**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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|---|---|---|
| COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, ALLIANCE OF FOREST WORKERS AND HARVESTERS, and SALVADOR MARTINEZ BARRERA, | : | |
| Plaintiffs | : | Civil No. 09-CV-240 |
| v. | : | |
| HILDA SOLIS, in her official capacity as United States Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR; ALEXANDER J. PASSANTINO, in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor; JANET NAPOLITANO, in her official capacity as United States Secretary of Homeland Security; and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, | : | |
| Defendants | : | |

**FIRST AMENDED COMPLAINT**

Plaintiffs Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), Pineros y Campesinos Unidos del Noroeste ("PCUN"), Alliance of Forest Workers and Harvesters ("Alliance"), and Salvador Martinez Barrera for their Complaint against defendant Elaine L. Chao and her successor Hilda Solis in their official capacities as United States Secretary of Labor, defendant United States Department of Labor, defendant Alexander J. Passantino in his official capacity as Acting Administrator of the Wage and Hour Division of the United States Department of Labor in December 2008 and January 2009, defendant Michael B. Chertoff and

his successor Janet Napolitano in their official capacities as United States Secretary of Homeland Security, and defendant United States Department of Homeland Security hereby allege as follows:

## INTRODUCTION

1. This proceeding relates to the regulation and administration of the H-2B temporary non-agricultural worker program. The H-2 temporary labor program was initially created by the Immigration and Nationality Act (INA) of 1952, 8 U.S.C. §1101 *et seq*. Prior to the Immigration Reform and Control Act of 1986 (IRCA), there were no separate H-2B non-agricultural temporary worker provisions in the Immigration and Nationality Act. Rather, there was simply one temporary worker program, the H-2 program. IRCA divided that program into a temporary agricultural worker program, designated H-2A, and a temporary non-agricultural worker program, designated H-2B.

2. The Secretary of Labor is required by 8 U.S.C. §1101 (a) (15)(H)(ii)(b) to determine prior to an employer being permitted to bring temporary H-2B workers into the country that "…unemployed persons capable of performing … service or labor cannot be found in this country."

3. The Secretary of Labor is required to establish effective procedures to determine and certify that: (1) there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2) that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. See, 8 U.S.C. §1184(c)(1), 8 CFR 214.2(h), 20 CFR 655.0(a). See also, 43 Fed. Reg. 10312 (Mar. 10, 1978) and 73 Fed. Reg. 29942 (May 22, 2008).

4. The Department of Labor (DOL) Office of Inspector General's annual report through March 31, 2008 noted that: "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others..." Other reports, investigations and Congressional testimony have documented increasing abuse of H-2B workers.

5. Despite explosive growth in employer demand for the H-2B program and documented abuse of H-2B workers, Secretary of Labor Chao has consistently failed to fulfill her duties to require employers seeking to employ H-2B workers to actively attempt to identify U.S. workers able willing and qualified to accept employment on terms that did not adversely affect the wages and working conditions of similarly employed workers.

6. Instead over the past years, in a series of regulatory actions particular since early in 2005 and culminating in Final Regulations taking effect on Sunday, January 18, 2009 (literally on the eve of the inauguration of a new President), the Secretary of Labor has arbitrarily, capriciously and contrary to law dismantled requirements and procedures previously established in order to lessen the adverse impact of a temporary guestworker program on the employment opportunities for U.S. workers and on the wages and working conditions of U.S. workers. The principal effect and intent of the January 2009 Final Regulations is, to a significant degree, to hamper the ability of a new Secretary of Labor to promulgate regulations and procedures which will effectively protect against adverse impact on employment, wages and working conditions of U.S. workers.

7. This case challenges the Secretary of Labor's promulgation of regulations and administrative procedures which violate the Secretary of Labor's legal duty to "determine and certify" that: (1) there are not sufficient workers who are able, willing, qualified and available to

perform labor for which foreign temporary non-agricultural H-2B workers are requested; and (2) that the employment of such foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8. This case challenges the Department of Labor and the Secretary of Labor's procedures announced in March 2005 without an opportunity for notice and comment which establish "prevailing" wage rates for H-2B workers which are so low that they adversely affect the wages and working conditions of workers in the United States. That action as applied to H-2B workers was the enactment of a rule within the meaning of the APA at 5 U.S.C. §551(4).

9. In so far as DOL's March 2005 new prevailing wage policy for H-2B workers relied upon changes made to regulations at 20 CFR 656.40 governing prevailing wage determinations for permanent labor certification (the "PERM Regulation") as published at 69 Fed. Reg. 77326 (Dec. 27, 2004), this case challenges the decision of DOL to apply that regulation and other new Congressionally mandated requirements for H-1B employers to H-2B employers as contrary to the requirements of the APA.

a. The PERM Regulation Notice of Public Rule Making (NPRM) published at 67 Fed. Reg. 30466 (May 6, 2002) provided no notice of an intent to apply substantive proposed changes to 20 CFR 656.40 to H-2B workers. The March 2005 action of DOL constituted implementation of new rule for H-2B workers without an opportunity for notice and comment in violation of the APA.

b. DOL in the May 2002 PERM NPRM failed to disclose the methodology which it was using and proposing to utilize in the future as a primary methodology in lieu of established primary reliance on Davis Bacon or Service Contract Act wages to calculate prevailing wages. Interested parties were therefore unable to comment on the rule, as

required by the APA. ("[T]he agency shall give interested person an opportunity to participate in the rulemaking through submission of written data." 5 U.S.C. § 553(c).).

c. As a result DOL's final PERM rule as applied by DOL beginning in March 2005 was not a "logical outgrowth" of the proposed rule because interested parties could not have "anticipated that such [requirements] might be imposed." See *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

10. This case further specifically challenges promulgation by DOL on March 8, 2005, January 7, 2006, October 10, 2006, July 15, 2007, October 13, 2008, and July 1, 2009 of prevailing wage rates for H-2B workers. See: wage rates promulgated by DOL as recorded at: http://www.flcdatacenter.com/Download.aspx.

a. Those wage rates were established as future minimum prevailing wages by procedures which were adopted without required notice and comment.

b. Those wage rates were established arbitrarily, capriciously and contrary to the requirements of 20 CFR 656.40 which requires DOL ETA to determine prevailing wage rates based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment.

c. Wage rates established for H-2B employers on October 13, 2008 which were applied to H-2B employers after January 19, 2009 and wage rates established on July 1 2009 were established arbitrarily, capriciously and contrary to the requirements of 20 CFR 655.10 which requires DOL ETA to determine prevailing wage rates based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment.

d. The information contained in those publicly available prevailing wage electronic databases and any supporting data which DOL relied upon in promulgating those wage rates including special generation for DOL of underlying data in the Occupational Employment Statistics (OES) survey provided to the DOL Employment Training Administration ("DOL ETA") by the DOL Bureau of Labor Statistics ("DOL BLS") (and other publicly disclosed wage survey data from the DOL BLS publicly disclosed by DOL BLS at http://www.bls.gov/oes/oes_dl.htm) are appropriately a part of the administrative record on review in this matter and may be relied upon by Plaintiffs to establish that the actions of DOL were arbitrary, capricious and contrary to law.

e. DOL ETA has publicly disclosed by posting on the internet of downloadable electronic databases purporting to reflect determinations as to prevailing wages in all H-2B applications for labor certification for federal fiscal years 2000 through 2008. See: http://www.flcdatacenter.com/CaseH2B.aspx. That data is appropriately a part of the administrative record on review in this matter and may be relied upon by Plaintiffs to establish that the actions of DOL were arbitrary, capricious and contrary to law.

11. The ongoing actions in 2009 and 2010 of DOL in approving applications for H-2B labor certification with wage rates in accordance with the July 1, 2009 published prevailing wage rates is further challenged as arbitrary, capricious and contrary to law.

12. This case challenges the Department of Labor's ("DOL") revised regulations of the H-2B non-agricultural guestworker program, which were promulgated on December 19, 2008, and went into effect on January 18, 2009. See, 73 Fed. Reg. 78020 – 78069 (Dec. 19, 2008).

13. This case also challenges the related revised regulations promulgated by the Department of Homeland Security ("DHS") published on December 19, 2008 and went into effect on January 18, 2009.

a. The new DHS regulations arbitrarily and contrary to law drastically change the long definition of the "temporary" employment eligible for the H-2B temporary non-agricultural worker program, and thus significantly expand the scope of the H-2B program.

b. The new DHS regulations also arbitrarily and capriciously fail to require reimbursement to workers who have paid unlawful fees and penalize workers who report violations of the regulations and See 8 C.F.R. §§ 214.2(h)(6)(i)(B) and (ii)(B), as modified at 73 Fed. Reg. 78104 at 78113-781128. (Dec. 19, 2008).

c. Additionally, the new DHS regulations arbitrarily and capriciously allow employers to pass off visa, transportation, passport, and other costs to workers.

14. Finally, this case challenges an arbitrary, capricious, and drastic change without any opportunity for prior notice or comment by Defendants DOL, the Acting Wage and Hour Administrator, DOL and the Secretary of Labor (the "DOL Defendants") to the long-established policy under the Fair Labor Standards Act (FLSA) at 29 U.S.C. Sec. 203(m) and related regulations announced as part of the December 19, 2008 rule making and as part of the discussion of separate rule making for the H-2A program on December 18, 2008. See, 73 Fed. Reg. 78020 at 78039–78041, 78059 (Dec. 19, 2008) and H-2B final rule at 20 CFR 655.22(g)(2). See also, 73 Fed. Reg. 77110 at 77148-77151 (Dec. 18, 2008). The DOL Defendants arbitrarily and contrary to law used the opportunity of the publication in the Federal Register of the H-2B regulations and the H-2A regulations to reverse longstanding DOL policy under the FLSA

relating to reductions in required minimum wages as a result of pre-employment expenses for the "convenience of the employer."

15. The DOL Defendants specifically stated disapproval of the application of the FLSA to pre-employment expenses incurred by workers traveling to accept employment with H-2B employers, as examined by this Court in a January 7, 2008 opinion by the Honorable Louis Pollak, in *Rivera v. Brickman Group, Ltd.*, United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. See, DOL Defendants citation to "*Rivera v. Brickman Group*, 208 WL 81570 (E.D. Pa. Jan. 7, 2008)" at 73 Fed. Reg. 78039. This Court in *Rivera v. Brickman Group* ruled that such pre-employment transportation costs (and other pre-employment expenses for the "convenience of the employer") were required to be repaid at the time of payment of the first week of wages by H-2B employers to the extent that such costs reduced wages below the minimum wage.

16. Unlike the H-2A program, neither DOL nor DHS has promulgated regulations relating to repayment of pre-employment transportation costs to workers employed through H-2B employers. In enunciating the new policy related to pre-employment transportation costs, the Secretary of Labor and DOL arbitrarily, capriciously, and in violation of law failed to appropriately determine if the application of this policy to H-2B employers would have an adverse impact on the wages and working conditions of U.S. workers, which was the appropriate purpose of the H-2B rulemaking proceeding for which DOL published final rules on December 19, 2008. The DOL Defendants' policy will have immediate adverse impact on the Plaintiffs and their members. This policy further has an adverse impact generally on the wages of U.S. workers prepared to travel from places of permanent residence to accept temporary employment with H-2B employers.

## JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to 28 U.S.C. §1331 over this suit for review of final agency action under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1946), and 28 U.S.C. §2201 (declaratory relief).

18. This Court has venue pursuant to 28 U.S.C. §1391(e).

## PARTIES

### PLAINTIFFS

19. Plaintiff Comité de Apoyo a los Trabajadores Agrícolas ("CATA"), known in English as the "Farmworkers Support Committee," is a membership organization open to farmworkers, members of the immigrant worker community, and their supporters. Members live and work primarily in southeastern Pennsylvania, southern New Jersey, and eastern Maryland. Members include U.S. landscaping workers and construction workers, and in the recent past have also included H-2B workers in those industries. Through its work, CATA strives to improve the working and living conditions of its members and member communities. The challenged changes to the H-2B program would adversely affect CATA members' wages, their working conditions, and their ability to obtain and retain jobs. CATA seeks to protect its members' interests by challenging these regulations. CATA has members, an office and staff in the Eastern District of Pennsylvania.

20. Plaintiff Pineros y Campesinos Unidos del Noroeste ("PCUN") is a union of farmworkers, nursery, agricultural food processing and reforestation workers in Oregon. PCUN has more than 5,000 registered members. PCUN's mission is to empower its membership to recognize and take action against worker exploitation. Reforestation workers are subject to regulation under the H-2B program and the regulation under that program affect PCUN's

members' wages, their working conditions, and their ability to obtain and retain jobs. PCUN seeks to protect its members' interests by challenging these regulations.

21. The Alliance of Forest Workers and Harvesters (the "Alliance") is a multicultural membership organization promoting social, environmental, and economic justice for forest workers in the Pacific Northwest. Its membership consists of both U.S. workers and H-2B workers who labor in the forests. The Alliance's mission is to advocate for and improve the lives of forest workers. Forestry workers may be subject to the H-2B regulations and the regulations under that program affect the Alliance's members' wages, their working conditions, and their ability to obtain and retain jobs. The Alliance seeks to protect its members' interests by challenging these regulations.

22. Plaintiff Salvador Martinez Barrera is a citizen of the Republic of Mexico with his permanent residence in Acambaro, Guanajuato, Mexico. He has been employed as an H-2B worker in the Eastern District of Pennsylvania in each of the years 2003, 2004, 2005, 2006, and 2007. He was employed as an H-2B worker outside of Pennsylvania in 2008. He is seeking re-employment as an H-2B worker for 2009. In July 2008 Plaintiff Martinez Barrera was certified as one of the class representatives for a F.R.C.P. Rule 23(b)(3) settlement class in *Rivera, et al. v. The Brickman Group, Ltd. et al*., United States District Court, Eastern District of Pennsylvania, Civil No. 05-1518. That class action settled claims for a nation wide class of approximately 2,500 persons employed through an H-2B employer that had failed to comply with requirements of the Fair Labor Standards Act to repay pre-employment costs that took wages below minimum wage. Plaintiff Barrera is directly affected by the regulations governing the employment of H-2B workers.

**DEFENDANTS**

23. Defendant Elaine L. Chao at the time of the filing of this lawsuit was the United States Secretary of Labor. The Secretary is responsible for all functions of DOL, including administration of the H-2B program. Secretary Chao is sued in her official capacity, pursuant to 5 U.S.C. §703. On February 24, 2009 Hilda L. Solis became Secretary of Labor. Pursuant to Fed. R. Civ. Proc. 25(d), Secretary of Labor Hilda Solis was thereafter automatically substituted as a defendant for Defendant Chao.

24. Defendant Passantino was the Acting Administrator of the Wage and Hour Division of the United States Department of Labor in December 2008 and January 2009. The Acting Wage and Hour Administrator is sued in his official capacity, pursuant to 5 U.S.C. §703.

25. Defendant Michael B. Chertoff was the United States Secretary of Homeland Security at the time of the filing of this lawsuit. The Secretary is responsible for all functions of DHS and its component organizations, including the issuance of visas for H-2B workers. Secretary Chertoff is sued in his official capacity, pursuant to 5 U.S.C. §703. On January 21, 2009 Janet Napolitano became Secretary of Homeland Security. Pursuant to Fed. R. Civ. Proc. 25(d), Secretary Homeland Security Janet Napolitano was thereafter automatically substituted as a defendant for Defendant Chertoff.

26. Defendant United States Department of Labor is responsible for administration of the H-2B program. The defendant Secretary of Labor, Administrator of the Wage and Hour Division and the United States Department of Labor shall be collectively referred to herein as "DOL" or the "DOL Defendants."

27. Defendant United States Department of Homeland Security is responsible for the issuance of visas for H-2B workers. The defendant Secretaries of Homeland Security and the

United States Department of Homeland Security shall be collectively referred to herein as "DHS" or the "DHS Defendants."

## ALLEGATIONS

### THE DOL DEFENDANTS' NEW FLSA POLICY IS CONTRARY TO LAW AND WAS ISSUED CONTARY TO THE ADMINISTRATIVE PROCEDURE ACT

28. Plaintiffs repeat and reallege ¶¶1-26 above.

29. The minimum wage provisions of the FLSA forbid employers from making certain deductions from workers' wages that would bring those wages below the minimum hourly wage mandated by the FLSA. 29 U.S.C. 203(m). In the preamble to the December 18, 2008 Federal Register promulgation of the H-2B regulations, DOL acknowledges that under the FLSA, "employment expenses incurred by the workers that are primarily for the employer's benefit cannot be counted as wages under 29 U.S.C. §203(m). 73 Fed. Reg. 78040. In the preamble, DOL further states that:

> [u]nder the FLSA, pre-employment expenses incurred by workers that are properly business expenses of the employer and primarily for the benefit of the employer are considered "kick-backs" of wages to the employer and are treated as deductions from the employees' wages during the first workweek. 29 CFR 531.35. Such deductions must be reimbursed by the employer during the first workweek to the extent that they effectively result in workers' weekly wages being below the minimum wage. 29 CFR 531.36.

73 Fed. Reg. 78039.

30. The DOL language as stated above is consistent with the long-standing policy of the Department of Labor and a substantial long body of case law regarding pre-employment expenses. See: *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), (holding that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses and visa and immigration fees paid by the workers employed by the growers under the H-2A program.); *Rivera v.*

*Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *De Leon-Granados v. Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos v. Express Forestry Inc.,* 2006 WL 197030 (E.D. La. Jan. 24, 2006).

31. However, the preamble to the Final Rule actively seeks to undermine the minimum wage requirement by overriding the application of the FLSA wage provision to H-2B workers. The preamble to the Final Rule sets forth a final "interpretation" of 29 U.S.C. 203(m) and the regulations promulgated thereunder that conflicts with both the FLSA and the DOL's regulations implementing the law.

32. The preamble provides that the Department believes that 'the costs of relocation to the site of the job opportunity generally is not an ``incident'' of an H-2B worker's employment within the meaning of 29 CFR 531.32, and is not primarily for the benefit of the H-2B employer. The Department states this as a definitive interpretation of its own regulations and expects that courts will defer to that interpretation.' 73 Fed. Reg. 78041

33. The DOL's new policy as enunciated in the preamble to the Final Rule is contrary to law and is arbitrary and capricious because it conflicts both with (1) the FLSA and DOL's own regulations implementing the FLSA and (2) with the statutory requirement that DOL regulate the H-2B program to ensure that the wages and working conditions of similarly employed U.S. workers are not adversely affected.

34. The DOL's statement in the preamble is also arbitrary and capricious because it was a legislative rule which was a substantial change to and repudiation of a longstanding rule and policy, and it was issued without notice or comment. The DOL failed to include notice that

this issue would be addressed in its proposed regulation. The commentators submitting comments generally did not address this issue at all because they were not on notice that the DOL was considering a modification of its longstanding policy. However, in the preamble to the Final Rule, DOL issued a lengthy discussion of this issue, proposing a substantial change in its own policy and deviating from the judgment of a substantial body of federal law without providing any opportunity for notice and comment.

**DOL'S CHALLENGED ACTIONS ARE IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

**REGULATORY HISTORY OF H-2B EMPLOYMENT**

35. The H-2B program is designed to allow employers to bring foreign workers into the United States on temporary work visas when the DOL certifies that the employer will experience a labor shortage, that United States workers will not be displaced, and that the job terms offered will not negatively affect the wages and working conditions of U.S. workers.

36. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §1101 *et seq.,* established the H-2 program, which provided mechanisms for the use of temporary foreign labor.

37. 8 U.S.C. §1101 *et seq* as initially enacted did not distinguish between agricultural and non-agricultural work.

38. Since at least 1964 the Secretary of Labor has had, and has exercised, authority to adopt regulations concerning the terms under which H-2 workers could be employed, and governing enforcement of those terms.

39. The DOL H-2 regulations promulgated between 1964 and 1986 cited as their sources of authority 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h).

40. 8 U.S.C. § 1184(c)(1) currently provides:

> "The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 1101(a)(15) of this title (excluding

> nonimmigrants under section 1101(a)(15)(H)(i)(b1) of this title) in any specific case or specific cases shall be determined by the Attorney General, *after consultation with appropriate agencies of the Government,* upon petition of the importing employer."

[Emphasis added]. The Department of Homeland Security is now responsible for this former function of the Attorney General. *See*, Homeland Security Act of 2002, 6 U.S.C. §§101, et seq. (Nov. 25, 2002).

41. 8 C.F.R. Part 214.2(h) currently provides in relevant part:

(h) Temporary employees — (1) Admission of temporary employees —

* * *

(ii) Description of classifications.

* * *

> (D) An H–2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, *if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such services or labor.…* The temporary or permanent nature of the services or labor described on the approved temporary labor certification are subject to review by USCIS. *This classification requires a* ***temporary labor certification*** *issued by the* ***Secretary of Labor*** …prior to the filing of a petition with USCIS.

[Emphasis Added]. Sources: 29 Fed. Reg. 11956, 11958 (Aug. 21, 1964) from the Immigration and Naturalization Service of the Department of Justice promulgating 8 C.F.R. Part 214.2(h) as in effect in 1964; 38 Fed. Reg. 35425, 35427 (Dec. 28, 1973) adopting the above current language of 8 C.F.R. Part 214.2(h).

42. In 1964, following termination by Congress of the Mexican "Bracero" program (Pub. L. 78, c. 223, 65 Stat. 119 (July 12, 1951), 7 U.S.C. 1461-1468 (1951)), which had regulated the usage of temporary Mexican agricultural workers, the Secretary of Labor established a broad regulatory regime for the H-2 temporary non-immigrant worker program. See: Aliens Performing Temporary Service, Criteria for Clearance Order, Notice of Proposed Rule Making, 29 Fed. Reg. 15191 (Nov. 10, 1964); 20 CFR Part 602— Cooperation of United

States Employment Service and States in Establishing and Maintaining a National System of Public Employment Offices/Foreign Agricultural Labor, Final Rule, 29 Fed. Reg. 19101 (Dec. 30, 1964).

43. The history of the Secretary of Labor's establishment of "adverse effect wage rates" for temporary foreign agricultural workers, which began under the Braceros program in 1961 and under the H-2 program in 1963, was reviewed by the Department of Labor, Employment Training Administration in the context of a rulemaking proceeding to determine adverse effect wage rates for H-2A temporary agricultural workers in the Federal Register of July 5, 1989 at 54 Fed. Reg. 28037, 28039-28040 (July 5, 1989).

44. Under the Bracero program prior to 1961, Mexican workers were required to be paid "prevailing wage rates." The requirement to pay an "adverse effect wage rate" was added by treaty agreement with the Mexican government in 1961. 54 Fed. Reg. 28039. Only "prevailing wages" were required to be offered under the H-2 program until the requirement to determine an "adverse effect wage rate" for H-2 agricultural workers was added in 1963. 54 Fed. Reg. 28040.

45. In November 1966, the Secretary of Labor gave notice of a proposed rulemaking process to review the 1964 H-2 regulations. 31 Fed. Reg. 14840 (Nov. 23, 1966). Thereafter, on March 28, 1967 the Secretary of Labor promulgated new regulations for H-2 workers effective April 1, 1967. 32 Fed. Reg. 4569 (Mar. 28, 1967). These regulations revised the previous regulations and added coverage for logging workers. Logging workers subsequent to 1986 were classified as H-2B workers until January 18, 2009 when they were reclassified by DOL regulation as H-2A workers. See 73 Fed. Reg. 77109, 77118 (Dec. 18, 2008) and 73 Fed. Reg. 8538, 8555 (Feb. 13, 2008). Regulations relating specifically to logging workers and to non-H-

2A agricultural workers prior to January 18, 2009 were set forth at 20 CFR 655, Subpart C, 20 CFR 655.200 et seq. General references herein to DOL's regulatory treatment of H-2B workers will not include logging workers who were subject to 20 CFR 655, Subpart C unless specifically specified otherwise.

46. On March 16, 1968, the Secretary of Labor proposed the first regulations specifically for employers seeking temporary workers for employment *other* than in agriculture or logging. 33 Fed. Reg. 4629 (Mar. 16, 1968). On May 22, 1968 the Secretary of Labor adopted those proposed regulations as final regulations effective June 22, 1968. 20 CFR Part 621 (1968) — Certification of Temporary Foreign Labor For Industries Other Than Agriculture or Logging, Final Rules, 33 Fed. Reg. 4629 (May 22, 1968).

47. The limited provisions of those 1968 regulations, which were redesignated in 1990 (55 Fed. Reg. 50510 (Dec. 6, 1990) codified at 20 C.F.R. § 655 Subpart A through January 18, 2009) as 20 CFR 655, Part A (20 CFR 655.1 - 655.3), continued to govern the employment of H-2B workers not engaged in logging or as registered nurses even after the creation of the separate H-2B program in 1986 and remained in force through January 18, 2009.

48. As subsequentially renumbered and redesignated in 1990, 20 CFR Part 655, Section A provided through January 18, 2009:

> 20 CFR Part 655
> Subpart A— Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H– 2B Workers)
>
> § 655.1 Scope and purpose of subpart A.
>
> This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than agriculture, logging, or registered nursing. [55 Fed. Reg. 50510 (Dec. 6, 1990)]
>
> § 655.2 Applications.

> Application forms for certification of temporary employment of nonimmigrant aliens may be obtained from and should be filed in duplicate with the local office of the State employment service serving the area of proposed employment.
> (Approved by the Office of Management and Budget under control number 1205–0015)
> (Pub. L. No. 96–511)
>
> [33 Fed. Reg. 7570 (May 22, 1968) as amended at 49 Fed. Reg. 18295 (Apr. 30, 1984). Redesignated and amended at 55 Fed. Reg. 50510 (Dec. 6, 1990)]
>
> § 655.3 Determinations.
>
> (a) When received, applications for certification shall be forwarded by the local office of the State employment service to the appropriate Regional Administrator, Employment and Training Administration, who will issue them if he or she finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.
>
> (b) In making this finding, such matter as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered, will be considered. The policies of the United States Employment Service set forth in part 652 of this chapter and subparts B and C of this part shall be followed in making the findings.
>
> (c) In any case in which the Regional Administrator, Employment and Training Administration, determines after examination of all the pertinent facts before him or her that certification should not be issued, he or she shall promptly so notify the employer requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.
>
> (d) The certification or notice of denial thereof is to be used by the employer to support its visa petition, filed with the District Director of the Immigration and Naturalization Service.

See: 33 Fed. Reg. 7570 (May 22, 1968) as amended at 43 Fed. Reg. 10311 (Mar. 10, 1978); redesignated and amended at 55 Fed. Reg. 50510 (Dec. 6, 1990).

49. DOL's asserted regulatory authority for issuance of regulations under 20 CFR Part 655, Subparts A subsequent to 1990 has been under 8 U.S.C. §§1101(a)(15)(H)(ii)(b) and 1184, 29 U.S.C. §49 *et seq*., and 8 CFR 214.2(h).

50. The Secretary of Labor significantly revised the provisions for the H-2 program with major changes in 1978. See: Temporary Employment of Alien Agricultural and Logging Workers in the United States, Final Rules, 43 Fed. Reg. 10306 (Mar. 10, 1978).

51. The 1978 changes included the promulgation of 20 CFR 655.0 which provided for all H-2 workers through May 31, 1987:

> Title 20 -- Employees' Benefits
> Chapter V -- Employment and Training Administration, Department of Labor
> PART 655 -- LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES
>
> 20 CFR § 655.0 Scope and purpose of part.
>
> (a) General. This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3)(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualifed U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (b) The statutory standard. The Immigration and Nationality Act (the Act) (8 U.S.C. 1101 et seq.) regulates the admission of immigrant and nonimmigrant aliens into the United States. Section 1101(a)(15)(H)(ii), 8 U.S.C., defines "nonimmigrant aliens" as follows:
>
> (a) As used in this chapter * * * * *
>
> (5) The term "immigrant" means an alien except an alien who is within one of the following classes of nonimmigrant aliens --
>
> (H) An alien having residence in a foreign country which he has no intention of abandoning * * * * *

> (ii) Who is coming temporarily to the United States to perform temporary services of labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

The basis for the admission of nonimmigrant aliens into the United States is set by section 1184(a), 8 U.S.C. which provides in pertinent part:

> (a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe * * *.

Section 1184(c), 8 U.S.C., directs the Attorney General to consult with "appropriate agencies of the Government" prior to a determination on the petition of an employer for the importation of temporary nonimmigrant alien workers:

> (c) The question of importing any alien as a nonimmigrant under section 1101(a)(15) (H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

(c) The INS regulations. The Attorney General, through the Immigration and Naturalization Service (INS), has promulgated regulations to implement the Attorney General's responsibilities regarding the admission of temporary foreign workers. These regulations, which are codified at 8 CFR 214.2(h)(3), **adopt the same admission standards for nonimmigrant temporary foreign workers that the INA (8 U.S.C. 1182(a)(14) (A) and (B)) requires for certain immigrants who seek to perform permanent work in the United States**. They also provide employers the right to an adjudicatory review before the INS whenever the Secretary has advised the INS that one or both of the factual determinations cannot be made. 8 CFR 214.2(h)(3)(i) requires:

> * * * [A] certification from the Secretary of Labor * * * stating that qualified persons in the United States are not available (see 8 U.S.C. 1182(a)(14)(A)) and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed (see 8 U.S.C. 1182(a)(14)(B)) or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii) of the Act. If there is attached to the petition a notice from the Secretary of Labor that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

> Under the authority of the INA and the INS regulations the Secretary of Labor has promulgated the regulations in this part. They set forth the requirements and procedures applicable to requests for certification by employers seeking the services of temporary foreign workers. They provide the Secretary's methodology for the two-fold determination of availability of domestic workers for, and of any adverse effect which would be occasioned by, the use of foreign workers for particular temporary jobs in the United States.
>
> (d) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976).
>
> Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.
>
> (e) Construction. This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

SOURCE: 43 Fed. Reg. 10312 (Mar. 10, 1978). [Emphasis Added].

52. The 1978 regulatory promulgation of 20 CFR 655.0 continues in significant part to govern both H-2A and H-2B workers, despite subsequent amendments to the language and structure of 20 CFR 655.0. Currently 20 CFR 655.0's regulatory history is identified as having

arisen from: 43 Fed. Reg. 10312 (Mar. 10, 1978), as amended at 52 Fed. Reg. 20507 (June 1, 1987); 55 Fed. Reg. 50510 (Dec. 6, 1990); 56 Fed. Reg. 24667 (May 30, 1991); 56 Fed. Reg. 54738 (Oct. 22, 1991); 56 Fed. Reg. 56875 (Nov. 6, 1991); 57 Fed. Reg. 1337 (Jan. 13, 1992); 57 Fed. Reg. 40989 (Sept. 8, 1992).

53. The separate agricultural H-2A and non-agricultural worker H-2B temporary visa programs were created by the Immigration Reform and Control Act of 1986 (IRCA). Immigration Reform and Control Act of 1986, Sec. 301, codified at 8 U.S.C. 1101(a)(15)(h)(ii)(a) and (b)). Pub.L. 99-603, Title III, 100 Stat. 3359, November 6, 1986.

54. The INA as modified by the IRCA provides at 8 U.S.C. § 1101(a)(15)(H)(ii) for admission as a non-immigrant to:

> (H) an alien . . .(ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26 and agriculture as defined in section 203(f) of title 29, of a temporary or seasonal nature, or (b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary 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). [Emphasis added].

55. Beginning in 1964 and continuing to the present, DOL has utilized rulemaking notice and comment procedures to establish the adverse effect wage rate for H-2 agricultural workers who subsequent to 1986 were H-2A workers. See. 20 CFR 655.102. There have been numerous Administrative Procedure Act challenges to changes in the methodology for establishment of such agricultural workers adverse effect wage rates.

56. At all times DOL has utilized rulemaking notice and comment procedures to establish procedures for determining prevailing wage rates for positions for which employers seek permanent labor certification. See 20 CFR 656.40.

57. At no time since the administrative creation of the H-2 non-agricultural labor regulations in 1968 has DOL utilized rulemaking notice and comment procedures to establish procedures for determining prevailing wage rates for H-2 or H-2B temporary foreign labor Between 1986, when the H-2 program was divided into H-2A (agricultural jobs) and H-2B (non-agricultural jobs) and January 30, 2005, the Department of Labor did not propose to enact any new regulations governing the H-2B program apart from some transitional provisions for logging workers, despite extensive promulgation of regulations relating to other temporary worker programs. In 1990 the Secretary of Labor re-designated the very limited pre-IRCA labor regulations used for certifying H-2 nonimmigrant aliens in occupations other than agriculture, logging and registered nurses from 20 CFR Chapter 655, Subpart 621 to Part A at 20 CFR 655.1 through 655.4. 55 Fed. Reg. 50510 (Dec. 6, 1990) codified at 20 C.F.R. § 655 Subpart A.

58. The Homeland Security Act of 2002, 6 U.S.C. §§101, et seq. (Nov. 25, 2002), transferred the prior authority of the Attorney General and the INS for administering certain immigration functions to the new Department of Homeland Security. 6 U.S.C. §§ 202, 236. However, the savings provisions of that Act make clear that the underpinnings of the authority and duties of the Secretary of Labor to protect U.S. workers and their wages and working conditions, under 8 U.S.C. § 1184(c) and 8 C.F.R. Part 214.2(h), were unaffected by this transfer of authority. 6 U.S.C. § 552.

59. At the time of the creation of the separate H-2B program and throughout the first ten years of the program, demand for the program was relatively low. The H-2B program was

capped by statute at 66,000 persons (INA §214(g)(1)(B)), and was very small in the 1980's and early 1990's. Between 1992 and 1996 there were only approximately 12,000 H-2B workers a year. However, beginning in the late 1990's the size of the program grew dramatically. See, Andorra Bruno, Congressional Research Service, Immigration: Policy Considerations Related to Guest Worker Programs, January 26, 2006, Order Code RL32044, at CRS-5. The CRS report notes:

> "… the number of H-2B visas issued by DOS [Department of State] dipped from 12,552 in FY1992 to 9,691 in FY1993 and then began to increase steadily."

See, ETA-2008-0002-0022.

60. The comparative scope of recent employer demand for H-2B workers in recent years is demonstrated by a historical review of DOL disclosure data for the period FY02 through FY07 which reveals the following.

| | FY02 Certified | FY03 Certified | FY04 Certified | FY05 Certified | FY06 Certified | FY07 Certified | Increase 02 -07 | Increase 04 -07 |
|---|---|---|---|---|---|---|---|---|
| Number Workers | 121,665 | 144,333 | 168,471 | 134,837 | 199,732 | 254,583 | 132,918 | 86,112 |

See, ETA-2008-0002-0022.

61. As the H-2B temporary worker program has grown in recent years, guestworkers have been subjected to increasingly well-documented abuses by their employers. The failure to prevent these abuses adversely affects the wages and working conditions of U.S. workers.

62. Rather than promulgate comprehensive regulations for the H-2B program through notice-and-comment, DOL's Employment and Training Administration ("DOL ETA") set forth virtually all internal procedures for administration of the H-2B system through Employment and Training Administration "General Administration Letters" ("GAL"), "Field Memorandum", "Employment Service Program Letters," and "Training and Employment Guidance Letter" ("TEGL").

63. At times the various internal procedures for administration of the H-2, H-2A and H-2B programs have been published by DOL in the Federal Register or otherwise made publicly available by DOL including on its website. None of those internal procedures were subject to notice and comment rulemaking procedures under the Administrative Procedure Act.

64. The earliest DOL document establishing DOL administrative procedures for the H-2 non-agricultural worker temporary labor program which is currently publicly available is General Administration Letter No. 10-84 (April 23, 1984) ("GAL 10-84") which was published together with another GAL (GAL 5-84) in the Federal Register at 49 Fed. Reg. 25837, 25841-25845 (June 25, 1984). GAL 10-84 references the recession of GAL 23-82 (from 1982), but that document appears to no longer be publicly available.

65. GAL 10-84 provided as to prevailing wages:

> A job offer containing a wage below the prevailing wage for such employment in the local area is inappropriate and would adversely affect the wages of similarly employed U.S. workers. The local office shall determine the prevailing wage, ***guided by the regulations at 20 CFR 656.40.***

GAL 10-84, 49 Fed. Reg. at 25843 (emphasis added).

66. From January 19, 1981 (45 Fed. Reg. 83933 (Dec. 19, 1980) effective Jan. 19, 1981) through March 20, 1998 (including at the time of the promulgation of GAL 10-84 in 1984) 20 CFR 656.40 provided:

> 20 CFR 656.40 Determination of prevailing wage for labor certification purposes.
>
> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by § 656.21(b)(3), shall be determined as follows:
>
> (a)(1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR Part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR Part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the

DOL Employment Standards Administration wage specialists if they need assistance in making this determination.

(a)(2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be:

(a)(2)(i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or

(a)(2)(ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes.

(b) For purposes of this section, "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean:

(b)(1) "Having jobs requiring a substantially similar level of skills within the area of intended employment"; or

(b)(2) If there are no substantially comparable jobs in the area of intended employment, "having substantially comparable jobs with employers outside of the area of intended employment."

(c) A prevailing wage determination for labor certification purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other Federal, State or local law.

Authority: Sec. 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14); Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq.; and 5 U.S.C. 301; unless otherwise noted.

Source: 45 Fed. Reg. 83933 (Dec. 19, 1980). 20 CFR 656.40 was next amended at 63 Fed. Reg. 13756, 13767 (Mar. 20, 1998), effective May 4, 1998.

67. At all times from July 26, 1967 (32 Fed. Reg. 10932 (July 26, 1967) adding 29 CFR 60.6) through March 27, 2005, DOL regulations at 20 CFR 656.40 and its predecessor at 29 CFR Part 60 (42 Fed. Reg. 3440 (Jan. 18, 1977), redesignating and revising regulations at 29 CFR Part 60 as 20 CFR Part 656) governing prevailing wage rates required to be paid to workers for whom permanent labor certifications were sought had required employers to pay wages established under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.,* 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 *et seq*., 29 CFR part 4 if such wage rates existed for the occupational positions in the area of employment.

