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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

[Docket No. ETA-2013-0003]

RIN 1205–AB69

Wage Methodology for the Temporary Non-agricultural Employment H-2B Program

AGENCY: Employment and Training Administration, Labor; U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) and the Department of Labor (DOL) are issuing final regulations governing certification of the employment of nonimmigrant

workers in temporary or seasonal non-agricultural employment. This final rule sets forth how DOL provides the consultation that DHS has determined is necessary to adjudicate H-2B visa petitions by setting the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with applications for temporary labor certification. Specifically, for the purposes of an H-2B temporary labor certification, this final rule establishes that, in the absence of a wage set in a valid and controlling collective bargaining agreement, the prevailing wage will be the mean wage for the occupation in the pertinent geographic area derived from the Bureau of Labor Statistics Occupational Employment Statistics survey, unless the H-2B employer meets the conditions for requesting that the prevailing wage be based on an employer-provided survey. Any such survey submitted must meet the new methodological criteria established in this final rule in order to be used to establish the prevailing wage. The final rule does not permit use of the wage determinations issued under the Service Contract Act or the Davis Bacon Act as sources to set the prevailing wage in the H-2B temporary labor certification context.

DHS and DOL are issuing this final rule together because DHS, as the Executive Branch agency charged with administering the H–2B program, has determined that the most effective implementation of the statutory H-2B labor protections requires that DHS consult with DOL for its advice about matters with which DOL has expertise, including questions about the methodology for setting the prevailing wage in the H–2B program. 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) 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. This rule also adopts, without change, certain revisions made to DHS's H-2B regulations, to clarify that DHS is the Executive Branch agency charged with making determinations regarding eligibility for H-2B classifications, after consulting with DOL for its advice about matters with which DOL has expertise, including questions related to the methodology for setting the prevailing wage in the H-2B program. Finally, DHS and DOL are issuing, simultaneously with this rule, a companion H-2B rule governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers.

DATES: This final rule is effective [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT:

For further information on 8 CFR Part 214, contact Steven W. Viger, Adjudications Officer (Policy), Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts NW., Washington, DC 20529-2060; Telephone (202) 272-1470 (this is not a toll-free number).

For further information on 20 CFR part 655, subpart A, contact William W. Thompson, II, Acting Administrator, Office of Foreign Labor Certification, Employment and Training Administration, 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 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Statutory and Regulatory Framework

The Immigration and Nationality Act (INA) establishes the H-2B visa classification for a non-agricultural temporary 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 . . . temporary [non-agricultural] service or labor if 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), INA section 101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), requires an importing employer (H-2B employer) to petition the Department of Homeland Security (DHS) for classification of the prospective temporary worker as an H-2B nonimmigrant.[1] DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa or H-2B status. Finally, the INA requires that "[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS], after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. 1184(c)(1), INA section 214(c)(1).

Pursuant to the above-referenced authorities, DHS has promulgated regulations implementing the H-2B program. See, e.g., 73 FR 78104 (Dec. 19, 2008). These regulations prescribe the conditions under which DHS may grant an employer's petition to classify an alien as an H-2B worker. See 8 CFR 214.2(h)(6). U.S. Citizenship and Immigration Services (USCIS) is the component agency within DHS that adjudicates H-2B petitions. Id.

[1] Under section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions that were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. 557 (2003) (codifying HSA, title XV, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

USCIS examines H-2B petitions for compliance with a range of statutory and regulatory requirements. For instance, USCIS will examine each petition to ensure, inter alia, (1) that the job opportunity in the employer's petition is of a temporary nature, 8 CFR 214.2(h)(2)(D), (6)(ii) and (6)(vi)(D); (2) that the beneficiary alien meets the educational, training, experience, or other requirements, if any, attendant to the job opportunity described in the petition, 8 CFR 214.2(h)(6)(vi)(C); (3) that there are sufficiently available H-2B visas in light of the applicable numerical limitation for H-2B visas, 8 CFR 214.2(h)(8)(ii)(A); and (4) that the application is submitted consistent with strict requirements ensuring the integrity of the H-2B system, 8 CFR 214.2(h)(6)(i)(B), (6)(i)(F).[2]

DHS has implemented the statutory protections attendant to the H-2B program by regulation. See 8 CFR 214.2(h)(6)(iii), (iv), and (v). In accordance with the statutory mandate at 8 U.S.C. 1184(c)(1), INA section 214(c)(1), that DHS consult with "appropriate agencies of the government" to determine eligibility for H-2B nonimmigrant status, DHS (and the former Immigration and Naturalization Service) has long recognized that the most effective administration of the H-2B program requires consultation with the Department of Labor (DOL) to advise whether U.S. workers capable of performing the temporary services or labor are available. See, e.g., Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 FR 2606, 2617 (Jan. 26, 1990) ("The Service must seek advice from the Department of Labor under the H-2B classification because the statute requires a showing that unemployed U.S. workers are not available to perform the services before a petition can be

[2] DHS also publishes annually a list of countries whose nationals are eligible to participate in the H-2B visa program in the coming year. See 8 CFR 214.2(h)(6)(i)(E); see also, e.g., 79 FR 3214 (Jan. 17, 2014) notice of eligible country list). As part of its adjudication of H-2B petitions, USCIS must determine whether the alien beneficiary is a national of a country on the list; if not, USCIS must determine whether it is in the U.S. interest for that alien to be a beneficiary of such petition. See 8 CFR 214.2(h)(6)(i)(E).

approved. The Department of Labor is the appropriate agency of the Government to make such a labor market finding. The Service supports the process which the Department of Labor uses for testing the labor market and assuring that wages and working conditions of U.S. workers will not be adversely affected by employment of alien workers.").

Accordingly, DHS regulations require that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A).[3] The temporary labor certification demonstrates that DOL has evaluated, and is providing advice to DHS with respect to, whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(iii)(A) and (D). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D).

DHS relies on DOL's advice in this area, as DOL is the appropriate government agency with expertise in labor questions and historic and specific expertise in addressing labor protection questions related to the H-2B program. This advice helps DHS fulfill its statutory duty to determine, prior to approving an H-2B petition, that unemployed U.S. workers capable of performing the relevant service or labor cannot be found in the United States. 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 8 U.S.C. 1184(c)(1), INA section 214(c)(1). DHS has therefore made DOL's approval of a temporary labor certification a

[3] The regulation establishes a different procedure for the Territory of Guam, under which a petitioning employer must apply for a temporary labor certification with the Governor of Guam. 8 CFR 214.2(h)(6)(iii)(A).

condition precedent to the completion of the H-2B petition. 8 CFR 214.2(h)(6)(iii) and (vi). Following receipt of an approved DOL temporary labor certification and other required evidence, USCIS may adjudicate an employer's complete H-2B petition. Id.

Consistent with the above-referenced authorities, since at least 1968,[4] DOL has established regulatory procedures to certify whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 20 CFR part 655, subpart A. As part of DOL's temporary labor certification process, and as required by DHS regulations, 8 CFR 214.2(h)(6)(iii)(D) and (iv), DOL sets the wage that employers must offer and pay foreign workers admitted to the United States in H-2B nonimmigrant status. See 20 CFR 655.10. This final rule sets forth DOL's methodology for setting the wage, consistent with the INA and existing DHS regulations.

As discussed above, DHS has determined that the most effective implementation of the statutory labor protections in the H-2B program requires that DHS consult with DOL for its advice about matters with which DOL has unique expertise, particularly questions about the methodology for setting the prevailing wage in the H–2B program. The most transparent and

[4] DHS has required a temporary labor certification as a condition precedent to adjudication of an H-2B petition for temporary employment in the United States since 2008. 73 FR 78103. DOL, however, has promulgated regulations governing its adjudication of employer applications for temporary labor certification since 1968, when DOL promulgated regulations under which it would review, among other things, "the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered." See 33 FR 7570 (May 22, 1968) (DOL final rule on certification of temporary foreign labor for industries other than agriculture and logging). Until 1986, there was a single H-2 temporary worker classification applicable to both temporary agricultural and non-agricultural workers. In 1986, Congress revised the INA to create two separate programs for agricultural (H-2A) and non-agricultural (H-2B) workers. See 8 U.S.C. 1101(a)(15)(H)(ii), INA 101(a)(15)(H)(ii), 66 Stat. 163 (June 27, 1952); Immigration Reform and Control Act of 1986, Public Law 99-603, Sec. 301, 100 Stat. 3359. Under the 1968 final rule, DOL considered, "such matter[s] as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered." 33 FR at 7571.

effective method for DOL to provide this consultation is by setting forth in regulations the standards it will use to provide that advice, as required by existing DHS regulations. DOL's rules set the standards by which employers demonstrate to DOL that they have tested the labor market and found insufficient numbers of qualified and available U.S. workers, and set the standards by which employers demonstrate to DOL that the offered employment does not adversely affect U.S. workers. By setting forth this structure in regulations, DHS and DOL ensure the provision of this advice by DOL is consistent, transparent, and provided in the form that is most useful to DHS.

As 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. 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 comprehensive H-2B rule (2012 H-2B rule) on the ground that the employers were likely to prevail on their allegation that DOL lacks H-2B rulemaking authority. Bayou Lawn & Landscape Servs. v. Sec'y of Labor, 713 F.3d 1080 (11th Cir. 2013). On remand, the district court issued an order vacating the 2012 H-2B rule, and permanently enjoined DOL from enforcing the rule on the ground that DOL lacks rulemaking authority in the H-2B program. Bayou Lawn & Landscape Servs., No. 3:12-cv-183 (N.D. Fla. Dec. 18, 2014) (Bayou II). The Bayou II decision is currently on appeal to the 11th Circuit. However, on February 5, 2014, the U.S. Court of Appeals for the Third Circuit held that "DOL has authority to promulgate rules concerning the temporary labor certification process in the context of the H 2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority." La. Forestry Ass'n v. Perez, 745 F.3d 653, 669 (3d Cir. 2014).

In order to ensure that there can be no question about the authority for and validity of the regulations in this area, DHS and DOL (the Departments), together, are issuing this final rule. By proceeding together, the Departments affirm that this rule is fully consistent with the INA and existing DHS regulations implementing the H-2B program and is vital to DHS's ability to faithfully implement the statutory labor protections attendant to the program. See 8 U.S.C. 1101(A)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 8 U.S.C. 1103(a)(6), INA section 103(a)(6); 8 U.S.C. 1184(c)(1), INA section 214(c)(1); 8 CFR 214.2(h)(6)(iv). This final rule 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 final rule also affirms DHS's and DOL's determination that implementation of the consultative relationship may be established through regulations that determine the method by which DOL will provide the necessary advice to DHS.

B. The CATA I Litigation, 2011 Wage Rule, and Congressional Riders

In 2008, DOL issued regulations governing DOL's role in the H-2B temporary worker program. The regulation established, among other things, a methodology for determining the wage that a prospective H-2B employer must pay. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes, 73 FR 78020 (Dec. 19, 2008) (the 2008 rule).[5] 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

[5] Before 2008, DOL set the prevailing wage in the H-2B program through sub-regulatory guidance. See, e.g., General Administration Letter (GAL) 10-84, "Procedures for Temporary Labor Certifications in Non Agricultural Occupations" (April 23, 1984); GAL 4-95, "Interim Prevailing Wage Policy for Nonagricultural Immigration Programs" (May 18, 1995), Attachment I, available at http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf; GAL 2-98, "Prevailing Wage Policy for Nonagricultural Immigration Programs" (published Oct. 31, 1997; effective Jan. 1, 1998) available at http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf.

arms' length between a union and the employer; the Occupational Employment Statistics (OES) wage rate if there was no CBA; a survey if an employer elected to provide an acceptable survey; or a wage rate under the Davis-Bacon Act (DBA), 40 U.S.C. 276a et seq., or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 et seq., if one was available for the occupation in the area of intended employment. See 20 CFR 655.10 (2009). In the absence of the CBA wage, the employer could elect to use the applicable SCA or the DBA wage in lieu of the OES wage. See 20 CFR 655.10(b) (2009). The 2008 rule and the agency guidance implementing it required that when prevailing wage determinations were based on the OES wage survey, which is compiled by the Bureau of Labor Statistics (BLS), the wage had to be structured to contain four tiers to reflect skill and experience.[6] DOL subjected most provisions of the 2008 rule to the Administrative Procedure Act's (APA) procedural requirements, but because the agency had already been implementing the four-tiered wages in the H-2B program pursuant to sub-regulatory guidance,[7] DOL did not seek public comments on the use of the four-tiered wage methodology for determining prevailing wages when promulgating the 2008 rule. See 73 FR at 78031. In 2009, shortly after the promulgation of the 2008 H-2B regulation, a suit was filed under the APA challenging several aspects of the 2008 rule. See Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa.

[6] The 2008 rule required that when the prevailing wage was based on the OES, it should reflect skill levels. The agency's implementing guidance required that the prevailing wage contain four wage tiers based on skill level. As a result, we refer throughout this rule to the 2008 rule's requirement of four wage tiers.

Because the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the four-tiered wage structure, adapted from the statutorily required four tiers applicable to the H-1B visa program under section 212(p)(4) of the INA, 8 U.S.C. 1182(p), was derived by mathematical formula as follows to reflect "entry level," "qualified," "experienced," and "fully competent" workers: Level 1 is the mean of the lowest-paid 1/3, or approximately the 17th percentile; Level 2 is approximately the 34th percentile; Level 3 is approximately the 50th percentile; and Level 4 is the mean of the highest-paid 2/3, or approximately the 67th percentile.

[7] See supra n.5.

2010) (CATA I). Among the issues raised in that litigation was the use of the four-tiered wage structure in the H-2B program. In an August 30, 2010 decision, the court ruled that DOL had violated the APA by failing to adequately explain its reasoning for adopting skill and experience levels as part of the H-2B prevailing wage determination process. Id. at *19. The court ordered promulgation of "new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the [APA]." Id. at *27.

In response to the CATA I order, DOL published a final rule, Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, on January 19, 2011, 76 FR 3452 (the 2011 Wage Rule). In that 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." 76 FR at 3460. Therefore, the 2011 Wage Rule revised the wage methodology by eliminating the 2008 rule's four-tier wage structure on the ground that it violated the obligation to set H-2B wages at a rate that did not adversely affect U.S. workers' wages.[8] Id. at 3458-3461.

The new methodology set the prevailing wage as the highest of the OES arithmetic mean wage for each occupational category in the area of intended employment; the applicable SCA/DBA wage rate; or the CBA wage. The rule also eliminated the use of employer-provided

[8] DOL found that in 2010, almost 75 percent of H-2B jobs were certified at a Level 1 wage (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. 76 FR at 3463. DOL determined that 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. DOL concluded that "the net result is an adverse effect on the [U.S.] worker's income." 76 FR at 3463.

surveys as alternative wage sources, except in limited circumstances.[9] The effective date of the 2011 Wage Rule was originally set for January 1, 2012. However, as a result of litigation challenging the effective date and following notice-and-comment rulemaking, DOL issued a final rule, 76 FR 45667 (Aug. 1, 2011), revising the effective date of the 2011 Wage Rule to September 30, 2011, and a second final rule, 76 FR 59896 (Sept. 28, 2011), further revising the effective date of the 2011 Wage Rule to November 30, 2011.

Shortly before the 2011 Wage Rule was to become effective, Congress issued an appropriations rider effectively barring its implementation. The Consolidated and Further Continuing Appropriations Act, 2012, enacted on November 18, 2011, 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]." Public Law 112-55, 125 Stat. 552, Div. B, Title V, sec. 546 (Nov. 18, 2011) (the November 2011 Appropriations Act). In response to the Congressional prohibition on implementation, DOL delayed the effective date of the 2011 Wage Rule until January 1, 2012. 76 FR 73508 (Nov. 29, 2011). The delayed effective date was necessary because, although the November 2011 Appropriations Act prevented the expenditure of funds to implement, administer, or enforce the 2011 Wage Rule, it did not prevent the 2011 Wage Rule from going into effect. 76 FR at 73509. Had the 2011 Wage Rule gone into effect, it would have superseded and nullified the prevailing wage provisions from the 2008 rule, leaving DOL without a methodology to make prevailing wage determinations. Id. Because the issuance of a prevailing wage determination is a condition precedent to approving an employer's request for an H-2B temporary labor certification, 20 CFR 655.10, DOL's H-2B

[9] These circumstances include very specific situations in which the job may be in a geographic location that is not included in BLS's data collection for the OES (e.g., the Commonwealth of the Northern Mariana Islands) or where the job opportunity is not "accurately represented" within the job classification used in those surveys. 76 FR at 3466-3467.

temporary labor certification program would be inoperable without the ability to issue a prevailing wage pursuant to regulatory standards. Accordingly, DOL determined that it was necessary, in light of the November 2011 Appropriations Act, to delay the effective date of the 2011 Wage Rule to allow DOL to continue to make prevailing wage determinations under the wage provisions of the 2008 rule.

Subsequent appropriations legislation[10] contained the same restriction prohibiting DOL's use of appropriated funds to implement, administer, or enforce the 2011 Wage Rule. This legislation necessitated subsequent extensions of the effective date of that rule. See 76 FR 82115 (Dec. 30, 2011) (extending the effective date to Oct. 1, 2012); 77 FR 60040 (Oct. 2, 2012) (extending the effective date to Mar. 27, 2013); 78 FR 19098 (Mar. 29, 2013) (extending the effective date to Oct. 1, 2013). While the 2011 Wage Rule implementation was suspended, DOL remained unable to implement the wage methodology that, among other things, eliminated the four-tier wage structure, and instead relied on the prevailing wage provisions of the 2008 rule, including the use of the four-tiered wage structure, when issuing a prevailing wage based on the OES.

C. CATA II and the 2013 Interim Final H-2B Wage Rule

Based on DOL's ongoing use of the 2008 rule's four wage tiers, the CATA I plaintiffs returned to court seeking immediate vacatur of the four-tiered wage structure from the 2008 rule. On March 21, 2013, the district court agreed with plaintiffs that its prior holding that the four-tiered wage structure was promulgated in violation of the APA remained unremedied.

[10] These include the Consolidated Appropriations Act of 2012, Public Law 112-74, 125 Stat. 786 (Dec. 23, 2011); Continuing Appropriations Resolution, 2013, Public Law 112-175, 126 Stat. 1313 (Sept. 28, 2012); Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113-6, 127 Stat. 198 (Mar. 26, 2013); Continuing Appropriations Act, 2014, Public Law 113-46, 127 Stat. 558 (Oct. 17, 2013); and Joint Resolution Making further Continuing Appropriations for Fiscal Year 2014, Public Law 113-73, 128 Stat. 3 (Jan. 15, 2014).

Therefore, the court vacated 20 CFR 655.10(b)(2), which was the basis for the four-tiered wage structure, and remanded the matter to DOL, ordering it to comply within 30 days. Comite de Apoyo a los Trabajadores Agricolas v. Solis, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (CATA II). Shortly thereafter, on April 1, 2013, the U.S. Court of Appeals for the Eleventh Circuit upheld a separate 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., 713 F.3d 1080.

In response to the vacatur and 30-day compliance order in CATA II, and the Eleventh Circuit's decision in Bayou Lawn & Landscape Servs., the Departments[11] promulgated an interim final rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 FR 24047 (Apr. 24, 2013) (2013 IFR), which established a new wage methodology. In the 2013 IFR, the Departments struck the phrase, "at the skill level," from 20 CFR 655.10(b)(2). As a result of the deletion of this phrase, the Departments now require that prevailing wage determinations issued using the OES survey be based on the mean wage for the occupation in the area of intended employment. 78 FR at 24053. The 2013 IFR became effective on April 24, 2013, the date of publication, because of the need to comply within the 30-day period ordered by the CATA II Court. The rule was published pursuant to 5 U.S.C. 553(b)(B), which authorizes agencies to make a rule effective immediately upon a showing of "good cause." Significantly, however, the 2013 IFR only implemented the court-ordered change to the wage methodology in 20 CFR 655.10(b)(2). It left intact all other provisions of the wage methodology and procedures contained in the 2008 rule at 20 CFR 655.10, including allowing

[11] The Departments issued the 2013 IFR jointly to dispel questions that arose contemporaneously with its promulgation about the respective roles of the two agencies and the validity of DOL's regulations as an appropriate way to implement the interagency consultation specified in section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1). See supra Sec. I.A.

the use of employer-submitted surveys, and permitting voluntary use of an SCA or DBA wage if one was available for the occupation in the area of intended employment.

Despite immediate implementation of the provisions of the 2013 IFR, the Departments requested comments on all aspects of the prevailing wage methodology of 20 CFR 655.10, including, among other things, whether the OES mean is the appropriate basis for determining the prevailing wage; whether wages based on the DBA or SCA should be used to determine the prevailing wage and if so, to what extent; and whether the continued use of employer-submitted surveys should be permitted and if so, how to better ensure their methodological soundness. The comment period closed on June 10, 2013, and the Departments received over 300 comments on all aspects of the H-2B wage methodology from interested parties.[12]

On July 23, 2013, DOL proposed the indefinite delay of the effective date of the 2011 Wage Rule, and accepted comments from the public on the proposed indefinite delay through August 9, 2013. 78 FR 44054. The reasons for this delay were two-fold: First, at that time, Congress's continued denial of appropriated funds for this purpose, with no indication that the prohibition would be lifted in the future, made implementation of the 2011 Wage Rule effectively impossible. Second, at that time, the Departments were reviewing and analyzing the comments received on the 2013 IFR to determine whether changes to 20 CFR 655.10 and 8 CFR 214.2(h)(6) were warranted in light of the public comments. For these reasons, on August 30, 2013, DOL published a final rule indefinitely delaying the effective date of the 2011 Wage Rule. 78 FR 53643, 53645 (indefinite delay rule). In the final indefinite delay rule, DOL stated that when "Congress no longer prohibits implementation of the 2011 Wage Rule, the Department [of

[12] A substantial number of comments on the IFR repeated, to a great extent, the same arguments that had been raised in connection with the 2011 rulemaking. See 76 FR at 3458-3463.

Labor] will publish a document in the Federal Register within 45 days of that event apprising the public of the status of 20 CFR 655.10 and the effective date of the 2011 Wage Rule." Id. DOL also stated that, "if Congress lifts the prohibition against implementation of the 2011 Wage Rule, the Department [of Labor] would need time to assess the current regulatory framework, to consider any changed circumstances, novel concerns or new information received, and to minimize disruptions." 78 FR at 53645.

On January 17, 2014, the Consolidated Appropriations Act, 2014, Public Law 113-76, 128 Stat. 5, was enacted. In that law, for the first time in over two years, DOL's appropriations did not prohibit the implementation or enforcement of the 2011 Wage Rule. Moreover, on February 5, 2014, the U.S. Court of Appeals for the Third Circuit held that "DOL has authority to promulgate rules concerning the temporary labor certification process in the context of the H-2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority." La. Forestry Ass'n v. Perez, 745 F.3d 653, 669 (3d Cir. 2014). The Third Circuit further found that DOL did not act in contravention of the procedural requirements of the APA in issuing the 2011 Wage Rule, and that the INA's requirement of the four wage tiers in the H-1B program, 8 U.S.C. 1182(p)(4), section 212(p)(4) of the INA, is not mandated in the H-2B program. Id. at 680. Under well-settled law, following the removal of the prohibitive rider, DOL was "free to take any steps deemed necessary to implement, administer and enforce the regulations." Am. Fed'n of Gov. Employees v. OPM, 821 F.2d 761, 764 (D.C. Cir. 1987).

D. The CATA III Decision and its Impact on H-2B Wage Rulemaking

As discussed above, given the swift deadline for compliance in the CATA II decision, the 2013 IFR adopted a focused approach, limited to eliminating the use of skill levels in setting wages under 20 CFR 655.10(b)(2). 78 FR 24047, 24053. Although comments were solicited in

the 2013 IFR on the use of employer-provided surveys and the use of the SCA and DBA wage determinations to set the prevailing wage, no changes were made in the 2013 IFR to 20 CFR 655.10(b)(4), (b)(5), or (f) from the 2008 rule, which governed those wage sources, or to the procedures for employers to request and receive a prevailing wage. Id. at 24053-55.

In 2014, CATA challenged the Departments' decision under the 2013 IFR to continue to permit use of employer-provided surveys to set the prevailing wage under 20 CFR 655.10(f). Comite de Apoyo a los Trabajadores Agricolas v. Perez, No. 2:14-02657, 2014 WL 4100708 (E.D. Pa. July 23, 2014). In addition, CATA challenged DOL's continued use under the 2013 IFR of the 2009 Prevailing Wage Guidance,[13] which continued to permit surveys to incorporate skill levels even though DOL had eliminated skill levels from prevailing wage determinations based on the OES methodology. Id. The District Court dismissed the case on procedural grounds. On December 5, 2014, the appellate court reversed the dismissal in Comite de Apoyo a los Trabajadores Agricolas v. Perez, 774 F.3d 173, 191 (3d Cir. 2014) (CATA III), vacating both 20 CFR 655.10(f), which established the conditions under which DOL would accept employer-provided surveys to set the prevailing wage, as well as the 2009 Prevailing Wage Guidance.

The CATA III court invalidated the use of employer-provided surveys in the H-2B program on both substantive and procedural grounds under the APA. First, the court held that DOL's failure to explain the broad acceptance of employer-provided surveys where an OES wage is available was procedurally invalid, particularly because this decision was a policy change from the 2011 Wage Rule's prohibition of most employer-provided surveys as an alternative to the OES. 774 F.3d at 187-188. Next, the court held that Section 655.10(f) was

[13] The 2009 Prevailing Wage Guidance set the methodology for employer-provided surveys across the DOL-administered programs. See Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised (revised Nov. 2009) ("2009 Prevailing Wage Guidance" or "2009 guidance"), available at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

arbitrary, and therefore substantively invalid under the APA, given DOL's findings in the 2011 Wage Rule, 76 FR at 3465, that the OES is the "most consistent, efficient, and accurate means of determining the prevailing wage rate for the H-2B program." The court further considered issues that DOL had not addressed as part of the development of the administrative record in the 2011 Wage Rule; it held that the survey provision of the 2013 IFR was substantively invalid under the APA because the survey provision permitted wealthy employers to commission surveys that resulted in a lower prevailing wage than that paid by less affluent employers without means to produce such surveys, and resulted in significant variations in the prevailing wage within a single occupation in the same geographic location. 774 F.3d at 189-190. Finally, the court held that the 2009 Wage Guidance violated the APA because it allowed employers to submit employer-provided surveys that contained tiered wages based on skill levels. The court held that this conflicted with the CATA II order, which required prevailing wages to be calculated based on the mean of wages in the occupation without regard to skill levels, and 20 CFR 655.10(b) of the 2013 IFR, which eliminated tiered wages in the calculation of the OES wage. 774 F.3d at 190-191.

