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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 214**

**[CIS No. 2536-13]**

**RIN 1615-AC02**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**RIN 1205-AB69**

**Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2**

**AGENCY:** Employment and Training Administration, Labor; U.S. Citizenship and Immigration Services, DHS

**ACTION:** Interim final rule; request for comments

**SUMMARY:** The Department of Homeland Security (DHS) and the Department of Labor (DOL) (jointly referred to as the Departments) are amending regulations governing certification for the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. This interim final rule revises how DOL provides the consultation that DHS has determined is necessary to adjudicate H-2B petitions by revising the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with the application for certification; the prevailing wage is then used in petitioning DHS to employ nonimmigrant workers in H-2B status. DOL and DHS are jointly issuing this

rule in response to the court's order in Comité de Apoyo a los Trabajadores Agrícolas v. Solis, which vacated portions of DOL's current prevailing wage rate regulation, and to ensure that there is no question that the rule is in effect nationwide in light of other outstanding litigation. This rule also contains certain revisions to DHS's H-2B rule to clarify that DHS is the Executive Branch agency charged with making determinations regarding eligibility for H-2B classification, after consulting with DOL for its advice about matters with which DOL has expertise, particularly, in this case, questions about the methodology for setting the prevailing wage in the H-2B program.

**DATES:** This interim final rule is effective [INSERT DATE OF PUBLICATION]. Interested persons are invited to submit written comments on this interim final rule on or before **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB69, by any one of the following methods:

- Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). Follow the Web site instructions for submitting comments.
- Mail or Hand Delivery/Courier: Please submit all written comments (including disk and CD-ROM submissions) to Michael Jones, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Comments received by means other than those listed above or received after the comment period has closed will not be reviewed. The Departments will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The

<http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Departments caution commenters not to include personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such information will become viewable by the public on the <http://www.regulations.gov> Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Departments encourage the public to submit comments through the <http://www.regulations.gov> Web site.

**Docket:** For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at <http://www.regulations.gov>. The Departments will also make all the comments either Department receives available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, DOL will provide you with appropriate aids such as readers or print magnifiers. DOL will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. DOL will consider providing the interim final rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the ETA Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

## **FOR FURTHER INFORMATION CONTACT:**

Regarding 8 CFR Part 214: Kevin J. Cummings, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave., NW., Suite 1100, Washington, DC 20529-2120, telephone (202) 272-1470 (not a toll-free call).

Regarding 20 CFR Part 655: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

## **SUPPLEMENTARY INFORMATION:**

### **I. The H-2B Program, the Prevailing Wage Methodology and Revisions to 8 CFR**

#### **216.2(h)(6) and 20 CFR 655.10(b)**

##### A. The Department of Homeland Security's Role in the H-2B Program

As provided by section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101(a)(15)(H)(ii)(b), the H-2B visa classification for non-agricultural temporary workers is available to a worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” Section 214(c)(1) of the INA (8 U.S.C. 1184(c)(1)) requires an importing employer to petition DHS for classification of the prospective temporary worker as an H-2B nonimmigrant as a prerequisite to the worker obtaining an H-2B

visa or being granted H-2B status. U.S. Citizenship and Immigration Services (USCIS) is the component agency within DHS that adjudicates H-2B petitions. See 8 CFR 214.2(h)(6) et seq.

Section 214(c)(1) of the INA requires DHS to consult with “appropriate agencies of the Government” before adjudicating an H-2B petition. DHS has determined that, under this statutory provision, it must consult with DOL as part of the process of adjudicating H-2B petitions because DOL is the agency best situated to provide advice regarding whether “unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C.1101(a)(15)(H)(ii)(b). DHS, in conjunction with DOL, has determined that the best way to provide this consultation is by requiring the employer (other than in the Territory of Guam),<sup>1</sup> prior to filing an H-2B petition, to first apply for a temporary labor certification from the Secretary of Labor. 8 CFR 214.2(h)(6)(iii)(A). The temporary labor certification serves as DOL’s advice to DHS that the employer has tried unsuccessfully to recruit sufficient U.S. workers at a DOL-determined prevailing wage for the position for which it now seeks H-2B workers, and that the employer has provided assurance that it will pay its H-2B workers and any successfully recruited U.S. workers at least the same prevailing wage. Thus, the certification serves as expert consultation and advice to USCIS on whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers. The fulfillment of the required consultation with DOL in this fashion represents good and efficient government, inasmuch as it avoids potentially significant and unnecessary cost that the federal government would otherwise incur if it was required to replicate within DHS the unique expertise already existing within DOL. DHS and DOL recognize the Congressional aim

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<sup>1</sup> In the Territory of Guam, the petitioner must apply to the Governor of Guam for a temporary labor certification. See 8 CFR 214.2(h)(6)(iii).

in enacting the consultation requirement in section 214(c)(1) of the INA to effectively utilize governmental resources by requiring DHS to solicit the expertise of other Federal agencies without having to independently and needlessly develop the same or overlapping expertise simply as a means to question the advice it receives. Under current DHS regulations, an employer may not file a petition with USCIS for an H-2B temporary worker unless it has received a labor certification from the Secretary of Labor (or the Governor of Guam, as appropriate). 8 CFR 214.2(h)(6)(iii)(C), (iv)(A), (vi)(A). DHS relies on DOL's advice in this area, as the appropriate government agency with expertise in labor market questions, to fulfill DHS's statutory duty of determining that unemployed persons capable of performing the relevant service or labor cannot be found in the United States and to approve H-2B petitions. INA 101(a)(15)(H)(ii)(b) (8 U.S.C. 1101(A)(15)(H)(ii)(b)); and INA 214(c)(1), (8 U.S.C. 1184(c)(1)).

#### B. The Department of Labor's Role in the H-2B Program

The Secretary of Labor's responsibility for the H-2B program is carried out by two agencies within DOL. Applications for temporary labor certification are processed by ETA's Office of Foreign Labor Certification, the agency to which the Secretary of Labor has delegated those responsibilities described in the USCIS H-2B regulations. Enforcement of the attestations and assurances made by employers on H-2B applications granted temporary labor certification is conducted by the Wage and Hour Division (WHD) under enforcement authority delegated to it by DHS on January 16, 2009 (effective January 18, 2009). See 8 U.S.C. 1184(c)(14)(B).

#### C. The Consultative Function in the Administration and Implementation of the H-2B Program

Since 1968, DHS's, and its predecessor INS's, consultation with DOL in the H-2 non-agricultural program has been implemented through the agencies' use of a combination of

legislative rules and guidance documents. As noted above, DHS's current consultation with DOL in the H-2B program under Section 214(c)(1) of the INA is based on DHS's regulatory requirement that an employer first obtain a temporary labor certification from the Secretary of Labor establishing that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6)(iii). The first step in DOL's certification process is the determination of the prevailing wage in the occupation that is the subject of the application for temporary labor certification. DOL has established a methodology for its determination of the prevailing wage rate through regulation, 20 CFR 655.10, and this regulation now requires revision in light of Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis, Civ. No. 09-cv-240, (E.D. Pa.) (March 21, 2013), which is discussed in greater detail below.

DOL's authority to issue its own legislative rules to carry out its duties under the INA has been challenged in litigation. Specifically, a group of employers challenged the regulations DOL issued on February 21, 2012, (77 FR 10038) (2012 H-2B rule) implementing its consultative responsibilities under the H-2B program. The 2012 rule implements all of DOL's responsibilities under the H-2B program *except* for determining the prevailing wage, which, as noted above, is now set forth in a separate regulation at 20 CFR 655.10. In their challenge to DOL's 2012 H-2B rule, the employers argued that DOL does not have independent rulemaking authority to issue the 2012 rule under the H-2B program. On April 1, 2013, the U.S. Court of Appeals for the Eleventh Circuit upheld a district court decision that granted a preliminary injunction against enforcement of the 2012 H-2B rule on the ground that the employers are likely to prevail on their allegation that DOL lacks H-2B rulemaking authority. Bayou Lawn &

Landscape Servs. et al. v. Secretary of Labor, --- F.3d ---, 2013 WL 1286129, No. 12-12462 (11th Cir. Apr. 1, 2013). The court stated that, “DHS was given overall responsibility, including rulemaking authority, for the H-2B program. DOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one.” 2013 WL 1286129 at \*2.

In substantial contrast, when faced with a similar employer challenge to DOL’s rulemaking authority with respect to an H-2B wage rule issued on January 19, 2011 (76 FR 3452) (2011 Wage Rule),<sup>2</sup> the district court in Louisiana Forestry Ass’n v. Solis, 889 F.Supp.2d 711 (E.D. Pa. 2012), held that DOL does have independent H-2B rulemaking authority. The court stated “the history of the H-2B program demonstrates Congress’s expectation that the DOL would engage in legislative rulemaking . . . at the time of [the Immigration Reform and Control Act (IRCA)]’s enactment, the DOL regulations governing the labor certification process for non-agricultural, unskilled guest workers already had been in place for many years. There is no evidence that Congress intended to alter or disrupt the DOL’s rulemaking when it enacted IRCA and created the H-2B visa program.” 889 F.Supp.2d at 728. The court also approved of DHS’s decision to “consult” with DOL by adopting the labor certification requirement, finding persuasive the DHS rationale that it does not have the expertise to make labor market determinations. 889 F.Supp.2d at 724-25. Oral argument is currently scheduled for May 2013 in the U.S. Court of Appeals for the Third Circuit in that lawsuit.<sup>3</sup>

Notwithstanding the Eleventh Circuit’s decision in Bayou, or the Departments’ joint issuance of this interim rule, DOL and DHS continue to maintain, as the Louisiana Forestry Association

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<sup>2</sup> As discussed further below, the 2011 Wage Rule has not been implemented due to Congressional prohibition contained in riders to DOL’s appropriations.

