

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

GABRIEL PEREZ,	)	
	)	No.3:14-cv-00682 MCR
Plaintiff	)	
	)	
v.	)	
	)	
THOMAS E. PEREZ, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**PROPOSED INTERVENOR SMALL AND SEASONAL BUSINESS  
LEGAL CENTER’S ERRATUM SHEET AND SUPPLEMENTAL EXHIBIT**

Proposed Intervenor files this erratum to notify the Court of an error in its Certificate of Consultation. The Certificate states erroneously that the government takes no position on the Motion to Intervene when, in fact, the government opposes it. Undersigned lead counsel is responsible for this error and will ensure that a similar mistake does not happen in the future.

Along with this erratum, Proposed Intervenor has attached a supplemental exhibit. Plaintiff’s expert Arthur Read represented the plaintiff in *Comité de Apoyo de Trabajadores Agrícolas v. Solis, et al.*, No. 2:09-cv-00240 (E.D. Pa filed Jan. 17, 2009). In Plaintiff’s Brief In Support Of Summary Judgment, Mr. Read explained the pre-2009 regulatory history of the H-2B Program as follows:

The regulations for H-2 non-agricultural jobs, by contrast, simply provided that the DOL would make labor certification decisions based on “such matters as the employer’s attempts to recruit workers and the appropriateness of the wages and working conditions offered.” 33 Fed. Reg. 7370 (May 22, 1968) *codified at* 20 C.F.R. 655.3. Instead of establishing procedures by regulation, DOL used General Administration Letters, which were adopted without notice and comment, to regulate H-2 non-agricultural visas. *See, e.g.* GAL 23-82 (1982); GAL 10-84

(“Procedures for Processing Applications for Certification of Temporary Employment in Nonagricultural Occupations in the United States”) (April 23, 1984) (Reg. App. A-007). This practice continued until 2009 when the regulations challenged herein went into effect.

*See id.* (Doc. 49-1, p. 3-4); *see also id.* (Doc. 56-1, Memorandum In Support Of Federal Defendants’ Motion For Summary Judgment And Response In Opposition To Plaintiffs’ Motion For Summary Judgment); *Comité*, No. 2:09-cv-00240, 2010 U.S. Dist. LEXIS 90155, at \*6, (E.D. Pa. Aug. 30, 2010). The first supplemental exhibit is Mr. Read’s compilation of the Department of Labor’s procedural regulation of the H-2B Program pre-2009. *See* Supp. Exhibit A.

Finally, Proposed Intervenors would like to notify the Court that DOL and the Department of Homeland Security have submitted ‘emergency’ regulations to the Office of Management and Budget (“OMB”). *See* Supp. Exhibit B (<http://www.reginfo.gov/public/do/eoReviewSearch>; Office of Management and Budget, *Wage Methodology for the Temporary Nonagricultural Employment H-2B Program, Part 2*; Final Rule, Received 04/13/15; DOL-ETA, *Temporary Non-Agricultural Employment of H-2B Aliens (H-2B Comprehensive Rule)*, Final Rule, Received 04/13/2015 (last accessed April 16, 2015)). The agencies intend to deprive the public of notice of, and an opportunity to comment on, the regulations based on a “judicial deadline.” Proposed Intervenors are aware of no such deadline. DOL should be asked to clarify this representation. If DOL was referring to the expiration of the stay, DOL should take appropriate steps to notify OMB that there is no emergency justifying departure from normal notice and comment procedures.

Dated: April 16, 2015

Respectfully Submitted,

/s/ Peter W. Zinober

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**Counsel for the Small and Seasonal Business  
Legal Center**

**CERTIFICATE OF CONSULTATION**

Pursuant to Local Rule 7.1(b), Counsel for the Small and Seasonal Business Legal Center consulted with counsel for the parties with respect to this motion. Both DOL and Plaintiff oppose.

/s/ Peter W. Zinober

Attorney

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

COMITÉ DE APOYO A LOS TRABAJADORES  
AGRÍCOLAS, *et al.*,

Plaintiffs

v.

HILDA SOLIS, *et al.*

Defendants

Civil Action No. 2:09-CV-00240 LP

**PRAECIPE OF FILING OF  
REGULATORY HISTORY APPENDIX**

**To the Honorable Court:**

Plaintiffs by and through the counsel hereby file the annexed Regulatory History Appendix for reference of the Court in relationship to the Plaintiffs' Motion for Summary Judgment.

Dated: December 4, 2009

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on December 4, 2009 the foregoing is being served by Electronic mail on the Defendant's attorneys addressed as follows:

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Arthur N. Read

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

<p>COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, <i>et al.</i>,</p> <p style="padding-left: 100px;">Plaintiffs</p> <p style="text-align: center;">v.</p> <p>HILDA SOLIS, <i>et al.</i></p> <p style="padding-left: 100px;">Defendants</p> <hr style="border: 0.5px solid black;"/>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Civil Action No. 2:09-CV-00240 LP</p>
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**REGULATORY HISTORY APPENDIX**



## DOL ETA Advisories

Pg.	Directive		Date
A-000001	TAG No. 656	Technical Assistance Guide (TAG) No. 656 Labor Certifications	1981
A-000007	GAL 10-84	Procedures for Processing Application for Certification of Temporary Employment in Nonagricultural Occupations in the United States	April 23, 1984
A-000018	GAL 1-95	Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations	November 10, 1994
A-000019	GAL 1-95, Attachment		
A-000026	GAL 4-95	Interim Prevailing Wage Policy for Nonagricultural Immigration Programs.	May 18, 1995
A-000028	GAL 4-95, Attachments		
A-000042	GAL 2-97	Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997	October 1, 1996
A-000046	GAL 2-98	Prevailing Wage Policy for Nonagricultural Immigration Programs	October 31, 1997
A-000048	GAL 2-98, Attachment		
A-000058	Employment Service Program Letter No. 01-01	Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2000-2001	December 22, 2000
A-000060	Employment Service Program Letter No. 01-01, Change 1	Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2001 - 2002.	August 8, 2001
A-000062	Employment Service Program Letter No. 01-01, Change 1	Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2001 - 2002	September 20, 2001
A-000064	TEGL 12-02	Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2002 - 2003	October 29, 2002
A-000066	TEGL 12-03	Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2003-2004	November 4, 2003
A-000068		Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs	March 8, 2005
A-000106		Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs	May 9, 2005
A-000144	TEGL 21-06	Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations	April 4, 2007

Pg.	Directive	Federal Register	web
A-000001	TAG No. 656		
A-000007	GAL 10-84	49 FR 25837, 25841-25845 (June 25, 1984)	
A-000018	GAL 1-95	60 FR 7216 (February 7, 1995)	<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=393">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=393</a>
A-000019	GAL 1-95, Attachment	60 FR 7216 (February 7, 1995)	<a href="http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf">http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf</a>
A-000026	GAL 4-95		<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=485</a>
A-000028	GAL 4-95, Attachments		<a href="http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf">http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf</a>
A-000042	GAL 2-97		<a href="http://wdr.doleta.gov/directives/attach/GAL2-97.cfm">http://wdr.doleta.gov/directives/attach/GAL2-97.cfm</a>
A-000046	GAL 2-98		<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942</a>
A-000048	GAL 2-98, Attachment		<a href="http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf">http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf</a>
A-000058	Employment Service Program Letter No. 01-01		<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1626">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1626</a>
A-000060	Employment Service Program Letter No. 01-01, Change 1		<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1627">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1627</a>
A-000062	Employment Service Program Letter No. 01-01, Change 1		<a href="http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1628">http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1628</a>
A-000064	TEGL 12-02		<a href="http://wdr.doleta.gov/directives/attach/TEGL12-02.cfm">http://wdr.doleta.gov/directives/attach/TEGL12-02.cfm</a>
A-000066	TEGL 12-03		<a href="http://wdr.doleta.gov/directives/attach/TEGL12-03.cfm">http://wdr.doleta.gov/directives/attach/TEGL12-03.cfm</a>
A-000068			<a href="http://www.flcdatacenter.com/download/PW_Guidance_2005_Mar_01_Full.pdf">http://www.flcdatacenter.com/download/PW_Guidance_2005_Mar_01_Full.pdf</a>
A-000106			<a href="http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf">http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf</a>
A-000144	TEGL 21-06		<a href="http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06.pdf">http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06.pdf</a>

LEXSTAT 13-1 TECHNICAL ASSISTANCE GUIDE O

Technical Assistance Guide

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1 Technical Assistance Guide of the Employment and Training Administration, Department of Labor (TAG)

I. APPLICATION OF REGULATIONS

*13-1 Technical Assistance Guide O*

O. 656.40--DETERMINATION OF PREVAILING WAGES

(1) Local Office Determination.

The local office shall, to the best of its ability, determine the prevailing wage for the job opportunity described on the application. Standards for determining the prevailing wage are:

a. If the job opportunity is an occupation and a geographic area for which DOL has made a wage determination under the Davis-Bacon Act or the Service Contract Act, the prevailing wage is the rate made under that determination. The rates determined under those two Acts are the actual prevailing rates for the occupation in that area, determined by surveying both Federally assisted and non-Federally assisted employment. Therefore, even if the job opportunity for which certification is requested is not directly subject to a Davis-Bacon Act or Service Contract Act wage determination, the employer must offer at least that wage if there is a current Davis-Bacon or Service Contract wage determination for the occupation in the same geographic area

The standard in paragraph (a)(2)(i) allowing the wage offer to be within 5 percent of the average rate of wages does *not* apply to prevailing wages determined under the Davis-Bacon and Service Contract Acts.

[Page 112]

b. If the job opportunity is an occupation not covered by a prevailing wage determined under the Davis-Bacon or Service Contract Act, the prevailing wage is:

The average wage determined by the local office by a survey of wages paid to workers similarly employed or by using an existing survey. The average is calculated by adding wages paid to similarly employed workers in the area of intended employment and dividing the total by the number of such workers. Since it may not be possible to determine an exact prevailing wage, the employer's wage offer will be accepted if it is within 5 percent of the average rate determined by the local office.

The wage rate set forth in the union contract between a union and the employer if the specific job opportunity is covered by the union contract. The standard allowing the wage offer to be within 5 percent of the average rate of wages *does not* apply.

## 13-1 Technical Assistance Guide O

(2) Job Opportunities Covered by Wage Determinations Under Davis-Bacon and McNamara-O'Hara Service Contract Acts.

The Employment Standards Administration, Wage Hour Division, administers provisions of the Davis-Bacon Act and the McNamara-O'Hara Service Contract Act. The Wage Hour Division, however, does not maintain a comprehensive listing of wage determinations made under these Acts, although they are published periodically in the *Federal Register*.

[Page 113]

The ESA Wage and hour specialists in each regional office can provide the most current information on wage determinations made under these Acts in specific occupations and localities.

Wage determinations made under these specific Acts are used for labor certification because these prevailing wages are determined and applied by the Department of Labor for other programs and their use for labor certification also avoids inconsistency within the Department.

(a) Davis-Bacon Act.

The Davis-Bacon Act applies to occupations in the construction trades and crafts engaged in work under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia.

The Wage and Hour Division of the Employment Standards Administration issues determinations under Davis-Bacon in:

- (1) Residential construction-structure less than four stories tall designed for living space;
- (2) Highway bridges, roads, tunnels, etc.;
- (3) Heavy construction--dams, railroads, airports, etc.;
- (4) Buildings--office building, large apartment buildings, etc.

[Page 114]

(b) McNamara-O'Hara Service Contract Act.

The McNamara-O'Hara Service Contract Act establishes standards for minimum compensation and safety and health protection of employees working for contractors and subcontractors under contract with the Federal Government and the District of Columbia. Examples are contracts for laundry and dry cleaning, for transporting mail, custodial, janitorial or guard service, packing and crating, food service, and for housekeeping.

Only service employees are covered under McNamara-O'Hara. Employees employed in executive, administrative or professional capacities are exempt from this Act.

(3) Job Opportunities Not Covered by Wage Determinations Under the Davis-Bacon or the McNamara-O'Hara Service Contract Act.

(a) Local Office Determination of the Prevailing Wage.

## 13-1 Technical Assistance Guide O

For most occupations in which labor certification is sought, the prevailing wage is obtained from a survey using the arithmetic mean of the wages paid other workers in the area similarly employed. The prevailing wage may be obtained by the local office conducting a survey for the occupation specified on the ETA 750, or use of a current survey which reflects the job as described and the appropriate labor market.

The prevailing rate shall be the average rate of pay calculated by the local office or specified by the survey. The employer can offer a wage range as long as the bottom of the range is no less than the prevailing rate. The wage offer may be within 5 percent of the prevailing rate as determined by the local office.

[Page 115]

## (1) Procedures for Conducting a Local Office Wage Survey

The local office should contact several organizations or establishments in the area who employ workers in the same or similar jobs and obtain the salary paid of these workers. A mixture of types and sizes of organizations in the area should be included in the survey. The jobs do not need to be identical to the job described in the ETA 750 but must be similar and require the same basic skills. When similarly employed workers are covered by a union wage, that data should also be included in the survey.

A specific wage rate should be obtained rather than a range from each organization contacted. Use requirements specified by the employer as a guide for the person contacted to use in providing information on wages paid. When updating wage surveys without considering a specific job offer, use requirements for a fully experienced worker in the occupation as a guide.

If there are not enough employers in the local area, the survey should extend the geographical area of consideration to include an adequate number of employees in the same labor market.

Every attempt should be made to obtain data from enough sources to reflect a representative sampling of employers and workers in the area of intended employment.

[Page 116]

Examples on how to calculate the average (mean) wage are:

(a) The local office has to conduct a wage survey for a meat cutter in a butcher shop to be employed 40 hours per week. After numerous calls, the office obtained the following information from six employers:

<i>Type of Employer</i>		<i>No. of Employees</i>	<i>Salary/Hrs.</i>
Supermarket	A	2	x \$7.50 = \$15.00
"	B	1	x 10.00 = 10.00
Packinghouse	A	6	x 9.25 = 55.50
"	B	4	x 7.25 = 29.00
Butchershop	A	2	x 5.25 =
"	B	3	10.50
"	C	1	x 6.00 =
			18.00
			x 7.75 =
			7.75
Restaurant		1	x 8.75 = 8.75
		20	\$154.50

Prevailing wage is  $\$154.50/20 = \$7.73/\text{hr.}$  or  $\$309.20/\text{wk.}$  A wage offer of \$7.34 per hour or more meets the prevailing wage due to the 5 percent standards.

## 13-1 Technical Assistance Guide O

(b) Wage survey for an accountant to be employed 40 hours per week. Eight establishments provided the following information.

[Page 117]

<i>Type of Employer</i>	<i>No. of Employees</i>	<i>Salary</i>
Accounting Firm A	27	x \$1300/mo. = \$35,100
Accounting Firm B	16	x 1225/mo. = 19,600
Accounting Firm C	5	x 1350/mo. = 6,750
Bank	2	x 1150/mo. = 2,300
Savings and Loan	3	x 1175/mo. = 3,525
Clothing Store	1	x 1300/mo. = 1,300
Construction Co.	1	x 1500/mo. = 1,500
Manufacturing Plant	2	x 1400/mo. = 2,800
	57	\$72,875

Prevailing wage is  $\$72,875/57 = \$1278.50$  per month. \$295.04 per week, or \$7.38 per hour. A wage offer within 5 percent of the prevailing wage is acceptable.

Where compensation is in the form of commissions, ask the employer for the average earnings from weekly or monthly commissions. The prevailing wage would then be calculated as in the above examples.

## (2) Use of Published Surveys.

Several published surveys are available from various public and private agencies. Surveys in which the rate for an occupation was determined by using the arithmetic mean of wages paid other workers similarly employed can be used if they are reasonably current and reflect the job and location described for the job opportunity. Common types of surveys available are:

[Page 118]

(a) Surveys available from the Bureau of Labor Statistics, Washington, D.C 20213 or any of its regional offices. They are:

### *Industry Wage Surveys*

Industry wage surveys provide data for occupations selected to represent the full range of activities performed by workers.

Fifty manufacturing and 20 nonmanufacturing industries, accounting for about 22.5 million employees, are surveyed on a regularly recurring basis. Most are studied on a 5-year cycle, but some comparatively low-wage industries are on a 3-year cycle. Special wage surveys also are undertaken at the request of others.

Nearly all of the manufacturing, utilities, and mining industries are studied nationwide and estimates are provided also for regions and major areas of concentration. Surveys in trade, finance, and service industries usually are limited to metropolitan areas. Nationwide surveys generally develop separate estimates by size of establishment, size of community, labor-management agreement coverage, and type of product or plant group.

## 13-1 Technical Assistance Guide O

*The Area Wage Survey (AWS)*

These surveys are part of the BLS regular data collection activities and annually yield data for about 75 separate Standard Metropolitan Statistical Area (SMSA). These surveys also form the basis for national and regional estimates for all Standard Metropolitan Statistical Areas in the United States excluding Alaska and Hawaii, which are periodically published.

[Page 119]

In each survey area, data are obtained from representative establishments within six broad industry divisions: manufacturing, transportation, communication, and other public utilities; wholesale trade; retail trade, finance, insurance, and real estate; and services.

Occupations selected for study are common to various manufacturing and nonmanufacturing industries, and are office clerical; professional and technical; maintenance, toolroom, and powerplant; and material movement and custodial. Occupational classification is based on uniform descriptions designed to consider inter-establishment variation in duties within the same job.

*The National Survey of Professional Administrative, Technical and Clerical Pay*

These surveys are broadly based on salary levels and distributions in private employment. About 75 occupations--work levels were studied in fields of accounting, legal services, personnel management, engineering and chemistry, buying, clerical supervisory, drafting, and clerical.

Industry divisions included are manufacturing, transportation, communication, electric, gas and sanitary services; wholesale trade; retail trade; finance, insurance, and real estate; and engineering and architectural services, and commercially operated research, development and testing laboratories.

[Page 120]

*Municipal Government Wage Surveys*

These surveys provide data for: occupations common to many municipal governments. The 50 occupations studies include 10 office clerical; 5 data processing; 13 maintenance, custodial, and trades and labor; 6 public safety and correction; 2 sanitation; and 14 professional, administrative, and technical jobs.

(b) Surveys conducted by the Department of Defense are available from the Department of Defense Wage Fixing Authority, Hoffman Building, 2461 Eisenhower Avenue, Alexandria, Virginia. Telephone (202) 325-0182.

*Coordinated Federal Wage System (CFWS)*

Annual surveys are conducted under this pay system in over 100 designated "wage areas" that are used as a basis for wage schedules to establish the pay for the so-called wage board or blue collar employees directly hired by the Federal Government.

*Nonappropriated Funds Pay System (NAF)*

Biennial surveys are conducted under this pay system in 143 designated areas throughout the country. They are updated by telephone in the interim year to assess wage change patterns. The surveys collect data for a group of selected job

[Page 121]

classifications common to establishments in wholesale distributor, retail, and service industries. The resulting schedules (three for each area--crafts and trades, administrative support, and patron services) represent the interpreted results of the survey. As with the CFWS pay system, the NAF system is reduced in the scope of industries studied when contrasted to BLS surveys; nevertheless, these survey/wage schedules are important indicators of prevailing rates and

## 13-1 Technical Assistance Guide O

often constitute the sole source of data (best information available) relative to service industry segments such as vending, laundry, tailoring and like services.

*Other Sources of Surveys.*

Surveys may also be conducted by and/or for State and local governments for various purposes that may be unrelated to the predetermination of prevailing wage rates. These sources can be used for labor certification whenever applicable. For example, the Research and Planning Division, Oklahoma Employment Security Commission, conducts annual wage surveys for 13 separate geographic areas in the State and the Research and Statistics section of the Indiana Employment Security Division conducts a number of occupational wage surveys throughout the State annually.

