CENTER FOR STRATEGY & APPLIED INSIGHTS

Bo Cooper
Executive Director
Direct: +1 202 380 1087
bcooper@fragomen.com

Leah L. Rogal
Senior Director
Direct: +1 202 380 1080
lrogal@fragomen.com

FRAGOMEN

ATTORNEYS AT LAW

Fragomen, Del Rey, Bernsen & Loewy, LLP
1101 15th St NW STE 700
Washington, DC 20005

T +1 202 223 5515
F +1 202 371 2898

www.fragomen.com

May 26, 2026

Submitted via regulations.gov

Brian D. 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: Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States; DOL Docket No. ETA-2026-0001

Dear Administrator Pasternak:

The Center for Strategy and Applied Insights at Fragomen (the Center) appreciates the opportunity to comment on the Department of Labor's notice of proposed rulemaking (NPRM) revising the prevailing wage methodology used in the PERM, H-1B, H-1B1, and E-3 programs.[1]

Drawing on lessons learned from Fragomen's long experience as an immigration advisor to employers in the United States and around the world, the Center seeks to identify and analyze issues and trends key in immigration systems, and to offer insight-based suggestions to help those systems function fairly, transparently, and efficiently.

We recognize and support the Department's commitment to ensuring wage integrity and to protecting U.S. workers by prohibiting employers from using the immigration system to pay foreign workers less than similarly qualified American workers. As explained below, however, the prevailing wage methodology proposed in this NPRM would fail to advance, and even thwart, those objectives. The Department's primary proposed approach—to set wage

[1] *Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States,* 91 Fed. Reg. 15,454 (proposed Mar. 27, 2026) (to be codified at 20 C.F.R. pts. 655 & 656).

requirements at chosen percentiles of overall wages paid within a particular occupation in a particular area and then boost those chosen percentiles far above current levels—does not even seek to do what Congress has required by statute: distinguish workers and pay levels based on experience, education, or supervision. At bottom, the proposal would not determine the wage levels that "prevail" in the market and therefore cannot ensure that pay requirements can be set to prohibit paying foreign workers less than similarly situated American workers. Instead, it produces wage requirements disconnected from labor market reality, misclassifies qualified workers, discourages lawful hiring, and raises serious concerns under the Administrative Procedure Act.

As explained below, the Center is writing to highlight four specific deficiencies with the NPRM:

1. The proposed percentile-based methodology relies on statistical assumptions that OEWS data cannot support, and it perpetuates and worsens a defect in the current prevailing wage process by substituting fixed and inflated percentile thresholds for the statute's required calibration of wage levels to the experience, education, and supervision required for the job.

2. Using a percentile-based method and merely raising the fixed percentiles increases prevailing wage requirements without proof of underpayment, excludes qualified workers, and may both prevent hiring well-paid professionals and permit hiring others below-market wages.

3. The defects that result from relying on fixed and raised percentiles are especially acute for non-professional occupations, where market pay levels commonly vary based on factors other than degrees and experience.

4. The NPRM does not meaningfully evaluate worker-specific alternatives, such as experience benchmarking, that would be much more closely aligned with statutory requirements and provide greater accuracy in identifying below-market pay.

I. The Proposed Wage Levels and Percentile-Based Framework Ignore Statutory Requirements, Perpetuate Existing Flaws in Prevailing Wage Requirements, and Depart Even Further from Market Pay Levels.

The NPRM proposes to continue setting prevailing wage Levels I through IV at percentiles of the Occupational Employment and Wage Statistics (OEWS) wage distribution, and simply elevate them far above currently chosen percentiles, to the 34th, 52nd, 70th, and 88th. The Department asserts that these percentiles better reflect experience, education, and level of supervision, but the NPRM does not attempt or even purport to establish any empirical relationship between these percentile cutoffs and the statutory factors they are intended to represent.

