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VIA REGULATIONS.GOV
Mr. Brian Pasternak, Administrator
Office of Foreign Labor Certification
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5311, Washington, DC 20210

Re: Comment of Kelly A. Simons on the Proposed Rule, *Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States*; DOL Docket No. ETA-2026-0001; RIN 1205-AC30

Dear Administrator Pasternak:

My name is Kelly A. Simons. I am a partner at Kramer Partners, LLP, where I counsel employers on employment-based immigration. My clients include public and private universities, academic medical centers and safety-net teaching hospitals, independent and faith-based non-profits, public school systems, and private companies ranging from venture-backed startups to established mid-market firms. I submit this comment in my own name and on the basis of my own practice experience. It reflects my independent analysis of the Proposed Rule[1] and should be evaluated on its own terms.

Summary of Position

> *The Proposed Rule should be withdrawn. It cannot be squared with the text of the Immigration and Nationality Act, which ties the prevailing wage to the local "area of employment" and to wage levels "commensurate with experience, education, and the level of supervision," and which requires the wage determination to rest on "the best information available." The Department's proposal substitutes a results-first percentile target for that statutory inquiry; it would raise costs by amounts the agency never honestly measured for the universities, hospitals, school districts, non-profits, and small companies that anchor my practice; and it would do so by upsetting two decades of settled reliance. If the Department proceeds notwithstanding these defects, it must repair the methodology and adopt a genuine, multi-year transition with protection for in-process cases.*

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1. The Proposed Rule Conflicts with the Text of the INA.

I begin with the statute because the Department barely engages it. Congress did not authorize the Department to peg prevailing wages to whatever percentile produces a desired average. It directed

[1] Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States, 91 FR 15454 (Mar. 27, 2026) ("Proposed Rule" or "NPRM").

something narrower and more specific. Three statutory commands constrain this rulemaking, and the Proposed Rule is in tension with each.

First, the wage must reflect the local *area of employment*.[2] Second, a government survey must yield levels *"commensurate with experience, education, and the level of supervision"*—that is, levels that actually track the skill content of the job.[3] Third, the certified wage must rest on *"the best information available"* at the time of filing.[4] A methodology that inflates every level by the same mechanical step—moving Levels I through IV to the 34th, 52nd, 70th, and 88th percentiles regardless of the occupation's actual education or supervision profile—honors none of these commands. It does not make the figures more "commensurate" with skill; it simply makes them larger. And by pushing the published figures above genuine market wages (a point I develop in Argument 3), it makes the Online Wage Library *less* reliable as "the best information available," not more.

The Department also cannot evade the statute by pointing to the existing "higher of the actual or prevailing wage" rule.[5] That rule already guarantees that an employer may never pay a foreign worker less than it pays comparable U.S. workers. If the concern is that some employers underpay, the lawful answer is enforcement of that existing command, not a wholesale percentile increase that overrides the statutory link between wages and skill.

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2. THE ECONOMIC HARM TO THE SECTORS I REPRESENT IS SEVERE AND LARGELY UNEXAMINED.

The heart of my objection is practical. The Department's preamble discusses software developers and computer systems analysts and projects a tidy aggregate cost. That is not the world my clients live in. Let me describe, concretely, what this rule would do to the institutions I advise.

a. Public and private universities.

Universities sponsor across a vast range of occupations—faculty, postdoctoral researchers, clinical instructors, lab scientists, librarians, and specialized administrators. Educational-services employers filed more than 45,530 labor condition applications in FY 2025 alone.[6] When the wage floor for a sponsored postdoctoral researcher jumps, a grant-funded principal investigator does not receive a larger grant; the budget is fixed and often tied to a named recipient. The result is fewer postdoctoral lines, shorter appointments, and stalled research—precisely the harms a coalition of higher-education institutions documented when they challenged the materially identical 2020 rule.[7] Smaller colleges that compete on affordability cannot raise an entire faculty pay band to avoid pay-equity exposure, so they will simply stop sponsoring.

