



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

July 26, 2017

Mr. Michel Smyth
OMB Desk Officer for DOL–BLS
Office of Information and Regulatory Affairs
Office of Management and Budget, Room 10235
725 17th Street NW
Washington, DC 20503

Submitted via e-mail: OIRA_submission@omb.eop.gov

RE: Comment Request: Report on Occupational Employment and Wages

Dear Mr. Smyth:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments in response to the Department of Labor’s (DOL) “Agency Information Collection Activities; Submission for OMB Review; Comment Request; Report on Occupational Employment and Wages” (OMB Control No: 1220-0042) published in the Federal Register on June 26, 2017.¹ We applaud DOL’s initiative to modernize the mechanism used to collect wage information that is utilized in preparing the Occupational Employment Statistics (OES) Wage Survey, and we are hopeful that through this process, the OES Wage Survey will better represent actual market data regarding wages paid by employers. We encourage DOL to treat this process as just the first step to improve to the OES Wage Survey, so that it ultimately follows generally-accepted statistical survey methodology and provides a true representation of market wage data.

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the collection of data for the OES survey and believe that our members’ collective expertise and experience makes us particularly well-qualified to offer comments on this matter.

1. Increase Data Collection in Order to Provide a More Accurate OES Wage Survey

We applaud the efforts of DOL to move toward the electronic collection of wage data for the OES Wage Survey, and we respectfully note that this change is long overdue. While the OES

¹ 82 Fed. Reg. 28906 (June 26, 2017).

Wage Survey is used for a variety of purposes, one that is particularly important is its use in setting prevailing wages for immigration petitions. Nonimmigrant employment categories such as H-1B, H-2B, and E-3 require the employer to demonstrate that it is paying the prevailing wage for the position involved, and most employers rely on the OES Wage Survey for this purpose. Moreover, a key part of the PERM labor certification process – the first step of the employment-based green card process in most cases – is obtaining from the Office of Foreign Labor Certification’s National Prevailing Wage Center (NPWC) a “prevailing wage determination” for the position that is the subject of the application. With limited exceptions, the NPWC relies on the OES Wage Survey in issuing these determinations. As a result, it is critical that the OES Wage Survey accurately reflect what employers are actually paying workers performing similar roles.

Unfortunately, the OES Wage Survey frequently does not provide accurate market data. Perhaps due to a limited sample size or the methodology of the survey itself, the OES Wage Survey often provides a prevailing wage that is disconnected from the actual market rate for wages and is inconsistent with well-established and sophisticated statistically-conducted salary surveys for the same geographic areas, such as Towers-Watson, Radford, and Mercer. This disconnect calls into question the validity and underlying methodology of the OES Wage Survey.

Prevailing wage data also fluctuates wildly from year to year, in a way that simply cannot be explained by presuming that employers have decided to provide employees with massive, across-the-board wage increases or reductions. Below are a few examples of situations where OES wage data has fluctuated significantly from year to year:

Level IV Actuary (15-2100) in Phoenix-Mesa-Scottsdale, AZ MSA

All Industries database for 07/2016-06/2017 - \$97,136/year

All Industries database for 07/2017-06/2018 - \$170,269/year

Level IV Health Specialties Teachers, Postsecondary (25-1071) in Jacksonville, FL MSA

ACWIA - Education Industry database for 7/2016-6/2017 - \$82,010/year

ACWIA - Education Industry database for 7/2017-6/2018 - \$241,700/year

Level IV Industrial Production Manager in Phoenix-Mesa Scottsdale, AZ MSA

All Industries database for 07/2016-06/2017 - \$122,678/year

All Industries database for 07/2017-06/2018 - \$113,485/year

Level IV Marketing Manager in Taunton-Middleborough-Norton, MA NECTA Division

All Industries database for 07/2016-06/2017 - \$170,348/year

All Industries database for 07/2017-06/2018 - \$221,354/year

These fluctuations can only be explained by problems with the data or the mechanism for collecting the data, for the OES Wage Survey. College professors teaching health classes in Jacksonville, Florida, certainly did not receive a \$160,000 raise overnight on July 1, 2017. Likewise, there is no reason to believe that Industrial Production Managers in Phoenix took a nearly 10% pay cut on July 1, 2017, but that is what the data in the OES Wage Survey indicates.