68. In 1981 the DOL, Employment Training Administration (ETA) prepared "Technical Assistance Guide (TAG) No. 656 Labor Certifications" which set forth *infra* in detail the procedures to be utilized in determining prevailing wage rates under 20 CFR 656.40. For jobs for which there was neither a Service Contract Act or Davis-Bacon Act wage rate, that guidance provided:

> For most occupations in which labor certification is sought, the prevailing wage is obtained from a survey using the *arithmetic mean* of the wages paid other workers in the area similarly employed. The prevailing wage may be obtained by the local office conducting a survey for the occupation specified on the ETA 750, or use of a current survey which reflects the job as described and the appropriate labor market.
> The prevailing rate shall be the average rate of pay calculated by the local office or specified by the survey. The employer can offer a wage range as long as the bottom of the range is no less than the prevailing rate. The wage offer may be within 5 percent of the prevailing rate as determined by the local office.

TAG No. 656 at p. 115. The Technical Assistance Guide of the Employment and Training Administration, Department of Labor (TAG) remains available as a publication through Matthew Bender & Company, Inc. and electronically on Lexis.

69. On November 19, 1994, DOL ETA issued General Administration Letter No. 1-95 ("GAL 1-95"). See 60 Fed. Reg. 7216 (Feb. 7, 1995). That document was described as

replacing GAL 10-84 and previous changes to that GAL. That document spelled out procedures for determining the temperature nature of a job opportunity. As to prevailing wage rate determinations for H-2B workers, it continued the instruction that state job service agencies "…shall determine the prevailing wage, guided by the regulations at 20 CFR 656.40."

70. Thereafter on May 18, 1995 DOL ETA issued General Administration Letter No. 4-95 ("GAL 4-95") "Interim Prevailing Wage Policy for Nonagricultural Immigration Programs." That directive provided *inter alia*:

> In conducting prevailing wage surveys and arriving at prevailing wage determinations, the same policies and procedures are followed for the permanent labor certification program and the nonimmigrant programs pertaining to H-lA nurses, H-1B specialty occupations, H-2B temporary nonagricultural employment, and the F-1 student off-campus employment program. In all of these programs, the applicable regulations and regulatory history require, with the exception of H-lA nurses, that the prevailing wage determination focus on the occupation without regard to the nature of the employer; e.g., profit vs. nonprofit, public vs. private. The relevant considerations are the job itself and the geographic locality of the job.
>
> * * *
>
> In determining prevailing wages for the permanent and temporary labor certification programs, the H-1B program, and the F-1 student attestation program, the regulatory scheme at 20 CFR 656.40 must be strictly followed. In the absence of a wage determination issued under the Davis-Bacon Act (DBA) or the Service Contract Act (SCA), or negotiated in a collective bargaining agreement, SESAs [State Employment Service Agencies] are to determine prevailing wage rates by conducting prevailing wage surveys or using published wage surveys. The methodology in both types of surveys must reflect the average (arithmetic mean) rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. This will, by definition of the term arithmetic mean (average), usually require computing a weighted average. Surveys which use the median or mode may not be used. The regulations also provide that the wage offered by the employer shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. The 5 percent variance does not apply to prevailing wage determinations based on Davis Bacon and Service Contract Act determinations, wages set forth in negotiated union agreements, and wage determinations…
>
> * * *
>
> 6. Skill Levels in Wage Determinations

The job related education, training and experience requirements of an occupation are factors to be considered in making prevailing wage determinations. A prevailing wage survey and/or determination should distinguish between entry level positions and those requiring several years of experience. At a minimum, a distinction should be made based on whether or not the occupation involved in the employer's job offer is entry level or at the experienced level.

To establish uniformity among SESAs in conducting surveys and making prevailing wage determinations within the resources available for immigration programs, prevailing wage rates for the skill levels described below should be determined in an occupation when the SESA conducts a wage survey.

a. Entry Level

Beginning level employees who have a basic understanding of the occupation through, education or experience. They perform routine to moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods practices and programs. They may assist experienced staff and perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

b. Experienced Level

Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may *supervise* or *provide direction* to entry level staff. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

* * *

**All employees who do not qualify as experienced workers in accordance with the above standards should be considered as "entry level" workers.**

* * *

B. Published Wage Surveys

The use of published surveys in making wage determinations is encouraged. Published surveys, conducted by public or private agencies, may be used if: (1) they provide an arithmetic mean (weighted average) of wages for workers in the appropriate occupational category in the area of intended employment; (2) they have been published within the last 24 months; (3) the data upon which the surveys were based were collected within 24 months of the surveys' publication date; and (4) the publication date is for the most current edition of the survey. The statistical methodology followed in conducting the published wage survey should be reviewed to determine that it will provide reliable results before it is used. In using published wage surveys, measures of central tendency other than the arithmetic mean, such as the median and mode, cannot be used as the bases for a prevailing ways determination.

> The arithmetic mean for an occupation in a published survey that covers the greatest number of industries in the area of intended employment should be used as the basis for making a prevailing wage determination. For example, if a manufacturer of switchgear and switchboard apparatus submits an application on behalf of a tool and die maker, and a survey is available that presents valid wage data for all durable goods manufacturers in the area of intended employment, as well as detailed data for the switchgear and switchboard apparatus industry, the wage determination should be based on the arithmetic mean shown for all durable goods manufacturing.
>
> However, a valid published wage survey that shows the arithmetic mean for only a single industry, such as switchgear and switchboard apparatus, may be used in arriving at the prevailing wage determination if such a survey is the only one available for the occupational classification relevant to the employers application in the area of intended employment.
>
> Published wage surveys may not always present one arithmetic mean for entry level workers and one for experienced workers. In such instances, the arithmetic mean published in the survey that most closely conforms to the employer's actual experience requirements should be used as the basis for the prevailing wage determination. SESAs shall issue the arithmetic mean(s) that is published by the survey. Interpolation of data published in surveys to conform to employers' specific experience requirements shall not be made by SESA staff.
>
> * * *
>
> D. Davis Bacon Act (DBA) and Service Contract Act (SCA) Applicability
>
> It is well settled that even if the job opportunity for which certification is requested is not itself directly subject to a DBA or SCA wage determination, the employer must offer at least that wage if there is a current DBA or SCA wage determination for the occupation in the same geographic area. In other words, the employer does not have to be involved in a government contract for the DBA or SCA wage determination to apply.
>
> E. Challenges to Prevailing Wage Determinations
>
> Employers that may wish to challenge a prevailing wage determination made by SESAs in connection with temporary labor certification applications, labor condition applications, and attestations, may do so pursuant to the provisions of the Employment Service Complaint System. See 20 CFR part 658, subpart E. Unlike the permanent labor certification program, there are no regulatory provisions or procedures that allow employers of nonimmigrant workers to file challenges regarding prevailing wage determinations or findings made by SESAs with the Regional Certifying Officer.

GAL 4-95. [Emphasis added]. GAL 4-95 is available on the DOL website at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485. The primary content thereof is in an attachment available at: http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf.

71. On October 1, 1996, DOL ETA issued General Administration Letter No. 02-97 (GAL 2-97) "Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997." GAL 2-97 indicated that it was determined that the most efficient way to develop consistently accurate prevailing wages would be to use the Bureau of Labor Statistics' expanded Occupational Employment Statistics program effective federal Fiscal Year 1998 and provided for interim procedures to be used pending the availability of that data. GAL 2-97 is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-97.cfm. A minor correction thereto was issued as General Administration Letter No. 02-97, Change 1 (GAL 2-97, Change 1) "Correction Concerning Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997." GAL2-97, Change 1 is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-97_Ch1.cfm.

72. On October 31, 1997, DOL ETA issued General Administration Letter No. 2-98 (GAL 2-98) "Prevailing Wage Policy for Nonagricultural Immigration Programs." GAL 2-98 stated:

> Over the past two years, the Employment and Training Administration (ETA) has been considering proposals for reengineering the process used by the States to determine prevailing wages in order to increase the timeliness of responses to employer requests, insure the use of a consistent methodology by all States, and to maximize the accuracy of the determinations. As a result of this activity, it was determined that the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. Effective January 1, 1998, State Employment Security Agencies (SESAs) are to implement the attached prevailing wage policy for nonagricultural immigration programs.

GAL 2-98 is available on the DOL website at: http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942. The primary content thereof is in an attachment thereto which is available on the DOL website at: http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf.

73. The Attachment to GAL 2-98 DOL ETA stated *inter alia*:

> In arriving at prevailing wage determinations, the same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1 B professionals in specialty occupations or as fashion models of distinguished merit and ability, and the H-2B temporary nonagricultural labor certification program. The implementation of the wage component of the Occupational Employment Statistics (OES) program requires that policy clarification and procedural guidance be issued to ensure consistency among State Employment Security Agencies (SESAs) in making prevailing wage determinations.
>
> II. General Prevailing Wage Policy
>
> A. Summary
>
> In determining prevailing wages for the permanent and H-2B temporary labor certification programs and the H-1 B program the regulatory scheme at 20 CFR 656.40 must be followed. Where a wage determination has been issued under the Davis-Bacon Act (DBA) or the Service Contract Act (SCA), or negotiated in a collective bargaining agreement, that rate shall be controlling. In the absence of a wage determination issued under the DBA, SCA, or a collective bargaining agreement, SESAs are to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program.
>
> * * *
>
> H. Skill Levels in Wage Determinations
>
> The level of skill required by the employer for the job opportunity is to be considered in making prevailing wage determinations. **The OES wage survey will produce two wage levels** which distinguish between positions requiring significantly different degrees of skills in the occupation. The SESA will determine which of the two levels in the OES survey is appropriate, i.e., a distinction must be made based on whether or not the job opportunity involved in the employer's job offer requires skills at a level I or a level II, as defined below.

Attachment to GAL 2-98. [Emphasis added]. http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf.

74. At no time did DOL ETA make publicly available any document setting forth the methodology utilized by DOL ETA to derive skill levels from the Bureau of Labor Statistics' Occupational Employment Statistics (OES) program or the basis for calculation thereof.

75. The DOL Bureau of Labor Statistics was instructed by DOL ETA to derive the Level 1 and Level 2 wages from the Occupational Employment Survey (OES) data as follows:

a. The level 1 wage was calculated as the mean of the first lowest paid one-third of workers.

b. The level 2 wage was calculated as the mean of the highest paid upper two-thirds of workers.

76. The Bureau of Labor Statistics OES wage survey does not purport to actually determine skill levels of workers doing different kinds of jobs. See: http://www.bls.gov/oes/oes_ques.htm#Ques4

77. At not time did DOL ETA establish procedures to determine by occupational classification the percentage of workers within that occupational classification with greater than entry level skills prior to distributing Occupational Employment Statistics survey data into level 1 (lowest paid one-third) and level 2 (highest paid two-thirds) wages.

78. For occupational codes in which most workers did not require higher levels of training or experience in order to perform their jobs, the DOL ETA methodology applied following issuance of GAL 2-98 which excluded the highest paid 2/3 of the workers in each local area, resulted in practice in determination of a lower prevailing wage rate than would have occurred under the methodology required by DOL ETA in prior procedures including: Technical Assistance Guide (TAG) No. 656 Labor Certifications (1981), GAL 1-95, GAL 4-95, and GAL 2-97.

79. At least as to the kind of low skilled workers for which H-2B labor certifications were most commonly sought by employers, the assumption by DOL ETA that two-thirds (2/3) of the workers in that occupational classification were other than low skilled workers required to be paid at "Level 2" wages was purely arbitrary and not justifiable by DOL ETA on the basis of any data available to it.

80. For occupational codes in which there was a Service Contract Act (SCA) wage rate, the Service Contract Act comparable wage rate established a higher prevailing wage rate than did the DOL ETA methodology adopted at the time of implementation of GAL 2-98.

81. At all times following the issuance of GAL 2-98 until March 2005, 20 CFR 656.40 continued to require DOL ETA to be determining the wage rate in accordance with 20 CFR 656.40(a)(2) and (b) where there was no SCA or Davis-Bacon wage rate. At all times through March 2005, DOL ETA continued to assert that 20 CFR 656.40 established the requirements for payment of prevailing wages to H-2B workers.

82. Procedures outlined in GAL 2-98 were applied by DOL to H-2B applications through March 2005. The above calculation procedure continues to determine the entry level 1 wage based on DOL ETA instructions to the Bureau of Labor Statistics which have not been made publicly available by DOL.

83. The administrative record before DOL in the 2008 rulemaking proceeding for H-2B workers included data as to the growth of the H-2B program. ETA-2008-0002-0022 included the following chart reflecting the explosion in employer demand for H-2B workers after federal FY1998.

| FY | H-2B Applications DOL * | Dept. of State Visas** | |
|---|---|---|---|
| 1992 | | 12,552 | |
| 1993 | | 9,691 | |
| 1994 | | 11,000 | ***est. graphic |
| 1995 | | 12,000 | ***est. graphic |
| 1996 | | 12,500 | ***est. graphic |
| 1997 | 35,773 | 17,000 | ***est. graphic |
| 1998 | 41,270 | 20,000 | ***est. graphic |
| 1999 | 63,079 | 31,000 | ***est. graphic |
| 2000 | 103,971 | 45,000 | ***est. graphic |
| 2001 | 109,004 | 58,000 | ***est. graphic |
| 2002 | 140,755 | 63,000 | ***est. graphic |
| 2003 | 165,110 | 78,955 | |

| FY | H-2B Applications DOL * | Dept. of State Visas** | |
|---|---|---|---|
| 2004 | 203,450 | 76,169 | |
| 2005 | 151,182 | 87,492 | |

* Source US DOL ETA Database
** Source Congressional Resarch Service

Andorra Bruno, Specialist in Social Legislation Domestic Social Policy Division, Congressional Research Service, The Library of Congress, Immigration: Policy Considerations Related to Guest Worker Programs (January 2006) Order Code RL32044, available at: http://fpc.state.gov/documents/organization/62664.pdf

ETA-2008-0002-0022 at 199. DOL-CATA 00285. The DOL administrative record was filed electronically with the Court. DOL ETA numbered comments submitted through the number system assigned by Regulations.gov at the time of electronic docketing. ETA-2008-0002-0022 appears in the DOL record at pages 85-305. The above referenced table ETA-2008-0002-0022 at page 199 appears in the DOL record at p. 285. This page in the DOL administrative record filed by Defendants will be referred to as "DOL-CATA 00285" herein

84. On April 27, 1998, DOL ETA issued Field Memorandum No. 25-98 ("FM-25-98") "H-2B Temporary Non-Agricultural Labor Certification Program Requirements." Field Memorandum 25-98 was formerly posted by DOL ETA on its website at: http://atlas.doleta.gov/dmstree/fm/fm98/fm_25-98.htm. It was not published in the Federal Register. A copy thereof as posted on July 1, 2003 is available at: http://www.friendsfw.org/H-2B/fm_25-98.pdf. That Field Memorandum outlined extensively the DOL and INS interpretation of "temporary need" for H-2B workers.

85. On December 22, 2000, DOL ETA issued Employment Service Program Letter No. 01-01 "Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2000-2001." That document was not published in the Federal

Register, but is available from DOL ETA at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1626.

86. On August 8, 2001, DOL ETA issued Employment Service Program Letter No. 01-01, Change 1 "Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2001-2002." That document was not published in the Federal Register, but is available from DOL ETA at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1627.

87. On September 20, 2001, DOL ETA issued Employment Service Program Letter No. 01-01, Change 2 "Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2001-2002." That document was not published in the Federal Register, but is available from DOL ETA at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1628.

88. On October 2, 2002, DOL ETA issued Training And Employment Guidance Letter No. 12-02 (TEGL 12-02) Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2002 – 2003." That document was not published in the Federal Register, but is available from DOL ETA at http://wdr.doleta.gov/directives/attach/TEGL12-02.cfm.

89. On November 4, 2003, DOL ETA issued Training And Employment Guidance Letter No. 12-03 (TEGL 12-03) Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2003 – 2004." That document was not published in the Federal Register, but is available from DOL ETA at http://wdr.doleta.gov/directives/attach/TEGL12-03.cfm TEGL 12-03 continued to govern applications for H-2B landscaping workers until March 2005.

90. The effect of ESPL 01-01 and subsequent revisions and extensions, including TEGL 12-02 and 12-03, was to remove most wage determinations for applications for H-2B landscaping workers from the wage rates governing such positions under the Service Contract Act (SCA) as required by 20 CFR 656.40 where SCA rates existed for such jobs. This rule was adopted by DOL ETA without an opportunity for public notice and comment in violation of the APA.

91. The administrative record before DOL in the 2008 rulemaking proceeding for H-2B workers contains data reflecting the explosive demand for DOL ETA labor certifications for the H-2B program for "landscape laborers" after ESPL 01-01 and subsequent revisions removed the applicability of higher prevailing wage rate determinations under the SCA. See, ETA-2008-0002-0022 at 114. DOL-CATA at 200.

| | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|---|---|---|---|
| Occupational Title | #Aliens | #Aliens | #Aliens | #Aliens | #Aliens | #Aliens | #Aliens | #Aliens |
| Laborer, Landscape | 296 | 762 | 5,579 | 17,878 | 22,261 | 30,702 | 37,445 | 50,850 |

92. On May 6, 2002, DOL issued a NPRM to consider substantial changes to 20 CFR Part 656 (the "PERM Regulation"). 67 Fed. Reg. 30466 (May 6, 2002).

93. That PERM NPRM did not refer to the usage of 20 CFR 656.40 as the basis for determination of wages for H-2B workers or otherwise indicate that changes would be applied to H-2B workers.

94. The proposed PERM changes including the elimination of the usage of Service Contract Act and Davis Bacon wage rates as prevailing wages rates for foreign labor certification determinations. The NPRM stated:

> 3. Collective Bargaining Agreement, Davis Bacon Act and Service Contract Act
>
> Under the current regulations at § 656.40 the first order of inquiry for a SWA in determining the prevailing wage is to determine if the employer's job opportunity is in an

occupation which is subject to a wage determination in the area under the Davis Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA). If there is a prevailing wage under one of those statutes in the area of intended employment it must be used as the prevailing wage whether or not the employer has a Government contract in the area of intended employment. We are proposing to amend the prevailing wage regulation so that the first order of inquiry by the SWA in determining prevailing wages will be to determine whether or not the employer's job opportunity is covered by a union contract which was negotiated at arms length between a union and the employer. If the job opportunity is covered by such a contract it will be the prevailing wage for labor certification purposes.

The BALCA decision in *El Rio Grande on behalf of Galo M. Narea* (1998-INA-133, February 4, 1998; Reconsideration July 28, 2000) has prompted us to review the requirement for use of DBA and SCA wage determinations in making prevailing wage determinations for the permanent alien labor certification program. As explained more fully below, BALCA, in El Rio Grande, held that it has jurisdiction to review challenges to PWD's based on an SCA wage determination.

The use of DBA and SCA statutory wage determinations first appeared in the permanent labor certification regulations in 1967 (see 32 Fed. Reg. 10932). The use of DBA and SCA wage determinations in the permanent labor certification was in large measure prompted by concerns for administrative convenience. The SCA and DBA wage determinations were viewed as a convenient source of wage determinations that could be used for labor certification purposes. At that time, wage surveys were not as numerous, comprehensive and well developed as they are now.

