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20 CFR Part 655
Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Proposed Rule

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: Proposed rule; request for comments.

SUMMARY: The Department of Labor (the Department or DOL) proposes to amend its regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. This Notice of Proposed Rulemaking (NPRM or proposed rule) proposes to revise and solicits comments on the methodology by which the Department calculates the prevailing wages to be paid to H–2B workers and 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: Interested persons are invited to submit written comments on the proposed rule on or before November 4, 2010.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB61, by any one of the following methods:

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

Please submit your comments by only one method. Comments received by means other than those listed above or that are received after the comment period has closed will not be reviewed. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public on the *http://www.regulations.gov* Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

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

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

FOR FURTHER INFORMATION CONTACT: William L. Carlson, PhD, Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR 655.10

A. Statutory Standard With Respect to Prevailing Wages and Current Department of Labor Regulations

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." There is an annual cap of 66,000 H–2B nonimmigrant visa approvals per fiscal year, divided into two biannual allocations of 33,000 each.

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). The regulations for U.S. Citizenship and Immigration Services (USCIS), the agency within DHS which adjudicates requests for H–2B status, require that an intending employer first apply for a temporary labor certification from the Secretary of Labor (the Secretary). 8 CFR 214.2(h)(6). That certification informs USCIS 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. A certification from the Secretary is currently not required for H–2B employment on Guam, for which certification from the Governor of Guam is required. 8 CFR 214.2(h)(6)(iii).

The Department's regulations at 20 CFR part 655, Subpart A, "Labor Certification Process for Temporary Employment in Occupations other than Agriculture or Registered Nursing in the United States (H–2B Workers)," govern the H–2B labor certification process, as well as the enforcement process to ensure U.S and H–2B workers are employed in compliance with H–2B labor certification requirements. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in ETA, the agency to which the Secretary has delegated her responsibilities described in the USCIS H–2B regulations. Enforcement of the attestations made by employers in H–2B applications for labor certification is conducted by the Wage and Hour

Division (WHD) within DOL, to which DHS on January 16, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B).

As a part of the process of applying to employ H–2B workers, an employer must ensure that it will pay the workers hired in connection with that application a wage that will not adversely affect the wages of U.S. workers similarly employed. To ensure that this requirement is met, the Department has established a process for providing to an employer a prevailing wage for the job opportunity, below which an employer may not pay its H–2B workers. Until 2005, the process of determining prevailing wages was governed by General Administration Letter (GAL) No. 2–98 (1998). The process required by the 1998 GAL made use of wage 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.,* wage rates mandatory for H–2B occupations for which such wage determinations existed. In the absence of DBA or SCA wage rates, prevailing wage determinations were based on the Occupational Employment Statistics wage survey (OES), compiled by the Bureau of Labor Statistics (BLS). In May 2005, as a result of legislation enacting section 212(p)(4) of the INA, 8 U.S.C. 1182(p)(4), relating to the H–1B visa program, the Department issued guidance on prevailing wage determinations. The Department applied that guidance to H–2B labor certification applications as well as the H–1B temporary specialty worker and permanent labor certification programs. Under that guidance, prevailing wage determinations in these three visa programs were set based on four tiers tied to skill levels using the OES wage survey, while the use of DBA or SCA wage rates was at the option of the employer seeking the determination. The Department did not use notice and comment rulemaking when issuing that guidance. See ETA Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs (the Prevailing Wage Guidance), *http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.*

In 2008, the Department proposed and finalized regulations that currently govern the H–2B temporary worker program. 73 FR 29942, May 22, 2008; 73 FR 78020, Dec. 19, 2008 (the 2008 Final Rule). The 2008 Final Rule essentially codified various aspects of the 2005 prevailing wage guidance, including that the prevailing wage for labor certification purposes shall be the arithmetic mean of the wages of workers similarly employed at the skill level in the area of employment. 20 CFR 655.10(b)(2). Additionally, the 2008 Final Rule, in accordance with the 2005 prevailing wage guidance, continued to require the use of the OES Survey in setting the prevailing wage, in the absence of a collective bargaining agreement, an employer-provided survey acceptable under 20 CFR 655.10(f), or a request from the employer to use the DBA or SCA wage determinations. The 2008 Final Rule also transferred the process of determining prevailing wages from the State Workforce Agencies (SWAs) to OFLC but did not change the method for calculating the wages for H–2B workers and U.S. workers. The activity of calculating and issuing prevailing wage determinations (PWDs) based upon requests from employers seeking to use them in connection with a foreign labor certification program is now conducted by OFLC's National Prevailing Wage Center (NPWC), previously named the National Prevailing Wage and Helpdesk Center, in Washington, DC; it is designated in the regulation by the generic National Processing Center, or NPC.

