

**DEPARTMENT OF LABOR****Employment and Training  
Administration****20 CFR Part 655****RIN 1205-AB61****Wage Methodology for the Temporary  
Non-agricultural Employment H-2B  
Program****AGENCY:** Employment and Training  
Administration, Labor.**ACTION:** Final rule; request for comment  
on specific issues.

**SUMMARY:** The Department of Labor (the Department or DOL) is amending its regulations governing the certification for the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment. This Final Rule revises the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status.

**DATES:** This Final Rule is effective January 1, 2012. Comments should be submitted by March 21, 2011.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Revisions to 20 CFR 655.10***A. The Department's Role in the H-2B Program*

As provided by section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1101(a)(15)(H)(ii)(b)), the H-2B visa classification for non-agricultural temporary workers is available to a foreign worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other [than agricultural] temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." This visa

status is granted by U.S. Citizenship and Immigration Services (USCIS), an agency within DHS, under its regulations at 8 CFR 214.2(h)(6) *et seq.* Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H-2B visa petition. 8 U.S.C. 1184(c)(1). That consultation occurs according to a USCIS regulatory requirement that an employer first obtain a temporary labor certification from the Secretary of Labor (the Secretary) establishing that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6).

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

*B. The Determination of the Prevailing Wage*

To comply with its obligations under the program, an employer must pay the H-2B workers hired in connection with the application a wage that will not adversely affect the wages of U.S. workers similarly employed. The Department's H-2B procedures have always provided that adverse effect is prevented by requiring H-2B employers to offer and pay at least the prevailing wage to the H-2B workers and those U.S. workers recruited in connection with the job opportunity. To facilitate compliance with this requirement, the Department has established a process for providing to an employer a prevailing wage for the job opportunity for which certification is being sought. From the outset of the H-2B program, the Department directed that the same prevailing wage procedures be used for the permanent, H-1B, and H-2B programs. Although the Department did not promulgate a separate prevailing wage methodology until 1995, General Administration Letter (GAL) 10-84, "Procedures for Temporary Labor Certifications in Non Agricultural Occupations" (April 23, 1984) provided

guidance to the States on the administration of the H-2 nonagricultural program (a predecessor of the H-2B program) requiring the States to determine the prevailing wage in accordance with regulations for the permanent program at 20 CFR 656.40. In 1995, the Department issued separate prevailing wage guidance through GAL 4-95, "Interim Prevailing Wage Policy for Nonagricultural Immigration Programs" (May 18, 1995), Attachment I,<sup>1</sup> and again in 1998, through GAL 2-98 "Prevailing Wage Policy for Nonagricultural Immigration Programs" (November 30, 1998) that continued to extend the provisions of § 656.40 to the H-2B program. Under the two GALs, payment of the rates determined under the Davis-Bacon Act (DBA), 40 U.S.C. 276a *et seq.*, 29 CFR part 1, or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, was mandatory for H-2B occupations for which such wage determinations existed. Starting in 1998, in the absence of SCA or DBA wage rates, prevailing wage determinations were based on the Occupational Employment Statistics wage survey (OES), compiled by the Bureau of Labor Statistics (BLS). The OES wage survey produces employment and wage estimates for about 800 occupations and is based upon wage data covering full-time and part-time workers who are given monetary compensation for their labor or services. The OES survey is published annually and features data broken out both by geographic area and industry. The wage estimates in the survey are made available at the national, State and metropolitan and nonmetropolitan area levels. The OES survey directly collects a wage rate for all occupations defined by the Office of Management and Budget's (OMB's) occupational classification system, the Standard Occupational Classification (SOC) system code. Employers, however, have been able since at least 1995 to submit private wage surveys that met Department standards.

Both the 1995 and the 1998 GALs provided that DOL would issue prevailing wage determinations at two levels, entry-level and experienced. At that time, there were not many H-2B program users, and new prevailing wage procedures were designed primarily to address the needs of the permanent and H-1B programs which were dominated by job opportunities in higher skilled occupations. There was considerable desire on the part of H-1B and permanent program users to have the Department create a multi-tiered wage

<sup>1</sup> See <http://wdr.doleta.gov/directives>.

structure to reflect the largely self-evident proposition that workers in occupations that require sophisticated skills and training receive higher wages based on those skills. Since the OES survey captures no information about actual skills or responsibilities of the workers whose wages are being reported, the two-tier wage structure introduced in 1998 was based on the assumption that the mean wage of the lowest paid one-third of the workers surveyed in each occupation could provide a surrogate for the entry-level wage. The Department did not conduct any meaningful economic analysis to test its validity and, most significantly, it did not consider whether assumptions about wages and skill levels for higher skilled occupations might be less valid when applied to lower skilled occupations. In December 2004, the Department revised its regulation governing the permanent program. 69 FR 77326, Dec. 27, 2004. These revisions included changes to 20 CFR 656.40 which governed the procedures for determining the prevailing wage. In particular, these revisions eliminated the requirement that SCA/DBA wage determinations be treated as the prevailing wage where such determinations existed. The regulation provided that use of available SCA/DBA wage rates would be only at the option of the employer.

The preamble to the PERM regulation also discussed Congress's enactment of the H-1B Visa Reform Act in the Consolidated Appropriations Act of 2005, Public Law 108-447, Div. J., Title IV, section 423, which amended section 212(p)(4) of the INA, 8 U.S.C. 1182(p)(4), relating to the H-1B visa program. This legislation mandated that the Department issue prevailing wages at four levels when the prevailing wages were based upon a government survey. The legislation mandated how the four levels were to be calculated by mathematically manipulating the existing two level wages. Section 656.40 of 20 CFR, the regulation implementing the H-1B Visa Reform Act, only specifically referenced prevailing wages established for the PERM and H-1B programs.

Soon after the enactment of the new regulations, the Department issued comprehensive guidance on prevailing wage determinations. Following the practice in place since 1984, this guidance also applied to the H-2B program. ETA Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs, May

2005, revised November 2009.<sup>2</sup> The guidance included the use of the four-tier wage structure and the elimination of the mandatory application of the SCA/DBA wage determinations.

In 2008, the Department issued the regulations that currently govern the H-2B temporary worker program. 73 FR 78020, Dec. 19, 2008 (the 2008 Final Rule). The 2008 Final Rule addressed some aspects of the 2005 prevailing wage guidance. See 20 CFR 655.10(b)(2). However, the Department did not propose or seek comments on the methodology for determining prevailing wages.

In early 2009, a lawsuit was filed challenging various aspects of the Department's H-2B procedures included in the 2008 Final Rule; among the issues raised was the use of the four-tier wage structure in the H-2B program and the optional use of SCA and DBA wages. *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa.). In its August 30, 2010 decision, the court ruled that the Department had violated the Administrative Procedure Act (APA) in failing to adequately explain its reasoning for using skill levels as part of the H-2B prevailing wage determinations, and failing to consider comments relating to the choice of appropriate data sets in deciding to rely on OES data rather than SCA and DBA in setting the prevailing wage rates. The court ordered the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order."

This rulemaking represents the Department's efforts to address both substantive and procedural concerns about prevailing wages in the H-2B program. The Department promulgated and published an NPRM in accordance with the court's order, allowing a 30-day comment period. 75 FR 61578, Oct. 5, 2010. Several commenters requested that the Department provide additional time to comment on the proposed rule; the Department requested additional time from the court and was granted until January 18, 2011, to promulgate a Final Rule. The Department, in turn, provided the public an additional 8 days for comment on the NPRM.

The NPRM proposed to eliminate the use of the four-tier wage structure for the H-2B program in favor of the mean OES wage for each occupational

category. It also provided that available SCA/DBA wage determination rates for those occupations for which H-2B certification is sought, or collective bargaining agreement (CBA) wages, if such an agreement exists, would be used if they reflected higher wages than the OES wage. The NPRM also proposed to eliminate the use of employer-provided surveys in the H-2B program. After a thorough review of the comments, the Department has decided to finalize these changes.

### C. Overview of Comments Received

The Department received almost 300 comments in response to the proposed rule. We have determined that 251 of these comments were completely unique, 8 were duplicates, and 39 were a form letter or based on a form letter. Commenters represented a broad range of constituencies for the H-2B program, including individual employers, worker advocacy groups, labor organizations, small business advocates, business associations, law firms, government agencies, including the Chief Counsel for the Office of Advocacy of the Small Business Association (Chief Counsel for Advocacy, SBA).<sup>3</sup> Members of Congress and Congressional Committees, and various interested members of the public. These comments, both supporting and opposing the proposed regulation, are discussed in greater detail below.

Some of the comments received were outside the scope of the proposed rule. The NPRM proposed a methodology for determining the prevailing wage for use in the H-2B program. Many comments went well beyond that issue, addressing matters such as comprehensive immigration reform, general immigration-related concerns, unemployment-related issues, the incorporation or continuation of special procedures in the H-2B program, enforcement, future regulatory actions, and various regulatory sections under Subpart A that are not part of this rulemaking. Comments submitted before the comment period began or after the comment period closed were not considered.

Among those comments the Department deemed out of scope were several comments received about the use of the wage methodology within the Territory of Guam. A labor certification from the Secretary is not required for H-

<sup>2</sup> [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>3</sup> The comment submitted by the Chief Counsel for Advocacy, SBA reflected not only that agency's concerns but also those expressed by employers at a roundtable hosted by the SBA on October 20, 2010.

2B employment on Guam.<sup>4</sup> Instead, an employer seeking a foreign labor certification on Guam is required to request and receive a certification from the Governor of Guam. 8 CFR 214.2(h)(6)(iii). The Department did not propose in the NPRM to revise the certification process on Guam; therefore all comments received about Guam have been deemed out of scope.

Additionally, several commenters asserted that the Interim Regulatory Flexibility Analysis (IRFA) in the NPRM failed to consider increased payroll costs associated with the wage increases for other workers who would be paid the prevailing wage. This rule is limited to the determination of methodology for the payment of a prevailing wage to H-2B workers and U.S. workers hired in response to the H-2B required recruitment. Any extension of the requirements to pay the prevailing wage to others is outside the scope of this rule.

## II. Discussion of Comments Received

### A. The Significance of Setting the Prevailing Wage at the Appropriate Level

The Department's role in the H-2B temporary nonimmigrant program is to certify to DHS that: (1) there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time of filing of the petition for the H-2B classification and at the place where the foreign worker is to perform the work; and (2) the employment of the foreign worker will not adversely impact the wages and working conditions of U.S. workers similarly employed. 20 CFR 655.1(b), 8 CFR 214.2(h)(6)(iii), and 8 CFR 214.2(h)(6)(iv). These two findings address the statutory requirement that H-2B workers be admitted only if no unemployed persons capable of performing such service or labor in this country are available. 8 U.S.C. 1101(a)(15)(h)(ii)(b).

Historically, requiring an H-2B employer to pay the prevailing wage for the locality in which the worker will be employed has been the cornerstone of the required labor market test. The Department has consistently held that payment of the prevailing wage ensures that there is no adverse effect on the wages of similarly employed U.S.

workers and provides meaningful access to these job opportunities.

The Department proposed a prevailing wage methodology that will result in wages that more closely reflect the average of wages paid to similarly employed workers in the area of intended employment. In doing so, the Department ensures full compliance with the statutory intent of the H-2B program and that unemployed U.S. workers capable of performing the jobs for which H-2B workers are sought will have meaningful access to job opportunities.

Several commenters claimed that regardless of the changes the Department makes to the wage methodology used in the H-2B program, H-2B employers will not be able to find interested U.S. workers for these job opportunities. The Department's objective in this rulemaking is not to guarantee that U.S. workers will apply for these positions, but to provide a prevailing wage that does not adversely affect the wages of U.S. workers and provides them the opportunity for jobs sought by H-2B employers at competitive wages.

One commenter agreed that setting the appropriate prevailing wage for the position is central to testing the labor market. This commenter argued that U.S. workers cannot be expected to accept employment under conditions below the established minimum levels, citing examples of high unemployment rates in industries in which employers tend to hire H-2B workers, including the construction industry, as well as high unemployment rates among specific groups of vulnerable low-wage workers: Youth, Hispanics, and African Americans. The same commenter indicated that a prevailing wage rate that ensures no adverse effect on wages and working conditions of U.S. workers is needed and that an increase in hourly wages for some H-2B guest workers and U.S. workers recruited and hired as part of the labor certification process is consistent with the INA's statutory intent.

Another commenter indicated that the primary goal of any change in the wage methodology is to ensure that there are no persons in the U.S. capable of performing the advertised unskilled labor. This commenter observed that if the wages are set high enough, U.S. workers will be interested in the work, but if the wages are set too low U.S. labor will not be interested. This commenter also noted that where there are genuine labor shortages, employers would normally attract workers by offering (among other things) higher

wages, which would increase wages for U.S. workers.

The Department agrees with the need to ensure there is no adverse effect by offering a wage that would be acceptable to U.S. workers. By proposing a prevailing wage methodology that will pay wages that more closely reflect the average of wages paid in any occupation, the Department creates conditions under which unemployed U.S. workers will have access to job opportunities that they would in fact seek out, rather than those in which the pay is too low. Testifying before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in April 2008, Ross Eisenbrey, Vice President of the Economic Policy Institute, cited CPS data identified by Jin Dai and Jared Bernstein that examined labor market indicators for seven H-2B occupations that constituted the majority of H-2B employment. Annual wage data for these occupations had increased at a slower rate than has those in other occupations.<sup>5</sup> The testimony points to the fact that economic theory suggests that employers who experience shortages of labor compete for available labor by increasing wages; however, under the H-2B program, if positions are not filled by U.S. workers at the wage offered by the employer, the employer may sidestep this effect by petitioning the Department for permission to bring in foreign workers at that lower wage.

Some commenters questioned the appropriateness of the Department's proposal, asserting that increasing wages of H-2B and U.S. workers recruited in the program is not synonymous with protecting the wages of U.S. workers from adverse effect. The DHS regulations explicitly require that certifications be granted only if they do not result in adverse impact on the wages and working conditions of U.S. workers. Since the inception of the program, the Department has determined that the best way to fulfill its mandate to protect wages is to require employers to pay a prevailing wage. In all labor certification programs, except for the unique requirements of the H-2A program, the Department has used a prevailing wage, however defined or calculated, as a means of protecting U.S. workers against adverse effect—as the INA requires in most programs in which the Department has

<sup>4</sup> The Secretary of Labor is required, for certain military workforce projects, to consult with the Governor of Guam in a certification to the Secretary of Defense regarding the adequacy of recruitment of U.S. workers. Public Law 111–84, Subtitle C, 123 Stat. 2672, section 2834 (October 28, 2009). This is a separate certification from that required to be given to the employer by the Governor of Guam under 8 CFR 214.2(h)(6)(iii).

<sup>5</sup> H-2B Program: Hearing Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. On the Judiciary, 110th Cong. 5 (2008) (statement of Ross Eisenbrey, Vice President, Economic Policy Institute).

a role. The Department proposed no change to this longstanding approach and this Final Rule does not make any such change.

Another commenter questioned why the Department, while asserting that the current wage methodology currently results in an adverse effect on U.S. workers, continues to certify H-2B labor applications as not adversely affecting U.S. workers, when the Department clearly states its belief that it does. The Department's role in all its immigration programs is to ensure that there is no adverse effect on the wages (and working conditions) of similarly employed U.S. workers by requiring the payment of an appropriate prevailing wage. The Department's concern that the current prevailing wage methodology may not be adequate to accomplish this task, together with the court's decision, was the impetus for the development of the NPRM in which the Department provided notice of a proposed change to the methodology, and solicited comments in order to fully examine the issue and determine the most appropriate course for meeting its obligation. The Department must continue to meet its obligations under the existing regulations until such time as a new regulation is promulgated in accordance with APA requirements. Discontinuing the issuance of prevailing wage determinations would abrogate the Department's obligation to administer the H-2B labor certification program.

#### *B. Highest of All Applicable Wages*

The Department proposed that the prevailing wage would be the highest of three wage rates: The wage established under an applicable CBA; the rate established under the DBA or SCA for that occupation in the area of intended employment; and the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment. Several commenters approved of this approach, noting that this methodology better protects U.S. workers and is far more likely to ensure that jobs for which employers petition for H-2B workers go unfilled by able U.S. workers because there are no such workers available, not because employers are offering wages far below the rates normally paid and expected by domestic workers in the area of intended employment. Other commenters objected to this approach, asserting that the various sources of prevailing wage rates the Department proposed to consider are not of equal validity.

The Department has concluded that the approach in the NPRM is most consistent with its responsibility under

the applicable DHS regulations to grant certifications that avoid adverse effect on wages. The mandate to prevent adverse effect has existed for many years in all of the immigration programs administered by the Department and, except for the unique requirements of the H-2A program, has always been implemented by a requirement that employers offer and pay the prevailing wage. In situations where there is a SCA or DBA wage determination or collectively bargained wage rate in addition to the OES determination, it is compatible with our responsibility to avoid adverse effect to mandate that the employer pay the higher of these determinations. Such determinations are based on real wages being paid to workers in these areas for the same kind of work for which H-2B workers are sought—in other words, the labor pool of those U.S. workers the would-be H-2B employer should be seeking. By requiring the highest wage among these available, validated sources, the Department is guaranteeing that the jobs are offered to available workers at wages that do not create an adverse effect.

#### *1. Collective Bargaining Agreements*

The Department proposed retaining from the 2008 Final Rule the inclusion of a collective bargaining wage as the prevailing wage if the job opportunity is covered by an agreement that was negotiated at arms' length between the collective bargaining unit and the employer. Several commenters supported this proposal, but suggested that the Department go further and require that whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should apply to all employers in the region who wish to hire H-2B workers in the same occupation classification, even those that are not signatory to the CBA or who have no collective bargaining unit in that occupation.

A CBA is a contractual agreement negotiated at arms' length between more or less equal parties. The provisions of a CBA reflect a negotiation process and a series of concessions between the parties to the agreement that would not apply to other parties not involved in the negotiations. The negotiation of a CBA also involves agreement on a range of issues, wages, working conditions, work rules and many others, all of which combine to lead to a complete agreement, only one of whose elements involves wages. For example, one set of negotiating parties may agree to a lower wage in return for a guarantee of job security while another set may agree to

higher wages at a greater risk of job cuts. Thus, the Department is unwilling to use a collectively-bargained wage outside the workplace for which it has been negotiated unless that wage has been determined to be prevailing through the SCA, DBA, or OES wage determination process.

By contrast, another commenter objected to the use of a wage higher than a CBA wage in an employment situation in which a CBA applies, noting that where an employer is subject to a CBA, paying a wage other than the CBA scale rate may violate the terms of the agreement and have ramifications under contract and labor law. However, the Department must consistently use the prevailing wage rate under the H-2B program in order to ensure that U.S. workers have meaningful access to these positions and do not experience wage depression as a result of employers hiring foreign workers at less than prevailing wages. A CBA rate that had fallen below the minimum wage would not be valid. Similarly, a CBA rate below the prevailing wage would not be a valid wage for purposes of the H-2B program.

#### *2. Use of SCA and DBA Wages*

The Department also proposed to include consideration of the Davis-Bacon Act (DBA), 40 U.S.C. 3142 *et seq.*, or the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. 351 *et seq.*, wage rate for occupations for which wage rates have been determined under either of the two Acts for the area of intended employment. After considering numerous comments, the Department adopts this proposal in the Final Rule.

An employer association questioned the validity of SCA wage determinations, claiming that the data used for SCA wage determinations is inconsistent and that the use of Federal employee wage data invalidates SCA wage rates. Similarly, two associations representing employers expressed concerns about the methodology and accuracy of DBA surveys. The commenters cited a 1979 report from the General Accounting Office (now the Government Accountability Office, GAO), 1996 Congressional testimony from the GAO, and a 2004 report from the Department's Office of Inspector General (OIG). One commenter suggested that DBA surveys take years to be distributed, collected, calculated and completed. Two of the commenters noted that survey completion is voluntary and the results may therefore be biased. Several commenters (an individual, two employer associations, and an employer) expressed concern

that DBA wage rates are based on union wages, and therefore are not reflective of the market.