Another source for occupational wage survey data are professional and trade associations. Many associations often survey their memberships for wage information and the results of these surveys may be available upon request.

[Page 122]

These surveys may lack some features of BLS and DOD surveys but they often report wage data by occupations within prescribed localities.

(b) Job Opportunities Covered by Union Contracts.

When the employer negotiates a union contract for the occupation, the Department accepts the wage set by the contract as the prevailing wage for the job opportunity. The local office shall contact the union local for this information.

(4) General

In all applications, the prevailing rate must be no less than the minimum wage required by Federal, State or local law.

The certifying officer, in all cases, will make the final determination on the appropriateness of a wage survey and/or the adequacy of the wage offered the alien based on information available at the time of review.

When an employer challenges a prevailing wage finding, the employer must prove that the finding is not accurate or that separate wage systems exist. Bases for a successful challenge to a finding may include the following:

- (a) Jobs in the survey are not substantially comparable.
- (b) Jobs in the survey do not require a substantially similar level of skills.

[Page 123]

(c) The job is covered by a Davis-Bacon or McNamara-O'Hara wage determination, which is lower than the local office survey.

(d) The job is covered by an arms-length collectively bargained wage, which is lower than the local office survey.

The prevailing wage for an occupation in a given area is normally the same whether the job is located in a large or small organization or in a publicly-or privately-owned enterprise or system.

When an employer challenges a finding as to the prevailing wage for an occupation, such as school teaching, on the basis that there are separate prevailing wages applicable to employment in public and private schools, the burden of proof is on the employer to establish that separate wage systems do exist.

[Page 125]



Procedures for Processing Application for Certification of Temporary Employment in  
Nonagricultural Occupations in the United States

49 FR 25837 at 25842

June 25, 1984

Dated: April 23, 1984.

Directive: General Administration Letter No. 10-84

To: All State Employment Security Agencies

From: Bert Lewis, Administrator for Regional Management

Subject: Procedures for Temporary Labor Certifications in Nonagricultural Occupations

1. *Purpose.* To transmit procedures for processing temporary labor certification applications in nonagricultural occupations.

2. *References.* 20 CFR Parts 621, 652 and 655.

3. *Background.* The attached procedures are designed to clarify processing requirements and to achieve uniform processing for applications under 20 CFR Part 621. They help to fill in the broad outline in those regulations and to direct agency staff to appropriate labor certification and Job Service policies.

4. *Action Required.* Administrators are requested to:

a. Provide attached procedures to appropriate staff.

b. Instruct staff to follow these procedures in processing temporary labor certification requests in nonagricultural occupations, except those in the entertainment industry and professional team sports.

c. Advise staff that attached procedures remain in effect after the expiration of this transmittal memorandum.

5. *Inquiries.* Direct questions to the appropriate regional office.

6. *Attachments*

a. Procedures for temporary labor certifications in nonagricultural occupations.

b. Final determination Form, ETA 7145T

*Rescissions:* GAL 23-82.

*Expiration date:* April 30, 1985.

Procedures for Temporary Labor Certifications in Nonagricultural Occupations

*I. Background*

The regulations at 20 CFR Part 621 govern the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than in agriculture and logging. Occupations on Guam are treated separately under other regulations. The policies in Part 655 -- Labor Certification Process for the Temporary Employment of Aliens in the United States, and Part 652 -- Establishment and Functioning of State Employment Services are followed in processing and making determinations on temporary nonagricultural applications.

This document replaces all previous instructions and outlines general processing standards for temporary nonagricultural applications, except for professional athletes in team sports and employment in the entertainment industry.

Professional sports applications are processed by the National Office according to policies and procedures which evolved from negotiations with the ins, major and minor leagues, player organizations, and exports in the industry. Procedures for temporary applications in the entertainment industry are included in General Administration Letter No. 5-84.

## *II. Guidelines for Determining the Temporary or Permanent Nature of a Job Offer*

To determine an alien's eligibility for admission on an H-2 visa, INS requires a Department of Labor certification based on adverse effect as well as availability *before* they rule on the temporary or permanent nature of the employment.

Because the availability test of U.S. workers in a given occupation can vary considerably depending on whether a job is permanent or temporary, the Department of Labor must consider whether in its judgment the job offered to an alien is, in fact, temporary or not. The guidelines below will help staff make this judgment:

A. Tests for determining the temporary or permanent nature of the employment are related to the job and job duties to be performed -- not the person who will perform the duties; in other words, whether specific duties which the alien(s) will perform are needed for a temporary period or on a continuing basis -- regardless of who will perform them.

The work must be above and beyond the employer's normal level of operation and not expected to become a part of the employer's future operations. Staff can consider the employer's "peakload" requirements, when temporary additions to permanent staff in an occupation are required due to seasonal or short-term demand, e.g., in resort establishments.

B. Answers to the following questions will help to determine the temporary or permanent nature of the job offered the alien(s).

1. Is the job included in the employer's regular business operation? If yes, are duties to be performed significantly different from the normal or regular operation? Is the equipment similar? Is the work of the same general skill and knowledge level?

2. Is the period for which the alien is requested reasonable in terms of the job to be done?

3. Are the number of aliens requested reasonable in terms of the job to be done and the time requested? Sometimes employers give "ball park" estimates which can be made more precise to avoid situations which would lead to less than full-time employment for U.S. workers and aliens alike.

4. Is this a request for an extension or does the employer often or repeatedly request temporary aliens? If yes, refer to item F.

5. Is there another way that the employer might reasonably be expected to meet his/her needs?

C. Temporary employment should not be confused with part-time employment which does not qualify for temporary labor certification. Part-time concerns work hours, days, and weeks less than those normal for the occupation in the employment area.

D. INS has the ultimate authority to reject the Department of Labor's advice on temporary alien employment. However, if the Department of Labor is convinced that a job is not temporary and INS plans to or does admit the aliens as nonimmigrants, DOL will still not issue a certification.

E. If the Department of Labor learns that an employer for whom a permanent certification was issued, also applies for a temporary certification for the same job (generally because of visa problems), a notice should be issued to the employer that certification cannot be made and an appropriate explanation of the reasons.

F. Some employers request extensions, sometimes several, for jobs represented as temporary. Others repeatedly request approval to bring in temporary workers. In such cases, State agencies and regional offices will assure that the employer is not evading its responsibility to obtain an adequate domestic work force; or -- as stated earlier -- an effort to substitute nonimmigrants when visa quotas cause delays in admitting immigrants. To help staff decide, they should consider the following:

1. Were previous extensions granted, and if so does the period covered exceed reasonable grounds for temporary work?

2. What reason does the employer give for incorrect time estimate(s)?

3. Has the availability picture or the prevailing wage changed?

4. Depending on the skill level and training time for the occupation and the industry practice on training, is it possible to train available workers?

5. If it is a higher skilled job, what, consistent with industry practice, is being done to upgrade current employed lower skilled workers and fill in behind them from the local work force?

6. What, consistent with industry practice, is being done to cross-train the present work force to handle peak demands?

7. If an apprenticeship trade is involved, does the employer have, consistent with industry practice, the accepted ratio of apprentices to journeymen?

G. Repeated applications from the same employer should be subject to very close scrutiny and satisfactory answers to the same type of questioning as listed above. Also, the employer should be asked to document or explain in writing what is being done to overcome reliance on alien workers before a new certification is issued.

H. If a job for which a temporary alien worker is sought is not *truly* temporary in nature,

decline to issue a certification even though U.S. workers are not available and wages being offered are prevailing.

### *III. Filing Instructions*

A. An employer who wants to use foreign workers for temporary employment must file a temporary labor certification application (OMB Approval No. 1205-0015) with a local office of the State job service.

B. Every temporary application should include:

1. ETA 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the Employer. Note: Part B, Statement of Qualifications of Alien is not required.

2. Documentation clearly showing the employer's efforts to recruit U.S. workers.

3. A statement explaining why the job opportunity cannot be performed by a permanent worker on a continuing basis.

C. To allow for enough recruitment of U.S. workers and enough processing time by State and regional offices, the local office shall advise employers to file requests for temporary labor certification at least 45 days before the labor certification is needed in order to receive a timely determination.

D. Unless the Certifying Officer specifies otherwise, the local office should return to employers' requests for temporary labor certification filed more than 120 days before the worker is needed and advise them to refile the application no more than 120 days before the worker is needed. This is necessary since the supply and availability of temporary U.S. workers change over short periods of time and an adequate test of the labor market cannot be made for a longer period.

E. More than one alien may be requested on an application if they are to do the same type of services in the same occupation, in the same area of employment during the same period. However, the number requested may not exceed the actual number of job openings.

F. If the employer's agent files the application, the employer must sign the statement on the Application for Alien Employment Certification which authorizes the agent to act on the employer's behalf. The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf. An attorney must file a Notice of Appearance (Form G-28) naming the attorney's client(s).

G. Requests for temporary labor certification may be filed for employment up to, but not exceeding 12 months. If the original intended duration of the temporary employment requires nonimmigrant aliens for a finite period not exceeding 3 years, or if unforeseen circumstances require an extension of an approved certification, a new application must be submitted each period beyond 1 year. This allows the Department of Labor to make a current determination of the availability of and adverse effect on U.S. workers. The period (including extensions) for which a particular job may be certified for temporary alien(s) employment may not exceed 3 consecutive years, except for recurring peakload or seasonal employment.

H. When the job opportunity requires the work to be done in more than one area of

employment, the application must include the itinerary or locations and duration of work in each locations. Such applications will be filed with the local State Job Service office having jurisdiction over the area where the employment will begin.

#### *IV. State Job Service Processing*

A. Upon receiving a request for temporary labor certification, the local office shall review the job offer for completeness. A job offer containing a wage below the prevailing wage for such employment in the local area is inappropriate and would adversely affect the wages of similarly employed U.S. workers. The local office shall determine the prevailing wage, guided by the regulations at [20 CFR 656.40](#).

B. If qualified U.S. workers are registered with the local office, a job order should be prepared, using the information on the application, and placed into the regular ES system for 10 days. During this period, the local office should refer qualified applicants who walk-in and those in its active files.

C. The employer shall advertise the job opportunity, before or after filing the application, in a newspaper of general circulation for 3 consecutive days or in a professional, trade, or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers. The advertisement shall:

1. Identify the employer's name, address, and location of the employment (except ads for aerospace engineers which shall be placed over the name of the local Job Service office) if other than the employer's location;
2. Describe the job opportunity with particularity;
3. State the rate of pay, which shall not be below the prevailing wage for the occupation;
4. Offer prevailing working conditions;
5. State the employer's minimum job requirements;
6. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien.

D. The employer shall document that unions and other recruitment sources, appropriate for the occupation and customary in the industry, were unable to refer qualified U.S. workers.

E. The employer must provide the local office a copy of the advertisement showing the name of the publication and the dates published and written results of all recruitment which must:

1. Identify each recruitment source by name;
2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and
3. Explain the lawful job-related reasons for not hiring each U.S. worker.

F. After the recruitment period, the local office shall send the application, results of recruitment, prevailing wage findings, and other appropriate information to the State office

for additional data and comments and transmission to the regional office.

#### *V. Temporary Labor Certification Determinations*

A. The certifying officer shall determine whether to grant or to deny the temporary labor certification, or to issue a notice that the required determination cannot be made based on whether or not:

1. U.S. workers are available for the temporary employment opportunity:

a. The certifying officer, in judging if a U.S. worker is available for the temporary employment opportunity, shall determine from documented results of the employer and local office recruitment efforts if there are other appropriate sources of workers, where the employer shall have recruited or may recruit U.S. workers. If further recruitment is required, the application should be returned to the State Job Service Office with specific instructions for the additional recruitment.

b. To determine if a U.S. worker is available, the certifying officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.

c. The certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed and is willing to accept the specific job opportunity.

d. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on dates specified by the employer.

2. The employment of the alien will adversely affect wages and working conditions of U.S. workers similarly employed. To determine this, the certifying officer shall consider such things as labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours in the occupation.

3. The job opportunity contains requirement on conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, such as:

a. The employment opportunity is represented as temporary and the Department of Labor believes it can and should be offered to U.S. workers on a permanent basis.

b. The job opportunity is vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage.

c. The job opportunity's terms, conditions, and/or occupational environment are contrary to Federal, State, or local law.

d. The employer has no location within the United States to which U.S. workers can be referred and hired for employment.

- e. The employer will not pay a wage or salary for the job to be performed.
- f. The job's requirements are unduly restrictive.
- g. The employer refuses to recruit U.S. workers according to DOL policies and procedures.

Such applications shall be denied on the basis that U.S. workers may be available for employment in the occupation and it was not shown that the employer made reasonable efforts to obtain U.S. workers for the job.

B. A temporary labor certification may be issued for the duration of the temporary employment opportunity, not to exceed twelve (12) months. If the temporary job opportunity extends beyond 12 months, the employer must file a new application; however, temporary certifications may not be granted for the same job opportunity for a total period (including extensions) of more than 3 years, except in applications for recurring seasonal employment.

C. Dates on the temporary labor certification shall be the beginning and ending dates of certified employment and the date certification was granted. The beginning date of certified employment may not be earlier than the date certification was granted.

#### *VI. Document Transmittal*

A. After making a temporary labor certification determination, the certifying officer shall notify the employer, in writing, of the determination.

B. If the labor certification is granted, the certifying officer shall send the certified application containing the official temporary labor certification stamp, supporting documents, and completed Temporary Determination Form to the employer or, if appropriate, the employer's agent or attorney. The Temporary Determination Form shall indicate that the employer should submit all documents together with the employer's petition to the appropriate INS office.

C. If the labor certification is denied or a notice is issued that certification cannot be made, the certifying officer shall return one copy of the Application for Alien Employment Certification form, supporting documents, and completed Temporary Determination Form to the employer, or, if appropriate, to the employer's agent or attorney. The Temporary Determination Form shall indicate specific bases on which the decision was made not to issue a temporary labor certification, and shall advise the employer of the right to appeal to the INS.

#### *VII. Appeal of a Denial or Notice That a Certification Cannot Be Made*

A. The granting or denial of a temporary labor certification by the certifying officer, or a finding that a certification cannot be made, is the final decision of the Secretary of Labor. Administrative appeal is made to INS, as set forth below.

B. Under the Act and regulations of the Immigration and Naturalization Service, the Department of Labor's role is only advisory. The Attorney General has the sole authority for the final approval or denial of a petition for temporary alien employment. The employer can submit countervailing evidence to the Immigration and Naturalization Service, according to [8 CFR 214.2\(h\)\(3\)\(i\)](#), that qualified persons in the United States are not available, that

wages and working conditions of U.S. workers will not be adversely affected, and that the Department of Labor's employment policies were observed.

### *VIII. Validity of Temporary Labor Certifications*

A. A temporary labor certification is valid only for the number of alien workers, the occupation, the area of employment, the specific activity, the period of time, and the employer specified in the certification.

B. A temporary labor certification is limited to one employer's specific job opportunity; it may not be transferred from one employer to another.

### *IX. Applications Requiring Special Processing*

#### *A. Aerospace Engineers*

1. Take a job order on all aerospace engineer certification requests.
2. Ensure that the employer advertises in a newspaper or appropriate engineering publication. Advertisements shall describe wages, terms, and conditions of employment, and shall not identify the employer, but shall direct applicants to send resumes to the local Job Service for referral to the employer. Results of ads must be documented. Advertising copy should indicate the same wages, education, working conditions, and location of work as that in the application for alien employment and on the order taken by the local office.
3. Require employers to offer laid-off engineers reemployment before applying for labor certification.
4. Ensure that all ETA 750, Part A from contract engineering firms identify the user aerospace company and specify where the alien will work.

Certification requests for temporary engineer jobs from contract engineering firms may be accepted without aliens' names. The application, however, must be accompanied by a letter from the user aerospace company. The letter will authorize a request for an unnamed alien, state the number and type of employees required, and specify where the alien will work.

5. Ensure that a copy of the contract for negotiation with alien accompanies all contract engineering firm certification requests.
6. Place into interstate clearance all alien certification job orders for aerospace engineers and related occupations.

Use procedures for placing alien certification job orders in nonagricultural interstate clearance.

7. Process the application according to Parts II, III and IV of these procedures, as appropriate.

#### *B. Construction Workers*

1. *General.* a. Unions representing construction workers in the same or substantially equivalent job classification as those for which labor certification is requested shall be contacted to determine availability of U.S. workers when local offices receive requests for 10



or more workers in the same occupation for the same employer at any one time or within a 6-month period.

The Human Resources Development Institute (HRDI) is the employment and training arm of the AFL-CIO; it serves as a centralized liaison between the Department of Labor and individual unions in providing labor market information in skilled trades in order to make an informed labor certification determination.

2. *Procedures.* a. The local office should process the application according to Parts II, III and IV of these procedures.

b. The local office shall advise the employer to obtain, from the union local, a letter describing the availability of qualified U.S. workers for the position offered to aliens.

c. Before making a determination, certifying officers should contact, in writing the Executive Director, Human Resources Development, 815 16th Street, NW., Washington, D.C. 20006, and send the following information for each application:

- (1) Name and address of company requesting certification;
- (2) Location of work site;
- (3) Local number and name of the union, if known;
- (4) Dates of any prior certifications requested by company;
- (5) Total number of aliens requested;
- (6) Duration of employment of aliens;
- (7) Job classification, special qualifications and wage offered;
- (8) Assistance offered to aliens (subsistence, housing, other); and
- (9) Reasons for requesting alien labor.

If HRDI knows of available U.S. workers, they will provide this information to the certifying officer, along with the name of the appropriate local for the employer to contact. If no response is received within three weeks of the request, a determination will be made on information in the file.

#### C. Machinists and Aerospace Workers

1. The local office should process the application according to Parts II, III and IV of these procedures.

2. Before making a determination, the certifying officer should send to the Executive Director of the International Association of Machinists and Aerospace Workers, Machinists Building, Room 911, 1200 Connecticut Avenue, NW., Washington, D.C. 20036, the following information for each application:

a. Name and address of company requesting certification;

- b. Location of work site;
- c. Local number of IAM union, if known;
- d. Total number of aliens requested;
- e. Duration of employment of alien;
- f. Job classification, including information on wages and special qualifications;
- g. Assistance offered to aliens (subsistence, housing, other); and
- h. Reason for requesting alien labor.

If the IAM knows of qualified U.S. workers, available for the position, they will give the certifying officer the name of the appropriate local for the employer to contact. If the IAM does not respond within 3 weeks, a determination should be made from the information provided by the local office.

U.S. DEPARTMENT OF LABOR

Employment and Training Administration

*Final Determination*

No. of Aliens and Occupation

Period of Certification

From:

To:

The Department of Labor has made a determination on your temporary application for alien employment certification pursuant to Title 20, Code of Federal Regulations, Part 621. Final action has been taken as follows:

square 1. Form ETA 750 has been certified and is enclosed with the supporting documents. All enclosures should be submitted to the Immigration and Naturalization Service District Office for consideration with your petition (Form I-129B).

square 2. Form ETA 750 has not been certified and is being returned. A certification cannot be issued as required by Immigration and Naturalization Service regulations at [8 CFR 214.2\(h\)\(3\)\(i\)](#) on the basis of information available for the following reasons (See details below):

square a. There are qualified U.S. workers who are available for the job.

square b. The employment of aliens would have an adverse effect on wages and/or working conditions of U.S. workers similarly employed.

square c. A certification cannot be made under Department of Labor policies and procedures.

Details:

Certifying Officer

cc: State ES Agency

A denial of certification or a notice that certification cannot be made is not reviewable by the Department of Labor, but may be appealed to the Immigration and Naturalization Service (INS). The petitioner may attach the decision to the nonimmigrant visa petition and present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. The INS will consider all such evidence in adjudicating the petition.

