

**Table of Contents**  
**Interim Prevailing Wage Policy**  
**for**  
**Nonagricultural Immigration Programs**

| <u>Item</u>   | <u>Page</u> |
|---|-------------|
| I. Background . . . . .   | 1           |
| II. Labor Certification, Labor Condition Application,<br>and Student Attestation Programs . . . . . | 1           |
| A. General Prevailing Wage Policy . . . . .   | 1           |
| 1. Regulatory Requirements . . . . .  | 1           |
| 2. Nature of the Job . . . . .  | 3           |
| 3. Determining Similar Levels of Skills . . . . .   | 4           |
| 4. Jobs Outside Area of Intended Employment. . . . .  | 4           |
| 5. Separate Wage Systems. . . . .   | 4           |
| 6. Skill Levels in Wage Determinations . . . . .  | 5           |
| a. Entry Level . . . . .  | 5           |
| b. Experienced Level . . . . .  | 6           |
| 7. Response to Requests for Wage<br>Determinations . . . . .  | 6           |
| 8. Documentation Issues in Responding to<br>Prevailing Wage Requests . . . . .                      | 7           |
| B. Published Wage Surveys . . . . .   | 8           |
| C. SESA Conducted Prevailing Wage Surveys . . . . .   | 9           |
| 1. Procedures and Methodology . . . . .   | 9           |
| 2. Length of Time Survey Results are Valid . . . . .  | 10          |
| D. Davis Bacon Act, Service Contract Act<br>Applicability . . . . .                                 | 10          |
| E. Challenges to Prevailing Wage Determinations . . . . .   | 10          |

|      |   |    |
|------|---|----|
| III. | H-1A Nursing Program . . . . .                                    | 11 |
| A.   | Prevailing Wage Determinations--Regulatory Requirements . . . . . | 11 |
| B.   | SESA Conducted Surveys and Published Surveys . . . . .            | 12 |
| C.   | Challenges to SESA Prevailing Wage Determinations . . . . .       | 12 |

**Interim Prevailing Wage Policy**  
**for**  
**Nonagricultural Immigration Programs**

**I. BACKGROUND**

Recent experience of the Department of Labor in administering its programmatic and enforcement responsibilities under the H-1A, H-1B and F-1 student attestation programs indicates that additional policy clarification and procedural guidance is needed to ensure consistency among State Employment Security Agencies (SESAs) in conducting prevailing wage surveys and making wage determinations based on published surveys. This instruction supplements and, in some cases, supersedes prevailing wage policy contained in Technical Assistance Guide No. 656.

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-1A 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-1A 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 arriving at prevailing wage determinations for the H-1A nursing program, on the other hand, the regulations specifically provide that such factors as the type of facility; e.g., acute care or long-term care, and working condition, e.g., shift, day of week, specialty area, are to be taken into account in arriving at a prevailing wage determination.

**II. LABOR CERTIFICATION, LABOR CONDITION APPLICATION, AND STUDENT ATTESTATION PROGRAMS**

A. General Prevailing Wage Policy

1. Regulatory Requirements

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 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 under the H-1A nursing program.

However, SESAs and employers should be aware that the Department's enforcement policy does not allow a 5 percent variance if back wages are assessed as a result of an investigation conducted of an H-1B or F-1 student employer. In the H-1B and F-1 programs, the required wage rate is the higher of either the actual wage or prevailing wage. Where the required wage is the prevailing wage and the employer pays a rate that is no less than 95 percent of the prevailing rate, no violation will be found. However, if the employer is found to have paid less than 95 percent of the prevailing wage, a violation will be cited and back wages will be assessed and due based on 100 percent, not 95 percent, of the prevailing rate. The 5 percent variance does not apply where the required rate is the actual wage.

Section 656.40 defines "similarly employed" as 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" 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.

A clear understanding of the definition of "area of intended employment" is necessary to properly implement the regulation at 20 CFR 656.40. The definition of "area of intended employment" at 20 CFR 656.2 states that the:

*Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within the normal commuting distance of the place of intended employment.

