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Brown Immigration Law P.C., L.L.O.

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U.S. Department of Homeland Security ("DHS")
U.S. Department of Labor ("DOL")
Employment and Training Administration ("ETA")

SUBMITTED VIA FEDERAL REGISTER ONLINE PUBLIC COMMENT TOOL
REGULATIONS.GOV

**RE: Comment regarding DOL's Notice of Proposed Rulemaking ("NPRM"), *Improving Wage Protections for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States***

We respectfully submit this comment to strongly oppose DOL's NPRM, 20 CFR Parts 655 and 656, [DOL Docket No. ETA-2026-0001], RIN 1205-AC30. We submit this comment as a professional services firm that provides comprehensive business immigration support to U.S. employers seeking to hire and retain foreign talent. Our clients range from well-established U.S. companies to early-stage startups, nonprofit research institutions, and consulting companies. We represent over 400 U.S. corporate clients and have, for the last 20 years, regularly assisted clients in filing H-1B, E-3, H-1B1, H-2B, H-2A and related petitions, along with PERM applications. Through our extensive experience advising our clients on employment-based matters and strategy, we have a deep understanding of both the legal framework and the real-world challenges facing employers and foreign talent alike. We are acutely aware of the critical contributions high-skilled foreign professionals make to the U.S. economy, especially in driving innovation in critical fields such as science, technology, engineering, healthcare, and research. We also provide this response as interested observers, separate and apart from client considerations, we believe that what makes this country special and unique is its history of immigration, and though our business immigration system is in need of overdue reform, this NPRM is not an advantageous change.

We support changes that strengthen the system, reinforce the integrity of existing processes, and, where possible, create efficiencies or streamline processing. We also welcome changes that promote the hiring and retention of highly talented individuals who contribute economic value and enrich our communities culturally. Unfortunately, the NPRM accomplishes none of these objectives and instead is likely to cause significant harm to the system as it currently operates. It is also unlikely to promote wage growth for U.S. workers. Indeed, it is far more likely that any wage growth resulting from this regulatory change will accrue to foreign workers at levels that exceed any prospective wage growth passed on to U.S. workers.

The published proposal is substantially similar to a prior proposal introduced in 2020. Chief among the proposed changes is a recalculation of the prevailing wage rates commonly used for LCA filings and prevailing wage determinations supporting H-1B, H-1B1, E-3, and PERM-related filings. The new wage

level percentiles are significantly higher than those currently used for such filings and, as a result, the proposed changes do not align with market forces.

For example, Wage Level I in the current four-level wage scale is set at the 17th percentile of wages for a specific occupation in a specific geographic area. Although Wage Level I is intended to cover entry-level positions and those with some experience, usually up to two (2) years of experience after graduation, it also corresponds with market forces based on our substantial experience with a wide range of employers, both large and small. Under the NPRM, however, the new Wage Level I rate would be based on the 34th percentile, suggesting that this wage represents approximately one-third of salaries paid across the wage spectrum. On its face, this is illogical. These are entry-level positions within their respective occupations, and setting the salary threshold at that level is inconsistent with market conditions. At the other end of the spectrum, Wage Level IV is currently set at the 67th percentile, and the NPRM proposes increasing it to the 88th percentile.

Importantly, these Wage Levels are not applied in a vacuum. DOL has developed and published a methodology for determining the applicable Wage Level. Under DOL's guidance, certain job or occupation attributes add "points," which increase the Wage Level used. As a baseline, every position begins at Wage Level I, and each additional point raises the Wage Level by one. If three points are added, Wage Level IV must be applied. It is widely understood that Wage Level IV is assigned to a position requiring a bachelor's degree and five years of experience. Conceptually, this means that a 27-year-old who holds a bachelor's degree and has five years of experience would, under DOL's guidance, be paid at the 67th percentile of the wage range. This outcome defies common-sense understandings of wage progression. Put simply, an individual five years into a 30-year career would be expected to fall within the top two-thirds of the salary distribution. That position implies there is little or no wage growth for individuals with 10, 15, or 20 years of experience, which is not accurate and does not reflect how compensation works in any industry. Importantly, the way DOL currently determines the Wage Level is flawed. Through this NPRM, DOL seeks to take a flawed system to which employers have adapted and make it even more difficult to follow.

By artificially raising wage rates at each level, this proposal will likely price thousands of employers out of the system. The current framework allows employers to rely on external salary surveys in lieu of the prevailing wage rates published by DOL. Under the current prevailing wage rates, employers do use qualifying external surveys, when necessary, in both LCA and PERM filings, but in our experience such use is relatively rare. If this NPRM is adopted and the new Wage Levels are applied pursuant to the existing DOL points framework, many employers will be unable to qualify within specific wage ranges without significant budgetary consequences, or they will be forced to rely on outside surveys to file LCAs or PERM applications. This will create substantial additional expenses for those employers to comply with an existing lawful government program. Additionally, in many parts of the United States and for many positions in which H-1B workers are hired, qualifying outside surveys are often unavailable, forcing employers in those circumstances to rely solely on the Wage Levels produced by DOL.