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[2] INA § 212(n)(1)(A)(i)(II); 8 U.S.C. § 1182(n)(1)(A). DOL defines the "area of intended employment" as the area within normal commuting distance of the place of employment. 20 C.F.R. § 655.715.

[3] 8 U.S.C. § 1182(p)(4) (requiring at least four wage levels "commensurate with experience, education, and the level of supervision").

[4] INA § 212(n)(1)(A)(i); see also 20 C.F.R. § 655.731(a)(2) (employer may rely on a DOL survey, an independent authoritative source, or another legitimate source).

[5] 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); 20 C.F.R. §§ 655.731(a), 656.40 (required wage is the higher of the actual or prevailing wage).

[6] 2026 Active Hiring by NAICS Industry (H-1B LCA), https://www.myvisajobs.com/reports/h1b/industry/ (educational-services employers filed more than 45,530 LCAs in FY 2025).

[7] Br. for the Am. Council on Educ. and 23 Other Higher Educ. Orgs. as Amici Curiae, Purdue Univ. v. Scalia, 2020 WL 7340156 (D.D.C. Dec. 14, 2020).

b. Academic medical centers and safety-net hospitals.

Teaching hospitals rely on H-1B physicians, residents transitioning to attending roles, and specialized therapists to staff services that frequently lose money—trauma, behavioral health, and care in rural and underserved areas. Physician compensation already sits well above OEWS survey figures because of genuine shortages,[8] so an inflated "prevailing" wage does not protect anyone; it simply raises the cost of keeping a clinic open. A hospital that cannot absorb the increase closes the service line. The people harmed are the patients who lose access, not a displaced U.S. worker who does not exist.

c. Public school systems.

This is the sector the Department ignores most completely. School districts sponsor special-education teachers, bilingual educators, speech-language pathologists, and STEM instructors—roles in chronic, documented shortage. Districts are funded by appropriations and millage, not by a market that can pass through higher labor costs. An across-the-board increase in the required wage for a sponsored special-education teacher does not raise wages for American teachers; it forces a cash-strapped district to leave the position vacant, enlarging class sizes and depriving children of services they are legally entitled to receive. The Proposed Rule contains no analysis of public-employer budgets at all.

d. Non-profits.

Charitable research institutes, community clinics, and social-service agencies operate on donations and program grants. Many are cap-exempt and many qualify as small entities, yet the Department's small-entity analysis (Argument 4) never separately accounts for them, even though USCIS already identifies non-profit sponsors for fee purposes.[9] For these employers, a mandated wage increase is not a transfer from employer to worker; it is a reduction in mission output—fewer clinic hours, fewer research projects, fewer people served.

e. Private companies and small businesses.

My corporate clients include startups with fewer than thirty employees. For a young company, a single sponsored engineer whose wage floor rises by tens of thousands of dollars can consume the margin that would have funded the next U.S. hire. And because federal and state equal-pay obligations and basic morale require comparable pay for comparable work, the increase does not stop at the sponsored worker; it ripples through the team. The realistic small-business response is not higher pay all around—it is a canceled requisition, a frozen headcount, or work sent offshore.

Across every one of these sectors the same mechanism operates: because the rule raises the floor only where a foreign national fills the role, it creates a direct economic incentive to avoid foreign-born candidates—including students and trainees already lawfully here—and it triggers compensation "cascades" for incumbent U.S. employees that budget-constrained employers cannot fund. The predictable outcome is fewer jobs, not higher wages. The H-1B program supports more than 580,000 workers across exactly these fields,[10] yet the Department's preamble estimates a total ten-year cost of only $24.59 million.[11] That figure is not credible, and its implausibility is itself evidence that the agency never genuinely studied the institutions this rule would reshape.

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[8] See, e.g., Doximity, Physician Compensation Report (2025) (documenting persistent shortages and above-survey physician pay).

[9] USCIS, Small Entity Compliance Guide for the 2024 Fee Rule (Mar. 28, 2024) (reduced Form I-129 fee of $460 and elimination of the $600 Asylum Program Fee for qualifying non-profits).

[10] USCIS, H-1B Authorized-to-Work Population Estimate (Sept. 30, 2019) (more than 580,000 individuals).