<sup>3</sup> Accord G.H. Daniels & Assocs. v. Solis, No. 12-cv-1943-CMA (D. Col. Sept. 17, 2012), Doc. 38 (Mot. Hrg. Tr.) at 4 (concurring with Louisiana Forestry opinion and rejecting, in the context of an enforcement action under the 2008 H-2B rule, the argument that DOL lacks rulemaking authority).



court held, that DOL does have independent legislative rulemaking authority for the H-2B program. However, due to these inconsistent court rulings on DOL's authority to issue independent legislative rules, DOL and DHS are issuing this joint regulation revising the prevailing wage methodology in the H-2B program in order to respond to the court order in CATA v. Solis, and also to dispel questions regarding the respective roles of the two agencies and the validity of DOL's regulations as an appropriate way to implement the consultation specified in section 214(c)(1) of the INA. DHS has determined that, under section 214(c)(1) of the INA, it must consult with DOL as the agency with expertise on labor market questions, which includes determining the prevailing wages that must be paid to workers in connection with the H-2B program, when adjudicating H-2B petitions.<sup>4</sup> DHS and DOL have determined that the best way for DOL to fill this statutory role as a consultant to DHS is for DOL to provide its advice with respect to whether U.S. workers capable of performing the services or labor are available, and whether the employment of the foreign worker(s) will adversely affect the wages and working conditions of similarly employed U.S. workers. DHS and DOL have further determined that the most effective method for DOL to provide this advice – a key component of which is establishing the prevailing wage methodology – is by setting forth in regulations the standards it will use to advise DHS regarding whether U.S. workers capable of performing the services or labor are unavailable and whether the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. DOL's rules, including this prevailing wage rule, set the standards by which employers demonstrate to

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<sup>4</sup> DHS (and the former Immigration and Naturalization Service, Department of Justice, which was charged with administration of the H-2B program prior to enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2142) has long recognized that DOL is the appropriate agency with which to consult regarding the availability of U.S. workers and for assuring that wages and working conditions of U.S. workers are not adversely affected by the use of H-2B workers. See 55 FR 2606, 2617 (Jan. 26, 1990).

DOL that they have tested the labor market and found no or insufficient numbers of U.S. workers, and also set the standards by which employers demonstrate to DOL that the offered employment does not adversely affect US workers. By setting forth this structure in regulations, DHS and DOL will ensure the provision of this advice by DOL is consistent, transparent, and provided in the form that is most useful to DHS.

This interim final rule is necessary because, in the absence of regulations to structure DOL's consultative responsibilities, DOL will be forced to cease processing employers' requests for prevailing wage determinations and temporary labor certifications and thus will be unable to continue to provide the advice that DHS has determined is necessary under section 214(c)(1) of the INA for DHS to fulfill its statutory responsibility under section 101(a)(15)(H)(ii)(b) of the INA to adjudicate H-2B petitions, as implemented in the DHS regulation at 8 CFR 214.2(h)(6). In particular, this will leave DHS incapable of meeting its statutory responsibility to meaningfully consult with DOL, the Government agency DHS has determined is the appropriate agency with the requisite expertise with respect to labor market questions. Without this statutory consultation, USCIS will be unable to adjudicate H-2B petitions, as 214(c)(1) of the INA requires that a petition cannot be adjudicated by DHS "until after consultation with appropriate agencies of the Government." Further, in order to maintain the integrity of the consultative process, and provide DHS with the best possible advice relating to the U.S. labor market concerns required by section 101(a)(15)(H)(ii)(b) of the INA, DOL must have certainty that it can enforce the assurances provided by employers who desire to participate in the H-2B program, such as those relating to the wages and working conditions that must be offered to H-2B workers and U.S. workers recruited in connection with the application for certification.

In order to ensure that there can be no question about the authority for and validity of the DOL's regulations governing the methodology for determining prevailing wages in the H-2B program, DHS and DOL are jointly publishing this regulation, which implements a key component of DHS's determination that it must consult with DOL on the labor market questions relevant to its adjudication of H-2B petitions. This regulation also executes DHS's and DOL's determination that implementation of the consultative relationship may be established through jointly adopted regulations that determine the method by which DOL will provide the necessary advice to DHS. Accordingly, DHS is amending its own regulations at 8 CFR 214.2(h)(6)(iii)(D) to clarify that DOL will establish regulatory procedures for administering elements of the program necessary to provide DHS with the requisite advice with respect to the labor market. This amendment will underscore that the consultative process has occurred and that DHS adopts DOL's prevailing wage methodology as part of the advice required for the administration of temporary labor certifications.

#### D. The Determination of the Prevailing Wage

To comply with its obligations under the program, an employer must pay the H-2B workers hired in connection with the application a wage that will not adversely affect the wages of U.S. workers similarly employed. DOL's H-2B procedures have always provided that adverse effect is prevented by requiring H-2B employers to offer and pay at least the prevailing wage to the H-2B workers and those U.S. workers recruited in connection with the job opportunity. To facilitate compliance with this requirement, DHS and DOL have set forth a number of specific provisions governing the system by which DOL will determine the prevailing wage for the job opportunity for which temporary labor certification is being sought.

From the outset of the H-2B program, DOL directed that the same prevailing wage procedures be used for the permanent and H-2B labor certification programs and the H-1B labor condition application program. Although DOL did not promulgate a separate prevailing wage methodology until 1995, DOL provided guidance to the States, which provided prevailing wage determinations until 2010, on the administration of the H-2 nonagricultural program (a predecessor of the H-2B program) requiring the States to determine the prevailing wage in accordance with regulations for the permanent program at 20 CFR 656.40.<sup>5</sup> In 1995, DOL issued separate prevailing wage guidance through GAL 4-95, “Interim Prevailing Wage Policy for Nonagricultural Immigration Programs” (May 18, 1995), Attachment I,<sup>6</sup> and again in 1998, through GAL 2-98, “Prevailing Wage Policy for Nonagricultural Immigration Programs” (November 30, 1998) that continued to extend the provisions of § 656.40 to the H-2B program. Under the two GALs, payment of the rates determined under the Davis-Bacon Act (DBA), 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, was mandatory for H-2B occupations for which such wage determinations existed. Starting in 1998, in the absence of SCA or DBA wage rates, prevailing wage determinations were based on the Occupational Employment Statistics (OES) wage survey, compiled by the Bureau of Labor Statistics (BLS). The OES wage survey produces employment and wage estimates for approximately 800 occupations and is based upon wage data covering full-time and part-time workers who are given monetary compensation for their labor or services. The OES survey is published annually and features data broken out both by geographic area and industry. The wage estimates in the survey are made available at the national, State and

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<sup>5</sup> See General Administration Letter (GAL) 10-84, “Procedures for Temporary Labor Certifications in Non Agricultural Occupations” (April 23, 1984),

<sup>6</sup> See <http://wdr.doleta.gov/directives>.

metropolitan and nonmetropolitan area levels. The OES survey directly collects a wage rate for all occupations defined by the Office of Management and Budget's (OMB) occupational classification system, the Standard Occupational Classification (SOC). Employers have also been able to use wages based on private wage surveys that meet Department standards since at least 1995.

Both the 1995 and the 1998 GALs provided that, absent a DBA or SCA rate, DOL would issue prevailing wage determinations at two levels or tiers, an entry-level wage and an experienced wage. At that time, there were not many H-2B program users, and new prevailing wage procedures were designed primarily to address the needs of the permanent and H-1B programs, which were dominated by job opportunities in higher skilled occupations. There was considerable desire on the part of permanent and H-1B program users to have DOL create a multi-tiered wage structure to reflect the widely-held view that workers in occupations that require sophisticated skills and training receive higher wages based on those skills. Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a reasonable proxy for the entry-level wage. DOL did not conduct any meaningful economic analysis to test the validity of that assumption and, most significantly, it did not consider whether assumptions about wages and skill levels for higher skilled occupations might be less valid when applied to lower skilled occupations. In December 2004, DOL revised its regulation governing the permanent program. 69 FR 77326, Dec. 27, 2004. These revisions included changes to 20 CFR 656.40, which governed the procedures for determining the prevailing wage. In particular, these revisions eliminated the requirement that SCA/DBA wage

determinations be treated as the prevailing wage where such determinations existed. The regulation provided that use of available SCA/DBA wage rates would be only at the option of the employer.

The preamble to the permanent regulation, 69 FR at 77326-27, also discusses Congress's enactment of the H-1B Visa Reform Act in the Consolidated Appropriations Act of 2005, Public Law 108-447, Div. J., Title IV, section 423, which amended section 212(p)(4) of the INA, 8 U.S.C. 1182(p)(4), relating to the H-1B visa program. This legislation required DOL to issue prevailing wages at four levels when the prevailing wages were based upon a government survey. The legislation mandated how to calculate the four levels through a mathematical formula that created two additional wage levels in between the existing two level wages. Section 656.40 of 20 CFR, the regulation implementing the H-1B Visa Reform Act, only specifically referenced prevailing wages established for the permanent and H-1B programs.