[FR Doc. 84-16865 Filed 6-22-84; 8:45 am]

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FEDERAL REGISTER

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Notices

DEPARTMENT OF LABOR (DOL)

Employment and Training Administration (ETA)

**[General Administration Letter No. 1-95]**

**Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations**

60 FR 7216

**DATE:** Tuesday, February 7, 1995

**ACTION:** Notice.

[\*7216]

**SUMMARY:** The Employment and Training Administration (ETA), Department of Labor has issued General Administration Letter (GAL) No. 1-95 that transmits to State and Regional Offices revised procedures for processing H-2B temporary labor certification applications in nonagricultural occupations, including revised standards for determining the temporary nature of a job under the

H-2B classification. The revised procedures and standards replace: (1) GAL 10-84, Subject: Procedures for Temporary Labor Certifications in Nonagricultural Occupations, issued April 23, 1984; (2) GAL 10-84, Change 1, Subject: Revised Standards for Determining the Temporary or Permanent Nature of a Job Offer Made in Conjunction With an Application for Nonagricultural Temporary Labor Certification, issued August 21, 1989; and (3) General Administrative Letter No. 10-84, Change 2, Subject: Handling of Temporary Labor Certification Applications for Boilermakers, issued May 9, 1990.

GAL 1-95 is published below for the information of all interested parties.

**DATES:** GAL 1-95 was issued on November 10, 1994.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Denis Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, Room N-4456, 200 Constitution Avenue NW., Washington, DC 20210. Telephone (202) 219-4369 (this is not a toll-free number).

Signed at Washington, DC, this 7th day of December 1994.

**John M. Robinson,**

*Deputy Assistant Secretary for Employment and Training.*

60 FR 7216, \*

Directive: General Administration Letter No. 1-95

To: All State Employment Security Agencies

From: Barbara Ann Farmer, Administrator for Regional Management

Subject: Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations

Classification: ES/Nonag.

Correspondence symbol: TEES

Date: Nov. 10, 1994

1. *Purpose.* To transmit revised procedures for processing H-2B temporary labor certification applications in non-agricultural occupations, including revised standards for determining the temporary nature of a job under the H-2B classification.

2. *References.* Title 20 CFR Parts 652 and 655, 8 CFR 214.2(h), 48 FR 2587, GAL 10-84.

3. *Background.* The H-2B visa classification applies to aliens coming temporarily to the U.S. to perform nonagricultural work of a temporary or seasonal nature, if U.S. workers capable of performing such service or labor cannot be found in the United States. The H-2B visa classification requires a temporary labor certification from the Secretary of Labor advising the Immigration and Naturalization Service (INS) whether or not U.S. workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers, or a notice that such certification cannot be made, prior to filing an H-2B visa petition with INS.

The attached procedures are intended to clarify and update DOL procedures for processing applications for temporary labor certification and to incorporate INS standards for determining the temporary nature of a job opportunity under the H-2B classification. They do not apply to applications filed on behalf of aliens in the entertainment industry and in professional team sports. These procedures replace:

. General Administration Letter No. 10-84: Procedures for Temporary Labor Certifications in Nonagricultural Occupations (Issued 4/23/84);

. General Administration Letter No. 10-84, Change 1: Revised Standards for Determining the Temporary or Permanent Nature of a Job Offer Made in Conjunction With an Application for Nonagricultural Temporary Labor Certification (Issued 8/21/89); and

. General Administration Letter No. 10-84, Change 2: Handling of Temporary Labor Certification Applications for Boilermakers (Issued 5/9/90).

4. *Action Required.* SESA Administrators are required to provide the attached procedures to appropriate staff, and instruct that they be followed in processing H-2B applications.

5. *Inquiries.* Inquiries should be directed to the appropriate Regional Certifying Officer.

6. *Attachments.* Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations.

Rescissions: GAL Nos. 10-84; 10-84, Ch. 1; 10-84, Ch. 2

Expiration Date: December 31, 1995 [\*7217]

## **Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations**

### **I. General**

60 FR 7216, \*

A. An H-2B temporary nonagricultural worker is an alien who is coming temporarily to the U.S. to perform temporary services or labor if qualified U.S. workers capable of performing such services or labor are not available, and whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.

B. Immigration and Naturalization Service (INS) regulations at 8 *CFR* 214.2(h)(6) establish requirements for the H-2B visa classification. INS regulations require: (1) That the H-2B petitioner be a U.S. employer, or the authorized representative of a foreign employer having a location in the United States; and (2) that the employer apply for temporary labor certification with the Department of Labor (DOL) prior to filing a petition with INS to classify an alien as an H-2B worker in all areas of the United States, except the Territory of Guam. In Guam, an employer must apply to the Governor of Guam for an H-2B temporary labor certification.

C. A temporary labor certification is advice from the Secretary of Labor to INS on whether or not U.S. workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers. The INS is not bound by DOL's certification or notice that certification cannot be made.

D. DOL regulations at 20 *CFR* 655 Subpart A-Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H-2B Workers) govern the labor certification process for temporary employment in the U.S. under the H-2B visa classification. They require that DOL, through the appropriate Regional Administrator of the Employment and Training Administration, issue a temporary labor certification if it finds that qualified persons in the U.S. are not available and that the terms of employment will not adversely affect the wages and working conditions of similarly employed workers in the U.S. In making its findings, DOL considers such matters as the employer's attempts to recruit U.S. workers and the appropriateness of the wages and working conditions offered, and the policies for the U.S. Employment Service set forth at 20 *CFR* 652 and 20 *CFR* 655, subparts A, B and C.

E. This document clarifies and updates procedures issued by ETA in General Administration Letter (GAL) 10-84 and Changes 1 and 2, to carry out responsibilities of making labor certification determinations pursuant to regulations at 8 *CFR* 214.2(h)(6) and 20 *CFR* 655, subpart A. It conforms DOL standards for determining the temporary nature of a job offer under the H-2B classification with those of INS and modifies DOL recruitment requirements to provide for a more effective test of the labor market for available U.S. workers. These procedures do not apply to applications filed on behalf of aliens in the entertainment industry and in professional team sports.

## **II. Standards for Determining the Temporary Nature of a Job Offer Under the H-2B Classification**

A. A job opportunity is temporary under the H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. As a general rule, the period of the employer's need must be 1 year or less, although there may be extraordinary circumstances where the need may be for longer than 1 year. The labor certification application may be filed for up to, but not exceeding, 12 months. If there are unforeseen circumstances where the employer's need exceeds 1 year, a new certification is required for each period beyond 1 year.

Temporary employment should not be confused with part-time employment which does not qualify for temporary (or permanent) labor certification.

B. The employer's need for the services or labor shall be either: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need.

### **1. One-time Occurrence**

The employer must establish: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

### **2. Seasonal Need**

The employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.

60 FR 7216, \*

### 3. Peakload Need

The employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and its needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand with temporary employees who will not become a part of the regular operation.

### 4. Intermittent Need

The employer must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers for short periods.

## III. Filing Instructions

A. An employer that wants to use foreign workers for temporary employment must file a temporary labor certification application with the State Employment Security Agency (SESA) serving the area of employment.

B. Every temporary application shall include:

1. An original and one copy of Form ETA 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the employer. Part B, Statement of Qualifications of Alien, is not required.

2. Documentation of any efforts to recruit U.S. workers the employer may have made before filing the application.

3. A statement explaining why the job opportunity is temporary and why the employer's need for the work to be done meets the standard of either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

C. To allow for enough recruitment of U.S. workers and enough processing time by State and Regional Offices, the State Employment Security Agency (SESA) shall advise employers to file requests for temporary labor certification at least 60 days before the labor certification is needed in order to receive a timely determination.

D. Unless the Certifying Officer specifies otherwise, the SESA should return to employers requests for temporary labor certification filed more than 120 days before the worker is needed and advise them to refile the application no more than 120 days before the worker is needed. This is necessary since the availability of temporary U.S. workers changes over short periods of time and an adequate test of the labor market cannot be made for a longer period.

E. More than one alien may be requested on an application if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of employment during the same period. However, the number requested may not exceed the actual number of job openings. The number of openings the employer intends to fill must also be specified in the advertisement and the job order required in section IV of these instructions.

F. If the employer's agent files the application, the employer must sign the "authorization of agent" statement on the Application for Alien Employment Certification which authorizes the agent to act on the employer's behalf. The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf. An attorney must file a Notice of Appearance (Form G-28) naming the attorney's client(s).

G. If extraordinary circumstances establish a need that requires the services of the alien beneficiary for more than a year, a new application must be filed (see section II.A). However, in no instance may the time for which a particular job be certified exceed 3 unbroken years.

H. When the job opportunity requires the work to be done in more than one location, the application must include the itinerary of locations and dates of work in each location. Such applications will be filled with the SESA having jurisdiction over the area where the employment will begin.

## IV. State Job Service Processing

A. Upon receiving a request for temporary labor certification, the SESA shall review the [\*7218] job offer for completeness. A job offer containing a wage below the prevailing wage for such employment in the local area is inappropriate and would adversely affect the wages of similarly employed U.S. workers. The SESA shall determine the prevailing wage, guided by the regulations at 20 CFR 656.40.

60 FR 7216, \*

B. If the job offer is less than full-time, or contains unduly restrictive job requirements, or has terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job, the SESA shall advise the employer to correct the deficiencies before commencing the recruitment.

C. The SESA shall prepare a job order, using the information on the application, and place it into the regular ES system for 10 days. During this period, the SESA should refer qualified applicants who walk-in and those in its active files.

D. The employer shall advertise the job opportunity after filing the application, in a newspaper of general circulation for 3 consecutive days or in a professional, trade or ethnic publication, whichever is most appropriate for the occupation and most likely to bring responses from U.S. workers. The advertisement shall:

1. Identify the employer's name and direct applicants to report or send resumes to the SESA for referral to the employer;
2. Include SESA identification number and the complete name and address of the SESA.
3. Describe the job opportunity with particularity, including the duration of the employment;
4. State the rate of pay, which shall not be below prevailing wage for the occupation;
5. Offer prevailing working conditions;
6. State the employer's minimum job requirements;
7. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien and are consistent with the nature of the occupation, activity, and industry.

E. The employer shall document that unions and other recruitment sources, appropriate for the occupation and customary in the industry, were unable to refer qualified U.S. workers.

F. The employer shall provide the SESA the "tearsheets" (for each day the advertisement was published) from the publication in which the advertisement appeared and written results of all recruitment which must:

1. Identify each recruitment source by name:
2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and
3. Explain the lawful job-related reasons for not hiring each U.S. worker.

G. After the recruitment period, the SESA shall send the application, results of recruitment, prevailing wage findings, and other appropriate information to the regional certifying officer.

## **V. Temporary Labor Certification Determinations**

A. The certifying officer shall determine whether to grant the temporary labor certification, or to issue a notice that such certification cannot be made based on whether or not:

1. U.S. workers are available for the temporary employment opportunity.
  - a. The certifying officer, in judging if a U.S. worker is available for the temporary employment opportunity, shall determine from documented results of the employer's and SESA's recruitment efforts, if there are other appropriate sources of workers where the employer should have recruited or may recruit U.S. workers. If further recruitment is required, the application should be returned to the SESA with specific instructions for the additional recruitment.
  - b. To determine if a U.S. worker is available, the certifying officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses.
  - c. The certifying officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed and is willing to accept the specific job opportunity.



60 FR 7216, \*

d. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on dates specified by the employer.

2. The employment of the alien will adversely affect wages and working conditions of U.S. workers similarly employed. To determine this, the certifying officer shall consider such things as labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours of work.

3. The job opportunity contains requirements or conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, such as:

a. The employment opportunity is represented as temporary and the Department of Labor believes it can and should be offered to U.S. workers on a permanent basis.

b. A permanent certification was issued to an employer for the same job opportunity.

c. The job opportunity is vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage.

d. The job opportunity's terms, conditions, and/or occupational environment are contrary to Federal, State, or local law.

e. The employer has no location within the U.S. to which U.S. worker can be referred and hired for employment.

f. The employer will not pay a wage or salary for the job to be performed.

g. The job's requirements are unduly restrictive.

h. The employer has not recruited U.S. workers according to DOL policies and procedures.

B. If the Certifying Officer issues a notice that a certification cannot be made, the notice shall:

(1) Detail the reasons why certification cannot be made;

(2) Address the availability of U.S. workers in the occupation, and the prevailing wages and working conditions of U.S. workers in the occupation; and

(3) Indicate the specific DOL policies which were to be followed.

C. If the Certifying Officer issues a temporary labor certification, it shall be for the duration of the temporary employment, opportunity, not to exceed 12 months. If extraordinary circumstances establish a need that require the alien beneficiary for more than 1 year, a new application must be filed. However, in no instance can the time for which a particular job may be certified exceed 3 unbroken years.

D. The date on the temporary labor certification shall be the beginning and ending dates of certified employment and the date certification was granted. The beginning date of certified employment may not be earlier than the date certification was granted.

## VI. Document Transmittal

A. After making a temporary labor certification determination, the certifying officer shall notify the employer, in writing, of the determination.

B. If the labor certification is granted, the certifying officer shall send the certified application containing the official temporary labor certification stamp, supporting documents, and completed Temporary Determination Form to the employer or, if appropriate, the employer's agent or attorney. The Temporary Determination Form shall indicate that the employer should submit all documents together with the employer's petition to the appropriate INS office.

C. If a notice is issued that certification cannot be made, the certifying officer shall return one copy of the Application for Alien Employment Certification form, supporting documents, and completed Temporary Determination Form to the employer, or, if appropriate, to the employer's agent or attorney. The Temporary Determination Form shall indicate the bases on which the decision was made not to issue a temporary labor certification, and shall advise the employer of the right to appeal to the INS.

60 FR 7216, \*

## VII. Appeal of a Notice That a Certification Cannot Be Made

A. The finding by the certifying officer, that a certification cannot be made, is the final decision of the Secretary of Labor. There is no provision for reconsideration or appeal of the decision within DOL. Administrative appeal of such a finding must be made to INS, as set forth below, or the employer may file a new application.

B. Under the Act and regulations of INS, DOL's role is only advisory. The Attorney General has the sole authority for the final approval or denial of a petition for temporary alien employment. The employer can submit [\*7219] countervailing evidence to INS, according to 8 *C.F.R.* 214.2(h)(6)(IV)(E), that qualified persons in the U.S. are not available, that wages and working conditions of U.S. workers will not be adversely affected, and the Department of Labor's employment policies were observed.

## VIII. Validity of Temporary Labor Certifications

A. A temporary labor certification is valid only for the number of aliens, the occupation, the area of employment, the specific activity, the period of time, and the employer specified in the certification.

B. A temporary labor certification is limited to one employer's specific job opportunity; it may not be transferred from one employer to another.

## IX. Applications Requiring Special Processing

### A. Aerospace Engineers

If the temporary labor certification application is for an aerospace engineer, the SESA shall:

1. Take a job order on all aerospace engineer certification requests.
2. Require the employer to advertise in a newspaper or appropriate engineering publication. Advertisements shall describe wages, terms, and conditions of employment, and shall not identify the employer, but shall direct applicants to send resumes to the local Job Service for referral to the employer. Results of ads must be documented. Advertising copy should include the elements specified in section IV. D. above, and indicate the same wages, education, working conditions, and location of work as that in the application for alien employment and on the order taken by the SESA.
3. Require employers to offer laid-off engineers reemployment before applying for labor certification.
4. Ensure that all applications for alien employment certification from contract engineering firms identify the user aerospace companies and specify where the aliens will work.
5. Ensure that a copy of the alien's proposed contract accompanies all contract engineering firm certification requests.
6. Place into interstate clearance all alien certification job orders for aerospace engineers and related occupations.
7. Process the application according to parts II, III, and IV of these procedures, as appropriate.

### B. Construction Workers

#### 1. General

Unions representing construction workers in the same or substantially equivalent job classification as those for which labor certification is requested shall be contacted to determine availability of U.S. workers when SESAs receive requests for 10 or more workers in the same occupation for the same employer at any one time or within a 6-month period.

The Human Resources Development Institute (HRDI) is the employment and training arm of the AFL-CIO; it serves as a centralized liaison between the Department of Labor and individual unions in providing labor market information in skilled trades in order to make an informed labor certification determination.

#### 2. Procedures

- a. The SESA should process the application according to parts II, III and IV of these procedures.

60 FR 7216, \*

b. The SESA shall advise the employer to obtain, from the union local, a letter describing the availability of qualified U.S. workers for the position offered to the alien.

c. Before making a determination, certifying officers should contact, by fax or telephone, the Executive Director, Human Resources Development, 815-16th Street, NW., Washington, DC 20006, and send the following information for each application:

- (1) Name and address of company requesting certification;
- (2) Location of work site;
- (3) Local number and name of the union, if known;
- (4) Dates of any prior certifications requested by company;
- (5) Total number of aliens requested;
- (6) Duration of employment of aliens;
- (7) Job classification, special qualifications and wage offered;
- (8) Assistance offered to aliens (subsistence housing, other); and
- (9) Reasons for requesting alien labor.

d. If HRDI knows of available U.S. workers, they will provide this information to the certifying officer, along with the name of the appropriate local for the employer to contact. If no response is received within 5 days of the request, a determination will be made on information in the file.

## C. Boilermakers

### 1. General

On occasion, boilermakers must be brought into the U.S. on an emergency basis. Such emergencies are generally precipitated by unscheduled outages in utility, petro-chemical and paper industries. Because of special considerations involved with boilermakers when there is an emergency situation, it was decided that the most efficient and effective way to process applications for boilermakers in emergency situations would be to centralize their handling in the National Office.

### 2. Procedures

a. Labor certifications for boilermakers in emergency situations are to be sent directly to National Office for processing. The address is: U.S. Department of Labor, Employment and Training Administration, Division of Foreign Labor, Certifications, 200 Constitution Avenue, N.W., Room N-4456, Washington, D.C. 20210.

b. Labor certification applications for boilermakers during nonemergency situations should be processed according to parts II, III, and IV of these procedures.

[FR Doc. 95-2965 Filed 2-6-95; 8:45 am]

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[ETA Home](#) > [Advisories and Memorandums](#) > GENERAL ADMINISTRATION LETTER NO. 4-95

**Directive:**

GENERAL ADMINISTRATION LETTER NO. 4-95

**Subject:**

Interim Prevailing Wage Policy for Nonagricultural Immigration Programs.

**Purpose:**

To provide policy clarification and procedural guidance for conducting prevailing wage surveys and making prevailing wage determinations for nonagricultural immigration programs until planned regulatory changes can be made to 20 CFR 656.40.

<b>To:</b>	All State Employment Security Agencies	<b>From:</b>	Barbara Ann Farmer Administrator for Regional Management
<b>Date:</b>	May 18, 1995	<b>Expiration Date:</b>	June 30, 1996

**Rescissions:** None

**Contact:** Direct questions to the appropriate Regional Certifying Officer.

**Text:**

Reference: 20 CFR Part 655, Subparts D and E; 20 CFR Part 655, Subparts H and I; 20 CFR Subparts J and K; 20 CFR Part 656; Technical Assistance Guide (TAG) No.656 Labor Certifications; and ESPL No. 2-91. Background: Prevailing wage surveys and determinations are made by State employment security agencies in response to labor certification applications, labor condition applications and attestations filed by employers for the purpose of employing immigrant aliens and nonimmigrant aliens in H-1A nursing occupations, in H-1B specialty occupations, in H-2B temporary nonagricultural job opportunities and in off-campus employment of students on F-1 visas. The Department of Labor has significant enforcement responsibilities involving wages and other matters in administering the H-1A, H-1B, and F nonimmigrant programs. Recent enforcement actions have shown that SESAs and Regional Offices may not be interpreting and applying existing regulations and policy directives relating to prevailing wage procedures in an accurate and consistent manner. Accuracy and consistency in conducting prevailing wage surveys and making wage determinations protect the wages of U.S. workers and place the Department in the best position to bring enforcement actions against employers who do not fulfill their wage obligations

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under the H-1A, H-1B, and F nonimmigrant programs. The number of immigration programs administered by the Employment and Training Administration and the number of prevailing wage surveys and determinations have increased substantially in recent years accompanied by a decline in resources. This has prompted ETA to look at the most cost effective use of scarce resources devoted to developing prevailing wage information throughout the system. Operating experience shows that current regulatory requirements limit the ability of SESAs to use published surveys, and in some cases, impose impractical requirements on surveys conducted by SESAs. Planned regulation changes will address these issues. Action Required: State Administrators are requested to: A. Provide the attached policy and procedural guidance to appropriate staff. B. Instruct staff to follow these interim policies and procedures, along with those contained in TAG No. 656 in conducting prevailing wage surveys and in making prevailing wage determinations.