[11] 91 FR at 15480 (estimating a $3.53 million annualized and $24.59 million ten-year cost at a 7% discount rate).

3. THE PERCENTILE TARGETS REST ON A CIRCULAR AND SELF-DEFEATING METHODOLOGY.

Even setting the statute aside, the numbers do not hold together. The Department's central exhibit is the gap between the average actual wage it computed ($121,908) and the average prevailing wage ($111,717), which it treats as proof that prevailing wages are too low.[12] But an employer cannot file an LCA unless it will pay at least the prevailing wage, so every actual wage in that dataset is, by definition, at or above the prevailing wage. The "gap" is not evidence of a defect; it is evidence that employers are obeying the "higher of" rule and paying premiums when the market demands them. Congress created separate actual-wage and prevailing-wage obligations precisely because it expected the two to differ.

The Level IV anchor compounds the problem. OEWS percentiles do not encode experience, education, or supervision.[13] The typical approved H-1B beneficiary was 34 years old in FY 2024,[14] while the median worker in professional and management occupations is 43.5.[15] Anchoring Level IV at the 88th percentile therefore benchmarks early- and mid-career professionals against a far older, more senior population. Because median tenure with a single employer is only 3.9 years,[16] and the 2009 Guidance can assign Level IV at just five years of experience,[17] a defensible Level IV for professional occupations sits far nearer the 50th percentile than the 88th. The Department selected a high-end target and back-solved the remaining levels to reach it—substituting numerical alignment for the statutory inquiry. That is the hallmark of arbitrary action: the agency did not "examine the relevant data and articulate a satisfactory explanation."[18]

The entry-level figure is no better grounded. Since 1997 the Department has set Level I at the 17th percentile;[19] the Bureau of Labor Statistics—the Department's own statistical agency—identifies the 10th-to-25th percentile as the entry-level band.[20] The proposed 34th-percentile Level I exceeds that ceiling, and the Department never explains why it is more correct than the 35th percentile it adopted and then abandoned in 2021,[21] or than the 45th it proposed and lost in 2020.[22] Three different "correct" entry-level percentiles in six years, with no change in the underlying labor market, is the definition of a moving target.

The Department's software-developer rationale also misuses its sources. The Occupational Outlook Handbook's word "typically" does not mean a degree is optional; the Ninth Circuit has squarely rejected

[12] 91 FR at 15471. The Department computed an average prevailing wage of $111,717 and an average actual wage of $121,908 for the same LCAs (FY 2020-2025).
[13] U.S. Bureau of Labor Statistics, OEWS, https://www.bls.gov/oes/ (OEWS percentiles do not report or control for experience, education, or supervision).
[14] U.S. Dep't of Homeland Sec., Characteristics of H-1B Specialty Occupation Workers, FY 2024 (median age of approved beneficiaries: 34).
[15] U.S. Bureau of Labor Statistics, Current Population Survey, Employed Persons by Detailed Occupation and Age (2024) (median age in management/professional occupations: 43.5).
[16] U.S. Bureau of Labor Statistics, Employee Tenure Summary, https://www.bls.gov/news.release/tenure.nr0.htm (median tenure with current employer: 3.9 years).
[17] Emp't & Training Admin., Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (rev. Nov. 2009) ("2009 Guidance").
[18] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[19] Prevailing Wage Policy for Nonagricultural Immigration Programs, General Administration Letter No. 2-98 (Oct. 31, 1997).
[20] U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, https://www.bls.gov/oes/earnings.htm; Beyond Averages: Other Ways to Look at Occupational Wages, BLS Occ. Outlook Q. (Winter 2007-08).
[21] Strengthening Wage Protections, 86 FR 3608 (Jan. 14, 2021) (the 35th/53rd/72nd/90th percentiles), vacated, 86 FR 70729 (Dec. 13, 2021).
[22] Strengthening Wage Protections, 85 FR 63872 (Oct. 8, 2020) (proposing the 45th/62nd/78th/95th percentiles), set aside, Chamber of Commerce of the U.S. v. U.S. Dep't of Homeland Sec., 504 F. Supp. 3d 1077 (N.D. Cal. 2020).

that reading.[23] O*NET—the source the Department actually uses for leveling—confirms that essentially all software developer and occupational-therapist positions require a degree.[24] Those two occupations alone account for roughly forty percent of recent LCAs,[25] which means the rule's stated worry—that low percentiles capture the "least educated" workers—is false for the bulk of the program.[26] A reasoned rule would map O*NET education data onto the OEWS levels rather than raising every occupation's floor in lockstep.

