DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 656

RIN 1205–AB11

Labor Certification Process for the Permanent Employment of Aliens; Researchers Employed by Colleges and Universities, College and University Operated Federally Funded Research and Development Centers, and Certain Federal Agencies

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) is publishing a final rule relating to labor certification for permanent employment of immigrant aliens in the United States. The amendments change the way prevailing wage determinations are made for researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDC's) operated by colleges and universities, and Federal research agencies. The final rule also changes the way prevailing wages are determined for colleges and universities, FFRDC's operated by colleges and universities, and Federal research agencies filing H–1B labor condition applications on behalf of researchers, since the regulations governing prevailing wage determinations for the permanent program are followed by State Employment Security Agencies (SESA's or State agencies) in determining prevailing wages for the H–1B program.

EFFECTIVE DATE: May 4, 1998.

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SUPPLEMENTARY INFORMATION:

I. Introduction

On April 22, 1996, ETA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) proposing to amend ETA's regulations at 20 CFR part 656 to permit prevailing wage determinations for researchers employed by colleges and universities to be based solely on the wages paid by such institutions. 61 FR 17610. In addition to inviting comments on that proposal, commenters were invited to submit comments about extending the proposed rule to researchers in other employment, such as Federal nonprofit research agencies and their affiliated nonprofit research institutions. Comments were invited from interested persons through May 22, 1996. This document adopts final regulations based upon the April 22, 1996, NPRM and the comments received.

II. Permanent Alien Employment Certification Process

Before the Department of State (DOS) and the Immigration and Naturalization Service (INS) may issue visas and admit certain immigrant aliens to work permanently in the United States, the Secretary of Labor (Secretary) first must certify to the Secretary of State and to the Attorney General that:

(a) There are not sufficient United States workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of such aliens will not adversely affect the wages and working conditions of similarly employed United States workers. 8 U.S.C. 1182(a)(5)(A).

If the Secretary, through ETA, determines that there are no able, willing, qualified, and available U.S. workers, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers, DOL so certifies to the INS and to the DOS by issuing a permanent alien labor certification.

If DOL cannot make either of the above findings, the application for permanent alien employment certification is denied. DOL may be unable to make either of the two required findings for one or more reasons, including, but not limited to:

(a) The employer has not adequately recruited U.S. workers for the job offered to the alien, or has not followed the proper procedural steps prescribed in 20 CFR part 656.

These recruitment requirements and procedural steps are designed to test the labor market for available U.S. workers. They include providing notice of the job opportunity to the bargaining representative (if any) or posting of the job opportunity on the employer's premises, placing an advertisement in an appropriate publication, and placing a job order for 30 days with the appropriate local public employment service office.

(b) The employer has not met its burden of proof under section 291 of the Immigration and Nationality Act (INA) (8 U.S.C. 1361), that is, the employer has not submitted sufficient evidence of attempts to obtain qualified, willing, able, and available U.S. workers and/or the employer has not submitted sufficient evidence that the wages and working conditions which the employer is offering will not adversely affect the wages and working conditions of similarly employed U.S. workers. With respect to the burden of proof, section 291 of the INA states, in pertinent part, that:

> Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible for such visa or such document, or is not subject to exclusion under any provision of (the INA) * * *.

III. Department of Labor Regulations

The Department has promulgated regulations, at 20 CFR part 656, governing the labor certification process described above for the permanent employment of immigrant aliens in the United States. Part 656 was promulgated pursuant to section 212(a)(14) of the INA (now at section 212(a)(5)(A)). 8 U.S.C. 1182(a)(5)(A).

These regulations set forth the factfinding process designed to develop information sufficient to support the granting or denial of a permanent labor certification. They describe the potential of the nationwide system of public employment service offices to assist employers in finding available U.S. workers and how the factfinding process is utilized by DOL as the primary basis of developing information for the certification determinations. See also 20 CFR parts 651–658; and the Wagner-Peyser Act (29 U.S.C. Chapter 4B).

Part 656 sets forth the responsibilities of employers who desire to employ immigrant aliens permanently in the United States. Such employers are required to demonstrate that they have attempted to recruit U.S. workers through advertising, through the Federal-State Employment Service System, and by other specified means. The purpose is to assure an adequate test of the availability of qualified, willing, and able U.S. workers to perform the work, and to ensure that aliens are not employed under conditions that would adversely affect the wages and working conditions of similarly employed U.S. workers.

IV. Prevailing Wages and Researchers

Employers seeking a permanent labor certification must recruit for U.S. workers at prevailing wages. The

SESA's survey prevailing wage rates on behalf of DOL. The permanent labor certification regulations at § 656.40 specify how State agencies are to calculate prevailing wages. The prevailing wage methodology set forth is used not only in determining prevailing wages for the permanent labor certification program, but is also followed in determining prevailing wages for the H–2B temporary nonagricultural certification program, the H–1B labor condition application (LCA) program, and the (expired) F–1 student off-campus employment program. See 20 CFR part 655, subparts A, H, and J, respectively. In each of these programs, the applicable legislative and/or regulatory history requires that prevailing wages be determined in accordance with the requirements of the permanent labor certification regulations at 20 CFR 656.40.

Section 656.40 of the permanent labor certification regulations requires that in the absence of a wage determination issued under the Davis-Bacon Act, the Service Contract Act, or a collective bargaining agreement, the prevailing wage shall be the weighted average rate of wages paid to workers similarly employed in the area of intended employment, *i.e.*, ''the rate of wages [is] to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers.'' Section 656.40(b) further provides that ''similarly employed'' is defined as having substantially comparable jobs in the occupational category in the area of intended employment.

The INA requires that the wages paid to an H–1B professional worker be the higher of the actual wage paid to workers in the occupation by the employer or the prevailing wage for the occupational classification in the area of employment. The H–1B regulations incorporate the language of 20 CFR 656.40 (as suggested by H.R. Conference Report, No. 101–955, October 26, 1990, page 122) and provide employers filing applications the option of obtaining a prevailing wage determination from the SESA, using an independent authoritative source or other legitimate source, as provided by § 655.731(a)(2)(iii)(B) and (C) of the H–1B regulations. Thus, this final rule applies to the H–1B program as well.

V. Effects of Hathaway Children's Services on Prevailing Wages

In accordance with the *en banc* decision of the Board of Alien Labor Certification Appeals (BALCA or Board) in *Hathaway Children's Services* (91–INA–388, February 4, 1994), prevailing wages are calculated by using wage data obtained by surveying employers across industries in the occupation in the area of intended employment. In *Hathaway*, the BALCA overruled its decision in *Tuskegee University* (87–INA–561, Feb. 23, 1988, *en banc*), which had interpreted § 656.40 to permit an examination of the nature of the employer's business in ascertaining the appropriate prevailing wage. 87–INA–561 at 4. In Tuskegee, the Board had said, in relevant part:

> Thus to be ''similarly employed'' for purposes of a prevailing wage determination, it is not enough that the jobs being compared are in the same occupational category; they must also be ''substantially comparable.'' Accordingly, it is wrong to focus only on the job title or duties; the totality of the job opportunity must be examined * * *.
>
> It is clear that it is not only the job titles, but the nature of the business or institution where the jobs are located—for example, public or private, secular or religious, profit or non-profit (sic), multinational corporation or individual proprietorship—which must be evaluated in determining whether the jobs are ''substantially comparable.''

In *Hathaway*, the Board declined to make an exception for maintenance repairers employed by nonprofit institutions, analogous to the exception it had made in *Tuskegee*. The employer in *Hathaway*, a nonprofit United Way affiliate, urged that the Board's decision in *Tuskegee* should be dispositive. The employer argued that the rationale in *Tuskegee* necessarily extends to nonprofit employers, thereby differentiating them from for-profit employers.