A determination of the normal commuting distance is not necessary for places of employment within an MSA since any place within an MSA is deemed to be within normal commuting distance. Although not specifically mentioned in the definition of "area of intended employment", any place within a Primary Metropolitan Statistical Area (PMSA) is also deemed to be within normal commuting distance of the place of intended employment, since PMSAs are derived from the largest MSAs. For prevailing wage purposes, commuting distance will not be extended to Consolidated Metropolitan Statistical Areas. If the place of employment is not within the boundaries of an MSA or a PMSA, a determination as to the normal commuting distance must be made based on the SESA's knowledge of commuting practices in the area.

The same wage for the same occupation should be used for every location within the MSA or PMSA. Where the MSA or PMSA is in more than one State, SESA staff should coordinate their prevailing wage activities to assure that each jurisdiction in the MSA or PMSA is using the same wage rates for an occupation.

## 2. Nature of the Job

Under section 656.40, the relevant factors in arriving at a prevailing wage rate are the nature of the job and the geographic locality of the job. In determining the nature of the job, the first order of inquiry is to determine the appropriate occupational classification. In most instances, this will be the appropriate 9-digit Dictionary of Occupational Titles (DOT) code that corresponds to the employer's job offer. In the case of combination jobs, e.g., engineer-pilot, the prevailing wage determination should be based on the 9-digit DOT code for the highest paying occupation.

There are certain limited situations, however, where determining the appropriate DOT code may not be dispositive in determining which occupations in the area of intended employment are comparable to the occupation involved in the employer's job offer, e.g., the employer is the only employer to employ workers in the occupational classification in the area of intended employment. In such case, the regulations provide that "similarly employed" may mean jobs requiring a substantially similar level of skills within the area of intended employment.

### 3. Determining Similar Levels of Skills

In determining which occupational categories in the area of intended employment require levels of skills similar to those involved in the employer's job offer, information contained in the Dictionary of Occupational Titles, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and, in particular, the Guide to Occupational Exploration (GOE) code can be very helpful in making such determinations.

### 4. Jobs Outside Area of Intended Employment

If the employer requesting a prevailing wage determination is the only employer employing workers in the occupation for which the prevailing request was made, the SESA may either:

- (1) Survey jobs requiring a substantially similar level of skills within the area of intended employment; or
- (2) Survey jobs outside the area of employment with the same 9-digit DOT code as was assigned to the job opportunity/occupation for which the employer requested a prevailing wage determination.

SESA's can also survey jobs requiring substantially similar level of skills within the area of intended employment, or survey jobs outside the area of intended employment if a sufficient number of employers fail to respond to a survey to provide a reliable prevailing wage determination. In such instances it would not be feasible to determine the average rate of wages (arithmetic mean) paid to workers in the occupation as required by § 656.40(1) of the permanent labor certification regulations. If it is necessary to include jobs outside the area of intended employment, the geographical area of consideration should not be expanded more than is necessary to obtain a representative number of employers employing workers in the occupation for which a determination is to be made. For example, it is appropriate to survey cities and counties that are in close proximity to the area of intended employment rather than using a State-wide average wage rate.

### 5. Separate Wage Systems

The nature of the employer is not a relevant factor in conducting prevailing wage surveys or in making prevailing wage determinations. As noted above, the relevant factors are the job and the geographic locality of the job. Therefore, in conducting prevailing wage surveys, the SESA should contact employers of varying size in a variety of industries in the area of intended employment.

It has been determined that the language on pages 122 and 123 of Technical Assistance Guide No. 656 Labor Certifications (TAG) which indicates that an employer may challenge a finding as to the prevailing wage for an occupation, such as school teaching, on the basis that there are separate prevailing wages applicable to employment in public and private schools, is not supportable by the regulation at section 656.40. As stated by the Board of Alien Labor Certification Appeals (BALCA) in Hathaway Children's Service 91-INA-388, February 4, 1994, in relevant part, "(t)he underlying purpose of establishing a prevailing wage is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality." Factors going to the nature of the employer, such as whether the employer is public or private, profit or nonprofit, academic or nonacademic, large or small, charitable, a religious institution, a job contractor, or a failing or prosperous firm, do not, bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40. A representative number of different types of employers should be included in a prevailing wage survey. For example, if workers in an occupation are employed by both job contractors and by direct-hire employers in the area of intended employment, a representative number of both types of employers must be included in the survey.