The court justified its decision to vacate the wage survey provision of the IFR, 20 CFR 655.10(f), along with the Wage Guidance. "[I]f we did not do so, we would leave in place a rule that is causing the very adverse effect that DOL is charged with preventing, and we would be 'legally sanction[ing] an agency's disregard of its statutory or regulatory mandate.'" 774 F.3d at 191 (quoting CATA II, 933 F. Supp. 2d at 714). Thus, the court "direct[ed] that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable OES survey does not provide any data for an occupation in a specific geographical location, or where the OES survey does not accurately represent the relevant job

classification." Id. The court concluded by suggesting the immediate implementation of the 2011 Wage Rule on employer-provided surveys as an interim final rule, explaining: "That rule offers rational, lawful limits on the use of employer surveys, already has gone through notice and comment, has been funded by Congress in its 2014 authorization, and has been upheld by this Court . . . ." Id. Because of CATA III's vacatur of that part of the wage regulation permitting the use of employer-provided surveys to set the prevailing wage, DOL immediately ceased accepting all employer-provided surveys. In light of the vacatur of 20 CFR 655.10(f), DOL lacked legal authority to accept such surveys without engaging in additional rulemaking.

Given the substantive concerns expressed by the CATA III court about the validity of employer-provided surveys in the H-2B program, DOL's options for accepting such surveys under this final rule are now necessarily more limited than under the 2013 IFR. The 2011 Wage Rule generally prohibited surveys, but allowed exceptions in specific situations in which the job may be in a geographic location that is not included in BLS's data collection for the OES or where the job opportunity is not "accurately represented" within the job classification used in those surveys, and those determinations were supported by DOL's contemporaneous fact-finding. 76 FR at 3466-3467. We asked the public in the 2013 IFR for any "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" in light of the concerns expressed in the 2011 Wage Rule, 78 FR at 24055, and this preamble reviews below that input and makes additional administrative factual determinations.

On March 14, 2014, DOL announced its decision to engage in further notice and comment rulemaking "working off the 2011 Wage Rule as a starting point." 79 FR 14450, 14453. DOL concluded at that point that "recent developments" in the H-2B program required

additional consideration of the comments submitted in connection with the 2013 IFR, and that further notice and comment was appropriate. Id. However, the U.S District Court for the Northern District of Florida's decision in Perez v. Perez, No. 3:14-cv-682 (N.D. Fla. Mar. 4, 2015) (Perez), discussed below now requires us to address the H-2B wage issues more expeditiously than planned in March 2014.

In finalizing the 2013 IFR, the Departments underscore that stakeholders have had several opportunities since 2008 to comment on the three primary issues covered by this final rule: 1) the appropriateness of using the mean wage or tiered wage when basing the prevailing wage on the OES; 2) the appropriate role of the SCA and DBA wage rates in setting the H-2B prevailing wage; and 3) whether and under what circumstances an employer-provided survey could be used to set the prevailing wage. Most recently, we provided the public with the opportunity to comment on all aspects of this final rule in response to the 2013 IFR, and we received over 300 comments from a range of interested parties, including employers, worker advocates, and members of Congress. Therefore, we have balanced the Departments' and the public's interest in additional notice and opportunity for public comment against our current need to timely act in response to the Perez decision, discussed below, as well as our need to achieve some stability in the administration of the H-2B program. For these reasons, we have assessed the input received in response to the request for comments in the 2013 IFR, and we issue a final rule today based on the review and analysis of those comments.

E. Perez and Good Cause to Issue this Final Wage Rule with an Immediate Effective Date

1. The Perez Vacatur and its Impact on Program Operations

Three months after the CATA III decision, on March 4, 2015, the U.S. District Court for the Northern District of Florida, which previously had vacated DOL's 2012 H-2B rule and enjoined its enforcement in Bayou II, vacated the 2008 rule and permanently enjoined DOL from

enforcing it. Perez v. Perez, No. 14-cv-682 (N.D. Fla. Mar. 4, 2015). As in its decision in Bayou II vacating the 2012 H-2B rule, the court in Perez found that DOL had no authority under the INA to independently issue legislative rules governing the H-2B program. Perez, slip op. at 6. Based on the Perez vacatur order and the permanent injunction, DOL ceased operating the H-2B program to comply immediately with the court's order. Shortly after the court issued its decision, DOL posted a notice on its website informing the public that "effective immediately, DOL can no longer accept or process requests for prevailing wage determinations or applications for labor certification in the H-2B program."[14]

At the time of the Perez vacatur order on March 4, 2015, DOL had pending over 400 requests to set the prevailing wage for an H-2B occupation, and almost 800 applications for H-2B temporary labor certification representing approximately 16,408 workers. In order to minimize disruption to the H-2B program and to prevent economic dislocation to employers and employees in the industries that rely on H-2B foreign workers and to the general economy of the areas in which those industries are located, on March 16, 2015, DOL filed an unopposed motion requesting a temporary stay of the Perez vacatur order. On March 18, 2015, the court entered an order temporarily staying the vacatur of the H-2B rule until and including April 15, 2015. On April 15, 2015, at the request of proposed intervenors, the court entered a second order extending the temporary stay up to and including May 15, 2015. The court in Perez requested briefing on several issues, including whether the plaintiff had standing to challenge the 2008 rule. The court's extension of the stay on April 15 occurred late in the day, after DOL had already initiated processes necessary to provide for an orderly cessation of the H-2B program and after DOL had

[14] Employment and Training Administration, Announcements, http://www.foreignlaborcert.doleta.gov (Mar. 4, 2015).

already posted a notice to the regulated community on its website that the H-2B program would be closed again the next day. On April 16, 2015, following the court's stay extension, DOL immediately posted a new notice on its website that it would continue to operate the H-2B program as it existed at the time of the Perez vacatur order and resume normal operations.

The court order in Perez did not vacate the 2013 IFR, and the court's concerns about DOL's independent regulatory authority do not impact the authority for issuing the 2013 IFR, which was promulgated jointly by DOL and DHS. However, although the Departments requested comment on all of the prevailing wage methodology for the H-2B program when they issued the 2013 IFR as discussed above, the 2013 IFR only amended the H-2B prevailing wage methodology in one way: it made a single change to 20 CFR 655.10(b)(2) to eliminate the use of skill levels in setting wages based on the OES. The 2013 IFR left the rest of the wage methodology and procedures from the 2008 rule untouched, and those provisions remained in effect until CATA III vacated 20 CFR 655.10(f). The court order in Perez then vacated the remainder of 20 CFR 655.10, except for 20 CFR 655.10(b)(2), which was amended in the 2013 IFR and thus not subject to the Perez vacatur. Thus, the Perez vacatur eliminated virtually all of DOL's wage methodology and procedures for setting prevailing wages, including the crucial regulatory provision that "[t]he employer must request a prevailing wage determination from the NPC in accordance with the procedures established by this regulation" set out at 20 CFR 655.10(a); the requirement that the prevailing wage be set at a CBA wage rate that was negotiated at arms' length between the union and the employer if there was a CBA covering the job opportunity in 20 CFR 655.10(b)(1); and the provision permitting the employer to request a DBA or SCA wage rate in 20 CFR 655.10(b)(5). The combination of the vacatur of 20 CFR

655.10(f) in CATA III and the decision in Perez left DOL without a complete methodology or any procedures to set prevailing wages in the H-2B program.[15]

DHS is charged with adjudicating petitions for a nonimmigrant worker (commonly referred to as Form I-129 petitions or, in this rule, "H-2B petitions"), filed by employers seeking to employ H-2B workers. But, as discussed earlier, Congress directed the agency to issue its decisions relating to H-2B petitions "after consultation with appropriate agencies of the Government." 8 U.S.C. 1184(c)(1), INA section 214(c)(1). Legacy INS and now DHS have historically consulted with DOL on U.S. labor market conditions to determine whether to approve an employer's petition to import H-2B workers. See 73 FR 78104, 78110 (DHS) (Dec. 19, 2008); 55 FR 2606, 2617 (INS) (Jan. 26, 1990). DOL plays a significant role in the H-2B program because DHS "does not have the expertise needed to make any labor market determinations, independent of those already made by DOL." 73 FR at 78110; see also 55 FR at 2626. Without consulting with DOL, DHS lacks the expertise to adequately make the statutorily mandated determination about the availability of United States workers to fill the proposed job opportunities in the employers' Form I-129 petitions. See 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 78 FR 24047, 24050 (DHS-DOL) (Apr. 24, 2013). DHS regulations therefore require employers to obtain a temporary labor certification from DOL before filing a petition with DHS to import H-2B workers. See 8 CFR 214.2(h)(6)(iii)(A), (C), (iv)(A). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D).

[15] While the provisions of 20 CFR 655.10 continued to be published in the Federal Register following the Perez decision, only 20 CFR 655.10(b)(2), which was altered in the 2013 IFR, remains operative following Perez. Accordingly, the Departments discuss all provisions of 20 CFR 655.10 contained in the Federal Register on the date of the Perez decision in the past tense in this final wage rule, except for those contained in subparagraph (b)(2).

DOL has fulfilled its consultative role in the H-2B program through the use of legislative rules to structure its advice to legacy INS and now DHS for several decades. See 33 FR 7570-71 (DOL) (May 22, 1968); 73 FR 78,020 (DOL) (Dec. 19, 2008). Before DOL issued the 2008 rule, it supplemented its regulations with guidance documents that set substantive standards for wages and recruitment and structured the manner in which the agency processed applications for H-2B labor certification. See 73 FR at 78,021-22. One district court has held that DOL's pre-2008 H-2B guidance document was a legislative rule that determined the rights and obligations of employers and employees, and DOL's failure to issue the guidance through the notice and comment process was a procedural violation of the APA. As a result, the court invalidated the guidance. See CATA I, 2010 WL 3431761, at *19, 25. Similarly, the U.S. Court of Appeals for the D.C. Circuit has held that DOL violated the procedural requirements of the APA when it established requirements that "set the bar for what employers must do to obtain approval" of the H-2A labor certification application, including wage and housing requirements, in guidance documents. Mendoza v. Perez, 754 F.3d 1002, 1024 (D.C. Cir. 2014) (setting substantive standards for labor certification in the H-2A program requires legislative rules subject to the APA's notice and comment procedural requirements). The APA therefore prohibits DOL from setting substantive standards for the H-2B program through the use of guidance documents that have not gone through notice-and-comment rulemaking.

The Departments are again facing the prospect of experiencing another program hiatus if and when the temporary stay expires on or before May 15, 2015. DOL's 2008 rule, which includes all the procedural provisions necessary for employers to request and DOL to issue a prevailing wage determination, is the only comprehensive mechanism in place for DOL to provide advice to DHS because the 2008 rule sets the framework, procedures, and applicable

standards for receiving, reviewing, and issuing H-2B prevailing wages and labor certifications. DHS regulations require employers to obtain a temporary labor certification from DOL before filing a petition with DHS to import H-2B workers, and DHS is precluded by its own regulations from accepting any H-2B petition without a temporary labor certification from DOL. See 8 CFR 214.2(h)(6)(iii)(A), (C), (iv)(A). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D). Moreover, without advice from DOL, DHS lacks the capability to test the domestic labor market or determine whether there are available U.S. workers to fill the employer's job opportunity. As a result, if and when the stay concludes as currently scheduled on or before May 15, 2015 the vacatur of DOL's 2008 rule will require DOL to once again cease operating the H-2B program, and DOL will again be unable to process employers' requests for prevailing wage determinations and temporary employment certification applications until the agencies can put in place a new mechanism for fulfilling the statutory directive to ensure that the importation of foreign workers will not harm the domestic labor market. See 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b).

2. Good Cause to Make this Final Rule Effective Immediately

The APA authorizes agencies to make a rule effective immediately, instead of imposing a 30-day delay, upon a showing of good cause. 5 U.S.C. 553(d)(3). The APA's good cause exception to a delayed effective date is easier to meet than the APA's exception at 5 U.S.C. 553(b)(B) for dispensing with notice-and-comment.[16] Riverbend Farms, Inc. v. Madigan, 958

[16] The APA's good cause exception to notice and comment applies upon a finding that those procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

F.2d 1479, 1485 (9th Cir. 1992); Am. Fed'n of Gov't Emp., AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981); U.S. Steel Corp. v. EPA, 605 F.2d 283, 289-90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day waiting period when it demonstrates the existence of urgent conditions the rule seeks to correct or seeks to address unavoidable time limitations. U.S. Steel Corp., 605 F.2d at 290; United States v. Gavrilovic, 551 F.2d 1099, 1104 (8th Cir. 1977).

Under the APA's "good cause" exception, an agency can take steps to minimize discontinuity in its program after a court has vacated a rule by making a new rule effective immediately. Mid-Tex Elec. Coop. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987) (upholding good cause to issue a post-remand interim rule without notice and comment or 30-day delayed effective date); see also Shell Oil Co. v. EPA, 950 F.2d 741, 752 (D.C. Cir. 1991) (observing that where the agency had a regulatory void as the result of a vacatur of its rule, it should consider issuing an interim rule under the good cause exception because of the disruptions posed by discontinuity in the regulations); Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 795, 800 (D.C. Cir. 1983) (same). Moreover, courts find "good cause" to make a rule effective immediately under the APA when an agency is moving expeditiously to eliminate uncertainty or confusion that, left to linger, could cause tangible harm or hardship to the agency, the program, program users, or other members of the public. See, e.g., Mid-Tex, 822 F.2d at 1133-34 (agency had good cause to proceed without notice and comment or 30-day delayed effective date to promote continuity and prevent "irremedial financial consequences" and "regulatory confusion"); Nat'l Fed'n of Fed. Employees v. Devine, 671 F.2d 607, 609, 611 (D.C. Cir. 1982) (agency had good cause to proceed without notice and comment or 30-day delayed effective date based on emergency circumstances, including uncertainty

created by pending litigation about significant aspects of the program, and potential harm to agency, to program, and to regulated community); AFGE. v. Block, 655 F.2d at 1157 (agency had good cause to proceed without notice and comment or 30-day delayed effective date where absence of immediate guidance from agency would have forced reliance upon antiquated guidelines, creating confusion among field administrators, and caused economic harm and disruption to industry and consumers); Woods Psychiatric Inst. v. United States, 20 Cl. Ct. 324, 333 (1990), aff'd, 925 F.2d 1454 (Fed. Cir. 1991) (agency had good cause when program would continue to suffer administrative difficulties that had previously resulted in litigation and might continue to result in litigation due to uncertainty and confusion over scope of benefits, program standards, and eligibility requirements).

As a result of the Perez vacatur, DOL has already had to cease operating the H-2B program for two weeks in March 2015. DOL faces this prospect again at the expiration of the stay on or before May 15, 2015. The on-again-off-again nature of H-2B program operations has created substantial confusion, uncertainty and disarray for the agencies and the regulated community. The original vacatur order in Perez left DOL with hundreds of pending and time-sensitive applications for prevailing wages and temporary labor certifications. Two weeks later, following the court's stay of the vacatur and upon resumption of the H-2B program, those cases pending on the date of the vacatur created a backlog of applications, while, at the same time, employers began filing new applications for prevailing wages and certifications. DOL worked diligently and quickly to address the backlog and simultaneously keep up with new applications. Then, facing the expiration of the stay on April 15, 2015, DOL once again prepared to cease H-2B operations, which included posting a notice to the regulated community on its website that day announcing another closure, which was then obviated at the last minute by the court's

extension of the stay late in the day on April 15. The next day, DOL announced that despite its earlier announcement, it would continue to operate the H-2B program as a result of the stay extension. These circumstances, which are beyond the Departments' ability to control, have resulted in substantial disorder and upheaval for the Departments, as well as employers and employees involved in the H-2B program.

The Departments have concluded that because of the program hiatus caused by the Perez vacatur, the anticipated additional hiatus at the expiration of the stay of that order, and the uncertainty and confusion surrounding operation of the H-2B program, we have good and substantial cause to rely on the APA's exception, 5 U.S.C. 553(d)(3), to make this rule effective immediately.[17] DHS and DOL must act expeditiously to enable the agencies to meet their statutory obligations under the INA and to prevent any further program disruption and economic dislocation. This final wage rule – which addresses a necessary component of the broader mandate of ensuring an adequate test of the U.S. labor market – must come into effect on the same day as the companion H-2B comprehensive rule, in order to provide for a seamless continuity of the H-2B program administration and enforcement, and complete implementation of all regulatory provisions.[18] Any delay in the effective date of this wage rule will require implementation of 20 CFR 655.10 without all the provisions necessary to its complete implementation. Accordingly, the Departments are relying on the APA's good cause exception to the 30-day delayed effective date, 5 U.S.C. 553(d)(3), to issue this new final rule establishing

[17] We note that the Departments are not invoking the good cause exception to forego the APA's requirement of notice and comment, because this wage rule is a final rule following the request for comment in the 2013 IFR, and this preamble sets forth our consideration of those comments on all aspects of the wage methodology.

[18] The procedures for requesting a wage determination are set forth in the new comprehensive H-2B rule entitled, Temporary Non-agricultural Employment of H-2B Aliens in the United States, and published simultaneously as a companion rule to this final wage rule.

the methodology for DOL to determine the prevailing wage in the H-2B program with an immediate effective date.

F. Comments Regarding DHS's Authority to Consult with DOL and to Set Wages.

While the comments received from the public overwhelmingly focused on the changes to the DOL prevailing wage methodology, a few submissions focused on DHS's authority to consult with DOL and to set wages. Some of these comments welcomed DHS's and DOL's joint promulgation of the 2013 IFR. Commenters stated that the IFR is consistent with statutory authority and that consultation with DOL is appropriate in light of DOL's expertise. A few commenters, however, stated that DHS improperly delegated its authority regarding the H-2B program to DOL. Another commenter also questioned why DHS does not consult with other government entities apart from DOL. Commenters also asked whether DOL had authority to promulgate the 2013 IFR. Finally, some commenters questioned DHS's statutory authority to set H-2B wages, stating that the INA does not support DHS's requirement that H-2B employment not adversely affect the wages and working conditions of United States workers.

1. DHS's Authority to Consult with DOL.

DHS disagrees with the comments that DHS improperly delegated its authority involving the H-2B visa classification to DOL. The general provision at 8 U.S.C. 1184(c)(1), INA section 214(c)(1) requires DHS to consult with other "appropriate agencies of the Government" in adjudicating a variety of nonimmigrant visa petitions, including petitions for H (such as H-2B) nonimmigrants, based on the specific requirements of each visa category. The H-2B nonimmigrant classification allows employers to petition for H-2B beneficiaries only "if 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), INA section 101(a)(15)(H)(ii)(b). In compliance with

the statutory requirement under 8 U.S.C. 1184(c)(1), INA section 214(c)(1), DHS has identified DOL as the most appropriate agency to consult regarding the availability of U.S. workers and their wages and working conditions for purposes of classifying aliens as H-2B nonimmigrants under 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(B), given DOL's expertise regarding U.S. labor. To satisfy the statutory consultation requirement, DHS regulations require that an H-2B petition for temporary employment in the United States be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A). These regulations require DOL to make the threshold determination of whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity. See 8 CFR 214.2(h)(6)(iii)(A) and (D). Thus, DHS has permissibly conditioned part of its own decision to grant an H–2B visa petition on DOL's expert advisory opinion, that is, on DOL's determination whether a temporary labor certification should be granted. See La. Forestry, 745 F.3d at 673-74 (citing U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 567 (D.C. Cir. 2004)). In addition, as part of DOL's certification, DHS regulations require DOL to "determine the prevailing wage applicable to an application for temporary labor certification in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 CFR 214.2(h)(6)(iii)(D). It is similarly permissible for DHS to "adopt a regulatory provision allowing the DOL to promulgate a narrow class of rules governing the temporary labor certification process. Without the ability to establish procedures to administer the temporary labor certification process, the DOL would not be able to fulfill the consulting role defined by DHS's charge to the DOL to issue temporary labor certifications." La. Forestry, 745 F.3d at 674.[19]

[19] DOL is presently litigating its independent authority to issue legislative rules in the H-2B program. See Bayou Lawn and Landscape Servs. v. Perez, No. 3:12-cv-183, 2014 WL 7496045 (N.D. Fla. Dec. 18, 2014), appeal pending, No. 15-10623E (11th Cir.); G.H. Daniels III & Assocs. v. Solis, No. 12-cv-01943, 2013 WL 5216453, at

Finally, DHS's authority to administer and enforce immigration laws is longstanding. See section 102 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 112, and 8 U.S.C. 1103(a), INA section 103(a). To ensure that there can be no question about the authority and validity of DOL's prevailing wage determination regulations in fulfilling its consultative role with DHS, this final rule includes 8 CFR 214.2(h)(6)(iii)(D), which specifically sets forth DOL's role as the appropriate consultative agency for purposes of assisting DHS in addressing questions necessary to DHS's adjudication of H-2B petitions. Similarly, to ensure the validity of the regulations outlining procedures to determine prevailing wages, DHS and DOL are jointly issuing this final rule.

2. DHS's Authority to Set H-2B Wages

DHS disagrees with comments stating that DHS lacks legal authority to set H-2B wages, and in particular, its authority to rely on DOL's advice, as a threshold matter, as to what constitutes the prevailing wage for H-2B occupations. DHS's authority to administer and enforce immigration laws through regulations is well established. See section 102 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 112, and 8 U.S.C. 1103(a), INA section 103(a). Further, 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b) establishes the H-2B visa classification for a nonagricultural temporary worker ". . . who is coming temporarily to the United States to perform . . . temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country" (emphasis added). In order to meet the statutory

*5 (D. Colo. Sept. 17, 2013), appeal pending, No. 13-1479 (10th Cir.). The analysis provided in this rule concerning the Departments' consultative relationship under the INA makes clear that DOL has the statutory authority to issue legislative rules governing the temporary labor certification process. Thus, while there are other arguments that would equally justify DOL's issuance of legislative rules in this circumstance, the Departments do not think it necessary to provide a further discussion of this issue for the purposes of this rule.

obligations required under 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b), and to determine whether "unemployed persons capable of performing such service or labor cannot be found in this country," an adequate testing of the U.S. labor market is necessary. Any meaningful test of the U.S. labor market requires that H-2B petitioning employers must attempt to recruit U.S. workers at the prevailing wage and pay H-2B beneficiaries such prevailing wages. As noted in detail above, DOL is the appropriate Government agency to set standards for testing the U.S. labor market, and to determine the manner in which prevailing wages affect such tests of the U.S. labor market. DHS has permissibly conditioned its approval of an H-2B petition on DOL's determination whether the U.S. labor market was adequately tested using the applicable prevailing wage. DHS retains the authority to deny a petition notwithstanding DOL's decision to grant a temporary labor certification. The regulatory provisions involving the determination of prevailing wages, which are jointly promulgated here, are necessary in order for DHS to meet the statutory obligations imposed under 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b).

Accordingly, in this rule, DHS is adopting the revision to 8 CFR 214.2(h)(6)(iii)(D) in this rulemaking without change.

II. Methodology for Determining the Prevailing Wage

A. Use of the Occupational Employment Statistics Survey

1. Application of Two- and Four-tiered Wage Structures to OES in H-2B: 1998-2011

In 1998, DOL first implemented use of the OES survey as an efficient and cost-effective way to develop consistent and accurate prevailing wage determinations in the H-2B program. See GAL 2-98, "Prevailing Wage Policy for Nonagricultural Immigration Programs" (November 30, 1998). The OES wage survey, issued by the Bureau of Labor Statistics (BLS), is among the

largest continuous statistical survey programs. BLS produces the survey materials and selects the nonfarm establishments to be surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over 1 million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be obtained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. These features are unique to the OES survey, which is a comprehensive, statistically valid, and useable wage reference, and widely used in the DOL's other foreign labor certification programs (H-1B and PERM). The frequency and precision of the data collected, as well as the comprehensive nature of the occupations for which such data is collected, make it an appropriate data source for determining applicable wages across the range of occupations found in the H–2B program.

BLS surveys workers' wages based on the 2010 Standard Occupational Code (SOC) system, which is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.[20] All workers are

[20] The OES data are used for many purposes in government. For example, BLS uses the data to make quarterly benchmark adjustments for the Employment Cost Index. See http://www.bls.gov/news.release/eci.toc.htm.

BLS also uses the OES employment data as the "denominator" to calculate rates for the Occupational injury and illness rates. See http://www.bls.gov/news.release/osh.toc.htm. OES employment and wage distributions are used by the Bureau of Economic Analysis to estimate social security receipts. See http://www.bea.gov/newsreleases/national/pi/pinewsrelease.htm. See also "What are the OES data used for?" http://www.bls.gov/oes/oes_ques.htm.

classified into one of 840 detailed occupations according to their occupational definition.[21] To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together. However, the OES survey captures no information about differences within the groupings based on skills, training, experience or responsibility levels of the workers whose wages are being reported.

Despite the change in 1998 from reliance on State workforce agency surveys to the OES survey in the H-2B program, DOL continued its prior practice of setting a prevailing wage based on two skill levels – "entry level" and "experienced level" – as previously set out in GAL 4-95 and subsequently reiterated in GAL 2-98. Because, as noted above, the OES does not provide data about skill differential within SOC codes, DOL established the entry and experienced skill levels mathematically. In 1998, the entry level, or Level I, wage was set at the mean of the lower one-third of the survey universe (approximately the 17th percentile), and the experienced level, or Level II, wage was the mean wage of workers in the upper two-thirds of the survey universe (approximately the 67th percentile). These two "skill level" tiers were expanded in 2005 guidance to include four "skill levels" – "entry level," "qualified," "experienced," and "fully competent" – and, based on a linear interpolation, Levels 1 through IV were set, respectively, at approximately the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile.[22] In 2008, DOL proposed and finalized regulations governing the H–2B temporary

[21] On May 22, 2014, the Office of Management and Budget (OMB) published a Federal Register notice announcing its periodic review of the 2010 SOC manual for revision in 2018 and soliciting public comment. For a timetable of the SOC revision process, see http://www.bls.gov/soc/.

[22] The expansion from two to four skill levels in 2005 stemmed from 2004 legislation enacting section 212(p)(4) of the INA, 8 U.S.C. 1182(p)(4), requiring the prevailing wage issued by DOL in the H–1B temporary specialty worker visa program to include four tiers commensurate with experience, education, and level of supervision. The DOL applied that statutory formula to H–2B temporary labor certification applications as well as the H–1B and permanent

worker program, and that rule essentially codified various aspects of the 2005 guidance, including the requirement that the prevailing wage for labor certification must include skill levels (73 FR 29942, May 22, 2008 (2008 NPRM); 73 FR 78020, Dec. 19, 2008 (2008 rule), and DOL's sub-regulatory guidance continued to require four skill levels. Because the four-tiered wage structure had already been implemented through guidance documents, the 2008 rule did not seek comment on the codification of four "skill levels" in the H-2B regulations.

2. Elimination of Tiered Wage Structure in H-2B: 2011-present

As discussed above in Sec. I. B., supra, the lack of notice-and-comment rulemaking in the 2008 rule on the issue of the four-tiered wage structure in the H-2B program resulted in a court ruling in 2010 that the implementation of the tiered wages violated the APA. CATA I, 2010 WL 3431761. The CATA I decision required DOL to, among other things, issue a new wage methodology rule that complied with the APA's notice and comment requirements. Accordingly, DOL engaged in notice-and-comment rulemaking that resulted in the elimination of the tiered wage structure in its 2011 Wage Rule. 75 FR 61578 (Oct. 5, 2010); 76 FR 3452 (Jan. 19, 2011). DOL based the elimination of the "skill levels" in the 2011 Wage Rule on the conclusion that:

> almost all jobs for which employers seek H-2B workers require little, if any, skill—an assertion with which few commenters disagreed. H-2B disclosure data from Fiscal Year (FY) 2007 to 2009 demonstrates that most of the jobs included in the top five industries for which the greatest annual numbers of H-2B workers were certified—construction; amusement, gambling and recreation; landscaping services; janitorial services; and food services and drinking places—require minimal skill to perform, according to every standardized source available to the Department, such as the SOC, O*NET and the Occupational Outlook Handbook. These jobs include, but are not limited to, landscaper laborer,

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labor certification programs although there was no corresponding statutory provision for the H-2B program. See ETA Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (revised May 9, 2005) ("2005 PWD guidance" or "2005 guidance"), available at http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

> housekeeping cleaner, construction worker, forestry worker, and amusement park worker, which make up the majority of occupations certified in those years, all of which require less than 2 years of experience to perform, if that. This prevalence of job opportunities in low-skilled categories is generally reflected in the H-2B employer applications. These jobs have typically resulted in a Level I wage determination, which is lower than the average wage paid to similarly employed workers in job classifications in non-H-2B jobs.