The Board stated in *Hathaway* that its holding in *Tuskegee* was ill-advised and explicitly overruled it. The Board went on to say that:

> The underlying purpose of establishing a prevailing wage rate is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality. It follows that the term ''similarly employed'' does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for performance of the job offered * * *.

In accordance with the holding in *Hathaway*, SESA's were instructed to survey all employers, without regard to the nature of the employer, in the area of intended employment in determining prevailing wages for an occupation.

It was subsequently asserted that implementation of this policy resulted in considerably higher prevailing wage determinations for research positions in colleges and universities. The higher education community maintained that this policy jeopardized its ability to recruit foreign researchers with talents and skills not readily available in the U.S. Further, following the decision in *Hathaway*, the Department received comments and inquiries from Congress and other Federal agencies and organizations, such as the Council of Economic Advisors (CEA); National Science Foundation (NSF); Department of Defense, Defense Research and Engineering (DRE); Office of Science and Technology Policy (OSTP); National Institutes of Health (NIH); National Aeronautics and Space Administration (NASA); United States Department of Agriculture (USDA); United States Geological Survey (USGS), Department of Energy (DOE), and Department of Transportation (DOT), expressing concern about the Department's change of policy in determining prevailing wages for researchers employed by universities.

VI. Bases for Proposed Rule

The Department believed there were substantial policy reasons to propose an exception to the current rule.

Among the bases of the proposed rule were:

- *The nonproprietary nature of academic research as articulated by the American Association of Universities.* The Department specifically requested comments on whether there are attributes of academic research that distinguish it from research conducted by private, for-profit employers. This was a factor in determining that such workers are not similarly employed.
- *Other Federal agencies.* Other Federal agencies and organizations with an interest in the research talent, knowledge, skills and abilities available to the U.S. academic community expressed concerns that the *Hathaway* decision could interfere with the ability of institutions of higher education to obtain the services of talented foreign scholars and researchers.
- *The belief of the academic community and others that intangible, non-pecuniary factors that are incentives for working in an academic environment should be considered in determining prevailing wages for researchers employed by institutions of higher education.* The Department stated that it was interested in comments specifying the nature of these intangible benefits and how they are unique to higher education.

The Department also invited comments with respect to extending the concept discussed in the proposed rule to prevailing wages in other employment, such as instances in which

researchers are employed by Federal research agencies and their affiliated nonprofit research institutions engaged in research, in which postdoctoral fellows and visiting scientists may be employed in a manner similar in certain respects to colleges and universities.

In sum, the proposal reflected a determination that consideration of all of the above factors supported a conclusion that researchers employed by colleges and universities may not be similarly employed to researchers employed by private, for-profit employers.

One also should note that in the context of college and university employment there is precedent, albeit statutory, for treating workers attached to the academic process differently than those outside the academic community. As stated in section 212(a)(5)(A) of the INA, certification of employment of aliens shall be denied on the basis of availability of ''qualified'' U.S. workers who are able and willing, that is, those who possess the minimum qualifications necessary to perform the job, even if they are less qualified than the alien beneficiary. By contrast, the statute states in the same subparagraph that for job opportunities as college and university teachers, certification of employment of aliens generally may be denied on the basis of availability of ''*equally* qualified'' (emphasis added) U.S. workers who are able and willing, that is, only those equally or more qualified than the alien beneficiary.

While differentiation of treatment of college and universities in this statutory provision certainly is not dispositive of issues discussed in this rulemaking, it does supplement the concept that it is legitimate to examine the differences between college and university employment and the broader employment market.

VII. Comments on Proposed Rule and Analysis of Comments

Seventy-five comments were received on the April 22, 1996, proposed rule. The largest number of comments were received from independent research institutes. Thirty-four comments were received from research institutes such as the Howard Hughes Medical Institute, the Scripps Research Institute, and the National Biomedical Foundation of Georgetown University.

The next largest group of comments was received from colleges and universities. Twenty-one comments were received from colleges and universities. Colleges and universities represented by these comments included such institutions as Princeton, University of Chicago, Yale, Harvard, Massachusetts Institute of Technology, Johns Hopkins, and Stanford.

Seven comments were received from Federal agencies. The agencies submitting comments were OSTP, NIH, NSF, DRE, the Smithsonian Institution, and the USDA which submitted comments from two different subcomponents.

Seven comments were also received from various associations. These associations included the Association of American Universities (AAU), American Immigration Lawyers Association (AILA), Council of Graduate Schools, and NAFSA Association of International Educators.

Two comments were received from State Employment Security Agencies. The SESA's submitting comments were the Arizona Department of Economic Security and the Wyoming Department of Employment.

One comment was received from each of the following: Congressman Lamar Smith, Massachusetts General Hospital, one international human rights group, and a senior economist employed by an association of universities.

Seventy-two of the comments were in favor of the proposed rule and the majority were in favor of extending the rule to include nonprofit research institutes. Only three commenters opposed the rule. The commenters opposed to the rule were the two SESA's and the senior economist employed by Oak Ridge Associated Universities.

A. Comments About the Proposal to Adopt the Rule as Proposed for Colleges and Universities

All of the 21 comments received from colleges and universities supported the proposed rule. The NPRM was also supported by the Association of American Universities (AAU), Council of Graduate Schools, NAFSA Association of International Educators (NAFSA), several Federal agencies, AILA, and nonprofit research institutes.

In addition to supporting DOL's finding that such employees are not ''similarly employed'' to commercial researchers, the colleges and universities and some other commenters advanced public policy arguments to the effect that the NPRM would eliminate perceived anomalies and economic hardship caused by the post-*Hathaway* policy of determining prevailing wages by surveying across industries. Perceived problems caused by the post-*Hathaway* policy that would be eliminated by the proposed rule, noted by one or more of the colleges or universities in their comments, included the following:

- Much higher prevailing wage determinations as a result of the post-*Hathaway* policy.
- Higher wages have precluded many universities from using the permanent labor certification program and the H–1B labor condition application program and have disrupted important university-based research programs.
- Need to increase the wage of the H–1B employee or terminate employment of the researcher.
- Some granting agencies, such as the National Institutes of Health, specify the amount to be paid to each researcher; even without such restrictions, it is often not possible to find the additional money needed to increase the salary of a researcher needed to meet the prevailing wage.
- Alien researchers may be paid more than U.S. citizens for performing similar duties and responsibilities.
- Requiring higher salaries to be paid to foreign researchers and foreign scholars who are in lower positions than, for example, Assistant Professors.
- Permanent labor certification applications and H–1B labor condition applications have been withdrawn because of the higher prevailing wages required by the post-*Hathaway* policy.

1. Department's Analysis of Comments

After consideration of all comments, the Department has concluded that the proposed rule should be adopted for colleges and universities and expanded as set forth below. The comments and the Department's analysis are discussed below in greater depth.

a. *Academic Researchers are not Similarly Employed to Commercial Researchers.* In the preamble to the NPRM, the Department specifically requested comments as to whether there are attributes of academic research that distinguish it from research conducted by private, for-profit employers (see 61 FR at 17613). About half of the comments from colleges and universities asserted that there were substantial differences between academic researchers and researchers working in a for-profit environment. A few commenters attached the AAU position on this issue previously submitted to the Department,[1] and

[1] In the preamble to the NPRM, the AAU's comment was quoted, in part, as follows:

Teaching is a primary mission of universities and occurs in all university settings. Teaching and research are inextricably intermingled in universities, with research extending into undergraduate education, and teaching extending into postdoctoral education. Academic research scientists are expected to operate as teachers as well as researchers. University teaching includes a wide range of activities beyond the traditional classroom lecture, such as seminars, advising and other forms

others addressed this issue directly. Having considered these comments, the Department has determined that different treatment of researchers employed by colleges and universities is justified, in part, by the close relationship of research to teaching in the academic environment. Research positions at colleges and universities are often related to teaching (faculty) positions and often involve teaching duties, albeit not in a classroom setting. See footnote 1.