After consideration, the Department concludes that the commenters' concerns with the consistency, timeliness, and validity of SCA and DBA wage determinations are unfounded. The highly localized wages in the SCA present the best market information with which to ensure that those workers similarly employed are not being adversely affected. To help ensure reliability, SCA wage determinations are now reviewed on a yearly basis. Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to be prevailing. Where a single rate does not prevail, statistical measures of central tendency reflected in BLS surveys are considered when issuing SCA wage determinations. The BLS conducts two surveys that produce locality based wage data: The National Compensation Survey (NCS), which is the primary data source for SCA wage determinations, and the OES survey, which serves as either a supplement to NCS data or as the primary data source for areas or classifications not surveyed by NCS. *See* 29 CFR 4.50–51.

The NCS is conducted by personal visit. Consideration is paid to supplemental sources, such as the General Schedule locality pay schedules, Non-Appropriated Fund (NAF) surveys, surveys conducted by states, and the Federal Wage System Schedules for the comparable geographic area, which indicates what Federal employees would be paid if they worked in the SCA contract work positions. *See* 29 CFR 4.50. While the Department rarely consults these Federal employee pay systems in determining H–2B wage rates, the use of these data, contrary to the commenter's claims, would likely not inflate wage rates: March 2009 NCS data reported by BLS and used by the Federal Office of Personnel Management and the Federal Salary Council showed that Federal employees make an average of 22 percent less than their counterparts in the private sector.<sup>6</sup>

Prevailing wages under the DBA are established for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision (usually a county) of the State in which the work is to be

performed. 40 U.S.C. 3142(b).

Department regulations establish that the prevailing wage is the wage paid to the majority (greater than 50 percent) of the workers in the classification on similar projects in the area during the relevant period. 29 CFR 1.2(a)(1). If the same wage is not paid to a majority of workers in the classification, then the prevailing wage is the weighted average of the wage rates paid to workers in that classification.

The prevailing wage rates found in the WHD Administrator's determinations are based on survey data derived from the information that responding contractors and other interested parties provide. 29 CFR 1.1–1.7. The wage surveys collect information from all interested parties including unions, contractors, and associations. If insufficient wage data is received for a particular county, then the calculation will be expanded to a group of surrounding counties.

The reports relied on by commenters who expressed concern about the accuracy of DBA wages are more than 6 years old and not reflective of the current status of the wage determinations. The Department has successfully implemented significant improvements to the DBA wage determination process in the last 7 years. As noted in the preamble to the proposed rule, WHD's DBA survey program has undergone a significant re-engineering effort, resulting in a greatly improved and timely prevailing wage rate determination process. By working with the Census Bureau at the U.S. Department of Commerce, the Department has successfully expedited the overall survey process. The Census Bureau now mails the data collection forms to employers and other interested parties and, upon their return, scans the completed form and loads the data into the electronic survey database. Additionally, the Department has significantly improved its timeframe for reviewing submitted survey data. As a result of these and other improvements, the Department recently published a statewide survey in less than 18 months. The Department anticipates that this will be the norm for future surveys. To increase survey participation and improve the accuracy of published survey data, the Department has developed newly enhanced post-collection activity, including more follow-up phone calls and on-site clarification and verification reviews.

The surveys used to determine DBA wage rates are sent to all relevant employers within the locality as well as to all other interested parties, including labor organizations, contractors, and

employers associations. No one source of wage data is determinative. The Department notes that while the DBA survey, like every other wage survey, is voluntary, and there is no statutory requirement that employers or labor organizations submit their wage data, the Department actively encourages participation; however, there is no statutory requirement that employers or labor organizations must submit their wage data. In order to mitigate any potential bias, the Department has taken and continues to take actions to improve completion rates, get the most representative sample possible, and ensure the accuracy of this data. First, it has expanded community outreach efforts and held additional public conferences. These efforts help responders to better understand the survey process and to appreciate the importance of survey participation. Additionally, an on-line response tool has been introduced, giving recipients the opportunity to submit data electronically. The Department has also engaged an outside contractor to randomly audit responses to improve accuracy and further mitigate any bias. In the rare event of misrepresentation in a survey response, fines and imprisonment can be pursued. Finally, the Department identifies the most fair and appropriate geographical statistical areas by relying on Census jurisdictions and OMB-defined Metropolitan Statistical Areas (MSAs). The Department believes these measures ensure that the DBA wages are reflective of the labor market.

In calculating DBA wage rates, WHD follows several important and well-established policies. First, in order for a classification and rate to prevail, the minimum craft sufficiency standard must be met. Long-standing WHD procedures provide that wage data for a particular classification generally must be received for at least three workers employed by two contractors in order for a wage rate to be published for a classification. Second, in compiling data for building and residential wage determinations, WHD cannot use data from Federal or federally-assisted projects “unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.” 29 CFR 1.3(d). Third, the county is the appropriate geographic unit for data collection, although data may be derived from groups of counties in some situations, as described below. 29 CFR 1.7(a), (b). Finally, data received from metropolitan and rural counties cannot be combined. 29 CFR 1.7(b).

<sup>6</sup> “Annual Report of the President's Pay Agent”, December 7, 2009. <http://www.opm.gov/oca/payagent/2009/2009PayAgentReport.pdf>.

In accordance with these principles, WHD first attempts to calculate a prevailing wage based on private project survey data at the county level. See *Mistick Construction*, ARB No. 04–051, slip op. at 3 (Mar. 31, 2006). If there is insufficient private survey data for a particular county, then WHD considers any available survey data from Federal projects. If the combined Federal and non-federal survey data received from a particular county is still insufficient to establish a prevailing wage rate for a classification, then data from surrounding counties may be used, provided that data from metropolitan and rural counties are not combined. See 29 CFR 1.7(b); see also *Mistick Construction*, ARB No. 04–051, slip op. at 3 (Mar. 31, 2006).

In considering survey data from surrounding counties, WHD first expands its calculation from the county alone to a group of counties. For metropolitan counties, WHD expands the county data to all of the other counties located in the same MSA, as determined by OMB. If private survey data from the established county group is still insufficient, then WHD will include Federal project data from all counties in the group. Rural county groups, which are defined by WHD, are made up of contiguous non-metropolitan counties with similar wage patterns.

OMB states that the “general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus.” 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 FR 37,246, Jun. 28, 2010. The purpose of establishing MSAs is to provide “a nationally consistent set of delineations for collecting, tabulating, and publishing Federal statistics for geographic areas.” Id. OMB publishes and maintains official MSA lists, based primarily on decennial Census data.

WHD strictly relies upon OMB’s MSA determinations in deciding which surrounding counties constitute a metro county “group” for DBA purposes, and WHD therefore does not reconfigure MSA groups. By using objective and well-established county group designations set by OMB, WHD avoids injecting bias and uncertainty into its wage determination process.

If both private and Federal data for an established county group are still insufficient to determine a prevailing wage rate, then WHD may expand to a “supergroup” of counties (either rural or metropolitan) or even to the statewide level; the expansion stops when

sufficiently standard data have been attained for the craft. WHD only expands data to these levels, however, for classifications that have been designated as “key” crafts. A list of “key” crafts can be found in WHD’s Prevailing Wage Resource Book. See U.S. Department of Labor, Prevailing Wage Resource Book (July 2009), Davis-Bacon Surveys (Tab 12) at 3, available at <http://www.dol.gov/whd/recovery/pwrb/toc.htm>. For non-key crafts, data are not expanded beyond the county group level.

One employer argued that using DBA wage rates would bypass the requirements of the National Labor Relations Act (NLRA). A DBA prevailing wage determination represents an accurate prevailing wage rate available for similar workers in a particular area of employment. Where a collectively-bargained wage rate prevails in a classification on similar projects in the area during the relevant period, then and only then is the resulting DBA prevailing wage the collectively-bargained wage rate. This does not, however, subject an employer to the collective bargaining agreement upon which the underlying wage rate is based. Rather, the rate is interpreted as a reflection of the prevailing wage in the area of employment.

Several commenters suggested that the Department consider SCA and DBA rates in its prevailing wage determinations only when the applicant’s H–2B workers would work on projects subject to the SCA or DBA. SCA and DBA wage rates provide a reliable prevailing wage for certain occupations within specific localities. The commenters’ concerns that an SCA or DBA wage is a “government wage” are unfounded: the resulting wage closely approximates the prevailing wage for a particular occupation within a particular locality. Since SCA and DBA calculations incorporate workers and projects outside of government contracts, these rates are an appropriate source of prevailing wages.

Some commenters requested that the SCA and DBA wage determinations not be consulted as prevailing wage sources for any occupations not covered by the SCA and DBA surveys. As indicated above, when determining prevailing wages, the Department will not consider either source unless it includes data appropriate for the actual tasks, duties, and activities the worker will perform in the area of intended employment, as described by the employer in the H–2B application.

Similarly, a number of landscaping employers commented that the proposed wage sources (SCA, DBA, and

OES) generalize the prevailing wage determination process and do not consider particular job classifications in areas of intended employment. However, the SCA, DBA, and OES wage rates are specific to occupations and areas of intended employment. National Prevailing Wage Center (NPWC) staff will match the job duties listed on the *Application for Prevailing Wage Determination* with the appropriate occupational definition contained in the O\*Net Occupational Outlook Handbook, the SCA Dictionary of Occupations, or specific Davis-Bacon wage determinations. Only if an appropriate match can be made will the source be considered in determining the H–2B prevailing wage.

Several submissions from various commenters noted that two different agencies within the Department collect wage data: BLS publishes OES, among other wage surveys, while WHD publishes SCA and DBA prevailing wage rates. Two of these commenters recommended that the Department consolidate wage calculations into fewer surveys, while others recommended that the Department give all of the responsibility for wage determinations to a single agency. The Department believes that OES survey data is distinct enough from SCA wage determinations and DBA surveys that all three should be retained, and that all are appropriate for use in the H–2B program. OES data encompasses occupations outside the scope of the SCA and DBA, while in certain instances the nature of government-contracted service work and construction projects requires SCA and DBA determinations to take into account more detailed information about how the work is performed (e.g., DBA wage rates reflect the work performed by various crafts determined by area practice).

Two employer associations and two employers commented that any increase in H–2B wage rates would be arbitrary. One commenter elaborated, explaining that because the methodologies used to produce the SCA, DBA, and OES wage rates and data are different, none can be truly accurate. As explained above, the SCA, DBA, and OES methodologies use the best information available to establish prevailing wage rates for specialized occupations within specific occupational categories. OES data has been used historically as the basis for prevailing wage determinations in the H–2B and other DOL immigration programs, while SCA and DBA rates were used in the H–2B program before 2005. Furthermore, the three wage rates are not fundamentally different: all are derived from employer survey data.

A few commenters believed incorrectly that the Department's use of SCA and DBA wage rates would require employers to provide fringe benefits or to pay workers the cash equivalent of such benefits. The Acts require contractors performing service or construction work, respectively, on covered Federal contracts to furnish, in addition to the prevailing hourly rate of pay, fringe benefits found prevailing in the locality (or the cash equivalent thereof).<sup>7</sup> SCA and DBA wage determinations reflect two figures—wages and benefits. For purposes of the H-2B program, however, the SCA or DBA prevailing wage is only the wage component of the wage determination. This Final Rule therefore does not require the payment of fringe benefits; such benefits would, however, otherwise be required if the employer's work involves a contract which is covered by one of the Acts.

Numerous commenters urged the Department to include fringe benefits in all H-2B prevailing wage determinations. These commenters assert that not including fringe benefits would "give employers an incentive to hire H-2B workers instead of U.S. workers" in order to avoid additional labor costs, and would thus undermine the requirement that H-2B visas be issued only if no qualified U.S. workers are available. The Department recognizes these commenters' concerns, particularly for H-2B positions that have been certified at an SCA or DBA wage rate. However, the Department historically has not required the payment of fringe benefits to H-2B workers, even before 2005, when SCA and DBA wage rates were mandatory for occupations where such wage determinations existed. See 75 FR 61578, 61579 (Oct. 5, 2010) ("Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program" Proposed Rule). In addition, no data exists to allow adequate computation and monetization of fringe benefits over all the occupations and locations covered by the H-2B program. Therefore, given the Department's historical practice, and given that the Department cannot currently fully estimate the economic impact of requiring fringe benefits for H-2B positions, the Department will not require fringe benefit payments to H-2B workers, regardless of the source of the prevailing wage.<sup>8</sup>

### 3. The Elimination of the Four-tier Wage Structure

In the NPRM, the Department proposed to eliminate the use of the four-tier wage structure and implement a single prevailing wage rate based on the arithmetic mean of the OES wage data for the job classification in the area of intended employment. The NPRM cited a number of reasons why the four tiers did not establish an adequate prevailing wage. After thorough consideration of the public comments, the Department has decided that the proposed elimination of the use of the four-tier wage structure is appropriate.

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

required by those laws regardless of whether the workers are domestic or H-2B workers.

### a. The Four-Tier Wage Structure is Not Suitable for Unskilled Jobs

The Department received a number of comments in support of its proposal to eliminate the four-tier wage structure. Three Congressional commenters supported the proposal. One indicated that the four-tier wage structure is inappropriate for the H-2B program because the program involves relatively low-skilled occupations with few differences in skill or experience. Another commenter, a Congressional subcommittee, indicated that the structure is contrary to the Department's obligation to ensure that H-2B employers offer wages that do not adversely affect the wages of the U.S. workforce. The third Congressional commenter argued that a tiered wage structure in the H-2B program undercuts Congressional intent to protect the wages of both U.S. and foreign workers.

Additional commenters supported the Department's decision to eliminate wage tiers, noting that the use of skill level wages in low-skill H-2B jobs causes an adverse effect because all workers in those job categories perform the same job duties and, in the commenters' view, compete with one another for job openings, regardless of their cumulative experience levels. One commenter noted that even if experience in the job normally results in a higher wage level, the current methodology permits employers to pay the H-2B workers entry-level wages, thus placing U.S. workers seeking the same job openings at a disadvantage because their experience is not compensated.

The Department also received a number of comments opposing the elimination of the four-tier wage structure; numerous commenters, including the Chief Counsel for Advocacy, SBA, offered arguments that wage tiers appropriately reflect the level of skill, education, experience and other requirements of the job. Several commenters opposed the elimination of the four-tier wage structure on the grounds that the skill levels allow employers to differentiate between employees based on their skills and level of experience. Some of these commenters expressed concern that the change to the arithmetic mean for all H-2B wages would result in an inappropriate averaging of the wages of entry-level and more experienced workers. Other commenters asserted that the use of a single wage would inflate the prevailing wages of entry-level workers and deflate prevailing wages of highly-experienced workers because it would fail to take into

<sup>7</sup> Section 2(a)(2) of the McNamara O'Hara Service Contract Act, 41 U.S.C. 351(a)(2); 40 U.S.C. 3141(2)(B).

<sup>8</sup> For projects covered by DBA or SCA, employers are responsible for paying fringe benefits as



consideration wage differentiation factors such as supervisory duties, responsibilities, and seniority/tenure or experience, particularly for skilled positions in certain industries. One commenter indicated that the wage determination methodology would average in wages for higher skilled workers, and therefore contradicts the intent for establishing the H-2B program as one for the recruitment of unskilled workers.

A few commenters argued against the elimination of skill levels, and presented an alternative in which employers could craft job descriptions in such a way as to couple the higher arithmetic mean-based wage with a requirement for more experience.<sup>9</sup> Several commenters expressed concern that the Department's proposal does not specify that employers will be able to increase their experience requirements as a result of the increased wages and requested that if the Department uses the OES arithmetic mean, H-2B employer-applicants should be allowed to specify the minimum experience requirements that are associated with the new wage.

One commenter argued that the skills in the H-2B program may not be a matter of educational degrees or detailed training, but rather properly and efficiently performing the job. This commenter asserted that employers typically reward H-2B workers with higher wages and benefits based on job performance, and that raising the wages in the program to the mean would eliminate the employer's ability to properly manage and reward those employees.

Other commenters indicated that the elimination of the four-tier wage structure will not maintain fair wage calculations to ensure U.S. workers are not adversely affected by the employment of H-2B workers because the current system ensures unskilled and skilled workers have access to H-2B job positions according to their level of experience, education, and supervision required to perform the job duties. One of these commenters further claimed that because many H-2B workers are in low-skilled or unskilled positions, wage rates from a lower tier should correlate with lower skills and be close to the appropriate wage such that H-2B workers earn wages at similar levels as the wages of domestic workers.

Several commenters representing the ski industry conceded that although not all positions in their industry reflect

skill levels, their industry is unique in that certain positions, particularly those for ski and snowboard instructors, require certification and/or accreditation which reflects specific levels of skill and experience consistent with those established for the industry nationally and internationally. These commenters indicated that establishing a prevailing wage rate based on a single overall arithmetic mean fails to account for skill progressions required of the ski instructor positions. In addition, one commenter in the construction industry associated the wage tiers with important skills and knowledge pertaining to safety requirements and programs, noting that Level II and Level III workers are necessary to maintain workers' safety.

As discussed elsewhere in this Final Rule, the Department's obligation to administer the H-2B program requires that the prevailing wage which is offered and paid in the program reflect the minimum requirements of the position. This requirement reflects the Department's obligations to avoid adverse effect on the wages of workers and enable meaningful access to job opportunities for U.S. workers. Because the Department has determined that the majority of H-2B jobs reflect no or few skill differentials, the appropriate prevailing wage an employer must offer and pay, absent a higher CBA, SCA, or DBA wage, is the arithmetic mean of the OES wage data of workers who are similarly employed in the area of intended employment. Where an employer's job opportunity requires skills beyond those minimally required for the position (which may include but are not limited to additional certifications based on experience, or safety accreditations), the employer is at liberty to offer and pay to its workers in excess of the prevailing wage to account for the additional skills or experience which the employer requires.

One commenter noted that the assumption that H-2B workers fill the lower skilled and lower paid positions and that the higher skilled and higher paid positions are taken by U.S. workers leads to a conclusion that no adverse effect exists because the H-2B workforce simply fills a predictable labor shortage permitting U.S. workers to consistently fill higher skilled complementary positions.

As discussed in the NPRM, the Department has found that almost all jobs for which employers seek H-2B workers require little, if any, skill—an assertion with which few commenters disagreed. H-2B disclosure data from Fiscal Year (FY) 2007 to 2009 demonstrates that most of the jobs

included in the top five industries for which the greatest annual numbers of H-2B workers were certified—construction; amusement, gambling and recreation; landscaping services; janitorial services; and food services and drinking places—require minimal skill to perform, according to every standardized source available to the Department, such as the SOC, O\*NET and the Occupational Outlook Handbook. These jobs include, but are not limited to, landscaper laborer, housekeeping cleaner, construction worker, forestry worker, and amusement park worker, which make up the majority of occupations certified in those years, all of which require less than 2 years of experience to perform, if that.<sup>10</sup> This prevalence of job opportunities in low-skilled categories is generally reflected in the H-2B employer applications. These jobs have typically resulted in a Level I wage determination, which is lower than the average wage paid to similarly employed workers in job classifications in non-H-2B jobs.

Under the Department's 2005 Prevailing Wage Guidance, the determination of an appropriate wage level is dependent upon the duties and requirements of the job opportunity as described by the employer on the "Application for Prevailing Wage Determination," ETA Form 9141. The Department applies a standard analysis of the job position (found in the 2005 Prevailing Wage Guidance) to determine the appropriate wage level. In doing so, the Department compares the employer's job requirements with those typical of the job classification. A Level I<sup>11</sup> wage is based on a determination that the job position described by the employer does not deviate, or only minimally deviates, from the typical

<sup>10</sup> The Executive Order (E.O.) 12866 analysis below analyzes FY 2007 through 2009 disclosure data that reflects the numbers of jobs certified in these occupations; the top five industries for which the average annual number of H-2B workers were certified are Construction—30,242; Amusement, Gambling, and Recreation—14,041; Landscaping Services—78,027; Janitorial Services—30,902; and Food Services and Drinking Places—22,948.

<sup>11</sup> Level I wage rates under the Prevailing Wage Guidance are typically assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may 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. Their work is closely monitored and reviewed for accuracy. See [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>9</sup> The Chief Counsel for Advocacy, SBA's comment reflected the suggestion of several businesses on this alternative.



minimum requirements of the corresponding SOC-based job classification contained in O\*NET, including the specific Job Zone. A Job Zone reference indicates the level of skill, education, experience and/or preparation typically required to perform the job, and ranges from one (for which little or no preparation is needed) to five (in which extensive education, training, and preparation are required to adequately perform the job duties at the entry-level). For example, one of the most requested H-2B job classifications, landscaping and groundskeeping worker, is classified as falling within O\*NET Job Zone One.<sup>12</sup> All of the other frequently represented positions in the program: janitors and cleaners, housekeepers, construction laborers, and amusement and recreation attendants, also are categorized within Job Zone One.