Taken together, these defects render the Proposed Rule arbitrary and capricious under 5 U.S.C. § 706(2)(A).[27]

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4. THE SMALL-ENTITY ANALYSIS VIOLATES THE REGULATORY FLEXIBILITY ACT.

The Regulatory Flexibility Act, as amended, requires a genuine assessment of impact on small entities.[28] The Department's analysis fails on multiple fronts, and several of those failures map directly onto my client base.

— **Undercounted universe.** The Department asserts 13,602 small H-1B employers[29] without disclosing its criteria or data. Because small firms are 99.9% of all U.S. businesses,[30] and because PERM sponsors include small employers with workers in E, L, R, and TN status who never filed an H-1B, the true affected universe is far larger.

— **Understated per-entity cost.** The $20,298 "average wage cost per small entity"[31] counts only the sponsored worker's raise and ignores the pay-equity cascade I described above; and the estimate that one hour of HR time ($60.94) suffices to evaluate the change[32] is unrealistic—twenty hours per affected worker is closer to reality. The rule also presents recurring annual obligations as one-time costs and omits more than 7,000 NAICS codes beyond its top ten.[33]

— **Small non-profits ignored.** The analysis never separately addresses small non-profit sponsors, even though USCIS data identify them for reduced-fee purposes.[34] For community clinics, research institutes, and independent schools, the omission hides the rule's most damaging effects.

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[23] Innova Sols., Inc. v. Baran, 983 F.3d 428, 432 (9th Cir. 2020) ("There is no daylight between typically needed in the OOH and normally required" under the H-1B criteria).
[24] O*NET OnLine, Summary Report for 15-1252.00 (Software Developers), https://www.onetonline.org/link/summary/15-1252.00.
[25] OFLC, LCA Programs Selected Statistics, FY 2026 Q1, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/LCA_Selected_Statistics_FY2026_Q1.pdf.
[26] O*NET OnLine, Summary Report for 29-1122.00 (Occupational Therapists), https://www.onetonline.org/link/summary/29-1122.00.
[27] 5 U.S.C. § 706(2)(A).
[28] Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121.
[29] 91 FR at 15493 ("13,602 unique small H-1B employers" meeting SBA size standards).
[30] Small firms are 99.9% of all U.S. businesses. U.S. Chamber of Commerce, The State of Small Business Now.
[31] 91 FR at 15493 ("average wage cost per small entit[y] is estimated at $20,298").
[32] 91 FR at 15493-94 (estimating one hour of HR-professional time, valued at $60.94).
[33] 91 FR at 15494 & Exhibits 11-23 (top-ten small-business NAICS codes, with average costs from roughly $14,000 to nearly $80,000).
[34] USCIS, Small Entity Compliance Guide for the 2024 Fee Rule (Mar. 28, 2024) (USCIS separately identifies non-profit petitioners for reduced-fee eligibility, data available to DOL).

— **Stale significance threshold.** The 3%-of-revenue threshold borrowed from pre-2019 rules understates impact after years of elevated inflation,[35] making the conclusion that only 15% of small entities are significantly affected unreliable.

The asserted eight-year implementation horizon is also illusory. Workers change employers, and a new employer must apply the current July 1 wage levels at once. With 1,285,721 total LCA approvals in FY 2024 against limited annual cap numbers,[36] large numbers of workers move each year and would feel the increase immediately; and because the PERM green-card process generally must begin by a worker's third H-1B year and requires a prevailing-wage attestation at filing,[37][38] the real impact arrives in months. The Department must redo this analysis before finalizing any rule.