On October 31, 1997, ETA in General Administrative Letter No. 2-98; Subject: Prevailing Wage Policy for Nonagricultural Immigration Programs, stated it had determined that the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. The OES is based on the Standard Occupational Classification System (SOC), which will be used by all Federal statistical agencies for reporting occupational data. The OES provides arithmetic means by occupation and relevant geographic area for use in making prevailing wage determinations in the labor certification program.

There are marked differences in the way prevailing wages are determined under the DBA and SCA programs. The first order of inquiry in making SCA and DBA wage determinations is the wage paid to the majority (more than 50 percent) of the workers in a particular classification. See 29 CFR parts 1 and 4. Under SCA, if there is no rate paid to the majority, the median is ordinarily used rather than the mean. The regulations for the SCA program at 29 CFR 4.51(c) also provide that in those instances in which a wage survey for a particular locality may result in insufficient data, the prevailing wage may be established through a "slotting" procedure whereby wage rates for an occupational classification are based on a comparison of equivalent or similar job duty and skill characteristics between the classification studied and those for which no survey data is available. Under the OES system, if the data obtained for an occupation are insufficient, larger areas are used in aggregating wage data so that an appropriate arithmetic mean can be determined. Operational difficulties are also encountered in applying DBA and SCA

statutory wage determinations because they are based on a different occupational classification system than the SOC. Further, SCA wage determinations frequently do not contain levels within an occupation, while the OES survey data furnished to ETA and the SWA's provides two levels of wages for every occupation.

We have concluded that it makes little sense to make determinations based on different statistical measures arrived at through inconsistent methodologies in determining prevailing wages mandatory for the permanent labor certification program. Accordingly, the proposed rule deletes the provision requiring that DBA and SCA wage determinations must be used in determining prevailing wages. Employers will, however, have the option to use current DBA and SCA wage determinations in addition to using the arithmetic mean provided by the wage component of the Occupational Employment Statistics Survey and employer provided wage information in accordance with the proposed provision at section 656.40(b)(4) of this part.

Surveys used to arrive at DBA wage determinations are not conducted by BLS, but by the Wage and Hour Division. Rather than sample surveys, they are universe surveys and data is sought on all projects in the area for a particular type of construction-ordinarily building construction, heavy construction, highway construction, and residential construction. The prevailing wage is determined based on the rate paid the majority, or if there is no majority, the arithmetic mean, of workers employed in the occupation based on wage data from the peak workweek for each project during the survey period (ordinarily 1 year), thereby allowing duplicated counting of workers. Since these procedures are significantly different than those set forth in GAL 2-98 cited above, and do not provide an arithmetic mean of all of the workers in the occupation in the appropriate geographic area, we are considering the appropriateness of use of Davis-Bacon surveys in the permanent labor certification program.

We invite comment on the appropriate use of the surveys conducted to arrive at DBA and SCA wage determinations.

Although the proposed rule for determining prevailing wages does not contain a provision about the use of DBA and SCA wage determinations, we are aware that the regulations may be changed after review of the comments. Therefore, as a result of the El Rio Grande decision, the proposed rule for the prevailing wage panel review of prevailing wage determinations, discussed below, contains provisions for review of determinations involving DBA or SCA wage determinations.

We are also proposing changes similar to those discussed above to § 655.731 of the regulations under the H-1B program. The INA requires that the wages paid to an H-1B professional worker be the higher of the actual wage paid to workers in the occupation by the employer or the prevailing wage for the occupational classification in the area of employment. The H-1B regulations incorporate the language of 20 CFR 656.40 (as suggested by H.R. Conference Report, No. 101-95, October 26, 1990, page 122) and provide employers filing applications the option of obtaining a PWD from the SWA, using an independent authoritative source, or using another legitimate source as provided by § 655.731(a)(2)(iii)(B) and (C) of the H-1B regulations. See also § 655.731(b)(3). Thus we are proposing changes to the H-1B regulations similar to the ones we are

> proposing to § 656.40 of the regulations governing the determination of prevailing wages for the permanent labor certification program.

67 Fed. Reg. at 30478-9.

95. The Service Contract Act mandates DOL's Employment Standards Administration, Wage and Hour Division ("DOL Wage and Hour") to determine:

> … the minimum monetary wages to be paid the various classes of services employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary [of Labor], or her authorized representative, in accordance with prevailing rates for such employees in the locality or where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations.

41 U.S.C. §351(a)(2).

96. DOL Wage and Hour published a November 2002 "Prevailing Wage Resource Book" which is currently in effect and is available from DOL at: http://www.wdol.gov/docs/WRB2002.pdf. That document explains the methodology which DOL utilizes for make wage determinations as to prevailing wage rates from the Bureau of Labor Statistics, National Compensation Survey and the BLS OES.

97. Despite the fact that the May 2002 NPRM proposed to discontinue the established usage of the Service Contract Act and Davis Bacon Act determinations of local prevailing wages, DOL ETA failed to disclose that its methodology for determining Level 1 prevailing wages was based upon the mean of the wages paid to the lowest paid one-third of the work force in each locality.

98. In July 2002, DOL received comments in response to the May 6, 2002 NPRM as to 20 CFR Part 656. These included numerous comments challenging the proposed changes in the methodology for determining prevailing wages and objecting to ceasing to utilize the Service Contract Act and Davis Bacon Act wage determinations.

99. In its subsequent actions in March 2005 DOL, without opportunity for prior notice and comment, applied the December 27, 2004 changes to the PERM regulation to the H-2B program. As a result the record of comments submitted in response to the 2002 PERM NPRM as to prevailing wage determinations is appropriately a part of the administrative record in this case. Although that record is not available in electronic format on Regulations.gov, Defendants have supplied an electronic copy of the administrative record to counsel for plaintiffs. That record is now available at: http://www.friendsfw.org/H-2B/PermRecord/default.htm.

100. Comments submitted in 2002 in response to the PERM NPRM do not reflect that any of the labor organizations objecting to the proposal for elimination of the Service Contract Act and Davis Bacon Act wages and objecting to the utilization of the DOL ETA application of the BLS OES survey to level 1 wages were aware of the methodology adopted by DOL ETA to determine Level 1 wages. See comments: AFL-CIO Building and Construction Trades Council, PERM Comment 050, http://www.friendsfw.org/H-2B/PermRecord/050_00001_AFL-CIO_Building_Trades.pdf); International Union of Bricklayers and Allied Craftworkers, PERM Comment 065, http://www.friendsfw.org/H-2B/PermRecord/065_00001_Bricklayers.pdf; Laborers International Union of North America, PERM Comment 088, http://www.friendsfw.org/H-2B/PermRecord/088_00001_Laborers.pdf; International Union of Operating Engineers, PERM Comment 141, http://www.friendsfw.org/H-2B/PermRecord/141_00001_Operating_Engineers.pdfl ; American Federation of Labor and Congress of Industrial Organizations, PERM Comment 175, http://www.friendsfw.org/H-2B/PermRecord/175_00001_AFL-CIO.pdf.

101. On December 8, 2004, the President signed into law the "H–1B Visa Reform Act of 2004" as a part of Division J of the Consolidated Appropriations Act, 2005, 108 P.L. 447; 118 Stat. 2809. This legislation amended Section 212(p) of the INA, 8 U.S.C. 1182(p), to provide that:

> (3) The prevailing wage required to be paid pursuant to (a)(5)(A), (n)(1)(A)(i)(II) and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections.
>
> (4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3 the difference between the two levels offered, adding the quotient thus obtained to the first level, and subtracting that quotient from the second level.

The above provisions of the H–1B Visa Reform Act of 2004 amended 8 U.S.C. 1182(p) did not relate to the H-2B (or H-2A) temporary worker programs.

102. Comments submitted by users of the H-1B program in response to the 2002 NPRM PERM regulation establish that the impetus for the H–1B Visa Reform Act of 2004 and in particular the creation of four (4) skill levels for employers seeking to utilize that program was that H-1B employers were allowed to seek two certification each for three year periods for each H-1B worker, but that the second certification application was proposed to be at a higher skill level reflecting the increased skills of the H-1B worker during that period of time. NPRM May 2002 PERM proposed 20 CFR 655.731(a)(2). In the context of H-1B professional researchers employers objected that the existence of only two skill levels arbitrarily resulted in much higher wages as an H-1B worker acquired additional skills and training.

103. On December 27, 2004, DOL ETA issued a final rule amending 20 CFR Part 656 at 69 Fed. Reg. 77326 (Dec. 27, 2004). DOL ETA described comments received in relationship

to the proposed elimination of the Service Contract Act and Davis Bacon prevailing wage requirements as follows:

> 4. Collective Bargaining Agreement, Davis Bacon Act, and Service Contract Act
>
> The proposed rule eliminated the mandatory use of DBA and SCA wages, where applicable. Several commenters, including some SWAs and AILA, supported this proposal. These commenters felt the DBA and SCA were suitable for government contracts but not for other situations, and the OES was a more realistic basis for making a PWD. Labor unions and other commenters, on the other hand, believed the proposed approach would undercut protections for U.S. workers.
>
> The AFL-CIO and the Laborers' International Union of North America (LIUNA) contended that, despite DOL's assertions to the contrary, the proposed approach would decrease administrative convenience for SWAs and DOL. The International Brotherhood of Bricklayers and Allied Craftworkers added administrative convenience was but one reason for using the DBA and SCA wage determinations, the other being to ensure offers of employment do not undercut local wages.
>
> The AFL-CIO also disputed DOL's assertion that BALCA's decision in *El Rio Grande on behalf of Galo M. Narea* (1998-INA-133, February 4, 1998; Reconsideration July 28, 2000) compelled DOL to reconsider its practice of using DBA and SCA wage determinations for alien labor certifications. The AFL-CIO argued BALCA's reference in El Rio Grande to the availability of "other information" that was a better source for determining prevailing wages than the SCA did not justify a change in DOL practice, and maintained determinations based on the SCA wage are more reliable than those based solely on OES wages.
>
> The International Union of Operating Engineers (IUOE) and LIUNA pointed to DOL presentations and public information describing the strengths and weaknesses of the OES survey and the National Compensation Survey (NCS) to support its argument that the NCS is superior to OES. The IUOE noted problems with using the OES survey: OES data does not provide occupational work levels, use of OES data results in the underestimation of wages of workers in seasonal jobs, and OES data does not include fringe benefit data. The IUOE also suggested employers would choose the methodology that produced the lowest wage rates. LIUNA identified other concerns about the OES survey's reliability, capacity for determining median and mean wages, and ability to collect data for work levels. LIUNA also provided specific examples in which OES wages would undercut the SCA or DBA wage determinations.
>
> The AFL-CIO defended use of the DBA, stating that DBA surveys produce a true "prevailing wage," that is, a wage rate paid more frequently to workers employed in the same job than any other wage rate paid in the same locality. LIUNA added DBA "universe" surveys of the construction trades are more reliable than the OES survey because DBA surveys collect wage data not only by job classification, but by type of construction job, which varies widely.
>
> One SWA supported condensing surveys into collective bargaining-derived wages and OES-derived wages. However, the commenter cautioned that until OES could provide

> coverage for more occupations, particularly in domestic service, SCA determinations should continue.
>
> Two commenters agreed with the provision in the proposed rule that employers be allowed to use DBA and SCA wage rates as alternatives to OES wages. AILA asked the final rule specify that SCA and DBA wages be prima facie evidence of the prevailing wage, should the employer choose to rely on either of these two sources.
>
> We have concluded that, while the use of DBA and SCA as wage data sources of first resort should be eliminated as proposed, employers should have the option of using this data at their discretion. We believe the continued mandatory use of SCA and DBA determinations would continue to complicate the operation of the prevailing wage system because of the differing occupational taxonomies between OES and DBA/SCA.
>
> The suggestion that SCA determinations be retained because SCA wages are more "accurate" is not compelling. In many instances SCA determinations are based upon data from the NCS. While the NCS is an excellent, albeit very expensive, source of wage data based on on-site data collection by trained staff, it is limited in scope. Only about 450 occupations in approximately 85 geographic locations are covered, and not all occupations are included in each geographic area. Thus, the NCS is inadequate as a sole source for prevailing wages for the permanent labor certification program, which must deal with a myriad of occupations across the nation. In addition, SCA wage determinations start with data from the NCS, but also incorporate OES data. The SCA also uses a concept known as "slotting" when determining a wage for an occupation/area combination for which they have no data. In slotting, wage rates for an occupational classification are based on a comparison of equivalent or similar job duties and skill characteristics between the classification studied and those for which no survey data is available. It would be difficult, if not impossible, to segregate those SCA surveys that are "better;" i.e., purely NCS-based from those that use slotting. We do not believe retaining this level of complexity in the prevailing wage determination process is warranted.
>
> We have adopted AILA's recommendation that if an employer chooses to rely on a SCA or DBA wage, that wage generally will be considered prima facie evidence of the prevailing wage. The SWA will not question the employer's use of the SCA or DBA survey as long as it is applied in an appropriate manner. However, should an employer attempt to apply a SCA or DBA wage in an inappropriate manner (e.g., by using the wrong occupational classification, geographic area, or level of skill), the SWA will not accept it as an alternative to the OES wage. At that point, the employer will be free to challenge the SWA's rejection of the SCA or DBA determination by requesting a review by the Certifying Officer.

69 Fed. Reg. at 77365-6.

104. On January 27, 2005, DOL published a Notice of Proposed Rulemaking (NPRM) specifically for the H-2B program. This was the first NPRM for the H-2B regulations since the creation of the H-2B program.

105. The January 27, 2005 NPRM proposed changes significant changes to the methodology used to calculate the prevailing wage for H-2B established by earlier General Administration Letters. 70 Fed. Reg. 3993 at 3994 (Jan. 27, 2005). That notice specifically stated:

> 4. Prevailing Wage
>
> Employers filing petitions will be required to utilize the prevailing wage information available on the DOL's Online Wage Library (OWL), which is accessible via the DOL's Web site at http://www.flcdatacenter.com/owl.asp
>
> .Section 212(p)(3) and (4) of the Immigration and Nationality Act (8 U.S.C. 1182(p)(3) and (4)) as added by the Consolidated Appropriations Act, 2005, provides that for prevailing wage surveys in the permanent alien labor certification program (and the H-1B and H-1B1 programs) the survey shall provide at least four levels of wages commensurate with experience, education, and the level of supervision. Although this statutory provision does not necessarily apply to H-2B labor certifications, it has been DOL's practice to treat prevailing wage determinations the same under the H-2B program as under the permanent labor certification program. This is consistent with the proposed rule below and we request public comment on this issue.

70 Fed. Reg. 3993 at 3994. The proposed regulation at 20 CFR 655.5 would have implemented this through language as follows:

> Sec. 655.5 What is the attestation regarding wages?
>
> An employer seeking to employ H-2B workers shall attest that, for the entire period of authorized employment, H-2B workers will be paid at least the prevailing wage for the occupation in the area of intended employment.
>
> (a) Determining the prevailing wage. The prevailing wage shall be determined by the Occupational Employment Statistics (OES) survey (if any) for the occupation in the area of intended employment. An employer shall obtain the prevailing wage through the DOL's On-Line Wage Library (OWL), a web-based service which can be accessed via the DOL's Web site at http://www.flcdatacenter.com/owl.asp. The data on this site are drawn from the wage component of the OES survey, conducted by the Bureau of Labor Statistics.

106. DOL sought public comment on the proposed change to the prevailing wage rates for H-2B workers. 70 Fed. Reg. 3993 at 3994. The deadline for the submission of comments

was initially February 28, 2005, which DOL extended by Federal Register noticed published on March 9, 2005 through April 8, 2005. 70 Fed. Reg. 11592 (Mar. 9, 2005).

107. On or about March 8, 2005, **prior to the close of the extended comment period for the January 2005 NPRM for H-2B workers**, DOL issued a "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs" that implemented the prevailing wage methodology proposed in the January 27, 2005 NPRM as to H-2B workers and applied all changes to the PERM regulations to H-2B workers without comment, explanation of discussion as to the appropriateness thereof. This included the elimination of the prior requirement to pay Davis Bacon or Service Contract Act wages to H-2B workers. The March 2005 "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs" is available at http://www.flcdatacenter.com/download/PW_Guidance_2005_Mar_01_Full.pdf.

108. On March 8, 2005, DOL ETA posted on its website at http://www.flcdatacenter.com new calculations of prevailing wages for all Occupational Codes for employers utilizing H-2B workers reflecting four different pay levels for each occupational code. At no time prior to this did DOL ETA publicly disclose or provide an opportunity for notice and comment on the now primary methodology for determining wage rates for H-2B workers through calculation of level 1 wages based upon the mean wage paid to the lowest one-third paid workers in each OES surveyed occupational classification.

109. The DOL ETA calculated wages for all periods from March 8, 2005 to the present are available as downloadable data files at: http://www.flcdatacenter.com/Download.aspx.

110. DOL ETA at http://www.flcdatacenter.com provides historic data for labor certification applications for federal FY2000 through FY2008.

http://www.flcdatacenter.com/CaseH2B.aspx. That downloadable data demonstrates that in fiscal year FY2005 the most commonly requested occupational code for which H-2B labor certification was sought from DOL ETA was for

| FY05_Occ_Code | | |
|---|---|---|
| DOT OCC_Code | OCC_Title | Num_Aliens |
| 408.687-014 | Laborer, Landscape | 51,626 |

111. DOL ETA on its websites and in its downloadable data files provides a cross walk to the Standard Occupational Classification ("SOC") codes which were utilized by it to generate wage data at four levels for each Occupational Code. That cross walk establishes that the SOC code for DOT Occ. Code 408.687-014 was to SOC Code 37-3011 "Landscaping and Groundskeeping Workers."

112. The DOL ETA cross walk for FY2005 identified occupational codes for which certifications for H-2B workers were sought during FY2005 as based on OES data for SOC Code 37-3011 or on SOC Code 37-3012 (First-Line Supervisors/Managers of Landscaping, Lawn Service, and Groundskeeping Workers).

113. The DOL ETA wage rates established in March 2005 for the Philadelphia Standard Metropolitan Statistical Area for SOC Code 37-3011 "Landscaping and Groundskeeping Workers" were as follows:

| CNTYTWN | SOC_Code | LVL1WG | LVL2WG | LVL3WG | LVL4WG |
|---|---|---|---|---|---|
| Philadelphia County, PA | 37-3011 | 8.39 | 9.82 | 11.24 | 12.67 |

114. The March 2005 DOL ETA wage rates were computed from the November 2004 DOL Bureau of Labor Statistics survey data. That data is available for download at: http://www.bls.gov/oes/oes_dl.htm.

115. The November 2004 DOL Bureau of Labor Statistics published survey data for the Philadelphia area for Soc Code 37-3011 shows the following surveyed wage rates:

| AREA_NAME | OCC CODE | OCC_TITLE | H MEDIAN | H PCT10 | H PCT25 | H MEAN | H PCT75 | H PCT90 |
|---|---|---|---|---|---|---|---|---|
| Philadelphia, PA-NJ PMSA | 37-3011 | Landscaping and groundskeeping workers | 11.04 | 7.96 | 9.39 | 11.83 | 13.84 | 16.94 |

116. The DOL Wage and Hour Division posts on its website at http://www.wdol.gov/sca.aspx a searchable database of Service Contract Act wage rates. At all times since at least 2002 their has been an established SCA wage in the Philadelphia Metropolitan Statistical area for SCA Occupational Code 11210 - Laborer, Grounds Maintenance. The current SCA rate for that position is $13.41 per hour. The 2002 wage rate was $11.51 per hour. Prior to March 2005 the DOL ETA websites for foreign labor certification calculations always alerted users to the existence of a possible SCA wage rate for each DOT code.