Soon after the enactment of the new regulations, DOL issued comprehensive guidance on prevailing wage determinations. Following the practice in place since 1984, this guidance also applied to the H-2B program. ETA Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs, May 2005, revised November 2009.<sup>7</sup> The guidance included the use of the four levels and the elimination of the mandatory application of the SCA/DBA wage determinations.

In 2008, DOL issued regulations governing DOL's role in the H-2B temporary worker program. 73 FR 78020, Dec. 19, 2008 (the 2008 rule). The 2008 rule addressed some aspects of the 2005 prevailing wage guidance, and adopted the four-level wages from the prior guidance by

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<sup>7</sup> [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

requiring wages based on the OES mean to reflect four “skill levels.” *See* 20 CFR 655.10(b)(2).<sup>8</sup> As described above, this guidance converted the two-level wages, containing an entry level and experienced wage, into a four-tier system by mathematically adjusting the two tiers in the manner prescribed by Congress in the context of H-1B specialty occupations. The 2008 rule provided that the prevailing wage would be the collective bargaining agreement (CBA) wage rate, if the job opportunity was covered by an agreement negotiated at arms’ length between the union and the employer; the OES four-tier wage rate if there was no CBA; a survey if an employer elected to provide an acceptable survey; or a DBA or SCA rate if the employer elected to use those determinations. *See* 20 CFR 655.10(b). DOL did not seek comments on the use of the four-level wage methodology for determining prevailing wages when promulgating the 2008 rule. 73 FR 78031.

#### E. CATA v. Solis and the 2011 Wage Rule

In early 2009, a lawsuit was filed challenging various aspects of DOL's H-2B procedures included in the 2008 rule. Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis, Civ. No. 09-cv-240, 2010 WL 3431761 (E.D. Pa. 2010). Among the issues raised in this litigation were the use of the four-level wage structure in the H-2B program and the optional use of SCA and DBA wages. In an August 30, 2010 decision, the court ruled that DOL had violated the Administrative Procedure Act (APA) by failing to adequately explain its reasoning for adopting skill levels as part of the H-2B prevailing wage determination process, and by failing to accept

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<sup>8</sup> The invalidated provision from the 2008 rule read: “If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.” (emphasis added).

comments relating to the choice of appropriate data sets in deciding to rely on OES data rather than SCA and DBA in setting the prevailing wage rates. The court ordered DOL to “promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order.” CATA, 2010 WL 3431761, at \*27.

Following the CATA court’s 2010 ruling, and following consultation with DHS, DOL engaged in rulemaking to address both substantive and procedural concerns about setting prevailing wages in the H-2B program. DOL published a Notice of Proposed Rulemaking (NPRM) in accordance with the court's order. 75 FR 61578, Oct. 5, 2010. The NPRM proposed to eliminate the use of the four-level wage structure for the H-2B program in favor of the mean OES wage for each occupational category. It also provided that available SCA and DBA wage determination rates for those occupations for which H-2B certification is sought, or collective bargaining agreement wages, if such an agreement exists, would be used if they reflected higher wages than the OES wage. The NPRM also proposed to eliminate the use of employer-provided surveys in the H-2B program.

After a thorough review of the comments, and with input from DHS, DOL promulgated a final rule, with some modifications relating to surveys. 76 FR 3452, Jan. 19, 2011 (the 2011 Wage Rule). DOL determined that “there are no significant skill-based wage differences in the occupations that predominate in the H-2B program, and to the extent such differences might exist, those differences are not captured by the existing four-tier wage structure.” Id. at 3460. DOL found that in 2010 almost 75 percent of H-2B jobs were certified at a Level 1 wage, which is defined as the mean of the lowest one-third of all reported wages, and over a several year



period, approximately 96 percent of the prevailing wages issued were lower than the mean of the OES wage rates for the same occupation. Id. at 3463. In the low-skilled occupations in the H-2B program, the mean “represents the wage that the average employer is willing to pay for unskilled workers to perform that job.” Id. Therefore, DOL concluded that the use of skill levels adversely affected U.S. workers because it “artificially lowers [wages] to a point that [they] no longer represent[] a market-based wage for that occupation.” Id. The application of the four levels set a wage “below what the average similarly employed worker is paid.” Id.; see also 75 FR 61577, 61580-81. DOL concluded that “the net result is an adverse effect on the [U.S.] worker’s income.” 76 FR at 3463.

The 2011 Wage Rule permitted the use of employer-submitted surveys only in very limited circumstances, such as where the job opportunity is not covered by a CBA and is not accurately represented within the available wage data under the DBA, SCA, or OES. 76 FR at 3467. In those circumstances, the employer could submit a wage survey that would be used if it met the methodological standards that were applicable to employer-submitted surveys in the 2008 rule. Compare 20 CFR 655.10(f)(2), (3)(i) and (ii) (2012 ed.) with 20 CFR 655.10(b)(7)(iv), (v)(A) and (B) (2012 ed. Note).

The 2011 Wage Rule required the use of wage determinations based on the DBA and SCA if a job opportunity involved an “occupation in the area of intended employment ... for which such a wage has been determined.” 20 CFR 655.10(b)(2) (2012 ed. Note). Finally, the 2011 Wage Rule concluded that the prevailing wage would be the highest of the wage rates established in the various wage sources – the applicable CBA wage, the arithmetic mean as found in the OES, or the applicable DBA or SCA wage – because that approach would be most consistent with DOL’s

responsibility to avoid an adverse effect on wages of similarly employed U.S. workers. After two adjustments to the effective date of the 2011 Wage Rule, it was set to become effective on November 30, 2011.<sup>9</sup>

#### F. Congressional Response to the 2011 Wage Rule

On November 18, 2011, Congress enacted the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (November 2011 Appropriations Act), a spending bill that contained DOL's appropriations. That Act provided that "[n]one of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [2011 Wage Rule]." Pub. L. No. 112-55, div. B, tit. V, § 546 (Nov. 18, 2011). The conference report accompanying the November 2011 Appropriations Act stated that the purpose of the postponement was to "allow Congress to address" the 2011 Wage Rule. H.R. Rep. No. 112-284 (2011) (Conf. Rep.).

Since the enactment of the November 2011 Appropriations Act, each subsequently enacted appropriations act has contained the same prohibition preventing implementation of the 2011 Wage Rule.<sup>10</sup> Because the Department was prohibited from spending funds to implement the 2011 Wage Rule, it was necessary to revert to the 2008 wage provisions for as long as the 2011 Wage Rule was blocked legislatively. The program could not continue to function without a

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<sup>9</sup> DOL originally set the effective date of the Wage Rule for January 1, 2012. However, as a result of the CATA litigation and following notice-and-comment rulemaking, DOL issued a final rule, 76 FR 45667, August 1, 2011, revising the effective date of the 2011 Wage Rule to September 30, 2011, and a second final rule, 76 FR 59896, September 28, 2011, further revising the effective date of the 2011 Wage Rule to November 30, 2011.

<sup>10</sup> These include the Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786, which was enacted on December 23, 2011; Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313, which was enacted on September 28, 2012; and Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198, enacted on March 26, 2013, which establishes DOL's appropriations through September 30, 2013.

wage rule in effect, and the 2008 rule was the only available option. In order to prevent the nullification of the wage provisions of the 2008 H-2B rule, 20 CFR 655.10, which would have occurred had the 2011 Wage Rule taken effect, DOL has extended the effective date of the 2011 Wage Rule four times.<sup>11</sup> Implementation of the effective date of the 2011 Wage Rule is currently extended to October 1, 2013.

#### G. Further Activity in CATA v. Solis

As a result of the appropriations riders, DOL continued to rely upon the 2008 rule, including its prevailing wage provisions. On September 27, 2012, the CATA plaintiffs filed a motion for preliminary and permanent injunction seeking to prevent DOL from using the four-level wage system in determining H-2B prevailing wages. Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary and Permanent Injunctive Relief, CATA v. Solis, Dkt. 152. Accordingly, they asked the court to vacate the phrase "at the skill level" from the prevailing wage formula at 20 CFR 655.10(b)(2). Id. at 1. Plaintiffs argued that DOL's continued reliance on the four-level OES wages contravened the court's 2010 holding that the provision was procedurally invalid. Id. at 1-2. Plaintiffs further argued that continued reliance on the four-level OES wages was in derogation of DOL's own finding, described in promulgating the 2011 Wage Rule, that the use of the four-level structure created an adverse effect on workers' wages. Id.