76 FR at 3459 (footnote omitted). DOL further concluded that "there is no correlation in the four-tier wage structure between the skill level required to perform a job and the wage attached to it." 76 FR at 3460. Noting that the comments on the 2010 proposal did not present data or analysis to the contrary, DOL concluded in the final rule 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. Ultimately, DOL concluded that the use of tiered wages in the H-2B program 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." 76 FR at 3463. The application of the four tiers set a wage "below what the average similarly employed worker is paid[,]" and "the net result is an adverse effect on the [U.S.] worker's income." Id. With the elimination of the wage tiers in the 2011 Wage Rule, when the prevailing wage determination was based on the OES survey, the prevailing wage was set at the mean of the wages of workers in the occupation in the area of intended employment.

As noted above, because of Congressional riders, the 2011 Wage Rule was never implemented, and DOL continued to implement the four-tiered approach established in the 2008 rule. In 2013, the CATA II decision permanently enjoined DOL from using the four-tiered approach and vacated the corresponding provision in the 2008 rule. 933 F. Supp. 2d 700, 711-716. CATA II held that because DOL concluded in the 2011 Wage Rule that the four wage tiers

"artificially lower[ ] wage[s] to a point that [they] no longer represent . . . market-based wage[s] for the occupation" and "have a depressive effect on the wages of [United States workers,]" 76 FR at 3477, they were in violation of the INA and DHS regulations, each of which explicitly preclude the grant of labor certifications to foreign workers whose employment may "adversely affect wages and working conditions of similarly employed United States workers." CATA II, 933 F. Supp. 2d at 712-713 (citing 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b); 8 CFR 214.2(h)(6)(iv)(A)). In response to CATA II, DOL and DHS issued the 2013 IFR, which, for the OES component of the prevailing wage determination, again eliminated the four-tiered wages, and established the mean of workers' wages in the occupation in the area of intended employment as the set point for a prevailing wage determination based on the OES survey. 78 FR 24047.

3. Comments on the IFR's Elimination of Wage Tiers

In the 2013 IFR, the Departments specifically invited comments on "whether the OES mean is the appropriate basis for determining the prevailing wage." 78 FR at 24053. All worker advocates who commented expressed general support for the continued use of the OES mean, stating it was far preferable to the 2008 rule's four-tiered approach. They agreed with the Departments' finding in the IFR that dividing wages into four skill levels artificially lowered wages. In their view, the use of the OES mean substantially improves the protection of the wages and working conditions of U.S. workers because most H-2B jobs require little or no prior training or experience. They also agreed with the Departments' conclusion that a four-tiered approach is inappropriate because there are no significant skill-based wage differences in the H-2B occupations. Numerous H-2B employers and associations of employers generally opposed

the use of the OES mean wage, and most advocated for a return to the four-tiered structure.[23] In their view, the OES mean overstates the prevailing wage for most H-2B positions because H-2B workers typically possess only entry level skills, yet under the OES mean they are paid a rate higher than more skilled permanent workers. Thus, in their view, H-2B workers typically should be compensated at the lowest of the four tiers established for a position. These commenters emphasized the impact of the substantially increased labor costs associated with the use of the OES mean wage and the detrimental effect on the profitability of their businesses. Many commenters expressed particular concern about the impact of the OES mean on small businesses, many predicting that it would make it impossible for many employers to continue in business, resulting in a direct "adverse effect" on the employment of U.S. workers.

Some commenters disagreed with DOL's premise in 2011, i.e., that a single prevailing wage is appropriate for each occupation in the H-2B program because "the majority of H–2B jobs reflect no or few skill differentials[.]" 76 FR at 3459. They asserted that if the premise was true, there should be no significant differences between the average wage and the Level I wage under the four-tier wage system (the average wage paid to workers in the lower third of the wage distribution for the occupation). In their view, the significant difference between the OES mean wage and the mean wages computed for the lowest tier under the four-tier approach demonstrates that significant skill differentials exist within H-2B occupations.

a. Support for Using the OES Mean

[23] Although most employers advocated for a return to the practice under the 2008 rule, several also supported as an alternative the approach included in the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), which was adopted by the Senate in June 2013 as part of its consideration of comprehensive immigration reform (hereinafter S. 744). S. 744's relevant provision, section 4211(a), reads, in part, "if there is no [CBA or DBA/SCA wage], the wage level [shall be] commensurate with the experience, training, and supervision required for the job based on Bureau of Labor Statistics data." Although it calls for wage levels or tiers, the bill does not specify the requisite number of levels. Moreover, as noted above, BLS does not issue data that takes these factors into account within an SOC.

Several worker advocates included the same basic position in their comments that a four-tier approach is inappropriate because there are no significant skill-based wage differences in the occupations that predominate in the H-2B program, and to the extent such differences exist, the differences are not captured by the existing four-tier system. In their view, eliminating tiers is appropriate because H-2B jobs require little or no experience and the use of the OES mean better protects U.S. wages and working conditions.

One commenter, an economic advocacy group, acknowledged that the use of the OES mean was a significant improvement over the approach taken in the 2008 rule. In its view, however, the IFR does not sufficiently protect the wages and working conditions of all workers in positions using H-2B workers. Setting the wage at the OES mean will pressure employers to establish the OES mean as the norm for a position, resulting in the eventual reduction in higher wages now received by U.S. workers in the position. According to this commenter, the only way to ensure that there is no reduction in wages paid to U.S workers would be to set the H-2B wage at the highest wage for a position. As an alternative to this method, it suggested that the Employment and Training Administration (ETA) use the OES 90th percentile wage rate for a position, which the commenter asserted would adequately protect the interests of U.S. workers.

The Departments received extensive comments from the forestry industry. One commenter suggested that the OES mean should be used for all H-2B jobs requiring little or no training (all O*NET Job Zone 1 positions) absent higher wages under a CBA, SCA, or DBA for a particular job. For H-2B jobs requiring some training (O*NET Job Zone 2

and 3 positions), it stated that the OES mean should also generally be used.[24] However, as discussed in the section that follows on the use of the SCA and DBA wage determinations to set the prevailing wage, a number of commenters stated that the SCA occupational codes and job descriptions generally better fit the forest industry's H-2B jobs than those used in the OES.

b. Opposition to Using the OES Mean

Several employers and associations of employers preferred the use of tiered wage rates because such rates, in their view, reflect the actual demands of the positions for which they seek H-2B or U.S. workers. Most of these commenters expressed an interest in preserving the approach set forth in the 2008 rule. Some commenters asserted that DOL was bound by the appropriations legislation to apply the four-tiered approach.[25] Many commenters expressed an interest in preserving a tiered approach, without expressing a strong preference among the 2008 rule, ETA's 2005 PWD guidance,[26] or the approach outlined in bipartisan immigration reform legislation considered and passed out of the U.S. Senate in 2013 (S. 744). Others supported one or more of these approaches as alternatives to their preferred approach; others preferred the S. 744 approach alone.

Many commenters cited to a study conducted by an H-2B employer coalition, predicting a substantial across-the-board increase in labor costs from the use of the OES mean rather than

[24] See Procedures for O*NET Job Zone Assignment (March 2008), Appendix, available at: http://www.onetcenter.org/dl_files/JobZoneProcedure.pdf. In short, the 5 Job Zones are as follows: Job Zone 1 requires little or no preparation; Job Zone 2 requires some preparation; Job Zone 3 requires medium preparation; Job Zone 4 requires considerable preparation; and Job Zone 5 requires extensive preparation.

[25] Although this argument is not developed at length by the commenters, they appear to contend that because Congress previously had barred implementation of the 2011 Wage Rule, which eliminated the use of tiered wages, it intended to deny the use of appropriated funds to promulgate any rule, such as the IFR, which also eliminates their use.

[26] 2005 PWD guidance explained supra.

tiered wages. Some commenters emphasized the impact that use of the OES mean would have on wages within particular industries. For example, one commenter asserted that in the forestry industry wage-rate increases would exceed 20 percent in most areas and exceed 60 percent in Arkansas, Idaho, and Virginia. Another commenter stated that landscape employers, based on new wage determinations, would face an average wage increase in H-2B wage rates of $3.27 an hour, or more than 36.9 percent. To emphasize its point about the large, unexpected increases experienced by employers within its industry, this commenter included a chart showing by state the amount and percentage of increases. To underscore a similar point across industries, the workforce coalition included a chart showing, by state and occupation, the amount and percentage increases that result from using the OES mean. While many commenters complained about the effect of using the H-2B rule on their particular industries (e.g., landscaping, transient amusement, lodging), a few commenters sought specific exemptions for their industries.

One commenter (describing itself as a group of "H-2B employers, agents who help small businesses…, and legal and economic experts") made the following claims to support its view that the OES skill-levels should be used to set prevailing wages:

- use of tiered wage levels could not allow employers to pay H-2B workers a lower wage than was appropriate because ETA certified the wage level;
- the OES mean wage inflates the wages for more than half the H-2B workers in a particular occupation;
- the 2011 Wage Rule's focus on wage depression for H-2B workers should have been outweighed by concerns about the impact of the ultimate wage depression on U.S. workers – the loss of their jobs;

- preventing wage deflation for H-2B workers does not protect domestic workers because the vast majority of H-2B applications involve 25 or fewer workers and the total number of H-2B workers is too small to impact domestic workers;[27]
- the 2013 IFR's analysis of wage depression was flawed because "the mean exceeds the median of the [wage] distribution. This means that a majority of workers, permanent or temporary, skilled or entry level, earn less than the arithmetic mean";
- the 2013 IFR inappropriately did not consider that the presence of temporary foreign workers is complementary and improves the job security of permanent U.S. workers, making "[t]he wage depression issue" irrelevant;
- the 2013 IFR's stated premise, i.e., that tiered wage rates are inappropriate because "almost all H-2B jobs involve unskilled occupations requiring few or no skill differentials," 78 FR 24047, 24053, is incorrect because, in the commenter's view, wage variation within H-2B occupations necessarily indicates differing skill levels for workers in the H-2B program; and
- the use of a single prevailing wage for a classification that includes different tasks, skills, and experience, "makes no economic sense" and will prevent the hiring of workers with the lowest skills in those categories.[28]

[27] This group provided an extensive submission on the tiered wage issue, and the comment contained numerous exhibits, including articles, wage comparisons, and declarations submitted in lawsuits involving the H-2B program.

[28] It provided the following examples from DOL's Standard Occupational Classification system to assert that workers are not "similarly employed" or "substantially comparable." "Landscaping and Grounds Keeping Workers" includes workers who install sprinkler equipment as well as workers who pull weeds; "Amusement and Recreation Attendants" includes workers in video arcades, marinas, golf courses, and ski resorts; and "Lifeguards" includes lifeguards at the local public swimming pool as well as members of a ski patrol at winter ski resorts.

A different commenter, an association of H-2B employers, stated that by requiring H-2B workers to be paid at the OES mean, the Departments denied some H-2B workers wages they were previously paid at a higher skill level. Several other commenters expressed similar concerns, and made the following points:

- DOL should provide data to support its position that "skill levels as determined currently do not reflect wage levels in lower skilled jobs." It is arbitrary to require the same rate be paid for a hotel housekeeping position without regard to whether the employee is able to clean 5 or 15 rooms per day;
- wages must be market driven, reflecting both the demand for workers for various seasonal positions not filled locally and the levels of experience available within the labor pool of seasonal and visitor workers;
- conflating tiers 1 through 4 compels employers to pay a wage rate that is appropriate for a more skilled worker than the lower-skilled worker requested by its application, which upwardly skews its labor costs not only for the H-2B workers but also for other individuals it employs;
- use of the OES mean is based on the false premise that unskilled entry-level positions should be paid an amount that greatly exceeds the Federal minimum wage;
- use of the OES mean requires an employer to pay an H-2B wage that is not based on the appropriate entry-level wage for the position, but instead a rate that includes wages paid to more experienced workers in the position or those with supervisory duties. The "premium" paid to the more experienced workers and supervisors appropriately reflected the nature of their jobs as year-round, permanent employees, differentiating them from temporary, supplemental employees;

- the OES mean reflects, in part, the wages paid to workers that have greater training, experience, and education than entry-level H-2B employees. It is inappropriate to include in the prevailing wage computation the rates paid to senior, experienced workers whose contributions to the employer's operations are greater than the H-2B workers because the senior workers require less supervision and are involved in fewer accidents than the entry-level workers; and
- the OES mean arbitrarily inflates the wages of entry-level workers and deflates the wages of more experienced workers. A "one-size-fits all approach ignores real-world wage differentiation factors such as supervisory duties, responsibilities, seniority/tenure, talent, dependability and efficiency." The regulatory history supports the use of setting wages based on the skill required for a position. Before 2005, where an applicant was the only employer in an area of intended employment, setting the H-2B wage required an analysis of the skill and experience levels of the occupation. The term "similarly employed" was defined, in part, in DOL's permanent labor certification (PERM) regulations as "jobs requiring a substantially similar level of skills within an area of intended employment." 20 CFR 656.40(b).

c. Comments Specific to the Forestry Industry

A number of commenters, including worker advocates and employers in the industry, expressed the view that the SCA rates better reflect wages paid in the forestry industry than the OES mean.[29] A group of worker advocates favored the general use of the SCA rates where they apply, instead of the OES mean for H-2B jobs in this industry.

[29] These comments are also addressed in Sec. II.B., infra, in the discussion of the use of the SCA wage determinations to set the prevailing wage in the H-2B program.

This comment asserted that where H-2B jobs are grouped together with other jobs that cannot be included accurately in the same O*NET Job Zone, ETA should establish O*NET sub-codes for such positions.[30] It explained that where a particular SOC code contains a mix of jobs – some requiring little preparation, but many others requiring substantially more preparation – the OES mean wage inflates the wages for jobs requiring little preparation. The group proposed that where ETA and its O*NET partners have identified sub-occupations with different O*NET levels within a single SOC code, ETA, in consultation with BLS, should establish a methodology to determine the prevailing wages for those positions. It proposed that in the interim ETA should adjudicate, on a case-by-case basis, the wage rates for affected occupations. Apparently, the group would have ETA determine whether a particular position requires more or less preparation than typical for other jobs within the OES classification, and then provide notice of such adjudication and an opportunity for labor organizations and worker advocacy groups to participate. Additionally, it stated that, absent strong evidence to the contrary, ETA should establish as a floor for "mixed occupational SOC codes" a wage rate not less than 95% of the OES rate for that code. The group asserted that relatively few H-2B jobs require substantial prior training (O*NET Job Zones 4 and 5) and questioned whether

[30] O*NET is sponsored by ETA through a grant to the North Carolina Department of Commerce, which operates the National Center for O*NET Development through a partnership of public and private-sector organizations. The O*NET program is the nation's primary source of occupational information. Central to the project is the O*NET database, containing information on hundreds of standardized and occupation-specific descriptors. The database, which is available to the public at no cost, is continually updated by surveying a broad range of workers from each occupation. The O*NET program groups occupations into five "Job Zones." Each Job Zone acts as a grouping of occupations that are similar with regard to: how much education is needed to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work. See http://www.onetcenter.org/about.html and https://www.onetonline.org/help/online/zones.

such jobs are appropriate for H-2B certification. For such positions, however, it stated that the presumption should be that the OES mean wage is appropriate.

An employer stated that gaps in the OES survey data result in extreme differences from county to county when compared year to year and that wide variations in required OES wages for adjoining counties demonstrate that the rates do not reflect actual wage rates paid to workers in the counties. In its view, the SCA rates better reflect the true prevailing wage for forestry occupations in an area, but it suggested that the H-2A program provided a better model for its industry. This commenter stated that ETA should establish state or regional rates for forestry work based on wages paid within the same multi-state regions used in the H-2A program. Alternatively, it suggested that ETA could establish larger geographical regions that follow the seasonal migratory patterns for forestry-related work: a Northeast Region, a Midwest and Great Lakes Region, a Pacific and Northwest Region, a Southwest Region, and a Southern Region. As a second possible alternative to the existing system, the commenter advocated the use of an average state-wide wage to avoid the wide divergence in rates from one particular local area of employment to another.

d. Other Comments

An individual commenter in the public sector stated that the use of skill levels, where level one becomes the default level for H-2B workers, could have an adverse effect on U.S. workers. At the same time, the commenter expressed concern that the use of the OES mean rate – without regard to skill – could lead to workers with different skills and education receiving the same level of pay. As an example he chose the OES "Construction Managers" category, which groups construction foreman and job

superintendent, positions that in his view both required job experience but only one of which (job superintendent) required a college degree. The commenter suggested that each position likely would receive the same H-2B rate of pay, despite the different educational requirements for the two positions. He suggested that the use of some tiers, but not necessarily four, would be more appropriate than using the OES mean.

Another individual commenter suggested that ETA create a two-tiered system based on the percentage differences between the average wage issued for a position in fiscal years 2011 and 2012 and the mean wage for that position. He characterized his approach as follows: "Wage Tier 1 = the mean of the lowest 1/3 of the wages reported. Wage Tier 2 = the mean of the top 2/3 of wages reported."

Some commenters, including a group of employers, employer agents, lawyers and economists, criticized DOL's reading of the court's order in CATA II to require the OES mean wage. This group claimed that the use of the OES mean is not required by CATA II; in its view, the decision only required DOL to stop using the skill levels that the Office of Foreign Labor Certification (OFLC) had long been using. Two associations of H-2B employers asserted that the Departments presented no evidence that H-2B workers occupy positions where similarly employed U.S. workers are actually paid the mean OES wage. They also asserted that DOL does not apply the arithmetic mean for wage determinations in its other labor certification programs.

4. Decision to Retain the Mean Wage when Issuing a Prevailing Wage Based on the OES

After reviewing the use of the OES survey in setting the prevailing wage in the H-2B program, including consideration of all the comments received on the 2013 IFR, the Departments have decided to continue to set the prevailing wage at the mean wage of all workers in the

occupation in the area of intended employment when the prevailing wage is based on the OES survey. As discussed in the preambles to the 2010 NPRM, the 2011 Wage Rule, and the 2013 IFR, it remains our view that the OES mean better protects U.S. workers from adverse effect than the tiered-wage approach used previously in the H-2B program.

A basic principle of supply-and-demand theory in economics is that in market economies, shortages signal that adjustments should be made to maintain equilibrium. Therefore, if employers experience a shortage of available workers in a particular region or occupation, compensation should rise as needed to attract workers. Market signals such as labor shortages that would normally drive wages up may become distorted by the availability of foreign workers for certain occupations, thus preventing the optimal allocation of labor in the market and dampening increased compensation that should result from the shortage. In enacting the foreign worker programs, generally, Congress has recognized the potential for market distortion by requiring in labor certification programs generally that the availability of foreign workers must not adversely affect the wages and working conditions of U.S. workers. See, e.g., 8 U.S.C. 1182(a)(5)(A)(i)(II), INA section 212(a)(5)(A)(i)(II); 8 U.S.C.1188(a)(1)(B), INA section 218(a)(1)(B). In its long-standing regulations, DHS has required this showing for the H-2B program. See, e.g., 8 CFR 214.2(h)(6)(iii)(A).

As in 2010 and 2013, we considered, but ultimately rejected, reinstituting a tiered wage system for H-2B employment.[31] We have revisited the question whether we should return to the practice used between 1995 and 2008, in which DOL employed a two-tiered system composed of an "entry level" and an "experienced level" wage as an alternative to the OES mean. However,

[31] In light of the CATA II holding and the findings by the DOL on which it is based, we concluded that a return to the four-tiered approach was not feasible.

we conclude that such an approach would not adequately protect the wages and working conditions of U.S. workers. This position is informed by DOL's prior conclusion that "there are no significant skill-based wage differences in the occupations that predominate in the H-2B program…." 76 FR at 3460. In the 2011 Wage Rule, DOL analyzed 4694 wage determinations over a ten-month period in 2010, and found that 74 percent of the determinations were issued at Level I; 10.5 percent were issued at Level II; 8.2 percent were issued at Level III; and 6.9 percent were issued at Level IV. 76 FR at 3468. Overall, in approximately 93 percent of those cases analyzed (summing the percentage of determinations issued at Levels I, II and III), wage rates were issued for H-2B occupations that were below the OES mean for the same occupation. Based on those findings, 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[,]" and that "the net result is an adverse effect on the [U.S.] worker's income." 76 FR at 3463; see also 75 FR 61578, 61580-81. Similarly, the preamble to the 2013 IFR stated that the OES mean is the appropriate wage level because almost all H-2B jobs involve unskilled occupations requiring few or no skill differentials. 78 FR at 24053. The 2013 IFR reiterated the conclusion that "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." Id.

DOL continues to see the pattern identified in 2011, in which Level I wages (approximately the 17th percentile) predominate where a tiered wage structure is in place. DOL conducted a fresh analysis for this rule of the frequency with which the former Level I wages occur in prevailing wage determinations under a tiered wage structure. In a statistically significant random sample of 472 wage determinations issued in FY 2012, before

implementation of the IFR, DOL found that 344 determinations, or 72.88 percent of the sample, were issued at Level I; 68 wage determinations, or 14.41 percent of the sample, were issued at Level II; 41 wage determinations, or 8.69 percent of the sample, were issued at Level III; and 19 wage determinations, or 4.03 percent of the sample, were issued at Level IV. As a result, approximately 96 percent of the wage determinations analyzed in the 2012 sample (summing the percentage of determinations issued at Levels I, II and III) were below the OES mean wage. Based on this analysis, DOL remains convinced that when tiered wages are available and the tiers are set below the mean, the average wage of workers in the occupation is driven down, resulting in an adverse effect on U.S. workers' wages caused by the influx of foreign workers.

Moreover, a tiered approach in the H-2B program has been an inadequate proxy for skill or other characteristics associated with wages, thereby discrediting comments on the 2013 IFR suggesting that any variation in wage payments when tiers are in place reflects remuneration for relative skill or proficiency. These commenters argued that if the premise that there are a few or no skill differences in H-2B work were accurate, we would not see the range of wages, and the dispersal away from the mean, that can be observed on an H-2B wage distribution. The wage differential, they say, must reflect a skill differential. However, many more factors can account for the H-2B wage differential than skill level. The literature reflects that there are factors in addition to skill level that can account for OES wage variation for the same occupation and location, which include, but are not limited to: size of employer; seniority; rate of worker turnover; union status; gender, race, ethnicity, or nationality; work hour schedule; age; availability of benefits in the form of training opportunity, health insurance, paid time off, and

other benefits; sub-location within the same area of intended employment; and pay structure (performance-based pay vs. fixed pay per hour).[32]

In the absence of a tiered wage system, the Departments must assign prevailing wages in the H-2B program in a manner in which does not depress wages for U.S. workers because of the artificially elevated labor supply in the market. Thus, we must identify the point on the OES wage distribution that protects the wages of U.S. workers from the depressive effect of the influx of surplus labor. In 2011 and in 2013, DOL concluded that the mean was that point (76 FR at 3462; 78 FR at 24053), and we rely on that same finding following public comment for the purposes of this final rule. The mean is the average of all wages surveyed in an occupation in the geographic area, and in the low-skilled occupations in the H-2B program, the mean represents the average wage paid to unskilled workers to perform that job. If the prevailing wage is set below the mean, the average wage of workers in the occupation would be drawn down, resulting in a depressive effect on U.S. workers' wages overall. In addition, we have set the wage rate at the mean rather than at the median because the mean provides equal weight to the wage rate received by each worker in the occupation across the wage spectrum and maintaining the OES mean provides regulatory continuity. As a result, when the prevailing wage is based on the OES survey, we will set it at the mean because it is the most appropriate wage to use in order to avoid immigration-induced labor market distortions inconsistent with the requirements of the INA.

[32] See BLS, "How much could I be earning? Using Occupational Employment Statistics data during salary negotiations" (2014), http://www.bls.gov/oes/earnings.pdf; BLS, "Measuring the distribution of wages in the United States from 1996 through 2010 using the Occupational Employment Survey" (2014). http://www.bls.gov/opub/mlr/2014/article/measuring-the-distribution-of-wages-in-the-united-states-from-1996-through-2010-using-the-occupational-employment-survey-1.htm; BLS, "How Jobseekers and Employers Can Use Occupational Employment Statistics (OES) Data during Wage and Salary Discussions" (2010), http://www.bls.gov/oes/highlight_wage_discussions.pdf; Krista Sunday and Jordan Pfuntner, "How widely do wages vary within jobs in the same establishment?" (2008), http://www.bls.gov/opub/mlr/2008/02/art2full.pdf ; Charles Brown, et. al., "The Employer Size-Wage Effect" (1989), http://unionstats.gsu.edu/8220/Brown-Medoff_Wage-Size_JPE_1989.pdf; John Buckley, "Wage differences among workers in the same job and establishment" (1985), http://stats.bls.gov/opub/mlr/1985/03/art2full.pdf.

For all these reasons, we have not returned to a tiered system as a basis for setting the prevailing wage for H-2B workers. We recognize that the use of the OES mean, rather than the use of tiered wages, has in some cases resulted in an increase in the wages paid to H-2B workers, which may result in overall increases in labor costs for some U.S. businesses that employ H-2B workers. The Departments also recognize that the use of the OES mean may impose particular burdens on small businesses. However, DOL is obligated to set a prevailing wage that protects all U.S. workers from adverse effect; this requirement could not be met by setting a lower wage for small businesses. In addition, most H-2B employers now have experience paying workers at the OES mean, which was established in the H-2B program two years ago. DOL concludes that the impact on small businesses of having to pay the OES mean wage will be less than that incurred under the 2013 rule, given that employers have been able since then to base projections of future labor costs on these wage rates. As discussed above, DOL concludes that use of the OES mean best meets the Departments' obligation to protect against adverse effect, while setting the prevailing wage at a threshold based on artificial skill levels likely distorts the labor market for U.S. workers, driving down wages.