The notion that the four wage tiers have a meaningful relationship to skill, as expressed by many commenters including the Chief Counsel for Advocacy, SBA, represents a misunderstanding of the way in which the Department calculates the four tiers. The Department does not collect data associated with skill levels, but instead collects data across the job spectrum. The Department approximates skill levels from that generalized data, not because the data can be disaggregated by skill level, but because it is required to assign a value to four skill levels, in accordance with the formula set forth at section 212(p)(4) of the INA. The formula is artificial, designed to approximate arbitrary skill levels and has a skewing effect when applied to the wage rates applicable to typical H-2B jobs, in which there are fewer skill differentials. The four wage levels currently used by the Department are calculated by applying a statutory mathematical formula to the wage distribution corresponding to a particular occupational classification in the area of intended employment. The Level I wage is established by taking the arithmetic mean of the bottom one-third of the wage distribution; the Level IV wage rate is determined by establishing the arithmetic mean of the top two-thirds of the wage distribution; the Level II and Level III wages are derived from a formula established by section 212(p)(4) of the INA which provides for the reconstitution of two-level Government surveys and creation of two intermediate levels by dividing by the number three the difference between the

initial two levels and adding the quotient to the first level to create Level II, and subtracting that quotient from the second level to create Level III.

Thus, there is no correlation in the four-tier wage structure between the skill level required to perform a job and the wage attached to it. An employer can pay a higher wage for many reasons other than skill level. The lack of a meaningful nexus between the skill level and the compensation is significant where applied to the wage rates assigned to typical H-2B jobs in which there are fewer skill differences, because in most cases, a basic skill set is all that is required to adequately perform these jobs. The range of wages reported in these low-skilled occupations represents the range of pay in the occupation, not the range of pay for skills associated with the job opportunity.

These comments did not identify any significant data or analysis that undermines the essential component of the analysis contained in the NPRM: that there are no significant skill-based wage differences in the occupations that predominate in the H-2B program, and to the extent such differences might exist, those differences are not captured by the existing four-tier wage structure. No commenter directly addressed the Department's concerns about these deficiencies in the existing methodology. No commenter challenged the fact that the OES survey does not collect information about the skills or responsibilities of the workers whose wages are included in the survey. No commenter offered any analytical or empirical support for the notion that the mean of the lowest one-third of the workers in the survey somehow reflects the entry-level wage, nor offered an alternative to the OES wage methodology that might better reflect the purported differences in skills within an occupation. While skill-based wage differences may exist in these occupations, there is insufficient evidence to justify any judgment about what that wage rate should be within a particular occupational code, and it is more appropriate for the employer to select a different occupational code that is more suitable for the level of skills and responsibilities required for the position. In the absence of reliable information that would permit the Department to make and quantify such a judgment, our responsibility to avoid adverse effect mandates that the average of the OES wage for that occupation be considered in determining the prevailing wage for the occupation for which workers are sought. Again, as noted above, this does not prevent

employers from offering higher wages if necessary to attract appropriate applicants.

Even with the elimination of the four-tier wage structure from the H-2B program, employers would still be able to obtain wage determinations that account for differences in skill. The SOC classification system generally groups job classifications into larger categories encompassing related positions; for example, it recognizes entry-level positions such as the landscaping and groundskeeping workers, as well as positions requiring additional skills or experience such as first-line supervisors/managers of landscaping, lawn service, and groundskeeping workers. The latter are classified as Job Zone Two and contain different and/or additional job duties and requirements, which, if selected by the employer, yield a prevailing wage that is higher than that for the low-skilled worker in the same broader SOC category. The variety of SOC job classifications reflecting different kinds and levels of skills ensures that the employer has the latitude to select a different SOC code for the Department's consideration to reflect a position which requires additional skills and experience, and which permits the employer to adequately compensate for those additional skills and experience.

Therefore, the Department disagrees with some commenters' assertions that raising the OES base wage to the mean necessarily means having to increase job requirements or otherwise justify that increase with additional skills. The jobs themselves are written to incorporate the basic skills at entry. Use of the arithmetic mean in determining the prevailing wage simply recognizes that those who are performing the tasks of the job at Level I are performing the same tasks at Level III, with the distinction between the wages for the two levels not being based on a differential in skills.

If an employer chooses to increase its requirements for the position, it should consider classifying the occupation under an SOC code that more closely approximates the requirements and duties of the job; otherwise, the employer will need to justify the higher requirements as a business necessity. Additionally, nothing in this rule prevents an employer from paying a wage higher than the prevailing wage to a worker who possesses skills, licenses, certifications, etc. above those listed in its H-2B application. Employers who cannot use a different O\*NET/OES category remain free to offer a wage higher than the established prevailing wage if they desire to do so. Employers

<sup>12</sup> For a full description of this job classification, see: <http://online.onetcenter.org/link/summary/37-3011.00>.

are also at liberty to specify experience or other requirements consistent with the long-standing program requirement that job qualification must be normal to the occupation, or are otherwise justified by business necessity. This rule does not prevent monetary rewards for those employees who have earned them through experience, skill acquisition, or even employer loyalty. Nothing in this Final Rule suggests nor should be construed to prevent the employer from paying its workers, U.S. and H-2B, more than the required prevailing wage.

Some commenters indicated that particular industries, such as forestry, will fare poorly based on a change to a mean-based OES wage rate. These commenters contended that their job classifications contain numerous occupations that range from low-skilled to professional-skilled work. Their concern is that obtaining a mean-based wage in these classifications will produce a prevailing wage that exceeds the level for a low-skilled job under these classifications.

The Department believes this concern to be misplaced given the way jobs are classified in OES. Each job family in O\*NET, and by extension in the OES, contains numerous levels of jobs. That comprehensiveness is one of the reasons the Department has successfully used the OES for over a decade for this purpose. A general forest conservation worker is categorized separately from a forest conservation technician, allowing for two separate levels of compensation, each appropriate to the work being performed. Again, an employer has the opportunity in filing for the prevailing wage determination to select the occupational code it believes most appropriate. That selection is reviewed against the actual job description provided by the employer, and the Department's final determination rests on the actual tasks, duties and activities in which the employer describes the worker as engaging.

The purpose of establishing the prevailing wage is to establish the minimum wage that avoids adverse effect, considering the actual requirements of the position for which H-2B certification is being sought. It is not to ensure that H-2B workers or workers whose experience or skills exceed those of the position receive premium pay for having more in the way of skills, knowledge, or experience than what the position actually requires. The Department, by this Final Rule, is only setting the floor against which compensation for the basic occupation for which an employer seeks H-2B workers is to be measured, in

accordance with its obligations under the H-2B program.

#### b. Section 212(p)(4) of the INA Does Not Impose a Four-tier Wage Structure on the H-2B Program

Several commenters opposed the Department's proposal to eliminate the four-tier wage structure, indicating that the use of a tiered prevailing wage system was supported by the regulatory history of the program. Other commenters, however, noted that the use of skill levels is illogical given the reasoning behind the implementation of the four-tier wage structure in the H-1B program.

The Department disagrees with the comment that suggests that the use of the four-tier wage structure is legally mandated. That contention was discussed and rejected by the district court in *CATA v. Solis*, 2010 WL 3431761 at \*19. fn. 22 (“[A]ny appeal to § 1182(p)(4) would not constitute a rational explanation for using skill levels in determining H-2B prevailing wage rates”). The Department's analysis in the NPRM and in this Final Rule reaches the same conclusion. While the Department had, for reasons of consistency and administrative efficiency, treated the application of skill levels in the H-2B, H-1B and PERM programs in the same manner, continuing a system that leads to the payment of wages below prevailing is contrary to the Department's regulatory mandate to ensure against adverse effect. The application of tiers to the H-2B program has no rational basis beyond the efficiency served by having one methodology for all foreign labor certification programs. The H-2B program is obviously distinguishable from the H-1B program that was the focus of the Consolidated Appropriations Act of 2005 (Pub. L. 108-447). The H-1B program is specifically designed to address the needs of employers of high-skilled, temporary workers and requires distinguishing among varying levels of skill by the nature of the kinds of jobs that it covers. Those jobs require theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in a specific specialty or its equivalent. As a result, the H-1B program reflects a wide range of experience, skills, and knowledge which appropriately correspond to stratified wage levels. The history of the H-2B program, by contrast, indicates that it grew out of its agricultural predecessor, the Bracero program, as a companion for employers requiring assistance with low-skilled non-

agricultural work. Although the Department recognizes that not all positions requested through the H-2B program are for low-skilled labor, the program is still overwhelmingly used for work requiring lesser skilled workers—those occupations that require at most 2 years, and in most cases much less than 2 years, of education, training, or experience to perform the job duties, tasks, and activities. As discussed above, there is no justification for stratifying wage levels to artificially create wage-based skill levels when in fact there is no great difference in skill levels with which to stratify the job.

#### c. Elimination of the Four-tier Wage Structure in the H-2A Program

In proposing the elimination of the four-tier wage structure in favor of a single arithmetic mean wage, the Department noted that it had previously taken similar action in the H-2A program. One commenter disagreed with the Department's reasoning behind the elimination of the four-tier wage structure arguing that the H-2A and H-2B programs are different and suggested that the Department continue to treat the H-2B program as distinct. Another commenter asserted that the Department's rationale for the elimination of the four-tier wage structure in the H-2A program was based on the concern that the OES data is inaccurate and not concern over adverse effect.

The H-2A and H-2B temporary programs are similar in that they both involve largely low-skilled occupations where skill-based wage differences do not appear to exist to any significant degree and to the extent they do exist, the differences are not reflected in the OES survey data. The Department especially limited its rationale to eliminating OES in the H-2A program to the inappropriateness of the OES in light of a more appropriate wage source (e.g., the Farm Labor Survey). No similar data source exists for the range of jobs in the H-2B program. Thus, the Department has adopted the OES as the best data source available for the H-2B program, absent an applicable CBA, SCA, or DBA wage rate. The lack of skill-based wage differences is a sufficient basis to support the determination that the four-tier wage structure should no longer be used in either program.

#### d. Other Issues Related to Four-tier Wage Structure

A number of commenters, including the Chief Counsel for Advocacy, SBA, argued that the ruling in *CATA v. Solis* did not identify anything inherently

wrong with the four skill levels as used in the current procedure. Several commenters asserted that the Department misconstrued the court's ruling and went well beyond the focus of the order. At least one commenter accused the Department of using the *CATA v. Solis* decision to promote an agenda to raise wages and to prevent employers from using the H-2B program.

These comments misconstrue our references to the *CATA v. Solis* ruling and demonstrate a misunderstanding of the Department's obligation to administer the H-2B program. The court's ruling in *CATA v. Solis* affected only the timing of the NPRM, not its content. The Department announced in the Fall 2009 Semiannual Regulatory Agenda its intention to propose a re-examination of the H-2B program. A review of the H-2B wage system was identified as part of that re-examination. The court's conclusions about the legal necessity for the four-tier system parallel the tentative conclusions that the Department had already reached in its review.

The *CATA v. Solis* court's reasoning parallels the Department's approach in some significant areas. The *CATA v. Solis* court's principal concern about the four-tier wage structure was the fact that the Department had never published an explanation as to why the two-tier system, and later the four-tier wage structure, that were used in the PERM and H-1B programs were also adopted for use in the H-2B program. The court's critique was largely correct, and this rulemaking is designed to provide the notice and comment process that was previously lacking.

The commenters who observed that the *CATA v. Solis* court ordered the Department to simply "show its work" overlook the court's clear disapproval of the use of the four-tier wage structure now used in the H-2B program. The Department based its methodology for the PERM, H-1B, and by extension, the H-2B programs, on the requirements now found in the INA at 8 U.S.C. 1184(p)(4). The Court found that any such reliance on this statutory provision, developed for the use of the H-1B visa program, would be irrational and not an appropriate foundation for the use of skill levels in determining H-2B prevailing wage rates. See *CATA v. Solis*, 2010 WL 3431761, at \*19 fn. 22. As explained in greater detail above, the Department believes that the use of skill levels in the H-2B program is inappropriate given the job duties, tasks, and experience required to perform them.

*C. The Arithmetic Mean Wage Rate Established by the OES Wage Survey Is the Most Appropriate Basis for Calculating the OES Component of the Prevailing Wage Rate*

The Department proposed to require that the arithmetic mean of the OES wage rates be the basis for determining the OES component of the prevailing wage rate in the H-2B program as the most effective available method for determining the prevailing wage. To determine the new wage calculation, the Department proposed to use the published arithmetic mean established by the BLS when compiling the OES survey. This mean is the average of all the survey's wages in the occupation. It will produce a wage rate that is at a point between the current Level II and III wages.

Several commenters, including the Chief Counsel for Advocacy, SBA, espousing the importance of the H-2B program to U.S. employers engaged in seasonal business, as well as its importance to both H-2B and U.S. workers, contended that selecting the arithmetic mean as a prevailing wage will result in increased H-2B wages, which will have a negative effect on employers for several reasons. The commenters first noted that some employers will not be able to afford to pay increased H-2B wages, which will be particularly problematic for small companies or those operating at marginal income levels. Commenters argue that this outcome favors larger companies that have greater economic ability to absorb an increase in wages, therefore, driving smaller companies out of business. Commenters, including the comments presented at the SBA-sponsored roundtable (reflected in the Chief Counsel for Advocacy, SBA comment), also asserted that smaller employers may cease to operate if they are unable to pay the increased costs in H-2B wages, especially when such companies are faced with an extreme shortfall of available U.S. workers. Furthermore, some commenters asserted that the costs to employers resulting from the increase in wages will have an overreaching effect on their profitability and were concerned that the disappearance of small and marginal companies may have a resulting negative effect on U.S. workers who may lose their jobs as a result of a shut-down of such companies.

Additionally, several commenters argued the Department did not take into account contracts employers have already put in place for the coming year; contracts that already established a set pricing for services. Employers

participating in the H-2B program have always been required to meet the conditions of the labor certification, which include the payment of a valid prevailing wage. The fact that a new wage methodology may result in wages in excess of anticipated labor costs does not minimize the Department's obligation. However, even though the NPRM provided current and future users of the H-2B program with some indication of what the Final Rule would require, we recognize that many employers already may have planned for their labor needs and operations for this year in reliance on the existing prevailing wage methodology. In order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012. The Final Rule will be effective in its entirety on January 1, 2012.

This is a final rule, without a phase-in period. We, however, welcome information from the public on the feasibility, and implementation of phasing in the new prevailing wages. The Department recognizes that rapid wage increases may create burdens for employers that choose to participate in the H-2B program, while also providing potentially higher wages for U.S. and H-2B workers hired under the program. Comments should address:

1. Is a phase-in desirable?
2. What would the impact be of a phase-in of the prevailing wage methodology on employers and workers?
3. Over what period and at what levels should any phase-in be implemented that would be consistent with the Department's obligation under this program?

While the Department recognizes the concerns of many commenters, it believes its responsibility to set the prevailing wage is most effectively fulfilled without regard to the size or economic state of the employer. No such qualifier is present in the relevant DHS H-2B regulations or statute. That decision cannot ultimately be influenced by the impact that requiring payment of the prevailing wage will have on any one individual employer. As the Court of Appeals for the First Circuit noted in one of the earliest cases examining the Department's responsibilities under the predecessor H-2 program, "[t]o recognize a legal right to use alien workers upon a showing of business justification would

be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible.” *Elton Orchards v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974). Contrary to one commenter’s claim, the Department’s decision to require that the arithmetic mean of the OES wage rate as the basis for determining the OES component of the prevailing wage rate is not arbitrary, but a deliberate acknowledgment that the levels currently provided to employers for use in the program are too low when weighed against the data on wages which are currently paid in those occupations for the same jobs. Our responsibility to set wage rates that avoid adverse effect on wages compels us to look to the OES arithmetic mean as an appropriate wage-setting tool, along with the CBA, SCA, and DBA.<sup>13</sup> As discussed earlier, the Department believes the arithmetic mean is far closer to the actual wage being paid in these same occupations and more closely approximates the prevailing wage which must be paid in order to avoid adverse effect.

#### *D. Evidence of Negative Effects on Wages*

The Department received a number of comments providing a variety of data and research attempting to refute the concept of wage depression resulting from the prevalence of low wages in the H-2B program. Additionally, several commenters, including the Chief Counsel for Advocacy, SBA, faulted the Department for not providing data and/or studies as empirical support for eliminating the four-tier wage structure. Still others claimed that H-2B workers are already paid wages that are higher than those that predominate in the geographic area where the job opportunity is located. To refute the notion of wage depression caused by the H-2B program, some of the commenters relied on the Department’s Initial Regulatory Flexibility Analysis (IRFA) indicating that the relatively small effect of the H-2B program on the overall economy undermines the wage depression rationale for the elimination of the four-tier wage structure.

Many of these commenters relied on a recent study, included in the rulemaking record by one commenter, which contains an economic analysis of the H-2B program by an academic economist, Madeline Zavodny.<sup>14</sup> In concluding that the admission of H-2B

workers on the national level does not have a negative correlation to U.S. workers’ employment or earnings and has no statistically valid relationship to the wages and employment levels of workers on the state level, the study compares wage changes “in sectors that rely heavily on H-2B visa holders with wages in other industries that hire few or no temporary workers.”<sup>15</sup>

Additionally, the appropriate measure of adverse impact on the wages of U.S. workers is not assessed on the national or even the state level but rather must be considered in terms of the workers who are similarly employed. Under the Department’s regulations, being similarly employed generally means having substantially comparable jobs in the occupational classification in the area of intended employment. Therefore, any study purporting to measure a net effect of the employment of H-2B workers on the wages, working conditions and access to job opportunities for U.S. workers fails to take into account the lack of uniformity in distribution of H-2B workers, as well as a variety of factors which at any time may also correlate with the presence of H-2B workers in any localized labor market.

The predominance of Level I wages in the program, wages based on the mean of the bottom one-third of all reported wages in the systems, is itself evidence of the adverse impact of those wages on those U.S. workers performing the same tasks and engaged in the same jobs. Specifically, a review of the Department’s records for the issuance of prevailing wages in calendar year 2010 indicates that almost 75 percent of jobs are classified at a Level I wage, with the remaining 25 percent scattered in Levels II, III and IV. In a broader examination of wages offered over the past several years, in about 96 percent of cases, the H-2B wage is lower than the mean of the OES wage rates for the same occupation. 75 FR 61580, Oct. 5, 2010. In a low-skilled occupation, the mean for the occupation represents the wage that the average employer is willing to pay for unskilled workers to perform that job. The four-tier structure artificially lowers that wage to a point that it no longer represents a market-based wage for that occupation. The H-2B worker, along with the domestic workers recruited against the application, who are being paid a significantly lower wage than two-thirds of those in that area of employment cannot help but have a depressive effect on the wages of those around him. An employer paying U.S. workers as well as

H-2B workers has no incentive to pay the U.S. workers any higher compensation. The local competitors, by extension, have no incentive to pay a higher compensation. Therefore, it follows that if the employer must only offer and pay Level I wages, wages below what the average similarly employed worker is paid, those wages will make the U.S. workers less likely to accept those job opportunities or will require them to accept the job at a wage rate less than the market has determined is prevailing for the job. The net result is an adverse effect on the worker’s income. While an arithmetic mean is not an indicator of the single best wage at which U.S. workers are considered to be adversely affected, by its placement at the average wage rate it establishes a more accurate wage for the average U.S. worker.

#### *E. Alternatives for the Calculation of a Prevailing Wage*

##### *1. OES Alternatives*

The Department received several proposals for alternative prevailing wage-setting methods, including those mentioned at the SBA roundtable later memorialized in the Chief Counsel for Advocacy, SBA comment. We considered alternatives such as using the OES median; using only the DBA wage for construction and using the SCA (or a regional) wage for reforestation; using some set percentile of some of these wages; and including fringe benefits. Our reasons for rejecting those alternatives are set out in the discussion of the RFA in the administrative section of this preamble.

Other options presented as alternatives were not alternatives for the setting a prevailing wage but rather suggestions to change elements in the proposed wage-setting methodology and are dealt with elsewhere in this discussion.