On March 21, 2013, the CATA court issued a permanent injunction against the operation of the skill levels contained in the wage provision, 20 C.F.R. 655.10(b)(2), of the 2008 rule. CATA

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<sup>11</sup> Because of the prohibition on expenditures to implement the 2011 Wage Rule, its effective date has been extended to January 1, 2012, 76 FR 73508 (Nov. 29, 2011); to October 1, 2012, 76 FR 82115 (Dec. 30, 2011); to March 27, 2013, 77 FR 60040 (Oct. 2, 2012); and to October 1, 2013, 78 FR 19098 (posted on the public website of the Office of the Federal Register on March 26, 2013, and appeared in print on March 29, 2013).

v. Solis, --- F.Supp. ---, 2013 WL 1163426, \*13 (E.D. Pa. 2013) (CATA II). The court noted that DOL continued to use the prevailing wage provisions of the 2008 rule, “nearly thirty (30) months after Judge Pollak invalidated the Rule, and two years after the DOL found that the Rule violates the DOL’s statutory and regulatory mandates.” Id. at \*5. The court held that DOL has authority to grant labor certifications only if it can assure that they will not adversely affect the wages and working conditions of U.S. workers. Id. at \*8. Because prevailing wage determinations issued based upon the four-level OES wage rates do result in adverse effect, the labor certifications based on such prevailing wages “exceed the bounds of DOL’s delegated authority.” Id. The court also found that the four-level component of the 2008 rule violated section 706(2)(A) of the APA, because it had consequences that “plainly contradict congressional policy.” Id. at \*10. The court rejected DOL’s request to leave the 2008 rule in effect while it promulgated another regulation in order to avoid disruption to the H-2B program, stating that in these circumstances “to leave an invalid rule in place is for a reviewing court to legally sanction an agency’s disregard of its statutory or regulatory mandate.” Id. at \*11. The court further stated that vacating the four-level component of the 2008 rule “will only disrupt the H-2B program to the extent that the DHS and DOL use the program to issue H-2B visas that they are expressly prohibited from granting.” Id. at \*12. Accordingly, the court vacated section 655.10(b)(2), remanded the matter to DOL, and gave DOL 30 days to come into compliance. Id. at \*13. As a result of the court’s order, DOL is currently unable to issue a prevailing wage determination based on the OES survey, which is the basis of more than 95 percent of DOL’s H-2B prevailing wage determinations.<sup>12</sup> Therefore, under the court’s order, we must now act

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<sup>12</sup> However, if a job opportunity for which a prevailing wage determination is sought is covered by a collective bargaining agreement, or the wage can be set based on the employer’s voluntary reliance on the SCA, the DBA, or

expeditiously to close the regulatory gap created by the court order and promulgate a regulation that sets prevailing wages in the H-2B program in a manner that does not adversely affect U.S. workers' wages, so that DOL may provide the advice DHS has determined is necessary for it to adjudicate H-2B petitions.

#### H. The Interim Wage Methodology

The wage methodology in the 2008 rule requires that if a job opportunity is covered by a collective bargaining agreement, the prevailing wage applicable to that job is the wage set in the CBA. 20 CFR 655.10(b)(1). However, if the job opportunity for which a prevailing wage determination is sought is not covered by a CBA, the prevailing wage is determined according to 20 CFR 655.10(b)(2). Under that now-vacated provision, the prevailing wage was the arithmetic mean of the OES wages of workers similarly employed "at the skill level" in the area of intended employment. 20 CFR 655.10(b)(2). Other wage provisions of the 2008 rule were not vacated. First, the 2008 rule also permits employers to submit their own wage surveys in lieu of the OES wage, under certain conditions. 20 CFR 655.10(b)(4), (f). In addition, employers are permitted, but not required, to use wage determinations issued by DOL under either the DBA or SCA. 20 CFR 655.10(b)(5).

By contrast, as noted above, the 2011 Wage Rule establishes a regime in which the prevailing wage would be the "highest of" either the wage applicable under the CBA, the DBA, the SCA, or the OES mean. 20 CFR 655.10(b)(1)-(3) (2012 ed. Note). The 2011 Wage Rule eliminates from the OES mean the four-level wages, and disallows the use of employer-submitted surveys if the prevailing wage could be determined based on the OES, the DBA, or the SCA. 20 CFR

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the submission of an acceptable private wage survey, DOL may issue a prevailing wage determination and comply with the March 21 court order.

655.10(b)(3), (6), (7) (2012 ed. Note). In the very limited circumstances in which employer-submitted surveys would be permitted, the 2011 Wage Rule continues DOL's role in reviewing such surveys for methodological soundness. 20 CFR 655.10(b)(7) (2012 ed. Note).

#### 1. Prevailing Wages Based on the OES

In developing the wage methodology for this interim final rule in order to provide the requisite advice to DHS, DOL will not divide the OES wage into four levels because the CATA court has concluded, based on DOL's administrative findings, 76 FR at 3463, that the four levels substantively violate the INA, and has vacated that aspect of the 2008 rule. CATA II, 2013 WL 1163426, at \*9-10. The OES wage survey formed the basis of the prevailing wage determination in both the 2008 and 2011 rules. Therefore, in order to avoid creating an adverse effect on U.S. workers, DOL will base prevailing wage determinations on the arithmetic mean wage established in the OES survey, without the four levels. The prevailing wage will no longer be the mean of the particular wage level, but will be the overall mean of all persons in the occupation in question. Accordingly, this interim rule promulgates the regulatory text contained in the 2008 version of 20 CFR 655.10(b)(2), but strikes from that provision the phrase, "at the skill level." Striking this phrase from the 2008 version of 20 CFR 655.10(b)(2) results in the use of the OES mean without the wage tiers. See revised 20 CFR 655.10(b)(2) below.

The OES survey is an appropriate basis for issuing H-2B prevailing wages because it is among the largest, most comprehensive, and continuous statistical survey programs of the Federal Government. The OES collects data from more than 1 million establishments, and salary information is available for all occupations in the SOC. Occupational wage data is available at state levels and at metropolitan and nonmetropolitan area levels within a state. For these

reasons, the OES is also used in other foreign labor certification programs administered by DOL. See 76 FR at 3458. DOL has decided to use the OES mean as the appropriate wage level in the H-2B program because almost all H-2B jobs involve unskilled occupations requiring few or no skill differentials (such as landscape laborer, housekeeping cleaner, forestry worker, and amusement park worker). There is no basis, under the existing statutory and regulatory framework, for creating wage levels since there are no skill-based wage differentials in these occupations. See 76 FR 3458-60. As DOL concluded in 2011, there was no justification for stratifying wage levels to artificially create wage-based skill levels when in fact there is no great difference in skill levels with which to stratify the job. Moreover, based on publicly available program data, DOL found during notice and comment rulemaking leading up to the 2011 rule that the predominance of Level I wages under the 2008 rule's four-tier regime results in an adverse impact on similarly situated U.S. workers, in violation of the INA. 75 FR 61580; 76 FR 3463. Under these circumstances, DOL cannot continue using the four-tier wage regime without violating the INA and USCIS's regulations. CATA II, 2013 WL 1163426, \*8. In addition, DOL has the capacity to operationalize the OES mean wage rate at once based on the immediately available data from the Bureau of Labor Statistics, which will allow DOL to issue prevailing wage determinations without delay. This will allow for the smoothest transition with the least disruption and cost to the Department while acting in compliance with the CATA II court's vacatur and remand order.

The Departments invite comments on whether the OES mean is the appropriate basis for determining the prevailing wage.

## 2. Prevailing Wages Based on Collective Bargaining Agreements

Similarly, both the 2008 and 2011 wage rules use the CBA wage as an alternate basis for determining the prevailing wage. DOL has left the CBA provision of the 2008 wage rule, 20 CFR 655.10(b)(1), intact. DOL and DHS invite comment on whether the CBA wage should continue to be used as the prevailing wage in all instances in which there is a CBA wage, or whether the CBA wage should only be required if it is higher than the OES wage.

### 3. Prevailing Wages Based on the Davis-Bacon Act and the Service Contract Act

As noted above, DOL historically relied on the prevailing wage regulations used for permanent labor certifications, as codified at 20 CFR 656.40, to determine prevailing wages in the H-2B program. In versions of section 656.40(a)(1) that pre-date 2005, wage rates were set at the levels mandated by the DBA and the SCA “if the job opportunity is in an occupation which is subject to a wage determination” in the area of intended employment under either statute. In 2008, DOL eliminated the requirement to apply DBA and SCA wages, and allowed employers to request voluntarily a prevailing wage based on those sources. The 2011 Wage Rule reinstated the mandatory use of the DBA and the SCA if they were the highest rate “for the occupation in the area of intended employment if the job opportunity is in an occupation for which such a wage rate has been determined.” 20 CFR 655.10(b)(2) (2012 ed. Note).

For purposes of this interim rule, DOL has decided to continue the 2008 rule’s approach, which permits, but does not require, an employer to use a prevailing wage determination based on the DBA or SCA. However, nothing precludes an employer from paying a higher DBA or SCA wage should they choose to do so. In addition, any employer employing H-2B and corresponding workers on particular contracts subject to the DBA or the SCA must comply with the wage provisions under DBA or SCA.