B. The Need for New Rulemaking

Because the 2008 Final Rule did not make any changes in the method by which wages for H–2B workers and U.S. workers are calculated and continued the four-tiered skill system, the Department did not seek comment in the rulemaking process on the sources of data used to set wage rates. Since the 2008 Final Rule took effect, however, the Department has grown increasingly concerned that the current calculation method does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H–2B workers. Additionally, the prevailing wage calculation methodology became the subject of litigation. On August 30, 2010, the U.S. District Court in the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), 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." The plaintiffs in *CATA* had challenged the Department's use of skill levels in establishing prevailing wages and the Department's reliance upon OES data in lieu of DBA and SCA rates. The court ruled that the Department had violated the Administrative Procedure Act when it did not adequately explain its reasoning for using skill levels as part of the H–2B prevailing wage determinations, and that it failed to consider comments relating to the choice of appropriate data sets in deciding to rely on OES data rather than DBA and SCA in setting the prevailing wage rates.

Accordingly, in order to comply with the Court's order and to appropriately establish a wage methodology that adequately protects U.S. and H–2B workers, the Department is engaging in this new rulemaking to provide the public with notice and opportunity to comment on a new proposed methodology to determine prevailing wages under the H–2B program. The Department anticipates further rulemaking that will address other aspects of the H–2B temporary worker program.

C. § 655.10 Prevailing Wage

The proposed rule would establish that the prevailing wage will be the highest of the following: Wages established under an agreed-upon collective bargaining agreement (CBA); a wage 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. The employer would be required to pay the workers at least the highest of the prevailing wage as determined by the NPC, the Federal minimum wage, the State minimum wage and the local minimum wage.

The NPRM proposes to include consideration of the use of DBA wages and SCA wages for those occupations for which wages have been determined under either of the two Acts for the area of intended employment. The WHD's DBA survey program has undergone a significant re-engineering effort in the last 7 years, resulting in a greatly improved and timely prevailing wage rate determination process. The wage determinations are maintained by type of public construction project (*e.g.,* residential, building, highway, and heavy), and they are issued on a county-by-county basis. In addition, they include more detail for crafts (*e.g.,* they distinguish between rates paid to a pipefitter who performs HVAC work and one who does not). Presently, SCA wage determinations are based upon BLS' National Compensation Survey and OES survey data, and in some cases Federal employee data is also used. SCA

wage determinations now are reviewed yearly. Therefore, the Department has revisited the issue of whether to require the consideration of these alternative prevailing wage rate sources and has concluded that process improvements have made these wage surveys appropriate for use in this program. During its long practice of making wage determinations under these statutes, the Department has invested significant time and resources in developing appropriate calculation methodologies and making decisions about appropriate sources of wage data which it must consider in order to preserve wage integrity for U.S. workers.

The Department has concluded that the mandatory consideration of the DBA and/or SCA wages for purposes of PWDs will address several important policy objectives, including protecting U.S. worker wages. First, it will ensure that each PWD reflects the highest wage from the most accurate and diverse pool of government wage data available with respect to a job classification and area of intended employment. Second, it will ensure compliance with mandatory wage standards for certain occupations. In addition, many of the H–2B job classifications already have DBA or SCA wages associated with the occupations; therefore, reinstating the explicit use of these wages can prevent the undercutting of wages in the local market when they more accurately reflect local market wages.

Furthermore, the proposed rule would eliminate the use of the four-tiered wage structure. The Department currently implements this four-tiered system in accordance with the 2005 Prevailing Wage Guidance. This guidance differentiates the wage tiers by the level of experience, education, and supervision required to perform the job duties, as required for H–1B wages by section 212(p)(4) of the INA, from which the four-tiered wage system is derived. For the reasons stated below, the Department proposes to amend the current four-tier practice for the H–2B program and proposes instead a single OES wage level for H–2B job opportunities based on the arithmetic mean of the OES wage data for the job opportunities in the area of intended employment.

The Department has re-examined section 212(p)(4) of the INA and has concluded that the use of the skill levels mandated in that provision is not legally required in the H–2B program. Section 212(p)(4) of the INA was enacted in the context of H–1B reform in the Consolidated Appropriations Act of 2005, and while it is the only paragraph in section 212(p) that does not reference any specific immigration programs to which it applies, it is embedded in the provisions dealing with prevailing wages for positions in the H–1B and permanent foreign labor categories. There is no legislative history indicating that it was or was not meant to apply only to the H–1B program. However, the other provisions of section 212(p), which were all added to the INA by Congress at the same time, all are specific in their application to H–1B, to the permanent program, or to both. None applies to the H–2B program.[1] Thus, the Department no longer believes that it is bound by section 212(p)(4) to offer four-tiered wage levels in the H–2B program. The Department has already eliminated the four-tiered wage levels in the H–2A program in its Final Rule on that program. 75 FR 6884 (Feb. 12, 2010).