**Attachments:**

To obtain a copy of attachment(s), please contact Deloris Norris of the Office of Regional Management at (202) 219-5585. 1. Interim Prevailing Wage Policy for Nonagricultural Immigration Programs Item Page I.


Background.....1 II. Labor Certification, Labor Condition Application, and Student Attestation Programs.....1 A. General Prevailing Wage Policy.....1 1. Regulatory Requirements.....1 2. Nature of the Job.....3 3. Determining Similar Levels of Skills.....4 4. Jobs Outside Area of Intended Employment.....4 5. Separate Wage Systems.....4 6. Skill Levels in Wage Determinations.....5 a. Entry Level.....5 b. Experienced Level.....6 7. Response to Requests for Wage Determinations.....6 8. Documentation Issues in Responding to Prevailing Wage Requests.....7 B. Published Wage Surveys.....8 C. SESA Conducted Prevailing Wage Surveys.....9 1. Procedures and Methodology.....9 2. Length of Time Survey Results are Valid.....10 D. Davis Bacon Act, Service Contract Act Applicability.....10 E. Challenges to Prevailing Wage Determinations.....10 III. H-1A Nursing Program.....11 A. Prevailing Wage Determinations--Regulatory Requirements.....11 B. SESA Conducted Surveys and Published Surveys.....12 C. Challenges to SESA Prevailing Wage Determinations.....12

**Attachment in**

**PDF:**

- 1. Attachment 

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Attachment to GAL No. 4-95

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

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

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

4

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

**I. BACKGROUND**

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

In conducting prevailing wage surveys and arriving at prevailing wage determinations, the same policies and procedures are followed for the permanent labor certification program and the nonimmigrant programs pertaining to H-1A nurses, H-1B specialty occupations, H-2B temporary nonagricultural employment, and the F-1 student off-campus employment program. In all of these programs, the applicable regulations and regulatory history require, with the exception of H-1A nurses, that the prevailing wage determination focus on the occupation without regard to the nature of the employer; e.g., profit vs. nonprofit, public vs. private. The relevant considerations are the job itself and the geographic locality of the job.

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

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

A. General Prevailing Wage Policy

1. Regulatory Requirements

In determining prevailing wages for the permanent and temporary labor certification programs, the H-1B program, and the F-1 student attestation program, the regulatory scheme at 20 CFR 656.40 must be strictly followed. In the absence of a wage determination issued under the Davis-Bacon Act (DBA) or the Service Contract Act (SCA), or negotiated in a collective



bargaining agreement, SESAs are to determine prevailing wage rates by conducting prevailing wage surveys or using published wage surveys. The methodology in both types of surveys must reflect the average (arithmetic mean) rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. This will, by definition of the term arithmetic mean (average), usually require computing a weighted average. Surveys which use the median or mode may not be used. The regulations also provide that the wage offered by the employer shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. The 5 percent variance does not apply to prevailing wage determinations based on Davis Bacon and Service Contract Act determinations, wages set forth in negotiated union agreements, and wage determinations under the H-1A nursing program.

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

Section 656.40 defines "similarly employed" as having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" means:

- (1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or
- (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

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

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

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

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

## 2. Nature of the Job

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

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

### 3. Determining Similar Levels of Skills

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

### 4. Jobs Outside Area of Intended Employment

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

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

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

### 5. Separate Wage Systems

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

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

#### 6. Skill Levels in Wage Determinations

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

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

##### a. Entry Level

Beginning level employees who have a basic understanding of the occupation through, education or experience. They perform routine to moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods practices and programs. They may assist experienced staff and perform higher level work for training and developmental purposes.

These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

b. Experienced Level

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

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

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

7. Response to Requests for Wage Determinations

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

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

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

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

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

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

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

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

8. Documentation Issues in Responding to Prevailing Wage Requests

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

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

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

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

#### B. Published Wage Surveys

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

The arithmetic mean for an occupation in a published survey that covers the greatest number of industries in the area of intended employment should be used as the basis for making a prevailing wage determination. For example, if a manufacturer of switchgear and switchboard apparatus submits an application on behalf of a tool and die maker, and a survey is available that presents valid wage data for all durable goods manufacturers in the area of intended employment, as well as detailed data for the switchgear and switchboard apparatus industry, the wage determination should be based on the arithmetic mean shown for all durable goods manufacturing.

However, a valid published wage survey that shows the arithmetic mean for only a single industry, such as switchgear and switchboard apparatus, may be used in arriving at the prevailing wage determination if such a survey is the only one available for the occupational classification relevant to the employers application in the area of intended employment.

Published wage surveys may not always present one arithmetic mean for entry level workers and one for experienced workers. In such instances, the arithmetic mean published in the survey that most closely conforms to the employer's actual experience requirements should be used as the basis for the prevailing wage determination. SESAs shall issue the arithmetic mean(s) that is published by the survey. Interpolation of data published in surveys to conform to employers' specific experience requirements shall not be made by SESA staff.

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

### C. SESA Conducted Prevailing Wage Surveys

#### 1. Procedures and Methodology

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

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



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

## 2. Length of Time Survey Results are Valid

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

### D. Davis Bacon Act (DBA) and Service Contract Act (SCA) Applicability

It is well settled that even if the job opportunity for which certification is requested is not itself directly subject to a DBA or SCA wage determination, the employer must offer at least that wage if there is a current DBA or SCA wage determination for the occupation in the same geographic area. In other words, the employer does not have to be involved in a government contract for the DBA or SCA wage determination to apply.

### E. Challenges to Prevailing Wage Determinations

Employers that may wish to challenge a prevailing wage determination made by SESAs in connection with temporary labor certification applications, labor condition applications, and attestations, may do so pursuant to the provisions of the Employment Service Complaint System. See 20 CFR part 658, subpart E. Unlike the permanent labor certification program, there are no regulatory provisions or procedures that allow employers of nonimmigrant workers to file challenges regarding prevailing wage determinations or findings made by SESAs with the Regional Certifying Officer.

### III. H-1A NURSING PROGRAM

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

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

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

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

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

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

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

B. SESA Conducted Surveys and Published Surveys

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

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

C. Challenges to SESA Prevailing Wage Determinations

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

<b>U.S. DEPARTMENT OF LABOR</b> <b>Employment and Training Administration</b> <b>Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> <b>ES</b>
	<b>CORRESPONDENCE SYMBOL</b> <b>TEES</b>
	<b>ISSUE DATE</b> <b>October 1, 1996</b>
<b>RESCISSIONS</b> <b>None</b>	<b>EXPIRATION DATE</b> <b>September 30, 1997</b>

**DIRECTIVE : GENERAL ADMINISTRATION LETTER NO. 02-97**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : BARBARA ANN FARMER**  
**Administrator**  
**for Regional Management**

**SUBJECT : Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997**

- Purpose.** To provide guidance to State Employment Security Agencies (SESAs) and Regional Offices for changes in the prevailing wage process during Fiscal Year 1997, the initial period of data collection for the expanded Occupational Employment Statistics (OES) program to be used for prevailing wage purposes.
- References.** 20 CFR Part 656, the Technical Assistance Guide (TAG) for Labor Certifications, GAL No. 4-95, and State Reimbursable Grants Agreements for FY 1997.
- Background.** Over the past 18 months, the Employment and Training Administration (ETA) has been considering proposals for reengineering the process used by the States to determine prevailing wages in order to increase timeliness, insure the use of a consistent methodology by all States, and to maximize accuracy. As a result of the reengineering activity, it was determined that the most efficient way to develop consistently accurate prevailing wages is to use the Bureau of Labor Statistics' expanded Occupational Employment Statistics program.

To obtain prevailing wages for labor certification purposes using the expanded OES, the Labor Certification reimbursable grant will include specific funds to be used by the state to provide the Labor Certification unit with a database usable for this purpose. Because the expanded OES is under the auspices of a work statement between the State and the Bureau of Labor Statistics, it is anticipated that the survey will be done by the State organization already working with BLS for earlier OES surveys, i.e., the Labor Market Information unit, the Research and Analysis unit, etc. The Labor Certification Unit will continue to be the official provider of

A-000042

prevailing wage levels for labor certification purposes, and therefore the user of data resulting from the expanded OES. It may be necessary, therefore, for the Labor Certification Unit to enter into a formal agreement with the appropriate unit producing the expanded OES data base. That agreement should specify that in return for funds for conducting the survey, the unit conducting the survey is responsible for providing the Labor Certification Unit with the BLS approved prevailing wage database in such a manner as to be accessible to Labor Certification staff.

It is necessary that the survey begin as soon as possible in order for the OES to have data for prevailing wages in time for their use by October 1, 1997. The data being collected will not be usable until that time, since it must first be reviewed and approved by BLS before it can be considered valid for the expanded OES.

Because the data from the expanded OES is not available for use at this time, the Labor Certification Unit must continue to use current references to provide prevailing wage information during FY 1997 to employers requesting it for the purposes of alien labor certification. The greatly reduced level of funding available for labor certification in FY 1997 may make it difficult for States to provide timely prevailing wages under the guidance which currently exists. The following changes are being made in prevailing wage guidelines issued in GAL 4-95, in order to allow States to meet their prevailing wage determination responsibilities under the current budget constraints. It has been estimated by States that these measures alone can save from 25 to 40 per cent of the cost of determining prevailing wages.

4. **Action Required.** In order to permit States to provide timely prevailing wage determinations in a cost effective manner during FY 1997, the following policy changes are to be implemented beginning October 1, 1997:

a) When using published surveys, surveys may be used if:

- the survey was published within the last 36 months, and;
- the data on which the survey is based was collected within 24 months of the publication date of the survey.

When using a published survey it is no longer mandated that the most current edition of the survey be used, as long as the above criteria are met. To be usable, published surveys must still conform to the requirements in the regulations regarding use of the weighted mean in the appropriate occupational category in the area of intended employment.

b) When using State conducted surveys, States may use survey results up to 3 years after the data are collected.

As indicated above, these changes are being initiated because the funding cuts taken by the alien labor certification program in FY 1997 are such that it will be difficult to provide timely prevailing wage information using the standards set out in GAL 4-95. Savings that could result from these changes are estimated to be as high as 40 percent in some States.

**The changes contained herein are temporary and are valid only for requests received in FY 1997.** In FY 1998, prevailing wages will be determined by using the output from the expanded Occupational Employment Statistics program with guidance to be provided later in FY 1997.

We believe these changes will not adversely affect wage protection for U.S. workers because of the limited time in which they will be in effect. Also, an analysis of earnings data indicates that the increase in earnings between 1995 and 1996 in the occupations for which labor certifications are generally requested is in most cases lower than 3%. Therefore the impact of using data one year older than is permitted under current standards should be minimal.

States are reminded that, as currently stated in 20 CFR 656.40, if a Davis Bacon Act or Service Contract Act wage determination exists for the occupation in the area of intended employment, that wage determination is considered the prevailing wage. Also, if the occupation falls under an "arms-length" negotiation between the employer and its union, the prevailing wage is the wage applicable to the occupation as set forth in the agreement.

States are also reminded that in the event surveys are necessary, the surveys must be done in compliance with 20 CFR 656.40, GAL 4-95, and other directives currently active.

5. **Inquiries.** Questions may be addressed to Patrick Stange or Scott Cote at 202-219-5263.

<b>U.S. DEPARTMENT OF LABOR</b> Employment and Training Administration Washington, D. C. 20210	<b>CLASSIFICATION</b> ES
	<b>CORRESPONDENCE SYMBOL</b> TEES
	<b>ISSUE DATE</b> December 6, 1996
	<b>EXPIRATION DATE</b> September 30, 1997
<b>RESCISSIONS</b> None	

**DIRECTIVE : GENERAL ADMINISTRATION LETTER NO. 02-97, Change 1**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : BARBARA ANN FARMER**  
 Administrator  
 for Regional Management

**SUBJECT : Correction Concerning Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997**

1. **Purpose.** To transmit a correction to General Administration Letter (GAL) No. 2-97.
2. **References.** [GAL No. 2-97](#); 20 CFR part 656; the Technical Assistance Guide for Labor Certifications; and the State Reimbursable Grants Agreements for FY 1997.
3. **Background.** On October 1, 1996, the Department of Labor issued GAL No. 2-97. The GAL provided guidance to SESAs and Regional Offices with respect to changes in the prevailing wage determination process during Fiscal Year 1997, the initial period of data collection for the expanded OES program to be used for prevailing wage purposes. Specifically, GAL No. 2-97 extended the validity of prevailing wage surveys conducted by SESAs or private surveys purchased by SESAs beyond the two-year period provided for in the reimbursable grant agreement.
4. **Correction.** In the first sentence under item 4 of the GAL (p. 2), there was an inadvertent typing error with regard to the date when the policy changes brought about by the GAL No. 2-97 were to take effect. This sentence should have read " . . . policy changes are to be implemented beginning October 1, 1996."
5. **Action Required.** Administrators are requested to:
  - a. Provide this information to appropriate staff.
  - b. Instruct staff to follow this change effective immediately.
6. **Inquiries.** Inquiries regarding this GAL should be directed to the appropriate Regional Office.

<b>U.S. DEPARTMENT OF LABOR</b> Employment and Training Administration Washington, D. C. 20210	<b>CLASSIFICATION</b> ES
	<b>CORRESPONDENCE SYMBOL</b> DFLC
	<b>ISSUE DATE</b> October 31, 1997
<b>RESCISSIONS</b> GAL 4-95, GAL 2-97 GAL 2-97, Change 1	<b>EXPIRATION DATE</b> November 30, 1998

**DIRECTIVE : GENERAL ADMINISTRATION LETTER NO. 02-98**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : Wendy L. McConnell  
Acting Administrator  
for Regional Management**

**SUBJECT : Prevailing Wage Policy for Nonagricultural Immigration Programs.**

- Purpose:** To provide policy clarification and procedural guidance for making prevailing wage determinations for nonagricultural immigration programs subsequent to the implementation of the wage component of the Occupational Employment Statistics program.
- References.** 20 CFR part 655, subpart A; 20 CFR part 655, subparts H and I; 20 CFR part 656; and Technical Assistance Guide (TAG) No. 656 Labor Certifications.
- Background.** Over the past two years, the Employment and Training Administration (ETA) has been considering proposals for reengineering the process used by the States to determine prevailing wages in order to increase the timeliness of responses to employer requests, insure the use of a consistent methodology by all States, and to maximize the accuracy of the determinations. As a result of this activity, it was determined that the most efficient and cost effective way to develop consistently accurate prevailing wage rates is to use the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program.

Effective January 1, 1998, State Employment Security Agencies (SESAs) are to implement the attached prevailing wage policy for nonagricultural immigration programs. The OES wage data should not be used for alien certification purposes until that date unless there are no other sources of wage data for a particular occupational classification and area. The validity of SESA surveys or published surveys which were to expire October 1, 1997, pursuant to GAL 2-97, "Changes in the Prevailing Wage Process for Labor Certification During Fiscal Year 1997," is hereby extended through December 31, 1997. The policy guidance provided in this document supersedes that contained in GAL No. ' 4-95 (May 18, 1995) effective January 1, 1998.

A-000046



4. **Action Required.** State Administrators are requested to:
  - A. Provide the attached policy and procedural guidance to appropriate staff.
  - B. Instruct staff to follow these policies and procedures in making prevailing wage determinations under the permanent and H-2B temporary labor certification programs as well as under the H-1B nonimmigrant program for professionals in specialty occupations or as fashion models of distinguished merit and ability.
5. **Inquiries.** Inquiries regarding this memorandum should be addressed to the appropriate regional certifying officer.
6. **Attachments.** [Prevailing Wage Policy for Nonagricultural Immigration Programs.](#)

Attachment to GAL No. 2-98

## Table of Contents

### Prevailing Wage Policy for Nonagricultural Immigration Programs

<u>Item</u>	<u>Page</u>
I. Background .....	1
II. General Prevailing Wage Policy .....	1
A. Summary .....	1
B. “Similarly Employed” .....	2
C. “Area of Intended Employment” .....	3
D. Nature of the Job .....	3
E. Determining Similar Levels of Skills .....	4
F. Expansion of the Area of Intended Employment .....	4
G. Separate Wage Systems .....	4
H. Skill Levels in Wage Determinations .....	5
I. Responses to Requests for Wage Determinations .....	6
J. Use of Employer-Provided Published Wage Surveys or Employer-Conducted Surveys .....	7
K. Documentation Issues in Responding to Prevailing Wage Requests .....	9
L. Challenges to Prevailing Wage Determinations .....	9

## **PREVAILING WAGE POLICY FOR NONAGRICULTURAL IMMIGRATION PROGRAMS**

### **I. Background**

In arriving at prevailing wage determinations, the same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1B professionals in specialty occupations or as fashion models of distinguished merit and ability, and the H-2B temporary nonagricultural labor certification program. The implementation of the wage component of the Occupational Employment Statistics (OES) program requires that policy clarification and procedural guidance be issued to ensure consistency among State Employment Security Agencies (SESAs) in making prevailing wage determinations.

### **II. General Prevailing Wage Policy**

#### **A. Summary**

In determining prevailing wages for the permanent and H-2B temporary labor certification programs and the H-1B program the regulatory scheme at 20 CFR 656.40 must be followed. Where a wage determination has been issued under the Davis-Bacon Act (DBA) or the Service Contract Act (SCA), or negotiated in a collective bargaining agreement, that rate shall be controlling. In the absence of a wage determination issued under the DBA, SCA, or a collective bargaining agreement, SESAs are to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program. In the absence of a wage determination under the DBA, SCA, or a collective bargaining agreement, if the employer provides the SESA with a survey, whether public or private, which meets the requirements described in item J of this General Administration Letter, that rate shall be used by the SESA as the prevailing wage determination in response to that particular request. Where no wage determination exists under any of the above sources and the SESA is aware of alternative sources of wage information, whether public or private, the SESA may utilize that wage data for prevailing wage purposes as long as it meets the criteria established in item J with regard to the adequacy of employer-provided wage data.

The methodology in any type of survey must reflect the average (arithmetic mean) rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. This will, by definition of the term arithmetic mean, usually require computing a weighted average. Surveys which list a median or modal

wage rate may not be used. The regulations also provide that the wage offered by the employer shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. The 5 percent variance does not apply to prevailing wage determinations based on DBA or SCA determinations nor does it apply to wages set forth in negotiated union agreements.

However, SESAs and employers should be aware that the Department's enforcement policy under the H-1B program does not allow a 5 percent variance if back wages are assessed as a result of an investigation conducted of an H-1B employer. In the H-1B program, the required wage rate is the higher of either the "actual wage" (see §655.731(a)(1)) or the "prevailing wage" (see §655.731(a)(2)). Where the required wage is the prevailing wage and if an employer pays a rate that is no less than 95 percent of the prevailing rate of wages, no violation will be found. However, if the employer is found to have paid less than 95 percent of the prevailing wage, a violation will be cited and back wages will be assessed and due based on 100 percent, not 95 percent, of the prevailing rate. The 5 percent variance does not apply where the required rate is the actual wage.