With one exception, all of the comments that addressed this issue agreed with the view of the AAU. The one commenter that disagreed with this position pointed out that according to the 1993 National Science Foundation survey of doctorate recipients, of those postdoctorates reporting that their primary work activity was research, only 5.3 percent indicated that teaching was their secondary activity. The commenter went on to state that ''all highly educated workers play a teaching role by helping to show new employees the ropes in their work environment, but in this regard doctorates in universities who do not teach courses are not substantially different from doctorates in industry or in government.''

The preamble to the proposed rule made clear that AAU was not speaking with respect to teaching in a classroom setting conducted by faculty members. In the Department's view, the relationship described by AAU and quoted above, as well as in the NPRM's preamble, goes substantially beyond showing new employees the ''ropes in their new environment.''

Based on the comments received, the Department is persuaded that teaching, as described by the AAU, is an important function often performed by college and university researchers. This is not as true for non-academic researchers.

Other commenters, such as independent nonprofit research institutes and Federal agencies, were also in agreement that there were significant differences between research conducted by academic institutions and research conducted by private, for-profit employers. These comments provide further amplification and support for the AAU position summarized in the preamble to the NPRM, 61 FR at 17613, that research in academic institutions is nonproprietary as opposed to research conducted in a private, for-profit research organizations. The research product delivered by researchers in private, for-profit organizations is proprietary in nature and can be appropriated by the employing institution for commercial purposes. 61 FR at 17613. Examples of the points made by the colleges and universities include the following:

- Academic research is for the public good and advancement of knowledge, as opposed to having a profit motive.
- Researchers in academia, unlike researchers in for-profit organizations, are expected to publish promptly and widely in peer-reviewed journals; commercial scientists apply research results to product development within the company, often withholding the publication of research.
- Academic research is independently initiated and sustained with the intention of transmitting bodies of knowledge to succeeding generations of researchers, public and private; commercial research priorities are set by company goals for developing marketable products.

Two of the three commenters opposing the rule asserted that the same skills are required on the part of researchers who are employed in a university setting as are required of those employed in a private, for-profit research organization. One of these two commenters acknowledged that university research tends to focus on issues of basic research while private sector research tends to focus on the applied end of the spectrum. However, this commenter indicated that the degree to which an academic institution is engaged in applied and basic research across a variety of disciplines is a function of the extent to which the institution's research is leveraged by private sector or Federal agency contracts.

The third commenter opposing the rule indicated that the dichotomy between university and industry research cited by the AAU is exaggerated. Industry funding of academic research has been growing rapidly, and many universities have been applying for patents of their own in promising new fields such as biotechnology, human genome research, and exotic materials.

These comments in opposition to the rule presently are unpersuasive, for the following reasons.

(1) Skill Requirements

Differences in the skills and knowledge required of researchers to work in an academic environment compared to the skills and knowledge in a private, for-profit organization was not one of the policy reasons for issuing the NPRM. The differences articulated in the proposed rule discussed such factors as the wide dissemination of research results in peer-reviewed scientific journals, the expected application of research results to producing marketable products within commercial organizations, the expansion of the frontiers of knowledge by academic researchers conducting fundamental research programs, and the nonproprietary nature of research performed in an academic setting as opposed to that performed in a private, for-profit setting. 61 FR at 17613.

(2) Differences Between Academic and Commercial Researchers

The Department has carefully considered the issues raised concerning the differences between academic and commercial research and has found that, at present, sufficient distinctions exist between the two to support separate treatment of researchers in the two venues.

Despite trends regarding sources and uses of research funds in colleges and universities, the overwhelming majority of R&D the $21.6 billion spent for R&D at U.S. academic institutions in 1995 appears to be nonproprietary in nature. This conclusion is supported by the following:

- Funds from the commercial sector during the past two decades grew faster than funds from any other source. Funding from the commercial sector, however, constituted a relatively small proportion (6.9 percent) of academic R&D funding in 1995. *Science & Engineering Indicators 1996*, National Science Board Subcommittee, National Science Foundation, at 5–8 and 5–9.
- Although patents awarded to universities have grown rapidly over the past two decades and universities are increasingly negotiating royalty and licensing arrangements based on their patents, income from these licensing arrangements are modest when compared with total R&D expenditures. In 1993, gross revenues received by U.S. universities from licensing arrangements amounted to $242 million. *Ibid.* at 5–42 and 5–43.
- The nonproprietary nature of academic research and the fact that academic researchers are expected to publish widely in peer-reviewed journals is also supported by the fact

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of mentoring. Some of the most effective teaching *about* research is carried out by *doing* research, and university research personnel often operate as student and teacher at the same time in the same setting: a postdoctoral fellow is instructed by the faculty researchers with whom he or she is working at the same time he or she serves as a teacher for graduate and undergraduate students working in the same lab. (Emphasis in original.)

61 FR at 17613.

that in 1993, as in previous years, the United States contributed the largest fraction—34 percent—of 414,000 articles published in refereed journals worldwide. About 70 percent of the U.S. articles had academic authors. Further, in virtually all nations' journals, U.S. articles are cited more heavily than articles appearing in domestic publications. *Ibid.* at 5–4, 5–30, 5–31, and 5–40.

In view of the trends regarding sources and uses of academic R&D funds, the Department plans to monitor such trends in promulgating a rule establishing an exception to the results of the *Hathaway* decision that would permit prevailing wage determinations for researchers in colleges and universities to be based solely on the wages paid by such institutions. If the current trends relative to the performance of research by colleges and universities were to continue long enough, one or more of the bases for concluding that researchers employed by colleges and universities are not similarly employed to nonacademic researchers may no longer be valid.

b. *Non-pecuniary Factors.* In the preamble to the proposed rule, the Department asked for comments that specify the nature of the intangible, non-pecuniary incentives to working in an academic environment and how they are unique to higher education. Several of the colleges and universities addressed this issue. These comments provide further amplification of and support for the nature of the intangible, non-pecuniary incentives to working in an academic environment advanced by the Council of Economic Advisors and cited in the NPRM (see 61 FR 17614). Other commenters, such as independent nonprofit research institutes and Federal agencies, were also in agreement that there were significant non-pecuniary incentives to working in an academic environment. Examples of these comments included the following:

- Intellectual freedom to determine one's own research direction is relatively unhindered by direction from management or by a profit motivation.
- The opportunity exists to interact with a large number of people with similar goals and interests.
- Academic research, unlike commercial research, is characterized by a great diversity of research interests and activities.

One commenter maintained that although ''tenured professors appreciate the autonomy they have in research universities and that this permits the universities to compete in the labor market without paying wages and benefits equal to those in industry,'' it is not clear that this applies to non-tenure track, temporary research appointments. The commenter observed that employees on temporary research appointments do not enjoy the autonomy experienced by tenure and tenure-tack faculty who are principal investigators on research projects. In particular, postdoctoral appointees and research associates do not have faculty status and enjoy few if any of the non-pecuniary incentives alluded to by the CEA.