B. Use of the SCA and DBA as Wage Sources in H-2B Prevailing Wage Determinations

1. History of the SCA and DBA Prevailing Wage Determinations in the H-2B Program

DOL historically relied on the prevailing wage regulations used for permanent labor certifications in the immigrant labor program, as codified at 20 CFR 656.40, to determine prevailing wages in the H-2B program. Versions of section 656.40(a)(1) that pre-date 2005 set wage rates 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. As a result, before 2005, if an H-2B job fell within an occupation for which an

SCA or DBA wage determination had been issued in the area of intended employment, that wage rate became the H-2B prevailing wage, even in cases in which the OES survey may have identified a wage for a comparable occupation. DOL abandoned this approach in the same 2005 guidance that introduced skill-based tiered wages, which gave employers the option to request the SCA or DBA prevailing wage determination, but did not mandate its application. See 2005 PWD Guidance. The H-2B rule issued in 2008 similarly permitted, but did not require, use of the SCA and DBA prevailing wage determinations. 73 FR 78020. As a result, under the 2008 rule DOL set the prevailing wage as: the collective bargaining agreement (CBA) wage rate; the OES four-tier wage rate if there was no CBA; an acceptable survey provided at the employer's election; or a wage rate under DBA or SCA at the employer's request, if one was available for the occupation in the area of intended employment. See 20 CFR 655.10 (2009). In the absence of a CBA wage, the employer could elect to use the applicable SCA or DBA wage in lieu of the OES wage. Id.

In DOL's 2010 H-2B Wage NPRM, DOL proposed revisions to the wage methodology that set the prevailing wage as the highest of: the OES arithmetic mean wage for each occupational category in the area of intended employment; the applicable SCA/DBA wage rate (if one was available); or the CBA wage. 75 FR 61578 (Oct. 5, 2010). This approach was finalized in 2011, 76 FR 3452, although never implemented as a result of Congressional riders, as discussed above. Because the riders prevented implementation of the 2011 "highest of" approach, DOL continued to use the approach in the 2008 rule, which permitted employers to request prevailing wages based on the SCA and DBA, if applicable and available.

The 2013 IFR retained the "employer's option" approach. 78 FR 24047. The preamble to the IFR explained that "although there are various ways to define or calculate the prevailing

wage rate, [DOL concludes] 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 [the OES mean, the SCA or the DBA] 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." 78 FR at 24054.

2. Comments on the 2013 IFR's Use of the SCA and DBA Wage Determinations to Set the Prevailing Wage

The 2013 IFR sought "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." 78 FR at 24054 (emphasis added). We identified three ways in which we could continue to incorporate DBA and SCA wage determinations in the H-2B program if we elected to use those wage sources: (1) applying the DBA or SCA wage determinations if they represent the highest available prevailing wage determination for the job opportunity in question (the 2011 approach); (2) making the SCA and DBA wage determinations available to the employer if it chooses to rely on them for that job opportunity, regardless of whether the wage is the highest or lowest available (the 2008 Rule and 2013 IFR approach); and (3) in the absence of a CBA wage, mandating use of the SCA or DBA wage determination applicable to that job opportunity (the pre-2005 approach). Id.

As a general matter, many worker advocates supported the mandatory application of SCA and DBA prevailing wage determinations where they are available for the occupation in the area of intended employment for which certification is being sought. These commenters often argued that the SCA and DBA wage determinations were the most complete and accurate measure of appropriate compensation levels for the occupations covered by those statutes in the geographic areas for which such wage rates have been determined. Many such commenters argued in favor

of DOL's pre-2005 approach in which the SCA and DBA wage determinations must be used where applicable to the job in the area of intended employment. However some commenters did not clearly state whether they advocated for use of the SCA and DBA wage determinations in the H-2B program as part of the unimplemented 2011 "highest of" methodology, in which SCA and DBA wage determinations are used only if they are higher than the OES mean and/or a CBA wage.

Similarly, many employers and employer associations advocated in favor of the approach in the 2008 rule, but did not identify whether this preference was specifically tied to the 2008 rule's voluntary use of the SCA and DBA wage determinations, or whether it reflected a preference for the four-tiered OES structure over the OES mean. In addition, many of the same commenters suggested that, in the event we do not employ the 2008 rule's voluntary use of the SCA and DBA wage determinations, we should adopt the 2005 guidance, which mirrors the 2008 rule's employer election to use SCA or DBA wage determinations. Many commenters also suggested that the Departments adopt the wage standards set out in S. 744, as alternative acceptable wage methodologies.[33] With respect to the SCA and the DBA, these commenters appear to suggest that S. 744's reliance on the use of the "best available information" to set the prevailing wage indicates that the SCA and DBA wage determinations should be used only when those wage determinations independently apply to the work the relevant H-2B employees will perform, i.e., when H-2B personnel perform work under a Government contract subject to the statutes.

One employer who is an extensive user of the H-2B program suggested that the SCA is a more appropriate rate-setting device for forestry occupations than is the OES because of the

[33] See Sec. II.A., supra, for the text of the wage provision in S. 744.

OES's single category of forestry worker, rather than the SCA's three categories. This commenter submitted that for forestry workers, the OES artificially inflates the wages of lower paid, manual labor-type forestry work and suggested that the SCA's use of three categories better recognizes the distinction between forestry work that requires solely manual labor and skilled forestry work performed by college graduates. This commenter further suggested that, with respect to the "range of" forestry-related occupations, the Departments should issue "regional" SCA rates as well as a "regional" OES wage rate with four skill levels, from among which an employer could select its preferred option.[34] Employers in the seafood processing industry asserted that the SCA and DBA job classifications (as well as the OES/SOC classifications) did not reflect well the production-based jobs in the seafood industry.

An association of contractors criticized the DBA wage determinations. This commenter argued that DBA rates are "grossly inflated" due to the "unscientific methodology" used to create them, and underscored that the surveys used to collect the information for the DBA wage determination are voluntary. As a result, this commenter suggested that labor organizations and large government contractors disproportionately submit the required data, resulting in wage determinations that are inconsistent with the actual prevailing wage rates. This comment also suggested that the system of deferring to the local area practice in defining the job duties of a particular classification makes it "difficult to determine the appropriate wage rate for many construction-related jobs."

[34] This commenter relied on the comment it had submitted for consideration during the 2011 Wage Rule proceeding. In the preamble to the 2011 Wage Rule, DOL rejected the proposal to establish regional prevailing wage rates for reforestation, explaining that an employer can avoid the complexity of paying various wage rates where projects stretch across multiple counties or states with different wage rates by paying the highest of the prevailing wages of those areas, which is similar to paying a regional wage, particularly because "[p]revailing wage rates for forestry work are generally the same across contiguous counties – and frequently noncontiguous counties – in the same State." 76 FR 3452, 3464. In addition, DOL concluded that it "is not feasible or desirable to establish regional wage rates for particular industries in the H-2B program" because the wage rates must be locality-based in order to prevent adverse effect on U.S. workers. Id. We reiterate that conclusion in this rulemaking as well.

We received virtually identical submissions from a dozen worker advocacy groups who advocated that DOL return to the pre-2005 approach, which required the use of the SCA or DBA wage determinations if the job opportunity was in an occupation subject to a wage determination in the area of intended employment under either statute. Most of the entities submitted the same statement advancing this position, expressing the view that the SCA and DBA wage rates "are the most complete and accurate measure of determining appropriate compensation levels for the occupations covered by those Acts in those geographic areas for which such wage rates have been determined" and asked that SCA and DBA wage rates be required in all circumstances in which they were available. The commenter further noted that requiring the use of SCA and DBA wage rates wherever available would be consistent with DOL's approach prior to 2005.

Moreover, as discussed above regarding the use of the OES mean to set the prevailing wage, a comment submitted by a worker advocacy project on behalf of a large consortium of worker groups underscored the view that the SCA wage determinations are particularly apt in the forestry and logging occupations because they are more "closely tailored" to the jobs and the SCA "classification includes many jobs that demand more knowledge, training and experience and pay higher wages."[35] This comment, which was joined by a number of other advocacy organizations, discussed alternative approaches depending upon Job Zone. The comment suggested that the OES mean should "at all times" be the prevailing wage for Job Zone 1 jobs, unless there was a higher CBA, SCA or DBA rate, and that the OES mean "should generally be used to determine the prevailing wage rate" for Job Zone 2 and 3 occupations. However, the comment also recommended that the SCA should be used for forest and conservation workers

[35] As noted above, an employer in the forestry industry articulated a similar point in advancing a preference for the SCA over the OES to set the prevailing wage for forestry occupations. However, no other comments singled out any other particular industry or occupation to which the SCA was better suited to set the prevailing wage.

(citing specifically SOC Code 45-4011, "Forest and Conservation Workers," classified as Zone 3 in O*NET) because the commenter suggested that the SOC occupations for these jobs include both jobs that require little to no preparation and those that require more knowledge and training.

As discussed in the OES section above, the same comment also suggested that if there were additional occupations beyond forestry for which many H-2B certifications were issued that were grouped in an SOC code with other occupations requiring different levels of preparation, DOL should develop new sub-codes using the O*NET system. Pending the development of these sub-codes, the comment asked that DOL use a case-by-case method to determine the appropriate wage rate. For Job Zones 4 and 5 (occupations requiring considerable preparation and occupations requiring extensive preparation), the group suggested the OES mean should be the presumed rate absent strong evidence to the contrary. The commenter discussed the use of O*NET Job Zones where the SOC code includes a mix of jobs and some require substantially more preparation than others, and concluded that O*NET sub-classifications should be created for any Job Zones 2 and 3 jobs that require mixed levels of skills and training "to permit a separate treatment of lower skilled jobs in a SOC class appropriately to reflect actual wage differences based upon the real differences in the training and skills needed to do the job." The comment again emphasized that classifying H-2B forest and conservation workers in a Job Zone 3 classification "is misleading as to the actual job duties performed for the positions certified for H-2B workers," so they again recommended using SCA wage rates for such workers. They also identified other H-2B jobs that fall within Job Zone 3, and stated that many of them may be appropriate, but that there may be circumstances where the H-2B jobs "do not require Zone 3 levels of experience and training, similar to forestry. In cases where this is identified, if there are

SCA or Davis Bacon rates that apply, they should be used." If not, they again recommended creating sub-classifications and using ad hoc adjudication to set rates in the meantime.

An individual commenter stated that the U.S. workers would be adversely affected if the regulations "retain the component of the 2008 final rule that permits, but does not require, an H-2B employer to use . . . DBA or SCA wage determinations." Finally, a federation of labor organizations suggested that "[w]here the DOL has already calculated a prevailing wage rate under the DBA or SCA in order to ensure that wages for currently-employed workers are not adversely affected, it would border on irrational for the agency to ignore such a wage determination when setting a prevailing wage rate for workers employed in the H-2B program." We considered all the comments addressing the use of the SCA and DBA wage determinations to set the prevailing wage, as well as the DOL's historical practice, and its current procedures.

3. ETA's Process for Determining the Prevailing Wage Based on the SCA or DBA

ETA used the following process to issue prevailing wage determinations under the 2008 rule, as modified at 20 CFR 655.10(b)(2) by the 2013 IFR. ETA issued a prevailing wage determination for a specific job performed in a specific geographic area. In order to do so, H-2B jobs or tasks were structured into occupational titles. These occupations were catalogued in taxonomies, which established how the occupations were defined, organized and presented. Taxonomies would vary depending on the wage survey used. For example, as discussed above, when conducting the OES survey, BLS surveys of workers' wages are based on the 2010 SOC system, which contains 840 detailed occupations, each one of which has its own definition. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together to form 461 broad occupations, 97 minor groups, and 23 major groups. The SOC classifies all occupations in the economy, including private, public, and

military occupations, in order to provide a means to compare occupational data produced for statistical purposes across agencies. It is designed to reflect the current occupational work structure in the U.S. and to cover all occupations in which work is performed for pay or profit.

By contrast, the Wage and Hour Division (WHD) employs the SCA Directory of Occupations (SCA Directory), which classifies occupations for the purposes of issuing SCA prevailing wage determinations.[36] The SCA Directory provides a list of occupations with accompanying position descriptions. The current edition of the directory contains 408 occupations, of which 339 are "standard" occupations applicable to both metropolitan and non-metropolitan areas; the remaining 69 are "non-standard" occupations. The DBA prevailing wage determinations are based on a third and separate occupational taxonomy, which, rather than relying on general task descriptions for each occupation, is defined according to local practice.[37] As a result, under the DBA, occupations with similar tasks may have different occupational titles based on variations in local area practice.

Although WHD is the agency responsible for the administration and enforcement of the SCA and DBA, all prevailing wage determinations requested through the H-2B program, regardless of whether the wage source is the OES, the SCA or the DBA, were set by ETA's National Prevailing Wage Center (NPWC). In order to issue a prevailing wage determination for a position requested in the H-2B program, the NPWC needed to first match the job duties identified on the employer's request for a prevailing wage, Form 9141, to an occupational title for which a prevailing wage determination exists. On the Form 9141, the employer requested a

[36] The current 5th edition of the SCA Directory was published on April 17, 2006, and can be accessed at http://www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.pdf.

[37] See http://www.wdol.gov/dba.aspx.

wage for an H-2B job that the employer identified by both SOC code and by the job's duties and tasks.

For all prevailing wage requests, the NPWC assessed the employer's job description, checked the employer's submitted SOC code against the job description, and determined the most accurate SOC code for the position. If the prevailing wage was based on the OES survey, which is keyed to the SOC system, the NPWC found the SOC occupation on its online wage library[38] and assigned the OES wage. However, where the employer requested a prevailing wage based on the SCA or the DBA, the NPWC not only matched the employer's job description to an SOC occupation, but also conducted the same matching process to find the appropriate occupational title in the SCA directory or the DBA online tool.

Although there is some overlap in the occupational titles and descriptions, the SOC, the SCA and DBA taxonomies can vary in ways that are challenging in setting the prevailing wage. The occupations contained in the SCA Directory and the DBA taxonomies are often defined more narrowly than are the corresponding occupations in the SOC system.[39] Furthermore, there may not be a corresponding SCA or DBA wage for every SOC code because the classifications included in SCA and DBA prevailing wage determinations are not always as comprehensive as the SOC code. As a result, this matching process required NPWC analysts to exercise

[38] See Foreign Labor Certification Data Center Online Wage Library, available at http://www.flcdatacenter.com/.

[39] For example, in the SCA Directory, a General Forestry Laborer, code 08520, may, among other things, sow seeds and lift seedlings, and hand scalp the seedlings. A Brush/Precommercial Thinner, SCA code 08010, may use a chainsaw, brush blade, or other hand-held equipment to remove excess trees and other vegetation. Finally, a Tree Planter, SCA code 08370, may plant trees using shovels or hoes, but may perform only part of the tree planting functions, while a Tree Planter, Mechanical, SCA code 08400, would complete the planting process using a mechanical planter. Although these tasks are all related, they are separated into different occupations in the SCA directory, with separate prevailing wages. Under the OES/SOC system, however, these tasks could all be captured under the same SOC code, 45-4011- Forest and Conservation Workers, which applies to workers who perform manual labor necessary to develop or protect forest areas, and includes forest aides, seedling pullers, and tree planters. These workers may cut trees, thin trees using saws, plant trees, or sow and harvest crops such as alfalfa.

professional judgment in determining whether an occupational taxonomy contains a particular title applicable to the employer's job description, and which occupation in the applicable taxonomy most closely resembled the position requested by the employer on the Form 9141.

Often, the job duties listed on a Form 9141 requesting an SCA or DBA wage either did not correspond to the job duties of the occupational classification in the SCA and DBA systems, or contained a combination of duties that cross one or more occupational titles, while the work performed under an H-2B job order ordinarily fits within a single SOC. In the former case, where the duties described by the employer were incompatible with the duties in an occupation within the relevant SCA or DBA wage determination, the NPWC would issue a default OES-based prevailing wage determination. In the latter case, where the duties described by the employer crossed occupational titles, the NPWC would issue a prevailing wage that is the highest wage of the SCA or DBA occupations encompassing the employer's job duties.[40] See 2009 Guidance at 4.

By contrast, when an SCA- or DBA-covered contract requires the performance of work for which the applicable wage determination contains no corresponding classification, the WHD engages in a conformance process to determine what the appropriate prevailing wage should be for the unlisted, relevant occupation. This generally entails identifying a wage rate that is reasonable in relationship to the wage rates of listed occupations in the applicable wage determination. 29 CFR 4.6(b)(2).[41] It would not be feasible to adopt such procedures for the H-

[40] By contrast, SCA and DBA implementing regulations allow contractors to compensate employees at the rate specified for each classification in the applicable wage determination, provided they maintain payroll records accurately reflecting the hours spent working at each of the jobs. See 29 CFR 4.169 (SCA); 29 CFR 5.5(a)(1)(i) (DBA).

[41] See SCA and DBA Conformance Processes, available at http://www.dol.gov/whd/recovery/pwrb/Tab7SCACnfrmncPrcss.pdf; 29 CFR 5.5(a)(ii) and http://www.wdol.gov/aam/aam213.pdf.

2B program because the conformance process generally takes longer than is compatible with NPWC's obligation to set an accurate prevailing wage rate in time for an employer to recruit U.S. workers at the appropriate prevailing wage.

Finally, once the proper occupational title was identified, a similar matching process needed to occur to determine the proper area of intended employment. In the DBA context, however, the area of intended employment might determine not just the appropriate wage, but also the title and description of the job itself, because the DBA taxonomy varies from area to area and is determined by local area practice. Issuing a DBA prevailing wage determination thus required the NPWC to match the Form 9141 tasks to a specific job taxonomy for every area of intended employment.

4. Decision Not to Allow Use of SCA and DBA Wage Determinations in the H-2B Program

In the 2013 IFR, the Departments asked whether and to what extent SCA and DBA wage determinations should be used in the H-2B program. 78 FR at 24054. This request for input reflected, in part, DOL's past practice of using the SCA and DBA wage determinations in the H-2B program in a variety of ways, and whether those methods effectively served our obligation to prevent against adverse effect to the wages of U.S. workers. Our previously varied use of the SCA and DBA wage determinations to set the H-2B prevailing wage included relying on them as the sole, mandatory source for determining the prevailing wage before 2005, allowing their use at the employer's discretion in 2008, and requiring their use if they were the highest of an array of wage sources in the unimplemented 2011 wage rule. Under each of those scenarios, some groups strongly favored the approach, and others strongly objected. Comments on this subject in response to the 2013 IFR generally reflected the same divergence of opinion, with some groups favoring the mandatory use of the SCA and DBA wage determinations, others favoring only

their discretionary use, and still others favoring their use only where the wage determinations were higher than the OES mean. In considering the competing interests of the regulated community with respect to using the SCA and DBA wage determinations to set the H-2B prevailing wage, the Departments' challenge is to protect against adverse wage effects resulting from the importation of foreign workers, establish a policy that promotes regulatory stability, and address the administrative challenges in conforming the SCA and DBA wage determinations in the H-2B program. Our decision, as outlined below, reflects these considerations.

This rule does not provide the option to request, for purposes of the H-2B program, a prevailing wage determination under the SCA or the DBA. The decision will result in the use of the SOC-based OES as the basis for all prevailing wage determinations in the H-2B program, unless an employer has a CBA or meets one of the conditions that would permit the submission of an employer-provided wage survey as discussed, infra, in Sec. II.C. In making this decision, we underscore that the SCA and DBA wage determinations remain the only appropriate wage sources for establishing the prevailing wages for use in the federal contracts to which they apply. However, for the reasons that follow, we are not allowing the use of the SCA and DBA prevailing wage determinations in the H-2B program, and the regulatory text that follows reflects that the option to use the SCA or DBA wage determinations as a source for an H-2B prevailing wage is not available. Thus, subsection (b)(5) in the 2008 rule does not appear in 20 CFR 655.10 of this final rule. This decision will have no impact on the independent statutory requirements imposed by the SCA and DBA on any employers employing H-2B or non-H-2B workers on a federal government contract covered by those statutes.[42]

[42] The SCA and DBA wage rates will remain in force and effect for all workers, including H-2B workers, who perform work on government contracts, but under this rule, the SCA and DBA wage determinations will not be used as wage sources to set the prevailing wage in the H-2B program. Therefore, when an H-2B employer with an SCA

a. Challenges Conforming the SCA and DBA Prevailing Wage Determinations to the H-2B Program

Our decision not to allow the use of the SCA and DBA wage determinations for establishing prevailing wage rates in the H-2B program is based largely on DOL's challenges conforming the SCA and DBA taxonomies and wage determinations to requests for prevailing wages in the H-2B program, including to avoid the potential for inconsistent prevailing wage determinations in the H-2B program. The substantial distinctions between the SOC system and the SCA and DBA occupation taxonomies, as discussed above, make the tasks of issuing and enforcing SCA and DBA prevailing wages in the H-2B program more complex than necessary to assure that U.S. workers experience no adverse wage effects when foreign workers are employed on a temporary basis.

As noted above, the SCA and DBA classifications are defined more narrowly than those in the SOC system, and job duties captured by an SOC occupation often span two or more applicable occupational titles in the SCA and DBA. Because the NPWC assigned the prevailing wage from the occupation with the higher wage in those cases where the employer's job duties cross more than a single SCA or DBA occupation, employers had an economic incentive to tailor their job descriptions on the Form 9141 to fit within the lower-paid occupational title.[43] The NPWC's experience has shown that in mixed-occupation cases in which it has issued an SCA prevailing wage determination and assigned the higher prevailing wage, it was not uncommon

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or DBA contract requests a prevailing wage from ETA's National Prevailing Wage Center, the NPWC will give the employer a prevailing wage based on the OES survey, with a reminder, as is currently issued, that the employer must comply with all applicable wage obligations. As is the case now, this obligation to comply with all applicable wage standards effectively results in the obligation to pay the highest legally applicable wage (i.e., the SCA, DBA, the OES mean, or state or local minimum wages) regardless of the prevailing wage determination issued by OFLC.

[43] By contrast, the SCA and DBA systems, when administered by WHD for the purpose of application to government contracts, create considerably less economic incentive to tailor job descriptions because the contracting agency specifies job duties for the purposes of a government contract based upon the work to be performed, without regard to profit maximization.

for the same employer to submit a new Form 9141 for the same job, and revise the job duties to conform to the lower-paying SCA occupation. In such circumstances, the NPWC then issued the lower wage because the new Form 9141 request then conformed to a single SCA or DBA occupation. However, if WHD later enforced the prevailing wage in cases where employees were performing job duties beyond the occupation assigned, employers might be required to pay the higher wage to the misclassified workers. But even requiring back wages and assessing civil money penalties does not provide an adequate approach, because no enforcement scheme can reach every violator. In addition, such relief will not typically reach potential U.S. applicants who may have sought the position if the employer had advertised the job with the appropriate wage. As a result, the incentive to craft job descriptions to fit the relatively more narrow SCA and DBA occupational categories thus compromises protections otherwise afforded to U.S. workers seeking to perform similar work in the area of intended employment.

The use of SCA and DBA wage determinations in the H-2B program has never carried with it the implementing tools established in the SCA and DBA regulations, such as the ability to prorate mixed-duty job descriptions or the conformance process that accompanies those wage determinations when administered by WHD. As discussed above, the conformance process used by WHD cannot be used by NPWC to issue H-2B prevailing wage determinations because the conformance process generally takes significantly longer than the timeframe under which the NPWC must issue prevailing wages. The absence of the SCA and DBA regulatory structures that facilitate WHD's effective implementation of the wage determinations, coupled with the frequent mismatch between the SOC occupations and the SCA and DBA classifications, could result in varying applications of the wage determinations between ETA and WHD. This is particularly true because ETA issues a single prevailing wage for the job opportunity in the H-2B

program, while, in the SCA and DBA programs, multiple wage rates may apply to a single worker, depending on the tasks performed at various points during the job. In order to eliminate confusion concerning implementation of the SCA and DBA wage determinations, DOL will not rely on SCA and DBA wage determinations as a source for H-2B prevailing wage determinations. WHD is the agency statutorily tasked with the administration of the SCA and DBA, and has extensive experience issuing prevailing wage determinations in the specific classifications within the SCA and DBA, and that agency will have sole authority within DOL to issue a prevailing wage based on those wage determinations. Without the regulatory structure attendant to the SCA and DBA wage determinations and because of the misalignment in their taxonomies as compared to the default SOC system currently in use, we conclude that the use of those wage determinations in the H-2B program is not feasible, and we are not allowing their use as prevailing wage determination sources.

The challenges noted above – the distinctions between the occupational categories under the SOC codes and those in the SCA and DBA and the absence of the same regulatory structures that promote effective implementation of those wage determinations – have caused uncertainty and confusion in the H-2B program, which in turn has resulted in complex litigation over the proper wage. Pacific Coast Contracting, Inc., Case No. 2014-TLN-00012 (Board of Alien Labor Certification Appeals (BALCA), March 5, 2014) illustrates the manner in which distinctions in occupational classification can create confusion and uncertainty for employers requesting SCA- and DBA-based prevailing wage determinations in the H-2B program. In that case, an employer requested and received two prevailing wage determinations under the SCA based on different job descriptions, one for a “”Brush/Precommercial Thinner” and one for a “Tree Planter.” The employer’s advertisements offered the job at a wage range that included both the lower and the

higher wages from the two wage determinations. ETA denied the temporary labor certification because the job opportunity involved duties from both tree planting and pre-commercial thinning, and the employer should have offered the wage for the higher-paid job that encompassed all the duties the employer expected to be performed. The employer argued that the SCA regulation, 29 CFR 4.169, governed. That regulation permits government contractors to pay different wage rates to a service employee who performs work within more than one classification in a workweek, provided the contractors maintain payroll records accurately reflecting such hours. The Board of Alien Labor Certification Appeals (BALCA) properly rejected this argument, concluding that the "H-2B temporary labor certification program is not governed by the SCA implementing regulations," but is governed solely by the H-2B regulations. Pacific Coast, slip. op. at 4.[44] As with Pacific Coast, DOL has experienced an increase in litigation involving the misalignment of the employer's job description to that in the SCA wage determination, and DOL concludes that the risk of such litigation and the potential for inconsistent prevailing wage determinations will be mitigated by no longer relying on the SCA and DBA wage determinations for establishing H-2B prevailing wage rates.