Other commenters noted that although the arithmetic mean represents an improvement to a stratified wage rate system, it will not do enough to protect U.S. workers from adverse effect. At least one such commenter suggested the Department set the OES wage at the 90th percentile wage instead to account for any fringe benefits without which the wages of U.S. workers who are similarly employed would be depressed. The Department declines to do so. As discussed above, the Department historically has not required the payment of fringe benefits to H-2B workers, even when SCA and DBA wage rates were mandatory for occupations where such wage determinations existed. No data exists to allow the full

<sup>13</sup> The Department’s justification for its reliance on the OES data has previously been expressed. See 69 FR 77368, Dec. 27, 2004.

<sup>14</sup> See *Economic Effect of H-2B Workers*, public comment ETA-2010-0004-0256.1.

<sup>15</sup> *Id.* at 17.

computation and monetization of fringe benefits over all the occupations and locations covered by the H-2B program. Nor is there any basis concluding that the 90th percentile represents any valid surrogate for such data.

One commenter challenged the Department's assertion that SCA rates do not differ substantially from the OES rates used in the H-2B program.<sup>16</sup> To support its claim, this commenter cited a disparity of \$2.27 in OES and SCA wage rates for landscaping and grounds keeping workers in Wichita County, Kansas. The Department was not able to replicate this commenter's analysis; however, it appears that much of the difference between the two wage rates resulted from the inappropriate comparison of the SCA wage rate to the baseline, the Foreign Labor Certification Online Wage Library's OES Level I wage. As explained above, the Level I wage rates are not representative of the prevailing wage paid to workers in the locality. If the Level III (mean) wage of \$10.26 per hour<sup>17</sup> is used instead (as it would be under the final rule), the \$2.27 difference between the OES and SCA rates cited by this commenter shrinks to \$0.29, with OES rate falling just short of the \$10.55 per hour SCA wage.<sup>18</sup> The Department acknowledges that for some occupations in some areas of intended employment there may appear to be a larger disparity between OES and SCA wage rates. However, many differences result from a comparison of similar-sounding job titles; under this Final Rule the determination of appropriate wage will be based on actual job duties, which the Department believes will minimize false equivalencies and thereby reduce wage disparities.

## 2. Non-OES Alternatives

One commenter suggested a wage methodology that would have SWAs, rather than employers and/or the Department, conduct surveys to effectively determine the appropriate wage for any occupation in a particular State. Before 1998, when the program was much smaller, SWAs did in fact conduct surveys to produce prevailing wages. The financial resources available today to be devoted to such an activity, in particular given the expansion of the program and the resources available

elsewhere (specifically, OES, SCA, and DBA) no longer make this a viable option. In addition, the inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used, created difficulties that the benefits of using such surveys do not outweigh.<sup>19</sup> Reliance on SWA surveys in our non-agricultural immigration programs was largely abandoned in 1998 because the OES provides a more reliable and cost-effective means for producing prevailing wage rates on a consistent basis across the country. For these reasons, the Department has determined that the OES survey with its standardized job descriptions, compensation data collection and analysis, and SCA and DBA wage determinations provide a much more accurate portrayal of wage information than State surveys.

Finally, one commenter representing reforestation employers suggested that the Department set as the prevailing wage 115 percent of the higher of the Federal or State minimum wage.<sup>20</sup> The Department believes such a calculation would result in an arbitrary rate not based on labor market conditions. U.S. workers, for instance, may make far more than this rate, in which case the resulting prevailing wage would suppress U.S. worker earnings. On the other hand, U.S. workers could earn less than the 115 percent level, creating a scenario where employers are required to pay H-2B workers more than U.S. workers.

One comment suggested the Department adopt methods of compensating reforestation workers that are more flexible and not based on specific locations, citing inevitable deviations (due to weather, ground conditions, contractor demands) in an itinerant work schedule. An alternative method proposed by a commenter was the establishment of a prevailing wage for a wider region—similar to the H-2A Adverse Effect Wage Rate (AEWR) which typically covers several states with a single wage rate—which would allow employers to deviate from identified worksites as long as they pay workers at least the established rate. The Department recognizes that the uncertainties inherent in reforestation can make it difficult to determine if and where employees will be working as

conditions change during the contract period. That is an issue about the amount of work available, not the wages to be paid. The Department notes that in situations where projects stretch across multiple counties or states with different prevailing wages, the employer can avoid this complexity by paying the highest of the prevailing wages of those areas, which is similar to paying to a regional wage, such as the AEWR. Prevailing wage rates for forestry work are generally the same across contiguous counties—and frequently noncontiguous counties—in the same State.

The Department has concluded that it is not feasible or desirable to establish regional wage rates for particular industries in the H-2B program. The prevailing wage rates are locality-based in order to prevent adverse effect on U.S. workers. The Department believes that using a regional wage rate could result in an arbitrary rate not based on labor market conditions. U.S. workers in some localities might make more than this rate, in which case the prevailing wage would suppress U.S. worker earnings, while U.S. workers in other localities might earn less than the H-2B workers earning the regional rate.

## 3. Other Alternatives

One commenter noted that the NPRM indicated that H-2B workers comprise a small proportion of the U.S. labor force—less than 1 percent of most job categories—and that since most of those positions are low skilled and low paid, it follows that U.S. workers occupy 99 percent of highest paying jobs in any given category. Based on this conclusion, the commenter proposed that to prevent adverse effect on the wages of U.S. workers, the prevailing wage should be based on the BLS 10th percentile wage estimate for the occupation in the area of employment. The commenter further noted that this would keep the H-2B workers in the lowest 10 percent of the wage category and the U.S. workers in the highest 90 percent of the wage category, therefore avoiding any adverse effect on the wages or working conditions of U.S. workers.

While the Department appreciates the suggestion for avoiding the adverse effect on similarly employed U.S. workers, this commenter's proposal reflects a misunderstanding of the purpose behind the change in prevailing wage methodology. The Department's role in the H-2B program is not to determine the wages of H-2B workers, per se, but rather to set an appropriate prevailing wage—a floor—for the job opportunity that will ensure no adverse

<sup>16</sup> This comment addresses a statement made in footnote 7 of the NPRM, in the economic analysis required under Executive Order 12866. 75 FR 61582, Oct. 5, 2010.

<sup>17</sup> 37-3011 for 2000001, at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=2000001&code=37-3011.00&year=11&source=1>.

<sup>18</sup> WD number 2005-2216, revision 13, 11/18/2010.

<sup>19</sup> The Department, in fact, recognized the need for consistency in the approach to establishing prevailing wages when it federalized the prevailing wage determination system in the 2008 Final Rule.

<sup>20</sup> This proposal was also expressed in the comment submitted by the Chief Counsel for Advocacy, SBA.

effect on the wages of U.S. workers who are similarly employed or who could be similarly employed. As discussed earlier, the Department must set a prevailing wage that assures that U.S. workers who might be interested in a job will be paid a wage that approximates the wages available to other U.S. workers in the same occupation. Only if there are insufficient U.S. workers to fill that job at that wage may H-2B workers be hired to make up the labor shortfall.

#### 4. Piece Rates

Several commenters in the seafood processing industry proposed that in light of the prevailing practice in the industry in which workers are paid a piece rate based on production, the Department should permit employers to pay a piece rate based on production for the production-based work and a prevailing wage rate for all non-processing work. The Department notes that it does not prohibit incentive piece rates, provided that the piece rates produce earnings that meet the required prevailing wage.

Having considered the proposed alternatives, the Department has concluded that none would satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely effect the wages of U.S. workers who might take H-2B jobs. Finally, the Department must ensure that in the H-2B program the wages offered to H-2B workers and U.S. workers recruited under H-2B job orders are the same wages and terms of employment offered to U.S. workers recruited by employers not participating in the H-2B program, that is, are the prevailing wages. Any method that results in offering H-2B workers lower than average wages adversely affects U.S. workers responding to H-2B-related recruitment. Similarly, any method that results in an employer recruiting for job opportunities using experience requirements that are higher than necessary or not normal to the occupation creates artificial entry barriers for potentially interested U.S. workers. While the Department appreciates the proposed alternatives received, it has concluded that none of

the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

#### F. Elimination of Private Wage Surveys

The Department received a wide range of comments about its proposal to eliminate employer-provided surveys from the prevailing wage determination process in the H-2B program. Some commenters supported the Department's proposal, some opposed it, and others sought to retain, but modify, the employer-provided survey review process.

The commenters supporting the Department's proposal to eliminate employer-provided surveys cited reasons including increased clarity and efficiency in the prevailing wage determination process; elimination of a wage source with inconsistent quality and accuracy; less uncertainty related to compliance; elimination of redundancy with the work the Department already performs in collecting vast amounts of representative wage data; and successful experience with OES. One commenter specifically noted that the Department's progress in consolidating prevailing wage determination processing in one national center and the resulting increased consistency supports eliminating employer-provided surveys as inefficient and unnecessary. While several commenters asserted that the only way to determine the wage where there is no adverse impact on U.S. workers is through surveys, either conducted by the employer or the Government, one commenter further opined that the Government was in a better position to gather wage information and undertake wage surveys than a private employer.

In contrast, commenters opposed to the Department's proposal to eliminate employer-provided surveys argued that the value of private surveys in the prevailing wage determination process justifies the administrative cost. Many of the commenters who wished to retain the employer-provided survey review process acknowledged that the current process was not workable in a time-sensitive program like H-2B, contending that more employers would use employer-provided surveys if the survey submission process was more user-friendly and survey review requirements were not so strict. The commenters who wished to retain, but modify, the employer-provided survey review process offered a variety of suggestions to do so. Some commenters suggested shifting review of private surveys to a disinterested third-party,

with the cost of such review borne by the industry sponsoring the survey. One commenter suggested the Department require surveys to be conducted by a reliable third party, such as a state agency, or to be "peer reviewed." Some commenters suggested the Department make approved employer-provided surveys available for use by all employers with the same occupation within the same area of intended employment. Other commenters suggested simplifying private survey submission instructions (but did not offer suggestions about how to do this), while others suggested revising the review criteria.

After reviewing all of the comments on the employer-provided survey review process, the Department concludes that the prevailing wage rate is best determined through reliable Government surveys of wage rates, rather than employer-provided surveys that employ varying methods, statistics, and surveys. The Department has concluded that using only CBA, SCA, DBA, and OES to determine the prevailing wage is the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H-2B program. The Department acknowledges, as it did in the preamble to the NPRM, that some private surveys may provide useful information. However, the Department agrees that employer-provided surveys, generally, are not consistently reliable. To illustrate, many H-2B employers in the ski industry and the crab processing industry in FY 2009 attempted to use surveys that did not meet the basic criteria outlined by the 2005 Prevailing Wage Guidance, but which had been previously accepted by the SWAs. Moreover, employers typically provide private surveys when the result is to lower wages below the prevailing wage rate. Such a result is contrary to the Department's role in ensuring no adverse impact. While the Department appreciates commenters' suggestions for alleviating the Department's administrative costs, the Department will not endorse specific private surveys in the H-2B program, in part because of the comprehensive public surveys available to calculate the prevailing wage, and in part to avoid the administrative inefficiency of endorsing surveys that frequently change. The Department believes the values commenters identified, including expedience, consistency, fairness, and accuracy, are best accomplished by using CBA, SCA, DBA, and OES wages, not employer-provided surveys. Moreover, the Department has

concluded that the use of CBA, SCA, DBA, and OES wages will not only protect U.S. worker wages, but also will simplify the H-2B process for both the Department and employers.<sup>21</sup> Given the quality of the three public wage data sources the Department will use and the Department's interest in providing accurate and consistent prevailing wage rates on a fast turn around, the cost of reviewing such private surveys far outweighs their usefulness in the H-2B program.

Several submissions, including two from employers and one from an individual, suggested that the wage surveys used to determine H-2B prevailing wages should only sample temporary workers. However, a wage survey of temporary workers may include workers who provide short-term services to fill in for sick or vacationing employees, while H-2B workers essentially become full-time workers for the entire period of need which may last for most of the year. Moreover, limiting the survey universe in this way would produce results inconsistent with the Department's responsibility to prevent the employment of temporary foreign workers under the H-2B program from adversely impacting U.S. workers, regardless of whether the U.S. workers are temporary or permanent. The sole use of temporary workers' wages would depress prevailing wage calculations, applying substantial downward pressure on wages for similar, permanent work within the region. Therefore, the Department will continue to use wage surveys that include permanent workers.

One commenter expressed concern that eliminating employer-provided surveys made Board of Alien Labor Certification Appeals (BALCA) review an insufficient legal recourse for employers, in that the review would evaluate only whether the Department had made an error in position classification rather than prevailing wage rate accuracy. It is correct that BALCA review will not permit the introduction of private surveys to challenge the determination; this is a necessary corollary to the elimination of private surveys in the program, and is a necessary product of the limitations upon BALCA as an administrative appellate unit charged with judging the Department's compliance with its

regulations. The proposed rule does not, moreover, eliminate BALCA's role in the H-2B program. Employers may continue to request BALCA review when an employer disagrees with the Department's application of the prevailing wage determination process at 20 CFR 655.11(e).

Several commenters suggested that some jobs in some industries are so unique that they are not represented by any SOC classification or are so remotely located that OES wage data is too broad to produce a realistic wage rate. These commenters suggested that surveys other than OES are necessary to accurately assess prevailing wages for these unique or remote jobs. The Department believes, however, that almost every job opportunity is effectively captured in the OES or the SCA or DBA wage determination rates and remote locations are effectively incorporated into the areas of intended employment reported in these wage sources.

The crab processing industry's crab picker occupation was cited by many commenters, including the Chief Counsel for Advocacy, SBA, for instance, as an example of the mismatched job in OES. Others cited the ski instructor for a mismatched job classification. Under the OES, crab pickers are classified as Meat, Poultry, and Fish Cutters and Trimmers. The selection of this category when setting up the SOC was not inadvertent as evidenced by the crosswalk from the predecessor categorization, the Dictionary of Occupational Titles (DOT) from the job occupation of "crab meat processor" (DOT title 525.687-126) to the O\*NET job classification of Meat Cutters. While specific duties of a crab picker are not included in the OES classification, a crab picker is an appropriate fit within that classification, since removing the meat from cooked crabs and sorting into categories (backfin, claw, etc.) for packaging and sale, as the job is described by many employers in that industry, could be easily encompassed by the duties outlined in the O\*NET job classification of the meat cutter.<sup>22</sup> The existence of a job in the DOT, and its mapping to an SOC code as evidenced in the crosswalk from DOT to SOC, is an objective demonstration that the Department deliberately considered and aligned that

job to an SOC code, making the SOC code now in use equivalent for these purposes to the former job description in the DOT. The Department further notes that SOC code classification modifications may be requested through a process administered by the BLS that is specifically established for that purpose, in which members of the public, included affected industries, may participate. We encourage employers believing that the SOC code in which their position has been classified is not representative to participate in this established process.<sup>23</sup>

One commenter suggested that some private surveys sometimes produce results below the Federal, State, or local minimum wages and have been used as a mechanism to lower H-2B wages to a level that displaces U.S. workers and adversely affects U.S. workers' wages and working conditions. Two commenters suggested that the Department, by accepting employer-provided surveys, would be authorizing the payment of wage rates lower than the prevailing wage rate as determined by reliable Government sources. One commenter argued that allowing private surveys, with wages below the prevailing wage rate, impedes the upward pressure on wages that would otherwise occur in a labor shortage situation. Similarly, other commenters asserted that acceptance of employer-provided surveys in industries or occupations dominated by temporary workers results in a stagnant and inaccurate prevailing wage rate. Yet another commenter suggested that employer-provided surveys undermine the consistency of prevailing wage rates in the program.

The Department agrees that employer-provided surveys, generally, are not consistently reliable. Wage surveys that find that some employers are paying rates higher than the Department's prevailing wage determination do not require review; employers are always able to pay higher than the required prevailing wage rate. The Department believes that administrative resources are not best spent on reviewing employer-provided surveys, especially when such surveys are provided typically to avoid using a survey that produces a higher wage. The Department, however, acknowledges that there are some very specific situations in which a survey can provide information to which the Department does not currently have access. For example, there are geographic locations that are not included in BLS' data collection area

<sup>21</sup> The Department has so far retained the use of private surveys in both the H-1B and the PERM programs. The H-1B program statutorily requires the use of some level of alternate information. While we may well in future review the use of private surveys in the PERM program, the Department has decided that this rule is not the vehicle in which to perform this activity.

<sup>22</sup> As defined in O\*NET, the classification includes the following tasks: Using knives, cleavers, meat saws, bandsaws, or other equipment to perform meat cutting and trimming; cutting and trimming meat to prepare for packing; obtaining and distributing specified meat or carcass; and separating meats and byproducts into specified containers and seal containers.

<sup>23</sup> See <http://www.bls.gov/soc/revisions.htm>.



(such as the Commonwealth of the Northern Mariana Islands (CNMI)). Where there is no data from which to determine an OES wage and where there are no applicable CBA, DBA or SCA wages, employers in those locations will continue to have the opportunity to submit wage surveys.

The Department also acknowledges that there may be other very limited circumstances in which an employer-provided wage survey may be potentially appropriate. This would occur where the employer is able to demonstrate it cannot use a collective bargaining agreement wage because it is not a party to a CBA, and cannot use a DBA wage, an SCA wage, or an OES wage because the job opportunity is not accurately represented within the job classification used in those surveys. In this regard, we are also mindful that the migration to SOC codes was not a perfect match in every case. The Department is particularly aware of the use of the generalized set of occupations as “all other” categories in the SOC, in which a meaningful comparison to the DOT becomes more problematic. Accordingly, to show that a job opportunity is not accurately represented within the SOC job classification system, an employer must demonstrate that the job opportunity was not in the DOT or if the job opportunity was in the DOT, the crosswalk from the DOT to the SOC Codes places the DOT job in an “all other” category in the SOC. Accordingly, the employer must demonstrate that the job entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different than those in any SOC classification other than with the “all other” category.<sup>24</sup>

Employers should submit a request to use a private survey no later than 180 days before the initiation of planned recruitment. This will provide the Department with enough time to analyze the job duties submitted and request additional information. Job titles are not used consistently among employers, and the Department will conduct a careful review of the duties, activities and tasks associated with the job opportunity to determine whether the employer’s assessment of how the job opportunity was treated under the DOT is accurate and whether the job is actually significantly different than any job described in the SOC classification other than with the “all other” category.

If the Department concludes that it is appropriate to allow the submission of a survey, the employer will then be permitted to submit its survey for evaluation to ensure that it meets the Department’s standards for the validity of the statistical methodology and the reliability of data. There will be no appeal from the determination of qualifying for use of a private survey, although there can be an appeal from the acceptability of the prevailing wage determination itself. The Department will issue revised Prevailing Wage Guidance, including changes necessary to conform to this regulation. This includes the requirement that any survey instrument submitted cannot include the wages of H-2B workers or other nonimmigrant workers in calculating the wages. The Department has added this requirement to ensure that wages of H-2B workers do not establish the parameters by which the wages of all workers would be measured, as this could have the net effect of creating a permanent subset of lower wages in that occupation or area of employment.

A number of commenters expressed concern that there is currently no alternative mechanism for labor organizations, worker advocate organizations, or other worker representatives to submit alternative surveys supporting higher wage rates. In none of our immigration programs has the Department ever permitted entities other than the employer to submit prevailing wage surveys. We have found no justification for departing from this practice.

#### *G. Multiple Worksites Wage Methodology*

The Department received comments from individual employers, labor unions, worker advocate groups, and a Congressional committee proposing that we revise the current process for determining wage requirements in those occupations that consist of employment in multiple locations under an approved labor certification. These commenters suggested that the Department require an employer to pay the highest prevailing wage rate out of all the areas of employment in which workers will be assigned for all the work performed throughout the itinerary. Many of these commenters stated that such a change is needed to prevent employers from exploiting wage rates in the most economically depressed labor markets. However, historically, the Department has required that employers pay workers the prevailing wage rate for the job opportunity in the area of intended employment, as this is the most effective way to avoid adverse effect in

that area. All proposed and existing wage calculations, whether based on the provisions of the SCA, DBA, OES, or applicable Federal, State, or local laws, are determined based on the area of intended employment. Revising the requirement to create a single wage determination regardless of the actual area of intended employment would be contrary to how the Department has determined and applied wage calculations for the H-2B program. The Department does not believe that there is a need at this time to revise this long-standing provision. Additionally, the Department in no way intends to hinder an employer’s ability to pay its H-2B and U.S. workers the highest prevailing wage rate for the areas in which they will be assigned for all the work to be performed under the H-2B application, if it so desires.

