' Alliance on Higher Education and Immigration (“Presidents' Alliance”), I submit this comment letter in response to the Interim Final Rule the Department of Labor (DOL) published on October 8, 2020, “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States.” With strong opposition and very serious concerns, we urge that the interim final rule be withdrawn in its entirety.

Jane K. Fernandes
Guilford College

Deneece G. Huftalin
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Salt Lake Community College

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Kim Wilcox
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Executive Director
Miriam Feldblum

The Presidents' Alliance is a non-partisan, nonprofit education and advocacy organization that brings college and university presidents and chancellors and their institutions together on the immigration issues that impact higher education, and the international and immigrant populations on their campuses and in their communities. We work to advance just immigration policies and practices at the federal, state and campus level that are consistent with our heritage as a nation of immigrants and the academic values of equity and openness. The Alliance is composed of approximately 500 presidents and chancellors of public and private colleges and

universities, enrolling over five million students in 42 states, D.C. and Puerto Rico. Our members' institutions and university systems reflect a wide range of nonprofit higher education institutional types. Roughly one quarter of our members' institutions grant Doctoral degrees, twenty-seven percent offer Master's level instruction, twenty-three percent offer only Baccalaureate degrees, nineteen percent grant Associate degrees, and six percent are specialized institutions, including law schools and medical schools.

The institutions we represent sponsor H-1B status for a wide array of positions that enrich their campuses, including tenure track faculty, researchers, lecturers and instructors, specialty librarians, and senior information technology positions. Those with healthcare programs sponsor medical residents and fellows and clinical faculty in nursing, medicine, dentistry, physical therapy and other specialties.

The Rule is Unsound Policy.

The stated purpose of the Interim Final Rule in the Preamble is to protect U.S. jobs—"to the extent employers have reliance in the existing levels, the Department has determined that setting the wage levels in a manner that is consistent with the text of the INA and that advances the statute's purpose of protecting U.S. workers outweighs such interests and justifies such increased costs." However, this statement is fundamentally flawed. Our members' campuses contribute significantly to economic growth in the United States, and their ability to hire a diverse and talented group of international employees drives further creation of jobs for American workers, enriches the educational experience for American students, and ensures U.S. remains the leader in higher education worldwide, including for the most talented international students and scholars. Our member institutions cannot maintain the same level of educational offerings without the robust ability to attract international faculty, researchers, and staff.

If the United States is to remain a leader in science and innovation, we must encourage, rather than deter, the best minds from around the world to study and conduct research at our institutions. One of the greatest strengths of our U.S. higher education system has been our ability to attract international students, faculty, staff, including scientists, researchers, doctors, scholars, and others. International students view opportunities to apply their academic learning in the work place as critical to their degree program, and it increasingly has become a highly important factor in deciding where to pursue study outside their home country. A survey of

international students showed that 62% of prospective students rated being able to work in the country after graduation as very important.¹

The H-1B category is a primary immigration route that allows international scientists, faculty, researchers, and scholars to remain in the U.S. to work on our campuses, conduct research in our labs, teach in our classrooms, and serve as physicians in our communities. These students and scholars enrich our classrooms, drive innovation, promote scientific advancement, create jobs, spur technological innovation, and advance medical discovery. Given the enormous asset that international students and scholars are to the United States, policies that impact them must take into account whether they help to attract and retain them, or whether they serve to deter them. This rule, unfortunately, does the latter.

The new regulations restrict our institutions' abilities to attract world-class experts to teach/instruct as well as new minds in the development of advanced medical science. These new regulations create new, arbitrary, and unreasonable obstacles for international students, scholars, and alumni, which will deter these populations from coming to our institutions to pursue learning, study, research or work. Now, more than ever, our member institutions cannot afford to turn away talent, devalue diversity, lose critical tuition dollars, and impede innovation.

The Rule Should Not Have Been Implemented Without Notice and Public Feedback.