The mandate to prevent adverse effect has existed for many years in the immigration programs administered by DOL and, except for certain unique requirements of the H-2A program, has always been implemented by a requirement that employers offer and pay the prevailing wage, however defined or calculated. The three prevailing wage rates used in this interim final rule (OES mean, SCA and DBA) all are determined by DOL, albeit using different methodologies and samples. Nevertheless, these three rates are based on actual wages being paid to workers in the particular area for the same kind of work for which H-2B workers are sought. Therefore, although there are various ways to define or calculate the prevailing wage rate, DOL and DHS conclude that, under the present circumstances in which we must act expeditiously in response to the CATA II order, the use of any of these three wage rates will serve to meet DOL's obligation to determine whether U.S. workers are available for the position and that the employment of H-2B workers will not adversely affect U.S. workers similarly employed. Adopting this standard from the 2008 rule with respect to the SCA and the DBA wages will allow for more efficient and consistent prevailing wage determinations that are in compliance with the INA and USCIS's regulations. It will allow DOL to begin to issue wage determinations upon publication of this interim rule, and begin to eliminate as quickly as possible the backlog of prevailing wage determination requests that has built up since the CATA II order. Approaches other than the voluntary application of the DBA and SCA wage rates (such as the "higher of" standard used in the 2011 Wage Rule) would require DOL to determine whether multiple wage rates exist for every application and would significantly impede DOL's ability to issue new prevailing wages to those employers in the backlog as well as to employers who previously received the now-invalidated prevailing wages. Any delay in issuing new prevailing wage rates would work to the detriment of employees working under the now-invalidated rates because it

would extend the time period during which they would be paid under those invalid rates. Additionally, it would prolong the depressive effect on the wages of similarly-employed U.S. workers, which was the ground for vacatur in the CATA II order.

DOL and DHS seek comment on the use of the DBA and the SCA in making prevailing wage determinations, and if these wage rates should apply, to what extent. DBA and SCA wage determinations, when they exist for the occupation for which certification is being sought and in the area of intended employment, could be used in the H-2B program in at least three possible ways:

- a. They will apply if they represent the highest available prevailing wage determination for the job opportunity in question. This is the approach used in the 2011 rule.
- b. They are available to the employer if it chooses to rely on them for that job opportunity, regardless whether the wage is the highest or lowest available. This is the approach used in the 2008 rule and in this interim final rule.
- c. They constitute the only prevailing wage determination applicable to that job opportunity unless there is a CBA wage. This is the approach that was followed before 2005.

DOL and DHS invite comments on these and other alternatives that may be considered, especially the reasons for or against the use of a particular option. Comments on use of the SCA and/or the DBA in setting prevailing wages will be thoroughly considered, and the Departments will explain fully the policy adopted on these issues following comment.

#### 4. Prevailing Wages Based on Employer-Submitted Surveys

DOL's 2008 rule permits employers to submit independent wage surveys under certain guidelines, and provides for an appeal process in the event of a dispute. Under the 2008

regulation, if an employer submits a survey, it must “provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow” DOL to determine the adequacy of the data provided and validity of the statistical methodology used in conducting the survey. 20 CFR 655.10(f)(2). DOL has issued guidance that sets out the standards by which it will determine the adequacy and validity of the survey methodology.<sup>13</sup> In addition, the survey must be based upon recently collected data, *i.e.*, generally within 24 months of the date of submission. 20 CFR 655.10(f)(3)(ii).

In the 2011 rule, DOL concluded that, given the quality, reliability and consistency of the three public surveys that would be used to make prevailing wage determinations – the OES, the DBA and the SCA – we would allow the submission of other surveys by employers as the basis for a prevailing wage determination only in limited circumstances. Those circumstances include specific situations in which the public surveys may not provide useful wage information about, for instance, geographic locations that are not included in BLS’s data collection area (such as the Commonwealth of the Northern Mariana Islands), where the job opportunity is not accurately represented within the job classification used in the OES, DBA or SCA surveys, or where the job opportunity is not accurately represented within the Standard Occupational Classification System published by the BLS. In virtually all other cases, the prevailing wage determination would be made based on the OES, the DBA or the SCA wages. However, if circumstances permitted the use of an employer-submitted survey as the basis for a prevailing wage determination, the 2011 regulation required the same “fresh” data standards as did the 2008 rule, and also required that

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<sup>13</sup> See [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) at 14-16.

DOL review the survey methodology in the same manner as the 2008 rule. 20 CFR 655.10(b)(7) (2012 ed. Note).

This interim final rule will permit the use of employer-provided surveys in lieu of wages derived from the other sources, in order for DOL to provide the advice DHS has determined is necessary for it to adjudicate H-2B petitions. Accordingly, we do not revise or amend in this interim rule 20 CFR 655.10(b)(4) and (f) of the 2008 rule. However, DOL still has the concerns expressed in the 2011 rule about the consistency, reliability and validity of these surveys, as well as the costs and delays involved in DOL's review of surveys. 76 FR 3465-67. The Department would like to collect additional data on the accuracy and reliability of private surveys covering traditional H-2B occupations to allow for further factual findings on the sufficiency of private surveys for setting prevailing wage rates. Therefore, DOL and DHS invite comment on whether to permit the continued use of employer-submitted surveys, and especially seek input on the ways in which, if permitted, the validity and reliability of employer-submitted surveys can be strengthened. Are there methodological standards that can or should be included in the regulation that would ensure consistency, validity and reliability of employer-provided surveys? Are there industries in which employers historically and routinely rely on employer-submitted surveys that should be permitted to do so because of the well-developed, historical, industry-wide practice, or for other reasons? Are there state-developed wage surveys, such as state agricultural surveys, or surveys from other agencies, such as maritime agencies, that could provide data that would be useful in setting prevailing wages? Should employer surveys that include data based on wages paid to H-2B or other nonimmigrant workers be permitted in establishing a prevailing wage that does not adversely affect U.S. workers? If so, under what circumstances? See 655.10(b)(7)(vi) (2012 ed. Note).

## I. The Interim Final Rule is Effective Immediately

The CATA II court order vacating 20 CFR 655.10(b)(2) in the 2008 rule prevents DOL from issuing any prevailing wage determinations based on the four-tiered version of the OES survey. Because prevailing wage determinations are a condition precedent to an employer's filing an application for temporary labor certification, which is the means by which DOL provides the advice that DHS has determined is necessary, and there is no prior regulation that DOL can use to issue prevailing wage determinations based on the OES, DOL has suspended issuance of prevailing wage determinations and certification of the vast majority of those applications (those which had not requested a determination based on a CBA, the DBA, the SCA, or an employer-provided survey) until this interim wage methodology becomes effective. Due to the suspension of most wage determinations created by the CATA II court order, and because DOL has only 30 days to comply with the court's order, this interim rule is effective immediately. In response to the vacatur of the existing wage rule and in order to come into compliance quickly, this rule applies to all requests for prevailing wage determinations and applications for temporary labor certification in the H-2B program issued on or after the effective date of this interim rule. Upon individual notification to the employer of a new prevailing wage, the new wage methodology will also apply to all previously granted H-2B temporary labor certifications for any work performed on or after the effective date of this interim rule. In addition to the requirements that follow directly from the CATA II court's vacatur, the employer's obligation to pay the wage under the interim rule is reflected in Appendix B.1 to the ETA Form 9142, H-2B Application for Temporary Employment Certification, in which employers have certified as a condition of employment under the H-2B program that they will offer and pay "the most recent prevailing

wage...issued by the Department to the employer for the time period the work is performed[.]”  
76 FR 21039.

Further, on April 1, 2013, the U.S. Court of Appeals for the Eleventh Circuit upheld a district court decision that granted a preliminary injunction against enforcement of DOL’s 2012 H-2B comprehensive rule on the ground that the plaintiffs (employers) are likely to prevail on their allegation that DOL lacks H-2B rulemaking authority. Bayou Lawn & Landscape Servs. v. Sec’y of Labor, --- F.3d ----, 2013 WL 1286129, No. 12-12462 (11th Cir. Apr. 1, 2013). DOL and DHS strongly disagree with the Eleventh Circuit’s decision and are defending on appeal to the U.S. Court of Appeals for the Third Circuit the district court’s decision in Louisiana Forestry Ass’n v. Solis, 889 F. Supp. 2d 711 (E.D. Pa. 2012), which came to the conclusion that DOL does have independent H-2B rulemaking authority. Nevertheless, DHS and DOL have concluded it is necessary to dispel any questions about the validity of the H-2B program or how it operates. As explained above, DHS has determined that, to exercise its statutory responsibilities to administer the H-2B program, it requires advice from DOL regarding the labor market, and DOL is unable to provide a key component that underlies this advice, namely the prevailing wage determination, without being assured a valid rule is in place. Therefore, based upon the Eleventh Circuit’s affirmance of the preliminary injunction against the implementation of the 2012 rule, DOL and DHS are making effective immediately this interim final rule and revising DHS’s regulations to resolve any doubt about the consultative role DOL plays in in the H-2B program with respect to prevailing wage determinations. However, this wage methodology is established on an interim basis while the public submits comments on the methodology, and DOL and DHS will promulgate a final rule following thorough consideration

of the comments received. DOL and DHS will act as quickly as possible in reviewing comments and in promulgating a final wage methodology regulation in light of those comments.

The Administrative Procedure Act (APA) authorizes agencies to make a rule effective immediately without public participation upon a showing of good cause. 5 U.S.C. 553(b)(B),(d)(3). The APA's good cause exception to public participation and a delayed effective date applies upon a finding that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Under the APA, "'(i)mpracticable' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." S. Rep. No.752, 79th Cong., 1st Sess. 200 (1945). The "'[p]ublic interest' supplements... 'impracticable' [and] requires that public rule-making procedures shall not prevent an agency from operating." Id.