#### 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.

If a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation which requires an advanced degree (Masters or PhD) shall be the rate for experienced workers. In this case, the requirement for advanced education substitutes for the entry level experience.

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

7. Response to Requests for Wage Determinations

To enable SESAs to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations should be in writing. The employer's request should specify the employer's title for the job, a brief description of the job duties, and the education, training and experience requirements. The name and address of the employer, contact person and telephone number, and the area of intended employment, if different from the employer's address, should also be indicated.

The SESA's response shall state the specific wage rate applicable to the employer's job and specify in bold letters that the rate is valid for filing applications and attestations for 90 days from the date of the response.

Responses to wage determination requests that can be satisfied by using existing SESA conducted surveys or published surveys should be sent to the employer or its representative in writing, within 2 weeks of receipt of the request. If the SESA must conduct a prevailing wage survey to provide the requester



with a determination, it should provide the results of such a survey within 45 days or provide the requester an interim written response indicating how long it will take to furnish the survey results.

In determining prevailing wage rates, the SESA can consider wage data furnished by the employer, e.g., results of a survey conducted by the employer that is more comprehensive than the SESA's. If, after validating the employer's survey, the SESA decides to substitute the rate from the employer's survey results, that rate must be used for subsequent requests for wage determinations in that occupation from other employers during the SESA's use of the survey. Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the SESA cannot be taken into consideration in making a wage determination.

The Employment Standards Administration may require prevailing wage determinations from the SESAs in the course of an investigation of an H-1B or an F-1 student employer. Such requests should be made through the ETA Regional Offices and SESAs should give priority to responding to such requests. SESAs should provide the requested wage rates to the Regional Office within 2 weeks, unless a longer period is required, such as to conduct a wage survey.

In issuing wage determinations and conducting surveys the SESAs may be required to convert an hourly rate to a weekly, monthly or annual rate, or to convert a weekly, monthly or annual rate to an hourly rate. Such conversions shall be based on 2,080 hours of work in a year.

Since it can take a long time to conduct valid prevailing wage surveys, SESAs should conduct and purchase prevailing wage surveys in advance of their need based on past certification and attestation experience. SESAs must structure their prevailing wage program in such a fashion that employers or their representatives are provided accurate wage rates in a timely manner.

8. Documentation Issues in Responding to Prevailing Wage Requests

It is incumbent upon SESAs to organize the prevailing wage function and establish controls that will enable them to provide information regarding a particular prevailing wage determination, to answer questions if it is required in an enforcement action conducted by the Department of Labor, or to adequately represent the Certifying Officer before BALCA.

Requests from employers for wage determinations shall be filed with the organizational subcomponent of the SESA responsible for processing labor certification applications. Only that component shall respond to requests for wage information for immigration purposes. The wage determination, of course, can be made in a unit other than the labor certification unit; e.g., labor market information unit. A dated copy of the prevailing wage determination provided to the employer should be maintained by the SESA for 2 years.

The SESA must also maintain detailed records pertaining to prevailing wage surveys. The records should include, at a minimum, the following:

- For published surveys, the survey relied upon must be identified with enough specificity so that the SESA can obtain the details regarding the survey, such as name of survey, name of organization which conducted or published the survey, date survey published, size of sample, survey methodology and occupational definitions.
- For SESA conducted surveys, documentation such as employers sampled, types of industries surveyed, size of sample (including employers and employees) and data furnished by respondents must be maintained. Consistent with the Alien Certification Reimbursable Grant agreement, SESAs shall not release the names of individual respondents to the surveys it conducts.
- The SESA shall maintain should keep documentation on the current and prior surveys it used in an occupation for the previous 2 years.

#### 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 wage 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.

It is acceptable, of course, to use arithmetic means from published wage surveys that relate to an area broader than the "area of intended employment" in the same circumstances it would be appropriate for the SESA to include comparable jobs outside the area of intended employment in a survey conducted by the SESA. As indicated above, the SESA must first determine that the employer for which a determination is being made is the only employer that has substantially comparable jobs in the occupational category in the area of intended employment.