The DOL regulation implemented without notice and with very little to no time to plan will alter many institutions' ability to continue to employ needed positions. The dramatically higher wages implemented without notice mean that new positions cannot be filled, extensions will not be possible for those already sponsored, and commitments for permanent residence Labor Certification cannot be kept. The lack of notice and the flawed methodology² used to impose these new wage levels will cause serious harms to America's institutions of higher education and upends the substantial reliance they placed on the existing rules.

DOL has not established that it has good cause to make this rule effective without complying with the notice-and-comment process required by the Administrative Procedure Act (APA). The

¹ Carmine Neghina (2016), *International Students' Changing Perceptions of the U.S.*, (Study Portals) <https://studyportals.com/blog/one-year-later-international-students-changing-perceptions-of-the-u-s/>.

² See David J. Bier, *DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent*, Cato at Liberty (Oct. 9, 2020), perma.cc/NZQ9-WQZZ.

agency acknowledges in the rule that existing wage levels “have been in place for over 20 years, and that many employers likely have longstanding practices of paying their foreign workers at the rates produced by current levels.” The agency has not established any basis for bypassing the notice-and-comment process required by the APA. This regulation overhauls wage requirements for the H-1B, H-1B1, E-3, and PERM programs without providing the affected public with notice or a meaningful opportunity to comment.

The Rule Dismisses the Reliance Interests of Institutions and their Employees and Does Not Take Into Account the Unemployment Rates in Programs Affected By the Rule.

Though DOL cites the current rates of unemployment due to COVID-19, the agency does not establish a connection between general unemployment rates and the programs affected by the rule. Many professions in which H-1B, EB-2, and EB-3 individuals participate have extremely low unemployment rates (under 4%).³ Higher education institutions recruit, hire, and train highly skilled international faculty, researchers, and other staff, who fill crucial roles on our campuses, in our labs, and in our teaching hospitals; our research, teaching, and campus operations rely on these talented international employees. Colleges and universities have planned out budgets and salaries, and signed employment contracts, based in part on the Department of Labor wage surveys that have used the same formula for decades. Our member presidents are now faced with re-visiting all of those plans, in the midst of a pandemic and in the middle of an academic year.

For example, the new rule would require employers to pay a minimum of \$100 per hour, or \$208,000 per year, for over 18,000 combinations of occupations and geographic labor markets, regardless of the skill level or position.⁴ This requirement bears no relationship to the occupational classification or area of employment and has no basis in the INA.

Unemployment rates have remained low in computer-related fields, and the majority of high-skilled immigrants work in these fields.⁵ Bureau of Labor Statistics (BLS) data contradicts the

³ See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (Oct. 5, 2020), perma.cc/VY7Y-P5QA.

⁴ *Analysis of the DOL H-1B Wage Rule*, National Foundation for American Policy (October 2020), available at <https://nfap.com/wp-content/uploads/2020/10/Analysis-of-DOL-H-1B-Wage-Rule.NFAP-Policy-Brief.October-2020.pdf>. We request that the agency review and consider all economic, policy, and legal issues identified in this policy brief as part of our regulatory comment.

⁵ National Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* (October 2020), <https://nfap.com/wp-content/uploads/2020/10/Employment-Data-for-Computer-Occupations-January-to-September-2020.NFAP-Policy-Brief.October-2020.pdf>.

agency's claim that high unemployment rates in the U.S. give the agency good cause to bypass the notice-and-comment process.

As the National Student Clearinghouse Research Center reported last month, freshman enrollment has dropped more than 16 percent from last year at American colleges and universities—and by nearly a quarter at community colleges—as the threat of the coronavirus has disrupted the nation's higher education system.⁶ Colleges and universities already struggling with less funding and enrollment tuition will now be forced to significantly increase the wages for its critical skilled international workforce.