The challenges identified above in using the SCA and DBA wage determinations as prevailing wage sources would be alleviated by relying solely on the SOC-based OES as the primary wage source for prevailing wage determinations in the H-2B program. SOC occupational titles are broadly defined, and therefore capture a wider range of job duties than do the SCA and DBA occupational titles. As such, small differences in the requested job duties reported on a Form 9141 will not often result in differences in the prevailing wage issued under

[44] The BALCA consists of Administrative Law Judges assigned to DOL and designated to be members of BALCA, and decides immigration-related administrative appeals. 20 CFR 655.4.

the OES. On the other hand, the very fact that SCA and DBA often provide more tailored occupational titles posed challenges in the H-2B program because in many cases duties for a single H-2B job opportunity cross multiple SCA or DBA occupations. The problems presented in Pacific Coast, supra, likely would not have arisen had the employer requested an OES prevailing wage determination because a single relevant SOC code would have captured all of the job requirements identified by the employer. Furthermore, centralizing the SCA and DBA prevailing wage determination process within WHD will reduce the potential for inconsistencies between the programs.[45]

b. Improved Prevailing Wage Procedures Without Adverse Effect to U.S. Workers

Declining to allow employers the option to request an H-2B prevailing wage based on an SCA or DBA wage determination will streamline the H-2B prevailing wage determination process and expedite review of applications by the NPWC. As mentioned above, to issue a prevailing wage determination, the NPWC matched the tasks identified in the Form 9141 to an SOC code for every prevailing wage application received. Because the OES wage data is aligned

[45] As we explain more fully in Sec. II.C., infra, DOL will accept an employer-provided survey under very limited conditions. However, where those conditions may be met, an SCA or DBA wage determination may not be submitted as an "employer-provided survey" under this rule because of the challenges conforming the SCA and DBA wage determinations to the H-2B prevailing wage process as discussed above. If an employer submitted SCA and DBA wage determinations as an employer-provided survey, the NPWC would still conduct the extra analysis described above, i.e., analysts must align the SOC code and the job duties submitted by the employer to that occupation in the SCA or DBA taxonomy. The NPWC's challenge in implementing the SCA and the DBA wage determinations rests not in defining the proper wage for an SCA or DBA occupational title – WHD has already accomplished this task and published this information – but rather in cross-walking the employer's identified position to an established SCA or DBA occupation. By contrast, in order for an employer to base a request for a prevailing wage on an employer-provided survey, the duties of the occupation surveyed have likely already been tailored to match those in the employer's job opening. Therefore, permitting the submission of SCA and DBA wage determinations as employer-provided surveys would only create the same challenges for the NPWC as if they were allowed as an optional basis upon which to set the prevailing wage for H-2B purposes. Accordingly, this final rule does not permit the use of SCA and DBA wage determinations as sources to set the prevailing wage in the H-2B program, whether employers ask for them expressly in their prevailing wage requests, or rely on them indirectly through the submission of an employer-provided survey under the narrow conditions in which DOL will accept such surveys.

with the SOC taxonomy, once the SOC code has been identified, it is relatively easy for NPWC to issue an OES-based prevailing wage for the occupation. An additional step is required, however, to match the position the employer has described on the Form 9141 to the corresponding occupation in the SCA Directory or the DBA local practice, which can be a cumbersome process because the duties identified on the Form 9141 do not always coincide with the duties reflected in the SCA and DBA occupational titles. As was recognized in the preamble to the 2013 IFR, determining whether multiple wage rates exist for every application is a time consuming process. 78 FR at 24054. If the H-2B regulation does not permit the optional use of the SCA and DBA wage determinations as sources to set the H-2B prevailing wage, the administration of the wage process will be streamlined and expedited, and disputes over their application and the attendant litigation will be reduced.

It is particularly time consuming for the NPWC to issue H-2B prevailing wage determinations based on DBA wage determinations because the same occupations can sometimes encompass different job duties based on the prevailing practice in the locality in question. The result is that the matching process described above must be completed for each area of intended employment identified in the Form 9141. Issuing an H-2B prevailing wage determination based on DBA wage rates differs from the process for determining the prevailing wage in an area of intended employment for the OES and the SCA. When issuing an H-2B prevailing wage determination based on a DBA wage rate, the NPWC does not identify the appropriate occupation only once and then locate that occupation's proper wage in each geographic area applicable to the employer's job opportunity. Rather, the job descriptions themselves change based on the local practice. This requires the NPWC to sort through each locality's taxonomy to find a position that matches the job duties identified on the Form 9141 for

each area of intended employment. This particular complexity in relying on DBA wage determinations for determining H-2B wage rates further underscores how the decision not to permit their use in the H-2B program will streamline the wage determination process, and reduce disputes over their application and any attendant litigation.

The percentage of H-2B prevailing wage requests seeking an SCA- or DBA-based prevailing wage determination steadily increased over the last few years, thereby increasing the amount of time and resources that are devoted to issuing these determinations. Although there is some fluctuation, in the three fiscal years (FYs 2010, 2011, and 2012) before implementation of the wage provisions in the 2013 IFR, the NPWC issued H-2B prevailing wage determinations based on SCA and DBA wage rates, on average, in slightly more than one percent of all H-2B wage determinations.[46] In FY 2014, the first complete fiscal year after implementation of the 2013 IFR, the NPWC issued H-2B prevailing wage determinations based on SCA and DBA wage rates in approximately seven percent of all H-2B wage requests.[47] For the first quarter of FY 2015 (October 1, 2014-December 31, 2014), SCA and DBA wage rates were issued for approximately 14 percent of all H-2B prevailing wage determinations.[48] Thus, the NPWC experienced an approximately six-fold increase in the issuance of H-2B prevailing wage rates based on SCA and DBA wage determinations through FY 2014 and an even greater increase for the beginning of FY 2015, a figure that does not take into account requests submitted but rejected because the NPWC determined, following its analysis, that the employer's job opening

[46] There is no direct link between the number of prevailing wage determinations and the number of temporary employment certifications. For example, an employer may request one PWD and then a second PWD for the same job opportunity, but would use only one of those two PWDs for its temporary employment certification application. NPWC issued 45 SCA and DBA PWDs in fiscal year 2010 for the H-2B program (out of 4,096 total H-2B determinations), 77 in 2011 (out of 4,551 total), and 110 in 2012 (out of 8,370 total).

[47] 634 SCA or DBA H-2B wage determinations out of 9,250 total.

[48] 936 SCA or DBA H-2B wage determinations out of 6,427 total.

did not fit the SCA or DBA occupation. The decision not to permit the issuance of H-2B prevailing wage determinations based on the SCA and DBA wage rates will allow the NPWC to redirect those resources for use in processing OES prevailing wage determinations and for reviewing employer-provided surveys, thereby increasing the efficiency, consistency and speed with which all prevailing wage determinations are processed.

The 2013 IFR acknowledged that the SCA and DBA wage rates constituted sound and reliable evidence of a wage that would "not adversely affect U.S. workers similarly employed," 78 FR at 24054, and this rule does not reach a different conclusion. Instead, the rule is based on the "extensive discretionary authority [granted to] the Secretary of Labor [under the INA to use] any of a number of reasonable formulas to prevent the employment of [temporary] foreign workers from having an adverse effect upon domestic workers. The immigration statute does not specify the particular way in which avoidance of this adverse effect must be determined." Florida Sugar Cane League, Inc., v. Usery, 531 F.2d 299, 303-304 (5th Cir. 1976). Thus, based on this wide latitude, we have determined that not issuing H-2B prevailing wage determinations based on SCA and DBA wage determinations will improve the administration and efficiency of the H-2B program, including promoting consistency in prevailing wage determinations, and that the remaining sources relied on to set the prevailing wage will adequately protect U.S. workers against adverse effect in their wages and working conditions arising from the employment of foreign workers. Workers who are currently working in H-2B occupations in which the SCA or DBA wages are higher than the OES mean are unlikely to be affected by the decision not to allow SCA and DBA wage determinations because most employers will have already chosen to pay the lower OES mean in that situation (unless those employers are required to pay the SCA or DBA wage rates under a government contract, as explained above).

C. Use of Employer-Provided Surveys to Set the Prevailing Wage

1. History of Employer-Provided Wage Surveys in the H-2B Program

Before 1998, in the absence of an applicable SCA or DBA wage determination or a CBA, DOL determined the applicable prevailing wage rate based on a wage survey provided by the local State Employment Service Agency (SESA). See GAL 4-95 at p. 1-2.[49] Employer-provided surveys were permitted for setting prevailing wage rates only where the results of the employer-provided survey were "more comprehensive" than the SESA survey. Id. at 7.[50]

In 1998, DOL began using the OES to set prevailing wages in the H-2B program where there was no available CBA, SCA, or DBA wage rate, but continued to allow employers to submit employer-provided surveys in the absence of a CBA, SCA, or DBA wage rate for the employer's job, even where there was an available OES wage. See GAL 2-98 at pp. 1, 7. GAL 2-98 eliminated the requirement that the employer-provided survey must be "more comprehensive" than the SESA survey. Id. Instead, employers submitting a survey had to disclose the survey methodology in enough detail "to allow the SESA to make a determination with regard to the adequacy of the data provided and its adherence to [survey] criteria." Id. The guidance required that the survey data be recently collected:

> (1) The data upon which the survey was based must have been collected within 24 months of the publication date of the survey or, if the employer itself conducted the survey, within 24 months of the date the employer submits the survey to the SESA.
> (2) If the employer submits a published survey, it must have been published within the last 24 months and it must be the most current edition of the survey with wage data that meet the criteria under this section.

[49] State Employment Service Agencies were the predecessors to the State Workforce Agencies.

[50] This final rule uses the term "employer-provided survey" to mean any survey that an employer submits to DOL for use in setting the prevailing wage. This term does not distinguish between different types of surveyors, and includes both surveys conducted by a government entity and those conducted by private entities. Where this final rule makes distinctions based on the type of entity conducting the survey, it uses specific terminology, such as "state-conducted survey."

Id.

In 2005, DOL issued revised prevailing wage guidance that allowed employers to continue to submit surveys. See 2005 PWD Guidance. If the job opportunity was not covered by a CBA, the 2005 PWD guidance allowed an employer to submit a wage survey even if there was an OES, SCA, or DBA wage. Id. at 14. This guidance maintained the timeliness of data requirements from GAL 2-98 and included a requirement that the employer provide "the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample) . . . " Id. at 15-16.

In the 2008 rule, DOL continued to allow use of employer-provided wage surveys in the absence of a CBA, provided that the surveys met minimum standards for validity. See 73 FR at 78,056 (20 CFR 655.10(f)). In the 2008 rule, DOL codified its historical standards for evaluating employer-provided wage surveys, stating that in each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer 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 a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office. The 2008 rule also codified the timeliness of data requirements under GAL 2-98. Id.

In November 2009, shortly before DOL centralized prevailing wage determinations with the NPWC, it issued a new prevailing wage guidance document reiterating the standards carried over from the May 2005 guidance document, now reflected in the 2008 rule. See 2009 PWD Guidance. The 2009 PWD Guidance retained the standards for evaluating employer-provided

wage surveys, including the requirement that the employer submit recent data along with information pertaining to the survey's methodology. Id. at pp. 14-16, Appendix F.

In the 2011 Wage Rule, DOL eliminated the use of employer-provided wage surveys, except under limited circumstances. The 2011 Wage Rule stated that where there was no CBA, DBA, or SCA wage available for the job opportunity, an employer could submit a survey if the employer's job opportunity was in a geographic area where OES wage data is not available, or where the OES does not accurately represent the employer's job opportunity. See 20 CFR 655.10(b)(6) and (7) at 76 FR 3484. However, as discussed above, because the 2011 Wage Rule was never implemented, DOL continued to rely on the 2008 rule to implement the H-2B program. In response to the vacatur order in CATA II, DOL published the 2013 IFR, which eliminated the use of skill levels in setting the wages for the OES but otherwise left the 2008 rule unaltered. 78 FR at 24053. The 2013 IFR continued to allow employer-provided surveys under the terms of the 2008 rule, and DOL continued to use the 2009 Prevailing Wage Guidance to govern the review of such surveys.

2. Comments on Employer-Provided Surveys

As discussed above, the 2013 IFR made no changes to the provisions of 20 CFR 655.10 dealing with employer provided surveys, which were maintained from the 2008 rule until vacated in CATA III. However, in the 2013 IFR, the Departments requested public comment on ways that "the validity and reliability of employer-submitted surveys can be strengthened," among other matters. 78 FR at 24055. In response, we received many comments from worker advocates, as well as from employers and their advocates.

Worker advocates argued for a move from the status quo under the 2008 rule – permissive use of employer-provided surveys – which the 2013 IFR did not modify, and which

remained in place until the CATA III vacatur. The advocates submitted detailed proposals for limiting employer-provided surveys, generally raising concerns that the surveys are inconsistent; are unreliable; are artificially low; contribute to wage depression; are based on a conflict of interest where employers or their agents conduct or fund them; and create a burden on the agency to review. To ameliorate some or all of these concerns, worker advocates supported various survey reforms. Comments from a union federation, a labor-based think tank, and a consortium of worker advocates offered many of the criticisms of surveys, and presented many of the reform ideas.

More specifically, worker advocacy groups echoed concerns, expressed in the 2011 Wage Rule and 2013 IFR, about the consistency, reliability, and validity of employer-provided surveys, and the groups stated that such surveys are only used to depress wages.[51] One labor-based think tank asserted that such surveys are "fundamentally flawed, regardless of the methodology used, because employer surveys are conducted and/or funded by the employer or its agent," creating an inherent pro-employer survey bias.

If the Departments elect to permit in the future employer-provided surveys beyond those allowed under the 2011 Wage Rule, worker advocacy groups, including a labor-based think tank and a federation of unions, overwhelmingly asked that we establish significant limitations for them. One labor-based think tank suggested it that if the Departments were to permit any employer-provided surveys, it should require each survey to be publicly posted for 30 days before acceptance and create a new adjudicatory process permitting members of the public or workers to challenge the survey.

[51] Several cited seafood processing as an example of an occupation where employer-provided surveys have been used to suppress wages.

In addition, we received virtually identical submissions from a dozen worker advocacy groups who recommended that, if we did not adopt the 2011 Wage Rule, which they favored, we should adopt a multi-part test for assessing employer-provided surveys. Most of these entities submitted the same statement advancing the following position:

- recommended that the Departments never permit employer-provided surveys if the resulting wage would be lower than the DBA, SCA, or CBA wage, consistent with DOL policy before 2005;
- asked that the Departments require any employer to demonstrate that the OES mean is inaccurate and inappropriate for the position. In the view of these commenters, the OES mean wage is the only accurate and appropriate wage for Zone 1 occupations if BLS has sufficient data to calculate the mean wage for the SOC. They stated that employer-provided surveys should only be permitted for Zones 2 and 3 if the employer can demonstrate that the job requires no pre-hire training or experience or requires less training or experience than other jobs in that occupational group;[52]
- recommended that we incorporate by reference the standards for employer-provided surveys in the PERM rule at 20 CFR 656.40(g), "including requiring that employer-provided surveys must be statistically accurate and independently verifiable";
- recommended that we "not accept employer-provided surveys that are based on data from H-2B employers whose wages have been depressed by participation in the prior four-tiered system or by reliance on prior employer wage surveys that did not meet the [PERM] requirements at 20 C.F.R. §656.40(g)";

[52] See the explanation of O*NET Job Zones in Sec. II. A., supra.

A comment submitted by a worker advocacy project on behalf of a large consortium of worker advocacy groups reiterated the proposals above and offered further explanation. Instead of asking the Departments to use the survey standards from the PERM regulation, this comment advocated the use of survey standards from the 2009 Prevailing Wage Guidance [which already applied to the H-2B program at the time the 2013 IFR was published], emphasizing the requirement that any survey be conducted "across industries that employ workers in the occupation." The comment further asked us to define the "occupation" in a manner consistent with the SOC. In addition, this comment recommended that, if there were occupations in which ETA receives a significant number of H-2B applications for which it determines that a job in Zone 2 or above requires less skill or experience than other jobs within the SOC (suggesting forestry as such an example), ETA should consult with its O*NET partners to establish appropriate O*NET sub-codes for that occupation. After completing this process, the comment further requested that ETA consult with BLS to establish methodologies that would allow the modification of OES-reported wage rates for those within the new sub-code. This comment asked that in all cases where an employer seeks to challenge the appropriateness of the BLS OES mean wage rate for a position within an SOC, we establish procedures to provide public notice of that application, including notice to labor organizations and others representing the economic interests of workers, allowing them to participate in the determination.

This same comment provided several additional recommendations. First, it stated that the wages of nonimmigrant workers should be excluded from any survey because the wages of such workers have been depressed by earlier wage rules. Second, it suggested a three-year phase-in of the new OES wage rate for employers who have long relied on employer-provided surveys if the industry is impacted by international trade, including in the seafood industry, in lieu of broader use of employer-provided surveys. Third, on the subject of state-conducted surveys, it expressed

the view that: "the H-2B program has been adopted by some industries as a source of cheap labor at rates below the competitive market rates for such labor. State or maritime surveys that document the degree to which certain industries have been able to exploit nonimmigrant labor to pay below the prevailing market rates in that occupational classification should not be the basis for setting future wage rates."

On the other hand, we received several comments from employers and employer associations in favor of the use of employer-provided surveys.[53] These comments tended to provide only general support for the use of employer-provided surveys with little explanation and largely advocated in favor of the status quo established in the 2008 rule, which remained unchanged under the 2013 IFR, before the CATA III vacatur. Comments by several employers and employer associations in the seafood industry, as well as two U.S. Senators, are representative of this group of comments, by offering general support for surveys, particularly where conducted by a state agency. Several comments generally noted that employer-provided surveys are necessary where the type of work to be performed is not sufficiently aligned with the SOC-based OES.

Several commenters noted DOL's long history of permitting employer-provided surveys across multiple programs and asserted that the methodology standards in place at the time the 2013 IFR was published are sufficient. For example, one employer association promoted the use

[53] As discussed above, in Sec. II.A. and B, we also received a number of comments that advocated using the wage methodology from the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). These comments advocated returning to a tiered OES wage, and we understand these comments to refer to the appropriate OES wage rate. We note, however, that the bill also contained a provision on private surveys. Sec. 4211(a)(1) would have permitted an employer to use "a legitimate and recent private survey of the wages paid for such positions in the metropolitan statistical area" only where "the wage level commensurate with the experience, training, and supervision required for the job based on Bureau of Labor Statistics data . . . is not available." Because BLS never issues data that takes these factors into account within an SOC, it is unclear whether this provision was intended always to permit use of private surveys, to allow such surveys only where there was no BLS wage for the SOC, or to use a methodology other than the SOC to determine whether the "job" was represented.

of employer-provided surveys as an "important safeguard" for employers whose work "does not align with OES wage categories," but did not identify any specific occupation for which there was a mismatch. This comment further provided that "the current provision provides more than enough safeguards to ensure such surveys are valid and reliable" and such surveys have been "long utilized by the Department [of Labor] across several temporary worker programs."

Comments offered by several associations of seafood processing employers, individual employers, and members of Congress specifically endorsed use of employer-provided, state-conducted surveys by seafood processing employers. These comments considered state surveys to be reliable, cited the "unique" nature of seafood processing occupations, and asserted that the broader SOC category encompassing seafood processing was inappropriate to set prevailing wages for these jobs. These comments stated that the work of seafood processors is not accurately represented by the DBA, SCA, or OES job classifications, necessitating the use of employer-provided surveys compiled by state agriculture or maritime agencies. For example, one comment noted that "the job category of 'seafood processor/picker' is considered under the much broader categories that do not accurately reflect the wages of crab pickers in the Maryland seafood industry." In addition, a seafood processing employer asserted that wages for seafood processers were based on particular industry challenges, including foreign competition and natural disasters that disrupt crops, and are generally based on a piece rate, making use of the OES survey data inappropriate in that industry.

Finally, although the 2013 IFR requested public comment on ways that "the validity and reliability of employer-submitted surveys can be strengthened," 78 FR at 24055, we did not receive any comments from any source that provided suggestions on sample size, response rates, or other data improvements that might make such surveys more reliable.

3. The Final Rule Permits Submission of an Employer-Provided Survey Only in Limited Circumstances.

Based on DOL's administrative experience with employer-provided surveys, the comments received, and the court's decision on CATA III, the Departments have decided to allow the submission of employer-provided surveys to set the prevailing wage in H-2B in limited circumstances. We discuss first the exceptions that CATA III recognized, where employer-provided surveys may be permitted in cases in which the OES does not provide data in the geographic area or where the OES does not accurately represent the relevant job classification, which may be conducted by private-sector, nongovernmental entities. We then discuss permissible employer-provided surveys conducted and issued by a state agency even where the OES may provide data to establish a prevailing wage.

a. Wage Surveys Conducted by Nongovernmental Entities

As discussed earlier in this preamble, given the substantive concerns expressed by the court in CATA III about the use of employer-provided surveys in the H-2B program, the options for accepting such surveys under this final rule are now necessarily more limited than when the Departments published the 2013 IFR. The court "direct[ed] that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable OES survey does not provide any data for an occupation in a specific geographical location, or where the OES survey does not accurately represent the relevant job classification." 774 F.3d at 191.

These exceptions identified in CATA III are the exceptions DOL set out in the 2011 Wage Rule, 76 FR at 3466-3467, which were supported by contemporaneous fact-finding. The court underscored this by suggesting that DOL could publish the survey provision in the 2011 Wage Rule immediately as an IFR to satisfy its decision. In the preamble to that rule, DOL

recognized that in limited circumstances, some employer-provided surveys might provide useful information – e.g., where the OES survey does not provide data for a job opportunity in a specific geographic area or where a job opportunity is not accurately represented within a job classification used by the OES or alternative government surveys – and that use of an employer-provided survey would be appropriate in those cases. 76 FR at 3465, 3467. However, DOL found that, as a general rule, employer-provided surveys should not be used to establish the prevailing wage, in part because they had been used "typically … to lower wages below the prevailing wage rate" or "to avoid using [a government] survey that produces a higher wage." Id. at 3465, 3466. The decision to reject the routine use of employer-provided surveys in the 2011 Wage Rule was based on DOL's assessment that employer-provided surveys were not consistently reliable and because their review was administratively inefficient. Id. at 3465-3466.

DOL continues to have concerns about the consistency, reliability, and validity of employer-provided surveys set out in the 2011 Wage Rule and in the 2013 IFR, 78 FR at 24055. Moreover, DOL experience reviewing employer-provided surveys since 2011 has not provided any demonstrable evidence that the wage information produced from non-government surveys is any more consistent or reliable than DOL determined was the case four years ago. These ongoing concerns were echoed in many comments submitted by worker advocates. The court underscored those concerns in the CATA III decision. In fact, the court went further, finding that DOL had arbitrarily allowed wealthy employers to pay for expensive private surveys to lower the prevailing wage when, at the same time, other employers in the same location and occupation who cannot afford such surveys pay the higher OES mean wage. 774 F.3d at 189-190. The court also noted the arbitrariness of the "considerable" wage disparities permitted by this system, which fails to set a consistent prevailing wage across an employment area. Id. 774

F.3d at 190. This kind of disparity, the court concluded, "harms workers whether foreign or domestic, is readily avoidable, and [is] completely unjustified." Id.

We conclude that, given the reliability and comprehensiveness of the OES survey, the 2011 Wage Rule reflects reasonable limitations on an employer's ability to submit an employer-provided survey. That rule's two limited exceptions identify the only circumstances in which employer-provided surveys may provide DOL with wage information to which DOL does not currently have access. Some comments suggested that there are other categories of jobs beyond those identified in the 2011 Wage Rule in which the OES is somehow mismatched to the H-2B job opportunity. However, despite some general criticisms about a particular H-2B job's inclusion in an overly broad SOC category, none of these comments established with any conclusiveness that a specific occupation is not included in the particular SOC surveyed by the OES. Accordingly, we continue to hold the view that the OES adequately covers all occupations outside of the two exceptions identified in the 2011 Wage Rule and upheld in CATA III. In addition, except for the limited circumstances discussed here, it is not administratively efficient to expend resources reviewing employer-provided surveys if a robust and accurate prevailing wage under the OES is available.

Accordingly, consistent with the 2011 Wage Rule and pursuant to the court's decision in CATA III, this final rule permits the use of a nongovernmental employer-provided survey to set the prevailing wage only where the OES survey does not provide any data for an occupation in a specific geographical location, or where the OES survey does not accurately represent the relevant job classification. In reviewing these exceptions from the 2011 Wage Rule, we note that the characterization of both exceptions in the preamble to the rule contained ambiguities, which are clarified in this final rule. With respect to the 2011 exception that permitted surveys where

the OES does not provide any data for an occupation in a specific geographic area, the regulatory text of the rule allowed surveys in "geographic areas where the OES does not gather wage data, including but not limited to…the Commonwealth of the Northern Mariana Islands[.]" Sec. 655.10(b)(6), 76 FR at 3484. This suggests that the exception was limited to those geographic areas in which the OES did not actually collect wage data, such as the CNMI. However, the preamble to the 2011 Wage Rule further described this exception as applicable "[w]here there is no data from which to *determine* an OES wage[.]" 76 FR at 3476 (emphasis added). This suggests that the no-OES-data exception is somewhat broader, and will also apply where the BLS may collect data in a geographic area but cannot report a wage for the SOC in that area, possibly because the sample size is so small for that area that it does not meet BLS methodological criteria for publication.

DOL intended in the 2011 Wage Rule to permit surveys in both cases, that is, where the OES does not collect data in a geographic area and where the OES does not report a wage in a geographic area, and we adopt this construction of the exception in this final rule. In both cases, there is no BLS data from which to access a wage in the particular geographic area. This is also the reading the CATA III court gave to this exception when it directed that private surveys no longer be used "except where an otherwise applicable OES survey does not provide any data for an occupation in a specific geographical area." 774 F.3d at 191 (emphasis added). Accordingly, the regulatory text in section 655.10(f)(1)(ii) of this final rule permits surveys where the OES does not collect data in a geographic area, or where the OES reports a wage for the SOC based only on national data. We adopt this construction because, where the OES reports wages for a geographic area based on a national average, that wage is not sufficiently tailored to the geographic area in which the job opportunity exists. Therefore, where the OES does not report

wages for the area of intended employment – generally the metropolitan statistical area (MSA), or more broadly at the level of the MSA plus its contiguous areas, or even more broadly at the state level – this exception will apply. An example of a survey for an H-2B job opportunity that would meet this exception in some geographic areas involves SOC Code 45-3011 – Fishers and Related Fishing Workers. The OES provides data for this category only for California and Washington State, and beyond those states it reports only the national wage. Therefore, surveys for Fishers and Related Fishing Workers would not be permitted in California or Washington State, but would be permitted in locations outside of those states. We expect that determining whether this exception applies should be relatively easy for both employers and DOL because it is based on objective, publicly available criteria that cannot be influenced.[54]

Similarly, the description of the second exception in the 2011 Wage Rule – where the OES does not accurately represent the job opportunity – also contained an ambiguity that is corrected here. The regulatory text set forth a somewhat unwieldy two-part test that would have led to confusion and subjectivity.[55] Sec. 655.10(b)(7)(i), 76 FR at 3484. However, the preamble to the 2011 Wage Rule suggested the employer's sole burden in invoking this exception was "[t]o show that a job is not accurately represented within the SOC job classification system, an employer must demonstrate that the job opportunity was not in the [Dictionary of Occupational

[54] DOL's analysis of FY 2013 H-2B data shows that of the top ten SOC codes used in the H-2B program, only two – Fishers and Related Fishing Workers and Forest and Conservation Workers – may be eligible for this exception because the OES may only report a national wage for the SOC in a particular geographic area. Certified H-2B applications involving those SOC codes combined constitute only 5 percent of all such certified applications. Furthermore, only 2 percent, which is a subset of this 5 percent of all such certified applications, involve geographic areas where the SOC reports only a national mean wage.

[55] Under the 2011 regulatory text, a survey is permissible if the job opportunity was not listed in the Dictionary of Occupational Titles (DOT) and is not listed in the Standard Occupational Classification (SOC) system, or if the job opportunity was listed in the DOT or is listed in the SOC system, the DOT crosswalk to the SOC system links to an occupational classification signifying a generalized set of occupations as "all other"; and the job description entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different, as defined in guidance to be issued by the OFLC, than those in any other SOC occupation.

Titles (DOT)] or if the job opportunity was in the DOT, the crosswalk from the DOT to the SOC Codes places the DOT job in an 'all other' category in the SOC." 76 FR at 3467. In further describing this burden, the preamble stated that "[a]ccordingly, the employer must demonstrate that the job entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different than those in any SOC classification other than with the 'all other' category." Id.