The underlying OEWS survey data do not support the experience-based distinctions the NPRM attempts to draw because they do not measure the factors the statute requires the Department to consider.[2] They do not measure worker education, experience, or supervisory responsibility. As the Bureau of Labor Statistics has long explained, variation within OEWS wage distributions reflects differences across employers, industries, firm size, and regional labor markets, not worker seniority or credentials.[3] Fixed percentile slicing of these distributions cannot reliably serve as a proxy for the factors Congress directed the Department to consider.

Independent research confirms that simply raising percentile thresholds does not improve the accuracy of prevailing wage comparisons. Analyses of the proposed percentile framework show that, even at higher thresholds, it frequently fails to determine whether a foreign worker is paid above or below relevant market wages.[4] This, of course, is the central purpose for the prevailing wage requirement. Because OEWS does not survey firms to collect information on employee education and experience, and the resulting data accordingly do not encode education or experience, the percentile-based comparisons remain blind to the very attributes the statute requires the Department to evaluate. As OEWS documentation explains, "employees are assigned to an occupation based on the work they perform," and wage data are collected in fixed wage intervals without reference to experience.[5] The National Academies has cautioned that these types of aggregate distributions do not reveal underlying skill, experience, or other distinguishing characteristics.[6] Raising percentile cutoffs, especially by such large new intervals, therefore changes aggregate wage outcomes very significantly but does not improve the accuracy of comparisons between similarly qualified foreign and U.S. workers.

II. DOL Has Not Provided a Reasoned Explanation for How Raising Fixed Percentiles Would Improve Accuracy.

A. The NPRM Artificially Inflates Wage Floors Without Evidence of Underpayment.

By anchoring the entry-level wage at the 34th percentile, the proposed framework assumes that workers paid below that level are not performing similar work. That is, the proposal is based on the idea that roughly one-third of all workers in a given occupation and location are

[2] Immigration and Nationality Act § 212(p)(4), 8 U.S.C. § 1182(p)(4) (2018) (added by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 423, 118 Stat. 2809 (2004) (requiring the governmental prevailing wage survey to "provide at least 4 levels of wages commensurate with education, experience, and the level of supervision").
[3] U.S. Bureau of Labor Statistics, *OEWS Concepts and Definitions* (explaining that wage variation reflects industry, employer, and geographic differences, and that occupations are classified by duties rather than worker credentials).
[4] Connor O'Brien, Jeremy Neufeld & Amy Nice, *A Prescription for Fixing the Prevailing Wage System: Replacing Blind Benchmarking with Experience Benchmarking*, Inst. for Progress (Mar. 27, 2026), https://ifp.org/prevailing-wage-benchmarking/.
[5] U.S. Bureau of Labor Statistics, *OEWS Documentation* (last modified May 16, 2026), https://www.bls.gov/oes/oes_doc.htm.
[6] National Academies of Sciences, Engineering, and Medicine, *Report Calls for a Coordinated Federal Data System to Better Measure Economic Disparities and Inform Policy* (Mar. 26, 2024).

paid less than the wage that "prevails" for entry-level positions. The administrative record does not support this assumption, nor are we aware of any meaningful economic analysis supporting it. Available labor-market data likewise do not demonstrate a meaningful distinction at that 34th percentile threshold.

The Department's rationale also mischaracterizes the relationship between prevailing wages and actual wages. Under the statute and implementing regulations, employers are already required to pay "the greater of the adjusted actual wage rate or the prevailing wage" for the occupation in the area of intended employment.[7] The Department has consistently described the prevailing wage as a "wage floor," not an expected average or median outcome, as the prevailing wage should properly be characterized. The fact that certified wages often exceed the prevailing wage is not evidence of systemic underpayment; it is the intended result of a minimum-wage safeguard designed to prevent adverse effect. It simply means that many employers, especially in the competitive fields often at issue in H-1B hiring or PERM recruitment, are paying more than the wage that prevails in the market overall. Using the gap between prevailing wages and higher offered wages to justify raising percentile thresholds improperly treats statutory compliance, paying "at least the prevailing wage," as proof that the prevailing wage is inadequate. In reality, that gap reflects how the statute is meant to function.