The wage-setting procedures no longer require a single wage determining methodology as a matter of administrative efficiency, which was a concern at the time of issuance of the 2005 Prevailing Wage Guidance. The Department, which had used a two-tiered wage system in its foreign labor certification programs before the enactment of section 212(p), implemented the four tiers in H–2B for administrative efficiency when it implemented them in the H–1B and permanent labor certification programs. At that time, the SWAs were responsible for providing all wage determinations. Training diverse State workforce staff around the country on multiple wage methodologies for different wage determination processes in foreign labor certification programs would have been difficult and would have inevitably resulted in inconsistent application and confusion, which is counterproductive to the Department's mandate to ensure that H–2B employers do not offer wages that will adversely impact the wages of U.S. workers. However, the Department completed consolidation of its wage determination activities for its foreign labor programs in the NPWC in January 2010. The use of a single Center to issue wage determinations ensures that wage calculations are applied consistently throughout a single program, thereby eliminating the need to use a single method of calculation for all programs for administrative efficiency. Indeed, as noted above, the Department already has stopped using the four-tiered system in the H–2A program as of the effective date of the H–2A Final Rule. 75 FR 6884 (Feb. 12, 2010).

The types of jobs found in the H–2B program involve few if any skill differentials necessitating tiered wage levels. The Department has an obligation to require H–2B employers to offer wages that do not adversely affect the wages of their U.S. workforce. By their very existence, however, multiple wage rates, particularly in a program in which most job opportunities have few or no skill requirements, stratify wages and inappropriately allow employers to force much of the wage-earning workforce into a lower wage. H–2B workers, most of whom fill jobs with low skill levels, are more likely to be classified at the low end of the wage tiers, ultimately adversely affecting the wages of U.S. workers in those same jobs. In addition, even if skill-based wage tiers were desirable as a theoretical matter, neither the OES nor any other comprehensive data series that we are aware of attempts to capture such variations. While the Department has, since 1998, created tiered wages by mathematically manipulating OES data in accordance with the statute, the actual OES survey instrument does not solicit data concerning the skill level of the workers whose wages are being reported. While the assumption that lower wages reflect lower skills (the basis for the current methodology) may have some validity in higher skilled occupations, there is no support for that assumption in the case of the lower-skilled occupations that predominate in the H–2B program.

H–2B disclosure data from the last 10 years demonstrates that many jobs for which employers seek H–2B workers—housekeepers, landscape workers, etc.—clearly require minimal skill to perform, have few special skill or experience requirements, and do not generally have career ladders. These jobs have typically resulted in a Level 1 (the lowest wage level) determination for the H–2B employer, because the jobs themselves do not require the employer to seek workers with higher skill levels. The result is a wage determination that is in fact lower than the average wage paid for many jobs that are of the same classification as those jobs filled under the H–2B program.[2] By allowing jobs to be filled by H–2B workers at these lower wages, a tiered wage system can have a

[1] Additionally, the decision issued by the court in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* 2010 WL 3431761, at *19 n.22, which invalidated the application of the four-tier wage skill levels to the H–2B program, found that section 212(p)(4) of the INA is limited to the H–1B context (if the Department argued that it was "using skill levels because of the statute, that explanation would be irrational").

[2] DOL analysis shows that, in about 96 percent of the cases, the H–2B wage is lower than the mean of the OES wage rates for the same occupation. See footnote 6.

depressive effect on wages of similar domestic workers, ultimately adversely affecting the wages of U.S. workers in those same jobs.[3] The Department cannot continue to allow such wage depression where its mandate is to ensure that the wages of U.S. workers suffer no adverse impact.

The Department, accordingly, proposes 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 it is the most effective available method for preventing adverse effect on wages. The Department welcomes comment on specific alternatives for wage calculations to meet its mandate for avoiding adverse effect on wages while ensuring that wages reflect economic realities in the marketplace for such jobs.

Finally, the H–2B regulations currently allow the use of an employer-provided survey to determine the prevailing wage when that survey meets certain methodological requirements, even if the survey produces a lower wage than the OES wage. The NPRM proposes to eliminate the use of private wage surveys in the H–2B program. After more than 10 years of successful experience with the OES, the Department has concluded that the review of such surveys is an inefficient and unnecessary expenditure of government resources. While private surveys can provide useful information, the cost of reviewing the surveys outweighs their utility.