Nonetheless, autonomy in choice of research projects is not the only intangible benefit associated with working in an academic environment. The Department believes, based on the comments, that postdoctorates are also significantly motivated by other non-pecuniary factors, such as working with leaders in their chosen field and generally working with colleagues and other scholars. The Department also believes that working on nonproprietary research issues adds an important qualitative dimension to the non-pecuniary incentives that is not readily duplicated in other work environments.

2. Additional Issues Raised by Commenters Opposing Rule; DOL Analysis

Additionally, the three commenters opposing the rule raised issues that were not addressed in the preamble to the NPRM. Those comments and the Department's analysis of them are provided below.

a. *Wage Differentials.* One commenter took issue with the claim that there is a great wage differential between researchers in private industry and in colleges and universities. According to this commenter, the wage differentials cited in the preamble to the proposed rule between industry and colleges and universities for researches are grossly exaggerated. According to the commenter, a ''true national average which included industry wages would almost certainly be less than 20 percent higher than a national average which included only colleges and universities.'' According to the commenter, such a differential was 23 percent in 1989. The commenter also maintained that implementation of the rule would reduce costs on research projects by an average of much less than 10 percent compared to the prevailing wage methodology required by the current regulation.

Economic hardship to employers due to wage differentials, by itself, would not be a basis for promulgating an exception to the decision in *Hathaway*. However, the Department is convinced that the wage differentials are significant and, in combination with the other factors—differences between academic and commercial research and the value of non-pecuniary benefits and incentives—constitute sufficient reason to conclude that researchers employed by colleges and universities and researchers employed by for-profit commercial employers are not ''similarly employed''.

Most employers would find wage differentials of 23 percent, as cited by the commenter, to be significant. Further comments received prior to the issuance and subsequent to the issuance of the NPRM suggest that the national wage differential could be greater than 23 percent. On a localized level, some commenters report differentials much greater than 23 percent. The Department is convinced that enough of a national differential exists, in combination with the other bases for the rule, discussed above, to justify the conclusion that DOL's regulations should recognize that researchers employed by colleges and universities and researchers employed by for-profit commercial employers are not similarly employed.

b. *General Labor Market Conditions.* Two commenters expressed concern about the general labor market impact of the proposed rule. These comments, in large measure, misconstrue the nature of the rulemaking. The Department's mandate under the permanent labor certification program is to prevent the entry of foreign immigrant workers from adversely affecting the wages or working conditions of similarly employed U.S. workers. The wage protection component of this requirement is effectuated by regulations which require that the employers seeking labor certification must offer at least the prevailing wage paid to similarly employed U.S. workers in the area of intended employment. The proposed rule was not intended to alter this basic structure and it does not do so. The rule addresses only the narrow issue of how the phrase ''similarly employed'' should be defined. Whether the use of foreign researchers, in and of itself, has some negative impact on the domestic labor market is simply beyond the scope of this rulemaking. The determination as to whether academic researchers and researchers in the for-profit sector are or are not similarly employed is not impacted by considerations of potential adverse effect on labor market conditions among researchers. If, as the Department has now concluded, academic researchers are not similarly employed to their colleagues outside academe, the adverse effect is addressed by requiring the payment of the prevailing wage among similarly

employed academic researchers. To the extent there are economic factors limiting the employment potential of researchers, they are outside the scope of this rulemaking.

Nevertheless, the Department is concerned about the possible adverse effect on U.S. researchers as a result of this rulemaking and has considered the comments submitted in this regard. As a result of the comments indicating that adverse effect may arise from this rule and trends regarding sources and uses of academic R&D funds discussed above, the Department plans to study the effects of this rulemaking over the next 5 years.

One SESA's comments were, on balance, against the proposed rule because of perceived adverse effects on U.S. researchers. The Arizona SESA pointed out that one published survey it used until recently to make prevailing wage determinations for researchers showed, based on a universe of employers that did not include colleges and universities, a wage level that was more than 30 percent higher than the universities' salary schedules. According to the SESA, many U.S. workers majoring or obtaining degrees in the Sciences, quickly go on to employment opportunities in private industry because of the higher wage scale. The SESA was of the opinion that many foreign workers are willing to work for universities at low wages because the opportunity to stay in the United States, either permanently or temporarily, is a big enticement. According to the SESA, many foreign workers know that if they can get permanent employment with a college or university, the opportunity to adjust to permanent residence status increases because of the INA's ''equally qualified'' provision which provides the basis for the special handling procedures for college and university teachers in the permanent labor certification regulations. See 8 U.S.C. 1182(a)(5)(A)(I)(I) and (a)(5)(A)(ii); 20 CFR 656.21a; and 61 FR at 17612. The SESA, in addition, expressed the view that grant funding restrictions and other established practices do not justify basing prevailing wage determinations for researchers employed by colleges and universities solely on the wages paid by such institutions if it discourages U.S. workers from applying for such positions.

This SESA in its comments indicated, however, that it may be appropriate to consider academic researchers as not similarly employed to researchers employed in the private sector and to base prevailing wage determinations solely on the wages paid by colleges and universities. Specifically, the SESA stated in the course of its comments that:

> The research positions at the universities and in the private sector are not totally comparable, since researchers are not ''similarly employed'' as the current regulation determines. The researcher at the university may also be teaching, writing articles for scientific journals, working on basic, fundamental or theoretical research. If they are performing other duties then they should be given a different job title and code (presumably from private sector researchers).

The Department has concluded that, currently, there are ample bases to conclude that researchers employed by colleges and universities and researchers employed by for-profit commercial employers are not similarly employed. The observations of the Arizona SESA concerning the general labor market effects of foreign doctorates in the labor force are discussed below along with those of another commenter who submitted comments expressing concern about the effect of foreign doctorates on the general labor market for doctorate recipients employed as researchers.

The senior economist employed by an association of universities offered a number of reasons for not promulgating a final rule that would allow prevailing wage determinations for researchers employed by colleges and universities to be based solely on the wages paid by such institutions. The reasons advanced by this commenter concerned general labor market factors affecting the supply and demand for researchers and the policy bases articulated for issuing the NPRM.

The comments concerning general labor market conditions are summarized and discussed below.

(1) Unemployment Rate

A commenter asserted that unemployment and underemployment, as measured by the NSF, are higher now for doctorate scientists and engineers than they have been in many years. Such concerns, however, are not relevant to this rulemaking, which is implementing the statutory protection against adverse effect on wages and working conditions of similarly employed U.S. workers, due to the importation of foreign workers. Further, in the permanent alien labor certification program, high levels of unemployment should have a self-correcting effect, since more U.S. workers will be available for the jobs for which certification is sought. In the H–1B program, to which this rule also will be applied, Congress has determined that no labor market test is necessary.

Nevertheless, available information indicates that, generally, job prospects for recent Ph.D. recipients remain strong. According to the NSF, in April 1993, the overall unemployment rate for recent science and engineering (S&E) doctorate recipients stood at 1.7 percent, while the NSF states that the unemployment rate for the entire U.S. labor force for the comparable period—1993—was 6.8 percent.[2] *Ibid.* at 3–5.

According to the NSF, concerns expressed about labor market prospects by recent S&E doctorate recipients have less to do with their ability to find a job than with their ability to get full-time jobs that use their training. In 1993, the ''involuntary out-of-field'' (IOF) rate for all recent S&E doctorate recipients was 3.6 percent. Individuals were considered involuntarily out of their Ph.D. field if they stated in an NSF survey that they were either working part-time solely because a full-time job was not available or that one reason they were working outside of their Ph.D. field was because a job in their field was not available. Unfortunately, it is not possible to compare the IOF rate for 1993 with previous years because of the lack of comparable data. *Ibid.* at 3–6. However, another measure reported by the NSF indicates that foreign doctorate recipients have not had a significant impact on the overall labor market for recent doctorate recipients. Self-assessment by recent S&E doctorate recipients as to whether their primary jobs in 1993 are closely related to their Ph.D. fields shows very similar patterns to the information pertaining to then-recent doctorate recipients in 1988. *Ibid.* at 3–8 and 3–9.