The assumption that workers below the 34th percentile are not similarly employed is inconsistent with labor market reality. In practice, workers earning below the 34th percentile are often professional employees who meet the occupation's educational requirements but work for smaller firms, in lower-cost regions, or in industries with different compensation structures. Excluding these workers from prevailing wage comparisons artificially inflates wage floors and contradicts the statutory requirement to consider wages paid to all workers who are "similarly employed," not only the highest-paid subset.

The NPRM's assumptions also run counter to modern labor-market practices, where employers increasingly use skills-based hiring and competency frameworks rather than rigid degree screens. Wage distributions in many occupations reflect variation in job duties, firm size, and industry, not educational attainment alone. A prevailing wage methodology that relies on assumed degree-based sorting rather than observed market data will misclassify entry level wages and inflate wages without improving labor-market integrity. The prevailing wage requirement was designed to prevent underpayment, not to exclude qualified workers from the labor market through arbitrary statistical thresholds unrelated to job requirements.

B. The Percentile-Based Methodology Is Statistically Unsound.

The percentile-based framework is fundamentally unsuited to experience-based wage tiering. The OEWS does not survey or report wages by education or experience, yet the NPRM assigns

[7] 20 C.F.R. § 655.731(a).

percentile cutoffs, an experience meaning they cannot support. Anchoring Level I wages near the middle of the distribution and Level IV wages near the extreme top predictably distorts wage outcomes across occupations and regions.

The framework also produces substantial data gaps. For many occupation-location combinations, percentile-based wages are not computable, requiring proxy or default values that bear little relationship to local labor markets. A system that generates widespread missing or implausible results cannot reasonably be described as empirically grounded or administratively workable. OEWS data are broad, backward-looking, and not well suited to capturing how quickly highly specialized roles change.

Additionally, by redefining "similarly employed" through fixed statistical thresholds rather than job-related criteria, the proposed methodology substitutes assumption for evidence. Wage variation within occupations frequently reflects geography, firm size, industry, and job duties—not educational attainment alone. A prevailing wage system built on assumed percentile-based sorting will misclassify workers and inflate wages without improving program integrity.

The NPRM further compounds these problems by deriving prevailing wages solely from OEWS percentiles, without reference to the sponsored worker's actual qualifications. Because OEWS data do not report wages by education or experience, this approach cannot reliably determine whether a foreign worker is being paid less than a similarly qualified U.S. worker—the statutory question the prevailing wage requirement is meant to answer.

Independent empirical analysis confirms that percentile-based benchmarking does not reliably identify whether employers are paying foreign workers below-market wages. The Institute for Progress (IFP) examined H-1B petitions filed between FY 2022 and FY 2024 and compared offered wages to the median wages earned by U.S. workers with the same occupation, geographic location, education, and experience.[8] That analysis found that percentile-based approaches routinely produced both false positives and false negatives when compared to worker-specific benchmarks.[9]

In one illustrative case identified by IFP, a highly educated worker employed in a research-intensive occupation in a high-wage technology labor market was offered a salary more than $22,000 above the median wage earned by similarly situated U.S. workers with the same occupation, education, experience, and location. Despite this clear above-market pay, the offered salary would have fallen below the applicable percentile threshold under the Department's revised framework and would have been flagged as underpaid.

[8] *O'Brien et al., Prevailing Wage System, supra,* at 8-10.
[9] *Id.* at 12-14.

Across the full dataset reviewed, IFP found that percentile-based benchmarking misclassified nearly one-third of cases, while experience benchmarking accurately distinguished between above-market and below-market wages in every instance reviewed. These findings demonstrate that percentile-based proxies do not improve the Department's ability to detect underpayment and, instead, can obscure both compliance and non-compliance by substituting crude statistical thresholds for worker-specific analysis.