By eliminating the use of such employer-provided surveys, the proposed rule also eliminates the need for the 2008 Final Rule provision allowing employers to file supplemental information regarding the use of a survey, rendering current section 655.10(g) at least partially moot. The section also references the submission of supplemental information when there is a disagreement with a wage level, which has also been rendered moot. As any other issue (such as the application of a DBA or SCA wage) can be appealed through the review of a PWD by the Certifying Officer or by BALCA through the procedures of section 655.11, the Department is removing paragraphs 655.10(f) and (g) of the current rule.

[3] Absent an increase in the number of workers under the H–2B program to fill the temporary labor shortage, wages for these temporary jobs would rise in order to dispel the shortage, until sufficient additional domestic labor is attracted into the market. These wage increases are avoided, however, under the prevailing wage requirements of the H–2B program as currently configured. Moreover, when H–2B wages are set lower than wages paid to U.S. workers in similar jobs, as they generally are under the tiered wage system, the H–2B wages may not actually reflect the economic value of the work, impeding any upward pressure on wages that would otherwise result from the labor shortage.

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

The Office of Management and Budget (OMB) has determined that this NPRM is an economically significant regulatory action under sec. 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 NPRM.

1. Need for Regulation

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program with respect to the wages paid to these workers. Chief among these reasons is the United States District Court for the Eastern District of Pennsylvania's order and accompanying opinion in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), which invalidated the application of the four-tier wage skill levels to the H–2B program and required 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." The Department is concerned that the methodology for calculating prevailing wages at issue in the Court's order does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H–2B workers.

For these reasons, discussed in more detail above, the Department is proposing the changes contained in the NPRM.

2. Alternatives

Given the fact that the court's order and accompanying opinion in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, requires the Department to promulgate this NPRM, the Department has limited its consideration of alternatives of wage calculations to the following: (1) To continue the current calculation methodology but provide a more complete justification for doing so, and (2) to eliminate the four tiers and use the arithmetic mean. For use of alternative government sources, the Department considered continuing (1) the optional use of DBA and SCA and (2) making the use of such surveys mandatory. For alternative wage sources, the Department considered, in addition to the continued use of CBAs, (1) continuing the use of private employer surveys and (2) elimination of private surveys.

The Department considered alternate data sources but given the time constraints imposed by the court's order, we were unable to fully analyze these alternatives. We welcome comments from the public on alternatives for wage sources that provide adequate protections to U.S. and H–2B workers.

The alternatives proposed in this NPRM are those that will best achieve the Department's policy objectives of ensuring that wages of U.S. workers are more adequately protected and, thus, that employers are only permitted to bring H–2B workers into the country where the wages and working conditions of U.S. workers will not be adversely affected. We request comments from the public on alternatives for calculating a prevailing wage that provides adequate protections to U.S. and H–2B workers.

3. Economic Analysis

The Department's analysis below considers the expected impacts of the proposed NPRM provisions against the baseline (*i.e.,* the 2008 Final Rule). The method of determining prevailing wages represents additional compensation for both H–2B and U.S. workers hired in response to the required recruitment.

The relevant benefits, costs, and transfers that may apply are discussed.[4]

The NPRM proposes to require employers to offer H–2B workers and U.S. workers hired in response to the recruitment required as part of the application a wage that is at least equal to the highest of the prevailing wage, or the Federal, State or local minimum wage. 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 Davis-Bacon Act or the McNamara-O'Hara Service Contract Act 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; and (3) the arithmetic mean of the OES-reported wage.

To estimate the proposed hourly change in wages, the Department collected H–2B program participation data for fiscal year (FY) 2009. We then matched the OES wage rates to the H–2B data for the same period by standard occupational code (SOC). Using all certified or 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 average OES average hourly wage, and we weighted this differential by the number of certified workers on each certified or partially certified application.[5] We then summed those products and divided the sum by the total number of certified workers of all certified or partially certified applications.[6] Based on this calculation, the proposed change in the method of determining wages will result in a $4.38 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 application.[7]

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 will be H–2B employers, and under the proposed higher wages in the NPRM, those employers who choose to continue to participate are likely to be those that have the greatest need to access the H–2B program. When summarizing the benefits or costs of specific provisions of this proposed rule, we present the 10-year averages to reflect the typical annual effect.

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 (33,000 of which are made available biannually), which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).[8] According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B workers certified in the top five industries 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. These employment numbers represent the following percentages of the total employment in each of these industries: Construction—0.4 percent (30,242/7,265,648); Amusement, Gambling, and Recreation—0.9 percent (14,041/1,506,120); Landscaping Services—13.2 percent (78,027/589,698); Janitorial Services—3.3 percent (30,902/933,245); and Food Services and Drinking Places—0.2 percent (22,948/9,617,597).[9] These percentages decrease further when scaled to the actual number of entries permitted each year: 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).[10] As these data illustrate, the H–2B program represents a small fraction of the total employment even in each of the top five industries in which H–2B workers are found—less than 1 percent in most of the categories.