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

#### B. "Similarly Employed"

Section 656.40 defines "similarly employed" as having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" means:

- (1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or
- (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

Occupations within an OES code will be considered as meeting the criteria of similarly employed as defined above.

C. "Area of Intended Employment"

A clear understanding of the definition of "area of intended employment" is necessary to properly implement the regulation at 20 CFR 656.40. The definition of "area of intended employment" at 20 CFR 656.3 states that the:

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

A determination of the normal commuting distance is not necessary for places of employment within an MSA since any place within an MSA is deemed to be within normal commuting distance. Although not specifically mentioned in the definition of "area of intended employment," any place within a Primary Metropolitan Statistical Area (PMSA) is also deemed to be within normal commuting distance of the place of intended employment, since PMSAs are derived from MSAs. For prevailing wage purposes, however, commuting distance will not be extended to Consolidated Metropolitan Statistical Areas. Counties not within an MSA or PMSA have been combined into "Balance of State" areas within each State. The allocation of the counties into Balance of State areas included consideration of prevailing commuting patterns. Counties within each Balance of State area are, for prevailing wage purposes, within the same area of intended employment.

The same OES wage for the same occupation should be used by the SESA for every location within the MSA, PMSA, or appropriate Balance of State area. In cases of cross-State MSAs/PMSAs, the OES data incorporates survey findings from the entire cross-State area, and will show the same information for all States affected by the cross-State MSA/PMSA.

D. Nature of the Job

Under § 656.40, the relevant factors in arriving at a prevailing wage rate are the nature of the job and the geographic locality of the job. In determining the nature of the job, the first order of inquiry is to determine the appropriate occupational classification. The Dictionary of Occupational Titles (DOT) job description that corresponds to the employer's job offer will normally be used to assign to the job the relevant 9-digit DOT code. The relevant DOT code will then be cross walked to an SCA or OES occupational code, as appropriate. If the job opportunity does not exist in the DOT, the SESA should default directly to the relevant SCA or OES occupational code. In the case of combination jobs, e.g., engineer-pilot, the prevailing wage

determination should be based on the SCA or OES code for the highest paying occupation.

#### E. Determining Similar Levels of Skills

In determining which occupational categories in the area of intended employment require levels of skills similar to those involved in the employer's job offer, information contained in the Dictionary of Occupational Titles, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and, in particular, the Guide to Occupational Exploration code can be very helpful. If it is necessary to use these guides, the process will lead to a DOT classification which must then be crosswalked to the appropriate SCA or OES code.

#### F. Expansion of the Area of Intended Employment

The OES survey data will represent all responding employers in the area of intended employment who employ workers in that OES occupational code. If the OES survey does not include enough responses in that area and occupation to allow BLS to publish the data, the OES system will first default to all MSAs, PMSAs, and Balances of State areas contiguous to the requested area within that State. If this still does not result in publishable data, the system will default to statewide information for that occupation. Because of the size of the sample, it is unlikely this will occur except in very unusual occupations or in small States.

#### G. Separate Wage Systems

It cannot be overemphasized that the nature of the employer is not a relevant factor in making prevailing wage determinations. As noted above, the relevant factors are the job and the geographic locality of the job.

It has been determined that the language on pages 122 and 123 of Technical Assistance Guide No. 656 Labor Certifications (TAG) which indicates that an employer may challenge a finding as to the prevailing wage for an occupation, such as school teaching, on the basis that there are separate prevailing wages applicable to employment in public and private schools, is not supportable by the regulation at § 656.40. As stated by the Board of Alien Labor Certification Appeals (BALCA) in *Hathaway Children's Service 91-INA-388, February 4, 1994*, in relevant part, "(t)he underlying purpose of establishing a prevailing wage is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality." Factors going to the nature of the employer, such as whether the employer is public or private, profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40. Consequently, OES wage rates are based upon cross-industry surveys.

## H. Skill Levels in Wage Determinations

The level of skill required by the employer for the job opportunity is to be considered in making prevailing wage determinations. The OES wage survey will produce two wage levels which distinguish between positions requiring significantly different degrees of skills in the occupation. The SESA will determine which of the two levels in the OES survey is appropriate, *i.e.*, a distinction must be made based on whether or not the job opportunity involved in the employer's job offer requires skills at a level I or a level II, as defined below.

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

### 1. Level I

Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practices, and programs. They may assist staff performing tasks requiring skills equivalent to a level II and 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. Work is closely monitored and reviewed for accuracy.

### 2. Level II

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

If a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation which requires an advanced degree (Masters or Ph.D.) shall be the rate for workers performing tasks requiring skills at a level II. In this case, the requirement for advanced

education substitutes for the skills required at a level II. Where an advanced degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation which requires such a degree shall be the rate for workers performing tasks requiring skills at a level I, unless there are other requirements contained in the job offer or components thereof which require skills that are at a level II. For example, a job opportunity for a librarian, an occupation for which a Master's degree is normally required for entry into the occupation, would generally be considered to require skills at a level I, unless other requirements in the job offer or components thereof require skills at a level II.

Where State licensure is required for an individual to independently perform all of the duties encompassed by the occupation, such workers shall be considered to be performing work requiring skills at a level II, unless the employer can present sufficient evidence that the alien does not, in fact, independently perform all of the duties encompassed by the occupation.

#### I. Responses to Requests for Wage Determinations

To enable SESAs to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations will be in writing. The requests should specify the employer's title for the job, a brief description of the job duties, the education, training and experience requirements, and any other information deemed necessary by the SESA for case processing or tracking. The name and address of the employer, contact person and telephone number, and the city or county of intended employment, if different from the employer's address, should be indicated.

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

Responses to requests for a prevailing wage determination should be sent to the employer or its representative in writing in a timely manner, preferably within 14 working days of receipt of the request. If the employer provides to the SESA its own published or privately-funded survey and requests SESA acceptance of the survey's use for prevailing wage purposes, responses to such requests should be sent to the employer or its representative in writing in a timely manner, preferably within 30 working days of the receipt of the request. If the employer's survey is not accepted, the response to the employer shall include the reasons why the survey is not acceptable (e.g., the survey presented only the median wage rate, or the geographic area covered by the survey is broader than that which is necessary to obtain a representative sample), and shall provide the employer



with the appropriate prevailing wage rate as derived from the SCA or OES survey data, as appropriate.

Lastly, it is important to note that §656.40(c) provides that a prevailing wage determination for labor certification [or labor condition application] purposes shall not permit an employer to pay a wage lower than that required under any other Federal, State, or local law. For example, if the OES wage rate is lower than the Federal, State, or local minimum wage, the response to the employer's request should indicate that the employer must offer at least the minimum wage provided by Federal, State, or local law, whichever is higher. Since the OES wage data is collected in the year prior to the data being available to the SESA, this may occur in some instances.

J. Use of Employer-Provided Published Wage Surveys or Employer-Conducted Surveys

In determining prevailing wage rates in the absence of a wage determination issued pursuant to the DBA, the SCA, or an applicable wage rate from a collective bargaining agreement, the SESA shall consider wage data that has been furnished by the employer, *i.e.*, wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer. The use of such employer-provided wage data is an employer option. However, if an employer wishes to use alternative wage data, it will be incumbent upon the employer to make a showing that the survey or other wage data meet the criteria outlined below. In all cases where an employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SESA with enough information about the survey methodology (e.g., sample frame size and source, sample selection procedures, survey job descriptions) to allow the SESA to make a determination with regard to the adequacy of the data provided and its adherence to these criteria. If the employer does not present sufficient information with its request, the SESA shall request such additional information from the employer as may be necessary to make the determination. Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the SESA cannot be taken into consideration in making a wage determination.

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

- (3) The survey or other wage data must reflect the area of intended employment. A valid arithmetic mean for an area larger than an OES wage area, whether an MSA, PMSA, or an OES Balance of State area, may only be used if there are not sufficient workers in the specific occupational classification relevant to the employer's job opportunity in the area of intended employment. However, the area of intended employment should not be expanded beyond that which is necessary to produce a representative sample. In all cases where an area that is larger than an OES wage area is used, the employer must establish that there were not sufficient workers in the area of intended employment, thus necessitating the expansion of the area surveyed.
- (4) The job description applicable to the employer's survey or other wage data must be an adequate match with the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purposes. Published wage surveys may not always present an arithmetic mean for job opportunities requiring skills at a level I and level II. In such instances, the arithmetic mean contained in the published survey that most closely conforms with the employer's job opportunity should be used as the basis for the prevailing wage determination. The job description submitted on the request for acceptance of an employer-provided survey or other wage data will be used in determining the appropriate level of skill to be applied.
- (5) The wage data must have been collected across industries that employ workers in the occupation.
- (6) The survey or other wage data must provide an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. In all cases where an employer provides the SESA with wage data for which it seeks acceptance, measures of central tendency other than the arithmetic mean, such as the median or modal wage rates, cannot be used as the basis for the prevailing wage determination.
- (7) In all cases where an employer provides the SESA with a survey or other wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its

adherence to these standards for the acceptability of employer-provided wage data.

It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

K. Documentation Issues in Responding to Prevailing Wage Requests

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

Requests from employers for wage determinations shall be filed in writing with the organizational subcomponent of the SESA responsible for alien labor certification prevailing wage determinations. Only that component shall respond to requests for wage information for immigration purposes. A dated copy of the prevailing wage determination provided to the employer should be maintained by the SESA for two years. The relevant portions of an employer-provided survey must also be maintained with the determination for the requisite period.

L. Challenges to Prevailing Wage Determinations

Employers who wish to challenge prevailing wage determinations made by SESAs in connection with temporary labor certification applications, labor condition applications, and attestations, may do so pursuant to the provisions of the Employment Service Complaint System. See 20 CFR part 658, subpart E. However, under the permanent labor certification program, there are regulatory provisions and procedures that allow employers to file challenges regarding prevailing wage determinations or findings made by SESAs directly with the regional certifying officer.

<b>U.S. DEPARTMENT OF LABOR</b> <b>Employment and Training Administration</b> <b>Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> <b>ALC</b>
	<b>CORRESPONDENCE SYMBOL</b> <b>OWS</b>
	<b>ISSUE DATE</b> <b>December 22, 2000</b>
<b>RESCISSIONS</b> <b>None</b>	<b>EXPIRATION DATE</b> <b>September 30, 2001</b>

**DIRECTIVE : EMPLOYMENT SERVICE PROGRAM LETTER NO. 01-01**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : GRACE A. KILBANE**  
**Administrator, Office of Workforce Security**

**SUBJECT : Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry, 2000-2001**

- Purpose.** To provide clarification to State Employment Service Agencies with regard to the processing of H-2B temporary applications for limited jobs in the landscaping industry which includes only those activities addressed in this guidance for the 2000-2001 season.
- References.** General Administration Letter No. 1-95, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations; [Field Memorandum 25-98](#): H-2B Temporary Non-Agricultural Labor Certification Program requirements; [General Administration Letter 2-98](#): Prevailing Wage Policy for Nonagricultural Immigration Programs.
- Background.** It has been brought to our attention that there are system wide inconsistencies in the processing of H-2B applications for limited jobs in the landscaping industry particularly with respect to two issues: a) the interpretation of DOT descriptions for landscaping, and b) the assignment of a wage rate to the landscaping job. Many applications for landscaping jobs list various activities and combination of activities that make it difficult to achieve a match with any specific DOT code. This problem has led to inconsistent classification of landscaping jobs and consequently, inconsistent assignment of wage rates, specifically SCA wage rates.
- Action Required.** SESA Administrators are requested to provide the following clarification and guidance to appropriate staff:
  - Any application received for landscaping jobs which includes the following activities and only the following activities: "mow, cut, water, and edge lawns; rake and blow leaves; dig holes for bushes; pull and chop weeds, prune, and haul topsoil and mulch should be coded as a Laborer, Landscape - DOT Code

A-000058

408.687-014.

- b) Any landscaping job with the above description should be given the Occupational Employment Statistics (OES) wage rate for OES Code 79041 (Laborers, Landscaping and Grounds Keeping) Level 1.
- c) This directive will not apply to H-2B applications where the state agency has already provided a wage rate to the employer and recruitment has begun. Employers are free to withdraw and refile to obtain a new wage determination.
- d) This directive does not affect the processing of any applications involving jobs containing duties other than those described above. If there are any questions or concerns regarding how to process a particular application, contact your Regional Certifying Officer.

This guidance is intended for use only in processing applications for the 2000-2001 landscaping season. The National Office is reviewing this matter and additional guidance will be provided well before the next landscaping season.

This guidance should be provided to staff immediately so that processing can be completed on applications pending for jobs in the landscaping industry.

5. **Questions.** Inquiries should be directed to Ms. Charlene Giles at 202/693-2950.

<b>U.S. DEPARTMENT OF LABOR</b> <b>Employment and Training Administration</b> <b>Washington, D. C. 20210</b>	<b>CLASSIFICATION</b>  <b>OWS</b>
	<b>CORRESPONDENCE SYMBOL</b>
	<b>ISSUE DATE</b>  <b>August 8, 2001</b>
<b>RESCISSIONS</b>  <b>ESPL No. 01-01</b>	<b>EXPIRATION DATE</b>  <b>August 31, 2002</b>

**DIRECTIVE : EMPLOYMENT SERVICE PROGRAM LETTER NO. 01-01, Change 1**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : GRACE A. KILBANE**  
**Administrator**  
**Office of Workforce Security**

**SUBJECT : Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2001 - 2002.**

1. **Purpose.** Since the 2000 - 2001 policy clarification provided to the State Employment Service Agencies was effective, it is being extended through the 2001-2002 season. This policy clarification applies to the processing of H-2B temporary applications for limited jobs in the landscaping industry which include only those activities addressed in this guidance.
2. **References.** General Administration Letter No. 1-95, Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations; Field Memorandum 25-98: H-2B Temporary Non-Agricultural Labor Certification Program requirements; General Administration Letter 2-98: Prevailing Wage Policy for Non-Agricultural Immigration Programs.
3. **Background.** It has been brought to our attention that there are system wide inconsistencies in the processing of H-2B applications for limited jobs in the landscaping industry particularly with respect to two issues; a) the interpretation of DOT descriptions for landscaping, and b) the assignment of a wage rate to the landscaping job. Many applications for landscaping jobs list various activities and combination of activities that make it difficult to achieve a match with a specific DOT code. This problem has led to inconsistent classification of landscaping jobs and consequently, inconsistent assignment of wage rates, specifically Service Contract Act (SCA) wage rates.
4. **Action Required.** SESA Administrators are requested to provide the following clarification and guidance to appropriate staff:
  - a. Any application received for landscaping jobs which includes the following activities and only the following activities: "mow, cut, water, and edge lawns; rake and blow leaves; dig holes for bushes; pull

and chop weeds, prune, and haul topsoil and mulch," should be coded as a Laborer, Landscape - DOT Code 408.687-014.

- b. Any landscaping job with the above description should be given the Occupational Employment Statistics (OES) wage rate for OES Code 79041 (Laborers, Landscaping and Grounds Keeping) Level 1.
- c. This directive will not apply to H-2B applications where the state agency has already provided a wage rate to the employer and recruitment has begun. Employers are free to withdraw and refile to obtain a new wage determination.
- d. This directive does not affect the processing of any applications involving jobs containing duties other than those described above. If there are any questions or concerns regarding how to process a particular application, contact your Regional Certifying Officer.

This guidance is intended for use only in processing applications for the 2001 - 2002 landscaping season. The National Office is reviewing this matter and additional guidance will be provided well before the next landscaping season.

This guidance should be provided to staff immediately so that processing can be completed on applications pending for jobs in the landscaping industry.

5. **Questions** Inquiries should be directed to Charlene Giles at (202) 693-3010 (x2950).

<b>U.S. DEPARTMENT OF LABOR</b> <b>Employment and Training Administration</b> <b>Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> <b>OWS</b>
	<b>CORRESPONDENCE SYMBOL</b>
	<b>ISSUE DATE</b> <b>September 20, 2001</b>
<b>RESCISSIONS</b> <b>ESPL No. 01-01, Change 1</b>	<b>EXPIRATION DATE</b> <b>September 30, 2002</b>

**DIRECTIVE : EMPLOYMENT SERVICE PROGRAM LETTER NO. 01-01, Change 2**

**TO : ALL STATE EMPLOYMENT SECURITY AGENCIES**

**FROM : GRACE A. KILBANE**  
**Administrator, Office of Workforce Security**

**SUBJECT : Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2001 - 2002**

- Purpose.** To change the OES Code provided in ESPL 01-01, Change 1 (see 4. "Action Required ", Item b). Since the 2000 - 2001 policy clarification provided to the State Employment Service Agencies was effective, it is being extended through the 2001-2002 season. This policy clarification applies to the processing of H-2B temporary applications for limited jobs in the landscaping industry which include only those activities addressed in this guidance.
- References.** [General Administration Letter No. 1-95](#), Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations; [Field Memorandum 25-98](#): H-2B Temporary Non-Agricultural Labor Certification Program requirements; [General Administration Letter 2-98](#): Prevailing Wage Policy for Non-Agricultural Immigration Programs.
- Background.** It has been brought to our attention that there are system wide inconsistencies in the processing of H-2B applications for limited jobs in the landscaping industry particularly with respect to two issues; a) the interpretation of DOT descriptions for landscaping, and b) the assignment of a wage rate to the landscaping job. Many applications for landscaping jobs list various activities and combination of activities that make it difficult to achieve a match with a specific DOT code. This problem has led to inconsistent classification of landscaping jobs and consequently, inconsistent assignment of wage rates, specifically Service Contract Act (SCA) wage rates.
- Action Required.** SESA Administrators are requested to provide the following clarification and guidance to appropriate staff:



- a) Any application received for landscaping jobs which includes the following activities and only the following activities: "mow, cut, water, and edge lawns; rake and blow leaves; dig holes for bushes; pull and chop weeds, prune, and haul topsoil and mulch," should be coded as a Laborer, Landscape - DOT Code 408.687-014.
- b) Any landscaping job with the above description should be given the Occupational Employment Statistics (OES) wage rate for OES/SOC Code 37-3011 (Landscaping and Groundskeeping Worker)
- c) This directive will not apply to H-2B applications where the state agency has already provided a wage rate to the employer and recruitment has begun. Employers are free to withdraw and refile to obtain a new wage determination.
- d) This directive does not affect the processing of any applications involving jobs containing duties other than those described above. If there are any questions or concerns regarding how to process a particular application, contact your Regional Certifying Officer.

This guidance is intended for use only in processing applications for the 2001 - 2002 landscaping season. The National Office is reviewing this matter and additional guidance will be provided well before the next landscaping season.

This guidance should be provided to staff immediately so that processing can be completed on applications pending for jobs in the landscaping industry.

- 5. **Questions:** Inquiries should be directed to Charlene Giles at (202) 693-3010 (x2950).

<b>Employment and Training Administration</b> <b>Advisory System</b> U.S. Department of Labor Washington, D.C. 20210	<b>CLASSIFICATION</b> H-2B Program
	<b>CORRESPONDENCE SYMBOL</b> OWS
	<b>DATE</b> October 29, 2002

**TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 12-02**

**TO:** ALL STATE WORKFORCE AGENCIES

*/S/*

**FROM:** EMILY STOVER DeROCCO  
Assistant Secretary

**SUBJECT: Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2002 - 2003**

1. **Purpose.** To provide clarification to State Workforce Agencies (SWA) with regard to the processing of H-2B temporary applications for limited jobs in the landscaping industry which includes only those activities addressed in this guidance for the 2002-2003 season.