Conversely, the alternative experience benchmarking approach would directly compare the sponsored worker's wage to the median wages earned by U.S. workers with the same occupation, geographic area, education, and experience, using supplemental data sources.[10] This method would produce an apples-to-apples comparison grounded in worker-specific qualifications.[11]

By contrast, IFP highlights a case involving an experienced worker with an advanced degree in a technical occupation who was offered a wage more than $17,000 below the median earned by similarly qualified U.S. workers in the same occupation and geographic area. Despite this clear wage gap, the offered salary would have satisfied the revised percentile-based standard because it exceeded the applicable OEWS percentile cutoff. Under experience benchmarking, this petition would have been correctly identified as involving below-market pay. Across the full dataset, IFP finds that experience benchmarking would accurately distinguish between above-market and below-market wages in every instance reviewed, illustrating the limitations of percentile-based proxies and the advantages of worker-specific comparisons.

III. The NPRM Does Not Fully Evaluate Alternatives That Would Be Less Burdensome for Employers.

A. The Department Failed to Meaningfully Consider Alternative Approaches.

The NPRM seems to reflect a finding by DOL that retaining the long-followed fixed percentiles approach, relying primarily on OEWS-generated data, and employing the permissive statutory method for creating 4-levels (picking level 1 and 4 and then creating two middle points not tied to any statistically significant differentials) is the simplest approach. Certainly, it is true that stakeholders are accustomed to a 4-level approach to prevailing wages based on the Department's 2009 Prevailing Wage Determination Policy Guidance. An agency may rely on a simpler approach even where more accurate alternatives exist, but such authority is not unbounded. The Supreme Court has made clear that agency action is arbitrary and capricious where the agency fails to consider relevant data, ignores "important aspect[s] of the problem," or does not provide explanations for its choices.[12] Here, the NPRM does not grapple with the

[10] *Id.* at 8-9.
[11] *Id.* at 15-16.
[12] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

core problem it identifies, distinguishing similarly employed workers, before discarding more tailored alternatives. The APA "requires more than a conclusory statement" and demands that the Department "examine the relevant data and articulate a satisfactory explanation for its action."[13]

The NPRM acknowledges that OEWS data do not measure experience, education, or supervision, yet applies fixed percentile cutoffs as substitutes for those factors without demonstrating that the substitution is valid.[14] While the Department briefly references alternative approaches, including experience benchmarking and other structural reforms, it does not meaningfully evaluate whether those alternatives would better address its stated concerns or explain why they were rejected. The absence of a comparative analysis undermines the Department's reasoning and limits commenters' ability to assess whether the NPRM reflects a proportionate and evidence-based response.

B. The Experience Benchmarking Alternative Would Not Impose New Administrative Burdens.

The Department requests comment on whether an experience benchmarking approach, requiring submission of worker-credential information would be administratively feasible or unduly burdensome.[15] That framing identifies a theoretical concern that overlooks that employers already collect, assess, and document worker credentials as part of existing H-1B and PERM processes. Because these credentials are required at the time of H-1B registration, LCA attestation, petition and PERM filing, they are necessarily known to and readily available to petitioners.

In the H-1B context, petitioners must determine before registration and petition filing that the offered position qualifies as a specialty occupation and that the beneficiary meets the position's education and experience requirements. This is especially true for cap-subject filings because, under the current H-1B registration system and the weighted lottery, petitioners must identify a unique beneficiary at the registration stage and assess education and experience to determine the appropriate wage level. The same evaluation is required for cap-exempt filings and for change-of-status and extension petitions. Across business, industry, and academia, employers necessarily know the job requirements and worker credentials before signing Labor Condition Application (LCA) attestations, obtaining prevailing wages (usually self-collected from the FLAG system's share of OEWS's data), and filing the LCA.

---

[13] *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1086 (11th Cir. 2013).

[14] NPRM at 15,491 (inviting public comment on "on all aspects of this alternative").

[15] NPRM at 15,491 (specifically inviting "comment on whether this [experience benchmarking] approach is more consistent with the statutory requirements for both the H-1B and PERM programs, the administrative feasibility and burden on employers and applicants to provide information about the alien worker's qualifications on revised Forms ETA-9035 and ETA-9141 and in a manner similar to the current authorized collection on Form ETA-9089, Appendix A, and whether this alternative better protects similarly employed U.S. workers from adverse effects").