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. In addition, workers who would have been hired at a lower wage rate are not hired at the higher wage rate, resulting in forgone earnings for workers. In this theoretical sense, to the extent that the higher wages imposed by the rule result in lower employment and lower output by firms employing those workers, the lost profits on the foregone output and the lost net wages to the foregone workers represent a deadweight loss because these gains from trade are not attained. This effect will be magnified during years in which the cap is not reached.[11]

[4] For the purpose of this analysis, H–2B workers are considered temporary residents of the U.S.

[5] A total of 30 applications were set aside due to invalid data.

[6] To perform this calculation, we assume that the weighted average wage of H–2B workers has the same distribution as the weighted average wage of the domestic workers. This may or may not be the case. While there is some uncertainty regarding this approach, it is the best methodology that can be applied given the available data. In about 4.1 percent of cases, the H–2B hourly wage was higher than the OES wage; it is likely that, instead of declining, those wages would not change as a result of the rule, so in such cases, the wage differential was assumed to be zero.

[7] The Department does not believe the imposition of these wages will cause increases in the wage beyond that represented by the OES arithmetic mean. 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 set forth in the CBA would be the required wage. Accordingly, including the wage rate set forth in the CBA among the definition of prevailing wage will not result in an increased cost to the employer. As for the application of SCA and DBA to the PWD, in most cases, the SCA wage should not result in an increased cost to employers because in most cases, the SCA wage is based upon the OES mean. The application of DBA wages, and their potential impact on the relative wage increase, cannot be determined at this time, because the situations in which DBA would be higher than the location-specific OES arithmetic mean cannot be determined with sufficient accuracy to permit calculation. As a result, this analysis assumes that the OES wage will represent the highest of the three alternatives.

[8] Source for total employment: *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[9] Source for total employment by industry: 2007 Economic Census.

[10] 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 was derived by dividing 115,500 by the total number of workers certified per year on average during FY2007–2009 (236,706).

[11] The output reduction impact of reducing labor demand may be partially offset by capital

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 is expected to be minimal. There has generally been excess demand for H–2B workers well beyond the 66,000 limit, and DOL believes that the increased wages resulting from the proposed 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 had unfilled positions will participate.

For example, for the years FY2007 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 to take up 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,[12] a $4.38 (51 percent) increase in wages would result in a 15 percent decline in the number of H–2B workers requested by employers, for a remaining total of 201,200 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 that would then be able to employ H–2B workers. Thus, DOL believes that for years in which the number of applications exceeds the number 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.[13] Indeed, the higher wages expected to result from the proposed rule could in turn result in a more efficient distribution of H–2B visas to employers who can less easily employ U.S. workers. DOL 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 proposed rule changes, so that those employers participating in the H–2B program after the proposed rule will have a greater need for the program, on average, than those employers participating in the H–2B program before the proposed changes.

In years in which the number of certified H–2B positions is less than the 66,000 visa cap, the higher proposed wages resulting from this NPRM 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 (by offering higher wages, for example) or could make other adjustments, such as substituting capital for labor, but, in a theoretical sense, the reduction in employment and output would not be completely offset, potentially resulting in some deadweight loss in production among H–2B employers. However, the history of the H–2B program suggests that this situation is rare. In recent history, the number of H–2B visas has reached the 66,000 cap every year except 2009.

ii. Transfers

The proposed 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 recruitment wages for U.S. workers increase, a larger number of U.S. workers may be attracted to work in jobs that would otherwise be occupied by H–2B workers. Additionally, faced with higher H–2B wages, some employers may find domestic workers relatively less expensive and may choose not to participate in the H–2B program and instead employ U.S. workers. While some of these U.S. workers may be drawn from other employment, some of them would otherwise remain unemployed or out of the labor force entirely, earning no salary.

The Department, however, is not able to quantify these transfer payments with precision. 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 (115,500, which includes both new entrants and an assumed portion of those who entered in each of the two previous years),[14] by the weighted average hourly wage increase ($4.38), the number of hours worked per day (7), and the total number of days worked (217).[15,16] We estimate the total annual average transfer incurred due to the increase in wages at $769.4 million. As a result, OMB has determined that the proposed 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 workers hired in response to the required 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 in the community. These are important concerns to the current Administration and a key aspect of the Department's mandate to ensure that wages of similarly employed U.S. workers are not adversely affected.

substitution and organizational substitution productivity effects. When substitution occurs, the deadweight loss will be reduced. Substitution may also involve outsourcing of production elements, which may entail a net welfare loss to the U.S. if outsourcing to a supplier overseas, but only a transfer if outsourcing to a supplier in the U.S.