The existence of public wage data should serve a public purpose. By artificially increasing the wage representation at each level, the public benefit is directly undermined. Members of the public who routinely

rely on this information, including petitioning employers, will no longer find it meaningful and will instead be forced to use alternative sources to their economic detriment because of the increased cost of compliance. In addition, for some positions, appropriate private survey data will be insufficient for the location or role involved, and the employer will therefore be forced either to use the government wage ranges as updated or to forgo filling the position with a qualified foreign hire.

This change appears to be a misguided attempt to increase wages generally by relying on the theory that, if the government makes it more expensive to hire H-1B workers because those positions must be paid more, it will in turn raise all wages, including for U.S. citizens. For example, if the current prevailing wage is $100,000 and it increases to $115,000, employers may pay H-1B workers at least $115,000, with the expectation that this will in turn pressure employers to pay U.S. workers a similar increase. However, such changes are not required by the H-1B or E-3 visa programs. The requirement is simply that hiring foreign workers in these roles should not undercut U.S. workers' wages. Thus, an H-1B worker with the level of education and experience required for the job should not be paid less than a similarly situated U.S. worker but may be paid more. As the new Wage Levels inflate wage rates for certain H-1B occupations in certain locations, employers may find themselves increasing compensation for some candidates, but there is no requirement that they implement corresponding increases across the board. This could harm, rather than help, U.S. workers' wages.

More likely, this is an effort to limit H-1B hiring by pricing it out of reach for many employers. Importantly, employers with significant needs for foreign talent, due to the relative size of U.S.-born graduating classes in many key industries, either have sufficient capital to pay higher wages for those they sponsor on H-1B or may rely on outside surveys for those roles. In either case, the wage rate is a limited obstacle for some employers, and where demand exists, artificial barriers will not stop the filing of H-1Bs. However, employers that have the need but lack the financial capacity—namely schools, hospitals, universities, and nonprofits—may be unable to find qualified workers because they do not have the resources to comply with the new Wage Levels or to use a qualified external survey. While such an outcome may help limit H-1B or E-3 hiring, it also prevents employers from hiring key talent to meet unmet needs.

We also find it important to note that this NPRM is not required by the Immigration and Nationality Act ("INA") and, arguably, is unsupported by the INA. The INA only requires that any survey used to determine prevailing wages "provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." *See* 8 U.S.C. § 1182(p)(4). The plain text of the statute does not mandate that any wage level be set above the median, nor does it assign the DOL authority to set wages at the 34th, 52nd, 70th, and 88th percentiles rather than any other configuration. The DOL's selection of these specific thresholds reflects a policy preference, not a statutory duty. Searching for other justification outside of the INA also comes up short. The DOL's own LCA data from FY2020-2025, cited in the rulemaking, shows that the average wage actually offered to H-1B workers ($121,908) exceeds the average OEWS prevailing wage of $111,717 by more than $10,000. *See* 91 Fed. Reg. at 15492. The DOL argues that this gap "indicates that the prevailing wage is set below the market value of comparable U.S. workers." *See id.* However, this is the wrong conclusion. Rather, this data indicates that some employers are already paying above the floor, thus, the floor is functioning as intended – it is a minimum protection, not a market-setting mechanism.

Dramatically increasing the floor does not protect U.S. workers from wage suppression that the data does not show is occurring, rather, it prices out smaller, but incredibly important, organizations from being able to hire needed talent. Along the same lines, we also proffer that the proposed rule cannot survive arbitrary and capricious review under the APA. *See* 5 U.S.C. § 706(2)(A). The DOL has offered no principled explanation for why the specific thresholds represent a legally or empirically correct calibration of 'commensurate' wages, as opposed to any other configuration. This is not a minor gap in reasoning; it is a central deficiency of this rulemaking. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." The DOL has not met that standard here. The proposed percentiles are materially identical to those advanced in the October 2020 interim final rule, which is a rule that was vacated on procedural grounds and never subjected to the adversarial testing that notice-and-comment provides. The DOL has simply recycled those figures without explaining why they were correct in 2020, why the passage of six (6) years and a changed labor market does not alter the analysis, or why the intervening LCA data, which shows many employers already paying above the prevailing wage floor, does not counsel a more restrained adjustment. An agency that selects a number because it previously selected that number, without more, has not engaged in reasoned decision making.

In closing, we have serious reservations about the NPRM. It will create additional burdens for employers, especially in key industries that are important to our economic well-being as a knowledge-based economy. It will also distort public data and undermine the purpose for which it exists, and it is likely to negatively affect the wages of U.S. workers insofar as these new Wage Levels will require U.S. employers to pay more for foreign talent without separately mandating increases to U.S. workers' wages.