117. The DOL Bureau of Labor Standards National Compensation Survey is available on line from DOL BLS as a searchable database at http://data.bls.gov/. That data provides a "Group 1" wage for Landscaping and groundskeeping workers for the Philadelphia SMSA. That median wage rate is the same for Group 1 (inexperienced) and for all workers. The National Compensation Survey does consider skill levels in determining wage rates whre that is appropriate. See: http://www.bls.gov/oes/oes_ques.htm#Ques4

118. In April 2005, DOL received comments on the January 27, 2005 NPRM from several interested parties expressing serious concern that DOL's prevailing wage regulations would depress the wages and working conditions of domestic workers.

119. In response to the January 2005 NPRM, comments were submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations and other organizations dated April 8, 2005: "Current proposal…would only increase the risk of employers selecting a 'prevailing ' wage for H-2B workers that falls short of the actual

prevailing wage and thus adversely affects the domestic labor market." ETA-2008-0002-0087 at 59-81. DOL-CATA 900-922.

120. In response to the January 2005, NPRM comment were submitted on behalf of the United Food & Commercial Workers International Union, dated April 8, 2005. Those are in the DOL record ETA-2008-0002-0087 at 82-87. DOL-CATA 00923-28. Those comments stated:

> The proposed changes center on using the OES for prevailing wage determinations. The OES is conducted by the Bureau of Labor Statistics and gives detailed wage information for about 770 occupations in specific geographic areas. Wages reported are straight-time gross pay, exclusive of premium pay, but do include additions such as on-call pay and tips. Benefits are not included. These wages are reported in segments from surveyed employers as well as an overall average. The published segments are structured at intervals of 10%, 25%, 50%, 75%, and 90%. For example, the 10% rate is a rate where 10% of the workers are making less and 90% are making more. The 50% is the median. The 75% rate indicates 75% make less and 25% make more, and soon.
>
> The DOL uses OES data on its web site to provide prevailing wage information. When a wage rate is requested for a specific job in a specific area, it will currently provide four levels of wages "commensurate with experience, education, and the level of supervision." These four levels of wages are also characterized in DOL documents as "four skill levels."
>
> The level one (1) wage, derived from unpublished OES data, is equal to the mean of the bottom third of wages surveyed, and the level four (4) wage is the mean of the top two-thirds of wages surveyed. Levels two (2) and three (3) are derived by an arithmetic formula that uses level one (1) and four (4) as base points respectively. Coincidentally, level three (3) is the mean or average wage for the specific occupation.
>
> There are a number of serious problems with this structure. **First, the OES survey does not measure skill. Rather, it reports the range of wages actually being paid for a specific job in a specific area.** Second, the OES survey essentially reports only straight time wages. It does not include benefits such as health insurance, retirement plans, or vacation pay. Consequently, overall compensation may be seriously understated. Third, the OES survey understandably lags behind current labor market conditions. The most recent data is from November 2003. This may also contribute to understating wage levels.
>
> The use of "skill levels" to determine the prevailing wage is particularly problematic for many occupations covered by the H-2B program. While all jobs require skill, there are many occupations where the very nature of the job or the structure of the activity does not allow for different skill levels, or more significantly, pay based on different skills. Essentially; either you can do the job, or you can't do the job. For these types of jobs

> (typically "Job Zone" 1 or 2), it is clear that the DOL's process for determining the proper wage level will almost always result in a level one (1), or at best, level two (2) wage.

DOL-CATA-000926. Emphasis Added.

121. At no time has DOL ETA responded to the comments in response to the January 2005 NPRM or discussed them in subsequent administrative guidance or rulemaking.

122. On May 9, 2005, DOL issued a modification of the March 2005 "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs," with technical changes to instructions which re-affirmed the March 2005 implementation of a new prevailing wage methodology for H-2B workers and other non-agricultural workers. The May 2005 memorandum is available on DOL's website at: http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf. DOL ETA has continued to utilize that memorandum to determine prevailing wage procedures for the H-2B program.

123. On April 4, 2007, DOL ETA issued an administrative notice as to revisions to procedures for the H-2B program. See, Training And Employment Guidance Letter No. 21-06 (TEGL 21-06). That document was not published in the Federal Register, but is available from DOL ETA at: http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06.pdf. That TEGL did not deal with prevailing wage determination procedures.

124. Based on significant concerns posed in the April 2005 comments, the NPRM published by DOL on January 27, 2005 (RIN 1205-AB36) was withdrawn July 23, 2007 without further comment or discussion in the Department of Labor Fall 2007 Regulatory Agenda. *See* http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=221117. *See also* 73 Fed. Reg. 29942 at 29944 (May 22, 2008).

125. On May 22, 2008, DOL published a new NPRM in the Federal Register that proposed substantial changes to the regulations for the H2-B program. 73 Fed. Reg. 29942 (May 22, 2008).

126. Unlike the 2005 NPRM, in the May 2008 NPRM DOL did not solicit comments on the methodology used to calculate the prevailing wage. The May 2008 NPRM anticipated that DOL ETA would continue to utilize the methodology used to calculate prevailing wages for H-2B workers that DOL proposed in the January 27, 2005 NPRM and implemented in the March 2005 and May 2005 "Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs." See, 73 Fed. Reg. at 29946.

127. The May 2008 NPRM proposed a new 20 CFR 655.10 which would provide:

> 20 CFR § 655.10 Determination of prevailing wage for temporary labor certification purposes.
>
> (a) Application process.
>
> (1) The employer must request a prevailing wage determination from the Chicago NPC be-fore commencing any recruitment under this part.
>
> (2) The employer must obtain a prevailing wage determination that is valid either on the date recruitment begins or the date of filing the Application for Temporary Employment Certification with the Department.
>
> (3) The employer must offer and advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPC.
>
> (b) Determinations. The Chicago NPC shall determine the prevailing wage as follows:
>
> (1) Except as provided in paragraph (e) 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, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the DOL Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean**, unless the employer provides an acceptable

survey under paragraph (f) of this section. The wage shall be determined in accordance with section 212(t) of the INA.

(3) If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist, i.e. multiple MSAs, the Chicago NPC will determine the prevailing wage based on the highest wage among all applicable MSAs.

(4) If the employer provides a survey acceptable under paragraph (f) of this section that 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 U.S. workers similarly employed in the area of intended employment.

(5) The employer **may** utilize a current wage determination in the area determined under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq.

(6) The Chicago NPC must enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its U.S. and H-2B workers.

(c) Similarly employed. For purposes of this section, similarly employed means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:

(1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or

(2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(d) Validity period. The Chicago NPC must specify the validity period of the prevailing wage, which in no event may be more than 1 year and no less than 3 months from the determination date.

(e) Professional athletes….

(f) Employer-provided wage information.

(1) If the job opportunity is not covered by a CBA, or by a professional sports league's rules or regulations, the Chicago NPC will consider wage information provided by the employer in making a PWD. An employer survey can be submitted either initially or after NPC issuance of a PWD derived from the OES survey.

(2) In each case where the employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the Chicago NPC with enough information about the survey methodology, including such items as

sample size and source, sample selection procedures, and survey job descriptions, to allow the Chicago NPC to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the ETA OFLC national office.

(3) The survey submitted to the Chicago NPC must be based upon recently collected data:

(i) The published survey must have been published within 24 months of the date of submission to the Chicago NPC, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey.

(ii) A survey conducted by the employer must be based on data collected within 24 months of the date it is submit-ted to the Chicago NPC.

(4) If the employer-provided survey is found not to be acceptable, the Chicago NPC must inform the employer in writing of the reasons the survey was not accepted.

(5) The employer, after receiving notification that the survey it provided for the Chicago NPC's consideration is not acceptable, may file supplemental information as provided in paragraph (g) of this section, file a new request for a PWD, appeal under § 655.11, or, if the initial PWD was requested prior to submission of the employer survey, acquiesce to the initial PWD.

(g) Submission of supplemental information by employer.

(1) If the employer disagrees with the skill level assigned to its job opportunity, or if the Chicago NPC informs the employer its survey is not acceptable, or if there are other legitimate bases for such a review, the employer may submit supplemental information to the Chicago NPC.

(2) The Chicago NPC must consider one supplemental submission about the employer's survey or the skill level as-signed to the job opportunity or any other legitimate basis for the employer to request such a review. If the Chicago NPC does not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, it must inform the employer of the reasons for its decision.

(3) The employer may then apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD provided if one was requested prior to submission of the employer survey.

(h) Wage cannot be lower than required by any other law. No PWD for labor certification purposes made under this section permits an employer to pay a wage lower than the highest wage required by any applicable Federal, State, or local law.

(i) Retention of Documentation. The PWD shall be retained by the employer for 5 years and submitted to a CO in the event it is requested in the course of an RFI or an audit or a Wage and Hour representative in the event of a Wage and Hour investigation.

73 Fed. Reg. at 29962-3.

128. DOL received comments from interested parties expressing serious concern with the adoption through the regulations of the March 2005 prevailing wage determination procedures.

129. The Low Wage Workers Legal Network submitted comments on behalf of a large coalition of organizations. Those comments and other documentation submitted in support of them directly challenged the DOL ETA methodology for calculation of wage rates as failing to meet the Secretary of Labor's duty to prevent adverse impact on U.S. workers. See, ETA-2008-0002-0088 at 32-41. DOL-CATA 00963-72. As to the DOL ETA methodology for calculation of wages those comments noted:

> It appears that the current Bureau of Labor Statistics Occupational Employment Survey (BLS OES) wage-setting process does not correspond to the Foreign Labor Certification Data Center's procedure for assigning wage levels. DOL sets the Level 1 wage based on the average of the wages paid to the workers earning in the bottom one-third of the wage distribution range of wages in an occupation and geographic area (for example, if there are 99 forestry workers in a region, Level 1 is the average of the lowest-paid 33 workers). The Level IV wage is the average wage paid to the workers earning in the top two-thirds of the distribution (not the top one-third). The two intermediate levels are created by dividing the difference between the first and fourth levels by three, and adding the quotient to the first level and subtracting it from the fourth level. Level 3 is equivalent to the average wage.
>
> This arithmetic formula for setting the wage levels is not appropriate in setting the prevailing wage to choose a wage that is lower than the average. It is especially inappropriate to allow an employer claiming a labor shortage to offer a wage rate (such as Level 1 and Level 2) that is at or just above the average of the lowest one-third of workers. Difficulty attracting job applicants should be solved by competing for workers through better job terms, not by offering wage levels that are paid to the lowest group of workers in the occupation.
>
> In any event, the wages listed by the BLS OES are two years out of date. The BLS apparently uses a six "panel" time period that it adjusts for inflation but apparently is not capable of preparing the survey results fast enough to be issued for the coming year. H-2B employers should not be offering wage rates that are two years out of date, particularly when wage rates have been increasing modestly overall during the past decade, and especially during a period of increasing inflation in the cost of living. A wage rate that is two years out of date is inappropriate because it allows employers to

> offer a non-competitive wage that many U.S. workers will reject. Workers from poor countries will accept such wage rates and displace U.S. workers, increasingly causing the U.S. workers to experience the same low wage rates.
>
> An adverse effect wage rate (AEWR) would better accomplish the goal of protecting U.S. workers from the harmful effects of a foreign temporary worker program. DOL has a regulatory obligation to require H-2B employers to offer wages that have not been depressed by the presence of temporary foreign workers in the workforce. . In many industries, as explained above, the accepted H-2B prevailing wage is close to, or slightly above, the minimum wage, clearly too low to attract available U.S. workers to these positions. If a U.S. worker applies and requests a higher wage, the employer is allowed to reject him or her as unavailable.
>
> This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. See Ross Eisenbrey, H-2B and the U.S. Labor Market, Economic Policy Institute (June 24, 2008, attached as Exhibit F. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. See Exhibit G Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.
>
> Even where the prevailing wage exceeds minimum wage or the average hourly wage, it is typically much lower than the AEWR…..

DOL-CATA 00965-67. Exhibit F: DOL-CATA 1044-1046. Exhibit G: DOL-CATA 1047-56.

130. As to prevailing wage determinations *See also,* comments submitted on behalf of the International Union of Bricklayers and Allied Craftworkers, dated July 7, 2008. ETA-2008-0002-0052. "[The] existing temporary labor certification process contains serious flaws—most notably, the DOL's 2005 abandonment of its longstanding practice requiring employers seeking certification to offer the standard prevailing wage raters determined by the DOL pursuant to the Davis-Bacon and Service Contract Act."

131. On December 19, 2008, DOL published Final Rules for a new 20 CFR Part 655, Subpart A at 73 Fed. Reg. 78020 (Dec. 19, 2008). These rules took effect on January 19, 2009.

132. DOL refused to consider comments submitted in response to the NPRM challenging the methodology for determination of prevailing wages, DOL responded that the methodology used to calculate the PWD was outside the scope of the proposed rulemaking. 73 Fed. Reg. at 78031. Specifically, DOL responded as follows:

> 5. General Process or Data Integrity Concerns
>
> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders. The Department appreciates these suggestions and concerns. **However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking.**

73 Fed. Reg. at 78031. [Emphasis added].

133. The final regulation for determining the prevailing wage for temporary labor certification purposes largely mirrored the regulation in the NPRM. 20 C.F.R. 655.10. The regulation provides, in pertinent part:

> (b) Determinations. Prevailing wages shall be determined as follows:
>
> (1) Except as provided in paragraph (e) 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, except as provided in paragraph (b)(4) of this section, of the wages of workers similarly employed at the skill level in the area of intended employment. The wage component of the BLS Occupational Employment Statistics Survey (OES) shall be used to determine the arithmetic mean, unless the employer provides a survey acceptable to OFLC under paragraph (f) of this section. 20 C.F.R. 655.10.

134. In early 2009, DOL posted disclosure data on its website at http://www.flcdatacenter.com/CaseH2B.aspx reporting on the number of labor certifications granted by it in FY2008 by Dictionary of Occupational Titles ("DOT") classification. That data reflected that the following were the ten most commonly certified occupations in FY2008.

| Rank | DOT Occupational Code | Job Title | SOC Code(s) (cross walk) | Workers Certified |
|---|---|---|---|---|
| 1 | 408.687-014 | Laborer, Landscape | 37-3011 Laborer, Landscape | 76,383 |
| 2 | 323.687-014 | Cleaner, Housekeeping | 37-2012 Cleaner, Housekeeping | 22,442 |
| 3 | 869.664-014 | Construction Worker I | 47-2043; 47-2061;47-2151;47-2152;47-3012 | 14,618 |
| 4 | 452.687-010 | Forest Worker | 45-4011 Forest Worker | 12,416 |
| 5 | 349.664-010 | Amusement Park Worker | 39-3091 Amusement Park Worker | 7,262 |
| 6 | 321.137-010 | Housekeeper | 37-1011 Housekeeper | 5,829 |
| 7 | 311.677-018 | Dining Room Attendant | 35-9011 Dining Room Attendant | 4,325 |
| 8 | 452.687-018 | Tree Planter | 45-4011 Tree Planter | 4,187 |
| 9 | 311.477-030 | Waiter/Waitress, Informal | 35-3031 Waiter/Waitress, Informal | 3,961 |
| 10 | 318.687-010 | Kitchen Helper | 35-9021 Kitchen Helper | 3,437 |

## DOL'S PROCEDURES FOR DETERMINATION OF PREVAILNG WAGE RATES FOR EMPLOYERS SEEKING H-2B WORKERS HAVE BEEN ESTABLISHED IN VIOLATION OF THE APA

135. The policies established by DOL for the administration of the H-2B program over the past six years have, contrary to law, had an increasingly adverse impact on the wages and

working conditions of U.S., and have interfered with employment opportunities for U.S. workers.

136. Since 2003 the Secretary of Labor and DOL sought to escape and evade their legal responsibility to protect the wages, working conditions, and employment opportunities for U.S. workers where employers sought to employ H-2B workers by changing the methodology for calculating the wages to be paid to those workers.

**March 2005 Changes in Determination of Wage Rates for H-2B Employment**

137. By policies adopted without notice and comment, effective March 2005, Defendants Chao and DOL arbitrarily and capriciously and without providing an opportunity for public notice and comment changed the established procedures for determining wages required to be paid by employer's seeking H-2B workers in a manner that has had, and continues to have, a severe adverse impact on the wages and working conditions of U.S. workers, in violation of the requirements of law and the Secretary of Labor's duties in relationship to the H-2B program.

138. In policy guidances with an effective date of March, 2005, the Defendant DOL changed the methodology for calculating the required prevailing wage rate. This policy guidance superseded prior procedures for determining "prevailing" wage rates and was applied to H-2B workers. See Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised May 9, 2005, available at: http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

139. These changes in methodology resulted in the drastic and continuing reduction in wages required to be paid to H-2B workers in many industries.

140. Among other things, that policy removed the requirement that Davis Bacon Act and/or McNamara-O'Hara Service Contract Act prevailing wage requirements should be applied when possible. Those wage rates were consistently higher than those under the new

methodology adopted by DOL and the Secretary of Labor. DOL and the Secretary arbitrarily, capriciously and contrary to law failed to consider the adverse impact on wages of U.S. workers in jobs for which employers sought to utilize H-2B workers.

141. Since March 2005 the "prevailing wage" has been calculated using wage data calculated at local levels using an Occupational Employment Statistics (OES) survey performed by the DOL's Bureau of Labor Statistics (BLS).

a. Four "skill levels" have been artificially created by DOL ETA in its instructions to DOL BLS for generating a special run of the publicly available OES data.

b. DOL BLS has never been asked by DOL ETA to validate the arbitrary assignment of all BLS SOC Codes to uniformly distributed percentiles of the OES survey data.

c. DOL BLS undertakes a separate National Compensation survey that could be used by BLS to review that validity of the assumption underlying that procedure as to the relationship between "skill levels" and wage rates for the SOC Codes most commonly utilized in applications by prospective H-2B employers.

d. DOL WHD utilizes such a blended approach of OES data and National Compensation survey data to determine prevailing wage rates at local areas for the Service Contract Act.

e. These artificially derived "skill levels" and are used in place of determining the average (or arithmetic mean) of wages actually paid to similarly skilled workers in the area of work.

f. Under the formula used by DOL ETA to establish the wage data for each of the skill levels, Level I is the average (arithmetic mean) wage paid to the lowest paid one-

third of workers in a Standard Occupational Code ("SOC code") occupation in a local area.

g. Level IV is the average wage paid to the highest paid two-thirds of workers in a Standard Occupational Code ("SOC code") occupation in a local area.

h. Level II and Level III wage rates are derived from the Level I and IV wages. The formula takes the difference between the Level IV wage and the Level I wage and divides that number by three. The Level II wage is determined by taking this result and adding it to the Level I wage. The Level III wage is determined by taking this result and subtracting it from the IV wage.

i. Level III and IV wage rates are the only wages at or above the average surveyed wage reported by OES data for a SOC Code in a local area.