Along similar lines, a commenter in the forest industry suggested the use of a regional wage methodology linking a number of worksites on an itinerary over a wide geographic area. The commenter takes no position on whether such a methodology would be appropriate for H-2B employers in other industries and occupations besides the forestry-related industry. Though the Department appreciates this suggestion, it has concluded that the SCA and OES provide various forestry occupations enough flexibility to accommodate the job opportunities in each area of intended employment. As discussed above, the Department has a history of determining wages based on the area of intended employment and we are not adopting alternative methodologies that would revise that position.

### **III. Administrative Information**

#### *A. Executive Order 12866*

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

<sup>24</sup> We received a number of comments from the ski industry seeking the opportunity to continue to use the surveys it has submitted in the past. Whether ski instructors qualify under this standard will be assessed when and if a request is submitted under this regulation.

of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

OMB has determined that this Final Rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. This regulation would likely result in transfers in excess of \$100 million annually and, consequently, is economically significant. Accordingly, OMB has reviewed this Final Rule.

#### 1. Need for Regulation

The Department has determined that a new wage methodology is necessary for the H-2B program. Although many commenters supported the Department's proposal, others questioned the Department's decision to change the methodology for determining the prevailing wage rate. The Department's decision to evaluate the prevailing wage, however, aligns with the Department's mandate under the H-2B program to ensure that U.S. workers are not adversely affected by the employment of H-2B workers. The order in the recent court decision in *CATA v. Solis* merely prompted a more expeditious review of this important issue. As noted in the NPRM, the Department has grown increasingly concerned that the current calculation method of the prevailing wage rate does not adequately reflect the appropriate prevailing wage necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers. Some commenters stated that the Department lacked the data to support this decision. The Department analyzed the breakdown of wages by OES level of 4,694 submitted requests for prevailing wages (all requests submitted from the inception of the electronic PWD request submission system on January 21, 2010 to November 7, 2010). According to this analysis, 74 percent of H-2B positions were certified at the Level I wage rates during that period. The percentages of H-2B positions certified at Levels II, III, and IV were 10.5, 8.2, and 6.9, respectively. In approximately 96 percent of the cases, the wage rates certified for the H-2B positions were lower than the mean of the OES wage rates for the same occupation. The Department therefore asserts that a reevaluation of the current prevailing wage determination methodology is empirically justified.

The Final Rule defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer; (2) the wage rate established under the DBA or the

SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. The OES wage level under the new methodology would effectively result in the payment of higher wages that would conform more closely to the wages paid by non-H-2B employers according to the results of the OES survey. Thus, it is the Department's position that when the certified prevailing wage is based on the OES survey, using the arithmetic mean will ensure that H-2B workers are paid a wage that will not adversely affect the wages of U.S. workers similarly employed.

#### 2. Economic Analysis

The Department's analysis below compares the expected impacts of this Final Rule to the baseline (*i.e.*, the 2008 Final Rule). According to the principles contained in OMB Circular A-4, the baseline for this rule would be the situation in which the proposed rule is not adopted. Thus, the baseline for this H-2B prevailing wage regulation is the four-tier wage structure derived from the OES wage survey, as outlined in the 2008 Final Rule.

The change in the method of determining prevailing wages under this Final Rule will result in additional compensation for both H-2B workers and U.S. workers hired in response to the required recruitment. In this section, the Department discusses the relevant benefits, costs, and transfers that may apply to this Final Rule.<sup>25</sup>

This Final Rule changes the OES component of the prevailing wage determination to the arithmetic mean of the OES wages for a given area of employment and occupation. This Final Rule requires employers to offer H-2B workers and U.S. workers hired in response to the required H-2B recruitment a wage that is at least equal to the highest of the prevailing wage, or the Federal, State or local minimum wage. Under the Final Rule, the prevailing wage is the highest of the following: (1) The wage rate set in a CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer;<sup>26</sup> (2) the wage rate

established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage.

With two exceptions, noted below, the Department calculated the change in hourly wages by matching the OES arithmetic mean wage rates to the H-2B data by the standard occupational classification (SOC) code and the metropolitan statistical area (MSA) of employment. We also matched the SCA and DBA wage rates (exclusive of fringe benefits) to the H-2B data using the occupational title specified in the H-2B program data and the county of employment.<sup>27</sup> For some occupations and counties, SCA and DBA wages had not been determined; in those cases, the SCA and DBA wages did not enter our calculations. In the Department's experience under the H-2B program, the work of landscape laborers generally involves grounds maintenance of the kind contained in SCA and OES job descriptions. Construction related landscaping—the construction of planters, walkways and similar structures as part of building construction projects as used in DBA job descriptions—is rarely applicable to H-2B employment. Accordingly, either SCA or OES rates were used to estimate costs for landscape laborers. Similarly, SCA job descriptions are generally more reflective of H-2B reforestation occupations than are OES job descriptions; therefore, SCA wage rates were used to estimate the effect of the Final Rule on reforestation employers. This analysis is based on job titles rather than actual job duties. After implementation, the Department will closely compare the job duties listed on the Application to the job duties listed in the SOC, SCA Dictionary of Occupational Titles and the DBA wage determinations to identify the most appropriate basis for determining the prevailing wage.

Using certified and partially certified applications in the H-2B program data, we calculated the increase in wages by selecting the highest wage among the OES arithmetic mean, the SCA, and DBA wage. We then subtracted the average H-2B hourly wage certified from the highest of the three wages, and we weighted this differential by the

<sup>25</sup> For the purpose of this analysis, the Department considers H-2B workers as temporary residents of the U.S.

<sup>26</sup> A CBA wage may in fact be the highest of the applicable wages; even under the 2008 Final Rule, if the job opportunity were covered by a CBA, the wage rate in the CBA would be the required wage. Accordingly, including the wage rate set forth in the CBA in the definition of prevailing wage will not result in an increased cost to the employer.

<sup>27</sup> Once this Final Rule is effective, the prevailing wage will be determined not by comparing job titles, but by comparing job duties listed on the employer's application with the occupational definitions in the SOC (for OES), the Dictionary of Occupational Titles (for SCA), or the DBA wage determination.

number of certified workers on each certified or partially certified application.<sup>28</sup> We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified applications.<sup>29</sup> Based on this calculation, we estimate that the change in the method of determining wages will result in a \$4.83 increase in the weighted average hourly wage for H-2B workers and similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application.

This approach for calculating the expected changes in hourly wages relative to the baseline is more accurate than the approach the Department used in the analysis presented in the NPRM in two ways. First, the calculations presented in this analysis use the highest wage among the OES arithmetic mean, the SCA, and DBA wages.<sup>30</sup> In the analysis presented in the NPRM, the SCA and DBA wages were not directly accounted for in these calculations. Second, the calculations presented in this analysis use wage data for each MSA or county where the H-2B work actually took place.<sup>31</sup> In the analysis presented in the NPRM, on the other hand, the Department used the national values rather than location-specific data.

More specifically, because the employer's address frequently does not represent the area where the work actually takes place, the Department conducted a manual extraction of area-of-employment data from the submitted H-2B applications, including the city, state, and zip code corresponding to the area of employment. The Department

used a random sample of 500 certified or partially-certified applications from Calendar Year (CY) 2009 H-2B program data.<sup>32</sup> The \$4.83 increase in the weighted average hourly wage for H-2B workers (and U.S. workers hired in response to the recruitment required as part of the H-2B application) was calculated using this data sample.

The Department provides an assessment of transfer payments associated with increases in wages resulting from the change in the wage determination method. Transfer payments, as defined by OMB Circular A-4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect but do not result in additional benefits or costs to society. The primary recipients of transfer payments reflected in this analysis are H-2B workers and any U.S. workers hired in response to the required recruitment under the H-2B program. The primary payors of transfer payments reflected in this analysis are H-2B employers. Under the higher wage obligation defined in the Final Rule, those employers who participate in the H-2B program are likely to be those that have the greatest need to access the H-2B program. When summarizing the benefits, costs, or transfers of this rule, we present the 10-year averages to reflect the typical annual effect.<sup>33</sup>

Employment in the H-2B program represents a very small fraction of the total employment in the U.S. economy both overall and in the industries represented in the program. The H-2B program is capped at 66,000 visas issued per year; assuming that half of all entering workers stay at least one additional year, and half of those workers stay a third year, H-2B workers represent approximately 0.09 percent of

total U.S. nonfarm employment (130.9 million).<sup>34</sup>

According to H-2B program data for FY 2007–2009, the average annual numbers of H-2B workers certified in the top five industries<sup>35</sup> were as follows: construction—30,242; amusement, gambling, and recreation—14,041; landscaping services—78,027; janitorial services—30,902; and food services and drinking places—22,948. When we scale these figures in accordance with the 66,000 cap, these certifications yield the following percentages of the total employment in each of these industries: Construction—0.2 percent (14,756/7,265,648); amusement, gambling, and recreation—0.5 percent (6,851/1,506,120); landscaping services—6.5 percent (38,073/589,698); janitorial services—1.6 percent (15,079/933,245); and food services and drinking places—0.1 percent (11,197/9,617,597).<sup>36</sup> Thus, as these data illustrate, the H-2B program represents a relatively small fraction of the total employment, even in each of the top five industries in which H-2B workers are found.

In the remaining sections of this analysis, we first present the costs resulting from the Final Rule, including an increase in H-2B employer expenses that could lead to a decrease in production. The Department predicts that most of these costs, which would result from a decrease in current H-2B participation by employers who cannot afford the increased labor costs or who

<sup>28</sup> The Department weighted the wage differentials by the number of certified workers as opposed to the number of workers requested because a decrease in number of workers granted may occur for reasons other than that a U.S. worker was hired in response to the recruitment.

<sup>29</sup> In all wage calculations where we found that the baseline H-2B wage is higher than any alternative wage considered, we assumed that the baseline wage prevails. That is, we assumed that the wage increase is zero for those cases. This situation, however, is rare; the baseline prevailing wage exceeded the OES mean in approximately 4 percent of the cases.

<sup>30</sup> These are hourly wage rates and do not include fringe benefits.

<sup>31</sup> A recent Congressional Research Service (CRS) report used a wage calculation approach that is similar to that used in this Final Rule. The report found that the SCA and DBA wage rates are in some cases higher than the OES arithmetic mean for a given job opportunity. This is consistent with the findings of the analysis conducted for this Final Rule. The CRS report, however, did not rely on wage data for each county where the work actually took place. Also, the CRS report was limited to a selected group of occupations and counties. Source: "Potential Impact of Proposed Regulations on the Wages of H-2B Workers," Congressional Research Service, October 2010.

<sup>32</sup> The Department's program database does not collect city and zip code data for the work locations for the certifications. Therefore, in order to extract that data, the Department hand-selected a random sample from the CY 2009 filed applications to calculate the wage increases. The Department used CY 2009 as a representative year. Although some commenters suggested that FY 2009 was not a representative year for use of the H-2B program, the random sample chosen was consistent with standard statistical methods. Further, the Department selected the data from the calendar year rather than the fiscal year to allay such concerns, but at the same time, represent the most recent data available.

<sup>33</sup> The 10-year analysis period starts on January 1, 2012 and ends on December 31, 2021 since the Final Rule is effective for wages paid to H-2B workers and U.S. workers recruited in connection with an H-2B labor certification for all work performed on or after January 1, 2012.

<sup>34</sup> For this and subsequent calculations, we used an estimated total of 115,500 H-2B workers because the number of visas available under the H-2B program is 66,000 (assuming no statutory increases in the number of visas available for entry in a given year) but employers can hire H-2B workers with existing visas for two additional years. Assuming that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, there will be a total of 115,500 H-2B workers in a given year. That is, in our calculations, we use 66,000 as the annual number of new entrants and 115,500 as the total number of H-2B workers in a given year during the 10-year time horizon. Source: <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>.

<sup>35</sup> One industry, forestry services, made the initial top-five list based on the number of H-2B workers certified; however, the employment data was insufficient to include it in this section. Data on employment size and business revenue were available for forestry and, thus, this industry is included in the Regulatory Flexibility Analysis at section B of this Administrative Information section.

<sup>36</sup> The number of visas available under the H-2B program is 66,000, assuming no statutory increases in the number of visas available for entry in a given year. We also assume that half of all such workers (33,000) in any year stay at least one additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H-2B workers in a given year. The scale factor (49.8 percent) was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706).

can more easily fill empty positions with U.S. workers, will be borne by an influx of employers who have the need for additional temporary labor but do not currently participate in the H-2B program. We then discuss the transfers from H-2B workers to U.S. workers and from U.S. employers to U.S. and H-2B workers resulting from the change in wage determination methodology. Finally, we analyze a total of four alternatives<sup>37</sup> and explain why the Department chose to eliminate the four-tiered OES wage structure and adopt the OES arithmetic mean absent a higher CBA, DBA, or SCA wage.

#### i. Costs

In standard economic models of labor supply and demand, an increase in the wage rate represents an increased production cost to employers leading to a reduction in the demand for labor. Because production costs increase with an increase in the wage rate, a resulting decrease in profits is possible for H-2B employers that are unable to increase prices to cover the cost increase. Some H-2B employers, however, can be expected to offset the cost increase by increasing the price of their products or services.<sup>38</sup> In addition, workers who would have been hired at a lower wage rate may not be hired at the higher wage rate, resulting in forgone earnings for workers. In this sense, to the extent that the higher wages imposed by the rule result in lower employment and lower output by firms who had employed those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss. In economics, a deadweight loss is a loss of economic efficiency that can occur when equilibrium for a good or service is not optimal. This effect will be magnified during years in which the cap is not reached.<sup>39</sup>

In a practical sense, because the total employment under the H-2B program is capped at 66,000 visas, the macroeconomic effect of reductions in H-2B employment and, therefore, reductions in output are expected to be

minimal. There has generally been excess demand for H-2B workers well beyond the 66,000 limit, and the Department believes that the increased wages resulting from the rule will not result in fewer than 66,000 visas for H-2B workers because, even if some employers decide not to participate in the H-2B program, other employers, who previously were unable to secure visas for H-2B workers before the cap was met, and therefore operated without a complete workforce, will participate.

For example, for FY 2007 through 2009, employers applied for an average of 236,706 certified H-2B positions per year. This number reflects the number of positions certified, rather than the number of actual workers who entered the program to fill those positions, which is capped at 66,000 per year. Using this number of certified workers to represent the quantity of labor demanded, and assuming an elasticity of labor demand of  $-0.3$ ,<sup>40</sup> a \$4.83 (56 percent) increase in wages would result in a 16.8 percent decline in the number of H-2B workers requested by employers, for a remaining total of 196,939 H-2B certified positions requested by employers, which still far exceeds the 66,000 maximum visas allowed under the H-2B program. Therefore, any loss of production resulting from some employers dropping out of the program will be offset by production by other employers who would then be able to fill previously vacant positions.

Thus, the Department believes that for years in which the number of applications exceeds the number of workers available under the cap, there will be no deadweight loss in the market for H-2B workers even if some employers do not participate in the program as a result of the higher H-2B wages. Indeed, the higher wages expected to result from the Final Rule could in turn result in a more efficient distribution of H-2B visas to employers who can less easily attract available U.S. workers. The Department believes that those employers who can more easily attract U.S. workers will be dissuaded from attempting to participate in the H-2B program after the Final Rule goes into effect, so that those employers participating in the H-2B program after the rule is in place will be those that have a greater need for the program, on average, than those employers participating in the H-2B program before the Final Rule goes into effect. Therefore, there would be no

appreciable decline in employment under the program.

In years in which the number of certified H-2B positions is less than the 66,000 visa cap, the higher wages resulting from this Final Rule could be expected to result in a reduction in employment of H-2B workers and, therefore, a reduction in output by employers participating in the H-2B program. This employment reduction would be expected to be partially offset by increased employment of U.S. workers to the extent that employers could attract U.S. workers or could in some cases make other adjustments, such as substituting capital for labor; but, in a sense, the reduction in employment and output would not be completely offset, potentially resulting in some deadweight loss in production among H-2B employers. The history of the H-2B program, however, suggests that this situation is rare. In recent history, the number of H-2B visas has reached the 66,000 cap every year except FY 2009 and FY 2010.

#### ii. Transfers

The change in the method of determining wages results in transfers from H-2B workers to U.S. workers and from U.S. employers to both U.S. workers and H-2B workers. A transfer from H-2B workers to U.S. workers arises because, as wages increase, jobs that would otherwise be occupied by H-2B workers will be more acceptable to a larger number of U.S. workers. Additionally, faced with higher H-2B wages, some employers may find domestic workers relatively less expensive and may choose to not participate in the H-2B program and, instead, employ U.S. workers. Although some of these U.S. workers may be drawn from other employment, some of them may otherwise be or remain unemployed or out of the labor force entirely, earning no compensation.

The Department is not able to quantify these transfer payments with precision, however. Difficulty in calculating these transfer payments arises primarily from uncertainty about the number of U.S. workers currently collecting unemployment insurance benefits who will become employed as a result of this rule.

To estimate the total transfer to H-2B workers via the increased wages resulting from the new wage determination method, the Department multiplied the total number of H-2B workers in the U.S. in a given year (115,500), which includes both new entrants and an assumed portion of those who entered in each of the two

<sup>37</sup> Although only four alternative arguments have undergone quantitative analysis in this section, there are an additional ten alternative suggestions that contain a qualitative discussion in section II.C of this Final Rule.

<sup>38</sup> Although employers may pass costs onto their customers, data does not exist from which to estimate the amount or extent to which costs would be absorbed by customers. Therefore, the Department was not able to quantify this cost offset.

<sup>39</sup> The output reduction impact of reducing labor demand may be in some cases partially offset by capital substitution and organizational substitution productivity effects. When substitution occurs, the deadweight loss will be reduced.

<sup>40</sup> See, e.g., Hamermesh, Daniel S., *Labor Demand*, Princeton and Chichester, U.K.: Princeton University Press, 1993.

previous years,<sup>41</sup> by the weighted average hourly wage increase (\$4.83), the number of hours worked per day (7), and the total number of days worked (217).<sup>42</sup> On this basis, we estimate the total annual average transfer incurred due to the increase in wages at \$847.4 million. As a result, OMB has determined that the rule is an economically significant rule.

The increase in the wage rates induces a transfer from participating employers not only to H-2B workers, but also to U.S. workers hired in response to the required H-2B recruitment. The higher wages are beneficial to U.S. workers because they enhance workers' ability to meet the cost of living and to spend money in their local communities, which has the secondary impact of increasing economic activity and, therefore, generates employment in the community. These are important concerns and a key aspect of the Department's mandate to ensure that wages of similarly employed U.S. workers are not adversely affected.<sup>43</sup>

Several commenters indicated that the increase in the wages of H-2B workers could impact the career ladder established by H-2B employers for non-H-2B employees. The Department recognizes that career ladders of non-H-2B workers could potentially be impacted by the wage increase but is unable to quantify that impact because of the lack of data to ascertain the degree to which H-2B employers will react by increasing wages for their other workers.

Similarly, our calculations do not include the wage increase of U.S.

workers hired in response to the required recruitment because of lack of data on these workers.

### 3. Alternatives

Several commenters proposed alternatives to the wage calculation methodology. In response to these comments, the Department analyzed the following wage calculation alternatives: (1) To continue the current calculation methodology but provide a more complete justification for doing so; (2) to eliminate the four tiers and use the OES arithmetic mean as the OES component of the prevailing wage determination; (3) to eliminate the four tiers and use the OES median as the OES component of the prevailing wage determination; and (4) use the proposed methodology—alternative 2—but require the provision of fringe benefits.

The Department conducted economic analyses of the four alternatives to better understand their impacts. Below is a discussion of each alternative along with an estimation of their associated transfers. Transfers for each alternative use the 2008 Final Rule as the baseline. In addition, for each alternative that was not chosen, we include a discussion on why the alternative was not chosen. Finally, we summarize the total transfers associated with each alternative considered.

#### i. Continue the Current Calculation Methodology

This alternative was espoused by several commenters, including the Chief Counsel for Advocacy, SBA. For the reasons discussed throughout this Final Rule, continuing the current calculation methodology that relies on the four tiers does not provide adequate protections to U.S. and H-2B workers. The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H-2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences. In the absence of such information, our responsibility to set wage rates that avoid adverse effect on wages compels us to use the highest of

the SCA or DBA rates, the wage established under an existing CBA, or the OES arithmetic mean wage as the principal wage-setting tool. The cost associated with this alternative is zero because it represents the baseline, that is, the alternative where no action is taken by the Department. The Department, therefore, rejected this alternative.