2. **References.** General Administration Letter No. 1-95, Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations; Field Memorandum 25-98: H-2B Temporary Non-Agricultural Labor Certification Program requirements; General Administration Letter 2-98: Prevailing Wage Policy for Non-Agricultural Immigration Programs; Employment Service Program Letter No. 01-01, Change 2: Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2001-2002.

3. **Background.** Several years ago it was brought to our attention that there were system wide inconsistencies in the processing of H-2B applications for limited jobs in the landscaping industry particularly with respect to two issues: a) the interpretation of DOT descriptions for landscaping, and b) the assignment of a wage rate to the landscaping job. Many applications for landscaping jobs list various activities and combination of activities that make it difficult to achieve a match with a specific DOT code. This problem has led to inconsistent classification of landscaping jobs and consequently, inconsistent assignment of wage rates, specifically Service Contract Act (SCA) wage rates.

<b>RESCISSIONS</b>	<b>EXPIRATION DATE</b>
	Continuing

4. **Action Required.** SWA Administrators are requested to provide the following clarification and

guidance to appropriate staff.

- a) Any application received for landscaping jobs which includes the following activities and only the following activities: "mow, cut, water, edge lawns; rake and blow leaves; dig holes for bushes; pull, chop weeds, prune, and haul topsoil and mulch" should be coded as a Laborer, Landscape - DOT Code 408.687-014.
- b) Any landscaping job with the above description should be given the Occupational Employment Statistics (OES) wage rate for OES/SOC Code 37-3011 (Landscaping and Grounds keeping Worker).
- c) This advisory will not apply to H-2B applications where the state agency has already provided a wage rate to the employer and recruitment has begun. Employers are free to withdraw and refile to obtain a new wage determination.
- d) This advisory does not affect the processing of any applications involving jobs containing duties other than those described above. If there are any questions or concerns regarding how to process a particular application, contact your Regional Certifying Officer.

This guidance is intended for use only in processing applications for the 2002-2003 landscaping season. This guidance should be provided to staff immediately so that processing could be completed on applications pending for jobs in the landscaping industry.

5. **Inquiries.** Inquiries should be directed to Charlene Giles at (202) 693-2950.

<b>Employment and Training Administration Advisory System</b> U.S. Department of Labor Washington, D.C. 20210	<b>CLASSIFICATION</b> H-2B Program
	<b>CORRESPONDENCE SYMBOL</b> ONP
	<b>DATE</b> November 4, 2003

**ADVISORY:** TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 12-03

**TO:** ALL STATE WORKFORCE AGENCIES

/S/

**FROM:** EMILY STOVER DeROCCO  
Assistant Secretary

**SUBJECT:** Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2003-2004

1. **Purpose.** To provide clarification to State Workforce Agencies (SWA) with regard to the processing of H-2B temporary applications for limited jobs in the landscaping industry which includes only those activities addressed in this guidance for the 2003-2004 season.

2. **References.** General Administration Letter No. 1-95: Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations; Field Memorandum 25-98: H-2B Temporary Nonagricultural Labor Certification Program Requirements; General Administration Letter 2-98: Prevailing Wage Policy for Nonagricultural Immigration Programs; Employment Service Program Letter No. 01-01, Change 2: Policy Clarification for Processing H-2B Temporary Certifications for Occupations in the Landscaping Industry 2002-2003.

3. **Background.** Several years ago it was brought to our attention that there were system wide inconsistencies in the processing of H-2B applications for limited jobs in the landscaping industry particularly with respect to two issues: a) the interpretation of the Standard Occupational Classification (SOC) description for landscaping, and b) the assignment of a wage rate to the landscaping job. Many applications for landscaping jobs list various activities and combinations of activities that make it difficult to achieve a match with a specific SOC code. This problem has led to inconsistent classification of landscaping jobs and consequently, inconsistent assignment of wage rates, specifically Service Contract Act (SCA) wage rates.

<b>RESCISSIONS</b>	<b>EXPIRATION DATE</b>
	Continuing

4. **Action Required.** SWA Administrators are requested to provide the following clarification and guidance to appropriate staff.

- a. Any application received for landscaping jobs which includes the following activities and only the following activities: "mow, cut, water, edge lawns; rake and blow leaves; dig holes and trenches; pull, chop weeds, prune, and haul topsoil and mulch" should be coded as a Laborer, Landscape - SOC Code 37-3011 (Landscaping and Grounds Keeping Worker).
- b. Any landscaping job with the above description should be given the Occupational Employment Statistics (OES) wage rate for OES/SOC Code 37-3011.
- c. This advisory will not apply to H-2B applications where the State agency has already provided a wage rate to the employer and recruitment has begun. Employers are free to withdraw and refile to obtain a new wage determination.
- d. This advisory does not affect the processing of any applications involving jobs containing duties other than those described above. If there are any questions or concerns regarding how to process a particular application, contact your Regional Certifying Officer.

This guidance is intended for use only in processing applications for the 2003-2004 landscaping season. This guidance should be provided to staff immediately so that processing can be completed on applications pending for jobs in the landscaping industry.

5. **Inquiries.** Inquiries should be directed to Charlene Giles at (202) 693-2950.

## **Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs**

The implementation of the H-1B Reform Act and the publication of the Labor Certification for the Permanent Employment of Aliens in the United States, or PERM, regulation necessitate the need to issue policy clarification and procedural guidance to the State Workforce Agencies (SWAs). The attached guidance provides the step by step procedure for selecting the appropriate wage level for prevailing wage purposes and is designed to ensure consistency in the prevailing wage determination process.

The requirements governing prevailing wage determinations used in the Foreign Labor Certification (FLC) program have been recently revised by the H-1B Visa Reform Act. The major changes affecting prevailing wage determinations due to the reforms are (effective on March 8, 2005):

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

The PERM regulation published on December 27, 2004, with an effective date of March 28, 2005, has modified the prevailing wage determination process in three significant ways. (1) The use of Davis-Bacon or the McNamara-O'Hara Service Contract Act is no longer controlling for prevailing wage determinations although an employer may request that those sources be considered as an employer-provided wage source. (2) Employers may continue to submit published surveys from public or private sources or employer-conducted surveys as long as the survey complies with acceptable standards. Although the prevailing wage data will be provided for four skill levels, employer-provided surveys are acceptable if they contain only one weighted arithmetic mean level. If an employer-proved survey does not contain an arithmetic mean, and only provides the median, the median wage figure can be used for determining the prevailing wage. (3) Employers that disagree with their prevailing wage determination are afforded one opportunity to provide supplemental information to the SWA. Additionally, employers may choose to file a new request for a wage determination or request review by the Certifying Officer or the Board of Alien Labor Certification Appeals.

The PERM regulation lists professional O\*NET-SOC occupations and their designated education and training categories. Those education and training categories shall be used when considering the education and training generally required for performance in that occupation (See Appendix D).

This guidance has been divided into several sections for easy reference:

**I. Policy Guidance**

- A. Background
- B. Prevailing Wage Factors

**II. Making Determinations**

- A. Wage Rates Covered by Collective Bargaining Agreements
- B. Wage Determinations Using BLS OES Wage Data
  - 1. OES Wage Levels
  - 2. Process for Determining Wage Level
  - 3. Foreign Labor Certification Data Center On-line Wage Library
- C. Wage Determinations Using Employer-Provided Wage Surveys

**III. Procedures**

- A. Filing
- B. SWA Response
- C. SWA Responsibilities

**IV. Challenges to SWA Determinations**

**Appendices**

- A. OES Prevailing Wage Guidance
- B. Check Sheet for Use in Determining OES Wage Level
- C. Worksheet for Use in Determining OES Wage Level
- D. Professional Occupations - Education and Training Categories
- E. Specific Vocational Preparation (SVP)
- F. Check Sheet for Employer-Provided Wage
- G. Prevailing Wage Determination Request Form

**I. Policy Guidance**

**A. Background**

The Department of Labor, Bureau of Labor Statistics (BLS) has provided wage data collected under the Occupational Employment Statistics (OES) Program for use in the Foreign Labor Certification process since 1998. Occupational wage data collected under that program will now be made available at the four levels as required by the Act for state and sub-state geographic areas for the purpose of making prevailing wage determinations. The wage data will be made available

on the Foreign Labor Certification Data Center On-Line Wage Library (OWL) found on the Division's website at <http://www.flcdatacenter.com/>.

Since September 1999, the Standard Occupational Classification (SOC) has been used by the OES program to classify occupational wage information. The SOC provides a common language for categorizing occupations. The SOC also serves as the framework for information being gathered through the Department of Labor's Occupational Information Network (O\*NET®) which supersedes the Dictionary of Occupational Titles (DOT) as the resource to be consulted for occupational information for the Foreign Labor Certification process. Developed by the Department of Labor, the O\*NET system provides the general public information on skills, abilities, knowledge, tasks, work activities, and the specific vocational preparation levels associated with occupations. The O\*NET information can be found at <http://online.onetcenter.org>. Wage data from the OES survey and occupational information in O\*NET are both classified by the SOC reducing the need to use crosswalks to connect wages to occupational requirements.

## **B. Prevailing Wage Factors**

The regulatory scheme at 20 CFR 656.40, effective March 28, 2005, must be followed in determining the prevailing wage. The same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1B professionals in specialty occupations or as fashion models, and the H-2B temporary nonagricultural labor certification program.

Under § 656.40, the relevant factors in determining a prevailing wage rate are the nature of the job offer, the area of intended employment, and jobs duties for workers that are similarly employed.

### *"Nature of the Job Offer"*

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. SWAs can identify the appropriate O\*NET occupation using O\*NET OnLine (<http://online.onetcenter.org/>) and entering the employer's job title to search for the appropriate O\*NET-SOC occupation and code.

If the employer's prevailing wage request contains only a code from the Dictionary of Occupational Titles (DOT) rather than a job title, the DOT to O\*NET-SOC crosswalk found on the On-Line Wage Library shall be used to identify the related O\*NET-SOC code.



In the event the employer's job opportunity is defined only by a DOT code and that DOT code crosswalks to a SOC residual code (those that end in '99') the existing DOT code shall be used to identify the specific vocational preparation.

If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

#### *"Area of Intended Employment"*

The definition of "area of intended employment" at 20 CFR 656.3 states that the: *Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. The On-Line Wage Library has been developed to account for these requirements. A more detailed explanation is provided in section II C 2 for use in making prevailing wage determinations that are based on employer-provided surveys.

#### *"Similarly Employed"*

Section 656.40 defines "*similarly employed*" as having:

- substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, it means:
- jobs requiring substantially similar level of skills within the area of intended employment; or
- substantially comparable jobs in the occupational category with employers outside of the area of intended employment if there are no substantially comparable jobs in the area of intended employment.

In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of:

- an institution of higher education, or
- an affiliated or related nonprofit entity,
- a nonprofit research organization, or
- a governmental research organization

the prevailing wage level should take into account the wage levels of employees only at such institutions and organizations found in the area of intended employment (See General Administration Letter No. 1-00).

## **II. Making Determinations**

The SWA shall make prevailing wage determinations as follows:

- A. If the job opportunity is covered by a collective bargaining agreement negotiated at arms length and a wage rate has been negotiated under the agreement, that wage rate shall be controlling.
- B. In the absence of a wage determined under a collective bargaining agreement, SWAs are to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program.
- C. If in the absence of a wage rate determined under a collective bargaining agreement, the employer provides the SWA with a survey, whether public or private, which meets the requirements of the regulations, that rate shall be used by the SWA as the prevailing wage determination in response to that particular request. The employer can elect to use a current wage determination in the area under the Davis-Bacon or Service Contract Acts.

The SWA shall specify the validity period of the prevailing wage which shall not be less than 90 days or more than 1 year from the determination date (See Federal Register Vol. 65 No. 245 Page 80196). Under no circumstances may the SWA charge a fee for making or reviewing a prevailing wage determination.

### **A. Wage Rates Covered by Collective Bargaining Agreements**

If the job opportunity is in an occupation covered by a collective bargaining agreement (CBA) negotiated between a union and an employer, the wage rate in the agreement shall be considered the prevailing wage in making prevailing wage determinations.

If the job opportunity is for a professional athlete and is covered by a sports league's rules or regulations, the wage rate set forth in those rules or regulations shall be considered the prevailing wage.

### **B. Wage Determinations Using BLS OES Wage Data**

If the job offer is for an occupation not covered by a collective bargaining agreement and the employer does not choose to provide a survey or request use of a current wage determination in the area under the Davis-Bacon or Service Contract Acts, the wage component of the BLS OES survey shall be used to determine the prevailing wage for an employer's job offer. The SWAs shall evaluate the particulars of an employer's job offer such as: the job duties, education and experience requirements, and any other special requirements, as well as the geographic area in which the job is located to arrive at a prevailing wage determination. The OES wage data is made available at the state and sub-state areas so the SWA can select the geographic area of intended employment.

The On-Line Wage Library has been developed to account for these requirements. The SWA should select the state and sub-state area that represents the area for the employer's job offer.

## 1. OES Wage Levels

The new requirements specify that determinations made using a government survey shall be made available for each occupation at 4 levels of wages commensurate with experience, education, and the level of supervision. The SWA shall make a prevailing wage determination selecting one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

It is important to remember that wage levels are determined only after selecting the most relevant O\*NET-SOC occupational code classification. The selection of the O\*NET-SOC code should not be based solely on the title of the employer's job offer. The SWA should consider the particulars of the employer's job offer and compare the full description to the tasks, knowledges and work activities generally associated with an O\*NET-SOC occupation to insure that the most relevant occupational code has been selected.

Level I wage rates should be assigned to job offers for beginning level employees who have only 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. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Employer requests for foreign workers are frequently for fully qualified workers who possess special skills. Wage Level I would not be assigned in those situations.

Level II wage rates should be assigned to job offers for qualified employees that have attained either through education or experience a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

Level III wage rates should be assigned to job offers for experienced employees that have a sound understanding of the occupation and have attained either through education or experience special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst) or 'senior' (senior programmer) or 'head' (head nurse) or 'chief' (crew chief) or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV wage rates should be assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and or supervisory responsibilities.

## **2. Process for Determining Wage Level**

The SWAs shall use O\*NET information to identify the tasks, work activities, knowledge and skills generally required for performance in an occupation. A comparison between the particulars of the employer's job offer to the requirements for similar (O\*NET) occupations shall be used to determine the appropriate wage level.

Information contained in the O\*NET Job Zones provide guidance in determining whether the job offer is for an entry level, qualified, experienced, or competent employee for making the determination of wage level. The O\*NET Job Zones describe the experience, education and training and the specific vocational preparation (SVP) range necessary to adequately perform in an occupation. A listing of SVPs and their definitions can be found in Appendix E of this document. Employer requirements in a job offer that are at the upper range of the requirements and preparation generally required for performance in an occupation are indicators that a prevailing wage determination at higher level should be considered.

A step-by-step process for arriving at the appropriate wage level is described below. Points are awarded based on the comparison of an employer's job offer

requirements to the general requirements for similar occupations. The points are entered on a worksheet then added to arrive at the wage level. SWAs should follow the step-by-step process while completing the worksheet.

The appendices section of this document provides several guides that can be used for reference during the process:

Appendix A: OES Prevailing Wage Guidance repeats the step-by-step process and can be used as a reference guide.

Appendix B: Check Sheet for Use in Determining OES Wage Level has been provided to track the process.

Appendix C: Worksheet for Use in Determining OES Wage Level provides an example of a worksheet that SWAs might use for determining the appropriate wage level.

All prevailing wage determinations start with a Level I determination; therefore, the check sheet and worksheet have a 1 entered in the Wage Level Column.

### **Step 1 – Enter the O\*NET Requirements on the Worksheet**

- Use the O\*NET OnLine Find Occupations feature (<http://online.onetcenter.org>) to determine the appropriate O\*NET-SOC code based on the job title provided on the prevailing wage determination request form.
- Enter the job title from the employer's job offer into the Quick Search box and click on Go.
- Select the O\*NET occupation that most closely matches the employer's request from the resulting list of occupations.
- Review the Tasks, Knowledge, Work Activities and Job Zone information contained in the O\*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O\*NET education and experience requirements on the Worksheet.

### **Step 2 – Complete the Experience Section of the Worksheet**

Compare the overall experience described in the O\*NET Job Zone to the years of experience on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer's experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short demonstration), enter a 0 in the Wage Level Column
- SVP of 2 (experience requirement of anything beyond short demonstration and up to 1 month), enter a 1 in the Wage Level Column

- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column
- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.
- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.
- Greater than the experience and SVP range, enter a 3 in the Wage Level Column

### **Step 3** – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in the employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O\*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.

For professional occupations:

- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.
- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations, use the education level for what ‘most of these occupations’ require or ‘these occupations usually require’ described in the O\*NET Job Zone for that occupation.

- If the education or training is more than what ‘most occupations require’ or the level that these occupations ‘usually’ require, enter a 1 on the worksheet in the Wage Level Column.
- If the education or training required on the prevailing wage determination request form is more than the level described by what ‘some may require,’ enter a 2 on the worksheet in the Wage Column.

**Step 4** – Complete the Special Skills, Knowledge, Work Activity or Tasks Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. Make note of machines, equipment, tools, or computer software used. Match those identified to the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples.
- If the employer’s requirements are not listed in those O\*NET sections, then the requirements shall be determined to be special skills. Enter a 1 on the worksheet in the Wage Level Column.

Note: A language requirement other than English in an employer’s job offer shall be considered a special skill for all occupations with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers.

**Step 5** – Complete the Certification and/or Licensure Section of the Worksheet

National or state licensure can be referred to as right-to-practice. Under licensure laws, it is illegal for a person to practice a profession without first meeting the national or state standards. Where national or state licensure is required for an individual to independently perform all of the duties encompassed by the occupation, such workers shall be considered to be performing work requiring skills at a level II, unless there are other requirements contained in the job offer or components thereof which require skills that are at a higher education or experience level than those required by the license warranting a determination of a higher wage level, or the employer provides documentation that the offer of employment is for a research fellow, a worker in training, or an internship.

- Review the job description and special requirements for certification or license requirements. In the unusual circumstance where an employer is requiring an occupational license not required by national or state licensing laws and regulation, enter a 1 on the worksheet in the Wage Level Column.

- If an employer's job offer requires an occupational certification, enter a 1 on the worksheet in the Wage Level Column. If more than one certification is required, enter a 2 on the worksheet in the Wage Level Column.

**Step 6 – Complete the Supervisory Duties Section of the Worksheet**

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement.
- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O\*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column. Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

**3. Foreign Labor Certification Data Center On-line Wage Library**

Use the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center website (<http://www.flcdatacenter.com/>) to select the prevailing wage for the occupation.

Use the OES Search Wizard to:

- Select the state and geographic area from the drop-down lists
- Select the occupation using the first 6 digits of the O\*NET-SOC code, OR
- Select the occupation from the drop-down list or enter the title in the key word search box
- Select a data year
- Select a data source
- Click on search



### **C. Wage Determinations Using Employer-Provided Wage Surveys**

If the job opportunity is in an occupation not covered by a collective bargaining agreement, the SWA shall also consider wage data that has been furnished by the employer; i.e., wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer. The employer can elect to use a current wage determination in the area under the Davis-Bacon or Service Contract Acts. An employer survey can be submitted either initially or after the SWA issues a prevailing wage determination. If the employer provides a wage survey after the SWA makes a prevailing wage determination, the new wage data from the employer-provided survey shall be considered a new prevailing wage request.

The use of such employer-provided wage data is an employer option. However, in each case where the employer submits wage data for consideration, it will be incumbent upon the employer to make a showing that the survey or other wage data meet the criteria outlined below. The employer must provide the SWA with enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow the SWA to make a determination with regard to the adequacy of the data provided and the statistical methodology used in conducting the survey.