DOL intended in the 2011 Wage Rule to permit surveys where the job opportunity is not within an SOC occupation, or if it is within an SOC occupation, it is designated in an SOC "all other" classification. The regulatory text at Sec. 655.10(f)(1)(iii) has been modified to reflect that.[56] We have concluded that in order to effectively implement this exception, it does not matter whether the job opportunity was included in the DOT and, similarly, the use of the DOT crosswalk to the SOC is no longer essential to establish this exception. What matters is whether or not the job is included within the SOC, and if it is, whether it is included within an SOC "all other" classification. For clarity and uniformity of application, in order to use this exception, a job opportunity must not be included within an SOC classification, or if it is, it must fall into the SOC "all other" classification. We further clarify that if an occupation is appropriately placed in an "all other" classification, it necessarily involves job duties which require knowledge, skills, abilities, and work tasks that are significantly different than those in other SOCs. Therefore, this final rule requires an employer to demonstrate only that its job appropriately falls within the "all other" classification to avail itself of the exception, and does not require a separate showing of uniqueness. This clarification is also consistent with the Third Circuit's reading of the exception,

[56] This exception will apply if (A) the job opportunity is not included within an occupational classification of the SOC system; or (B) the job opportunity is within an occupational classification of the SOC system designated as an "all other" classification.

namely, that a private survey is available "where the OES survey does not accurately represent the relevant job classification." 741 F.3d at 191. As with the first exception described above, we expect that determining whether a job opportunity fits this exception will be relatively straight-forward for all involved. Moreover, DOL will not accept an employer-provided survey on the basis that the job opportunity is within an "all other" SOC if the duties of the job opportunity or the employer's prior filing history suggests that a more specific SOC is applicable.

b. State-conducted Surveys

After considering the comments submitted in response to the 2013 IFR and re-examining the administrative findings from the 2011 Wage Rule, we have determined that it is appropriate to permit prevailing wage surveys that are conducted and issued by a state as a third, limited category of acceptable employer-provided surveys, even where the occupation is sufficiently represented in the OES. In 2011, DOL rejected a comment suggesting that the SWAs rather than employers themselves should conduct surveys to determine the prevailing wage. 76 FR at 3464. DOL concluded then that SWA surveys resulted in inconsistent treatment of the same job opportunity from state to state that reflected "not the local conditions but the quality of the surveyors and the collection instruments used[.]" Id. However, DOL also concluded in 2011 that "the prevailing wage rate is best determined through reliable Government surveys of wage rates, rather than employer-provided surveys that employ varying methods, statistics, and surveys [because using only government wage surveys] to determine the prevailing wage is the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H-2B program." 76 FR at 3465.[57] Consistent with this assessment, we conclude that surveys

[57] For the reasons discussed above, this rule differs from the 2011 Wage Rule in that it does not require an employer to pay the highest of the OES, SCA, DBA, and CBA wage rates, and instead eliminates the use of the SCA and DBA wage rates as a source for determining H-2B prevailing wages. Similarly, this final rule does not require an

conducted and issued by a state represent an additional category of reliable government surveys, and will not suffer the same infirmities as other employer-provided surveys as long as the state-conducted surveys meet the methodological standards included in this rule. The requirement that the state must independently conduct and issue the survey means that the state must design and implement the survey without regard to the interest of any employer in the outcome of the wage reported from the survey. In addition, to satisfy this requirement, a state official must approve the survey.

This result has support in comments offered by worker advocates. Many commenters argued that, if permitted, employer-provided surveys must be conducted by third parties disinterested in the results. In addition, many survey advocates pointed to state-conducted surveys as ones undertaken by neutral third parties free from bias related to the outcome. Finally, no comments suggested that state-conducted surveys suffer from an inherent pro-employer bias, and we conclude that they do not so long as they are conducted using the survey standards we adopt here. Further, we understand that state-conducted surveys are ordinarily provided free of charge, and so allowing this limited exception does not implicate the court's concern in CATA III that the 2013 IFR permitted wage disparities based solely on the financial resources available to employers to purchase surveys. 774 F.3d at 189-190.

Moreover, DOL has substantial experience with wage surveys conducted by the states, and DOL concludes that they are generally reliable and an adequate substitute for the OES, provided that they meet sufficient methodological standards.[58] Although ETA no longer funds

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employer to demonstrate that there is no available SCA or DBA wage rate before submitting an employer-provided survey.

[58] Because DOL lacks similar relationships and experience with prevailing wage surveys conducted by local governments, employers may not submit surveys conducted by any unit of government other than the state, unless

the states to conduct prevailing wage surveys for the H-2B program given the availability of the OES survey, states continue to play an important role in the collection of prevailing wages for both the OES survey itself, as well as in DOL's H-2A program. As BLS explains in its technical notes for the OES survey, "[t]he OES survey is a cooperative effort between BLS and the State Workforce Agencies (SWAs). BLS funds the survey and provides the procedures and technical support, while the State Workforce Agencies collect most of the data."[59] Given DOL's extensive experience partnering with the states to collect wage data, we now conclude that where a state elects to conduct a survey meeting the methodological requirements in this final rule, it is appropriate to permit that state-conducted wage survey to be used as a permissible alternative to the OES mean wage. This rule permits surveys conducted by state agencies, such as state agriculture or maritime agencies, or state colleges and universities because those sources are reliable and independent of employer influence.

DOL stated in the 2011 Wage Rule that some wage surveys conducted by states did not meet DOL's methodological standards. However, rather than barring all state-conducted surveys because some do not pass muster, we conclude that the appropriate course is to permit the submission of state-conducted surveys, but for DOL to review them carefully, and reject those that do not meet methodological requirements. In addition, DOL is no longer concerned about the depletion of administrative resources in the review of employer-submitted surveys noted in 2011 for the following reasons. See 76 FR at 3465, 3466. First, far fewer employers will be permitted to submit wage surveys under this final rule than were allowed under either the 2013 IFR or the 2008 Rule. In addition, because employers will no longer have the option to request

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the employer falls within one of the other two permissible exceptions in this final rule for a job in which the OES does not collect or report data for a geographic area or does not adequately represent the occupation.

[59] Technical Notes for May 2013 Estimates, available at http://www.bls.gov/oes/current/oes_tec.htm.

SCA and DBA wage determinations, resources typically devoted to review of requests to use the SCA and DBA wage determinations can be reallocated to review employer-provided surveys. Finally, as discussed in greater detail below, this final rule will require a uniform cover sheet for all surveys submitted that will facilitate a more streamlined, consistent, and effective review. Accordingly, we conclude that the review of state-conducted wage surveys – in addition to those employer-provided surveys that may be submitted as permitted by the 2011 Wage Rule – will not place a significant burden on DOL resources or measurably impact processing times.

DOL's experience to date shows that state-conducted surveys have produced prevailing wage rates below the OES mean. However, we conclude that this is likely the result of those instruments surveying the wages of only entry level workers. The now-vacated 2009 Prevailing Wage Guidance permitted surveys using skill levels and, as a result, under the 2013 IFR, the state surveys submitted by some employers surveyed only entry level workers. We think that this explains much of the wage gap between the wages issued under these surveys and the OES mean. As the court held in CATA III, acceptance of such skill-level surveys incentivized some employers to submit a survey to receive a skill level wage rate that was no longer permitted under the OES. Moreover, as this rule is implemented, DOL will continue to monitor closely the methodological standards employed and the results produced by state-conducted surveys. Consistency in setting the prevailing wage is best promoted by requiring both state-conducted and other employer-provided surveys to meet the same methodological standards.

Because many state-conducted surveys use their own occupational taxonomy in conducting prevailing wage surveys, we received comments asking us to standardize job classifications by requiring all employer-conducted surveys to use the OES SOC taxonomy. We decline to impose such a standard because it would be inconsistent with DOL's current practice

in other immigrant and nonimmigrant programs. Where the survey reflects the actual job duties to be performed by the H-2B workers, it remains an adequate basis upon which to set the prevailing wage, and will not have an adverse effect on the wages and working conditions of U.S. workers. Accordingly, this final rule will permit employer-provided surveys, including those conducted by a state, to survey an "occupation" based on the job duties performed, consistent with DOL practice across labor certification programs. This practice may result in a reported wage that is below the SOC-based OES mean, which we conclude will not have adverse effect on the wages of U.S. workers because it is an accurate representation of the wages paid to other workers performing the same duties, given the use of an alternate, non-SOC-based taxonomy.[60] As discussed below, however, consistent with DOL's practice across other programs and under earlier H-2B rules, DOL will require that employer-provided surveys report wages across industries that employ workers in the occupation surveyed and will use the same cross-industry standard for surveys that are conducted by states as well as those that are allowed under the two 2011 categories. Indeed, because this final rule permits employer-provided surveys where the SOC does not adequately represent the occupation, it would frustrate the purpose of that exception to then require employer-provided surveys to be conducted across the SOC.

4. Methodological Standards Applicable to All Employer-Provided Surveys

[60] A comment submitted by a worker advocate project on behalf of a large consortium of worker groups provided evidence that some employer-provided surveys submitted under the 2008 Rule in FY-2012 resulted in wages below the OES Level One Wage. It appears that some of the wages cited by the commenter as below the OES Level One wage were issued based on a state-conducted survey. As discussed above, a tiered wage rate was permitted for both OES wages and wages issued based on an employer-provided survey under the 2008 Rule. For the reasons discussed elsewhere in this final rule, we have now eliminated the use of skill levels in both OES and employer-provided survey wage rates and have eliminated the option for employers to submit any wage survey conducted by a non-governmental entity other than in very limited circumstances.

For the reasons discussed above, this final rule permits the prevailing wage to be set based on an employer-provided survey only where the survey was conducted by a state or in the two limited circumstances where this final rule concludes that the OES wage does not provide adequate information for the geographic area or occupation. DOL will provide all other employers with a prevailing wage determined by either a collective bargaining agreement negotiated at arms' length or the OES mean wage for the occupation.

For the limited class of employer-provided surveys that are permitted, this final rule imposes methodological requirements to ensure that the survey is sufficiently reliable as the basis for setting the prevailing wage. Many of the requirements are imposed to provide consistency between the OES and an employer-provided survey to the extent possible, and were contained in the 2009 Prevailing Wage Guidance that DOL uses to implement the PERM rule. [61] Many worker advocates asked the Departments to include the PERM standards by reference in this final rule. Other requirements in this section are imposed to ensure compliance with the court's decision and order in CATA III. Finally, this rule requires use of a standard survey attestation that will provide needed consistency across surveys that are submitted and add efficiencies to the DOL survey review process.

Some commenters asked us to adopt additional requirements, beyond those included in the 2009 Prevailing Wage Guidance that was in effect at the time the 2013 IFR was published, for the limited class of employer-provided surveys permitted under this final rule. The commenters suggested creating an adjudicatory process to allow worker advocates to submit

[61] The 2009 Prevailing Wage Guidance is also used to assess employer-provided surveys submitted in the H-1B program. It was also used to assess surveys in the H-2B program until the CATA III court vacated the guidance as it was applied in the H-2B program. The court's vacatur of the guidance related primarily to its authorization of skill levels in H-2B surveys and most aspects of the guidance document remain reasonable general standards for application to survey assessment.

competing evidence in response to an employer-provided survey. DOL has never required such a process in any of the prevailing wage programs that ETA administers, and the agency declines to do so now. ETA analysts review surveys submitted across the immigrant and nonimmigrant programs within DOL's jurisdiction and possess the expertise needed to review an employer-provided survey to determine whether it falls into one of the permissible categories and meets methodological requirements. Accordingly, we determine that any value from this additional information is outweighed by the costs and delays that such a requirement would impose.

a. The final rule bars the use of skill levels in employer-provided surveys and requires all surveys to report the mean or median wage of workers similarly employed in the area of intended employment

This final rule requires that, in the limited circumstances where an employer-provided survey is permitted, the survey must provide the arithmetic mean of the wages of all workers similarly employed in the area of intended employment, except that if the survey provides only a median, the prevailing wage will be based on the median of the wages of workers similarly employed in the area of intended employment.[62] This provision largely mirrors the language in paragraph (b)(2) applicable to use of the OES to set the prevailing wage, and requires an employer-provided survey to include all workers in the occupation regardless of skill level, experience, education, and length of employment. This provision reflects the limitations imposed by the court in the CATA III decision, which concluded that surveys based on skill

[62] The 2008 rule at 20 CFR 655.10(b)(4) , which remained unchanged under the 2013 IFR, likewise permitted the use of the median if a mean wage was not provided in the survey. This provision permitting the median wage to be used is consistent with the rule for employer-provided surveys across DOL's other programs. See, e.g., 20 CFR 656.40(b)(3) (PERM).

In addition, while 20 CFR 655.10(b)(4) of the 2008 Rule provided that any median from an employer-provided survey must be the "median of the wages of U.S. workers similarly employed," we do not include the "U.S." from this language in the new regulatory text at 20 CFR 655.10(f)(2). DOL has never had a rule in effect for the H-2B program that limited employer-provided surveys that provide a mean wage rate to U.S. workers, and the limitation on surveys providing the median in the 2008 Rule appears to be the result of a drafting error. A discussion of the inclusion of nonimmigrant workers in employer-provided surveys is provided below.

levels impermissibly conflict with the agency's rejection of skill level-based wage determinations in the IFR. See 774 F.3d at 190-191.[63]

The court held in CATA III that permitting employers to submit surveys that used skill levels was a substantive APA violation in light of DOL's finding in the 2011 Wage Rule and the 2013 IFR that the use of skill levels to issue OES prevailing wages would depress the wages of U.S. workers because most H-2B jobs involve unskilled occupations requiring few or no skill differentials. 774 F.3d at 190-191. Accordingly, to achieve consistency with our methodology for prevailing wages issued under the OES and to comply with the CATA III decision, this final rule prohibits employer-provided surveys in the H-2B program that report wages based on skill levels. See 20 CFR 655.10(f)(2) of this final rule.

In addition, the requirement that the survey provide the mean or median of the wages of all workers "similarly employed" requires the survey to be conducted without regard to the immigration status of the workers surveyed. In imposing this requirement, we revisit DOL's administrative finding in the 2011 Wage Rule that including the wages of H-2B or other nonimmigrant workers in the survey may depress wages. 76 FR at 3467. In addition, some comments in response to the 2013 IFR asked that we bar employer-provided surveys that include the wages of nonimmigrant workers on the same grounds. However, we now conclude, for the reasons stated below, that requiring surveys to collect data without consideration of the immigration status of nonimmigrant workers is appropriate. We caution that this final rule does not allow the selective reporting of only nonimmigrant workers, but requires all similarly

[63] Before the court vacated 20 CFR 655.10(f) of the 2013 IFR in CATA III, DOL continued to permit employers to submit surveys that used skill levels, including surveys seeking wages of only "entry level" workers or workers with less than a year of experience based on the 2009 Prevailing Wage Guidance. That guidance required employers to survey workers who are "similarly employed," which was defined as "jobs requiring substantially similar levels of skills." 2009 Prevailing Wage Guidance at p. 15.

employed workers to be included in the sample, regardless of immigration status. DOL will not accept wage surveys that exclude the wages of U.S. workers or exclude the wages of nonimmigrant workers.

DOL's determination in the 2011 Wage Rule was not based on empirical data showing that excluding the wages of nonimmigrant workers from a survey would result in a more accurate prevailing wage. In addition, the commenters did not submit any data supporting their request to exclude nonimmigrant workers from surveys. Requiring the survey to be collected without regard to immigration status will promote consistency with the OES, which does not bar the inclusion of nonimmigrant workers.[64] Further, commercial wage surveys generally do not exclude workers from the survey based on immigration status, and, where this final rule concludes that the OES does not provide adequate information for the occupation or geographic location, we are concerned that requiring the exclusion of nonimmigrant workers would effectively bar employers from using such wage surveys. See 20 CFR 655.10(f)(2) of this final rule.[65]

b. This final rule requires employers to provide a standard attestation with an employer-provided survey that provides basic methodological information needed to evaluate the request

[64] The OES instructs employers to exclude the wages of workers "not covered by unemployment insurance." See, e.g., OMB Form 1220-0042 at p. 1, available at http://www.bls.gov/respondents/oes/pdf/forms/311000.pdf. State law governs whether nonimmigrant workers, including H-2B workers, are covered by unemployment insurance, and so this instruction may have the incidental effect of excluding the wages of some categories of nonimmigrant workers from the OES survey in some states.

[65] As discussed in Sec. II.C.2, we also received comments asking that DOL "not accept employer-provided surveys that are based on data from H-2B employers whose wages have been depressed by participation in the prior four-tiered system or by reliance on prior employer wage surveys that did not meet the requirements at 20 C.F.R. §656.40(g)." Because nearly all employers who have participated in the H-2B program in recent years paid a wage based on wage tiers until the 2013 IFR, this comment suggests the exclusion from surveys of nearly all H-2B employers, an outcome that would go beyond the position that we adopted in the 2011 Wage Rule. We decline to take this suggestion because it requests that the surveyor exclude workers performing identical tasks included in the survey. We conclude that this selective sampling suggested is inconsistent with both the requirements for random or universe sampling discussed below and with the OES methodology.

The content of employer-provided surveys in the H-2B program has varied widely and has not been consistently reliable, which is why such surveys are generally not permitted in this final rule. To enhance the consistency of the limited class of employer-provided surveys that are acceptable under this final rule and ensure that surveys provide sufficient information to allow DOL to make a finding that the survey is reliable, this final rule requires that each employer-submitted survey include a standard attestation, signed by the employer, based on information provided by the surveyor. The attestation must set forth specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey. The form, provided as an appendix to this final rule, addresses each of the methodological requirements in this final rule.[66] Submission of this form will not preclude the NWPC from requesting additional information as necessary to evaluate and determine the validity of the survey for the purposes of issuing a prevailing wage determination.

Much of the information required by the new form was already required to be provided under the 2008 rule. This information was unchanged as to employer-provided surveys under the 2013 IFR, and required an employer to provide, among other things: "specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office." See 20 CFR 655.10(f)(2) of the 2008 rule.

[66] The methodological standards required in this rule are consistent with – and in some circumstances more extensive than – the methodological standards from the PERM rule that some commenters urged us to apply to the H-2B program. The Paperwork Reduction Act implications of this attestation are discussed in Sec. III.C., infra.

The 2009 Prevailing Wage Guidance provided further instructions on employer-provided surveys, and the NPWC could issue a request for information to seek additional information needed to evaluate a survey that was submitted. However, in practice, employers often submitted information of varying quality and detail. Whether information required by this final rule is new or based on established survey requirements is discussed for each survey requirement in this preamble.

The enhanced survey consistency enabled by the new form will make DOL's review more efficient. In addition, the required attestation will increase the transparency of the survey review process by providing all employers the criteria against which DOL will assess the surveys in an easily accessible format. This will reduce the number of instances where DOL will reject an employer-provided survey because it provides insufficient information to assess its validity.

Although employer-provided surveys are limited to those conducted by bona fide third parties for occupations and geographic areas where the OES does not provide adequate information (as discussed in Sec. II.C.4.f below) or surveys conducted by states (as discussed in Sec. II.C.3 and II.C.4.f), it is appropriate to require the employer to attest to the methodology in the survey to the best of its knowledge and belief. Because the employer is seeking to use the survey to set the prevailing wage, the employer is ultimately responsible for ensuring that the survey meets all required standards. We expect that in many cases the employer will be able to obtain the basic methodological information required to complete the attestation from the survey instrument itself. See 20 CFR 655.10(f)(4) of this final rule.

c. The final rule requires surveyors to either make a reasonable, good faith effort to sample all employers with workers similarly employed in the occupation and area surveyed or base the survey on a random sample of such employers

The 2009 Prevailing Wage Guidance suggested, but did not expressly require, that an employer-provided survey use random sampling. See 2009 Prevailing Wage Guidance, Appendix F at p. 2. We are concerned that leaving random sampling as only an option rather than a requirement may result in employer-provided surveys that use selective sampling or other techniques that do not result in a reliable prevailing wage. To address this concern and ensure that surveys submitted are sufficiently reliable, this final rule requires that the surveyor either make a reasonable, good faith attempt to contact all employers employing workers in the occupation and area surveyed, or survey a random sample of such employers.

Where the universe of employers is small, it may be necessary to attempt to contact all employers with workers similarly employed in the occupation and geographic area to ensure that the minimum sample size is met. A reasonable, good faith attempt to contact all employers with workers similarly employed in the occupation means, for example, that the surveyor might send the survey through mail or other appropriate means to all employers in the geographic area and then follow-up by telephone with all non-respondents.

On the other hand, if there are a large number of employers in the geographic area, surveyors will likely use the random sample option. Proper randomization requires the surveyor to determine the appropriate "universe" of employers to be surveyed before beginning the survey and to select randomly a sufficient number of employers to survey to meet the minimum criteria on the number of employers and workers who must be sampled, as discussed below. See 20 CFR 655.10 (f)(4)(i) of this final rule.

d. The final rule requires all employer-provided surveys to include the wages of at least three employers and 30 workers.

Consistent with OES methodology, this final rule requires an employer-provided survey to include wages collected from at least three employers and 30 workers. BLS requires wage

information from a minimum of three employers and 30 workers (after raw OES survey data is appropriately scrubbed and weighted) before it deems data of sufficient quality to publish on its website. In addition, these standards are consistent with the methodology from the 2009 Prevailing Wage Guidance that was in effect for the H-2B program at the time the 2013 IFR was published and with standards for the PERM program that some commenters recommended we apply to any H-2B surveys accepted. See 2009 Prevailing Wage Guidance, Appendix F at p. 2. Further, although the 2013 IFR sought comments on ways to improve the methodology for employer-provided surveys, 78 FR at 24055, we did not receive any comments recommending that we change these minimum sample sizes.

Based on DOL's experience reviewing employer-provided surveys and the desire to provide consistency between the OES methodology and the methodology for employer-provided surveys, we conclude that three employers and 30 workers is the minimum number of data points required to produce a reliable arithmetic mean wage for an occupation in a given area of intended employment. Under this final rule, the surveyor would take into account the nature and duties of the job opportunity, and contact a large enough sample of employers to yield usable data for at least three employers and 30 workers similarly employed, regardless of immigration status, as discussed further in Sec. II.C.4.a above. Employers responding to the survey may not report wages selectively or base responses on only a portion of the workers similarly employed in the occupation that is the subject of the survey; rather, each employer responding to the survey must collect and report wage data for all of its workers in the occupation regardless of their level of skill, education, seniority, or experience. Under this final rule, if a surveyor could not obtain wage results for 30 workers, the area surveyed may be expanded beyond the area of intended employment under the guidelines discussed further below. However, as DOL stated in the 2009

Prevailing Wage Guidance (see Appendix F at p. 2), in most cases a surveyor should be able to report data for at least 30 workers and three employers in the occupation and area of intended employment without expanding the survey beyond the area of intended employment. See 20 CFR 655.10(f)(4)(ii) of this final rule.

e. The final rule allows the area surveyed to be expanded beyond the area of intended employment in certain limited circumstances

In any of the three limited categories in which an employer-provided survey may be submitted, this final rule permits the survey to cover a geographic area larger than the area of intended employment only if all of the following conditions are met: 1) the expansion is limited to geographic areas that are contiguous to the area of intended employment; 2) the expansion is required to meet either the 30-worker or three-employer minimum; and 3) the geographic area is expanded no more than necessary to meet these minimum requirements. The H-2B program has always required that surveys reflect wage data for the area of intended employment, but has allowed states and employers to expand wage survey boundaries under limited circumstances, such as where the employer submitting the prevailing wage request is the only entity in the area employing persons in a given occupation,[67] or when the survey elicits an insufficient response from employers.[68] When the number of workers in the area of intended employment[69] – that is, the metropolitan statistical area of the job opportunity and the area within normal commuting distance from the job opportunity – is insufficient to meet survey standards, DOL has also

[67] See GAL 4-95 (May 18, 1995) at p. 4 ("If the employer requesting a prevailing wage determination is the only employer [in the area of employment] employing workers in the occupation for which the prevailing wage request was made, the SESA may…. [s]urvey jobs outside the area of employment with the same 9-digit DOT code as was assigned to the job opportunity/occupation for which the employer requested a prevailing wage determination[.]").

[68] See id. at p. 4 ("SESAs can also… survey jobs outside the area of intended employment if a sufficient number of employers fail to respond to a survey to provide a reliable prevailing wage determination.").

[69] The term "area of intended employment" is defined at 20 CFR 655.5 of the companion H-2B rule issued on the same day as this final wage rule.

allowed surveys to include data from employers located outside the area of intended employment.[70] This final rule codifies the practice.

This final rule also requires that the area to which the survey expands be contiguous to the area of intended employment. OFLC's program experience demonstrates that some employers have submitted surveys that expanded the survey area using remote geographic areas located far from the job opportunity. We see no reason for a survey to ignore areas immediately surrounding the job opportunity in favor of geographic areas located large distances from the job In practice, the NPWC rarely, if ever, has found a reason to accept surveys from remote locations. Thus, codifying this limitation will give surveyors clearer guidance and save employers the cost and effort of commissioning surveys the NPWC will not use. The new requirement would also save processing time, as NPWC staff would no longer be presented with surveys for areas not narrowly tailored to suit the job opportunity.

The final rule further requires that surveyors expand the geographic area only to the extent necessary to meet the minimum sample size requirements of this final rule. DOL has traditionally cautioned states and employers that, for purposes of surveys, the geographic area should be expanded only to the extent necessary to produce a representative sample,[71] and this

[70] See ETA, Prevailing Wage Determination Policy Guidance (November 2009), Appendix F, at p. 1; ETA, Prevailing Wage Determination Policy Guidance (May 17, 2005), Appendix F, at p. 1; GAL 2-98 (Oct. 31, 1997) at p. 8 ("A valid arithmetic mean for an area larger than an OES wage area, whether MSA, PMSA, or OES Balance of State area, may only be used if there are not sufficient workers in the specific occupational classification relevant to the employer's job opportunity in the area of intended employment.").

[71] See GAL 4-95 (May 18, 1995) at p. 4 ("If it is necessary to include jobs outside the area of intended employment, the geographic area of consideration should not be expanded more than is necessary to obtain a representative number of employers employing workers in the occupation for which a determination is to be made. For example, it is appropriate to survey cities and counties that are in close proximity to the area of intended employment rather than using a State-wide average wage rate."), GAL 2-98 (Oct. 31, 1997) at p. 8 ("However, the area of intended employment [for survey purposes] should not be expanded beyond that which is necessary to produce a representative sample. In all cases where an area that is larger than an OES wage area is used, the employer must establish that there were not sufficient workers in the area of intended employment, thus necessitating the expansion of the area surveyed."), and GAL 1-00 (May 16, 2000), Attachment A, p. 2, available at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1214 (restating this principle).

provision codifies that expectation. This limitation reflects DOL's view that surveys submitted for labor certification purposes must take a careful approach to expansion rather than default immediately to state-wide coverage. As always, if the NPWC, in the course of its prevailing wage review, believes that the geographic area is overly broad, the NPWC may ask the employer for additional information and/or reject the survey under this subsection.