#### ii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Arithmetic Mean

This alternative is the method required by the Final Rule which defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. This alternative represents the policy that will best achieve the Department's policy objectives of ensuring that wages and working conditions of U.S. workers are more adequately protected and, thus, will not be adversely affected by the admission of H-2B workers to the country.

As discussed above, the elimination of the four tiers and the use of the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the arithmetic mean would constitute the OES wage rate will result in a total annual average transfer of \$847.4 million to H-2B workers.

#### iii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Median

This alternative represents the elimination of the four tiers and the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the OES median constitutes the OES wage rate. To estimate the total transfer to H-2B workers via the increased wages resulting from the use of the median, we used the same methodology discussed above to calculate the wage differential for the OES mean. The Department multiplied the total number of H-2B workers in a given year (115,500), which includes both new entrants and an assumed portion of those who entered in each of the two previous years, by the weighted average hourly wage increase estimated using the OES median (\$4.64), the number of hours worked per day (7),

<sup>41</sup> The Department's data on certified applications cannot be used to determine the actual number of H-2B workers in the country. Certifications are made without regard to the cap on the number of H-2B workers admissible each year and are not intended to indicate whether a worker actually entered the country to fill a position. Additionally, available DHS data is based on total entries of H-2B workers, which may or may not equal the admissions of H-2B workers in a given year. See <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/table25d.xls>. The Department of State keeps records of visas issued but does not publicly break down these numbers based on subcategories within the H category. [http://travel.state.gov/visa/statistics/nivstats/nivstats\\_4582.html](http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html).

<sup>42</sup> For the number of hours worked per day, we use 7 hours as typical. For the number of days worked, we assume that the employer will retain the H-2B worker for the maximum time allowed (10 months, or 304 days [10 months  $\times$  30.42 days]) and will employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months  $\times$  30.42 days  $\times$  (5/7)].

<sup>43</sup> An additional transfer noted by a commenter is increased remittances to the worker's home country. The Department, however, does not have data on the remittances made by H-2B workers to their countries of origin.

and the total number of days worked (217). We estimate the total annual average transfer incurred due to the increase in wages represented by the median at \$814.1 million.

The Department rejected this methodology. Although the numbers are generally comparable to the arithmetic mean, the median does not represent the best “average” wage across a distribution. The median wage represents only the midpoint of the range of wage values; it does not account for the actual average. The mean is widely considered to be the best measure of central tendency for a normally distributed sample, as it is the measure that includes all the values in the data set for its calculation, and any change in any of the wage rates will affect the value of the mean. This is not the case with the median. The Department has traditionally relied on arithmetic means for wage programs and has determined that these reasons make continuing reliance on the mean, rather than the median, logical.

iv. Use the Proposed Methodology but Require the Provision of Fringe Benefits

To estimate the total transfer to H-2B workers from the increased wages

resulting from the elimination of the four tiers and the inclusion of fringe benefits, the Department multiplied the estimated annual number of H-2B workers (115,500), by the weighted average hourly wage increase represented by the DBA wages plus fringe benefits (\$7.20), the number of hours worked per day (7), and the total number of days worked (217). For records where DBA wages and fringes were not available, we used the OES mean (as calculated according to option 2) plus the SCA health and welfare (H&W) \$3.35 flat fringe.<sup>44</sup> We estimate the total annual average transfer incurred due to the increase in wages represented by the wages plus fringe benefits at \$1,263.2 million.<sup>45</sup>

The Department historically has not required the payment of fringe benefits to H-2B workers, even before 2005, when the payment of DBA wage rates was mandatory for occupations where such wage determinations existed. See 75 FR 61578, 61579, Oct. 5, 2010 (“Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program” Proposed Rule). Under this Final Rule, the Department will again certify the DBA wage as the prevailing wage rate that must be paid to H-2B

workers if those rates are the highest in those occupations in the area of intended employment among the rates listed in § 655.10. For H-2B positions for which the DBA wage is not applicable, the Department believes that not requiring fringe benefit payments is an appropriate reflection of the Department’s historical practices. As previously noted, fringe benefits costs have never been included in H-2B wage determinations. The Department reaffirms its belief that requiring fringe benefit payments to H-2B workers is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers.

#### v. Summary of Alternatives Analyzed Quantitatively

Exhibit 1 below summarizes the total 10-year transfers incurred for the wage methodology alternatives discussed above relative to the baseline. The 10-year analysis period starts on January 1, 2012<sup>46</sup> and ends on December 31, 2021. The alternative of regional SCA wages applies to forestry workers only. We use discount rates of 7 and 3 percent to estimate the transfers over the 10-year analysis period.

### EXHIBIT 1: SUMMARY OF ALTERNATIVES ANALYZED QUANTITATIVELY (\$ millions over 10-year analysis period)

7 percent discount rate		Transfers
Take no action		0
Highest of the CBA, DBA, SCA, and OES mean		5,562
Highest of the CBA, DBA, SCA, and OES median		5,344
Inclusion of fringe benefits		8,292
3 percent discount rate		
Take no action		0
Highest of the CBA, DBA, SCA, and OES mean		7,018
Highest of the CBA, DBA, SCA, and OES median		6,742
Inclusion of fringe benefits		10,462

<sup>44</sup> Health and welfare includes life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of \$3.35 per hour

are computed on the basis of all hours worked by employees employed on the contract.

<sup>45</sup> See the RFA analysis at section II.C of the Administrative Information section for a more descriptive analysis of the wage differential between DBA and fringe benefits and the prevailing

wage under the OES mean for the construction industry.

<sup>46</sup> The Final Rule is effective for wages paid to H-2B workers and U.S. workers recruited in connection with an H-2B labor certification for all work performed on or after January 1, 2012.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce compliance guidance for small entities if the rule has a significant economic impact. For the reasons explained in this section, the Department believes this Final Rule is not likely to impact a substantial number of small entities and, therefore, a final regulatory flexibility analysis is not required by the RFA. However, in the interest of transparency, we have prepared the following Final Regulatory Flexibility Analysis to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards.

Employers seeking to participate in the H-2B program come from virtually all industries and segments of the economy and industries. Participating businesses are a small portion of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 (“the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall”). Employment in the H-2B program represents a small percentage of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program. The H-2B program is capped at 66,000 visas issued per year; assuming that half of all entering workers stay at least one additional year, and half of those workers stay a third year, the 115,500 H-2B workers working in the U.S. in a year represent approximately 0.09 percent of total U.S. nonfarm employment (130.9 million).<sup>47</sup>

According to H-2B program data for FY 2007–2009, the average annual numbers of H-2B positions certified by ETA in the top six industries were as follows: construction—30,242; amusement, gambling, and recreation—14,041; landscaping services—78,027;

janitorial services—30,902; food services and drinking places—22,948; and forestry services—18,387. As explained below, this Final Rule provides an enhanced analysis of the impact on small businesses, including extending the analysis to forestry services. Thus, we present analysis on the top six industries (rather than the top five industries presented in the NPRM).<sup>48</sup>

When the actual number of entries permitted each year (given the H-2B visa cap of 66,000 workers) is accounted for, H-2B workers represent the following percentages of the total employment in each of these industries: construction—0.2 percent (14,756/7,265,648); amusement, gambling, and recreation—0.5 percent (6,851/1,506,120); landscaping services—6.5 percent (38,073/589,698); janitorial services—1.6 percent (15,079/933,245); and food services and drinking places—0.1 percent (11,197/9,617,597).<sup>49</sup> As these data illustrate, the H-2B program represents a small fraction of the total employment in the top industries in which H-2B workers are found. The Economic Census does not contain industry employment data for forestry support services; therefore, the Department is not able to calculate the percentage of total employment represented by H-2B workers in that industry.

#### 1. Description of the Reasons That Action by the Agency Is Being Considered

The Department has determined that a new wage methodology is necessary for the H-2B program. The Department’s decision to reevaluate the prevailing wage aligns with the Department’s mandate under the H-2B program to ensure that U.S. workers are not adversely affected by the employment of H-2B workers. The order in the recent court decision in *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) merely prompted a more expeditious review of this important issue. As noted in the NPRM, the Department has grown

increasingly concerned that the current method of calculating the prevailing wage does not produce rates that adequately reflect the appropriate wage necessary to ensure that U.S. workers are not adversely affected by the employment of H-2B workers.

As discussed in the E.O. 12866 analysis, the Department analyzed the breakdown of wages by OES level of 4,694 submitted requests for a prevailing wage submitted this calendar year. This analysis found that 74 percent of H-2B positions were certified at the Level I wage rates; the percentages of H-2B positions certified at Levels II, III, and IV were 10.5, 8.2, and 6.9, respectively.

The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H-2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences.

The Final Rule defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms’ length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. The OES wage level under the new methodology would effectively result in the payment of wages that would conform more closely to the wages paid by non-H-2B employers according to the results of the OES survey. Thus, it is the Department’s position that when the certified prevailing wage is based on the OES survey, using the arithmetic mean will not adversely affect the wages of U.S. workers similarly employed.

#### 2. Succinct Statement of the Objectives of, and Legal Basis for, the Rule

The Department is proposing to establish a new wage methodology that adequately protects the wages of U.S. and H-2B workers. The legal basis for

<sup>48</sup> Although we were not able to obtain industry employment data for the forestry support services industry, we were able to obtain revenue and employment data for this industry from the business data provider ReferenceUSA. ReferenceUSA relies primarily on phone verification and public data sources to obtain employment and revenue figures for businesses of different sizes.

<sup>49</sup> The scale factor was derived by dividing 115,500 by the total number of workers certified per year on average during FY 2007–2009 (236,706). Please see the transfer payments subsection in the E.O. 12866 section above for a discussion of how we derived the number of H-2B workers in a given year (115,500).

<sup>47</sup> Source: <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt>.



the rule is the Department's authority, delegated from DHS under its regulations at 8 CFR 214.2(h)(6), to grant temporary labor certifications under the H-2B program. Additionally, as discussed earlier, the Department is subject to the *CATA v. Solis* order, which requires the Department to "promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order." That date was subsequently modified to give the Department until January 18, 2011 to promulgate the rule.

### 3. Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Rule Will Apply

#### Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the six industries with the largest number of H-2B workers, as mentioned above: landscaping services; janitorial services (includes housekeeping services); food services and drinking places; amusement, gambling, and recreation; construction; and forestry support services. These top six industries accounted for 82 percent of the total number of H-2B workers certified during FY 2007–2009.<sup>50</sup>

We have adopted the SBA small business size standard for each of the six industries, which is a firm with annual revenues equal to or less than the following: landscaping services, \$7 million; janitorial services, \$16.5 million; food services and drinking places, \$7 million; amusement, gambling, and recreation, \$7 million; construction, \$20.7 million; and forestry support services, \$7 million.<sup>51</sup>

<sup>50</sup> According to H-2B program data, the average annual number of firms (of all sizes) and H-2B workers certified for these industries during FY 2007–2009 were as follows: landscaping services, firms—2,754, workers—78,027; janitorial services, firms—788, workers—30,902; food services and drinking places, firms—851, workers—22,948; amusement, gambling, and recreation, firms—227, workers—14,041; construction, firms—860, workers—30,242; and forestry support services, firms—130, workers—18,387.

<sup>51</sup> The SBA small business size standards for construction range from \$7 million (land subdivision) to \$33.5 million (general building and

Several commenters expressed a concern that the Department made the assumption in the NPRM analysis that 50 percent of all H-2B employers are small businesses, asserting that this assumption was not based on data. In response to this concern, the Department has obtained third-party data to improve the analysis. Specifically, to identify annual revenue and employment for H-2B employers, the Department used data from the business data provider ReferenceUSA and matched them to H-2B program data. ReferenceUSA relies primarily on phone verification and public data sources to obtain employment and revenue figures for businesses of different sizes.<sup>52</sup>

In order to ensure that the interests of small business were adequately considered, the Department assumed that all H-2B employers with no revenue or employment data available from ReferenceUSA are small.

### 4. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The rule does not impose any reporting or recordkeeping requirements. Other provisions in the current regulations impose those requirements.

For other compliance requirements, this RFA estimates the incremental costs for small businesses from the baseline, that is, from the 2008 Final Rule. The baseline for this rule is the burden of participating in the program under the existing requirements, and is represented by a prevailing wage calculation methodology that uses the four tier wage structure based on the stratification of the OES survey. Using available data, we have estimated the costs of the increased wages and the time required to read and review the Final Rule.

heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H-2B workers, the Department used the average of \$20.7 million as the size standard for construction.

<sup>52</sup> As stated in the NPRM, the revenue figure is part of the information collection but is not required for successful completion of the application. It has also been part of the application only since the implementation of the ETA-9142 in 2009. The Department began collecting revenue data at the behest of the SBA to be better able to calculate such figures but the data is at best minimal and sporadically provided and, in the Department's view, the data that we have collected is not adequately representative of revenue figures for employers using the program. Therefore, the Department has concerns about the statistical validity of the data. This is why the Department chose to rely on an outside source (ReferenceUSA) for revenue and employment data that is more comprehensive than the data received in program applications.

The Department receives an average of 8,717 applications annually (not necessarily the same as the number of applicants, because one employer may file more than one application) for the H-2B program, and the Department estimates that an average of 6,980 of those applications results in petitions for H-2B workers that are approved by DHS. Even if all 6,980 applications were filed by unique small entities, the percentage of small entities authorized to employ temporary non-agricultural workers would be less than 1 percent of the total number of small entities in the six industries with the largest number of H-2B workers.<sup>53</sup> Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses in the top six industries. Because any small business could apply and receive certification under the program, the universe is all small businesses in the relevant industries that participate in the program. A detailed industry-by-industry analysis is provided below. Several commenters, including the Chief Counsel for Advocacy, SBA, cited two court decisions involving fishing quotas<sup>54</sup> to suggest that the Department incorrectly over-estimated the universe of potentially affected businesses. Those cases are not relevant because they resulted from an agency decision to issue a certification that the rule in question did not significantly impact a substantial number of small businesses. The Department has not made such a certification here. That being said, the Department does not believe it over-estimated the number of potentially affected businesses based on the analysis presented above.

To examine the impact of this rule on small entities, the Department evaluated the impact of the incremental costs on a hypothetical small entity of average size. We used individual employer revenue and employment data from ReferenceUSA to determine which certified or partially certified applicants were considered small by using the industry-specific SBA size standards. Using H-2B program data, the Department estimates the average number of H-2B workers for small

<sup>53</sup> The total number of firms classified as small entities in these industries is as follows: landscaping services, 63,210; janitorial services, 45,495; food services and drinking places, 293,373; amusement, gambling, and recreation, 43,726; construction, 689,040; and forestry support services, 1,353. Source: 2002 County Business Patterns and 2002 Economic Census. <http://www.census.gov/econ/susb/data/susb2002.html>.

<sup>54</sup> *Southern Offshore Fishing Association v. Daley*, 97–1134–CIV–T–23C, slip op. (Oct. 16, 1998); *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

businesses in the top six industries at any given time are as follows: landscaping services, 5.8 workers; janitorial services, 6.9 workers; food services and drinking places, 4.2 workers; amusement, gambling, and recreation, 11.4 workers; construction, 6.6 workers; and forestry support services, 25.4 workers.<sup>55</sup>

Using the data obtained from ReferenceUSA, we then derived the annual revenues for small entities in each of the top six industries. The Department estimates that small businesses in the top six industries have the following average annual revenues: landscaping services, \$1.781 million; janitorial services, \$4.240 million; food services and drinking places, \$1.607 million; amusement, gambling, and recreation, \$1.490 million; construction, \$4.788 million; and forestry support services, \$1.299 million.<sup>56</sup>

#### i. Change in the Method of Determining Wages for H-2B Workers

This Final Rule requires employers to offer H-2B workers and U.S. workers hired in response to the required H-2B recruitment, a wage that is at least equal to the highest of the prevailing wage, or the Federal, State, or local minimum wage. Under the Final Rule, the prevailing wage is defined as the highest of the following: (1) The wage rate established in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between the union and the employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage.<sup>57</sup> This Final Rule changes the methodology for calculating the prevailing wage to the arithmetic mean of the OES wages for a

given area of employment and occupation.

With two exceptions, noted below, the Department calculated the change in hourly wages by matching the OES wage rates to the H-2B data by the SOC and the MSA of employment. We also matched the SCA and DBA wage rates to the H-2B data using the occupational title specified in the H-2B program data and the county of employment.<sup>58</sup> For some occupations and counties, SCA and DBA wages have not been determined; in those cases, the SCA and DBA wages did not enter our calculations. In the Department's experience under the H-2B program, the work of landscape laborers generally involves grounds maintenance of the kind contained in SCA and OES job descriptions. Construction related landscaping—the construction of planters, walkways and similar structures as part of building construction projects as used in DBA job descriptions—is rarely applicable to H-2B employment. Accordingly, SCA and OES rates were used to estimate costs for landscape laborers. Similarly, SCA job descriptions are generally more reflective of H-2B reforestation occupations than are OES job descriptions; therefore, SCA wage rates were used to estimate the effect of the Final Rule on reforestation employers. This analysis is based on job titles rather than actual job duties. After implementation, the Department will closely compare the job duties listed on the Application to the job duties listed in the SOC, SCA Dictionary of Occupation Titles, and the DBA wage determinations to identify the most appropriate basis for determining the prevailing wage.

Using certified and partially certified applications in the H-2B program data, we calculated the increase in wages by selecting the highest wage among the OES arithmetic mean, the SCA wage determination, and DBA wage determination. We then subtracted the average H-2B hourly wage certified from the highest of the three wages, and we weighted this differential by the number of certified workers on each certified or partially certified application. We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified

applications.<sup>59</sup> Based on this calculation, the change in the method of determining wages will result in a \$4.83 increase in the weighted average hourly wage for H-2B workers (and similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application).

This approach for calculating the expected changes in hourly wages relative to the baseline is more accurate than the approach the Department used in the analysis presented in the NPRM in two ways. First, the calculations presented in this analysis use the highest wage among the OES arithmetic mean and the SCA and DBA wage determinations. In the analysis presented in the NPRM, the SCA and DBA wages were not directly accounted for in these calculations. Second, the calculations presented in this analysis use wage data for each county where the H-2B work actually took place.<sup>60</sup> In the analysis presented in the NPRM, on the other hand, the Department used the national values rather than location-specific data.

More specifically, because the employer's address frequently does not represent the area where the work actually takes place, the Department conducted a manual extraction of area-of-employment data from the submitted H-2B applications, including the city, state, and zip code corresponding to the area of employment. The Department used a random sample of 500 certified or partially-certified applications from Calendar Year (CY) 2009 H-2B program data.<sup>61</sup> The \$4.83 increase in the

<sup>59</sup> In all wage calculations where we found that the baseline H-2B wage is higher than any alternative wage considered, we assumed that the baseline survey prevails. That is, we assumed that the wage increase is zero for those cases. This situation, however, is rare; the prevailing wage exceeded the OES mean in approximately 4 percent of the cases.

<sup>60</sup> A recent Congressional Research Service (CRS) report used a wage calculation approach that is similar to that used in this Final Rule. The report found that the SCA and DBA wage rates are in some cases higher than the OES arithmetic mean for a given job opportunity. This is consistent with the findings of the analysis conducted for this Final Rule. The CRS report, however, did not rely on wage data for each county where the work actually took place. Also, the CRS report was limited to a selected group of occupations and counties. Source: "Potential Impact of Proposed Regulations on the Wages of H-2B Workers," Congressional Research Service, October 2010.

<sup>61</sup> The Department used the Calendar Year 2009 as a representative year. Although some commenters suggest that FY 2009 was not a representative year for use of the H-2B program, the random sample chosen was consistent with standard statistical methods and was selected from the calendar year, rather than the fiscal year, to reach data outside the FY 2009 data while representing the most recent data available. Calendar Year 2009 applications, for example, reach

<sup>55</sup> The Department estimated that approximately 28 percent of certified H-2B workers are actually hired by dividing the annual H-2B visa cap (66,000) by the total number of positions certified per year on average during FY 2007–2009 (236,706). We then applied this percentage to the number of workers certified in certifications granted in each of the six industries to approximate the distribution of the 66,000 H-2B visas by multiplying 28 percent by the number of workers certified for each certified or partially certified H-2B application.

<sup>56</sup> As indicated above, the SBA small business size standards are highest for construction and janitorial services.