142. DOL ETA assigns Dictionary of Occupational Title ("DOT Codes") to employer applications for H-2B (and other foreign labor certification wage categories) and utilizes a "cross walk" between DOT codes and BLS SOC Codes.

143. In many cases, more than one DOT code is cross referenced to the same BLS SOC code. In some cases one DOT Code can be cross referenced to more than one SOC Code.

144. The Prevailing Wage Memorandum procedure adopted by DOL in May 2005, requires that all wage calculations begin as Level 1 wages and are only increased if the requested position has particular job skills requiring a higher job level. See, *In Reed Elsevier, Inc., Employer*, BALCA No. 2008-Per-00201, USDOLCNPC No. 07-0021, Ohio Tracking No. 2007-2319, Department Of Labor, Board of Alien Labor Certification Appeals, 2009 BALCA Lexis 99, April 13, 2009.

145. The four wage levels supposedly correspond to the skill level of an occupation. For example, jobs that require a PhD should be classified as "experienced level" jobs, for which a worker should receive the Level III or Level IV wage. In the same way, jobs that require only basic skills and experience are classified as "entry level" jobs, for which a worker will almost always receive the Level I wage. See Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (May 9, 2005). DOL ETA applies this methodology to a variety of foreign labor visa programs, including some programs that issue visas for "experienced" jobs (e.g. the H1-B visa program).

146. DOL has acknowledged in the December 18, 2008 rulemaking proceeding for H-2A workers that the H2-B visa program "primarily serves low-skilled jobs." 73 Fed. Reg. 77110, 77177 (December 18, 2008).

147. As a result of the DOL mandated procedures, the Level I wage has been the most common wage level required to be offered by H-2B employers.

148. Since March 2005, H-2B employers have routinely been permitted to pay wage rates lower than those currently received by approximately 84% of workers in the SOC code as reflected in DOL BLS data.

149. The result of the prevailing wage determination policy implemented for H-2B applications submitted for federal FY06 and thereafter has been that the approved "prevailing wage" for an employer seeking H-2B workers is usually far lower than the average hourly wage paid in the locality for that kind of work. See, Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088 (submitted July 7, 2008). See also, Laborers International Union of North America, PERM Comment 088, http://www.friendsfw.org/H-2B/PermRecord/088_00001_Laborers.pdf (July 5, 2002).

150. This problem is exemplified by the landscaping industry. In 2007, landscape laborer was the job category most often certified for H-2B employment. Despite this, the prevailing wage for 47 of 49 companies employing H-2B landscape laborers in two counties in New York was more than four dollars less per hour than the average hourly rate for landscaping workers in those counties. See Ross Eisenbrey, H-2B and the U.S. Labor Market, Economic Policy Institute (June 24, 2008, attached as Exhibit F to ETA-2008-0002-0088).

151. In an unpublished analysis of prevailing wage rates for 98 occupations in nine states and 27 different cities of employment, chosen randomly, all but three determinations set the prevailing wage rate below both the median hourly wage and the mean hourly wage prevailing in the area, sometimes by as much as 50%. See Exhibit G attached to ETA-2008-0002-0088, Ross Eisenbrey Unpublished Research Comparison Prevailing Wage FY07 to Median Hourly Wage and Mean Hourly Wage.

152. This policy change was arbitrary and capricious and contrary to law in that it was inconsistent with the requirements of 8 U.S.C. §1182, which requires that "[a]ny alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. §1182(5)(A).

153. The policy change is also inconsistent with the regulations (initially of the Department of Justice and subsequently of the Department of Homeland Security) which impose

upon employers the obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). Those regulations at 8 CFR 214.2(h)(6) require the Secretary of Labor to issue a certification "…stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 CFR 214.2(h)(6)(iv)(A)(1).

154. The policy change is also in conflict with the long established requirements of 20 CFR 655.0(a), which mandate:

> (1) . . . procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (i) Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (ii) whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required to carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.
>
> (2) The Secretary's determinations. Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery, 531 F. 2d 299 (5th Cir. 1976).*

155. The March 2005 policy change has resulted in devastating wage reductions for H-2B workers in a manner contrary to law. In addition, contrary to law, U.S. workers in industries employing H-2B workers have been adversely affected by these wage reductions.

**DOL 2008 Regulatory Action**

156. DOL issued a Notice of Proposed Rulemaking ("NPRM"), publishing proposed rules on the 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 on May 22, 2008, with a Notice and Comment period ending July 7, 2008.

157. The record before the agency of comments and actions related to that proposed rulemaking has been posted under ETA-2008-0002 Docket at: http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ETA-2008-0002.

158. On June 4, 2008, the Honorable George Miller, Chair of the U.S. House Education and Labor Committee, submitted a request for more information and a request for an extension of the forty-five day Notice and Comment period. See: ETA-2008-0002-0014.

159. On June 17, 2008, the Southern Poverty Law Center requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0036.

160. On June 24, 2008, the Brennan Center for Public Justice requested that DOL extend its Notice and Comment period forty-five additional days. See: ETA-2008-0002-0086.

161. On June 30, 2008, Friends of Farmworkers, Inc. requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0087.

162. On July 2, 2008, Change to Win, a partnership of seven unions with six million members, requested that DOL extend its Notice and Comment period for an additional forty-five days. See: ETA-2008-0002-0023.

163. DOL abused its discretion and acted arbitrarily when it denied these requests for an extension of the public comment period. See: ETA-2008-0002-0092.

164. One hundred thirty-four (134) individuals and organizations submitted comments, of which "88 were unique and another 46 were duplicate form comments." 73 Fed. Reg. at 78023.

165. On December 18, 2008, DOL issued its final rule. 73 Fed. Reg. 78019-78069. The regulations go into effect on January 18, 2009.

166. The December 18, 2008 actions by DOL in promulgating its final rules are arbitrary and capricious and contrary to DOL's statutory obligations to protect workers. They further run contrary to the evidence before DOL in the administrative record, and are not explained and justified. In some cases, new policies were adopted without notice and comment.

167. These regulations will cause devastating harm to U.S. workers and to H-2B guestworkers by causing an adverse effect on U.S. workers' wages and working conditions and by eliminating labor protections.

**Prevailing Wages**

168. Federal law requires the Secretary of Labor to establish effective procedures to "determine and certify" that the employment of H-2B workers foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed.

169. The Secretary of Labor's changes in policies for determination of H-2B prevailing wages beginning in March 2005 had a particularly devastating impact on the wages and working conditions of U.S. workers beginning with applications for federal FY06 and FY07 because the H-2B program was temporarily expanded beginning in May 2005 through the creation of a "returning worker" exemption to the general statutory cap on the number of H-2B workers permitted to enter the country annually.

170. As the H-2B program has expanded its role in certain industries such as landscaping and into an increasing breadth of job classifications, the adverse impact of the DOL's establishment of lower required wage rates for H-2B employment has had an adverse economic impact on the wages and working conditions of U.S. workers, in violation of the Secretary of Labor's duties under the H-2B program.

171. Although the 2008 DOL NPRM offered the public its first opportunity to comment on the procedures to be utilized by DOL for determination of "prevailing wages," DOL and the Secretary of Labor arbitrarily and contrary to law continued in the final rule to use procedures for determination of "prevailing wages" which have a severe adverse impact on the wages of U.S. workers.

172. Despite the continuing failure of the Secretary of Labor to promulgate regulations for the H-2B program to establish a system for determining wage rates which will not adversely affect the wages and working conditions of U.S. workers, DOL arbitrarily and contrary to law rejected without good cause comments in response to its May 2008 NPRM addressing the failure of the existing prevailing wage rate policies to meet the statutory duties of the Secretary of Labor. See, for example, ETA-2008-0002-0022 at pp. 9-11 and Attachments E and F; ETA-2008-0002-0088 at pp. 31-337 and annexed Ross Eisenbrey Exhibits E, F, and G annexed to comment ETA-2008-0002-0088.

173. In its preamble to the December 19, 2008 promulgation of H-2B rules DOL acknowledged:

> Some commenters raised concerns about the integrity of the data currently being used for prevailing wage determinations and recommended changes to the OES survey itself. Others commented on different aspects of the methodology and procedures. One commenter suggested that the Department set the minimum wage rate for H-2B workers at or above the wage (presumably the adverse effect wage rate) for H-2A workers in that State. Another commenter suggested the Department require employers in the

> construction industry to use, first, the Davis-Bacon Act (DBA) survey wage rate; second, if no DBA wage existed, the collective bargaining agreement rate; and as a last resort, the OES rate, if neither of the other rates was available. Another commenter suggested that the provision regarding when an employer may utilize a wage determination under the Davis-Bacon Act also cover when an employer can choose not to utilize that wage rate. One commenter believed that the proposal did not correct what they claimed was a problem with the Department's Bureau of Labor Statistics (BLS) wage rates being 2 years out of date and also expressed concerns that piece rate policies have led to depressed wages and suggested that the Department should require advance written disclosure of piece rates on the job orders.
>
> The Department appreciates these suggestions and concerns. However, the Department did not propose changes to the sources of data to be used for prevailing wage determinations and, therefore, these comments are beyond the scope of the current rulemaking. The Department notes that the proposed procedures that were retained in the Final Rule already cover the use of wages specified in a collective bargaining agreement. Similarly, these procedures provide that an employer may use the Davis-Bacon wage and that such use is at the employer's option unless the employer is a Federal construction contractor. There is a similar provision that applies to Service Contract Act wage rates.
>
> Some commenters suggested that employers should not be allowed to submit their own wage surveys. The Department, however, believes that employers should continue to have the flexibility to submit pertinent wage information and therefore, the Final Rule continues the Department's policy of permitting employers to provide an independent wage survey under certain guidelines. It also continues to provide for an appeal process in the event of a dispute over the applicable prevailing wage.

73 Fed. Reg. at 78031.

174. In the face of the overwhelming evidence that the March 2005 changes to the DOL prevailing wage rate system for H-2B workers had failed to meet the statutory duty of the Secretary of Labor to prevent adverse impact on wages and working conditions of U.S. workers, the arbitrary refusal of DOL to reconsider its system for determination of prevailing wages was arbitrary and capricious and contrary to law.

175. The record before DOL reflected evidence of considerable reasons to be concerned about existing policies of accepting employer wage surveys to reduce the already low prevailing wage rates established by DOL for most H-2B workers. DOL arbitrarily and capriciously and without justification permitted employer surveys to be used for determining

required prevailing wage rates without establishing procedures to safeguard against an adverse impact on the wages of U.S. workers.

**Elimination of Role of State Workforce Agencies**

176. During 2005, DOL and the Secretary of Labor, by administrative orders issued without an opportunity for public comment, dismantled the established structure for ETA Regional offices to review H-2B applications for their regions in consultation with the State Workforce Agencies (SWAs) within their region. The interaction of Regional Staff with local SWA staff over a period of years had created a shared level of expertise in reviewing employer applications for H-2B workers.

177. Comments submitted to DOL during the 2008 NPRM noted the effectiveness of the Philadelphia Regional Office in reviewing the wage and working conditions terms of applications for H-2B workers with that Region. ETA-2008-0002-0022 at p. 8. Those offices in conjunction with the SWAs also were able to evaluate what local publications might most effectively disseminate information about job opportunities, including whether Spanish language media should be required to be utilized for certain jobs. By mid-2005, those offices and their local expertise had been eliminated. The 2005 decision by the Secretary of Labor to eliminate those Regional offices role in the H-2B was arbitrary and capricious.

178. Under the existing regulations, SWAs are responsible for processing employer's application and job offer, which includes ensuring that the offered wage equals or exceeds the prevailing wage, that the applicant's need falls into one of the four categories for temporary need, supervising U.S. worker recruitment, and forwarding the completed applications to ETA for a final determination. In the new rule, DOL has eliminated the role of SWAs in accepting and reviewing H-2B labor certification applications. 73 Fed. Reg. 78034.

179. Data in the record before DOL established that the level of SWA activity in relationship to the H-2B program. See, ETA-2008-0002-0022, Attachment D. For example, the date for the Pennsylvania SWA reflected the following for federal FY07:

| WORK AREA | Total Wrks Requested | Total Workers Denied | % Workers Denied | FY07 Workers Certified | Number H-2b Cases | Nmbr Cases Certified | % Cases Certified | Cases Denied | Cases Partial Certified | Cases Remand to SWA |
|---|---|---|---|---|---|---|---|---|---|---|
| PENNSYLVANIA | 10,210 | 1,337 | 13.1% | 8,873 | 650 | 549 | 84.5% | 75 | 18 | 8 |

Other SWAs that processed applications for more than 10,000 H-2B workers during FY07 included the following:

| WORK AREA | Total Wrks Requested | Total Workers Denied | % Workers Denied | FY07 Workers Certified | Number H-2b Cases | Nmbr Cases Certified | % Cases Certified | Cases Denied | Cases Partial Certified | Cases Remand to SWA |
|---|---|---|---|---|---|---|---|---|---|---|
| TEXAS | 53,831 | 18,744 | 34.8% | 35,087 | 1,598 | 1,103 | 69.0% | 437 | 57 | 1 |
| LOUISIANA | 39,372 | 21,046 | 53.5% | 18,326 | 673 | 380 | 56.5% | 261 | 30 | 2 |
| FLORIDA | 31,893 | 8,307 | 26.0% | 23,586 | 1,333 | 953 | 71.5% | 323 | 49 | 8 |
| COLORADO | 19,584 | 3,951 | 20.2% | 15,633 | 803 | 608 | 75.7% | 173 | 20 | 2 |
| ALABAMA | 12,399 | 6,563 | 52.9% | 5,836 | 152 | 60 | 39.5% | 78 | 14 | |
| MARYLAND | 12,339 | 2,717 | 22.0% | 9,622 | 429 | 293 | 68.3% | 115 | 19 | 2 |
| MISSISSIPPI | 12,225 | 3,432 | 28.1% | 8,793 | 143 | 83 | 58.0% | 40 | 20 | |
| VIRGINIA | 11,889 | 1,789 | 15.0% | 10,100 | 514 | 367 | 71.4% | 112 | 34 | 1 |
| MISSOURI | 10,308 | 2,034 | 19.7% | 8,274 | 336 | 265 | 78.9% | 48 | 23 | |
| ARKANSAS | 10,116 | 2,669 | 26.4% | 7,447 | 114 | 66 | 57.9% | 26 | 18 | 4 |

See: ETA-2008-0002-0022, Attachment D.

180. The record before DOL reflects that numerous SWAs and other respondents to the NPRM submitted statements to DOL in opposition to the elimination of the role of the SWAs in reviewing H-2B applications submitted by employers. A preliminary review of the record before DOL in the NPRM indicates comments in opposition to the elimination of the role of SWAs as proposed by DOL were submitted by the following commentators:

| Document ID | Commenter |
|---|---|
| ETA-2008-0002-0009 | private citizen - BADGER, KEITH |
| ETA-2008-0002-0014 | Committee on Education and Labor - Miller, George Chair |

| Document ID | Commenter |
|---|---|
| ETA-2008-0002-0018 | Law Office of Michelle Skole retired from NJ Alien Certification - Skole, Michelle |
| ETA-2008-0002-0019 | State of Oregon Employment Department - Johnson, Andrew |
| ETA-2008-0002-0024 | Mount Washington Resort - Gruenfelder, Claire |
| ETA-2008-0002-0028 | Ohio Vicinity Regional Council of Carpenters - Galea, Mark |
| ETA-2008-0002-0029 | Arizona Department of Economic Security - Ufford, C. |
| ETA-2008-0002-0030 | Outdoor Amusement Business Association - Johnson, Robert |
| ETA-2008-0002-0035 | Virginia Employment Commission - Esser, Dolores |
| ETA-2008-0002-0037 | Federation of Employers and Workers of America (FEWA) - Evans, Scott |
| ETA-2008-0002-0038 | Vermont Department of Labor - Seckler, Cynthia |
| ETA-2008-0002-0039 | PA Department of Labor and Industry - Mead, Andrea |
| ETA-2008-0002-0041 | President/Save Small Business - Lavery, Hank (representative form letter, 41) |
| ETA-2008-0002-0045 | American Federation of State, County & Municipal Employees, (AFSCME) - Korpi, Kerry |
| ETA-2008-0002-0046 | Maine Department of Labor - Fortman, Laura A. |
| ETA-2008-0002-0047 | Sharp's Landscaping, Inc. - Sanborn, Tina |
| ETA-2008-0002-0048 | American Hotel & Lodging Association - McBurney, Shawn |
| ETA-2008-0002-0049 | Emory University - Eiesland, Terry |
| ETA-2008-0002-0050 | H-2B Workforce Coalition - McBurney, Shawn |
| ETA-2008-0002-0052 | International Union of Bricklayers & Allied Craftworkers - Flynn, John |
| ETA-2008-0002-0053 | University of Wisconsin-Madison - Ahlstedt, Deborah |
| ETA-2008-0002-0055 | Building and Construction Trades Department, AFL-CIO - Ayers, Mark |
| ETA-2008-0002-0058 | Massachusetts Executive Office of Labor and Workforce Development - James, Jennifer |
| ETA-2008-0002-0062 | Olathe Corn Company, LLC - Fishering, Nancy |
| ETA-2008-0002-0063 | Maryland Department of Labor, Licensing and Regulation - Perez, Thomas |
| ETA-2008-0002-0067 | U.S. Senate - Kennedy, Sen. Edward M. |
| ETA-2008-0002-0068 | private individual - Lang, Erik |
| ETA-2008-0002-0069 | California State Government Agency - Marquez, Jose Luis |
| ETA-2008-0002-0073 | Alliance of Forest Workers and Harvesters - Smith, Denise |
| ETA-2008-0002-0075 | National Employment Law Project - Smith, Rebecca |
| ETA-2008-0002-0076 | Oversight and Government Reform - Domestic Policy, Subcommittee |
| ETA-2008-0002-0077 | Beaver Run Resort and Conference Center - Brennan, Stephanie |
| ETA-2008-0002-0078 | State of Nevada, Department of Employment training and Rehabilitation - Jones, Cynthia |
| ETA-2008-0002-0083 | The Law Office of Robert Kershaw, P.C. - Kershaw, Robert |
| ETA-2008-0002-0084 | Amigos Labor Solutions - Wingfield, Bob |
| ETA-2008-0002-0088 | Low Wage Worker Legal Network and Other Co-Signers |
| ETA-2008-0002-0090 | Texas Workforce Commission |
| ETA-2008-0002-0091 | Laborers' International Union of North America |

181. DOL's final rule arbitrarily assumes that the only function which SWAs perform apart from referral of workers in response to local job orders is the ministerial calculation of required prevailing wage rates. The record before DOL reflected that SWAs have a broader role in the review of applications of applications submitted by prospective H-2B employers. In the

absence of effective DOL Regional office review of terms and conditions of employment apart from the calculation of wage rates, the SWAs have been forced to assume that role by default.

182. DOL's justification for eliminating SWAs from the H-2B application process is arbitrary, capricious, and contrary to law in that it elevates its "commit[ment] to modernizing the application process" over the statutory mandate that it protect the wages *and working conditions* of U.S. workers. 73 Fed. Reg. 78034.