One critical step to correcting existing problems with the OES Wage Survey is gathering more responses from employers. Business has long ago shifted primarily to electronic communication, and gathering information from employers by providing a paper survey that the employer fills out by hand and returns via mail is outdated, burdensome, and inconsistent with modern business realities. This system of collecting wage information is a likely contributor to the low response rate and raises concerns that a small number of responders may provide data that is entirely out of touch with market wage data. Bad data leads to bad results, and simply increasing the amount of data available is a step in the right direction toward improving the quality and accuracy of the OES Wage Survey. Therefore, AILA strongly supports DOL's proposal to implement electronic data gathering methods.

As DOL makes this shift, however, it will be important to ensure that the data received still represents a wide range of employers. If large, multinational companies respond to an electronic data request, but small, less sophisticated employers do not receive an email or lack the ability to respond, this too will skew the data. We trust that in implementing new collection methods, DOL will take the necessary steps to ensure that the data received is analyzed and reported using appropriate and accepted statistical analysis techniques.

We note in particular that one goal of this proposed change is to “minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.”² AILA is particularly supportive of this goal, and we encourage DOL to go beyond simply allowing survey responses via email. Many employers possess large quantities of wage information, and DOL would greatly improve the accuracy of the data received by providing employers with a more flexible way to provide it. Having employers complete an inflexible survey form, even if that form can then be submitted by email, does not solve the underlying problem. Instead, DOL should take steps to allow data to be uploaded through systems that minimize the burden on employers. Only with this kind of change will the OES Wage Survey have the necessary data to accurately reflect market wages.

2. Expand the Scope and Categories of Data Collected to Further Improve the OES Wage Survey

DOL's proposal to move to electronic collection of wage data should be just the first of a number of changes. For the OES Wage Survey to truly be an accurate reflection of market wage data, DOL must also expand the scope and categories of data collected from employers. AILA is hopeful that the proposed change to electronic responses in lieu of paper surveys is the first step of many that DOL is planning to implement to improve the OES Wage Survey.

For example, a flaw in the existing wage data collection practices is that DOL's survey does not ask for wage data about various skill or experience levels for rates of pay. Instead, the current

² 82 Fed. Reg. 28907 (June 26, 2017).

survey simply asks for what positions an employer has and what it pays workers in those positions. There are no questions about the amount of experience required for a particular role or whether the role involves niche skills or other characteristics that would lead to payment of a higher wage. The four wage levels listed in the OES Wage Survey come not from employers describing what is being paid at various experience or skill levels, but rather through a mathematical formula created by Congress in 2004. DOL should change the methodology by which it gathers data in order to correct this problem. This would then allow DOL to report wage levels in the OES Wage Survey that reflect data reported by employers.

The current OES Wage Survey also suffers from the fact that it includes compensation received by employees as non-guaranteed merit-based bonuses, while DOL regulations for the H-1B, H-2B, and PERM programs prohibit employers from relying on any non-guaranteed compensation in meeting the prevailing wage. This effectively forces employers to compare apples to oranges – the data collected for the OES Wage Survey includes bonuses, but employers relying on that survey cannot include bonuses in meeting the required wage. This could be addressed by gathering information from employers on both base pay and discretionary bonuses, and ultimately reporting those wage elements in the OES Wage Survey.

In addition, the OES Wage Survey currently lists only four levels of wages ranging from entry-level to very experienced, but the DOL 2009 Prevailing Wage Guidance³ requires most professional positions requiring anything more than a Bachelor's degree and five years of experience to be classified at the very highest level of experience. As a result, the prevailing wage for a 26 year old software engineer who is five years out of college receives the same prevailing wage as a software engineer with 25 years of experience. In contrast with the OES, many private wage surveys that are used by employers to set wages company-wide include eight or more wage levels. AILA encourages DOL to gather the kind of data it would need to make comparable distinctions in wage leveling to produce an accurate survey that differentiates wages between someone with 5 years of experience and someone with decades of experience.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

CC:

U.S. Department of Labor-OASAM
Office of the Chief Information Officer
Attn: Departmental Information Compliance Management Program
Room N1301, 200 Constitution Avenue NW.
Washington, DC 20210
Via email: DOL_PRA_PUBLIC@dol.gov

³ See Employment and Training Administration, Prevailing Wage Determination Policy Guidance (revised November 2009), available at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.