#### **Criteria for Employer-Provided Surveys**

(1) The survey must be recent.

If the employer submits a published survey, that survey must:

- have been published within 24 months of the date of submission of the prevailing wage request;
- be the most current edition of the survey; and
- be based on data collected within 24 months of the date of the publication of the survey.

If the employer submits a survey conducted by the employer, the survey must be based on data collected within 24 months of the date of submission of the prevailing wage request.

(2) The wage data submitted by the employer must reflect the area of intended employment.

*Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment.

- If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place

- within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
- All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
  - The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.

The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB); however, ETA will continue to recognize the use of these area concepts as well as their replacements.

(3) The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. *Similarly employed* means jobs requiring substantially similar levels of skills.

(4) The wage data must have been collected across industries that employ workers in the occupation.

(5) The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.

(6) In all cases where an employer provides the SWA with wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data. It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the SWA cannot be taken into consideration in making a wage determination. If the SWA does not find the employer-provided wage survey acceptable, the SWA must notify the employer in writing and include the reasons that the survey was not found to be acceptable. Upon receiving this

determination, the employer may provide supplemental information, file a new request, or appeal the determination.

In issuing wage determinations the SWAs may be required to convert an hourly rate to a weekly, monthly or annual rate, or to convert a weekly, monthly or annual rate to an hourly rate. As a matter of policy, such conversions shall be based on 2,080 hours of work in a year.

It cannot be overemphasized that the nature of the employer is not a relevant factor in making prevailing wage determinations. As noted above, the relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job. Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40.

## **II. Procedures**

### **A. Filing**

Employers must request and receive the determination of the prevailing wage from the SWA having jurisdiction over the geographic area of intended employment. The SWA shall enter its wage determination on the form it uses and return the form to the employer. To enable SWAs to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations will be in writing. If the employer does not present sufficient information with its request – the particulars of the job offer or sufficient information about employer-provided wage data – the SWA shall request such additional information from the employer as may be necessary to make the determination.

Section 656.40 states: "The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer." To provide consistency and to facilitate accurate wage level determinations, SWA prevailing wage forms should request sufficient information about the employer's job offer, including: the employer's title for the job; a brief description of the job duties; the education, training, and experience requirements; special skills, licenses, or certifications required; supervisory duties; and any other information deemed necessary by the SWA for case processing or tracking. The name and address of the employer, contact person and telephone number, and the city or county of intended employment, if different from the employer's address, should be

indicated. Appendix G: Request for Prevailing Wage Determination – Terms and Definitions includes additional details and provides a checklist for SWA use.

656.10(f) requires that "supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification." Therefore, SWAs should include language on the Prevailing Wage Request Form such as: "The information provided is to be used to complete the Application for Permanent Employment Certification, Form ETA 9089, as appropriate. The employer is not required to submit this form with the application but is required to retain this document for a period of five years from the date of filing." If the State chooses to provide electronic copies, then it should add language to the effect that "It is recommended that a copy of this Prevailing Wage Determination form be printed and placed in the application file."

## **B. SWA Response**

The SWA's responses shall state the specific wage rate applicable to the employer's job opportunity and indicate the source of such information. The response shall also specify in bold letters that the rate is valid for filing applications and attestations for at least 90 days and not more than a year from the date of the determination.

Responses to requests for a prevailing wage determination should be sent to the employer or its representative in writing in a timely manner, preferably within 14 working days of receipt of the request. If the employer provides to the SWA its own published or privately-funded survey and requests SWA acceptance of the survey's use for prevailing wage purposes, responses to such requests should be sent to the employer or its representative in writing in a timely manner, preferably within 30 working days of the receipt of the request.

Lastly, it is important to note that §656.40(i) provides that a prevailing wage determination for labor certification purposes shall not permit an employer to pay a wage lower than that required under any other Federal, state, or local law. For example, if the wage rate in the OES or employer-provided survey is lower than the Federal, state, or local minimum wage, the response to the employer's request should indicate that the employer must offer at least the minimum wage provided by Federal, state, or local law, whichever is higher. Since the OES wage data or data in an employer-provided survey are collected in the year or years prior to the data being available to the SWA, this may occur in some instances.

## **C. SWA Responsibilities**

It is incumbent upon SWAs to organize the prevailing wage function and establish controls that will enable them to provide information regarding a particular prevailing wage determination, to answer questions if it is required in

an enforcement action conducted by the Department of Labor, and to adequately represent the certifying officer before the Board of Alien Labor Certification Appeals. Requests from employers for wage determinations shall be filed in writing with the organizational subcomponent of the SWA responsible for alien labor certification prevailing wage determinations. Only that component shall respond to requests for wage information for immigration purposes. A dated copy of the prevailing wage determination provided to the employer should be maintained by the SWA for two years. The relevant portions of an employer-provided survey must also be maintained with the determination for the requisite period.

#### **IV. Challenges to Prevailing Wage Determinations**

Employers who wish to challenge prevailing wage determinations must request a review of the determination in writing and within 30 days of the date of the determination. The request must be sent to the SWA that made the determination.

The employer's request for review must:

- clearly identify the prevailing wage determination for which review is sought,
- state the grounds for the request, and
- include all the materials submitted to the SWA up to the date that the determination was made.

Upon receipt of a request for review the SWA must:

- review the employer's request and accompanying documentation,
- add material that the employer may have omitted, and
- send a copy of the employer's appeal to the appropriate national processing center.

The director of the national processing center will determine which certifying officer (CO) will review the employer's appeal. The CO will review the appeal solely on the basis of the information upon which the prevailing wage determination was made. The CO may:

- affirm the prevailing wage determination,
- modify the prevailing wage determination, or
- remand the matter to the SWA for further action.

If an employer desires further review after a CO prevailing wage determination, a request for review by the Board of Alien Labor Certification Appeals must be made to the CO and in writing within 30 days of the date of the CO determination.

## Appendix A: OES Prevailing Wage Guidance

It is important to remember that wage levels are determined only after selecting the most relevant O\*NET-SOC occupational code classification. The selection of the O\*NET-SOC code should not be based solely on the title of the employer's job offer. The SWA should consider the particulars of the employer's job offer and compare the full description to the tasks, knowledge, and work activities generally associated with an O\*NET-SOC occupation to insure that the most relevant occupational code has been selected.

A step-by-step process for arriving at the appropriate wage level is described below. Points are awarded based on the comparison of an employer's job offer requirements to the general requirements for similar occupations. The points are entered on a worksheet then added to arrive at the wage level. SWAs should follow the step-by-step process while completing the worksheet.

All prevailing wage determinations start with a Level I determination. For that reason the Check Sheet has a 1 entered in the Wage Level Column.

### Step 1 – Enter the O\*NET Requirements on the Worksheet

- Use the O\*NET OnLine Find Occupations feature (<http://online.onetcenter.org>) to determine the appropriate O\*NET-SOC code based on the job title provided on the prevailing wage determination request form.
- Enter the job title from the employer's job offer into the Quick Search box and click on Go.
- Select the O\*NET occupation that most closely matches the employer's request from the resulting list of occupations.
- Review the Tasks, Knowledge, Work Activities, and Job Zone information contained in the O\*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O\*NET education and experience requirements on the Worksheet.

### Step 2 – Complete the Experience Section of the Worksheet

Compare the overall experience described in the O\*NET Job Zone to the years of experience on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer's experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short demonstration), enter a 0 in the Wage Level Column

- SVP of 2 (experience requirement of anything beyond short demonstration and up to 1 month), enter a 1 in the Wage Level Column
- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column
- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.
- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.
- Greater than the experience and SVP range, enter a 3 in the Wage Level Column

**Step 3** – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O\*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.

For professional occupations:

- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.
- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations use the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O\*NET Job Zone for that occupation.

- If the education or training is more than what 'most occupations require' or the level that these occupations 'usually' require, enter a 1 on the worksheet in the Wage Level Column.
- If the education or training required on the prevailing wage determination request form is more than the level described by what 'some may require,' enter a 2 on the worksheet in the Wage Column.

**Step 4** – Complete the Special Skills, Knowledge, Work Activity or Tasks Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. Make note of machines, equipment, tools, or computer software used. Match those identified to the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples.
- If the employer's requirements are not listed in those O\*NET sections, then the requirements shall be determined to be special skills. Enter a 1 on the worksheet in the Wage Level Column.

Note: A language requirement other than English in an employer's job offer shall be considered a special skill for all occupations with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers.

**Step 5** – Complete the Certification and/or Licensure Section of the Worksheet

National or state licensure can be referred to as right-to-practice. Under licensure laws, it is illegal for a person to practice a profession without first meeting the national or state standards. Where national or state licensure is required for an individual to independently perform all of the duties encompassed by the occupation, such workers shall be considered to be performing work requiring skills at a level II, unless there are other requirements contained in the job offer or components thereof which require skills that are at a higher education or experience level than those required by the license warranting a determination of a higher wage level, or the employer provides documentation that the offer of employment is for a research fellow, a worker in training, or an internship.

- Review the job description and special requirements for certification or license requirements. In the unusual circumstance where an employer is



- requiring an occupational license not required by national or state licensing laws and regulation, enter a 1 on the worksheet in the Wage Level Column.
- If an employer's job offer requires an occupational certification, enter a 1 on the worksheet in the Wage Level Column. If more than one certification is required, enter a 2 on the worksheet in the Wage Level Column.

**Step 6** – Complete the Supervisory Duties Section of the Worksheet

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement.
- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O\*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column. Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

Use the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center website (<http://www.flcdatacenter.com/>) to select the prevailing wage for the occupation.

Use the OES Search Wizard to:

- Select the state and geographic area from the drop-down lists
- Select the occupation using the first 6 digits of the O\*NET-SOC code, OR
- Select the occupation from the drop-down list or enter the title in the key word search box
- Select a data year
- Select a data source
- Click on search

### Appendix B: Check Sheet for Use in Determining OES Wage Level

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Instruction	Wage Level Result
Step 1. Requirements				1
Step 2. Experience	Enter the years of experience required by the employer	Job Zone (overall experience, job training)	If the years of required experience in the job order are greater than O*NET usual requirements, enter 1,2, or 3	
Step 3. Education	Enter the education or training required by the employer	Professional Occupations Appendix D  Other occupations - Job Zone (overall experience, job training, education)	If the years of required education in the job order are greater than the Categories for Professional Occupations OR O*NET usual requirements for non-professional occupations, enter 1 or 2	
Step 4. Special Skills, Knowledge, Work Activities or Tasks? (Y/N)	Note special requirements from the job description or other special requirements	O*NET Tasks, Knowledge, and Work Activities	If skills, knowledge, work activities, or tasks in the job are not listed in O*NET, enter 1, UNLESS they are required by a license or certification below	
Step 5. Licensure/Certification required (Y/N)	Note any certifications or licensure required in the job description or special requirements		Enter a 1 or 2 as indicated in the guidance	
Step 6. Supervisory duties (Y/N)	Note any supervisory duties indicated in the job duties or description		If Yes, enter a 1 – UNLESS the O*NET occupation is for a First-line Supervisor/Manager	
			<b>Sum:</b>	

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**Appendix C: Worksheet for Use in Determining OES Wage Level**

**Employer's Job Title:**

**O\*NET Title:**

**O\*NET Code:**

**Date:**

**Reviewer:**

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Comments	Wage Level Result
Step 1. Requirements				1
Step 2. Experience				
Step 3. Education				
Step 4. Special Skills, Knowledge, Work Activities or Tasks? (Y/N)				
Step 5. Licensure/Certification required (Y/N)				
Step 6. Supervisory duties (Y/N)				
			<b>Sum:</b>	

## Appendix D: Professional Occupations Education and Training Categories

Code	Definition
1	First professional degree. Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program.
2	Doctoral degree. Completion of the degree program usually requires at least 3 years of full-time equivalent academic work beyond the bachelor's degree.
3	Master's degree. Completion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree.
4	Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related non-managerial position.
5	Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1
29-1081.00	Podiatrists	1
29-1131.00	Veterinarians	1
15-1011.00	Computer and Information Scientists, Research	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2
19-2011.00	Astronomers	2
19-2012.00	Physicists	2
19-3031.00	Clinical, counseling, and school psychologists	2
19-3031.01	Educational Psychologists	2
19-3031.02	Clinical Psychologists	2
19-3031.03	Counseling Psychologists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2
25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1072.00	Nursing Instructors and Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
25-1191.00	Graduate Teaching Assistants	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-1041.00	Epidemiologists	3
19-2041.00	Environmental Scientists and Specialists, Including Health	3
19-2042.00	Geoscientists, Except Hydrologists and Geographers	3
19-2042.01	Geologists	3
19-2043.00	Hydrologists	3
19-3011.00	Economists	3
19-3021.00	Market Research Analysts	3
19-3022.00	Survey Researchers	3

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3
19-3091.02	Archeologists	3
19-3092.00	Geographers	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3
21-1011.00	Substance Abuse and Behavioral Disorder Counselors	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1013.00	Marriage and Family Therapists	3
21-1014.00	Mental Health Counselors	3
21-1015.00	Rehabilitation Counselors	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
21-1091.00	Health Educators	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
25-9031.00	Instructional Coordinators	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.00	Chief Executives	4
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-1021.00	General and Operations Managers	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-2031.00	Public Relations Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.00	Financial Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4



11-9011.00	Farm, Ranch, and Other Agricultural Managers	4
11-9011.01	Nursery and Greenhouse Managers	4
11-9011.02	Agricultural Crop Farm Managers	4
11-9011.03	Fish Hatchery Managers	4
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4
<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4
13-1011.00	Agents and Business Managers of Artists, Performers, and Athletes	4
13-1111.00	Management Analysts	4
15-2011.00	Actuaries	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
25-2023.00	Vocational Education Teachers, Middle School	4
25-2032.00	Vocational Education Teachers, Secondary School	4
27-1011.00	Art Directors	4
27-2012.00	Producers and Directors	4
27-2012.01	Producers	4
27-2012.02	Directors - Stage, Motion Pictures, Television, and Radio	4
27-2012.03	Program Directors	4
27-2012.04	Talent Directors	4
27-2012.05	Technical Directors/Managers	4
27-2041.00	Music Directors and Composers	4
27-2041.01	Music Directors	4
27-2041.02	Music Arrangers and Orchestrators	4
27-2041.03	Composers	4
27-3020.00	News Analysts, Reporters and Correspondents	4
27-3021.00	Broadcast News Analysts	4
27-3022.00	Reporters and Correspondents	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5

11-9151.00	Social and Community Service Managers	5
13-1071.00	Employment, Recruitment, and Placement Specialists	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-1121.00	Meeting and Convention Planners	5
13-2011.01	Accountants	5
<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
13-2011.02	Auditors	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2061.00	Financial Examiners	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.00	Network and Computer Systems Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2031.00	Biomedical Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5

17-2072.00	Electronics Engineers, Except Computer	5
17-2081.00	Environmental Engineers	5
17-2111.00	Health and Safety Engineers, Except Mining Safety Engineers and Inspectors	5
17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.00	Marine Engineers and Naval Architects	5
17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1010.00	Agricultural and Food Scientists	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1020.00	Biological Scientists	5
19-1020.01	Biologists	5
19-1023.00	Zoologists and Wildlife Biologists	5
19-1031.00	Conservation Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
21-1021.00	Child, Family, and School Social Workers	5
21-1022.00	Medical and Public Health Social Workers	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
23-2092.00	Law Clerks	5
25-2012.00	Kindergarten Teachers, Except Special Education	5

25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5
25-2043.00	Special Education Teachers, Secondary School	5
25-3011.00	Adult Literacy, Remedial Education, and GED Teachers and Instructors	5
25-4013.00	Museum Technicians and Conservators	5
25-9021.00	Farm and Home Management Advisors	5
27-1014.00	Multi-Media Artists and Animators	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5
<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
27-1024.00	Graphic Designers	5
27-1025.00	Interior Designers	5
27-1027.00	Set and Exhibit Designers	5
27-1027.01	Set Designers	5
27-1027.02	Exhibit Designers	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3043.00	Writers and Authors	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
29-2091.00	Orthotists and Prosthetists	5
29-9010.00	Occupational Health and Safety Specialists and Technicians	5
29-9091.00	Athletic Trainers	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5

53-2011.00 Airline Pilots, Copilots, and Flight Engineers

5

## **Appendix E: SPECIFIC VOCATIONAL PREPARATION (SVP)**

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

<i>Level</i>	<i>Time</i>
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

*Note: The levels of this scale are mutually exclusive and do not overlap.*

**Source:** *DICTIONARY OF OCCUPATIONAL TITLES (4th Ed., Rev. 1991) -- APPENDIX C*

## **Appendix F: Check Sheet for Employer-Provided Wage Surveys**

Employer-provided surveys cannot be considered if a union agreement covers the wage rates for the job opportunity where the worker will be employed.

Current wage determination in the area under the Davis-Bacon or Service Contract Acts can be submitted.

Published surveys or surveys conducted by employers can be submitted.

Documentation on the methodology of how the survey was conducted must be made available when submitting a survey for consideration.

### **Surveys Must Meet the Following Criteria**

- Data on which the wage is based must have been collected within 24 months of the publication date of the survey or, if the employer itself conducted the survey, within 24 months of the date the employer submits the survey to the SWA.
- A published survey must have been published within the last 24 months and it must be the most current edition of the survey with wage data that meet the criteria under this section.
- The survey data must represent similar jobs in the area of intended employment - the area within normal commuting distance of the place (address) of intended employment. The area surveyed can be expanded if the employer can show that there is an insufficient number of workers in the original area.
  - If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
  - All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
  - The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.
- The survey's job description must match the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purposes.



- The job description submitted on the request for acceptance of an employer-provided survey or other wage data will be used in determining the appropriate level of skill to be applied.
- Cross Industry Wage Data - The wage data must have been collected across industries that employ workers in the occupation.
- The survey should produce an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. If a mean is not available, the median can be used.

### **Suggested Survey Methodology**

The following are suggested actions that should be taken to conduct a valid wage survey:

Obtain a valid directory of employers in the area of intended employment (or expanded area) that would most likely employ the occupation to be surveyed.

Identify the industries in which the occupation is likely to be found. Use the industry/occupation matrix available from the state's labor market information agency.

Count (or estimate) the number of employers in the applicable area.

Decide how many employers must be contacted to produce usable wage results from at least three employers and at least 30 workers. Results for 30 workers is the minimum acceptable sample; for most occupations there should be wage data for many more workers.

Divide the number of employers to be contacted (the sample) by the number of employers in the applicable industry (the universe).

Use the number calculated in this last step to methodically select a random sample of employers to contact. For example, if the number is one-tenth, select every tenth employer in the universe or listing of employers in the industry.

Design a survey form which includes: the definition of the particular occupation (see Appendix G for Terms and Definitions), the number of workers in the occupation, and the wage rate.

Contact all the employers in the sample (call, write, or fax) to obtain the wage rate and employment data for the occupation surveyed.

Prepare a summary table of the data collected. There should be columns for: the employer, number of workers, the wage rate, and the product of multiplying the number of workers times the wage rate. There should be a row for each employer that responded to the survey. Add the data in the column showing the number of workers to get the total number of workers. Add the data in the column showing the product of workers times wage rate.

Calculate the weighed mean by dividing the total product by the total number of workers.

### **Survey Documentation**

Provide documentation to include the:

- Sample frame size and source, sample selection procedures, survey job descriptions, and related information to allow a determination with regard to the adequacy of the data provided and its adherence to the criteria; and
- Methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample).

### Appendix G: Prevailing Wage Determination Request Form Suggested Items to Include and Definitions

In addition to information deemed necessary by the SWA for case processing or tracking, SWA prevailing wage forms should request sufficient information about the employer's job offer to describe the job duties, the area of intended employment and the work experience, education, and skills required of the worker. The chart below offers suggestions for the terms to include on the form.