In this case, DOL and DHS consider that it is impracticable to adopt a new prevailing wage methodology, which is the first step in DOL's consultative role in assessing employers' requests for temporary labor certifications, only after the consideration of public comments and the passage of 30 days following the publication of a final rule, as normally required by the APA (and after 60 days, pursuant to the Congressional Review Act's provision for major rules). 5 U.S.C. 553(b), (d); 5 U.S.C. 801. DHS and DOL must act under an extremely short deadline, outside the control of either agency, to come into compliance with the CATA II court's vacatur order. Neither DHS nor DOL may use the vacated 2008 prevailing wage rule, which effectively leaves the Departments without a wage regime by which they may operate a congressionally created program. DOL and DHS must take action within 30 days to come into compliance with the CATA II court order, and also must establish as quickly as possible a wage methodology so

that DOL may fully resume providing advice that DHS requires by issuing prevailing wage determinations, which is a condition precedent to an employer's application for temporary labor certification. If this interim wage methodology did not become effective until after the submission and consideration of comments and after a 30-day period following the publication of a final rule, DOL's H-2B certifications and DHS's H-2B petition adjudications would be suspended for that period of time, likely several months. Under such a scenario, the H-2B program could not operate, which would have the dual effects of depriving employers of H-2B workers and depriving workers, both U.S and foreign, of job opportunities with legally sustainable wages.

Moreover, under the CATA II court's order, and DOL's own factual findings, the U.S. workers and H-2B workers currently employed under approved certifications, based on the invalid wage rates under the 2008 rule, are being underpaid in violation of the INA. CATA II, 2013 WL 1163426, \*11-12; 76 FR 3463. To come into compliance with the court's order and to ensure that DHS and DOL fulfill the statutory mandate to protect the domestic labor market, DHS and DOL must immediately set new and legally valid prevailing wage rate standards to allow for an immediate adjustment of the wage rates for these currently employed workers. Further delay in setting a legally valid prevailing wage regime will cause continued harm to U.S. workers, foreign workers, and the domestic labor market.

In addition, the Departments must forego full notice and comment rulemaking to provide immediate regulatory guidance for the operation of the H-2B program, which will avoid continued confusion and disruption to sectors of the economy that may need to supplement their workforce with H-2B workers. The ongoing suspension of the H-2B program beyond the period



it has taken DOL and DHS to issue this interim rule would create a significant impact on the H-2B program. For instance, as of late March (shortly after the CATA II court order), DOL had in process approximately 287 applications for H-2B prevailing wage determinations. Over the next month, DOL anticipates receiving requests for an additional 265 H-2B prevailing wage determinations. As shown below in Table 1, based on present and historical filing trends, we anticipate receiving an estimated additional 3,023 H-2B prevailing wage requests over the next six months, the amount of time it would likely take to fully implement the APA procedures related to public participation and a 30-day delay in the effective date.<sup>14</sup>

**Table 1.** *Six-Month Forecast of H-2B Prevailing Wage Applications*

<b>Month</b>	<b>Month by Month Forecast</b>
March -- April	265
May	456
June	355
July	377
August	675
September	1,160
<b>Total</b>	<b>3,023</b>

Therefore, the suspension of processing OES-based prevailing wage determinations for this period of time will create a significant backlog for DOL’s National Prevailing Wage Center. Without this fundamental advice from DOL, DHS will be unable to adjudicate H-2B petitions, which will significantly hinder employers’ ability to use the program to meet temporary labor shortages and will deprive workers of job opportunities during that suspension.

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<sup>14</sup> This forecast estimate of incoming H-2B prevailing wage requests includes the 4.4 percent decrease in H-2B prevailing wage requests submitted so far in this fiscal year (FY 2013) as compared the number of H-2B prevailing wage requests submitted during the same time period last fiscal year (FY 2012).

A months-long program suspension would also significantly delay the issuance of temporary labor certifications, which, under the Departments' consultative framework, are a predicate to H-2B petitions adjudicated by USCIS. The INA limits the number of H-2B visas to 66,000 visas per year, one half of which, or 33,000, can be allocated during the first six months of each fiscal year, and the remainder of which may be allocated during the second half of each fiscal year. For applications for temporary labor certification filed in October 2013, recruitment of U.S. workers would typically begin as early as June 1, 2013. Requests for prevailing wage determinations are generally made between 30 and 60 days in advance of when prevailing wage determinations are needed, *i.e.*, by April or May of 2013. Because an extended suspension of H-2B prevailing wage determinations will prevent the required recruitment of U.S. workers before filing a temporary labor certification application, and H-2B petitions cannot be filed with USCIS without an approved temporary labor certification application, the process will be backlogged significantly, and employers will forego workers necessary to conduct business and workers will forfeit job opportunities. Moreover, if DOL took months to implement a new wage methodology after notice and comment, upon resuming the issuance of prevailing wages, there would be a large backlog and unusually longer wait times that would have an adverse impact on employers' ability to file timely petitions for H-2B workers and for DHS to timely adjudicate those petitions. As of April 10, 2013, there are approximately 682 H-2B petitions, consisting of around 10,117 beneficiaries, on hold at DHS.<sup>15</sup>

Finally, DHS and DOL note that the regulated public already had a significant opportunity to comment on the substantive prevailing wage regime that DHS and DOL are adopting through this interim final rule. DOL already accepted public comments on the

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<sup>15</sup> This figure does not include any Form I-129 H-2B petitions filed at DHS from Guam.

proposed use of the mean OES wage rates for the H-2B program. 75 FR 61580-87. DOL subsequently considered and responded to public comments on this issue. 76 FR 3458-67. In addition to the reasons stated above, the Departments find good cause to implement the prevailing wage standards in this interim final rule immediately on a temporary basis because the regulated public is familiar with the prevailing wage regime adopted in this rule. The Departments do not contend that public comments will not be helpful; rather, under the particular circumstances and history of this program, the emergency situation created by the CATA II court's order justifies an immediate effectiveness of a prevailing wage standard of which the regulated public is well aware. The Departments still request and will accept and consider additional public comments on all of the prevailing wage issues addressed in this interim final rule.

For these good and sufficient reasons, DOL and DHS have determined that there is good cause to dispense with the APA's notice and public comment and 30-day effective date requirements.

## **II. Regulatory Procedures**

### **A. Executive Order 12866**

Under Executive Order (E.O.) 12866, DOL and DHS must determine whether a regulatory action is economically significant and therefore subject to the requirements of the E.O. and to review by OMB. Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments

or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

#### **IV. Administrative Information**

##### **A. Executive Orders 12866 and 13563**

Under Executive Order (E.O.) 12866 and E.O. 13563, the Departments must determine whether a regulatory action is significant and therefore subject to the requirements of the E.O. and to review by OMB. Section 3(f) of the E.O. defines a significant regulatory action as an action that is likely to result in a rule that: (1) has an annual effect on the economy of \$100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Departments have determined that this interim final rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. In response to the court's March 22, 2013 order in CATA II, which vacated the prevailing wage methodology in 8 C.F.R. 655.10(b)(2) because of its depressive effect on wages, the Department of Labor has been unable

to provide prevailing wage determinations calculated according to four skill levels based on the OES mean wage. The Department has, however, continued to provide prevailing wage determinations based on those portions of section 655.10(b) that the court did not vacate, i.e., those determinations based on the applicable collective bargaining wage or those determinations in which the employer has requested a wage based on an applicable Service Contract Act wage, Davis Bacon Act wage, or an appropriate private wage survey. No more than approximately five percent of all prevailing wage requests are based on these wages. The revision to section 655.10(b)(2) will bring the Department into compliance with the court's order by establishing a prevailing wage based on the OES mean without four tiers, thereby eliminating any depressive effect on wages. This will allow the Department to resume issuing prevailing wages to all employers requesting them. In order to evaluate the economic impact of this interim final rule, it is necessary to project what would happen in the future if the rule is not adopted and to compare this to what is expected to happen in the future if the rule is adopted. In this case, the Department is unable to project what would happen to wage and visa requests under the program since the majority of wage requests have been made based on the four-tiered wage methodology, which is no longer available. The Department has been unable to estimate the economic effects of the rule, but has determined that due to the change in the prevailing wage provisions, this interim final rule is likely an economically significant regulatory action under section 3(f)(1) of E.O. 12866, because without the rule H-2B applications might fall precipitously. The analysis below is not an estimate of the effect of the rule, but instead quantifies the economic significance of the interim final rule's change in the prevailing wage provisions when compared to the wage provisions under the previous wage rule.

The Departments' economic analysis under this section is limited to meeting the requirements under Executive Orders 12866 and 13563. The Departments did not use the economic analysis under this section as a factor or basis for determining the scope or extent of the Departments' obligations under the Immigration and Nationality Act, as amended.

### **Need for Regulation**

The Departments have determined that a new wage methodology is necessary for the H-2B program, based on the recent court decision in CATA v. Solis vacating section 655.10(b)(2) of the 2008 rule because it did not adequately ensure that U.S. workers were not adversely affected by the employment of H-2B workers and the 2008 rule had not been properly promulgated under the APA. The Departments are issuing the interim final rule pursuant to the court's order requiring the Department of Labor to come into compliance with its ruling within 30 days.