[12] *See, e.g.,* Hamermesh, Daniel S., *Labor Demand,* Princeton and Chichester, U.K.: Princeton University Press, 1993.

[13] DOL believes that any decline in employment among employers participating in the H–2B program will be offset by increased employment among new employers who previously were unable to hire workers under the H–2B program. Therefore, there would be no appreciable decline in employment under the program.

[14] See note 11, which explains that the Department assumes that 50 percent of workers entering the H–2B program in one year will remain in the country the following year and that 50 percent of those will remain in the country for a third year. The Department data with regard to 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 rely 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.*

[15] Our analysis focuses on the costs related to H–2B workers because of the lack of data on U.S. workers hired in response to recruitment conducted in connection with an H–2B application.

[16] 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)].

B. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605. For the reasons explained in this section, the Department believes this NPRM is not likely to impact a substantial number of small entities and, therefore, an initial regulatory flexibility analysis is not required by the RFA. However, in the interest of transparency and to provide a full opportunity for public comment, we have prepared the following Initial Regulatory Flexibility Analysis to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. We specifically request comments on the following burden estimates, including the number of small entities affected by the requirements, and on alternatives that could reduce the burden on small entities. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this proposed rule upon submission of the proposed rule to OMB under E.O. 12866, as amended, "Regulatory Planning and Review" 58 FR 51735, Oct. 4, 1993; 67 FR 9385, Feb. 28, 2002; 72 FR 2763, Jan. 23, 2007.

Because employers seeking to participate in the H–2B program are derived from virtually all segments of the economy and across industries, those 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 very small fraction 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, which represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (130.9 million).[17] According to H–2B program data for FY2007–2009, the average annual numbers of H–2B workers certified in the top five industries 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 the number of workers certified is scaled to reflect the actual number of entries permitted each year, given the H–2B visa cap of 66,000 workers, the data reflect that 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).[18] As these data illustrate, the H–2B program represents a small fraction of the total employment even in each of the top five industries in which H–2B workers are found.

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

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program with respect to the wages paid to these workers. Chief among these reasons is the United States District Court for the Eastern District of Pennsylvania's order and accompanying opinion in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), which invalidated the application of the four-tier wage skill levels to the H–2B program and required 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." The Department is concerned that the methodology for calculating prevailing wages at issue in the Court's order does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H–2B workers.

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

The Department has grown increasingly concerned that the current prevailing wage calculation method does not adequately reflect the appropriate wage necessary to ensure U.S. workers are not adversely affected by the employment of H–2B workers. Accordingly, the Department is proposing to establish a new wage methodology that adequately protects U.S. and H–2B workers. The legal basis for the proposed rule is the Department's authority, as 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 an order from the United States District Court for the Eastern District of Pennsylvania 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." *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

3. Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed 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 five industries with the largest number of H–2B workers and for which data were available, as mentioned above: Landscaping Services; Janitorial Services (includes housekeeping services); Food Services and Drinking Places; Amusement, Gambling, and Recreation; and Construction. These top five industries accounted for almost 75 percent of the total number of H–2B

[17] *Source: ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[18] Source for total employment by industry: 2007 Economic Census. 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 was derived by dividing 115,500 by the total number of workers certified per year on average during FY2007–2009 (236,706).

workers certified during FY2007–2009.[19]

One industry, Forest Services, made the initial top-five list but is not included in this analysis because the only data available for forestry also include various agriculture, fishing, and hunting activities. Relevant data for Forestry only were not available. The Department requests the public to propose possible sources of data or information on the revenues and average number of workers of a typical small Forestry firm.

We have adopted the SBA small business size standard for each of the five 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; and Construction, $20.7 million.[20]

The Department has used representative data because actual data regarding entity size is not uniformly collected in the H–2B program. The Department added information collection elements surrounding entity size, revenue, and number of all employees in early 2009, specifically to obtain information regarding the size and status of program participants. This would provide the Department with a little over a year of program data regarding participants' size and status. However, these data elements are not required to be provided in order for an employer to submit the *Application for Temporary Employment Certification,* and employers accordingly have the option of not providing information about their size, employee complement, and revenues without penalty in the application process. As a result, the information on the size and status of program participants that has been collected since 2009 is therefore not sufficient to provide to the Department statistically valid data to use in analyzing the actual impact on small businesses.

[19] According to H–2B program data, the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY2007–2009 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; and Construction, Firms—860, Workers—30,242.

[20] The SBA small business size standards for construction range from $7 million (land subdivision) to $33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H–2B workers, the Department used an average of $20.7 million as the size standard for construction.

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

The proposed rule does not impose any reporting or recordkeeping requirements.