<sup>57</sup> A CBA wage may in fact be the highest of the applicable wages; even under the 2008 Final Rule, if the job opportunity were covered by a CBA, the wage rate in the CBA would be the required wage. Accordingly, including the CBA wage rate in the definition of prevailing wage will not result in an increased cost to the employer covered by the CBA.

<sup>58</sup> Once this Final Rule is effective, the prevailing wage will be determined not by comparing job titles, but by comparing job duties listed on the employer's application with the occupational definitions in the SOC (for OES), the Dictionary of Occupational Titles (for SCA), or the DBA wage determination.

weighted average hourly wage for H-2B workers (and similarly employed U.S. workers hired in response to the recruitment required as part of the H-2B application) was calculated using this data sample.

These calculations yielded the following hourly wage increases by industry associated with this rule: landscaping services, \$4.32; janitorial services, \$5.81; food services and drinking places, \$2.59; amusement, gambling, and recreation, \$6.61; construction, \$9.72; and forestry support services, \$1.23.<sup>62</sup>

#### ii. Reading and Reviewing the New Processes and Requirements

During the first year that this rule would be in effect, employers would need to learn about the new PWD. We estimate this cost for a hypothetical small entity which is interested in applying for H-2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the wage calculation methodology under the rule by the average compensation of a human resources manager.<sup>63</sup> In the first year of the rule, the Department estimates that the average small business participating in the program will spend approximately 1 hour of staff time to read and review the new regulation, which amounts to approximately \$61.42 ( $\$61.42 \times 1$ ) in labor costs in the first year.<sup>64</sup>

#### iii. Total Cost Burden for Small Entities

This section presents the total cost burden for small entities, which includes both the wage cost (by far the largest component) and the cost to read

and review the rule (applies to the first year only). The Department's calculations indicate that for a hypothetical small entity in each of the top six industries that applies for one worker (representing the smallest of the small entities that hire H-2B workers), the total average annual costs of the rule are: landscaping services, \$6,568; janitorial services, \$8,832; food services and drinking places, \$3,940; amusement, gambling, and recreation, \$10,047; construction, \$14,771; and forestry support services, \$1,875.

The analogous average annual costs for small employers in the top six industries that hire the average number of H-2B workers are as follows: landscaping services, \$38,082; janitorial services, \$61,286; food services and drinking places, \$16,528; amusement, gambling, and recreation, \$114,929; construction, \$97,657; and forestry support services, \$47,433. As a percent of revenue, these costs represent the following: landscaping services, 2.14 percent; janitorial services, 1.45 percent; food services and drinking places, 1.03 percent; amusement, gambling, and recreation, 7.71 percent; construction, 2.04 percent; and forestry support services, 3.65 percent.

The Department considers that a rule has a "significant economic impact" when the total annual cost associated with the rule is equal to or exceeds 1 percent of annual revenue. Thus, the rule is expected to have a significant economic impact on the average participating small entity in each of the top six industries. Although applying to hire H-2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H-2B program or fills its workforce with U.S. workers, could face sizeable costs. However, increased employment opportunities for U.S. workers and higher wages for both U.S. workers and H-2B workers provide a broad societal benefit that, in the Department's view, outweighs these costs.

Several commenters indicated that the increase in the wages of H-2B workers could impact the career ladder established by H-2B employers for non-H-2B employees by adversely impacting the ability to pay those in career ladders a higher wage, thus compressing wages for supervisory positions. The Department recognizes that career ladders could potentially be impacted by the wage increase; however, a lack of data about the prevalence of such career ladders and the ways in which employers might restructure them makes any potential effect impossible to quantify.

Similarly, our calculations do not include the wage increases of U.S. workers hired in response to the required recruitment who must be paid the same wages as H-2B workers because we do not have a basis for estimating how many of these workers are hired as a direct result of the recruitment effort.

The small entities that have historically applied for H-2B workers represent relatively small proportions of all small businesses. The following are the percentages of firms that were certified for H-2B workers among all small U.S. businesses in their respective industries: Landscaping services, 2.3 percent (1,462/63,210); janitorial services, 1.0 percent (436/45,495); food services and drinking places, 0.1 percent (350/293,373); amusement, gambling, and recreation, 0.4 percent (164/43,726); construction, 0.1 percent (358/689,040); and forestry support services, 6.8 percent (92/1,353).<sup>65</sup> Due to the statutory annual cap on available visas, the percentage of small entities receiving H-2B visas, to which the full cost burden would apply, would be even lower.

The Department considers that a rule has an impact on a "substantial number of small entities" when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities in a given industry. *See, e.g.*, 73 FR 78049, Dec. 19, 2008. The Department has used the 10 percent threshold in previous regulations. Therefore, this rule is not expected to impact a substantial number of small entities.

#### 5. Identification of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Rule

The Department is not aware of any relevant Federal rules that duplicate, overlap or conflict with the rule.

#### 6. Summary of Issues Raised in Response to the IRFA

The Department received a number of comments related to its IRFA analysis including, as mentioned above, one submitted by the Chief Counsel for Advocacy, SBA. Several of these comments, including the Chief Counsel for Advocacy, SBA comment, focused on the Department's choice of the universe of potential H-2B participants.

<sup>65</sup> The source of the numerator (*i.e.*, the number of certified H-2B employers) is H-2B program data for FY 2009. The source of the denominator (*i.e.*, the total number of U.S. businesses meeting the SBA small-size criteria) is the 2002 County Business Patterns and 2002 Economic Census. <http://www.census.gov/econ/susb/data/susb2002.html>.

back to applications filed under the regulations in place before the 2008 Final Rule, and were filed using Form ETA 750. In addition, the Department's program database does not collect city and zip code data for the work locations for the certifications. Therefore, to extract that data, the Department hand-selected a random sample from the CY2009 filed applications to calculate the wage increases.

<sup>62</sup> For the number of hours worked per day, we use 7 hours as typical for an average. For the number of days worked, we assumed that the employer would retain the H-2B worker for the maximum time allowed (10 months, or 304 days [10 months  $\times$  30.42 days]) and would employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months  $\times$  30.42 days  $\times$  (5/7)].

<sup>63</sup> The hourly compensation rate for a human resources manager is calculated by multiplying the hourly wage of \$42.95 (as published by the Department's OES survey, O\*NET Online) by 1.43 to account for private-sector employee benefits (Source: Bureau of Labor Statistics). Thus, the loaded hourly compensation rate for a human resources manager is \$61.42.

<sup>64</sup> The number of small businesses that will read and review the Final Rule is likely to include some that will not apply for the program. There are no available data to quantify this possible effect.

Some of these comments asserted that the Department did not correctly identify the universe of small entities to whom the analysis must be directed, while other comments stated that the Department did in fact correctly identify the universe of small entities affected by the rule.

Other comments, including the Chief Counsel for Advocacy, SBA comment, asserted that the Department did not use its own data with regard to the revenue and size of businesses participating in the program. Comments, including that submitted by the Chief Counsel for Advocacy, SBA, also asserted the Department did not include an analysis of the impacts on the forestry industry with respect to its IRFA analysis. These comments have been discussed previously in this Regulatory Flexibility Act analysis. For example, this Regulatory Flexibility Act analysis now includes an analysis of impacts in the forestry industry in response to these comments.

Other commenters were critical of the fact that the RFA analysis did not consider the broader effects on the economy since companies using the H-2B program may be forced to scale back on employees or on downstream purchases of equipment, inventory or products as a result of increased labor costs. The Department cannot estimate such costs, even assuming their existence.

The Department also received several comments recommending the use of the Department's data on the H-2B program, available on its Web site, to demonstrate the impact on employers, particularly small employers, in various economic sectors. Several commenters, including the Chief Counsel for Advocacy, SBA, sought to derive applicable numbers of H-2B workers from the data available from the certifications employed by DOL. The Department does not believe that its data can be relied upon for the number of H-2B individuals employed in the U.S. at any one time. Employers may file an application as an extension of their normal recruitment efforts, which may or may not result in the hiring of H-2B workers. As discussed above, the Department certifies more workers than can be legally admitted under the H-2B program. The Department has no data that indicate the number of certified workers who are actually hired after a certification has been adjudicated.<sup>66</sup>

The Department believes its calculations in this final Regulatory Flexibility Analysis more accurately reflect the usage of the H-2B program by employers.

Many commenters discussed the economic impact of the proposed rule on their own operations. These comments focused on the overall impact of the burden and specifically on the burden imposed on the imposition of a Final Rule, at a time when contracts and financial obligations have been set for the coming season and prices for services have been set and cannot be renegotiated. As discussed in detail above, employers participating in the H-2B program have always been required to meet the conditions of the labor certification, which include the payment of a valid prevailing wage. The fact that a new wage methodology may result in wages in excess of anticipated labor costs does not minimize the Department's obligation to ensure the avoidance of adverse impact on the wages of U.S. workers. Even though the NPRM provided notice to program users of the Department's intent with respect to recognizing that this adverse impact was not being met under the current methodology and so changes would be made, the Department recognizes the commitments that employers have made in reliance on the current methodology. In recognition of these comments and this impact, and in order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012. Moreover, the Department has no data that indicate the number of certified workers who are actually hired after a certification has been adjudicated. The Department believes its calculations in this final Regulatory Flexibility Analysis more accurately reflect the usage of the H-2B program by employers.

In addition, several commenters, including the Chief Counsel for Advocacy, SBA, asserted that the Department did not provide viable alternatives in its IRFA. A full discussion of alternatives is contained below. For the reasons stated in the quantitative and qualitative discussion

actual employment of workers in H-2B status, much less in any given industry sector. That number does not take into account the number of those H-2B workers who do not enter or who are replaced with a U.S. worker prior to employment, or the changes or extensions of status granted for H-2B status.

of the alternatives, the Department has decided to retain the proposal of the NPRM of defining the prevailing wage to be the highest of the CBA, DBA or SCA wage determinations, or the arithmetic mean of the OES to best avoid adverse impact.

#### 7. Alternatives Considered as Options for Small Entities

As noted in section 3 of the E.O. 12866 analysis, several commenters proposed alternatives to the wage calculation methodology. In response to these comments, the Department analyzed the following wage calculation alternatives: (1) To continue the current calculation methodology but provide a more complete justification for doing so; (2) to eliminate the four tiers and use the OES arithmetic mean as the OES component of the prevailing wage determination; (3) to eliminate the four tiers and use the OES median as the OES component of the prevailing wage determination; and (4) use the new methodology—alternative 2—but also require the provision of fringe benefits.<sup>67</sup> Below is a discussion of each alternative along with an estimation of their associated impacts on small entities.

##### i. Continue the Current Calculation Methodology

For the reasons discussed throughout this Final Rule, continuing the current calculation methodology that relies on the four tier wage structure does not provide adequate protections to U.S. and H-2B workers. The existing procedure for extracting tiered wages from the basic OES wage survey data was adopted without any systematic effort to determine if that system was empirically justified. The OES wage surveys collect no data about the skill levels or duties performed by the workers at any particular wage level. Although lower wages may be associated with lower skill levels and responsibilities in professional occupations, there is no evidence to suggest that such a relationship exists in the lower skilled occupations that predominate in the H-2B program. Even if there were some evidence of the existence of skill-based wage differences with these occupations, the OES survey does not purport to capture such differences. In the absence of such information, our responsibility to set wage rates that avoid adverse effect on

<sup>66</sup> One commenter suggested the Department use the Department of State's data regarding H-2B visas issued. The Department thanks the commenter for pointing out the availability of these numbers. However, even the number of H-2B visas issued in any given fiscal year does not necessarily represent

<sup>67</sup> The Department notes that although only four alternative arguments have undergone quantitative analysis in this section, there are an additional nine alternative suggestions that contain a qualitative discussion in section C of this Administrative Information section.

wages compels us to use the highest of the SCA or DBA rates, the wage established under an existing CBA, or the OES arithmetic mean wage as the principal wage-setting tool. The cost associated with this alternative is zero because it represents the baseline, that is, the alternative where no action is taken by the Department. The Department recognized that action needed to be taken and, therefore, rejected this alternative.

ii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Arithmetic Mean

This alternative is the method required by the Final Rule which defines the prevailing wage to be the highest of: (1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arm's length between a union and an employer; (2) the wage rate established under the DBA or the SCA for the occupation in the area of intended employment, if the job opportunity is in an occupation for which such a wage rate has been determined; or (3) the arithmetic mean of the OES-reported wage. This alternative represents the arithmetic mean of the wages of workers in similar occupations in the area of employment, as determined by the OES. This method will best achieve the Department's policy objectives of ensuring that wages of U.S. workers are more adequately protected and, thus, will not be adversely affected by the admission of H-2B workers into the country.

As discussed above, the replacement of the four-tiered wage structure with the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the arithmetic mean would constitute the OES wage rate will result in the following total average annual cost for a hypothetical small entity that applies for one worker: landscaping services, \$6,568; janitorial services, \$8,832; food services and drinking places, \$3,940; amusement, gambling, and recreation, \$10,047; construction, \$14,771; and forestry support services, \$1,875. The analogous costs for employers that hire the average number of H-2B workers for their respective industries are as follows: landscaping services, \$38,082; janitorial services, \$61,286; food services and drinking places, \$16,528; amusement, gambling, and recreation, \$114,929; construction, \$97,657; and forestry support services, \$47,433.

These increases are more than justified by the need for a wage rate that is based on the prevailing wage that is

actually paid to similarly employed U.S. workers as demonstrated by OES mean wage rates, as well as the SCA and DBA wage rates. As noted above, the current methodology requires payment based on the unsupported assumption that skill-based wage differences are common in low-skilled H-2B jobs, and that the OES survey provides a basis for measuring a skill-based wage differential.

iii. Eliminate the Four Tiers and Use the Highest of the Wage Rates Set Forth Under the CBA, DBA, SCA, or OES Median

This alternative would replace the four-tiered wage structure with the highest of the wage rates set forth under the CBA, DBA, SCA, or OES where the OES median constitutes the OES wage rate. The Department used the same methodology discussed above to calculate the wage differential for this alternative. These calculations yielded the following hourly wage increases by industry associated with this rule: landscaping services, \$4.18; janitorial services, \$5.76; food services and drinking places, \$2.47; amusement, gambling, and recreation, \$6.38; construction, \$9.39; and forestry support services, \$1.23.

Using the OES median hourly wages, the Department's calculations indicate that for a hypothetical small entity that applies for one worker (representing the smallest of the small entities that hire H-2B workers), the total average annual costs of the rule are as follows: landscaping services, \$6,356; janitorial services, \$8,756; food services and drinking places, \$3,758; amusement, gambling, and recreation, \$9,697; construction, \$14,270; and forestry support services, \$1,875. The analogous costs for employers that hire the average number of H-2B workers for their respective industries are as follows: landscaping services, \$36,848; janitorial services, \$60,759; food services and drinking places, \$15,762; amusement, gambling, and recreation, \$110,930; construction, \$94,342; and forestry support services, \$47,433.

The Department rejected this methodology. Although the median wage is generally comparable to the arithmetic mean, the median does not represent the most predominant wage across a distribution. The median wage represents only the midpoint of the range of wage values; it does not account for the actual average. The mean is widely considered to be the best measure of central tendency for a normally distributed sample, as it is the measure that includes all the values in the data set for its calculation, and any change in any of the wage rates will

affect the value of the mean. This is not the case with the median. The Department has traditionally relied on arithmetic means for wage programs and has determined that these reasons make continuing reliance on the mean, rather than the median, logical.

iv. Use the New Methodology but Require the Provision of Fringe Benefits

This alternative would replace the four-tiered wage structure with the inclusion of fringe benefits. To calculate the change in hourly wages, the Department matched the DBA wages plus fringe benefits to the H-2B data for construction workers by the occupational title and the county of employment. Using certified and partially certified applications in the H-2B program data, we calculated the increase in wages by subtracting the average H-2B hourly wage certified from the DBA wages plus fringe benefits, and we weighted this differential by the number of certified workers on each certified or partially certified applications. For cases for which there was no applicable DBA wage or fringe available, we used the OES mean and the SCA health and welfare (H&W) \$3.35 flat fringe.<sup>68</sup> We then summed those products and divided the sum by the total number of certified workers from the certified or partially certified applications. This calculation yielded an hourly wage increase of \$7.20.

To estimate the total cost to the average small entity of increased wages for H-2B workers associated with the inclusion of fringe benefits, the Department multiplied the average hourly increase in wages by the average total number of days worked by H-2B workers, the number of hours worked per day, and the average number of H-2B workers employed by all small entities identified in the H-2B data sample.<sup>69</sup> The Department's calculations indicate that for a hypothetical small entity that applies for one worker (representing the smallest of the small entities that hire H-2B workers), the total average annual

<sup>68</sup> Health and welfare includes life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of \$3.35 per hour are computed on the basis of all hours worked by employees employed on the contract.

<sup>69</sup> For the number of hours worked per day, we use 7 hours as typical for an average. For the number of days worked, we assume that the employer would retain the H-2B worker for the maximum time allowed (10 months, or 304 days [10 months × 30.42 days]) and would employ the workers for 5 days per week. Thus, total number of days worked equals 217 [10 months × 30.42 days × (5/7)].

costs (to include the wage increase and the cost to read the rule in the first year) of the rule is \$10,943. The analogous cost for employers that hired the average number of H-2B workers is \$70,002.

The Department historically has not required the payment of fringe benefits to H-2B workers, even before 2005, when the payment of DBA wage rates was mandatory for occupations where such wage determinations existed. See 75 FR 61578, 61579, Oct. 5, 2010 ("Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program" Proposed Rule). Under this Final Rule, the Department will again certify the DBA wage as the prevailing wage rate that must be paid to H-2B workers if those rates are the highest in those occupations in the area of intended employment among the rates listed in § 655.10. For H-2B positions for which the DBA wage is not applicable, the Department believes that not requiring fringe benefit payments is an appropriate reflection of the

Department's historical practices. As previously noted, fringe benefits costs have never been included in H-2B wage determinations. The Department reaffirms its belief that requiring fringe benefit payments to H-2B workers is not necessary in order to prevent an adverse effect on the wages and working conditions of U.S. workers.

#### v. Summary of Alternatives Analyzed Quantitatively

According to the analysis, this regulation will not impact a substantial number of small entities. However, we recognize the potential impact on small businesses and have considered alternatives to minimize such impacts. Exhibit 2 below summarizes the average cost per average small entity (that is, a small entity with the average number of employees) for each industry. Exhibit 3 presents the ratio of average cost to average revenue for each industry. The Department's mandate under the H-2B program is to set requirements for employers that wish to hire temporary

foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H-2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. These regulations set those minimum standards with regard to wages. The required wage rate is a critical aspect of the H-2B program that determines whether U.S. workers' wages will be adversely affected by the admission of foreign workers. To create different and likely lower standards for one class of employers (*e.g.*, small businesses) would essentially sanction the very adverse effect that the Department is compelled to prevent. Although the Final Rule can have a significant impact on small businesses that use the H-2B program, those costs can be avoided since ultimately an employer's decision to petition to hire H-2B workers is voluntary.

#### EXHIBIT 2—AVERAGE ANNUAL COST PER SMALL ENTITY OF AVERAGE SIZE

	Land-scaping services	Janitorial services	Food services & drinking places	Amusement, gambling, & recreation	Construction	Forestry
Take no action .....	0	0	0	0	0	0
Highest of the CBA, DBA, SCA, and OES mean .....	\$38,082	\$61,286	\$16,528	\$114,929	\$97,657	\$47,433
Highest of the CBA, DBA, SCA, and OES median .....	\$36,848	\$60,759	\$15,762	\$110,930	\$94,342	\$47,433
Inclusion of fringe benefits .....	\$70,002					

#### EXHIBIT 3—RATIO OF AVERAGE COST TO AVERAGE REVENUE FOR SMALL ENTITY OF AVERAGE SIZE

	Land-scaping services	Janitorial services	Food services & drinking places	Amusement, gambling, & recreation	Construction	Forestry
Take no action .....	0	0	0	0	0	0
Highest of the CBA, DBA, SCA, and OES mean .....	2.14%	1.45%	1.03%	7.71%	2.04%	3.65%
Highest of the CBA, DBA, SCA, and OES median .....	2.07%	1.43%	0.98%	7.44%	1.97%	3.65%
Inclusion of fringe benefits .....	2.89%					

#### 8. Additional Alternatives

As noted elsewhere in the Administrative Information section, the Department received many comments that suggested other alternatives to the prevailing wage methodology proposed in the NPRM. Four of those alternatives have been summarized in sections A and B of this Administrative Information section because the Department conducted quantitative analysis on those alternatives. The additional nine alternatives are summarized here. The Department conducted a qualitative rather than

quantitative analysis on these alternatives because a quantitative analysis was either not possible or was unnecessary due to the nature of the alternative suggested.