The PERM process similarly requires employers to define the minimum job requirements, conduct recruitment based on those requirements, and confirm that the foreign worker satisfies them. These showings must be supported by documentation, retained and attested under penalty of perjury.

Requiring submission of credential information for experience benchmarking would therefore not create new or materially different administrative burdens. The information is already collected, reviewed, and documented as a routine part of existing recruitment processes.

IV. The Percentile-Based Methodology Is Especially Flawed for Non-Professional Occupations.

The flaws with the NPRM's primary proposal to adopt raised fixed percentiles are even more pronounced for non-professional occupations. Many covered occupations—including technicians, skilled trades, and health care support roles—do not follow a bachelor's-degree-based or linear experience-based wage progression. In these labor markets, wages vary based on factors such as shift schedules, work setting, licensure, unionization, regional demand, and other job-specific conditions unrelated to education or experience. Applying fixed percentile thresholds to these occupations disregards how these markets function and risks producing wage levels untethered from job requirements.

The Department itself acknowledges that education and experience-based benchmarking "may not be feasible for all occupations, particularly non-professional occupations, because data on workers' education and experience are not consistently available for those occupations."[16] At the same time, the Department concedes that its economic analysis is informed largely by H-1B data, which predominantly reflect professional, degree-based roles.[17] The NPRM does not reconcile this limitation with its decision to apply the same percentile-based framework across fundamentally different labor markets.

An examination of EB-3 PERM applications in non-specialty occupations shows that the proposed fixed percentile framework would materially raise entry-level wage floors in ways inconsistent with how comparable Americans with the same education and experience are paid. The Center reviewed a representative sample of PERM applications in the EB-3 category for jobs in Job Zones 1, 2, and 3—occupations that generally do not qualify as specialty occupations eligible for H-1B classification. Across the occupations and geographic areas reviewed, and regardless of filing volume, the unweighted salary increase imposed by the proposed fixed percentiles would average 16.9 percent for Level I positions, which are commonly used in EB-3 PERM filings.

[16] NPRM at 15,518.

[17] NPRM at 15,492-15,493 (acknowledging that "the Department's analysis of prevailing wage levels is informed largely by data from the H-1B program").

The resulting wage increases are particularly pronounced for experienced workers in occupations facing persistent labor shortages, where PERM filings occur across multiple wage levels. In these cases, the application of raised OEWS percentiles does not appear well aligned with local labor-market conditions. For example, for Home Health and Personal Care Aides (Job Zone 2, SOC 31-1121) in the Boston MSA, the proposed methodology would increase Level IV wages by 48.3 percent compared to current prevailing wage determination standards. Similar disparities appear at Level IV for Nursing Assistants (Job Zone 3, SOC 31-1131) and for Licensed Practical and Licensed Vocational Nurses (Job Zone 3, SOC 29-2061), suggesting that the percentile-based approach can generate wage outcomes that diverge substantially from prevailing market conditions in these roles.

In contrast, the Center's review suggests that under the experience-benchmarked approach described in the NPRM, prevailing wages would more closely align with the actual wages paid to similarly credentialed U.S. workers. The Department's responsibilities under the PERM program require an assessment of whether the employment of foreign workers adversely affects the wages and working conditions of U.S. workers who are similarly employed. The credentials focus of experience benchmarking offers a more direct and job-relevant means of conducting that assessment and therefore represents a promising path for prevailing wage reform in the PERM context that warrants serious consideration.

Conclusion

For the reasons detailed above, the Department should withdraw or substantially revise the proposed prevailing wage methodology. Any final rule should reflect the limitations of OEWS data, meaningfully evaluate reasonable alternatives, and adopt an approach grounded in actual labor market conditions and worker-specific qualifications, consistent with statutory requirements.

A prevailing wage system grounded in empirical reality strengthens worker protections while preserving the talent pipeline necessary for innovation, growth, and U.S. competitiveness.

Respectfully,

Center for Strategy and Applied Insights at Fragomen

Bo Cooper
Executive Director

Leah Rogal
Senior Director