With regard to other compliance requirements, the Department has estimated the incremental costs for small businesses from the baseline. For this proposed rule, the baseline is the 2008 Final Rule. This Initial Regulatory Flexibility Analysis reflects the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. Using available data, we have estimated the costs of the increased wages and the time required to read and review the Final Rule.

The Department receives an average of 8,717 applications annually (which is 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 result in petitions for H–2B workers that are approved by DHS. Even if all 6,980 applications are filed by unique small entities, the percentage of small entities authorized to employ temporary non-agricultural workers will be less than 1 percent of the total number of small entities in these industries.[21] Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses. A detailed industry-by-industry analysis is provided below.

To examine the impact of this proposed rule on small entities, the Department evaluates the impact of the incremental costs on a hypothetical small entity of average size, in terms of the total number of both U.S. and foreign workers, in each industry if it were to fill 50 percent of its workforce with H–2B workers. There are no available data to estimate the breakdown of the workforce into U.S. and foreign workers. Based on Economic Census data, the total number of workers (including both U.S. and foreign workers) for this hypothetical small business is as follows: Landscaping Services, 2.3 workers; Janitorial Services, 11.3 workers; Food Services and Drinking Places, 6.3 workers; Amusement, Gambling, and Recreation, 5.0 workers; and Construction, 6.3 workers.[22]

Also using Economic Census data, we derived the annual revenues for small entities in each of the top five industries by multiplying the average number of workers by the average revenue per worker for each of the industries. The Department estimates that small businesses in the top five industries have the following annual revenues: Landscaping Services, $0.181 million; Janitorial Services, $0.336 million; Food Services and Drinking Places, $0.223 million; Amusement, Gambling, and Recreation, $0.209 million, and Construction, $0.884 million.

a. Change in the Method of Determining Wages for H–2B Workers

The Department proposes to require employers to offer H–2B workers and to any similarly employed U.S. worker hired in response to the recruitment required as part of the application a wage that is at least equal to the prevailing wage, or the Federal, State or local minimum wage, whichever is highest. 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 Davis-Bacon Act or the McNamara-O'Hara Service Contract Act 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; and (3) the arithmetic mean of the OES-reported wage.[23]

To estimate the proposed hourly change in wages, the Department collected H–2B program participation data for FY2009. We then matched the OES wage rates to the H–2B data for the

[21] 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; and Construction, 689,040.

[22] Source: 2002 County Business Patterns and 2002 Economic Census. These data do not distinguish between U.S. workers and foreign workers.

[23] The Department does not believe the imposition of these wages will cause increases in the wage beyond that represented by the OES arithmetic mean. 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 set forth in the CBA would be the required wage. Accordingly, including the wage rate set forth in the CBA among the definition of prevailing wage will not result in an increased cost to the employer. As for the application of SCA and DBA to the PWD, in most cases, the SCA wage is equivalent to the arithmetic mean of the OES wage, and will also not result in an increased cost to employers beyond that represented by the change in the OES from the four tiers to the arithmetic mean. The application of DBA wages, and their potential impact on the relative wage increase, cannot be determined at this time. As a result, this analysis assumes that the OES wage will represent the highest of the three alternatives.

same period by SOC. Using all certified or partially certified applications in the H–2B program data, we calculated the increase in wages for each industry by subtracting the H–2B hourly wage certified from the OES average hourly wage and then estimated the average of those differences for each industry.[24]

These calculations yielded the following hourly wage increases by industry associated with this proposed rule: Landscaping services, $3.60; Janitorial Services, $3.72; Food Services and Drinking Places, $1.29; Amusement, Gambling, and Recreation, $1.37; and Construction, $10.61.[25]

To estimate the total cost to the average small entity of increased wages for H–2B workers due to the new wage determination method, the Department multiplied the average hourly increase in wages for the top five industries 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 small entities in each of the top five industries.[26] Our estimates of the total annual average cost incurred due to the increase in wages for the average small employer in the top five industries are as follows: Landscaping Services, $6,562 ($3.60 × 217 × 7 × 1.2); Janitorial Services, $32,209 ($3.72 × 217 × 7 × 5.7); Food Services and Drinking Places, $6,270 ($1.29 × 217 × 7 × 3.2); Amusement, Gambling, and Recreation, $5,203 ($1.37 × 217 × 7 × 2.5); and Construction, $51,573 ($10.61 × 217 × 7 × 3.2).

b. 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.[27] 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 × 1) in labor costs in the first year.[28]

c. Total Cost Burden for Small Entities

The Department's calculations indicate that for a hypothetical small entity in the top five 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 NPRM are as follows: Landscaping Services, $5,794; Janitorial Services, $5,976; Food Services and Drinking Places, $2,281; Amusement, Gambling, and Recreation, $2,402, and Construction, $16,455. Similarly, the analogous costs for employers in the top five industries that hire the average number of H–2B workers for their respective industries are as follows: Landscaping Services, $6,638; Janitorial Services, $33,004; Food Services and Drinking Places, $6,832; Amusement, Gambling, and Recreation, $5,760, and Construction, $51,481.