Incremental, tailored expansion is consistent with OES survey methodology. The OES data used in the foreign labor certification program (which appears on DOL's Online Wage Library) uses the concept of geographic "levels" to allow expansion of the area for which wages are reported. Geographic levels are indicators of the breadth of the area. When the OES survey fails to collect enough usable data for a given geographic area (for example, an MSA or a "balance of state" area), BLS rolls over to the next largest geographic area until it reaches an area large enough that it has enough data to report. BLS will expand the area for which it reports data only as necessary, and will report wage data for the smallest area for which reliable data is available.[72]

Surveyors may approach this requirement in two ways. In cases where an employer contracts with a surveyor familiar with the area of employment, the surveyor may determine before beginning the survey that the survey will not elicit a sufficient response to meet the regulatory requirements – for example, if there are not enough employers or workers in the area. In these cases, the surveyor may elect, at the outset, to survey a geographic area larger than the

[72] The BLS practice is generally described in GAL 2-98, at p. 4 ("Expansion of Area of Intended Employment…The OES survey data will represent all responding employers in the area of intended employment who employ workers in that OES occupational code. If the OES survey does not include enough responses in that area and occupation to allow BLS to publish the data, the OES system will default to all MSAs, PMSAs, and Balance of State areas contiguous to the requested area within that State. If this still does not result in publishable data, the system will default to statewide information for that occupation. Because of the size of the sample, it is unlikely this will occur except in very unusual occupations or in small States."). See also OFLC's explanation of "geographic level" at: http://flcdatacenter.com/faq.aspx.

area of employment. The employer, when completing the survey attestation, discussed above at Sec. II.C.4.b, must explain the decision to expand the survey area at the outset, and describe the extent of the expansion and the reason why expansion was needed to meet the regulatory requirements based on information provided by the surveyor.

In other cases, a surveyor may use a more incremental approach. For example, the surveyor may survey the area of intended employment, but the survey still yields an insufficient response. In such cases, the surveyor must either make a reasonable, good faith effort to contact all employers employing workers in the occupation in the expanded area or survey a new, random sample of such employers in the expanded area, as discussed further in Sec II.C.4.c. See 20 CFR 655.10(f)(3) of this final rule.

f. The survey collection must be conducted by a state or, in a case where the OES does not provide adequate data for the geographic area or the occupation, a bona fide third party.

This final rule requires that if an employer provides a survey because the OES survey does not provide data for the SOC in a geographic area under 20 CFR 655.10(f)(1)(ii) or the OES does not provide adequate information for the occupation as provided under 20 CFR 655.10(f)(1)(iii), a bona fide third party must conduct the collection.[73] For purposes of this rule, H-2B employers and H-2B employers' agents, representatives, and attorneys are not bona fide third parties.[74] These exclusions are intended to prevent self-interest and other biases from affecting the reliability of employer-provided surveys under this rule, which is also why privately-conducted employer-provided wage surveys are barred in all circumstances where the

[73] This requirement does not bar an employer from paying an otherwise bona fide third party to conduct the survey. In addition, employers who are eligible to submit a survey under Sec. 655.10(f)(1)(ii) or (iii) may submit a survey conducted and issued by a state.

[74] Employer associations may be bona fide third-parties for the purposes of this rule.

OES provides adequate data. Such concerns were raised in the comments of many worker advocates in response to the 2013 IFR. These concerns are particularly acute in the case of surveys conducted by H-2B employers, representatives, agents, and attorneys. Even H-2B employers, representatives, agents, and attorneys who are not directly involved in the application for which the survey is submitted are barred from conducting a wage survey under this final rule because we conclude that H-2B employers and the entities that represent them are likely to share common interests and biases that may affect the reliability of such surveys. See 20 CFR 655.10(f)(4)(iii) of this final rule.

This rule reflects our determination that DOL will accept non-state surveys only where the OES either does not cover the geographic area and occupation or does not adequately provide data about the job. In these limited circumstances in which the OES does not provide adequate data, it would be inappropriate to require the employer to submit only a state-conducted survey because such a survey may not be available. As discussed in Sec. II.C.3, where an OES wage adequately represents the occupation, thus making the exceptions in 20 CFR 655.10(f)(1)(ii) or (iii) of this final rule inapplicable, a survey conducted and issued by a state is the only type of employer-provided survey that may be submitted. See 20 CFR 655.10(f)(1)(i). This reflects our determination, discussed above, that use of privately-conducted wage surveys would depress the wages of U.S. workers where OES wages adequately represent the occupation.

g. This final rule requires the wage reported by an employer-provided survey to include all types of pay as set out in Form ETA-9165

This final rule requires that the wage reported from any employer-provided survey must include all types of "pay" to workers in the survey as required by new Form ETA-9165. Form ETA-9165 uses the definition of pay from the OES. The OES requires surveys to consider as pay and convert into the hourly rate reported to the surveyor the base rate of pay, commissions, cost-

of-living allowance, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonus, and tips. See, e.g., Occupational Report of Food Manufacturing (311000) at p.2, OMB No. 1220-0042.[75] For example, if an employer guarantees a minimum hourly wage, but pays other types of monetary compensation, including tips, commission, or piece rate, in excess of the hourly guarantee, the total of the hourly guarantee and this additional compensation must be reported in the survey as the hourly wage paid. This requirement is needed for consistency with the OES. If we did not require inclusion in the survey wage reported of all of the types of pay reported to the OES, those limited surveys permitted by this final rule would necessarily undercut the OES by not reporting the complete wage paid. We understand that employers ordinarily calculate the wage paid for OES purposes by consulting payroll records. We conclude that, given this swift and accurate means of providing the complete rate of "pay" in a survey, this requirement is not unduly burdensome. See 20 CFR 655.10(f)(4)(v) of this final rule.

h. The final rule requires all employer-provided surveys to be the most recent edition of the survey and be based on wages paid no more than 24 months before the date of submission to DOL

This final rule requires that the data reported in an employer-provided survey must be based on wages paid no more than 24 months before the survey is submitted to ETA. The relevant provision of the 2008 Rule at 20 CFR 655.10(f)(3) (which was unchanged in the 2013 IFR until vacated by the CATA III decision) required surveys to be based on "recently collected data[,]" which, for "employer-conducted" surveys meant that the survey data must have been collected within 24 months of its submission.[76] The standard was somewhat different for

[75] Available at http://www.bls.gov/respondents/oes/pdf/forms/311000.pdf.

[76] Before the 24-month standard was codified in 2008, it appeared for years in the program's prevailing wage guidance to the states.

"published" surveys, which were permitted to rely on data published within 24 months of submission, but the data could be collected up to 24 months prior to publication. As a result, at the time they were submitted to the NPWC, published surveys could contain data collected up to 48 months before submission.[77] To ensure that no employer submitted-surveys are based on out-of-date wage information, this final rule requires that all surveys, regardless of when or whether they are published, be based on wages paid not more than 24 months before submission. Thus, this final rule retains the 24-month standard that was applicable to employer-conducted surveys under the 2008 Rule. In addition, by eliminating the "published" survey distinction, this final rule broadens the application of the 24-month rule to all employer-provided surveys. The final rule also changes the event that delineates the 24 month period under earlier rules – the survey submitted to the NPWC must be based on wages paid, rather than wage data collected, within the 24 months prior to submission.

This final rule updates and strengthens the data timeliness requirements from earlier rules, starting with the distinction between types of surveys. Over the years, the program and its stakeholders have developed a vocabulary referring to the source of surveys supporting prevailing wage requests. These include, for example, "published," "unpublished," "commercial," and "private." In the digital age, these distinctions are no longer as meaningful or as helpful for prevailing wage determination purposes. Today, technology often allows professional surveyors and users of surveys alike to post or make surveys widely available on the Internet, thus blurring the clear distinctions that once existed between published and private

[77] For purposes of comparison, OES survey estimates are based on data collected over a three-year period, with the survey updated every six months based on more recent data. In addition, in the 1990s, the DOL recommended that state employment service agencies use their in-house wage surveys for only two years. See GAL 4-95 at pp. 9-10 ("SESA Conducted Prevailing Wage Surveys…Length of Time Survey Results are Valid…SESAs may use survey results for up to 2 years after the data are collected. After 2 years, the results of a new survey should be implemented.").

surveys. In addition, the survey landscape has changed dramatically, as the production of surveys has developed into an industry with multiple choices, prices, and arrangements that include, for example, survey search services, survey subscription services, traditional surveyors for hire, and more informal or customized surveys conducted directly by private employers or their agents for limited purposes. Thus, we have concluded that these distinctions made in the 2008 Rule are less relevant, and we eliminate them.

This allows us to collapse the requirements on age of data. To be relevant and reliable, survey data must, among other things, be contemporary. Wage data, in particular, quickly becomes stale in a growing economy, and we have determined that data over 24 months old is sufficiently out-of-date that it does not permit us to set an accurate prevailing wage in the area of intended employment. Moreover, in the information age, it is no longer appropriate for the foreign labor certification program to use employer-provided wage data that at times may be up to four years old. In addition, many professional wage survey services update their surveys annually or quarterly. Requiring wage data to be based on wages paid no more than 24 months before submission in all instances, and accepting only the current edition of the survey, adds rigor and improves data quality for the limited class of employer-provided surveys permitted under this final rule. See 20 CFR 655.10(f)(5) of this final rule.

D. Use of a Collective Bargaining Agreement Wage to Set the Prevailing Wage

As discussed above, the 2011 Wage Rule would have required the prevailing wage to be set at the wage rate contained in a collective bargaining agreement only where the CBA rate was the highest of the OES mean, SCA, DBA, and CBA wage rates. In explaining its decision to set the prevailing wage at the CBA wage only where it is the highest applicable wage, DOL stated

that "a CBA rate below the prevailing wage would not be a valid wage for purposes of the H-2B program." 76 FR at 3455.

In contrast, the 2008 Rule at 20 CFR 655.10(b)(1), which was unchanged in the 2013 IFR, included the requirement that, unless the job opportunity was covered by a sports league's rules or regulations, "if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the 'prevailing wage' for labor certification purposes." 20 CFR 655.10(b)(1). Thus, these rules required the applicable CBA wage rate to be paid in all cases where the job opportunity is covered by the agreement, and would not require the H-2B employer to offer and pay a higher OES, SCA or DBA wage.

In response to the 2013 IFR, we received several comments about the appropriate role of CBA wage rates in the H-2B program. Worker advocates, including a federation of unions and a worker advocate project representing a large consortium of worker advocate groups, asked the Departments to adopt the 2011 Wage Rule's position on the application of the CBA wage rate to the H-2B prevailing wage, and require the CBA wage rate to be paid only where it is the highest wage. These comments generally reflected the concern that a wage rate is often only one of a package of terms and conditions of employment negotiated between an employer and the employees' representative, and the negotiated wage rate may reflect a quid pro quo in exchange for another improved term in the package.

After considering these comments, we adopt the approach under the 2008 Rule, which was unchanged by the 2013 IFR, in which the CBA wage rate is the prevailing wage where it is applicable to the H-2B employer's job opportunity, regardless whether the OES mean is higher.

When negotiated at arms' length by a duly elected or recognized bargaining representative, the CBA wage accurately represents the "wage paid to similarly employed workers in a specific occupation in the area of intended employment[,]" which is DOL's definition of the prevailing wage for the purposes of its labor certification programs.[78] We are not persuaded by the argument that because the CBA wage may be offset by improvements in other terms and conditions of employment, the wage may not be an accurate representation of the prevailing wage. In setting the prevailing wage, we do not consider or adjust for the many factors that may influence a particular wage, beyond the occupational classification and the geographic area in which the H-2B job opportunity exists. Moreover, as with a CBA wage rate, the OES mean wage reflects only those forms of monetary compensation that the OES classifies as pay, and does not contain any non-monetary compensation that may exist in an occupation in a geographic area.[79] We conclude that a prevailing wage rate based on a CBA wage negotiated at arms' length by the employer and a proper employee representative does not have an adverse effect on the wages of U.S. workers because it reflects the agreement of the parties on the appropriate wage for the job opportunity. Accordingly, the CBA wage should be paid in all circumstances[80] where the job opportunity is covered by the agreement. See 20 CFR 655.10(b)(1) of this final rule.

[78] See http://www.foreignlaborcert.doleta.gov/pwscreens.cfm.

[79] The OES excludes attendance bonuses, back pay, draw, holiday bonuses, holiday premium pay, jury duty pay, lodging payments, meal payments, merchandise discounts, nonproduction bonuses, on-call pay, overtime pay, perquisites, profit-sharing payments, relocation allowances, severance pay, shift differential, stock bonuses, tool allowance, tuition repayment, uniform allowances and weekend pay from the definition of pay. See http://www.bls.gov/oes/oes_ques.htm.

[80] As under the 2008 Rule, this final rule at 20 CFR 655.10(b)(1) excludes those occupations covered by a sports league's rules or regulations. Prevailing wages for occupations covered by a sports league's rules or regulations are set through the methodology in 20 CFR 655.10(i), as provided in the companion H-2B comprehensive rule entitled, Temporary Non-agricultural Employment of H-2B Aliens in the United States, published the same day as this final wage rule.

E. Implementation

This final rule will apply to all new prevailing wage requests submitted on or after the effective date of this rule. Any prevailing wage request submitted before the effective date of this rule and pending at the time this rule is published will be processed under the standards of the rule in effect on the date that the prevailing wage request was filed.

III. Administrative Information

A. Executive Orders 12866 and 13563

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 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 affects in a material way 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 Executive Order. Id.

This final rule is a significant regulatory action under section 3(f)(4) of Executive Order 12866. The results of the Departments' cost-benefit analysis under this Part (III.A) are meant to satisfy the analytical requirements under Executive Orders 12866 and 13563. These longstanding requirements ensure that agencies select those regulatory approaches that maximize net benefits — including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity — unless otherwise required by statute. The Departments did not use the cost-benefit analysis under this Part (III.A) for purposes forbidden by or inconsistent with the Immigration and Nationality Act, as amended.

The following analysis evaluates the expected impacts of this final rule. According to the principles contained in OMB Circular A-4, the baseline for the economic analysis of this rule is the situation most recently in effect, as described in detail below, which is based on the 2008 rule and the 2013 IFR, as modified by the CATA III court decision on December 5, 2014. As discussed in the preamble, on March 4, 2015, the district court in Perez vacated the 2008 rule, effectively ending DOL's ability to issue any prevailing wage determinations (PWDs). On March 18, 2015, the Perez court granted a temporary stay of the vacatur order. The court ordered a further extension of its temporary stay on April 15, 2015. Therefore, the Departments conclude that it is most appropriate to assess the impact of this final rule compared to the situation that existed immediately prior to the court's vacatur order and during the period of the stay, i.e., the rules governing the most recent PWDs actually issued. Accordingly, we compare this final rule

to the situation under the 2008 rule and the 2013 IFR, as modified by CATA III (hereinafter referred to for ease of reference as "the 2013 IFR" unless a more specific reference to the 2008 rule is required).

The 2013 IFR establishes that when the prevailing wage determination (PWD) is based on the Occupational Employment Statistics (OES) survey, the wage rate is the arithmetic mean of the OES wages for a given geographic area of employment and occupation. The 2013 IFR permits, but does not require, an employer to use a PWD based on employer-provided surveys approved by DOL or Service Contract Act (SCA) and Davis-Bacon Act (DBA) wage determinations. The 2013 IFR also requires the use of an applicable Collective Bargaining Agreement (CBA) wage rate, if one exists. Finally, the 2013 IFR requires 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.

On December 5, 2014, the Court of Appeals for the Third Circuit in CATA III vacated the provision of DOL's regulation permitting the use of employer-provided surveys as a basis for PWDs. Accordingly, after that date, DOL no longer accepted such wage surveys when issuing PWDs. Therefore, under the baseline, H-2B employers can use PWDs based on the OES mean, the SCA or DBA wage rate, or the CBA wage rate if one exists.

This final rule retains the OES mean as the default wage, does not permit the use of wage determinations under the SCA or DBA as H-2B wage sources, and establishes three circumstances in which employer-provided surveys may be accepted for PWDs. They are as follows:

- The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers employed in the Standard Occupation Classification (SOC);[81]
- The job opportunity is not included within an occupational classification of the SOC system or is within an occupational classification of the SOC system designated as an "all other" classification; or
- The survey was conducted and issued by a state, including any state agency, state college, or state university.

The final rule continues to use the OES mean as the basis for setting H-2B prevailing wage rates. The OES mean wage rate conforms more closely to the wages paid by employers in a given geographic area of employment and occupation and, as discussed above, is the most appropriate wage to use to prevent adverse immigration-induced labor market distortions inconsistent with the requirements of the Immigration and Nationality Act. The use of the OES mean is consistent with the 2013 IFR in which we explained that the four-tier skill levels used in the 2008 rule did not adequately ensure that H-2B workers are paid a wage that will not adversely affect the wages of similarly employed U.S. workers.

Historically, SCA and DBA wage determinations developed for work on government contracts were used as sources for H-2B prevailing wages before the OES survey began to dominate the wage survey landscape. In the 2008 rule, SCA and DBA wage rates became permissive sources; employers could request their use as a source for PWDs among an array of

[81] BLS publishes data at the national level only when data for smaller geographic areas are not available.

sources. The 2013 IFR retained the 2008 rule's approach, allowing employers to select among the array of available sources (OES mean, SCA, DBA, or employer-provided surveys).

The final rule does not permit the use of SCA and DBA wage determinations as sources for the H-2B prevailing wage. SCA and DBA wage determinations would still be applicable to and enforced in H-2B work covered by a government contract, but the prevailing wage issued by OFLC would be based on the OES mean, unless an employer-provided survey was submitted and approved. The primary benefits of this approach are the resulting streamlined PWD process, the removal of challenges associated with conforming the SCA and DBA wage determinations into the H-2B prevailing wage process, and the alleviation of the administrative burden associated with matching employers' job descriptions submitted in prevailing wage requests with the appropriate SCA or DBA job classifications.

The final rule allows the use of employer-provided surveys in limited circumstances for determining H-2B prevailing wages. First, in specific geographic locations where OES does not collect wage data or the OES reports only a national-level wage for the SOC, employers are permitted to use a survey that meets the methodological standards required by this final rule. The only geographic area where OES wage data are not collected is the Commonwealth of the Northern Mariana Islands (CNMI).[82] Of the top ten occupations that account for approximately 70 percent of all certified H-2B applications during FY 2013, workers engaged in "Forest and Conservation" and "Fishers and Related Fishing" related positions are the two occupations for which the OES reports a wage at the national level in some geographic areas. Based on this analysis, certified H-2B applications involving those two SOC codes in geographic areas where

[82] Currently, employers are not using the H-2B program in the CNMI. In fiscal years 2013-14, DOL issued four PWDs for H-2B positions in the CNMI: three based on the OES mean wages in Guam and one based on the DBA. However, no H-2B positions were certified during the same period.

wages are reported only at the national level combined constitute no more than 2 percent of all such certified applications.

Second, employers will be able to submit a survey if the job opportunity is not included in the SOC or is in a SOC "all other" category. Based on an analysis of approximately 9,250 H-2B PWDs issued during FY 2014, DOL issued a PWD using a SOC "all other" category in only 6 instances, constituting less than 0.1 percent of all PWDs issued. Therefore, DOL believes the category is largely unavailable and it has received H-2B certification requests that would meet this category only on very rare occasions.

Third, the final rule permits employers to request a PWD based on a wage survey of all similarly employed workers in the job and area of intended employment where such a survey is conducted and issued by a state. Such a survey must also meet the new methodological standards contained in the final rule.[83] Approximately 1 percent of employers used state surveys as the basis for their PWDs under the 2013 IFR.[84]

The 2008 rule and the 2013 IFR permitted employers to submit employer-provided surveys as a wage source in lieu of the OES or other sources. The 2011 rule virtually eliminated the use of employer-provided surveys to set the prevailing wage in the H-2B program.

After the issuance of the 2013 IFR and the establishment of the default wage at the OES mean, the use of employer-provided surveys grew exponentially. Pre-IFR use of these surveys included about 1 percent of all PWDs, while post-IFR use climbed to about 30 percent of all PWDs.[85] A review of some post-IFR employer-provided surveys used as wage sources indicated

[83] A state survey refers to a survey conducted by any state agency, state college, or state university.

[84] Source: a random sample of 524 employers with 10,282 certified H-2B positions between May 1, 2013, and April 30, 2014.

[85] Source: H-2B PWDs issued FY 2012 and first quarter of FY 2014.

that, in many cases, employers reported wages of workers at the entry-level of the occupation. This may be a key reason why some employer-provided surveys have resulted in wages far below the OES mean.

In addition, in many cases the survey methodology employed was insufficient to produce a reliable and valid wage for the occupation, largely because the current survey standards do not adequately promote valid and reliable results. Given the low quality of many of the surveys deemed acceptable under the existing wage guidance, we have determined that if employer-provided surveys continue to be available, additional methodological rigor is needed to support their continued use. Therefore, the final rule improves the methodological standards required for employer-provided surveys to improve their reliability and validity. Key improvements to the methodological standards generally are as follows:

1. Require the survey to include the mean or median wage of all similarly employed workers in the area of intended employment, regardless of skill level, experience, education, and length of employment;
2. Require the survey to make a reasonable, good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed or conduct a randomized sample of such employers;
3. Require the survey to be independently conducted and issued by a state and approved by a state official or, in the limited circumstances where the OES wage does not provide adequate data for the occupation or geographic area, a bona fide third party;
4. Require the survey to include at least thirty employees and three employers in a sample;

5. Require that surveys include all types of pay set out in the OES survey instrument, including payment of piece rates or production bonuses in the wages reported;[86]
6. Require the wages reported in the survey be no more than twenty-four months old;
7. Require that that surveys be conducted across industries that employ workers in the occupation; and
8. Require that employers submit a new Employment and Training Administration (ETA) Form ETA-9165, which permits DOL to better assess the validity and reliability of the survey.

Changes in the method of determining prevailing wages required by this final rule will result in additional compensation (i.e., transfer payments) for both H-2B workers and U.S. workers hired in response to the required recruitment. In addition, some employers will face additional costs to meet the higher methodological standards of the employer-provided survey. In this section, the Departments discuss the relevant costs, transfers, and benefits that may apply to this final rule.

The impact of wage increases to employers was measured by comparing the prevailing wages under the final rule to the H-2B hourly wages under the baseline (i.e., the 2013 IFR, as modified by the CATA III court decision). Under this final rule, DOL would base PWDs on the OES mean, the CBA, and employer-provided surveys in very limited circumstances. For this economic analysis, DOL first calculated the increase in wages as the difference between the prevailing wages under the final rule and the H-2B hourly wages under the baseline for each certified or partially certified application. Next, DOL weighted this wage differential by the

[86] The types of pay that must be reported in the OES survey include: base rate of pay, commissions, cost-of-living allowance, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonus, and tips.

number of certified workers on each certified or partially certified application. DOL then summed those products to calculate the weighted average wage differential for all certified H-2B applications under the baseline.

The equation below shows the formula that DOL used to calculate the weighted average wage differential (WWD). In the formula, Prevailing Wage is the arithmetic mean of the OES-reported wage, the CBA wage, or the wage from an employer-provided survey under the final rule; and Certified H-2B Wage is the H-2B hourly wage under the baseline.

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

Finally, to estimate the total transfer to all H-2B workers that results from the increase in wages due to the application of the final rule's new PWD method, DOL multiplied the weighted average wage differential by the total number of H-2B workers in the United States in a given year.

Under the current baseline, employers could select their prevailing wage source from the OES mean, the SCA or DBA wage, or the CBA wage if one exists. DOL believes employers that select prevailing wages based on the OES mean under the current baseline would continue to select the OES mean, except for those employers who elect to submit a survey in the three circumstances in which surveys are accepted for PWDs under the final rule. As a result, the final rule will have no impact on the employers who continue to use the OES mean. Employers who

use the OES mean account for approximately 95 percent of the total PWDs under the current baseline.[87]

One of the more challenging aspects of this economic analysis is accurately determining the expected prevailing wages for the employers that selected their prevailing wage sources from the SCA and DBA wage determinations (approximately 5 percent of employers under the current baseline). Employers that submitted an SCA or DBA wage determination as a source for their prevailing wage under the current baseline will no longer be able to use the SCA or DBA wage determinations under the final rule. Therefore, they can either request the OES mean wage as the prevailing wage source or submit a survey conducted and issued by a state or third party, if one is available and permissible and the wage from the survey is lower than the OES mean.[88] However, DOL expects few, if any, employers will be able to use a state survey because they currently are available on a limited basis for the seafood industry, while the industries that use SCA or DBA wages as their prevailing wage sources are construction, forestry, and landscaping. A small number of employers in the forestry industry will be eligible to submit an employer-provided survey because OES data is reported only at the national level; however, due to the fact that employers in these industries typically operate on multi-state itineraries on a single H-2B certification and different prevailing wage rates exist within each area of employment within each itinerary, DOL does not have sufficient data to identify the employers that would be able to switch from the SCA or DBA to an employer-provided survey as their prevailing wage source

[87] In the first quarter of FY 2014, approximately 65 percent of the total H-2B PWDs were based on the OES, 30 percent were based on employer-provided surveys, and 5 percent were based on SCA or DBA wage determinations. The 30 percent of the total PWDs that were based on employer-provided surveys before the December 5, 2014, CATA III decision are now issued based on the OES mean. Therefore, under the current baseline the OES mean accounts for about 95 percent of the total PWDs.

[88] Although an employer-conducted survey may also be provided under this final rule if it is higher, we expect that an employer will only submit a survey to set the prevailing wage if the survey wage would be lower than the OES mean.

under the final rule. Therefore, DOL assumed that all the employers that selected their prevailing wage sources from the SCA and DBA wage determinations will select the OES mean as their prevailing wage source under the final rule. This represents a conservative, upper-bound assumption.

Employers that received a prevailing wage determination based on a survey under the 2013 IFR before the CATA III decision have not been able to use a survey as a prevailing wage source since that decision. Thus, the baseline for this analysis includes no surveys. However, employers will be able to use a survey conducted by a state if the survey meets the new methodological standards under the final rule. DOL cannot estimate with reasonable accuracy which employers will be able to submit a state survey that meets the new methodological standards under the final rule. Furthermore, no information exists that allows DOL to measure how much the new survey standards will affect the number of state surveys submitted or their resulting wages. Therefore, we are required to make certain assumptions, which are described in the following discussion.

Employers that submitted a state survey as their PWD source under the 2013 IFR prior to the CATA III decision will likely continue to submit such a survey if they can still obtain a wage rate that will cost them less than the OES mean. Otherwise, these employers will select the OES mean as their prevailing wage source. DOL anticipates that the wage rates from state surveys will increase because the final rule requires these surveys to include the mean wage of all similarly employed workers, while most state surveys submitted under the 2013 IFR included only entry-level workers.[89] Therefore, it is expected that the new wage rates from state surveys

[89] Even if the new wage rates from state surveys that meet the new methodological standards are expected to increase from the wage rates in the surveys that employers submitted under the 2013 IFR before CATA III, these

that meet the new methodological standards will increase, but not to the level of the OES mean (the current baseline) or employers would not submit these surveys. Accordingly, it is assumed that for an employer that submitted a state survey under the 2013 IFR before the CATA III decision, the new survey wage rate would increase to the OES wage level 2 if the wage rate from the survey that the employer previously submitted was below this level.[90] It is also assumed that if an employer submitted a state survey under the 2013 IFR with a wage rate between OES wage levels 2 and 3, the new wage rate from a state survey that meets the new methodological standards would increase to the OES mean. Therefore, the employer would select the OES mean as the prevailing wage source rather than use a new state survey. Approximately 84 percent of previous state survey wage rates were between OES wage levels 1 and 2.