#### i. When Other Methods Are Inapplicable, Use a Multiplier of the Federal, State or Local Minimum Wage for a "Living Wage" That Is Higher Than the Federal, State or Local Minimum Wage

Several commenters requested the Department to consider alternatives that could be used when none of the prevailing wage methodologies is

available. In particular, one commenter found that the 2010 NPRM mentioned requiring employers to use the Federal, State or local minimum wage rates but did not actually include it as an option for determining the prevailing wage. This commenter further noted that S. 2910, a bill introduced by Senator Bernie Sanders in December 2009, included a provision that would make the minimum wage payable to H-2B or similarly employed U.S. workers 150 percent of the Federal minimum wage under the FLSA. This commenter proposed that the Department adopt and

expand this proposal to require a wage that is not less than 200 percent of the Federal, State, or local minimum wage.

The Department rejects this proposal, along with the similar proposal that the prevailing wage for reforestation workers be set at 115 percent of the Federal or State minimum wage. The purpose of this rulemaking is to establish a methodology for calculating the prevailing wage for a specific occupation within a particular area of employment. Although raising the minimum wage payable under the program might be consistent with the program's mandate to protect U.S. workers from adverse effect, a wage rate that is some multiple of the minimum wage is by definition not a prevailing wage, and therefore is not appropriate for this rulemaking.

ii. Allow for Specific Experience-Based Wage Levels

Many commenters requested that the Department continue to establish wage increases based on the experience of the worker. These commenters argue that employers should be permitted to increase the wages of an H-2B worker based on years of experience, that is, an entry-level worker should not earn the same wage as someone who has been performing the job for several years. Thus, these commenters argue that creating a "one-tiered" system as proposed by the Department would artificially inflate the wages of unskilled workers. Another commenter stated that under the proposed prevailing wage methodology, the Department removes the employer's ability to properly manage and reward employees for a job well done.

As noted in the NPRM, however, the Department does not believe that the level of experience a worker possesses should be a factor in determining minimum wages for low-skilled positions. It is the Department's position that experience differentiation is unnecessary for this program for several reasons.

First, the Department notes that the number of years of experience is irrelevant to the job description itself. In fact, 74.4 percent of the positions in the H-2B program are currently classified as Level I positions. For these positions, H-2B workers are hired if they can perform the task with little or no preparation. As discussed in this Final Rule, almost all jobs for which employers seek H-2B workers require little, if any, skill—an assertion with which few commenters disagreed. H-2B disclosure data from FY 2007 to 2009 demonstrates that most of the jobs for which the greatest annual numbers of

H-2B workers were certified in the top five industries—construction; amusement, gambling and recreation; landscaping services; janitorial services; and food services and drinking places—require minimal skill to perform, according to every standardized source available to the Department, such as the SOC, O\*NET and the Occupational Outlook Handbook. These jobs, which made up the majority of occupations certified in those years, include, but are not limited to, landscaper laborer, housekeeping cleaner, construction worker, forestry worker, and amusement park worker, all of which require less than 2 years of experience to perform. These jobs have typically been granted a Level I wage determination, which is lower than the average wage paid to similarly employed workers in job classifications in non-H-2B jobs.<sup>70</sup>

Second, the Department noted in the NPRM that it was artificially manipulating the OES data to create the tiered wage system in 1998.<sup>71</sup> The OES survey instrument in itself does not solicit data on skill level; the four-tiered wage structure therefore did not truly represent skills-based pay.

Moreover, this rule does not prevent monetary rewards for those employees who have earned them through experience, skill acquisition, or employer loyalty. Nothing in this Final Rule prevents, nor should be construed to prevent, the employer from paying its workers, U.S. or H-2B, more than the required prevailing wage. This Final Rule merely establishes a minimum wage for specific occupations in a locality.

iii. Allow the Use of Regional Wages for the Reforestation Industry

A few reforestation contractors recommended that the Department adopt methods of compensating reforestation workers that are not based on specific locations, citing inevitable deviations (due to weather, ground conditions, contractor demands) in an itinerant work schedule. One commenter proposed the use of a prevailing wage for a wider region, similar to the H-2A program's AEWRs, which typically cover several states with a single wage rate. This would allow employers to deviate from identified worksites as long as they pay workers at least the established rate. The Department recognizes that the uncertainties inherent in reforestation can make it difficult to determine if and

where employees will be working as conditions change during the contract period. The Department notes that in situations where projects stretch across multiple localities with different prevailing wages, the employer can avoid the complexity inherent in itinerant work by paying the highest of the prevailing wages of those areas listed on the job order, which would effectively act as a regional wage. Prevailing wage rates for reforestation work are generally the same across contiguous counties—and frequently noncontiguous counties—in the same State.

The Department has concluded that it is not feasible or desirable to establish regional wage rates for particular industries in the H-2B program. The prevailing wage rates are locality-based in order to fulfill the Department's requirement to prevent adverse effect on U.S. workers within the area of intended employment. The Department believes that the establishment of a regional wage rate could result in an arbitrary rate not based on labor market conditions—U.S. workers in some localities might make more than this rate, in which case the prevailing wage would suppress U.S. worker earnings—and therefore would be contrary to the intent of the H-2B program.<sup>72</sup>

iv. Use BLS Wages

One commenter suggested that the Department use BLS wages that are the basis for OES wages. Rather than use the OES for MSAs, this commenter contends that the Department should just use the BLS wage as the prevailing wage for the intended area of employment for the job category that is the latest published 25 percentile rate. The Department notes that the BLS wages are already the basis for the OES prevailing wage rates proposed in the NPRM and adopted in this Final Rule. The OES rates represent a more localized wage rate based on more sophisticated analysis and are a more accurate indicator of the prevailing wages for a SOC classification in any given locality.

Another commenter noted that the NPRM indicated that H-2B workers comprise a small proportion of the U.S. labor force—less than 1 percent of most job categories—and that since most of those positions are low skilled and low paid, it follows that U.S. workers occupy 99 percent of highest paying jobs in any given category. Based on this

<sup>70</sup> The Department, in fact, recognized the need for consistency in the approach to establishing prevailing wages when it federalized the prevailing wage determination system in the 2008 Final Rule.

<sup>71</sup> *Id.*

<sup>72</sup> The Department does not find that the same issues apply to the use of a regional wage in the H-2A program, as there is typically little variation in agricultural wage rates within the USDA regions.



conclusion, the commenter proposed that to prevent adverse effect on the wages of U.S. workers, the prevailing wage should be based on the BLS 10th percentile wage estimate for the occupation in the area of employment. The commenter further noted that this would keep the H-2B workers in the lowest 10 percent of the wage category and the U.S. workers in the highest 90 percent of the wage category, therefore avoiding any adverse effect on the wages or working conditions of U.S. workers.

Although the Department appreciates the suggestion for avoiding the adverse effect on similarly employed U.S. workers, this commenter's proposal reflects a misunderstanding of the purpose behind the change in prevailing wage methodology. The Department's role in the H-2B program is not to determine the wages of H-2B workers, *per se*, but rather to set an appropriate prevailing wage—a floor—for the job opportunity that will ensure no adverse effect on the wages of U.S. workers who are similarly employed or who could be similarly employed. As discussed earlier, the Department must set a prevailing wage that assures that U.S. workers who might be interested in a job will be paid a wage that approximates the wages available to other U.S. workers in the same occupation. Only if there are insufficient U.S. workers to fill that job at that wage may H-2B workers be hired to make up the labor shortfall.

#### v. Collective Bargaining Agreements

The Department proposed retaining from the 2008 Final Rule the inclusion of a collective bargaining wage as the prevailing wage if the job opportunity is covered by an agreement that was negotiated at arms' length between the collective bargaining unit and the employer. Several commenters supported this proposal, but suggested that the Department go further and require that whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should apply to all employers in the region who wish to hire H-2B workers in the same occupation classification, even those that are not signatory to the CBA or who have no collective bargaining unit in that occupation.

A CBA is a contractual agreement negotiated at arms' length between more or less equal parties. The provisions of a CBA reflect a negotiation process and a series of concessions between the parties to the agreement that would not apply to other parties not involved in

the negotiations. The negotiation of a CBA also involves agreement on a range of issues, wages, working conditions, work rules and many others, all of which combine to lead to a complete agreement, only one of whose elements involves wages. For example, one set of negotiating parties may agree to a lower wage in return for a guarantee of job security while another set may agree to higher wages at a greater risk of job cuts. Thus, the Department is unwilling to use a collectively-bargained wage outside the workplace for which it has been negotiated unless that wage has been determined to be prevailing through the SCA, DBA, or OES wage determination process.

By contrast, another commenter objected to the use of a wage higher than a CBA wage in an employment situation in which a CBA applies, noting that where an employer is subject to a CBA, paying a wage other than the CBA scale rate may violate the terms of the agreement and have ramifications under contract and labor law. However, the Department must consistently use the prevailing wage rate under the H-2B program in order to ensure that U.S. workers have meaningful access to these positions and do not experience wage depression as a result of employers hiring foreign workers at less than prevailing wages. A CBA rate that has fallen below the minimum wage would not be valid. Similarly, a CBA rate below the prevailing wage would not be a valid wage for purposes of the H-2B program.

#### vi. Set Wages at 90th Percentile Wage Because the Arithmetic Mean Wage Is Less Than the Average Worker's Compensation

Some commenters noted that although the arithmetic mean represents an improvement to a stratified wage rate system, it will not do enough to protect U.S. workers from adverse effect. At least one such commenter suggested the Department set the prevailing wage at the 90th percentile of the OES wage instead of the arithmetic mean to account for any fringe benefits without which the wages of U.S. workers who are similarly employed would be depressed.

The Department rejects this commenter's proposal. The 90th percentile is not a reflection of the prevailing wage of workers in the U.S. and therefore, is not appropriate for the purposes of this rulemaking. Setting the prevailing wage at the 90th percentile would be comparable to or slightly higher than the current Level IV wage, which applies to only 6.92 percent of the workers in the program, and

therefore cannot be considered prevailing. Further, as discussed in another section, employers are not precluded from providing workers with a higher wage. Requiring the arithmetic mean will ensure that employers offer wages comparable to those that U.S. workers expect for a given occupation within a particular locality without unduly disadvantaging employers.

#### vii. Allow Employers To Compensate Workers Through Production Rate (*i.e.*, "Piece Rate") During Processing and Prevailing Wage for all Non-processing

Several commenters in the seafood processing industry proposed that in light of the prevailing practice in the industry in which workers are paid a piece-rate based on production, the Department should permit employers to pay a piece-rate based on production for the production-based work and a prevailing wage rate for all non-processing work. The Department notes that it does not prohibit incentive piece rates, provided that the piece rates produce earnings that meet the required prevailing wage.

Having considered the proposed alternative, the Department has concluded that it would not satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H-2B jobs. Finally, the Department must ensure that in the H-2B program the wages offered to H-2B workers and U.S. workers recruited under H-2B job orders are the same wages and terms of employment offered to U.S. workers recruited by employers not participating in the H-2B program, that is, are the prevailing wages. Any method that results in offering H-2B workers lower than average wages adversely affects U.S. workers responding to H-2B-related recruitment. Similarly, any method that results in an employer recruiting for job opportunities using experience requirements that are higher than necessary or not normal to the occupation creates artificial entry barriers for potentially interested U.S. workers. While the Department appreciates the proposed alternatives suggested, it has concluded that none of

the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

viii. Reinstate the Use of SWA Surveys To Effectively Determine the Appropriate Wage for Any Occupation in That State

One commenter suggested a wage methodology that would have SWAs, rather than employers and/or the Department, conduct surveys to effectively determine the appropriate wage for any occupation in a particular State. Before 1998, when the program was much smaller, SWAs did in fact conduct surveys to produce prevailing wages. The financial resources available today to be devoted to such an activity, in particular given the expansion of the program and the resources available elsewhere (specifically, OES, DBA, and SCA) no longer make this a viable option. In addition, the inconsistencies that resulted from State to State in the treatment of the same job opportunity, reflecting not the local conditions but the quality of the surveyors and the collection instruments used, created difficulties that the benefits of using such surveys do not outweigh. Reliance on SWA surveys in our non-agricultural immigration programs was largely abandoned in 1998 because the OES provides a more reliable and cost-effective means for producing prevailing wage rates on consistent basis across the country. For these reasons, the Department has determined that the OES survey with its standardized job descriptions, compensation data collection and analysis, and DBA and SCA wage determinations provide a much more accurate portrayal of wage information than State surveys.

ix. Include Only the Wages of Temporary Workers in Determining the Prevailing Wage for the H-2B Program

Several submissions, including two from employers and one from an individual, suggested that the wage surveys used to determine H-2B prevailing wages should only sample temporary workers. However, a wage survey of temporary workers may include workers who provide short-term services to fill in for sick or vacationing employees, whereas H-2B workers essentially become full-time workers for the entire period of need. Moreover, limiting the survey universe in this way would produce results inconsistent with the Department's responsibility to prevent the employment of temporary foreign workers under the H-2B program from adversely impacting U.S.

workers, regardless of whether they are temporary or permanent. The sole use of temporary workers' wages would depress prevailing wage calculations, applying substantial downward pressure on wages for similar, permanent work within the region. Therefore, the Department will continue to use wage surveys that include permanent workers to make H-2B prevailing wage determinations.

x. Summary of Other Alternatives

Having considered the proposed alternatives, the Department has concluded that none would satisfactorily effectuate the Department's objective of ensuring that wages and working conditions of U.S. workers are more adequately protected than under the current prevailing wage determination process, while maintaining an efficient and consistent administrative process. The Department believes the alternatives proposed would at worst reduce and at best not improve the efficiency and consistency of the prevailing wage determination process, or would directly or indirectly adversely affect the wages of U.S. workers who might take H-2B jobs. Finally, the Department must ensure that in the H-2B program the wages paid to H-2B workers do not adversely affect the wages paid to U.S. workers and U.S. workers recruited under H-2B job orders by employers not participating in the H-2B program. Any method that results in offering H-2B workers lower than average wages adversely affects U.S. workers similarly employed. While the Department appreciates the proposed alternatives received, it has concluded that none of the alternatives provided better accomplishes the Department's policy objectives than the prevailing wage determination method contained in the Final Rule.

9. Steps To Minimize Economic Impact on Small Entities

As the Department explained in its IRFA analysis, it recognizes the potential impact on small businesses that this Final Rule will have and has reviewed alternatives to minimize such impacts. The Department's mandate under the H-2B program as extended to it by the Department of Homeland Security under the INA is to set requirements for employers that wish to hire temporary foreign non-agricultural workers. Those requirements are designed to ensure that foreign workers are used only if qualified domestic workers are not available and that the hiring of H-2B workers will not adversely affect the wages and working

conditions of similarly employed domestic workers. This Final Rule sets those minimum standards with regard to wages. As discussed throughout this Final Rule, the required wage rate, as established by the methodology set in this rule, determines whether U.S. workers' wages will be adversely affected by the hiring of an H-2B worker. A different and presumably lower standard applied to small business would potentially result in the very adverse effect that the Department is compelled to prevent. As a result, a different standard for this class of employers cannot be implemented by the Department.

However, the Department recognizes the impact that wage increases are likely to have on businesses, including small businesses, that have in recent years relied on H-2B visas. In particular, the Department recognizes the commitments that employers have made in reliance on the current methodology, which has been expressed by many employers. In recognition of this impact, and in order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012.

*C. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This Final Rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a "Federal intergovernmental mandate" or a "Federal private sector mandate." A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H-2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

*D. Small Business Regulatory Enforcement Fairness Act of 1996*

The Department has determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any compliance guides for small entities as mandated by

the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The Department has, however, concluded that this rule is a major rule requiring review by the Congress under the SBREFA because it will likely result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### *E. Executive Order 13132—Federalism*

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

#### *F. Executive Order 13175—Indian Tribal Governments*

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

#### *G. Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this Final Rule and determined that it will not have a negative effect on families.

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

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

#### *I. Executive Order 12988—Civil Justice*

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

#### *J. Plain Language*

The Department drafted this Final Rule in plain language.

#### *K. Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l). The information collection (IC) requirements for the current H–2B program are approved under OMB control number 1205–0466 (which includes ETA Form 9141 and ETA Form 9142). This rule imposes no new information collection requirements and there are no burden adjustments that need to be made to the analysis. For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting the Department at: Office of Policy

Development and Research, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by e-mail at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

#### **List of Subjects in 20 CFR Part 655**

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

■ Accordingly, ETA amends 20 CFR part 655 as follows:

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

■ 1. The authority citation for part 655 continues to read as follows:

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

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. Amend § 655.10 by:

■ a. Revising paragraphs (b) introductory text, (b)(1), and (2);

- b. Removing paragraphs (b)(4) and (b)(5) and redesignating paragraph (b)(3) as (b)(4) and (b)(6) as (b)(5);
- c. Adding new paragraphs (b)(3), (b)(6), and (b)(7); and
- d. Removing paragraphs (f) and (g) and redesignating paragraphs (h) as (f), and (i) as (g).

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

\* \* \* \* \*

(b) *Basis for prevailing wage determinations.* The prevailing wage is the highest of the following:

(1) The wage rate set forth in the CBA, if the job opportunity is covered by a CBA that was negotiated at arms' length between the union and the employer;

(2) The wage rate established under the DBA or SCA for the occupation in the area of intended employment if the job opportunity is in an occupation for which such a wage rate has been determined; or

(3) The arithmetic mean of the wages of workers similarly employed in the occupation in the area of intended employment as determined by the OES. This computation will be based on the arithmetic mean wage of all workers in the occupation.

\* \* \* \* \*

(6) In geographic areas where the OES does not gather wage data, including but not limited to the jurisdiction of the Commonwealth of the Northern Mariana Islands, and there is no CBA, DBA, or SCA wage available for the job opportunity, the NPC will consider wage information in the form of a wage survey provided by an employer in making a prevailing wage determination. Such a survey may only be submitted with a request for a prevailing wage determination. A request filed under this paragraph does not need to be preceded by a request and approval to submit wage

information as described in paragraph (b)(7) of this section.

(7)(i) An employer may submit a written request to the Administrator, OFLC to provide a private wage survey for OFLC to consider in making a prevailing wage determination which must demonstrate that the following factors are present:

(A) There is no CBA, DBA, or SCA wage available for the job opportunity;

(B) The job opportunity was not listed in the Dictionary of Occupational Titles (DOT) and is not listed in the Standard Occupational Classification (SOC) system, or if the job opportunity was listed in the DOT or is listed in the SOC system, the DOT crosswalk to the SOC system links to an occupational classification signifying a generalized set of occupations as "all other"; and

(C) The job description entails job duties which require knowledge, skills, abilities, and work tasks that are significantly different, as defined in guidance to be issued by the OFLC, than those in any other SOC occupation.

(ii) The Administrator, OFLC may approve or deny an employer's written request to provide a wage survey. If the Administrator, OFLC approves the employer's written request, the Administrator, OFLC will send an approval letter to the employer. Approvals shall be valid for 1 year from the date of approval and only for the job opportunity and area of intended employment specified in the original written request. This approval does not constitute an acceptance of any particular wage survey.

(iii) If approval is granted, the employer may submit a request for a prevailing wage determination to the NPC along with a copy of the Administrator, OFLC's approval letter and a complete copy of the private survey. The NPC will evaluate the adequacy of the data provided and validity of the statistical methodology

used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(iv) In each case where the employer submits a wage survey for which it seeks acceptance, the employer must provide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC National Office.

(v) The survey must be based upon recently collected data:

(A) Any published survey must have been published within 24 months of the date of submission, must be the most current edition of the survey, and must be based on data collected not more than 24 months before the publication date.

(B) A survey conducted by the employer must be based on data collected within 24 months of the date it is submitted for consideration.

(vi) The survey cannot as any part of its data wage information reflect the wages of H-2B workers or other nonimmigrant workers.

(vii) If the NPC does not approve the survey for use in the H-2B program, the NPC shall inform the employer in writing of the reasons the survey was not accepted. An employer may appeal the NPC's decision in accordance with § 655.11.

\* \* \* \* \*

Signed in Washington this 14th day of January 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

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**BILLING CODE 4510-FP-P**