The proposed rule is expected to have a significant economic impact on a hypothetical small entity that applied for enough workers to fill 50 percent of its workforce. While applying to hire H–2B workers is voluntary, and any employer (small or otherwise) may entirely avoid costs associated with the proposed changes by choosing 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 H–2B and U.S. workers provide a broad societal benefit that in the Department's view outweighs these costs.

The small entities that have historically applied for H–2B workers, however, represent very 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, 2.2 percent [(2,754 × 0.50)/63,210]; Janitorial Services, 0.9 percent [(788 × 0.50)/45,595]; Food Services and Drinking Places, 0.1 percent [(851 × 0.50)/293,373]; Amusement, Gambling, and Recreation, 0.3 percent [(227 × 0.50)/43,726], and Construction, 0.1 percent [(860 × 0.50)/689,040].[29] 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.

Therefore, the Department estimates that this proposed rule will have a net direct cost impact on a very limited number of small non-agricultural employers above the baseline of the current costs incurred by the program as it is currently implemented under the 2008 Final Rule. Accordingly, the proposed rule is not expected to impact a substantial number of small entities. The Department specifically requests comments on these burden estimates, including the number of small entities affected by this proposed change in prevailing wage methodology, and on how the final rule can reduce burden on small entities while meeting the statutory requirement that the employment of H–2B workers not adversely affect the wages and working conditions of similarly employed U.S. workers.

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

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

6. Alternatives Considered as Options for Small Entities Businesses

While the Department believes this proposed regulation would not impact a substantial number of small entities, we recognize the potential impact on small businesses and have considered alternatives to minimize such impacts. 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

[24] A total of 30 applications were set aside due to invalid data.

[25] These wage increases reflect the differences between the OES wages and the H–2B wages for the occupations most closely associated with each industry. This estimate may slightly understate the wage increase because cases in which the H–2B wages were higher than OES wages would bias the estimate downward; however, this occurred in only about 4.1 percent of all cases.

[26] 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)].

[27] 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.

[28] 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.

[29] The source of the numerator (i.e., the number of certified H–2B employers) is H–2B program data for FY2007–2009. 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.* We multiply the numerator by 0.50 to reflect our assumption that 50 percent of H–2B employers are small businesses.

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.

The Department considered alternate data sources to determine prevailing wages, but given the time constraints imposed by the court's order and the absence of available data, we were unable to fully analyze these alternatives. The only available sources of information that we are aware of for setting the prevailing wage are the OES, DBA/SCA, and surveys created by private entities. The NRPM discusses the agency's proposal about how those sources should be used. It would be difficult, if not impossible, to cost out any alternative use of these sources. For example, to the Department's knowledge there is no accessible data base of acceptable private surveys that would allow us to determine the cost implications of allowing their continued use. While the Department has been unable to fully analyze other viable options for the calculation of prevailing wages for small entities, the Department invites comments on the availability, usefulness and costs of other potential, reliable data sources.

Ultimately the decision of an employer to apply for H–2B workers is a voluntary choice. That is, any individual employer can avoid the costs associated with the NPRM by not applying for H–2B workers.

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. The proposed 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 SBREFA. The Department has, however, concluded that this proposed 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 proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have federalism implications. The proposed 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 proposed 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 proposed rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The proposed 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 proposed 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 proposed rule and determines that it will not have a negative effect on families.

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

The proposed 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 proposed 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 NPRM 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 process helps to ensure that the public understands the Department's collection instructions; respondents provide requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department properly assesses the impact of collection requirements on respondents.

The PRA requires all Federal agencies to analyze proposed regulations for

potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information. These information collection (IC) requirements must be submitted to the OMB for approval. 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) or it is exempt from the PRA.

The majority of the 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). 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 package for information collection OMB control number 1205–0466 may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

PRA Addressee: Sherril Hurd, Office of Policy Development and Research, U.S. Department of Labor, Employment & Training Administration, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210. *Telephone:* 202–693–3700 (this is not a toll-free number).

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 proposes to amend 20 CFR part 655 as follows:

Title 20—Employees' Benefits

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

1. Revise the authority citation for part 655 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 (b)(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 a new paragraph (b)(3); 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 collective bargaining agreement (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 Davis-Bacon Act or the McNamara-O'Hara Service Contract Act 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.

* * * * *

Signed in Washington this 1st day of October 2010.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

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BILLING CODE 4510–FP–P