Under certain circumstances, employers requesting H-2B certifications are permitted to use an employer-provided survey that meets the methodological standards required under this final rule. Such employers must be operating in geographic areas where the OES does not collect data or where the OES reports a wage for the SOC at the national level only. In addition, employers requesting H-2B certifications for an occupation not included in the SOC or designated as an "all other" classification will be able to use an employer-provided survey. However, DOL does not have enough information to predict with reasonable accuracy which employers are going to submit the OES mean as the prevailing wage source or which employers are going to submit an employer-provided survey. In addition, DOL has no information about how much the new survey requirements will affect the number of surveys submitted or the

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employers will experience wage decreases under this final rule because they currently use the OES mean as their prevailing wage source under the current baseline.

[90] The OES level 2 wage is approximately the 34th percentile on the OES wage distribution for that occupation in the applicable geographic area. The OES level 3 is the same as the OES median. See Sec. II.A.1, supra, for an explanation of the linear interpolation that set the four wage levels in H-2B.

resulting wages. Therefore, DOL estimated the upper-bound wage impact of this final rule by applying the OES mean wages to employers that potentially fall into the two categories described above. DOL estimated that employers in these two categories represent approximately 2 percent of all employers in the H-2B Program. Therefore, the upper-bound estimate of the impact would not substantially overstate the true wage impact of this final rule.[91]

DOL based its analysis on sample data drawn from a pool of 3,593 employers with 92,602 certified H-2B positions between May 1, 2013, and April 30, 2014, to represent the most recent data available for the one-year period following the publication of the 2013 IFR on April 24, 2013. A statistically valid sample that accurately represents the employers with certified H-2B positions between May 1, 2013, and April 30, 2014, was drawn to provide a timely measure of the change in hourly wages that would result from this final rule without having to include all the employers with certified H-2B positions following the publication of the 2013 IFR. Consequently, DOL used a random sample of 524 employers with 10,282 certified H-2B positions between May 1, 2013, and April 30, 2014, 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. DOL then obtained the prevailing wage rate actually certified, the source of the PWD, and the OES mean wage for each employer with certified H-2B positions in the random sample of 524 by SOC code and county of employment

[91] At least some of the employers in these two categories that represent approximately 2 percent of all employers in the H-2B program would be able to submit an employer-provided survey that provides a lower wage than the OES mean. DOL could not take this into account in its analysis to estimate the changes in their prevailing wages due to data limitations on which employers are going to submit an employer-provided survey and the resulting wages. However, as discussed infra, DOL estimated the cost of conducting an employer-provided survey by a third party for all these employers and included it in the total cost of this rule, again presenting an upper-bound estimate of the cost of this final rule.

from H-2B program data between May 1, 2013, and April 30, 2014.[92] This random sample of 524 employers is consistent with standard statistical methods and exceeds the minimum sample size requirement.[93]

Using the random sample of 524 employers, DOL calculated the increase in wages as the difference between the baseline[94] and the Final rule. This differential was weighted by the number of certified workers on each certified or partially certified application.[95] Those products were then summed to calculate the weighted average wage differential for the randomly selected sample of 524 employers. DOL estimated that the changes in the method of determining wages under this final rule would result in an hourly wage increase of $0.16. The actual wage change for employers will vary depending on the current source for their prevailing wage determinations. For example, employers in the forestry industry may experience greater increases than the average wage increase of $0.16 because more employers in that industry previously selected SCA and DBA wage determinations as their prevailing wage sources. On the other hand, employers in the seafood industry may experience a wage decrease due to the fact that these employers have historically used state-conducted wage surveys not based on the

[92] Depending on the scope of work required by H-2B workers, multiple PWDs 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 DOL's program database collects the total number of H-2B workers certified for each certified or partially certified application, the DOL 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, DOL used the average wage rate for each application.

[93] The statistically valid minimum sample size with 95 percent confidence level and 5 percent margin of error is 347. DOL selected a much larger sample than 347 to strengthen the statistical results of the sample in this analysis.

[94] Of the random sample of 524 employers following the publication of the 2013 IFR, 30 percent of the total PWDs were based on employer-provided surveys. DOL replaced the prevailing wages from employer-provided surveys with the OES mean to accurately represent the current baseline.

[95] DOL weighted the wage differentials by the number of certified workers as opposed to the number of workers requested because a decrease in the number of workers granted may occur for several reasons, including the hiring of a U.S. worker in response to required recruitment.

SOC, and such surveys are allowed in certain circumstances under the final rule. Finally, many employers in the food services industry will experience no wage change because almost all employers in that industry already selected the OES mean wage as their prevailing wage source.

The remaining sections of this analysis present the estimated costs of the final rule, the transfer payments associated with the increased wages resulting from the changes in the wage determination method, and the benefits of the final rule.

1. Costs

During the first year that this rule is in effect, employers would need to learn about the new rule and its requirements. DOL estimates this cost for a hypothetical entity interested in applying for H-2B workers by multiplying the time required to read the final rule and/or any educational and outreach materials explaining the wage calculation methodology under the rule by the average compensation of a human resources manager (SOC code 11-3121).[96] In the first year of the rule, if adopted, DOL estimates that the average business participating in the program will spend approximately one hour of staff time to read and review the new regulation. This amounts to approximately $76.43 ($76.43 × 1 hour) in labor costs in the first year. Therefore, DOL calculated the total estimated cost to employers with certified H-2B positions as $274,613 (1 hour × $76.43 × 3,593).

Employers are allowed to submit wage surveys as long as they meet the criteria set forth in the final rule. DOL estimated that approximately up to 185 or 2 percent of H-2B PWDs

[96] The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of $53.45 (derived from the 2013 Occupational Employment Statistics) by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). Thus, the loaded hourly compensation rate for a human resources manager is $76.43.

could be based on private wage surveys.[97] Because a survey can be valid for 24 months, it is estimated that there will be 93 new private wage surveys conducted by third parties for employers each year (93 = 185/2).

Accordingly, these employers will incur additional costs. The cost of conducting a wage survey by a third party can vary widely depending on various factors, such as the scope of the survey, the survey methodology used, the number of respondents, and the nature of the sample. After reviewing pricing information provided by some survey service providers,[98] DOL estimates that it would take a manager (SOC code 11-0000) 8 hours at $76.00 per hour to review and a survey researcher (SOC code 19-3022) a total of 40 hours at $36.58 per hour to randomly select at least 3 employers and 30 employees (8 hours), collect their wage data (16 hours), calculate the hourly average wage (8 hours), and write a report and provide it to the employer (8 hours).[99] Therefore, the direct cost of conducting a wage survey by a third party is estimated at $2,071.20 (= $76× 8 + $36.58 × 40). DOL then added 10 percent to $2,071.20 to account for a profit for the third party surveyor and the full cost of conducting a wage survey is $2,278.32 (= $2,071.20 × 1.1).[100] In addition, a human resources manager (SOC code 11-3120) at $76.43 and

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[97] During the fiscal years 2013-14, there were on average 9,253 PWDs. DOL estimated that 2 percent of 9,253, or 185, could be based on private wage surveys under the final rule.

[98]Custom-Insight: Employee Survey Pricing, http://www.custominsight.com/employee-engagement-survey/pricing.asp.

Salary Basics – Compensation Surveys, http://www.salary.com/Small-Business-Advice/advice.asp?part=par408

HRA-NCA 2014 Benefit and Compensation Survey, http://www.hra-nca.org/sites/default/files/survey-documents/HRA%202014%20Order%20Form.pdf.

[99] Hourly wages were derived from the 2013 Occupational Employment Statistics (OES) wage data (http://www.bls.gov/oes/#data) and were multiplied by 1.43 to reflect a fully loaded wage rate.

[100] Profit is the amount a business charges above their direct cost. Profit percentage varies widely by industry, and may also vary from business to business within the same industry. DOL used 10 percent because profit typically varies from 3 to 12 percent for the Corps of Engineers contracts. http://www.nws.usace.army.mil/Portals/27/docs/construction/Preconstruction%20packet/Fig%208-2%20Modification%20Pricing%20Guidelines.pdf.

a payroll and timekeeping clerk (SOC code 43-3051) at $27.40, would need to spend one hour and four hours, respectively, for each employer to provide wage information for all of its employees in the same occupation to the third-party agent. This amounts to an additional $186.03 for each employer surveyed and $558.09 for all three employers surveyed. Therefore, the total cost of conducting an employer-provided survey that meets the requirements of this rule is estimated at $2,836.41 (= $2,278.32 + $558.09). Assuming that 93 employers will conduct a private wage survey by a third-party each year that is valid for two years, DOL estimates that the total cost of conducting a private wage survey per year at $263,786 annually ($2,836.41 × 93).[101]

In addition to the 185 employers that will submit an employer-provided survey, DOL estimated that approximately 93 employers[102] will submit a state survey for their PWDs. As discussed in the PRA section of the preamble, for each submission, the employer's human resource manager ($76.43) will take 25 minutes to complete and sign Form ETA-9165 once the third-party surveyor's survey researcher ($36.58) takes 50 minutes supplying the necessary information. The resulting cost for all 278 employers who submit a private or state survey is $17,352 [($76.43 × 116 hours) + ($36.58 × 232 hours)].

The total cost of the final rule is estimated at $555,751, which is the sum of the regulatory familiarization cost ($274,613), the cost of conducting private wage surveys ($263,786), and the cost of completing and signing Form ETA-9165 ($17,352).

2. Transfers

[101] This is an overestimation because some employers would have the option to use surveys published by the state or other employers in the same area of employment for a minor fee. Therefore, the actual number of employer-provided surveys conducted per year would likely be fewer than 93 per year.

[102] During the fiscal years 2013-2014, there were on average 9,253 PWDs. DOL estimated based upon data from the random survey of 524 employers that 1 percent of 9,253, or 93, would be based on state surveys under the final rule.

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

Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy as well as in the industries represented in the program. The H-2B program is capped at 66,000 visas issued per year, but an H-2B worker who extends his/her stay in H-2B status may remain in the country and not count against the cap. The 2013 IFR assumed that half of all such workers (33,000) in any year are able to extend their stay at least one additional year and that half of those workers (16,500) are able to extend their stay a third year. See 78 Fed. Reg. 24059 (April 24, 2013). Therefore, DOL used 115,500 as the total number of H-2B workers in a given year. The change in the method of determining the prevailing wage rate will result 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 for H-2B workers, jobs that would otherwise be occupied by H-2B workers may 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 participate in the H-2B program and, instead, may employ U.S. workers. Although some of these U.S. workers may be

drawn from other employment, some of them may currently be unemployed or out of the labor force entirely. DOL is 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 H-2B workers that results from the increase in wages due to application of the final rule's new method of determining the prevailing wage, DOL multiplied the weighted average wage differential ($0.16) by the total number of H-2B workers estimated to be in the United States in a given year (115,500). For the number of hours worked per day, seven hours were used as typical. For the number of days worked, DOL assumed that the employer would retain the H-2B worker for the maximum time allowed (9 months or 274 days) and would employ the workers for five days per week. Thus, the total number of days worked equals 196 (274 × 5/7). The following equation shows the formula used to compute the total upper-bound impact per year:

$$\begin{aligned} &\$0.16 \text{ (Weighted average wage differential)} \\ &\times 7 \text{ (Working hours per day)} \\ &\times\ 196 \text{(Total number of days worked)} \\ &\times 115{,}500 \text{ (Total number of H-2B workers)} \\ &= \$25.35 \text{ million (Total impact per year)} \end{aligned}$$

We estimated the total impact associated with the increased wages at $25.35 million per year. These calculations also do not include the wage increase for U.S. workers hired in response to the required H-2B recruitment due to a lack of data regarding key points such as the number of

U.S. workers hired in response to the employer's recruitment efforts who would be entitled to the H-2B wage rate and what those workers currently earn.

3. Benefits

The Departments have determined that a new wage methodology is necessary for the H-2B program, particularly in light of the CATA III decision vacating the regulation authorizing the use of employer-provided surveys as a basis for PWDs. We want to ensure that the method for calculating the prevailing wage rate results in the appropriate prevailing wage necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers, including when it results from a survey. The decision to discontinue use of the SCA and DBA wage determinations as a wage source and heighten the methodological standards of employer-provided surveys would help ensure that H-2B workers are paid a wage that will not adversely affect the wages of similarly employed U.S. 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 increase in the prevailing wage rates is expected to improve workers' productivity and the quality of their work, thereby mitigating the higher labor costs to employers. Furthermore, higher prevailing wages promote the retention of experienced workers and minimize the costs of hiring and training new employees, and also create an environment of increased compliance with workplace safety and workers' compensation rules and regulations.[103] These are important benefits and a key aspect of the Departments' mandate to ensure that the wages of similarly employed U.S. workers are not adversely affected by H-2B workers.

[103] Hamid Azari-Rad et al., "State Prevailing Wage Laws and School Construction Costs," Industrial Relations, vol. 42, No. 3 (July 2003), available at http://ohiostatebtc.org/wp-content/uploads/2014/04/School_Costs_9.pdf.

The discontinued use of the SCA and DBA wage determinations as a source for the prevailing wage in the H-2B program offers additional benefits. The primary benefits of this approach are the streamlining of the PWD process, the removal of challenges associated with conforming the SCA and DBA wage determinations into the H-2B prevailing wage process, and the alleviation of the administrative burden associated with matching employers' job descriptions submitted in prevailing wage requests with the appropriate SCA or DBA job classifications.

A review of post-IFR employer-provided surveys used as wage sources indicated that, in many cases, employers report wages of workers at the entry level of the occupation instead of reporting the mean wage of all workers in the occupation as required when the prevailing wage is based on the OES. In addition, in many cases the survey methodology employed was insufficient to produce a reliable and valid wage for the occupation. Therefore, we have decided to raise the methodological standards required for employer-provided surveys to improve their reliability and validity so the prevailing wage rate adequately reflects the appropriate prevailing wage necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b), and that are likely to have a significant economic impact on a substantial number of small entities. Under 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. 5 U.S.C. 553(b)(B). The Departments' interim final rule issued in 2013 was exempt from the notice and comment requirements of the APA because DOL and DHS made a good cause finding in the preamble of that rule, 78 FR at 24055,

that a general notice of proposed rulemaking is impracticable and contrary to the public interest under 5 U.S.C. 553(b)(B). Therefore, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. 603, did not apply to that rule. Similarly, the requirements of the RFA that pertain to final rules, 5 U.S.C. 604, issued by an agency following the publication of a proposal on which notice and comment is required by the APA, 5 U.S.C. 553(b), are inapplicable to this final rule. Therefore, 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 encouraged the public to submit comments that suggested alternative rules that would accomplish the stated purpose of the 2013 IFR and minimize the impact on small entities. We received just a handful of comments responsive to this request, including one from the Office of the Chief Counsel for Advocacy of the Small Business Administration (SBA Advocacy). SBA Advocacy noted that the IFR would suddenly increase the wages that small businesses must pay to hire foreign workers under the H-2B program mid-season, and that employers have told SBA Advocacy that the IFR would have significant economic impacts on their businesses because they operate on narrow margins. In particular, SBA Advocacy obtained input from employer associations in landscaping, seafood processing, and lodging industries, and all those associations asserted that the higher labor costs resulting from the 2013 IFR negatively impacted their businesses. The Departments received similar comments from some small businesses indicating that the 2013 IFR unnecessarily encumbered those businesses with increased wage costs. We also recognize that wage increases may impose unique burdens on small businesses. However, as further explained in Section II.A.4 above, a prevailing wage that protects all U.S. workers from adverse effect is a legal

requirement, and this requirement could not be met by setting a lower wage for small businesses. As previously discussed, use of the OES mean best meets the Departments' obligation to protect against adverse effect, whereas setting the prevailing wage at a threshold based on artificial skill levels likely distorts the labor market for U.S. workers, driving down wages. Wage increases from the 2013 IFR resulted for some H-2B employers, but most H-2B employers now have experience paying workers at the OES mean. Moreover, most H-2B employers now have experience paying workers at the OES mean, and DOL concludes it is likely that H-2B employers have incorporated the new wage requirements, which were established in the H-2B program two years ago. This final rule is estimated to increase wages on average only $0.16 per hour above the levels that have been required for two years under the 2013 IFR.

C. Paperwork Reduction Act

The final rule modifies the standards associated with the submission by employers of surveys as an alternative to establishing the prevailing wage based on the OES survey. As noted above, we are modifying the H-2B regulation to set new standards for permissible employer-provided surveys in order to improve their reliability and validity. The new standards require: (1) the survey to include the mean or median wage of all workers regardless of skill or experience; (2) the survey collection must be independently conducted and issued by a state and approved by a state official or, in limited circumstances, a bona fide third party; (3) that surveyors make a reasonable good-faith effort to survey all employers in the occupation and area surveyed or base the survey on a random sample; (4) the survey to include at least 3 employers and 30 employees in a sample; (5) that any wage survey submitted report all types of pay; (6) that surveys be conducted across industries that employ workers in the occupation; (7) that wages paid and reported in the survey be no more than 24 months old; and (8) that employers

submit new Form ETA-9165 that permits DOL to better assess the validity and reliability of the survey.

New Form ETA-9165, which is attached as an Appendix to this final rule, asks the employer to respond to a number of questions about the underlying methodology used to develop the wage surveyed. Most of the questions require a yes/no response or the selection of a response from an array of two to four standard choices. There are a few questions that require a fill-in-the-blank response, such as the survey name, title of the job opportunity, the duties of the job, the area of intended employment, and the resulting wage found by the survey. The responses to all of the questions on the form are intended to provide that the third-party who conducts the survey for the H-2B employer complies with the new survey standards, that the employer is aware of the compliance standards and certifies that they have been met, and permits the agency to more easily assess compliance. Once the survey is designed and conducted with the new standards in mind, the third-party surveyor should have at its ready disposal the responses to the questions in the new Form ETA-9165, and should be able to transmit them to the employer quickly so that the employer may complete the form.

Form ETA-9165 is an information collection subject to the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq. and subject to Office of Management and Budget (OMB) review and clearance under the PRA. In order to have the information collections take effect on the same dates as all other parts of the Final Rule, DOL submitted an ICR to OMB under the emergency processing procedures codified in regulations 5 CFR 1320.13. OMB approved the information collection for 6 months, during which time DOL will publish Notices in the Federal Register that invite public comment on the collection requirements, in anticipation of extending the ICR.

Overview of Information Collection

Type of Review: New

Agency: Employment and Training Administration

Title: Employer-Provided Survey Certification to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey

OMB Number: 1205-NEW

Agency Number(s): Form ETA-9165

Annual Frequency: On occasion.

Affected Public: Individuals or Households, Private Sector - businesses or other for profits, Government, State, Local and Tribal Governments.

Total Respondents: 556

Total Responses: 556

Estimated Total Burden Hours: 75 minutes. DOL views the burden on respondents to complete the Form ETA-9165 as a two-step process. DOL concludes that third-party surveyors, including States, will take, on average, 50 minutes to compile the information necessary for the employer to complete Form ETA-9165. In turn, DOL concludes that employers will take, on average, 25 minutes to complete and sign Form ETA-9165 once the third-party surveyor supplies the necessary information.

Total Burden Calculation: 348

Total Burden Cost (capital/startup): 0

Total Burden Cost (operating/maintaining): 0

D. 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.

E. The Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 et seq.) requires rules to be submitted to Congress before taking effect. We will submit to Congress and the Comptroller General of the United States a report regarding the issuance of the final rule prior to its effective date, as required by 5 U.S.C. 801(a)(1).

F. Executive Order 13132—Federalism

The Departments 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, the Departments have 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 final rule was reviewed under E.O. 13175 and determined not to have tribal implications. The final 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 final 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 final 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 final 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 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 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

The Departments have drafted this final rule in plain language.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, 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, the interim final rule amending 8 CFR part 214, which was published at 78 FR 24047 on April 24, 2013, is adopted as a final rule without change.

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Chapter V

Authority and Issuance

Accordingly, for the reasons stated in the joint preamble, 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

- 1. The authority citation for part 655 continues to read in part 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. 733, 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. 107-296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

* * * * *

- 2. Amend § 655.10 by adding paragraphs (b) and (f) to read as follows:

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

* * * * *

(b) Determinations. Prevailing wages shall be determined as follows:

(1) Except as provided in paragraph (i) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

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

* * * * *

(f) Employer-provided survey. (1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the NPWC will consider a survey provided by the employer in making a Prevailing Wage Determination only if the employer submission demonstrates that the survey falls into one of the following categories:

(i) The survey was independently conducted and issued by a state, including any state agency, state college, or state university;

(ii) The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers employed in the SOC;

(iii)(A) The job opportunity is not included within an occupational classification of the SOC system; or

(B) The job opportunity is within an occupational classification of the SOC system designated as an “all other” classification.

(2) The survey must provide the arithmetic mean of the wages of all workers similarly employed in the area of intended employment, except that if the survey provides a median but does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

(3) Notwithstanding paragraph (f)(2) of this section, the geographic area surveyed may be expanded beyond the area of intended employment, but only as necessary to meet the

requirements of paragraph (f)(4)(ii) of this section. Any geographic expansion beyond the area of intended employment must include only those geographic areas that are contiguous to the area of intended employment.

(4) In each case where the employer submits a survey under paragraph (f)(1) of this section, the employer must submit, concurrently with the ETA Form 9141, a completed Form ETA-9165 containing specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey. In addition, the information provided by the employer must include the attestation that:

(i) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed or conducted a randomized sampling of such employers;

(ii) The survey includes wage data from at least 30 workers and three employers;

(iii) If the survey is submitted under paragraph (f)(1)(ii) or (iii) of this section, the collection was administered by a bona fide third party. The following are not bona fide third parties under this rule: any H-2B employer or any H-2B employer's agent, representative, or attorney;

(iv) The survey was conducted across industries that employ workers in the occupation; and

(v) The wage reported in the survey includes all types of pay, consistent with Form ETA-9165.

(5) The survey must be based upon recently collected data: The survey must be the most current edition of the survey and must be based on wages paid not more than 24 months before the date the survey is submitted for consideration.

* * * * *

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix

OMB Approval: 1205-NEW
Expiration Date: xx/xx/xxxx

Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey (20 CFR 655.10(f))

Form ETA-9165
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. Those items marked with * are required. Items marked with § are required if the condition listed is met.

A. Requestor Point-of-Contact Information *(from Form ETA-9141, Section B)*

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Telephone number *	5. Extension	6. Fax Number
7. E-Mail Address		

B. Employer Information *(from Form ETA-9141, Section C)*

1. Legal business name *	
2. Trade name/Doing Business As (DBA), if applicable	
3. Telephone number *	4. Extension

5. Federal Employer Identification Number (FEIN from IRS) *	6. NAICS code (must be at least 4-digits) *

C. Employer-Provided Survey Information

1. Survey name or title *	
2. A collective bargaining agreement is applicable to the job opportunity? *	❑ Yes ❑ No
3. A professional sports league's rules or regulations are applicable to the job opportunity? *	❑ Yes ❑ No

4. The survey falls within the following permissible category for submission *(select only one)* *

❑ 4a. The survey was independently conducted and issued by a state, including any state agency, state college, or state university.

❑ 4b. The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers in the SOC.

❑ 4c. The job opportunity is not included within an occupational classification of the SOC system; or the job opportunity is within an occupational classification of the SOC system designated as an "all other" classification

5. If the survey was independently conducted by a state, including any state agency, state college or state university under question 4a, provide responses to questions 5a-5b. ***§***

5a. Name of state agency, state college or state university.

_____

5b. Name of the state official approving the survey.

Contact's last (family) name _____ First (given) name _____

C. Employer-Provided Survey Information *(continued)*

6. If the survey is eligible under question 4b or 4c, provide responses to questions 6a-6c ***§***

6a. The collection of data was collected by a third party permitted by ETA regulations at 20 CFR 655.10(f)(4)(iii) and no data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney. ❑ Yes ❑ No

6b. Name of third party surveyor.

_____

6c. Name of the official representative of the third party surveyor who approved the survey.

Contact's last (family) name First (given) name

_____ _____

7. The survey is based on wages paid 24 months or less before the date on which the survey was submitted to ETA. *	❑ Yes ❑ No
8. This is the most recent edition of the survey. (Answer "yes" if this is the only edition of the survey.) *	❑ Yes ❑ No

D. Relationship to job opportunity listed on the Form ETA-9141

1. Title of job(s) included in the survey *

2. Duties of the job(s) included in the survey (submit an attachment if more space is required): *

3. Identify the area of intended employment, as that term is defined in 20 CFR 655.5, covered by the survey. *
4. The survey was expanded to include workers beyond the area of intended employment * ❑ Yes ❑ No
4a. If yes to question 4, the geographic area surveyed was ***§***
4b. If yes to question 4, the survey was expanded beyond the area of intended employment (check all that apply) ***§*** ❑ to meet the 30 worker minimum. ❑ to meet the 3 employer minimum. ❑ The area surveyed was expanded for another reason. Provide below:

E. Survey Methodology

1. It was determined that _____ employers employ workers in the occupation and geographic area surveyed. *	
2. The following sources were used to determine the number of employers employing workers in the occupation and geographic area surveyed: *	
3. Did the surveyor attempt to contact all employers employing workers in the occupations in the geographic area surveyed or a sample of employers in the geographic area? *	❑ All Employers ❑ Sample
3a. If a sample, was the sample selected randomly? ***§***	❑ Yes ❑ No
3b. If a sample, provide a brief summary of the procedures used to randomize the sample: ***§***	
4. The surveyor attempted to solicit responses from _____ employers in conducting the survey. *	
5. For each responding employer, the survey includes the wages of all workers in the occupation regardless of skill level or experience, education, and length of employment. *	❑ Yes ❑ No
6. The survey includes data collected across industries that employ workers in the occupation. *	❑ Yes ❑ No
7. The survey reflects the mean wage for all workers it covers. *	❑ Yes ❑ No
7a. The mean wage is $ _____ . ____ per _____ (specify whether hourly, weekly, or monthly). ***§***	
8. The survey reflects the median wage for all workers it covers. *	❑ Yes ❑ No

8a. The median wage is $ _____ . ___ per _____ (specify whether hourly, weekly, or monthly). § 9. The hourly, weekly, or monthly wage reported from the survey is based on data from _____ employers (minimum of 3), and reflects wages from _____ workers (minimum of 30) within the occupation in the geographic area surveyed. *	
10. The hourly, weekly, or monthly wage rate reported by the survey includes all types of wages paid to workers, including base rate of pay, commissions, cost-of-living allowance, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonus, and tips. *	❑ Yes ❑ No
11. The survey includes wages from workers in the occupation regardless of immigration status. *	❑ Yes ❑ No

F. Employer Declaration

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a $250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Title *		
6. Signature *	6. Date Signed *	

G. OMB Paperwork Reduction Act *(1205-NEW)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is required to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 75 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification ● U.S. Department of Labor ● Room C4312 ● 200 Constitution Ave., NW, ● Washington, DC 20210. **Do NOT send the completed application to this address.**

SIGNED: at Washington, D.C. this 22nd of April, 2015.

_____

Thomas E. Perez

Secretary of Labor

SIGNED: at Washington, D.C. this 22nd of April, 2015.

_____

Jeh Charles Johnson

Secretary of Homeland Security

[FR Doc. 2015-09692 Filed: 4/28/2015 08:45 am; Publication Date: 4/29/2015]