(2) Effect on Recent Doctorate Recipients in Universities

Two commenters maintained that the wage levels of recent U.S. doctorate recipients employed in colleges and universities have been held in check by the hiring of foreign researchers. One commenter maintained that the rule as proposed, in conjunction with the hiring of foreign researchers, increased immigration levels, and the elimination of the growth in research and development funding will have unfavorable consequences for U.S. researchers.

It does not appear that the number of foreign doctoral recipients who remain in the United States after graduating are numerous enough to have any appreciable affect on general wage

[2] The Bureau of Labor Statistics, in its ''Labor Force Statistics from the Current Population Survey'' reports that for September 1996, the seasonally adjusted civilian unemployment rate was 5.2 percent.

levels. About 30 percent of the 8,000 foreign students earning S&E doctoral degrees received firm offers to stay in the United States in 1993. (This overall percentage has been stable over the past several years.) The firm offers were from three primary sources:

- About 400, or 5 percent, received firm offers for academic employment.
- Almost 500, or 6 percent, received firm offers for commercial employment.
- A larger group, almost 1,500, or 18 percent, obtained a postdoctoral research position for 1 year.

Ibid. at 2–28 and 2–29.

Not all foreign students who receive a firm offer to stay in the United States do so. A number of factors influence foreign doctoral recipients' decisions to return home. Further, as emerging countries expand their capacity to educate at the doctoral level, the NSF expects that fewer foreign students will come to the United States to be educated. *Ibid.* at 2–29. The number of foreign students studying S&E fields in the United States seems to have peaked in 1992. *Ibid.* at 2–33.

With respect to the comment concerning flattened growth in R&D funding, a look at overall R&D spending presents a rather complex picture. Overall R&D spending in the 1990's generally has not kept pace with inflation. The decline, in real terms (largely related to the Defense downsizing), has been modest—2 percent. In nominal terms, R&D funding reached an all time high of $171 billion in 1995. It is important to note, however, that of the three major R&D performing sectors—industry, the Federal Government, and academia—academic is the only one to have registered a real increase in R&D performance since 1990. *Ibid.* at 4–2. A more detailed examination of the trends reveals that the annual rate of increase in academic R&D performance has been falling fairly steadily since the late 1980's. On the other hand, the Federal Government, which supplies about three-fifths of all funds used to perform R&D on campus, has been increasing its support of academic research continuously since 1982. *Ibid.* at 4–2. This suggests that job opportunities involving research in academia have been growing rather than declining, albeit at a slow rate over the last several years.

If foreign doctorate recipients have an adverse effect on any part of the labor market segment, it is most likely to be on the market for postdoctoral appointments. However, the wage data included in the comments of the individual opposing the rule do not indicate that foreign doctorate recipients have had an adverse effect on the market for postdoctoral appointments. This commenter asserted that the wage gap between academe and industry for recent doctorate recipients with less than 6 years of work experience has been steadily declining. According to information furnished by the commenter, the percentage gap between non-academic and academic salaries of doctorates with less than 6 years of experience declined from 32 percent in 1981 to 23 percent, as indicated above, in 1989. And this trend, according to the commenter, continued through 1993—the year of last available data.

DOL is not convinced, for the reasons cited above, that the admission of foreign academic researchers, at current levels, is at such an extent as to diminish or stagnate the wage levels of doctoral recipients doing academic research nationwide. While foreign worker penetration of the job market for postdoctoral positions is greater, DOL has reached the same conclusion for those job opportunities. The Department, however, plans to study over the next 5 years whether pervasive hiring of foreign workers has taken place and whether adverse effect has occurred on a scale broader than individual job opportunities or individual localities.

(3) Discourages U.S. Workers From Obtaining Doctorates

One commenter expressed the belief that declining labor market conditions for young researchers will discourage talented young Americans from choosing to make investments in S&E graduate education in the near future, and that the United States will suffer as a result. These concerns appear to be overstated in light of the supply and demand projections for S&E personnel discussed in *Science & Engineering Indicators 1996.*

According to the NSF-reported ''mid-growth scenario'' of the demand for S&E workers, overall demand for S&E will slightly exceed supply by the year 2005 by a small amount—4 percent. Most of this excess demand occurs in the last 3 years of the forecast; until 2002, the S&E labor market appears to be in balance. This should not be a problem, since the NSF indicates that even if the ''high-growth scenario'' were to materialize there would be sufficient time for the labor market to respond to the new higher demands. *Ibid.* at 3–21. In any event, these models suggest that concerns that foreign researchers are shutting U.S. researchers out of the labor market are not a problem over the long term.

The Department, based on the above, is not convinced at this time that foreign recipients of doctoral degrees have had an appreciable impact on the general market for recent doctorate recipients or on the market for postdoctoral recipients. However, the impact of foreign labor on the ability of recent U.S. recipients of doctorates to obtain employment generally and to obtain postdoctoral appointments in particular has not been definitively determined. Therefore, the Department cannot dismiss those related issues raised by the commenters in view of its statutory responsibility to protect wages and working conditions of similarly employed U.S. workers under section 212(a)(5)(A) of the INA. The Department, therefore, plans to study the impact of the final rule over the next 5 years.

3. Conclusion

The Department is convinced that a set of unique factors lead to the conclusion that, at this time, researchers in academe and researchers employed by for-profit commercial employers are not similarly employed and that the proposed rule should be adopted for colleges and universities. The Department, however, plans to study the impact of the final rule over the next 5 years, and determine whether the bases for promulgating the rule continue to hold.

B. Other Issues Relating to Colleges and Universities

Commenters submitting comments on the NPRM also raised other issues relating to colleges and universities that are discussed below.

1. Definition of ''College and University''

Nine commenters, including six universities, two academic associations and one Congressman recommended that the term ''institutions of higher education as defined in section 1201(a) of the Higher Education Act of 1965'' be used instead of the term ''colleges and universities'' in any final rule promulgated by the Department. The Department has reviewed the definition of institutions of higher education in section 1201(a) of the Higher Education Act and has determined that it is not appropriate for the labor certification program. The definition proposed by commenters is not consistent with the definition of ''college or university'' that has been used for many years in administering the special handling provisions in the regulations established for college and university teachers. Unlike the definition of ''colleges and

universities'' used in administering the permanent labor certification program, section 1201(a) of the Higher Education Act includes business and vocational schools and is limited to public or other nonprofit institutions. A directive dated January 13, 1984, from Bryan T. Keilty, then ETA's Acting Administrator for Regional Management, to all regional administrators, in relevant part, defined ''college or university'' as follows:

''College or university'' means an educational institution: (A) which admits as regular students only individuals having a certificate or diploma of graduation from high school, or the recognized equivalent of such a certificate or diploma; (B) which is legally authorized by the Federal and/or State Government(s) to provide a program of education beyond high school; and (C) which provides an educational program for which it awards a baccalaureate (bachelor's) or higher degree, or provides a program which is acceptable for such a degree. This would include those junior or community colleges which award associate degrees, but which teach courses which can be credited toward a baccalaureate degree at another college or university.

The Department has concluded it cannot change the definition of ''college or university'' used for the past 14 years in administering the permanent labor certification program without complying with the notice and comment requirements of the Administrative Procedure Act.