### C. SESA Conducted Prevailing Wage Surveys

#### 1. Procedures and Methodology

Valid statistical methodologies and procedures prescribed by 656.40 shall be followed by SESAs in conducting prevailing wage surveys necessary for making a prevailing wage determination. As a minimum, wage surveys conducted by SESAs should meet the criteria listed below.

- Data should be collected by means of mail questionnaire or personal interview to the extent possible.

- Questionnaires, instructions, and job descriptions should be clearly written.
- Sample should be representative of employers employing workers in the area of intended employment.
- Data collection and interpretation should be conducted by trained staff.
- Survey results should be reviewed by professional SESA staff trained in survey methodology and appropriate statistical procedure.

## 2. Length of Time Survey Results are Valid

SESAs may use survey results for up to 2 years after the data are collected. After 2 years, the results of a new survey should be implemented. A validity period should be specified on each survey to ensure that it is updated at appropriate intervals. Regardless of the validity period of a survey, every wage determination issued using that survey shall specify that the rate given may only be used for filing applications and attestations for 90 days from the date the determination was issued.

### 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.

### III. H-1A NURSING PROGRAM

#### A. Prevailing Wage Determinations--Regulatory Requirements

As indicated above, more factors have to be considered in conducting prevailing wage surveys and arriving at prevailing wage determinations under the regulations implementing the H-1A nursing program than in making prevailing wage determinations for the other nonagricultural immigration program. This stems primarily from the definition of "similarly employed" in the nursing regulations at 20 CFR 655.302. The term "similarly employed" is defined to mean "employed by the same type of facility (acute care or long-term care) and working under like conditions, such as the same shift, on the same days of the week, and in the same specialty area." In any event, as a minimum, SESA's when conducting prevailing wage surveys to determine prevailing wages under the nursing program must, as for any other occupation, collect wage information for entry level and experienced workers.

The definition of the term "geographic area" in the nursing regulations at 20 CFR 655.302 also provides SESAs greater flexibility in making prevailing wage determinations than does the definition of "area of intended employment" contained in the permanent labor certification regulations at 20 CFR 656.3. The definition of "geographic area" at 20 CFR 655.302, unlike the definition of "area of intended employment", specifically provides under what circumstances the "geographic area" can be expanded and that any place within the MSA may be deemed to be within normal commuting distance. Specifically, "geographic area" is defined as follows:

(T)he area within normal commuting distance of the place (address) of the intended worksite. If the geographic area does not include a sufficient number of facilities to make a prevailing wage determination, the term "geographic area" shall be expanded (by the SESA, unless directed not to do so by the Director) with respect to the attesting facility to include a sufficient number of facilities to permit a prevailing wage determination to be made. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA may be deemed to be within normal commuting distance of the place of intended employment.

The term "prevailing wage" in the nursing regulations is defined to be the average wage paid to similarly employed registered nurses within the geographic area and the employer must obtain the prevailing wage from the appropriate SESA. Similar to the permanent labor certification regulations at

20 CFR 656.40(a)(2)(ii), the H-1A nursing regulations also provide that "(w)here wage rates for a facility are the result of arms-length collective bargaining, those rates shall be considered 'prevailing' for that facility. . . ."

However, unlike the immigration programs discussed above, the employer's wage offer provided on the H-1A nursing attestation (Form 9029) must equate exactly to the prevailing wage provided by the SESA. The 5 percent variance from the prevailing wage allowed in the labor certification, H-1B, and F-1 student programs, is not permitted in the H-1A nursing program.

#### B. SESA Conducted Surveys and Published Surveys

The SESA, in conducting prevailing wage surveys and in evaluating the use of published wage surveys, should be guided by the same general procedures, methodologies, and principles that are described above in II.B.--SESA Conducted Surveys and II. C.--Published Surveys.

The H-1A nursing regulations do not require the use of a prevailing wage determination for registered nurses in the geographic area made under the McNamara-O'Hara Service Contract Act. Although not mandated under the regulations, such wage determinations and the survey data upon which they were based, may be considered by the SESAs, if they believe they will be helpful in making prevailing wage determinations for registered nurses.

#### C. Challenges to SESA Prevailing Wage Determinations

Challenges to SESA prevailing wage determinations made pursuant to sections 20 CFR 655.302 and 655.310 prior to filing an attestation may be made only through the Employment Service Complaint System.