183. DOL relied on past complaints that it has allegedly received from employers that the existing system is "complicated, time-consuming, inefficient, and dependent upon the expenditures of considerable resources by employers," 73 Fed. Reg. 78022, and arbitrarily ignored arguments by the commenters that eliminating the SWAs from the application and certification process "would result in the loss of local labor market and prevailing practice expertise in the review process. . . would increase the potential for fraud," and that "the knowledge and expertise of local staff in reviewing and processing applications was essential to the integrity of the H-2B certification process." 73 Fed. Reg. 78034. See also: ETA-2008-0002-0022 at pp 1-5 and Attachments A and B thereto (as to the scope of denial of H-2B employer applications); ETA-2008-0002-0088 at pp. 16-21.

184. DOL asserts that the elimination of SWAs is necessary because, "[t]he increasing workload of the Department and SWAs poses a growing challenge to the efficient and timely processing of applications," 73 Fed. Reg. 78022, but they provide no authority for this assertion. To the contrary, many of the SWAs that commented expressed their desire to continue processing and reviewing H-2B applications. See, e.g., ETA-2008-0002-0039 (Pennsylvania), ETA-0002-0040 (North Carolina), ETA-002-0063 (Maryland), ETA-0002-0078 (Nevada), ETA-0002-0090 (Texas), ETA-2008-0002-0019 (Oregon), ETA-2008-0002-0025

(Washington), ETA-2008-0002-0029 (Arizona), ETA-2008-0002-0038 (Vermont), and ETA-2008-0002-0046 (Maine). DOL's assumption that this change will help SWAs, despite the fact that all of the SWAs that commented on this issue were opposed to the change, is arbitrary and capricious.

**Definition of Full-time**

185. Under the prior regulations, employers have a dual obligation to prove that H-2B workers are not displacing U.S. workers and that H-2B workers are not "adversely affecting the wages and working conditions of United States workers." 8 CFR 214.2(h)(6). The Secretary of Labor must certify that these two requirements have been met. 8 CFR 214.2(h)(6)(iv)(1).

186. Since at least 1994, DOL has directed State Workforce Agencies not to accept, and DOL would not certify, Clearance Orders that do not provide for full-time employment. See General Administration Letter I-95 (November 10, 1994); Training and Employment Guidance Letter 21-06 (April 4, 2007); Training and Employment Guidance Letter 21-06, Change 1 (June 25, 2007).

187. In the preamble of its Notice of Proposed Rulemaking, DOL acknowledged that it has "always required that the positions offered be . . . *full-time* in nature." 73 Fed. Reg. at 29951 (emphasis added).

188. The definition of full-time which was published for Notice and Comment was "35 or more hours per week, except where a State or an established practice in an industry has developed a definition of full-time employment for any occupation that is less than 35 hours per week, that definition shall have precedence." Proposed 20 CFR 655.4. The proposed rule also specifically required that an employer establish a need for full-time employees, as part of the showing of temporary need. Proposed 20 CFR 655.6(a).

189. As the commentators on the proposed rule made clear, this proposal, which effectively shortened the length of time that DOL would consider full-time, would have adversely affected U.S. workers by making it substantially less likely that U.S. workers, who need full time employment, could compete for the jobs. At the same time, the proposal would allow employers access to foreign workers to fill less-than-full-time-jobs because the lower costs and standards of living in foreign countries make it easier for foreign workers to accept part-time jobs. See Comments of Low Wage Worker Legal Network, ETA-2008-0002-0088 (p. 27); former National Monitor Advocate Erik Lang, ETA-2008-0002-0068; Alliance of Forest Workers and Harvesters, ETA-2008-0002-0073; National Employment Law Project, ETA-2008-0002-0075 .

190. The Final Rule changes the proposed definition of full-time employment from 35 or more hours per week (with exceptions) to 30 hours or more per week (with exceptions). 20 CFR 655.22(h); 655.4. It no longer includes a requirement that an employer establish a need for full-time employees as part of the showing of temporary need. 20 CFR 655.6.

191. In the preamble to the Final Rule, DOL states that the definition of full-time "should not be construed to establish an actual obligation of the number of hours that must be guaranteed each week" and that "the parameters set forth in the definition of 'full-time' . . . are not a requirement that an employer offer a certain number of hours ..." 73 Fed. Reg. at 78024.

192. This new definition of full-time, coupled with the disclaimer that the employer does not even need to guarantee the 30 hour minimum, is a major, and wholly unexplained, change from the proposed rule and from the existing regulations

193. DOL has provided no empirical data, and no such data was submitted to DOL, to support its assertion that its new definition of full-time employment "reflects [its] experience in the administration of this program." 73 Fed. Reg. at 78038.

194. The definition of full-time as 30 hours per week is arbitrary, capricious and contrary to law in that it will materially adversely affect U.S. workers.

195. DOL's interpretation of the definition is also a major change from the existing interpretation, and represents a new policy. *See* Comments of Mid-Atlantic Solutions LLC, ETA-2008-0002-0071 (noting that some State Workforce Agencies have rejected applications offering fewer than 40 hours of work per week).

196. DOL's new interpretation of the full-time definition as not establishing a contractual obligation to actually provide a certain number of hours of work per week was not subject to notice and comment, as this interpretation did not appear in the proposed regulation when it was published in the Federal Register. See Notice of Proposed Rulemaking.

197. DOL has offered no basis for its interpretation of the full-time requirement as not establishing a contractual obligation.

**RECRUITMENT OF U.S. WORKERS**

198. The Secretary of Labor is required by law to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

**Historical Regulatory Requirements for H-2A Temporary Agricultural Employers**

199. On December 18, 2008, the Secretary of Labor promulgated drastically revised regulations for the H-2A program which would strip the program of many of its important

provisions. Those changes are being challenged in *United Farm Workers, et al. v. Chao*, United States District Court, District of Columbia, Case No. 1:09-cv-00062-RMU.

200. Prior to the December 18, 2008 changes to the H-2A program, the H-2A agricultural worker regulations required recruitment of U.S. workers for agricultural labor and to protect such U.S. workers from adverse impact have included requirements that:

(a) employers must recruit U.S. workers through both the interstate job clearance order process and through "positive recruitment," which is the active recruitment by the employer in areas of potential labor supply and in the area where the employer's establishment is located;

(b) U.S. workers who apply for work with an H-2A employer in the first half of the H-2A contract period must be hired if they are qualified and accept the DOL-approved job terms (this is the so-called "50 percent" rule);

(c) employers may not fire or refuse to hire a U.S. worker for other than a lawful job-related reason and may not discriminate against U.S. workers by providing wages or benefits to H-2A workers that the employer does not provide also to the U.S. workers;

(d) employers must abide by the terms of the job offer they have submitted and that have been approved by DOL, which become an enforceable work contract between the employer and the workers;

(e) employers must pay workers the highest of one of three DOL-mandated wages including an "adverse effect" wage rate;

(f) employers must provide workers with an opportunity to work at least three-fourths of the workdays in the season or must reimburse the workers (absent an Act

of God) (this is the so-called "3/4 guarantee");

(g) employers must provide free housing that meets substantive health and safety standards to H-2A workers and migrating U.S. workers;

(h) employers must reimburse inbound transportation costs for workers who work at least one-half of the season and provide return transportation costs for workers who work the entire season; and

(i) H-2A program employers may not discriminate against U.S. workers in hiring or job terms.

(j) Employers must comply with all federal, state and local laws including the Fair Labor Standards Act.

201. Under the previously established regulations for H-2A employers, recruitment efforts for U.S. workers are required to be "no less than (1) the recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers." 20 CFR 655.105(a).

202. Each employer who intends to hire H-2A workers have been required to prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). Those regulations required employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id.

§655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

203. In addition to the requirements of the individualized recruitment plans, all H-2A employers have been required to:

a. Assist the ES in preparing job orders for posting locally and in the interstate system, *Id.* §655.103(d)(1);

b. Place advertisements (in a language other than English, where the OFLC Administrator deemed appropriate) for the job opportunities in newspapers of general circulation and/or on the radio, as required by the OFLC Administrator, *Id.* §655.103(d)(2);

c. Contact labor contractors, migrant workers, and other potential workers in other areas by letter and/or telephone, *Id.* §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

204. The OFLC Administrator, in evaluating H-2A applications and determining whether a labor shortage exists, will "ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind of recruitment efforts which the potential H-2A worker made to obtain H-2A workers" in order to ensure that the effort to recruit non-H-2A employees reflects an equal or greater effort. Id. §655.105(a). The OFLC is also directed to

"provide overall direction to the employer and the SWA with respect to the recruitment of U.S. workers." Id. §655.105(b).

205. Each employer who intends to hire H-2A workers must prepare a written "positive recruitment plan" that provides both "a description of recruitment efforts (if any) made prior to the actual submittal of the application," and a description of how "the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment." Id. §655.102(d). The plan must also describe how the employer will utilize farm labor contractors where it is the prevailing practice to do so. See Id. The prior regulations require employers to take whatever specific actions are prescribed by the OFLC Administrator and to cooperate with the Employment Services ("ES") System in actively recruiting U.S. workers. Id. §655.103(d). The ES System comprises federal and state entities responsible for administration of the H-2A program, including SWAs, the DOL's Employment and Training Administration, which includes two National Processing Centers ("NPCs") and the DOL's Office of Foreign Labor Certification ("OFLC"). Id. §655.100.

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c. Contact farm labor contractors, migrant workers, and other potential workers in

other areas by letter and/or telephone, *Id.* §655.103(d)(3); and

d. Contact schools, business and labor organizations, fraternal and veterans' organizations, and nonprofit organizations and public agencies throughout the area of intended employment and in other potential labor supply areas in order to enlist them in helping to find U.S. workers, *Id.* §655.103(d)(4).

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**Requirements for Recruitment of U.S. Workers for H-2B Positions**

208. The May 2008 NPRM was the first occasion since the inception of the H-2B program in 1986 in which DOL and the Secretary of Labor sought input through notice and comment on the appropriateness of measures to be required from employers for the recruitment of H-2B temporary workers.

209. The existing procedures for recruitment of U.S. workers for the H-2B program have never paralleled procedures for recruitment of H-2A workers and the limited extent of recruitment requirements under the existing H-2B procedures have not been adequate to meet the responsibilities of the Secretary of Labor pursuant to 8 U.S.C. §1182(a)(5)(A)(i).

210. DOL's December 19, 2008 provisions for recruitment of H-2B workers do nothing to overcome the historical failure of the Secretary of Labor to have met requirements of

law for insuring that U.S. workers have access to job opportunities with H-2B employers. The new regulations provide as to recruitment as follows:

> Sec. 655.15 Required pre-filing recruitment.
>
> * * *
>
> (d) Recruitment Steps. An employer filing an application must:
>
> (1) Obtain a prevailing wage determination from the NPC in accordance with procedures in Sec. 655.10;
>
> (2) Submit a job order to the SWA serving the area of intended employment;
>
> (3) Publish two print advertisements (one of which must be on a Sunday, except as provided in paragraph (f)(4) of this section); and
>
> (4) Where the employer is a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application, the employer must formally contact the local union that is party to the collective bargaining agreement as a recruitment source for able, willing, qualified, and available U.S. workers.
>
> (e) Job Order.
>
> (1) The employer must place an active job order with the SWA serving the area of intended employment no more than 120 calendar days before the employer's date of need for H-2B workers, identifying it as a job order to be placed in connection with a future application for H-2B workers. Unless otherwise directed by the CO, the SWA must keep the job order open for a period of not less than 10 calendar days. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the text of the job order and the start and end dates of posting. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work has been identified to begin. Upon placing a job order, the SWA receiving the job order under this paragraph shall promptly transmit, on behalf of the employer, a copy of the active job order to all States listed in the application as anticipated worksites.
>
> (2) The job order submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in Sec. 655.17.
>
> (f) Newspaper Advertisements.
>
> (1) During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, the employer must publish an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday advertisement (except as provided in paragraph (f)(2) of this section), in a newspaper of general circulation serving the area of intended

employment that has a reasonable distribution and is appropriate to the occupation and the workers likely to apply for the job opportunity. Both newspaper advertisements must be published only after the job order is placed for active recruitment by the SWA.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer must, in place of a Sunday edition advertisement, advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements contained in Sec. 655.17. The employer must maintain copies of newspaper pages (with date of publication and full copy of advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If a professional, trade or ethnic publication is more appropriate for the occupation and the workers likely to apply for the job opportunity than a general circulation newspaper, and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, then the employer may use a professional, trade or ethnic publication in place of one of the newspaper advertisements, but may not replace the Sunday advertisement (or the substitute permitted by paragraph (f)(2) of this section).

(g) Labor Organizations. During the period of time that the job order is being circulated for intrastate clearance by the SWA under paragraph (e) of this section, an employer that is already a party to a collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application must formally contact by U.S. Mail or other effective means the local union that is party to the collective bargaining agreement. An employer governed by this paragraph must maintain dated logs demonstrating that such organizations were contacted and notified of the position openings and whether they referred qualified U.S. worker(s), including number of referrals, or were non-responsive to the employer's request.

(h) Layoff. If there has been a layoff of U.S. workers by the applicant employer in the occupation in the area of intended employment within 120 days of the first date on which an H-2B worker is needed as indicated on the submitted Application for Temporary Employment Certification, the employer must document it has notified or will notify each laid-off worker of the job opportunity involved in the application and has considered or will consider each laid-off worker who expresses interest in the opportunity, and the result of the notification and consideration.

(i) Referral of U.S. workers. SWAs may only refer for employment individuals for whom they have verified identity and employment authorization through the process for employment verification of all workers that is established by INA sec. 274A(b). SWAs must provide documentation certifying the employment verification that satisfies the standards of INA sec. 274A(a)(5) and its implementing regulations at 8 CFR 274a.6.

(j) Recruitment Report.

> (1) No fewer than 2 calendar days after the last date on which the job order was posted and no fewer than 5 calendar days after the date on which the last newspaper or journal advertisement appeared, the employer must prepare, sign, and date a written recruitment report. The employer may not submit the H-2B application until the recruitment report is completed. The recruitment report must be submitted to the NPC with the application. The employer must retain a copy of the recruitment report for a period of 3 years.
>
> (2) The recruitment report must:
>
> (i) Identify each recruitment source by name;
>
> (ii) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker, including any applicable laid-off workers;
>
> (iii) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied or were referred to the position.
>
> (3) The employer must retain resumes (if available) of, and evidence of contact with (which may be in the form of an attestation), each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact must be retained along with the recruitment report for a period of no less than 3 years, and must be provided in response to an RFI or in the event of an audit or an investigation.

73 Fed. Reg. at 78057-78058

211. In its December 19, 2008 preamble to the adoption of the proposed regulations, DOL acknowledged that it had received comments opposing its proposed system for recruitment of U.S. workers by prospective H-2B employers. DOL acknowledged:

> The Department received a number of comments about the proposed timeframe for pre-filing recruitment; some opposing recruitment so far in advance of the date of need and others suggesting the timeframe be lengthened. The commenters who were opposed to the proposal generally believed that U.S. workers would not be able or willing to commit to temporary jobs so far ahead of the actual start date or would indicate they would accept the jobs but then fail to report on the actual start date. These commenters believed this would result in delays, additional costs to employers and the Department, and the late arrival of H-2B workers because new applications would have to be filed. One commenter opposed the early pre-filing recruitment and believed the result would be a false indication that no U.S. workers were available. Another commenter opined that employer compliance would be reduced due to the pre-filing recruitment. One SWA recommended that the period for recruitment be shortened because 120 days in advance is not suitable when serious job seekers are looking for temporary employment and stating their view that those U.S. workers who apply are rarely offered employment because the employer knows foreign workers are available. The commenter was further

> concerned that the U.S. workers who are hired that far in advance of the date of need are not reliable and will not report for work.

73 Fed. Reg. at 78031-78032

212. DOL arbitrarily failed without good cause to discuss or examine proposals for more effective recruitment of H-2B workers, including proposals that it:

> Require More Extensive Recruitment. In the H-2A program, employers are required to engage in the kinds of affirmative strategies that would be expected actually to locate and attract employees to the work. H-2B employers need only run three newspaper ads and list the job with the local SWA for ten days, many weeks before the job will actually become available.
>
> Require Recruitment in Areas of Labor Surplus. With U.S. unemployment rates rising in many parts of the country, efforts should be made to connect U.S. workers with job opportunities through interstate recruitment. This has been a staple of the H-2A program for many years.
>
> Require Employers to Provide Free Housing and Reimbursement of Transportation Expenses. Again, this is a requirement in agriculture.
>
> Adoption of the "50 % Rule." The Department has found that requiring employers to hire qualified U.S. workers who become available at any time up to 50% of the period of the job opportunity helps to locate available U.S. workers, and serves as an incentive to avoid over-recruitment of foreign workers and wrongful rejection of U.S. workers.

See, ETA-2008-0002-0088 at pages 27-32, and 64.

**Impact of Requirements for SWAs to Complete I-9 Before Referral of Workers**

213. DOL acknowledged considerable criticism by State Workforce Agencies (SWAs) of the new regulatory provision requiring that SWA staff would have to complete I-9 verifications of the employment status of U.S. workers before referring such workers to jobs with employers seeking H-2B workers. See 73 Fed. Reg. at 78033. DOL also failed to acknowledge statements of Congressional opposition to this proposal. ETA-2008-0002-0067. Opposition to this rule included comments from the following states:

| Document ID | Commenter |
|---|---|
| ETA-2008-0002-0029 | Arizona |
| ETA-2008-0002-0069 | California |
| ETA-2008-0002-0046 | Maine |
| ETA-2008-0002-0063 | Maryland |
| ETA-2008-0002-0058 | Massachusetts |
| ETA-2008-0002-0078 | Nevada |
| ETA-2008-0002-0040 | North Carolina |
| ETA-2008-0002-0019 | Oregon |
| ETA-2008-0002-0039 | Pennsylvania |
| ETA-2008-0002-0090 | Texas |
| ETA-2008-0002-0035 | Virginia |
| ETA-2008-0002-0025 | Washington |

214. At least some of the SWAs comments raise issues as to the legality of requiring SWAs to complete I-9's before referral of prospective U.S. workers to positions for which employers seek to bring I-9's. These included the potential that SWAs could be liable for discrimination in the application of such requirements only to certain referrals as well as the impact of other laws on such requirements. Amongst the states raising concerns about the legal appropriateness of requiring them to complete I-9's or e-verify employment was the Pennsylvania Department of Labor and Industry.

215. DOL arbitrarily failed to consider the adverse impact of such a rule on U.S. workers seeking employment and the Secretary of Labor's obligation to establish effective procedures to "determine and certify" that there are not sufficient workers who are able, willing, qualified and available to perform labor for which foreign temporary non-agricultural H-2B workers are requested.

216. Instead of requiring employers to widely disseminate information about potential H-2B jobs, DOL arbitrarily, capriciously, and contrary to law removed a requirement which had been in the NPRM for employers to notify unions in areas of employment about H-2B positions. See 73 Fed. Reg. 78032-78033.

217. The final regulations arbitrarily, capriciously, and contrary to law fail to require employers seeking to utilize H-2B workers to actively recruit able, willing and qualified workers to jobs for which foreign temporary non-agricultural H-2B workers are requested.