2. Extension of Proposed Amendment to H–1B Labor Condition Application (LCA) Program

Many commenters, including several colleges and universities, independent nonprofit research institutes, various associations, the American Immigration Lawyers Association, Federal agencies and one member of Congress, indicated that the H–1B regulations dealing with prevailing wages, at 20 CFR 655.731(a)(2)(iv), should be modified to clarify that the proposed changes would also apply to the H–1B program. Amendment of the H–1B regulations at 20 CFR 655.731(a)(2)(iv) would require the initiation of a separate NPRM to modify that regulation, but such a rulemaking is unnecessary for the reasons discussed below.

There are sufficient bases to apply the methodology required by this final rule to the H–1B program. The Department clearly expressed in the preamble to the proposed rule that the change proposed for § 656.40(b) would be followed in determining prevailing wage for the H–1B LCA program, as well as the permanent labor certification program. The preamble stated that the ''proposed rule would also change the way prevailing wages are determined for colleges and universities filing H–1B labor condition applications on behalf of researchers, since the regulations governing prevailing wage determinations for the permanent program are followed by State Employment Security Agencies in determining prevailing wages for the H–1B program.'' The preamble also noted that the H–1B regulations incorporate the language of 20 CFR 656.40 (as suggested by H.R. Conf. Rep. No. 101–955 (October 26, 1990), page 122). Specifically, the conference report at page 122 stated that the prevailing wage to which an H–1B visa petitioner ''must attest is expected to be interpreted by the Department of Labor in a like manner as regulations currently guiding section 212(a)(14)'' (now section 212(a)(5)(A) of the Immigration and Nationality Act).

It should also be noted that the H–1B regulations at § 655.731(a)(2)(iv) define ''similarly employed'' as it is defined in the current permanent labor certification rule. Section 655.731(a)(2)(iii)(A) provides, in relevant part, that ''(w)here the prevailing wage is not immediately available, the SESA will conduct a prevailing wage survey using the methods outlined at 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA.'' On May 18, 1995, ETA issued General Administrative Letter (GAL) No. 4–95 to All State Employment Security Agencies, Subject: *Interim Prevailing Wage Policy for Nonagricultural Immigration Programs.* That GAL provided, in relevant part, that ''(i)n determining prevailing wages for the permanent and temporary labor certification programs, the H–1B program, and the F–1 student attestation program, the regulatory scheme at 20 CFR 656.40 must be strictly followed.'' [3]

3. Extension of the Proposed Amendment to Research Institutes Affiliated with Colleges and Universities

Some commenters expressed the view that institutions ''affiliated'' with colleges and universities should be included in the exception to the Department's general prevailing wage methodology crafted for colleges and universities. The Department is not including institutions affiliated with colleges and universities because it requires additional information as to whether researchers employed by such affiliated institutions are sufficiently similar to college and university researchers to warrant similar treatment, and if so, how to define affiliated research institutes and what institutions should be included in wage surveys to determine prevailing wages for such institutions.

4. Including an Express Provision to Permit Consideration of Wage Differences by Discipline

The AILA recommended that the rule should explicitly provide for consideration of wage differentials among researchers working in different disciplines. The Department does not believe such an express provision is necessary. According to the *Dictionary of Occupational Titles* (DOT), researchers are classified according to field of specialization. Consequently, the Department currently makes prevailing wage determinations for researchers by discipline.

C. Extension of Rule to Nonprofit Research Institutes

As indicated above, commenters also were invited in the preamble to the NPRM to submit comments with respect to extending the proposed rule change to researchers in other employment. All of the comments submitted by apparently nonprofit, independent research institutes were in favor of extending the scope of the proposed rule to cover independent research institutes. The overwhelming majority of the comments received from independent research institutes included the reasons discussed below for extending the rule to cover such research institutes.

1. Competitive Factors

The commenters maintained that researchers at independent research institutes across the Nation compete for Federal grants and publish research results in the same manner as universities. According to the commenters, the only difference between institutes and universities is that most institutes are not degree-granting institutions.

The Department did not receive sufficient information to evaluate to what extent the independent research institutes compete for Federal grants and publish research results in the same manner as universities. However, an issue more important to this rulemaking would be the extent to which researchers at independent research institutes are or are not ''similarly employed'' to researchers in private industry. The extent to which the

[3] General Administrative Letter 2–98, issued on October 31, 1997, which superseded GAL 4–95, provides that the regulatory scheme at 20 CFR 656.40 must be followed in determining prevailing wages for the permanent and temporary H–2B labor certification programs and the H–1B program.

nonprofit research institutes perform nonproprietary research as opposed to proprietary research and development would, for example, be an important factor in making this determination. The commenters did not submit sufficient information with respect to competitive factors and the ''similarly employed'' issue to determine that such concerns could be used as a basis for making an exception in the prevailing wage methodology for researchers employed by nonprofit research institutes.

2. Prevailing Wage Methodology for Researchers

The research institutes asserted that prior to *Hathaway*, researchers in independent research institutes were included with researchers at colleges and universities in determining prevailing wages. The commenters stated that inclusion of independent research institutes would not be an extension of the proposed rule—it would be a restoration of the pre-*Hathaway* practice. It was stated in the preamble to the NPRM that prior to *Hathaway*, SESA's, in conducting prevailing wage surveys for researchers employed by colleges and universities, consistently limited prevailing wage surveys to colleges and universities, and DOL was not aware of any other situation in which a similar practice was followed in determining prevailing wages for an occupation found in a variety of industries.

Further investigation of sampling practices by SESA's subsequent to the receipt of comments on the NPRM, however, indicates that there was greater variation in sampling practices for colleges and universities than indicated in the NPRM. Not all SESA's limited surveys only to researchers employed by colleges and universities. Some surveyed a variety of industries in making such determinations. Some SESA's included nonprofit research institutes in the sample used in determining prevailing wages for colleges and universities. Some sampled nonprofit research institutions separately in the course of making prevailing wage determinations for researchers employed by such institutions. Some SESA's pointed out that they would not have known prior to the *Hathaway* decision whether the employer was profit or nonprofit, and included profit and nonprofit institutes in the same sample when responding to prevailing wage requests. Because SESA's were inconsistent in their sampling practices, their practices in this regard cannot be considered as a basis for the NPRM or the final rule.

3. Pending Legislation to Change Prevailing Wage Methodology for Researchers

Many commenters stated that Congress has acknowledged the similarities between researchers in academic settings and those at nonprofit, independent research institutes by providing legislative language in immigration bills that would require prevailing wage determinations for employees employed by colleges and universities and research institutes to be based solely on the wages paid by such institutions. Unenacted legislation is, however, outside the scope of this rulemaking and to consider it in the rulemaking would be speculative.

4. Additional Reasons Advanced for Extending the Proposed Rule to Nonprofit Research Institutes

One or more commenters offered additional reasons for extending the proposed rule to nonprofit, independent research institutes. Their comments and the Department's response to them are provided below.

a. *Anomalies of Staff Doing the Same Work Being Paid at Dissimilar Rates.* Some commenters pointed out that there are many situations where staff from the university and nonprofit research institutes work side-by-side. One commenter expressed the opinion that it would make little sense for institute employees on H–1B visas to be subject to a different wage structure than everyone else on the university campus.