5. Alternative Wage Surveys Should Be Expanded, Not Curtailed.

The Proposed Rule signals that the Department may restrict alternative wage surveys to "limited circumstances."[39] That is exactly backwards, and it contradicts the regulations, which treat DOL surveys and independent authoritative surveys as equally legitimate sources.[40] My corporate and institutional clients license commercial compensation surveys precisely because those surveys ask employers what they actually pay at defined education and experience levels—information OEWS does not capture. By inflating the OEWS percentiles above real market wages, the rule would widen the gap between the government's figures and genuine market data, defeating its own stated objective of accuracy and undermining the statutory "best information available" standard.

OEWS data are, moreover, frequently incomplete: the Department aggregates detailed occupations, reports no data for many occupations, substitutes state or national figures for local ones, and caps entire occupations at a single rate when wages are "too high to provide an estimate."[41] Until OEWS collection is re-engineered to capture education and experience, the Department should broaden—not narrow—reliance on validated private surveys, and could contract with survey providers to streamline review.

6. Any Final Rule Must Include a Genuine Phased Transition.

If the Department proceeds over these objections, it cannot lawfully impose the new floors overnight. Its own 2021 rule phased increases in over eighteen months for most positions and over three and a half years for workers on track to permanent residence,[42] recognizing that an abrupt, dramatic increase can be counterproductive by forcing the very layoffs the rule purports to prevent. The current proposal would instead apply the new levels to any prevailing-wage request pending on the effective date,[43] upending applications properly filed under the existing standard. At a minimum, the Department must (1) exempt requests pending on the effective date; (2) grandfather PERM cases already filed or in recruitment; (3) phase remaining increases over multiple years; and (4) protect H-1B, H-1B1, and E-3 extensions for workers already employed in reliance on the current methodology.

[35] U.S. Bureau of Labor Statistics, Consumer Price Index Summary, https://www.bls.gov/news.release/cpi.nr0.htm.

[36] 91 FR, Exhibit 4 (1,285,721 total LCA approvals, FY 2024), against limited annual cap allocations.

[37] 8 C.F.R. § 214.2(h)(13)(ii)(D); AC21 §§ 104(c), 106(a)-(b).

[38] ETA Form 9089, Section I, Attestation No. 1; 20 C.F.R. §§ 656.40, 656.41.

[39] 91 FR at 15479 (acknowledging that, in "limited circumstances," private surveys may best reflect market wages).

[40] 20 C.F.R. §§ 655.731(a)(2), 656.40(b) (alternative wage sources).

[41] OFLC, Technical Release Notes for the OEWS Update, Wage Year 2025-26 (eff. July 1, 2025) (documenting aggregated, missing, substituted, and capped wage data).

[42] 86 FR 3608 (Jan. 14, 2021) (two-step phase-in over eighteen months; four-step phase-in over three-and-a-half years for workers on track to permanent residence).

[43] 91 FR at 15478 (applying new levels to prevailing wage requests pending on the effective date).

7. CONCLUSION.

I do not write to defend wage abuse. Where a particular employer underpays, the Department should enforce the "higher of" requirement, deploy its Secretary-certified investigations, and rely on the new wage-weighted selection process—tools that already target genuine bad actors.[44] What the Department may not do is dismantle a methodology on which universities, hospitals, school districts, non-profits, and small companies have relied for more than twenty years, on the strength of a circular benchmark, a missing public-sector and non-profit analysis, and percentile targets untethered from the statute's focus on skill and locality. I respectfully urge the Department to withdraw the Proposed Rule, and—if it proceeds—to correct the Level I and Level IV methodologies, preserve and expand alternative surveys, redo the small-entity analysis, and adopt a real multi-year transition that protects pending and in-process cases.

Thank you for considering these comments. I am glad to provide any further information that would assist the Department.

Respectfully submitted,

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[44] U.S. Dep't of Labor, "Project Firewall" (Secretary-certified LCA investigations); 90 FR 60864 (Dec. 29, 2025) (weighted, wage-based H-1B selection).