**Attestation Provisions**

218. In the new regulations, DOL replaces the existing pre-hiring certification process required by regulation with a process based entirely on attestation. In so doing, DOL has transformed the process from one requiring meaningful review and approval by DOL to a *post hoc* system that dramatically weakens DOL oversight of the H-2B program. 73 Fed Reg. 78060 and 780540 (codified at 20 C.F.R. 655.22 and 20 C.F.R. 655.24) This proposed transformation is arbitrary and capricious.

219. An attestation system does not comply with the DOL's statutory and regulatory mandate that it certify compliance with H-2B requirements. Congress has stated that labor certification is required for workers entering the U.S. to perform unskilled labor. "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that . . .there are not sufficient workers who are able willing, qualified. . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and . . .the employment of such alien will not adversely affect the wages and working conditions in the United States similarly employed." 8 U.S.C. 1182(a)(5)(A)(i) (emphasis added).

220. Other regulations specifically require certification and not attestation. 8 C.F.R. §214.2(h)(ii)(D) ("An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed

persons capable of performing such service or labor cannot be found in this country. . .This classification requires a temporary labor *certification* issued by the Secretary of Labor or the Governor of Guam, or a notice from one of these individuals that such a certification cannot be made, prior to the filing of a petition with the Service.") (emphasis added).

221. DOL failed to consider substantial empirical evidence that the certification process had, in fact, resulted in the denial of a substantial number of H-2B applications which likely would be inappropriately approved under an attestation system. Analysis of data for FY07 that establishes that DOL denied certification of 105,532 positions which was 29.3% of the number of workers sought in employer applications for H-2B workers. See ETA-2008-0002-0022 at pp. 1-5 and Attachment A .

222. Significantly, under an attestation system, the Department will no longer review the recruitment system utilized by employers to ensure that there actually are no U.S. workers available to do the work prior to approving the applications for H-2B workers. 73 Fed Reg. 78057 (codified at 20 C.F.R. 655.15).

223. DOL failed to explain how a post hoc attestation system is consistent with its legal obligations to protect U.S. workers. In fact, empirical evidence submitted to DOL clearly demonstrated that under the former certification regime, DOL did reject a large number of applications for H-2B certification. Under an attestation system, those employers would simply be approved by DOL, causing potentially enormous adverse effect to wages and working conditions of U.S. workers.

224. The arbitrariness of the DOL final rule in assuming that it can effectively satisfy its duties to determine and certify that there is a need for H-2B workers solely on the basis of employer attestations is demonstrated by the recent annual report of the DOL Office of Inspector

General which was in the record before DOL pursuant to its NPRM. See, ETA-2008-0002-0088, Attachment A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The OIG annual report makes a legislative recommendation in relationship to the H-1B program, "Provide Authority to Ensure the Integrity of the Foreign Labor Certification Process." *Id* at p. 39. That recommendation states:

> "If DOL is to have a meaningful role in the H-1B specialty occupations foreign labor certification process, it must have the statutory authority to ensure the integrity of that process, including the ability to verify the accuracy of information provided on labor condition applications. Currently, DOL is statutorily required to certify such applications unless it determines them to be "incomplete or obviously inaccurate." Our concern with the Department's limited ability to ensure the integrity of the certification process is heightened by the results of OIG analysis and investigations that show the program is susceptible to significant fraud and abuse, particularly by employers and attorneys. The OIG also recommends that ETA should seek the authority to bar employers and others who submit fraudulent applications to the foreign labor certification program."

*Id* at 39. See, ETA-2008-0002-0088.

**DOL'S FINAL RULE PROVISIONS AS TO TRAVEL, VISA AND PASSPORT EXPENSES WERE ADOPTED IN VIOLATION OF THE APA**

225. DOL's adoption of 20 C.F.R. § 655.22(g)(2) regarding reimbursement of travel costs, such as visa and passport expenses, is significantly different from the rule proposed by DOL in the NPRM and was not properly subject to notice and comment.

226. The rule which was published for notice and comment would require employer's seeking H-2B certification to attest to the following:

> (h) The offered wage is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage. **For purposes of this provision, the offered wage shall be held to excluded any deductions for reimbursement of the employer or any third party by the employee for expenses in connection with obtaining or maintaining the H-2B employment, including, but not limited to international recruitment, legal fees not otherwise prohibited by this section, visa fees,** items such as tools of the trade, and other items not expressly permitted by law.

. . .

> (l) The employer has not sought or received payment of any kind for any activity related to obtaining the labor certification, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in recruiting the foreign worker or in preparing or filing the application, from the employee or any other party. For purposes of this paragraph (l), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

Proposed 20 C.F.R. § 655.22(h), (1), 73 Fed. Reg. 29942 (emphasis added).

227. The final rule eliminates the sentence about deductions related to H-2B employment and adds a new and contradictory sentence. The final rule requires employers seeking H-2B certification to attest that:

> (g)(1) The offered wage is not based on commissions, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, biweekly, or monthly basis that equals or exceeds the prevailing wage, or the legal Federal, State, or local minimum wage, whichever is highest. The employer must make all deductions from the worker's paycheck that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.
>
> (2) The employer has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees, except as provided for in DHS regulations at 8 CFR 214.2(h)(5)(xi)(A). **This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees.**

20 C.F.R. § 655.22(g) (emphasis added).

228. Because the proposed rule did not include the language about transportation costs, such as visa and passport fees, being the responsibility of the worker, interested parties were not on notice that DOL may add that provision and they were not given an opportunity to comment. The only mention of such costs in the proposed rule suggested that employers could not receive reimbursement for those costs.

229. DOL did not provide a reasonable explanation for eliminating the language in the proposed rule and replacing it with drastically different language. DOL did not provide any rationale for this change and it did not cite to any comments supporting the change.

230. DOL's characterization of transportation costs, such as visa and passport fees, as the responsibility of the worker in 20 C.F.R. § 655.22(g) is a radical departure from DOL's long-held position and from a substantial body of case law. See: *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), (holding that growers violated the minimum wage provisions of the FLSA by failing to reimburse farmworkers during their first workweek for travel expenses and visa and immigration fees paid by the workers employed by the growers under the H-2A program.); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *De Leon-Granados v. Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Castellanos-Contreras v. Decatur Hotels, LLC*, 488 F. Supp. 2d 565 (E.D. La. 2007); *Recinos-Recinos v. Express Forestry Inc.,* 2006 WL 197030 (E.D. La. Jan. 24, 2006).

## DHS'S FINAL RULEMAKING WAS ARBITRARY, CAPRICIOUS AND VIOLATES APA

**DHS 2008 Regulatory Action**

231. Defendants Secretary of Homeland Security and DHS and issued a Notice of Proposed Rulemaking, publishing proposed rules on Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers on August 20, 2008, with a Notice and Comment period ending September 19, 2008. 73 Fed. Reg. 49109-49122.

232. One hundred nineteen individuals and organizations submitted comments.

233. The record before the agency of comments and actions related to that proposed rulemaking has been posted under USCIS-2007-0058 Docket at: http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=USCIS-2007-0058.

234. On December 19, 2009, USDHS issued its final rule entitled Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78104-78130. The rule goes into effect on January 18, 2009.

235. The final DHS regulations are arbitrary and capricious and were adopted in violation of the APA. While DHS states that its intention is to protect workers from economic hardship and unscrupulous employer and recruiter practices, the new regulations 1) penalize H-2B workers who have been victimized by these practices by providing for the termination of employment for workers who have been made to pay improper fees, and 2) allow employers to pass off fees and possibly avoid reimbursement, including visa and transportation costs. These regulation provisions contravene DHS' stated purpose and fail to rectify the unscrupulous recruitment practices that the regulations were purportedly designed to prevent.

**DHS Failed to Require Reimbursement of Improper Fees and Provides for an Arbitrary and Capricious Revocation Remedy**

236. In its Notice of Proposed Rulemaking, DHS stated that fees charged by unscrupulous employers and recruiters result in "economic hardship" to and the "effective indenture" of H-2B workers. 73 Fed. Reg. at 49112. DHS claimed that its purpose in promulgating the new regulations is to protect workers from these abuses, and to prevent H-2B workers from incurring "any expenses or debt in connection with obtaining employment in the United States." Id. at 49113 (emphasis added). In adopting its final regulations, DHS also stated that the regulations are intended to "provide further protections to H-2B workers against

unscrupulous recruiter practices" and to encourage the reporting of "post-filing wrongdoing by labor recruiters." Id. at 78113.

237. Despite recognizing and purportedly attempting to prevent the imposition on H-2B workers of fees associated with their employment in the United States, the new DHS regulations arbitrarily and unfairly allow H-2B workers to be charged for visa and transportation costs. The DHS regulations provide that:

> As a condition of approval of an H-2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H-2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees). 8 C.F.R. 214.2 (h)(6)(i)(B).

238. This exception to the prohibition on fees that an H-2B worker may be required to pay arbitrarily and capriciously contravenes DHS' stated purpose in promulgating this regulation.

239. Further, DHS fails to explain adequately its adoption of this exception, which constitutes a drastic deviation from substantial case law clearly holding that these costs should not properly be borne by the H-2B worker.

240. Despite DHS' stated purpose of protecting H-2B workers, the regulations proposed and adopted by DHS result in further economic hardship to workers by providing that H-2B petitions will be revoked where it is discovered that the workers paid unauthorized fees, a remedy that will often result in the worker's loss of employment and will leave the worker to face possible deportation. The regulations provide for reimbursement of the H-2B workers for

unauthorized fees only as an alternative remedy to be selected at the employer's discretion. The regulations provide:

> If USCIS determines that the petitioner has collected, or entered into an agreement to collect, [unauthorized] fee[s] or compensation, the H-2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary. 8 C.F.R. § 214.2(h)(6)(i)(B)(1).

241. DHS acknowledged that "[f]orty-seven out of 57 commenters" who commented opposed the revocation scheme. 73 Fed. Reg. at 78112. Commenters opposing the revocation scheme included observations that "the proposed rule will likely punish the affected workers far more than the unscrupulous recruiters," (DHS comments at 525) and, similarly, that the "petition revocation system will punish H-2B workers for their US employer's bad behavior." (DHS Comments at 400).

242. DHS arbitrarily and capriciously adopted this proposed rule as a final rule without addressing the concerns raised by commenters who opposed implementation of the revocation remedy, and failed to explain adequately its reasoning for maintaining revocation of petitions as the penalty for improper fees.

243. The revocation remedy adopted by DHS contravenes DHS' stated purpose of protecting H-2B workers from unscrupulous recruitment practices by failing to require that workers be reimbursed for improper fees.

244. Further, the revocation remedy contravenes DHS' stated purpose of encouraging the reporting of recruitment violations. Workers who have been victimized by recruitment abuses are the most likely to report those abuses. Nonetheless, by providing for the revocation of H-2B petitions where these abuses are discovered, the new regulations provide a strong

disincentive for workers to come forward and report unlawful fees, as reporting these violations will likely result in their loss of employment and attendant right to live and work in the United States.

245. Additionally, DHS failed to explain its adoption of a more restrictive reimbursement requirement, which significantly deviated from the proposed rule. DHS' proposed rule required "Reimbursement [of unauthorized fees] as a condition to approval of future H-2B petitions" filed by an employer. Proposed 8 C.F.R. § 214.2(h)(6)(i)(B)(3). See 73 Fed. Reg. at 49120. DHS' final regulations require that employers attempt to reimburse workers for improper fees only as a condition for approval of H-2B petitions filed within one year after revocation of a previously filed H-2B petition" pursuant to the revocation remedy provided by the new regulations. 8 C.F.R. § 214.2(h)(6)(i)(D). DHS' failure to provide any reason for this change from the proposed regulation is arbitrary and capricious and further contravenes DHS' stated purpose of protecting H-2B workers who have been victimized by unscrupulous recruitment practices.

## DEFINITIONS ADOPTED IN DHS AND DOL FINAL RULEMAKING ARE ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

246. The DOL and DHS regulations arbitrarily, capriciously, and without adequate justification change definitions of terms relating to the administration of the H-2B program in ways that are serious and consequential and, contrary to law, are likely to result in an adverse effect on wages, working conditions, or employment opportunities for U.S. workers.

**Definition of Temporary**

247. Current DHS regulations define temporary need in relationship to H-2B employment as follows:

8 CFR 214.2(h)(6)(ii) Temporary services or labor —

> (A) Definition. Temporary services or labor under the H–2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
>
> (B) Nature of petitioner's need. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:
>
> > ( 1 ) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
> >
> > ( 2 ) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
> >
> > ( 3 ) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.
> >
> > ( 4 ) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

248. Available evidence in response to the DOL and DHS NPRMs indicated that a high number of applications for temporary H-2B labor certifications are likely denied because of a determination that such positions are not temporary. See, ETA-2008-0002-0022 at pp. 1-5, Attachments A and B (analyzing by occupational code those jobs for which certification was denied); ETA-2008-0002-0088 at pp. 17-19, 24-27).

249. Both the May 2008 DOL NPRM and the August 2008 DHS NPRM proposed to significantly change this definition so as to permit a "one-time" occurrence to include "temporary" employment of up to three years.

250. In the December 19, 2008 preamble to the DOL regulations, DOL states that:

> … the Department will consider a position to be temporary as long as the employer's need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need--as demonstrated by the employer's attestations, temporary need narrative, and other relevant information--is less than 3 consecutive years.

73 Fed. Reg. at 78025-78026.

251. DOL accomplishes this by reference to the December 19, 2008 change to 8 CFR 214.2(h)(6)(ii) in the new DHS regulations.

252. Defendant DHS substantially changes the definition of 8 CFR 214.2(h)(6)(ii)(B) to provide:

> (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a onetime occurrence, a seasonal need, a peak load need, or an intermittent need.

73 Fed. Reg. 78104 at 78129.

253. In conjunction with the creation of a new definition in the revised DOL regulations definitions of a "job contractor" (discussed below), the new definition of "temporary" is arbitrary, capricious and contrary to law.

**Definitions of Job Contractor and Employ**

254. The definitions section of the DOL regulations at 20 CFR 655.4 as published on December 19, 2008 add a provision for a "Job Contractor" defined as follows:

> Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and who contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.

73 Fed. Reg. at 78054.

255. The record before DOL reflected that such labor brokers have been identified by the DOL Office of Inspector General as a source of potential serious abuse. ETA-2008-0002-0088, Exhibit A, Office of Inspector General - U.S. Department of Labor, Semiannual Report to Congress, October 1, 2007–March 31, 2008, available at: http://www.oig.dol.gov/SAR-59-FINAL.pdf. The introduction to that report notes:

> "OIG investigations revealed that the foreign labor certification process continues to be compromised by unscrupulous attorneys, labor brokers, employers, and others."

The reports summary of significant concerns noted:

> "… defendants also took advantage of the devastation caused by Hurricane Katrina by fraudulently obtaining certification from the Department for nearly 250 H-2B temporary foreign workers, purportedly on behalf of four New Orleans hotels. We will continue to aggressively pursue those who seek to defraud the Department's foreign labor certification programs."

*Id* at p. 4. The same OIG annual report has an article "Conspirators of Florida Labor Leasing Company Sentenced to Pay $1 Million" discussing DOL OIG joint investigation with DOS Diplomatic Security Service (DSS) and the U.S. Immigration and Customs Enforcement (ICE). *United States v. Anna Czerwien* and *United States v. Aleksander Berman et al.* (N.D. Florida). See also, I*d* at p. 24. See, ETA-2008-0002-0088, Exhibit A.

256. By adopting its definition of a labor broker as eligible to apply for H-2B temporary foreign workers, DOL arbitrarily and capriciously authorizes "job contractors" to obtain H-2A visas in direct violation of its statutory mandate to protect U.S. workers.

257. As structured by the new regulations, there is no guarantee that the employer with whom the job contractor will place workers has any obligation to abide by the regulatory controls designed to protect U.S. workers' wages and working conditions. Nor is there any mechanism to evaluate the employer's statement that the job contractor's workers will not displace U.S. workers. See 73 Fed. Reg. at 78042.

258. The DOL regulations are contrary to law in that they reflect a narrow restriction on "displacing" current U.S. workers rather than a broad commitment to positive recruitment of U.S. workers for all positions for which employers seek H-2B workers.

259. The DOL regulations arbitrarily fail to bind the "employer" to whom the "job contactor" supplies workers as a joint employer through usage of a narrow common law definition of "employee" rather than a broader protective definition such as used by the FLSA.

260. The DOL regulation at 20 CFR 655.4 of "employee" states:

> Employee means employee as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

73 Fed. Reg. at 78054.

261. DOL arbitrarily and without justification specifically declined to include a broader definition "employ" which would more adequately operate to protect U.S. workers against job brokers and others claiming to need temporary H-2B workers without regard to the recruitment efforts of the joint employer to whom the workers are assigned. See. 73 Fed. Reg. at 78024.

262. DOL further arbitrarily defined "agent" for an H-2B employer in order to permit persons to file H-2B applications for employers without any licensing or other qualifications for

such persons. Doing so despite a demonstrated history of abuse by many such agents is arbitrary and capricious and contrary to law. See, ETA-2008-0002-0088, Exhibit A. See also, ETA-2008-0002-0074 at pp. 5-8 reflecting comments of American Immigration Lawyers Association (AILA).

263. The actions of DOL and DHS as described above are arbitrary and capricious and contrary to law.

## CAUSES OF ACTION

### FIRST COUNT
### VIOLATION BY DOL DEFENDANTS OF 5 U.S.C. §706(2)

264. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

265. The actions by the DOL Defendants as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

266. The actions of the DOL Defendants as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

### SECOND COUNT
### VIOLATION BY DEFENDANTS SECRETARY OF HOMELAND SECURITY AND DHS OF 5 U.S.C. §706(2)

267. Plaintiffs re-allege and incorporate by reference all preceding paragraphs of this Complaint as though fully set forth herein.

268. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are in violation of the Administrative Procedure Act in violation of 5 U.S.C. §706(2).

269. The actions by the Defendants Secretary of Homeland Security and DHS as set forth above are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in accordance with 5 U.S.C. §706(2)(a).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Enter a declaratory judgment that prevailing wage policies, determinations and rules adopted by DOL for H-2B workers effective March 2005 and thereafter were legislative rules adopted without a proper opportunity for notice and comment and are arbitrary, capricious, and contrary to law and therefore null and void;

(b) Enter a declaratory judgment that the final policy declaration interpreting the Fair Labor Standards Act, 29 U.S.C. §203(m) announced in 73 Fed. Reg. at 78039–78041, 78059 and 73 Fed. Reg. at 77148-77151 is arbitrary, capricious, and contrary to law and therefore null and void;

(c) Enter a declaratory judgment that the Final Rule promulgated by DOL effective January 18, 2009 is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

(d) Enter a declaratory judgment that the Final Rule promulgated by DHS effective January 18, 2009, is invalid as challenged herein under the Administrative Procedure Act and therefore null and void;

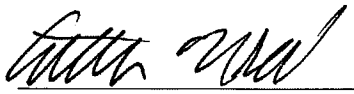
(e) Permanently enjoin the Secretary of Labor and the Secretary of Homeland Security, and the Department of Homeland Security and the Department of Labor from implementing the Final Rules as challenged herein;

(f) Award Plaintiffs their costs and expenses, including reasonable attorney's fees and expert witness fees; and

(a) Grant such further and additional relief as this Court may deem just and proper.

Dated: August 17, 2009

Respectfully submitted,



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