Such anomalies are not prohibited under the H–1B program, as a result of amendments made to the INA by the Miscellaneous and Technical Immigration Amendments of 1991 (MTINA), Pub. L. 102–232, 105 Stat. 1733 (December 12, 1991). The anomalies are not a function of DOL prevailing wage methodologies and policies. The INA, as amended by the Immigration Act of 1990 (IMMACT), Pub. L. 101–649, 104 Stat. 4978, provided that employers did not have to pay similarly employed U.S. workers the same wage as must be paid to H–1B workers. Under IMMACT prior to MTINA, the employer was required to pay the higher of the actual or prevailing wage for an occupation to both H–1B nonimmigrant and ''to other individuals employed in the occupational classification and in the area of employment. . . .'' MTINA amended the INA/IMMACT wage requirements, in relevant part, so that the obligation that the employer pay the prevailing wage applied only to its H–1B nonimmigrant workers and not to the ''other individuals employed in the occupational classification. . . .'' Thus, subsequent to MTINA, not all workers in the U.S. labor market receive prevailing wage protections, even when they have foreign co-workers. It is, therefore, not illegal under this program to have workers working side-by-side being paid disparate wages. This possible disparity in wages between U.S. workers and H–1B nonimmigrant workers is not unique to colleges and universities, Federal research agencies, nonprofit research institutes, or even for-profit entities.

In the Department's view, disparities in wages paid to researchers with similar duties working side-by-side does not justify establishing an exception to the prevailing wage determination methodology currently followed in situations involving employers other than colleges and universities. More fundamentally, wage disparity among workers is not germane to the question of whether the workers are similarly employed.

b. *Source of Funding Should be Considered.* One commenter pointed out that research projects are funded by many different government agencies, and it is a waste of taxpayers' money to require payment of artificially high salaries to temporary foreign and immigrant employees.

The Department has consistently taken the view that sources of funding are not factors to be taken into consideration in prevailing wage determinations. Had source of funding been a determinant, the broad protection against adverse effect in the INA would have made an exception for government-funded employment—but it does not do so. Further, in the Department's view, such a position furthers its statutory mission to protect the wages and working conditions of U.S. worker, rather than constituting a waste.

However, the Department recognizes that source of funding may be a factor for determining similarity of employment, to the extent it supports nonproprietary research, as opposed to proprietary research and development. Since nonproprietary research currently dominates academic research performance in large measure, it is one determinant that distinguishes academic research from commercial research. The rulemaking record does not establish to the satisfaction of the Department that nonprofit research institutes perform nonproprietary research in relative or absolute terms to the same extent as colleges and universities.

c. *Non-pecuniary Motivations.* Some commenters asserted that non-pecuniary motivations of researchers working in nonprofit research institutes are similar to those working in academia. This may be true, but unlike academe, research in nonprofit institutions does not appear to be ''inextricably intermingled'' with teaching in an academic setting as it is in colleges and universities. Nor is there any firm information as to the relative significance of performing research with the attributes that distinguish that research from research in a for-profit setting, to the total research and development effort. The Department believes that the amount of nonproprietary research performed by an institution is not only important in terms of the attributes that distinguish it from commercial research, but that it adds an important dimension to the non-pecuniary incentives to working in a research environment.

d. *Worker Displacement.* At least one commenter maintained that foreign researchers do not displace immigrant or citizen researchers, but rather complement their efforts. As previously indicated, available information does not indicate that displacement of domestic doctorate recipients by foreign labor is significant. In any event, as indicated above, this rule addresses only the narrow issue of how the phrase ''similarly employed'' should be defined.

5. Overly Broad Implementation of Hathaway

The AILA was strongly in favor of the NPRM, but was of the opinion that DOL's implementation of *Hathaway* was overly broad and incorrect, and did not require conducting wage surveys across industries to determine prevailing wages for researchers employed by colleges and universities. The Department does not believe these comments are germane to the rulemaking. Assuming that the recognition of a separate wage system for college and university researchers was achievable under the existing regulations, a proposition that the Department does not accept, that conclusion would not preclude the Department from addressing the matter through a regulatory change. Given the interest expressed and the need to assure consistent treatment of the issue, the Department concluded that rulemaking was the appropriate course. Whether the *Hathaway* precedent is being applied improperly in occupations other than academic researchers is both beyond the scope of this rulemaking and is a matter that can and should be addressed to the BALCA in an appropriate case.

D. Other Requests to Extend the Rule

In response to the proposed rule, comments also were received from Federally Funded Research and Development Centers (FFRDC's) and Federal agencies urging that they be included within the scope of the rule. The comments received from the FFRDC's and the Federal agencies are discussed below.

1. Federal Research Centers

The Department has concluded that it is appropriate to include FFRDC's administered by academic institutions within the scope of the final rule. The Department believes that research conducted by FFRDC's administered by academic institutions are an extension of the research environment existing in the colleges and universities and the research performed in such FFRDC's has the same attributes as research performed by colleges and universities; i.e., nonproprietary in nature, inextricably intermingled with teaching, and offers significant intangible, nonpecuniary incentives.

Comments to support this conclusion were received from the National Laboratory Immigration Forum (NLIF) which represents the 10 most well known of the FFRDC's often referred to as the national laboratories. The comments of the NLIF relevant to the scope of this rule were similar to those made by the colleges and universities and the independent research institutes. The main points made by the NLIF were:

- National laboratories are involved in far-ranging collaborative efforts with the academic community and many researchers have joint appointments with both a laboratory and a university, which involve teaching as well as research.
- Most funding for the operation of the national laboratory complex comes through the Federal Government and is subject to many of the same salary limitations that universities are subject to under non-DOE Federal research grants.
- Research conducted by the national laboratories is largely nonproprietary in nature. Research results are expected to be disseminated through publication in peer-reviewed scientific journals.
- Non-pecuniary factors are a substantial motivator for researchers seeking employment in the national laboratories.
- Some areas of research are well beyond the scope of normal domestic research and may call for expertise in disciplines that are not readily available in the United States.

The above comments are consistent with the comments of the colleges and universities urging that the national laboratories be included within the scope of the proposed rule.

The Department believes the above factors apply in large measure to all of the FFRDC's administered by colleges and universities, and has therefore, concluded that FFRDC's administered by academic institutions should be included within the final rule. The Department, however, does not believe the FFRDC's managed by non-academic institutions should be included in the final rule establishing an exception to the way prevailing wage determinations are made for researchers employed by colleges and universities. The Department is not convinced that the attributes of academic research which distinguish it from commercial research are as pronounced in those FFRDC's managed by nonacademic institutions as they are in the FFRDC's administered by colleges and universities. Further, the Department is concerned that researchers from other countries coming to work for the FFRDC's managed by nonacademic entities may be used to a greater extent to perform research of a proprietary nature in those FFRDC's that are not managed by academic institutions. Therefore, the Department is extending the final rule to include only those FFRDC's managed by colleges and universities.

2. Federal Agencies

All Federal agencies that submitted comments were in favor of the thrust of the proposed rule, but generally indicated that it was too narrow and should be extended to Federal agencies and laboratories; federally-affiliated, nonprofit institutions; and other nonprofit institutions affiliated with universities and colleges. Reasons offered for supporting the rule were similar to those advanced by many of the other commenters. The major points made by one or more of the agencies with respect to extending the proposed rule to cover Federal agencies were:

- Post-*Hathaway* policies impact negatively on the ability to recruit foreign scientists and result in such anomalies as foreign staff being paid more than U.S. workers.
- The proposed rule is too narrow. It should be extended to Federal agencies and laboratories, federally-affiliated nonprofit institutions, and other nonprofit institutions affiliated with universities and colleges.
- Research by Federal agencies is nonproprietary in nature.

• Non-pecuniary factors similar to those in colleges and universities motivate individuals to work for Federal research agencies and federally affiliated nonprofit institutions.