According to the distribution of the 59,694 H-2B prevailing wage determinations the Department of Labor issued based on the Occupational Employment Statistics (OES) wage survey in FY 2011 and 2012<sup>16</sup>, 72.3 percent of H-2B prevailing wage determinations based on the OES were at Level I. The percentages of H-2B prevailing wage determinations based on the OES at Levels II, III, and IV were 14.4, 5.9, and 7.4, respectively. In over 90 percent of those cases, the H-2B prevailing wage was determined at the wage rate lower than the mean of the OES wage rates for the same occupation.

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<sup>16</sup> In FY 2011 and 2012, a total of 72,037 prevailing wage determinations were issued by the Department of Labor's National Prevailing Wage Center (NPWC) for employers seeking wage rates for H-2B workers. Of the 72,037, 59,694 determinations (82.9%) were based on the OES and 12,343 determinations were based on a collective bargaining agreement (CBA), the Davis-Bacon Act (DBA), or the Service Contract Act (SCA) prevailing wage, or employer-submitted wage surveys.

As the Department of Labor found in its 2011 Final Wage Rule, 76 FR 3452, 3458-63 (Jan. 19, 2011), and as the CATA court concurred, this distribution of wage rates does not adequately protect U.S. workers from adverse effect. Therefore, as explained in the preamble to this interim rule, because the OES mean wage rate conforms more closely to the wages actually paid by employers in the area for the occupation, the Departments have decided to use the OES mean when the certified prevailing wage is based on the OES survey. Using the arithmetic mean is one way to ensure that H-2B workers are paid a wage that will not adversely affect the wages of similarly employed U.S. workers.

## **2. Economic Analysis**

The Departments' analysis below compares the expected impacts of this interim final rule to the baseline (i.e., the 2008 rule). According to the principles contained in OMB Circular A-4, the baseline for this rule would be the situation that exists if this interim final rule is not adopted. Thus, the baseline for this H-2B prevailing wage regulation is the four-tier wage structure derived from the OES wage survey, as implemented in the 2008 rule. The 2008 rule also permits the use of certain employer-submitted surveys, the DBA, or the SCA wages as the basis for a prevailing wage determination. The 2008 rule also requires the use of the CBA wage rate when a CBA exists that was negotiated at arms' length.

This interim final rule establishes that when the prevailing wage determination is based on the OES, the wage rate is the arithmetic mean of the OES wages for a given area of employment and occupation. The median does not represent the most predominant wage across a distribution. The median wage represents only the midpoint of the range of wage values; it does not account for the actual average. The mean is widely considered to be the best measure of central tendency for a normally distributed sample, as it is the measure that includes all the

values in the data set for its calculation, and any change in any of the wage rates will affect the value of the mean. The Department has traditionally relied on arithmetic means for wage programs and has determined that these reasons make continuing reliance on the mean, rather than the median, logical. This interim final rule eliminates the four-tier wage structure of the 2008 final rule. For the purposes of this interim final rule, the Departments have decided to retain the component of the 2008 final rule that permits, but does not require, an employer to use a prevailing wage determination based on employer-provided alternatives from legitimate sources such as employer-submitted surveys, DBA, or SCA wage determinations. It also retains the component of the 2008 final rule that requires the use of an applicable CBA wage rate, if one exists. Finally, this interim final rule retains the requirement that employers offer H-2B workers and U.S. workers hired in response to the required H-2B recruitment a wage that is at least equal to the highest of the prevailing wage, or the Federal, State or local minimum wage.

The change in the method of determining prevailing wages under this interim final rule will result in additional compensation for both H-2B workers and U.S. workers hired in response to the required recruitment. In this section, the Departments discuss the relevant costs, transfers, and benefits that may apply to this interim final rule.

The Departments calculated the change in hourly wages that would result from the interim final rule by comparing the prevailing wage rates to the H-2B hourly wages actually certified by standard occupational classification (SOC) code and county of employment, using a randomly selected sample of 512 certified or partially certified H-2B applications from FY 2012. Under this interim final rule, the Departments will base prevailing wage determinations on the OES mean wage, the SCA or DBA wage, the CBA wage, or wage based on an employer-submitted survey.



Using certified and partially certified applications from the random sample, we calculated the increase in wages as the difference between the prevailing wages and the H-2B hourly wages actually certified in FY 2012.<sup>17</sup> We weighted this differential by the number of certified workers on each certified or partially certified application.<sup>18</sup> We then summed those products to calculate the weighted average wage differential for the randomly selected sample drawn from FY 2012 H-2B program data.

The equation below shows the formula that we used to calculate the weighted average wage differential (WWD). In the formula, “*Prevailing Wage*” is the arithmetic mean of the OES-reported wage, the SCA or DBA wage, whichever is lowest.

$$WWD = \sum_{i=1}^{512} (\text{Prevailing Wage}_i - \text{Certified H-2B Wage}_i) \times \left( \frac{\text{Number of Certified Workers on Each Application}_i}{\text{Total Certified Workers in the Sample}} \right)$$

In order to accurately calculate the expected changes in hourly wages relative to the baseline, the Departments used wage data for each county where the H-2B work was expected to be performed. The Department of Labor’s program database does not contain all work locations for the H-2B certifications; further, the employer’s address frequently does not represent the area where the work actually takes place. Consequently, the Departments used a stratified random

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<sup>17</sup> Depending on the scope of work required by H-2B workers, multiple prevailing wage determinations may be needed if the work will be performed in multiple locations for a certified or partially-certified application (such as those involving carnival or reforestation workers). While the Department of Labor’s program database collects the total number of H-2B workers certified for each certified or partially-certified application, the Department of Labor has limited information about H-2B workers certified on the same application who were paid different prevailing wages because they performed work in multiple locations. In this analysis for the certified and partially-certified applications with multiple prevailing wage rates, we used prevailing wage rates that occurred most frequently in each application for certification.

<sup>18</sup> The Departments weighted the wage differentials by the number of certified workers as opposed to the number of workers requested because a decrease in number of workers granted may occur for reasons other than that a U.S. worker was hired in response to the recruitment.

sample of 512 certified or partially-certified applications from FY 2012 H-2B program data<sup>19</sup> and conducted a manual extraction of area-of-employment data from these certified H-2B applications, including the city, county, state, and zip code corresponding to the area of employment.

Using this sample data, we estimated that this interim final rule's change in the method of determining wages will result in, at most, a \$2.12 increase<sup>20</sup> in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application.

The Departments provide an assessment of transfer payments associated with increases in wages resulting from the change in the wage determination method. Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional benefits or costs to society. The primary recipients of transfer payments reflected in this analysis are H-2B workers and U.S. workers hired in response to the required recruitment under the H-2B program. The primary payers of transfer payments reflected in this analysis are H-2B employers. Under the higher wage obligation established in this interim

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<sup>19</sup> The stratified random sample chosen was consistent with standard statistical methods.

<sup>20</sup> This is an upper bound estimate because, due to the lack of data on employer surveys in our sample, we were not able to fully calculate the increase in the weighted average hourly wage. Our estimate of the increase in the weighted average hourly wage at \$2.12 was calculated as the difference between the OES mean wage (or the SCA or DBA wage, whichever is lower) and the wage actually certified. However, we assume that employers would choose an available survey wage where it is lower than the OES mean wage and the SCA and/or DBA wage. Therefore, our estimated weighted average hourly wage increase is likely an overestimate. We also did not have data on CBA rates. However, if an employer has a higher CBA rate, this interim final rule will not result in a transfer payment because the employer already would be legally bound to pay the CBA wage.

final rule, those employers who participate in the H-2B program are likely to be those that have the greatest need to access the H-2B program.

The H-2B program is capped at 66,000 visas issued per year but H-2B workers with existing visas may remain in the country for two additional years if an H-2B employer petitions for them to remain. Assuming, as the Department of Labor did in its 2011 Final Wage Rule, that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) stay a third year, there will be a total of 115,500 H-2B workers in a given year. That is, in our calculations, we used 66,000 as the annual number of new entrants and 115,500 as the total number of H-2B workers in a given year.

In the remaining sections of this analysis, we first present the estimated costs resulting from the interim final rule, including an increase in H-2B employer expenses that could lead to a decrease in production. The Departments predict that most of these costs, which would result from a decrease in current H-2B participation by employers who cannot afford the increased labor costs, or who can more easily fill empty positions with U.S. workers, will be borne by the additional employers who have the need for additional temporary labor but do not currently participate in the H-2B program. We then discuss the transfers from H-2B workers to U.S. workers and from employers to U.S. and H-2B workers resulting from the change in wage determination methodology.

**i. Costs**

In standard economic models of labor supply and demand, an increase in the wage rate represents an increase in production costs to employers, which leads to a reduction in the demand for labor. Because production costs increase with an increase in the wage rate, a resulting decrease in profits is possible for H-2B employers that are unable to increase prices to cover the

labor cost increase. Some H-2B employers, however, can be expected to offset the cost increase by increasing the price of their products or services.<sup>21</sup> In addition, workers who would have been hired at a lower wage rate may not be hired at the higher wage rate, resulting in forgone earnings for H-2B and U.S. workers. In this sense, to the extent that the higher wages imposed by the rule result in lower employment and lower output by firms that had employed those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss. In economics, a deadweight loss is a loss of economic efficiency that can occur when equilibrium for a good or service is not optimal. This effect will be magnified during years in which the H-2B visa cap is not reached.<sup>22</sup>

The Department of Labor certified employers for 79,305 H-2B positions on average for both FY 2011 and 2012. This number reflects the number of positions certified, rather than the number of actual workers who entered the program to fill those positions because, as previously stated, the H-2B program is capped at 66,000 visas per year. Using this number of certified positions to represent the quantity of labor demanded, and assuming an elasticity of labor demand of -0.3,<sup>23</sup> a \$2.12 (21.4 percent) increase in the average H-2B prevailing wage rate would result in a 6.4 percent decline in the number of H-2B positions requested by employers,

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<sup>21</sup> Although employers may pass costs onto their customers, data does not exist from which to estimate the amount or extent to which costs would be absorbed by customers. Therefore, the Departments are not able to quantify this cost offset.