When an agency overturns decades of law and regulations affecting programs that are this important, it must do so thoughtfully and take into account all the costs and benefits of any change. DOL needs to give colleges and universities, their employees, including faculty, researchers and other employees, as well as their students and alumni, sufficient time to comment on the rule, and to consider these comments. Further, institutions of higher education and other employers need time to prepare, *before* enacting sweeping changes to these vital programs. It is especially important to provide colleges and universities and their employees with proper notice of changes, especially with the many challenges they are already facing in the pandemic and in the current economic environment.

The Agency Must Provide More Information About Its Wage Methodology And Allow Additional Time To Resolve Substantive Concerns With The Rule.

The INA and DOL regulations require higher education institutions to pay the greater of “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment.” DOL guidance states, “The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.”⁷ The new wage requirements that would result from this rule raise serious concerns about the methodology the agency used in restructuring the

⁶ National Student Clearinghouse Research Center, *Stay Informed with the Latest Enrollment Information* (Oct. 15, 2020), perma.cc/PR62-LTYQ.

⁷ *Prevailing Wages (PERM, H-2B, H-1B, H-1B1, and E-3)*, U.S. Department of Labor, Employment and Training Administration, available at <https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage>.

wage requirements for these programs. The agency should not enforce this regulation until it can address these concerns.

Additionally, the data reported by the DOL on prevailing wages within academia is confusing and complicated, so higher education institutions have spent years developing the methodology according to DOL requirements. Our member presidents' campuses have invested significant resources over the years to train international offices on DOL prevailing wage methodology, including sending staff to NAFSA training courses on prevailing wage.⁸ It is not possible to re-do years of training instantaneously. Thus, the immediate change by the DOL regulation does not allow for a retooling of the methodology to ensure the intended purpose of the regulation.

Even for those member institutions who anticipate that they could comply with the artificially high wage increases for their international employees, these institutions will face serious harms due to inequities between international employees and institutions' American workforce. Additionally, intentionally placing wage requirements far above the prevailing wage for an occupation in a geographic area is contrary to the statute. Institutions would either have to pay their international employees vastly more than similarly situated counterparts and develop strategies to combat the clear internal inequity that creates, or institutions would need to increase wages for all employees in certain divisions to mitigate those internal inequities. For example, at one of our member institutions, a research professor is currently earning \$120,000, but the DOL Rule's new prevailing wage would require an increase to \$205,000, a 71% increase. For another individual, who is serving as a budget analyst currently earning \$104,000, the DOL Rule's new prevailing wage would require an increase to \$177,000. In both instances, these increases would impact larger cohorts of employees.

The rule thus creates a lose-lose situation for institutions: they must either (1) not renew or hire the international faculty, researchers, or staff; forgo the value from investments already made; and cripple their educational and research missions or (2) if they have the resources to devote (and many do not), they must dramatically increase wages for entire cohorts out-of-line with market rates. These changes would result in harm to our institution, students, campus and community. We urge DOL to halt implementation of the rule, provide more information about its methodology, and allow additional time for colleges and universities and other members of the public to comment, so that the agency can resolve these substantive issues.

⁸ See e.g., NAFSA, *Navigating the Nuances of Prevailing Wage Determinations* (as of Oct. 22, 2020), perma.cc/C52N-7APL.

CONCLUSION

It is for all the reasons laid out above that, we urge that the interim final rule be withdrawn in its entirety. We urge that DOL immediately pause implementation of this rule, provide more information about its wage methodology, and allow additional time for public comments. We urge DOL to review and consider this and other comments it receives, and to address our substantive concerns with the wage methodology. We request that the agency comply with the requirements of the APA as it determines how best to reform these programs, without creating new risks or unintended consequences that would undermine the intent of Congress in creating them.

We would welcome the opportunity to engage further with the agency on this and other immigration issues that impact higher education.

Thank you for your consideration of this comment. For questions, please contact me at miriam@presidentsalliance.org.

Sincerely,



Miriam Feldblum

Executive Director

Presidents' Alliance on Higher Education and Immigration