• The Federal pay scale should be accepted by DOL as a ''legitimate source'' of prevailing wage data for federally sponsored employment. Alternatively, a rule should be promulgated recognizing that postdoctoral fellows, visiting scientists and other scholars employed by Federal agencies in H–1B status will necessarily be paid according to the pay practices of the research entity, and this fact satisfies prevailing wage concerns.

Although the comments advocating inclusion of the Federal research agencies did not provide sufficient information to draft a final rule excluding all Federal research agencies as a class from the effects of *Hathaway Children's Services* on the Department's prevailing wage methodology, the Department is convinced that some Federal agencies may be able to satisfy the necessary criteria in order to be provided such an exception. These criteria are: (1) A close relationship between research and teaching; (2) a primary engagement in nonproprietary research; and (3) significant, intangible nonpecuniary factors that motivate researchers to work for the Federal research agency. Federal research agencies, by virtue of the fact that they are Government institutions, can presumptively satisfy the criterion of being primarily performers of nonproprietary research. Therefore, the final rule provides that Federal research agencies may petition the Director, U.S. Employment Service, to submit evidence that shows they meet the other two criteria necessary to obtain an exception to the prevailing wage methodology required by the issuance of *Hathaway Children's Services.* The rule also provides that if a petition is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals.

The procedures that will have to be followed and the documentation that will have to be supplied by the Federal research agencies to obtain an exception from the general prevailing wage methodology that requires prevailing wages to be determined by surveying employers across industries in the occupation in the area of intended employment will be developed and issued by ETA within 45 days of publication of the final rule. Prevailing wages for the research agencies that are granted an exception from the general prevailing wage methodology will be determined by considering only the wages paid to researchers by Federal research agencies, colleges and universities, and FFRDC's administered by colleges and universities.

ETA believes that to meet the criteria contemplated by this rule requires a relatively large organization. The research agency must be rather large before it can have researchers significantly and substantially involved in teaching as well as research and offer significant, intangible nonpecuniary incentives similar to those offered by colleges and universities. Therefore, a Federal research agency is defined for the purpose of this rule as:

> [A] major organizational component of a Federal cabinet level agency or other agency operating with appropriated funds that has as its primary purpose the performance of scientific research. Federal research agencies are presumed to be doing nonproprietary research. To be considered a major organizational component of a cabinet level agency or other agency operating with appropriated funds for the purpose of this part, the organizational component or other agency must be administered by a person who is no lower than Level V (or the equivalent) of the Executive Schedule (see 5 U.S.C. 5316).

ETA is not establishing a similar petitioning process for other members of the research community, such as nonprofit research institutes. Since such entities are private organizations, it cannot be presumed that the research they perform is of a nonproprietary nature. Since they are private entities, they can engage in either proprietary or nonproprietary research. Although the entity may be accorded a nonprofit status under the Internal Revenue Code, they can contract to perform research that has a commercial application for private, for-profit entities. The ETA cannot be expected to sort out in this rulemaking process the extent to which non-profit research organizations are or are not performing research that has commercial applications for a for-profit entity.

Executive Order 12866

The Department has determined that this proposed rule is not an ''economically significant regulatory action'' within the meaning of Executive Order 12866, in that it will not have an economic effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

While it is not economically significant, the Office of Management and Budget reviewed the final rule because of the novel legal and policy issues raised by the rulemaking.

Regulatory Flexibility Act

When the proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule does not have a significant impact on a substantial number of small entities. The Chief Counsel did not submit a comment.

Small Business Regulatory Enforcement Fairness Act

The Department has determined that this final rule is not a ''major rule'' pursuant to the Small Business Enforcement Regulatory Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Paperwork Reduction Act

This final rule will create no collection of information requirements. The petitioning process for Federal agencies requests information from current Federal employees acting in their official capacity.

Catalogue of Federal Domestic Assistance Number

This program is listed in the *Catalogue of Federal Domestic Assistance* at Number 17.203. ''Certification for Immigrant Workers.''

List of Subjects in 20 CFR Part 656

Administrative practice and procedure, Aliens, Employment, Employment and training, Enforcement, Fraud, Guam, Immigration, Labor, Longshore work, Unemployment, Wages, and Working conditions.

Final Rule

Accordingly, part 656 of Chapter V of title 20, Code of Federal Regulations, is amended as follows:

PART 656—[AMENDED]

1. The authority citation for part 656 continues to read as follows:

Authority: 8 U.S.C. 1182(a)(5)(A); 29 U.S.C. 49 *et seq.*; section 122, Pub. L. 101–649, 109 Stat. 4978.

2. Section 656.3 is amended as follows:

a. A definition of ''Federal research agency'' is added in alphabetical order as follows:

§ 656.3 Definitions for the purpose of this part, of terms used in this part.

* * * * *

Federal research agency means a major organizational component of a Federal cabinet level agency or other agency operating with appropriated funds that has as its primary purpose the performance of scientific research. Federal research agencies are presumed to be doing nonproprietary research. To be considered a major organizational component of a cabinet level agency or other agency operating with appropriated funds for the purpose of this part the organizational component or other agency must be administered by a person who is no lower than Level V (or the equivalent) of the Executive Schedule (see 5 U.S.C. 5316).

* * * * *

3. Section 656.40 is amended as follows:

a. In the introductory language in paragraph (b), the phrase ''except as provided in paragraph (c) of this section,'' is added immediately after the phrase ''For purposes of this section,''.

b. Paragraph (c) is redesignated as paragraph (d), and a new paragraph (c) is added to read as follows:

§ 656.40 Determination of prevailing wage for labor certification purposes.

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(c) For purposes of this section, *similarly employed* in the case of researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDC's) administered by colleges and universities or Federal research agencies, means researchers employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies in the area of intended employment.'' If no researchers are employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies other than the employer applicant, researchers employed by colleges and universities, FFRDC's administered by colleges and universities, and Federal research agencies outside the area of intended employment shall be considered ''similarly employed.''

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4. Subpart E is added to read as follows:

Subpart E—Petitioning Process for Federal Research Agencies

§ 656.50 Petitioning Process.

(a) Federal research agencies seeking to have prevailing wages determined in accordance with § 656.40(c)(2) shall file a petition with the Director, U.S. Employment Service.

(b) The procedures and information to be included in the petition shall be in accordance with administrative directives issued by ETA that will specify the procedures to be followed and information that shall be filed in support of the petition by the requesting agency.

(c) The Director shall make a determination either to grant or deny the petition on the basis of whether the petitioning agency is a Federal research agency, whether most researchers at the petitioning agency have a close relationship with teaching as well as research, and whether the employment environment for researchers at the petitioning agency provides significant intangible and nonpecuniary incentives of the nature found at colleges and universities.

(d) Denials of agency petitions may be appealed to the Board of Alien Labor Certification Appeals.

(1) The request for review shall be in writing and shall be mailed by certified mail to the Director, U.S. Employment Service, within 35 calendar days of the date of the determination, that is by the date specified in the Director's determination; shall set forth the particular grounds for the request; and shall include all the documents which accompanied the Director's determination.

(2) Failure to file a request for review in a timely manner shall constitute a failure to exhaust available administrative remedies.

(e) Upon a request for review, the Director shall immediately assemble an indexed Appeal File.

(1) The Appeal File shall be in chronological order, shall have the index on top followed by the most recent document. The Appeal File shall contain the request for review, the complete petition file, and copies of all the written material upon which the denial was based.

(2) The Director shall send the Appeal File to the Board of Alien Labor Certification Appeals.

(f) In considering requests for review of denied petitions, the Board of Alien Labor Certification Appeals shall be guided by § 656.27.

Signed at Washington, DC, this 17th day of March, 1998.

Alexis M. Herman,

Secretary of Labor.

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