<sup>22</sup> The output reduction impact of reducing labor demand may be in some cases partially offset by capital substitution and organizational substitution productivity effects. When substitution occurs, the deadweight loss is reduced.

<sup>23</sup> Hamermesh estimated that the elasticity of labor demand ranged from -0.21 to -0.45 by industry with an average of about -0.30 (Hamermesh Daniel S., *Labor Demand*, Princeton and Chichester, U.K.: Princeton University Press, 1993). Although this is a 20-year old study, it has been cited recently by Leif Danzier (2007) and Pedro Trivin (2012). We did not use these more recent studies of elasticity of labor demand because they are limited to the manufacturing sector or low-wage workers.

for a remaining total of 74,229 H-2B certified positions<sup>24</sup>, which is still larger than the maximum number of visas allowed under the H-2B program. Therefore, any loss of production resulting from some employers dropping out of the program will be offset by the increase in production by other employers who would then be able to fill previously vacant positions.

Thus, the Departments believe that for years in which the number of certified positions exceeds the number of positions available under the annual cap, there will be no deadweight loss in the market for H-2B workers even if some employers do not participate in the program as a result of the higher H-2B wages. Indeed, the higher wages expected to result from the interim final rule could in turn result in a more efficient distribution of H-2B visas to employers who can less easily attract available U.S. workers. The Departments believe that, under this interim final rule, those employers who can more easily attract U.S. workers will be dissuaded from attempting to participate in the H-2B program, so that those employers participating in the H-2B program after the rule is in place will be those that have a greater need for the program, on average, than those employers not participating in the H-2B program. Therefore, there would be no appreciable decline in the total employment under the program.

## **ii. Transfers**

The change in the method of determining the prevailing wage rate results in transfers from H-2B workers to U.S. workers and from U.S. employers to both U.S. workers and H-2B workers. A transfer from H-2B workers to U.S. workers arises because, as wages increase, jobs that would otherwise be occupied by H-2B workers will be more acceptable to a larger number of U.S. workers who will apply for the jobs. Additionally, faced with higher H-2B wages, some employers may find domestic workers relatively less expensive and may choose not to

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<sup>24</sup>  $79,305 - (79,305 \times 6.4\%) = 74,229$ .

participate in the H-2B program and, instead, employ U.S. workers. Although some of these U.S. workers may be drawn from other employment, some of them may otherwise be or remain unemployed or out of the labor force entirely, earning no compensation.

The Departments are not able to quantify these transfers with precision. Difficulty in calculating these transfers arises primarily from uncertainty about the number of U.S. workers currently collecting unemployment insurance benefits who would become employed as a result of this rule.

To estimate the total transfer to all H-2B workers that results from the increase in wages due to application of the interim final rule's new prevailing wage determination method, the Departments multiplied the weighted average wage differential (\$2.12) by the total number of H-2B workers in the United States in a given year (115,500).<sup>25</sup> We estimated the total impact incurred due to the increase in wages at \$371.82 million per year. For the number of hours worked per day, we used 7 hours as typical. For the number of days worked, we assumed that the employer would retain the H-2B worker for the maximum time allowed (10 months or 304 days) and would employ the workers for 5 days per week. Thus, the total number of days worked equals 217 ( $304 \times 5/7$ ). The following equation shows the formula used to compute the total impact per year, which likely will be lower due to the use of other lower wage rates:

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<sup>25</sup> The Department's data on certified applications cannot be used to determine the actual number of H-2B workers in the country. Certifications are made without regard to the cap on the number of H-2B workers admissible each year and are not intended to indicate whether a worker actually entered the country to fill a position.

**\$371.82 million (Total Impact per year)**  
**■ \$2.12 (Weighted Average Wage Differential) × 7 (Working hours per day)**  
**× 217 (Total number of days worked)**  
**× 115,500 (The Total Number of H – 2B Workers)**

The increase in the prevailing wage rates induces a transfer from participating employers not only to H-2B workers, but also to U.S. workers hired in response to the required H-2B recruitment. The higher wages are beneficial to U.S. workers because they enhance workers' ability to meet the cost of living and to spend money in their local communities, which has the secondary impact of increasing economic activity and, therefore, generates employment in the community. An additional transfer is increased remittances to the H-2B worker's home country. The Departments, however, do not have data on the remittances made by H-2B workers to their countries of origin. Our calculations also do not include the wage increase for U.S. workers hired in response to the required recruitment because of the lack of data on these workers. The annual transfer of this interim final rule was calculated based on the stratified random sample of 512 certified or partially-certified applications from FY 2012 H-2B program data, which are the most recent data available. Because we are assuming no statutory increases in the number of H-2B visas available for entry in a given year or in the maximum employment period of 10 months per year, it is unlikely that the selection of a different fiscal year (or years) would significantly affect the amount of transfers calculated in this analysis.

## B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal rules that are subject to the notice and comment requirements of section 553(b) of the APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic

impact on a substantial number of small entities. Under Section 553(b) of the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. This interim final rule is exempt from the requirements of section 553(b) of the APA because DOL and DHS have made a good cause finding earlier in this preamble that a general notice of proposed rulemaking is impracticable and contrary to the public interest. Therefore, the RFA does not apply, and the Departments are not required to either certify that the rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis. Consistent with the policy of the RFA, the Departments encourage the public to submit comments that suggest alternative rules that accomplish the stated purpose of this interim final rule and minimize the impact on small entities.

#### C. Unfunded Mandates Reform

Executive Order 12875 – This rule will not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995 – This rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more. It also does not result in increased expenditures by the private sector of \$100 million or more, because participation in the H-2B program is entirely voluntary.

#### D. Paperwork Reduction Act

This interim rule contains no new information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

#### E. The Congressional Review Act



Consistent with the Congressional Review Act, 5 U.S.C. 808(2), this interim final rule will take effect immediately because the Departments have found, as stated earlier in this preamble, that there is good cause to conclude that notice, the opportunity for public participation, and a delay in the effective date are impracticable and contrary to the public interest. However, consistent with the CRA, 5 U.S.C. 801, DOL will, upon publication, submit to Congress and the Comptroller General of the United States the reports required by the Act.

#### F. Executive Order 13132—Federalism

DOL and DHS have reviewed this Final Rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government as described by E.O. 13132. Therefore, DOL has determined that this rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

#### G. Executive Order 13175—Indian Tribal Governments

This interim rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. As a result, no tribal summary impact statement has been prepared.

#### H. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681) requires the Departments to assess the impact of this interim rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. The Departments have assessed this interim rule and determined that it will not have a negative effect on families.

#### I. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

This interim rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

#### J. Executive Order 12988—Civil Justice

This interim final rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Departments have developed the interim final rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the rule carefully to eliminate drafting errors and ambiguities.

#### K. Plain Language

DOL and DHS have drafted this interim rule in plain language.

### **List of Subjects**

#### **8 CFR Part 214**

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

## **20 CFR Part 655**

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

## **DEPARTMENT OF HOMELAND SECURITY**

### **8 CFR Chapter I**

#### **Authority and Issuance**

Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Secretary of Homeland Security, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### **PART 214 -- NONIMMIGRANT CLASSES**

1. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

2. Section 214.2 is amended by revising paragraph (h)(6)(iii)(D) to read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

(h) \* \* \*

(6) \* \* \*

(iii) \* \* \*

(D) The Governor of Guam shall separately establish procedures for administering the temporary labor program under his or her jurisdiction. The Secretary of Labor shall separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that temporary labor program under his or her jurisdiction, and shall determine the prevailing wage applicable to an application for temporary labor certification for that temporary labor program in accordance with the Secretary of Labor's regulation at 20 CFR 655.10.

**DEPARTMENT OF LABOR**

**20 CFR Part 655**

**Authority and Issuance**

Accordingly, for the reasons stated in the joint preamble and pursuant to the authority vested in me as the Acting Secretary of Labor of the United States, part 655 of title 20 of the Code of Federal Regulations is amended as follows:

**PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES**

3. The authority citation for part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

4. Amend § 655.10 by revising paragraph (b)(2) to read as follows:

**§ 655.10 Determination of prevailing wage for temporary labor certification purposes.**

\* \* \* \* \*

(b) \*\*\*

(2) If the job opportunity is not covered by a CBA, the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section.

\* \* \* \* \*

Signed at Washington, D.C. this 19th of April, 2013.

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**Janet Napolitano,**  
Secretary of Homeland Security

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**Seth D. Harris**  
Acting Secretary of Labor

[FR Doc. 2013-09723 Filed 04/22/2013 at 4:15 pm; Publication Date: 04/24/2013]