<b>Term</b>	<b>Definition</b>
Job Title	Title of the job in the offer of employment
Job description or duties	A description of the actual work to be performed in the job offered. The description should be written in non-technical terms and should include the machines, equipment, tools, or computer software used. The description should also include any supervisory duties to be performed.
Education and Training Level	The minimum diploma, degree, or training required for a worker to satisfactorily perform the job described.
Field of Study	The field of study for the training or education required.
Length of Education or Training	The minimum number of months or years of education or training required.
Experience	The minimum number of months or years of experience necessary for the worker to carry out the duties of the job offered.
Field of Experience	The type of experience necessary for the worker to carry out the duties of the job offered.
Special Skills or other requirements	A description of any job-related skills or other requirements needed to perform the job offered. Examples of specific skills include: type 45 words per minute, lift over 40 pounds, or proficiency in computer program languages and/or platforms. Examples of other requirements might be: live on premises, proficiency in a language other than English, Federal or state licenses, certifications such as MCSE or permits.
Supervision	The number of workers supervised by the worker in the job offered and the level of supervision that supervises the worker in the job offered.

**Employment and Training Administration**  
**Prevailing Wage Determination Policy Guidance**  
**Nonagricultural Immigration Programs**  
**Revised May 9, 2005**

The implementation of the H-1B Visa Reform Act and publication of the Labor Certification for the Permanent Employment of Aliens in the United States, or PERM, regulation have changed the prevailing wage determination process and necessitated the issuance of policy clarification and procedural guidance to the State Workforce Agencies (SWAs). The following guidance provides clarification to the step-by-step procedure for selecting the appropriate wage level for prevailing wage purposes and is designed to ensure national consistency in the prevailing wage determination process.

The requirements governing prevailing wage determinations used in the Foreign Labor Certification (FLC) programs have been recently revised by the H-1B Visa Reform Act. The major changes affecting prevailing wage determinations due to the reforms that became effective on March 8, 2005, include:

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

The PERM regulation published on December 27, 2004, with an effective date of March 28, 2005, has modified the prevailing wage determination process in three significant ways:

1. The use of Davis-Bacon or the McNamara-O'Hara Service Contract Act is no longer controlling for prevailing wage determinations, although an employer may request those sources be considered as an employer-provided wage source;
2. If an employer-provided survey does not contain an arithmetic mean, and only provides the median, the median wage figure can be used for determining the prevailing wage. Employers may continue to submit published surveys from public or private sources or employer-conducted surveys as long as the survey complies with acceptable standards. Although the Occupational Employment Statistics (OES) prevailing wage

Revised May 9, 2005

data will be provided for four skill levels, employer-provided surveys are not required to contain multiple levels; and

3. Employers that disagree with their prevailing wage determination are afforded only one opportunity to provide supplemental information to the SWA. Employers may choose to file a new request for a wage determination or request review by the Certifying Officer and the Board of Alien Labor Certification Appeals.

The PERM regulation lists professional O\*NET-SOC occupations and their designated education and training categories. Those education and training categories shall be used when considering the education and training generally required for performance in that occupation (see Appendix D). This guidance has been divided into several sections for easy reference:

## **I. Policy Guidance**

- A. Background
- B. Prevailing Wage Factors

## **II. Making Determinations**

- A. Wage Rates Covered by Collective Bargaining Agreements
- B. Wage Determinations Using BLS OES Wage Data
  1. OES Wage Levels
  2. Process for Determining Wage Level
  3. Foreign Labor Certification Data Center On-line Wage Library
- C. Wage Determinations Using Employer-Provided Wage Surveys

## **III. Procedures**

- A. Filing
- B. SWA Response
- C. SWA Responsibilities

## **IV. Challenges to SWA Determinations**

### **Appendices**

- A. OES Prevailing Wage Guidance
- B. Check Sheet for Use in Determining OES Wage Level
- C. Worksheet for Use in Determining OES Wage Level
- D. Professional Occupations - Education and Training Categories
- E. Specific Vocational Preparation (SVP)
- F. Check Sheet for Employer-Provided Wage Surveys
- G. Prevailing Wage Determination Request Form

## **I. Policy Guidance**

### **A. Background**

The Department of Labor, Bureau of Labor Statistics (BLS) has provided wage data collected under the Occupational Employment Statistics (OES) Program for use in the Foreign Labor Certification process since 1998. Occupational wage data collected under that program is now available at the four levels required by the H-1B Visa Reform Act for state and sub-state geographic areas for the purpose of making prevailing wage determinations. The wage data is now available on the Foreign Labor Certification Data Center On-Line Wage Library (OWL), found on the Division's website at <http://www.flcdatacenter.com/>.

Since September 1999, the Standard Occupational Classification (SOC) has been used by the OES program to classify occupational wage information. The SOC provides a common language for categorizing occupations. The SOC also serves as the framework for information being gathered through the Department of Labor's Occupational Information Network (O\*NET®) which supersedes the Dictionary of Occupational Titles (DOT) as the resource to be consulted for occupational information for the Foreign Labor Certification process. Developed by the Department of Labor, the O\*NET system provides the general public information on skills, abilities, knowledge, tasks, work activities, and the specific vocational preparation levels associated with occupations. The O\*NET information can be found at <http://online.onetcenter.org>. Wage data from the OES survey and occupational information in O\*NET are both classified by the SOC, reducing the need to use crosswalks to connect wages to occupational requirements.

### **B. Prevailing Wage Factors**

The regulatory scheme at 20 CFR 656.40, effective March 28, 2005, must be followed in determining the prevailing wage. The same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1B or H-1B1 professionals in specialty occupations or as fashion models, and the H-2B temporary nonagricultural labor certification program.

The step-by-step process described in Section II. B. represents a new approach for determining the appropriate prevailing wage. All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity).

Revised May 9, 2005

Under § 656.40, the relevant factors in determining a prevailing wage rate are the nature of the job offer, the area of intended employment, and jobs duties for workers that are similarly employed.

*"Nature of the Job Offer"*

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. SWAs can identify the appropriate O\*NET occupation using O\*NET OnLine (<http://online.onetcenter.org/>) and entering the employer's job title to search for the appropriate O\*NET-SOC occupation and code.

If the employer's prevailing wage request contains only a code from the Dictionary of Occupational Titles (DOT) rather than a job title, the DOT to O\*NET-SOC crosswalk found on the On-Line Wage Library shall be used to identify the related O\*NET-SOC code.

If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

*"Area of Intended Employment"*

The definition of "area of intended employment" at 20 CFR 656.3 states: *Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. The On-Line Wage Library has been developed to account for these requirements. A more detailed explanation is provided in section II C. 2. for use in making prevailing wage determinations that are based on employer-provided surveys.

*"Similarly Employed"*

Section 656.40 defines "*similarly employed*" as having:

- substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, it means:
- jobs requiring a substantially similar level of skill within the area of intended employment; or

Revised May 9, 2005

- substantially comparable jobs in the occupational category as employers outside of the area of intended employment if there are no substantially comparable jobs in the area of intended employment.

In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of:

- an institution of higher education;
- an affiliated or related nonprofit entity;
- a nonprofit research organization; or
- a governmental research organization;

the prevailing wage level should take into account the wage levels of employees only at such institutions and organizations found in the area of intended employment (see General Administration Letter No. 1-00).

## II. Making Determinations

The SWA shall make prevailing wage determinations as follows:

- A. If the SWA determines the job opportunity is covered by a collective bargaining agreement negotiated at arm's length and a wage rate has been negotiated under the agreement as evidenced by information provided by the employer, that wage rate shall be controlling.
- B. In the absence of a wage determined under a collective bargaining agreement, SWAs are to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program.
- C. If in the absence of a wage rate determined under a collective bargaining agreement, the employer provides the SWA with a survey, whether public or private, which meets the requirements of the regulations, that rate shall be used by the SWA as the prevailing wage determination in response to that particular request. In addition, an employer can elect to use a current wage rate in the area of intended employment under the Davis-Bacon or the McNamara Service Contract Acts.

The SWA shall specify the validity period of the prevailing wage which shall not be ***less than 90 days or more than 1 year*** from the determination date (see Federal Register Vol. 65 No. 245 Page 80196). Under no circumstances may the SWA charge a fee for making or reviewing a prevailing wage determination.



## **A. Wage Rates Covered by Collective Bargaining Agreements**

If the job opportunity is in an occupation covered by a collective bargaining agreement (CBA) negotiated between a union and the employer, the wage rate in the agreement shall be considered the prevailing wage in making prevailing wage determinations.

If the job opportunity is for a professional athlete and is covered by a sports league's rules or regulations, the wage rate set forth in those rules or regulations including union agreements shall be considered the prevailing wage.

## **B. Wage Determinations Using BLS OES Wage Data**

If the job offer is for an occupation not covered by a collective bargaining agreement and the employer does not choose to provide a survey or request use of a current wage determination in the area under the Davis-Bacon or McNamara-O'Hara Service Contract Acts, the wage component of the BLS OES survey shall be used to determine the prevailing wage for an employer's job offer. The OES survey is a national survey managed by the Bureau of Labor Statistics which provides a large enough sample to allow BLS to determine a prevailing wage for most occupations in every area of intended employment in the United States.

The OES wage data is made available at the state and sub-state areas so the SWA can select the geographic area of intended employment. The On-Line Wage Library has been developed to account for these requirements. The SWA should select the state and sub-state area that represents the area for the employer's job offer.

### **1. OES Wage Levels**

The new requirements specify that determinations using a government survey shall be made available for each occupation at 4 levels of wages commensurate with experience, education, and the level of supervision. The SWA shall make a prevailing wage determination selecting one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation (education, training, and experience) generally required for acceptable performance in that occupation.

It is important to remember that wage levels are determined only after selecting the most relevant O\*NET-SOC occupational code classification. The selection of the O\*NET-SOC code should not be based solely on the title of the employer's job offer. The SWA should consider the particulars of the employer's job offer and compare the full description to the tasks, knowledge, and work activities

Revised May 9, 2005

generally associated with an O\*NET-SOC occupation to insure the most relevant occupational code has been selected.

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only 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. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

## 2. Process for Determining Wage Level

The SWAs shall use O\*NET information to identify the tasks, work activities, knowledge, and skills generally required for performance in an occupation. A comparison between the particulars of the employer's job offer to the requirements for similar (O\*NET) occupations shall be used to determine the appropriate wage level. It is important, therefore, that the job description included in an employer's request for a prevailing wage determination include sufficient information to determine the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. SWAs may need to contact employers for additional information to obtain this information, if needed.

Information contained in the O\*NET Job Zones provides guidance in determining whether the job offer is for an entry level, qualified, experienced, or fully competent employee for making the determination of wage level. Employer requirements in a job offer that are at the upper range of the requirements and preparation generally required for performance in an occupation are indicators that a prevailing wage determination at a higher level should be considered. The O\*NET Job Zones were developed to transition from the Specific Vocational Preparation (SVP), as shown in the Dictionary of Occupational Titles (DOT), to measures of experience, education, and job training included in the O\*NET database. A listing of SVPs and their definitions can be found in Appendix E of this document.

A step-by-step process for arriving at the appropriate wage level is described below. Points are awarded based on the comparison of an employer's job offer requirements to the general requirements for similar occupations. The points are entered on a worksheet then added to arrive at the wage level. SWAs should follow the step-by-step process while completing the worksheet.

The appendices section of this document provides several guides that can be used for reference during the process:

Appendix A: OES Prevailing Wage Guidance repeats the step-by-step process and can be used as a reference guide.

Appendix B: Check Sheet for Use in Determining OES Wage Level has been provided to track the process.

Appendix C: Worksheet for Use in Determining OES Wage Level provides an example of a worksheet that SWAs might use for determining the appropriate wage level.

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for

experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O\*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

All prevailing wage determinations start with a Level I determination; therefore, the check sheet and worksheet have a 1 entered in the Wage Level Column.

### **Step 1 – Enter the O\*NET Requirements on the Worksheet**

- Use the O\*NET OnLine ‘Find Occupations’ feature (<http://online.onetcenter.org>) to determine the appropriate O\*NET-SOC code based on the job title provided on the prevailing wage determination request form.
- Enter the job title from the employer’s job offer into the Quick Search box and click on Go.
- Select the O\*NET occupation that most closely matches the employer’s request from the resulting list of occupations.
- Review the Tasks, Knowledge, Work Activities, and Job Zone information contained in the O\*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O\*NET education and experience requirements on the Worksheet.

### **Step 2 – Complete the Experience Section of the Worksheet**

Compare the overall experience described in the O\*NET Job Zone to the years of experience required by the employer on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer’s experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short duration), enter a 0 in the Wage Level Column.
- SVP of 2 (experience requirement of anything beyond short duration and up to 1 month), enter a 1 in the Wage Level Column.

Revised May 9, 2005

- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column.
- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column.

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- At or below the level of experience and SVP range, make no entry in the Wage Level Column.
- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.
- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.
- Greater than the experience and SVP range, enter a 3 in the Wage Level Column.

Points should be added for the amount of experience only if the required work experience is above the starting point of the O\*NET job zone range. ***Education required for the job is addressed in Step 3 of the worksheet, and therefore the years of education required should not be considered in Step 2. However, if education is considered as an equivalent amount of experience in Step 2, it should not also be considered in Step 3.***

### **Step 3 – Complete the Education Section of the Worksheet**

Compare the education requirement generally required for an occupation to the education requirement in the employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O\*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the PERM regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.

For professional occupations:

- If the education required on the prevailing wage determination request form is equal to or less than the usual education contained in Appendix D, make no entry in the Wage Level Column.
- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.
- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations, use the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O\*NET Job Zone for that occupation.

- If the education or training is equal to or less than what 'most occupations require' or the level that these occupations 'usually' require, make no entry in the Wage Level Column.
- If the education or training is more than what 'most occupations require' or the level that these occupations 'usually' require, enter a 1 on the worksheet in the Wage Level Column.
- If the education or training required on the prevailing wage determination request form is more than the level described by what 'some may require,' enter a 2 on the worksheet in the Wage Column.

***Experience required for the job is addressed in Step 2 of the worksheet, and therefore the years of experience required should not be considered in Step 3.***

**Step 4** – Complete the Special Skills and Other Requirements Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. An employer's requirement for an occupational license and/or certification should be evaluated to determine if they are indicators of a requirement for special skills

warranting the award of a point or points on the worksheet. They may not necessarily be such an indicator.

- Make note of machines, equipment, tools, or computer software used. Consider how the employer's requirements compare to the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples. Consider whether the employer's requirements indicate the need for skills beyond those of an entry-level worker.
- In situations where the employer's requirements are not listed in the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a specific skill not listed in the O\*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O\*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

**Note:** A language requirement other than English in an employer's job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers, and a point should be entered on the worksheet.

It is recognized, however, that there may be circumstances where a foreign language is required for the job, but that requirement does not sufficiently increase the seniority and complexity of the position such that a point must be added for the foreign language requirement (e.g. Specialty Cooks).

- If the employer's job opportunity requires the possession of a license or certification, the SWA must give careful consideration to the occupation in question and the education, training, and experience requirements of the license or certification to evaluate whether possession of a license or certification is an indicator that the offer of employment is for an experienced worker.
- An employer's requirement for the possession of an occupational license or certification does not constitute a situation where a point must automatically be awarded. The SWA should look at the employer's job description and stated requirements to evaluate, along with other factors, whether the position is closely supervised, involves only moderately complex duties, and allows limited exercise of independent judgment. If the license or certification is a normal requirement to perform the job duties as an entry level worker, no point should be added on the worksheet in the Wage Column, e.g., attorney, teacher, registered nurse.

- Some occupations have more than one license and the requirements of the license provide an indicator of the level of independent judgment and complexity of tasks required of the licensee, e.g., Journeyman Plumber or Master Plumber. The SWA must consider the education, training, and experience requirements of the license or certification to determine when points should be entered on the worksheet in the Wage Column.

If a substantial amount of work experience, education, or training is required to obtain a license or certification and this results in the total amount of necessary work experience being on the high end of the O\*NET job zone range, **a point could be added either in Step 2 for the work experience, or in Step 3 for the education or training, or in Step 4 for the license. A point or points should not be added in every step.**

**Step 5** – Complete the Supervisory Duties Section of the Worksheet

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement; and
- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O\*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column.

**Note:** Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance, an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level because the wages for supervisory occupations already account for the supervision of employees. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

The process described above should not be implemented in an automated fashion. The SWA must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of



Revised May 9, 2005

tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.

### **3. Foreign Labor Certification Data Center On-line Wage Library**

Use the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center website (<http://www.flcdatcenter.com/>) to select the prevailing wage for the occupation.

Use the OES Search Wizard to:

- Select the state and geographic area from the drop-down lists.
- Select the occupation using the first 6 digits of the O\*NET-SOC code, OR
- Select the occupation from the drop-down list or enter the title in the key word search box.
- Select a data year.
- Select a data source.
- Click on search.

### **C. Wage Determinations Using Employer-Provided Wage Surveys**

If the job opportunity is in an occupation not covered by a collective bargaining agreement, the SWA shall also consider wage data that has been furnished by the employer; i.e., wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer. The employer can elect to use a current wage determination in the area of intended employment under the Davis-Bacon or McNamara-O'Hara Service Contract Acts. An employer survey can be submitted either initially or after the SWA issues a prevailing wage determination. If the employer provides a wage survey after the SWA makes a prevailing wage determination, the new wage data from the employer-provided survey shall be considered a new prevailing wage request.

The use of such employer-provided wage data is an employer option. However, in each case where the employer submits wage data for consideration, it will be incumbent upon the employer to make a written showing that the survey or other wage data meet the criteria outlined below. The employer must provide the SWA with enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow the SWA to make a determination with regard to the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey.

## Criteria for Employer-Provided Surveys

(1) The survey must be recent.

If the employer submits a published survey, that survey must:

- have been published within 24 months of the date of submission of the prevailing wage request;
- be the most current edition of the survey; and
- be based on data collected within 24 months of the date of the publication of the survey.

If the employer submits a survey conducted by the employer, the survey must be based on data collected within 24 months of the date of submission of the prevailing wage request.

(2) The wage data submitted by the employer must reflect the area of intended employment.

*Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment.

- If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
- All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
- The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.

The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB); however, ETA will continue to recognize the use of these area concepts as well as their replacements.

(3) The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. *Similarly employed* means jobs requiring substantially similar levels of skills.

Revised May 9, 2005

(4) The wage data must have been collected across industries that employ workers in the occupation.

(5) The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.

(6) In all cases where an employer provides the SWA with wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data. It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the SWA will not be taken into consideration in making a wage determination. If the SWA does not find the employer-provided wage survey acceptable, the SWA must notify the employer in writing and include the reasons the survey was not found to be acceptable. Upon receiving this determination, the employer may provide supplemental information, file a new request, or appeal the determination.

In issuing wage determinations, the SWAs may be required to convert an hourly rate to a weekly, monthly, or annual rate, or to convert a weekly, monthly, or annual rate to an hourly rate. As a matter of policy, such conversions shall be based on 2,080 hours of work in a year.

Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40. As noted above, the relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job.

### **III. Procedures**

#### **A. Filing**

Employers must request and receive the determination of the prevailing wage from the SWA having jurisdiction over the geographic area of intended employment. The SWA shall enter its wage determination on the form it uses and return the form to the employer. To enable SWAs to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations will be in writing. If the employer does not present sufficient information with its request – the particulars of the job offer or sufficient information about employer-provided wage data – the SWA shall request such additional information from the employer as may be necessary to make the determination.

Section 656.40 states: "The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer." To provide consistency and to facilitate accurate wage level determinations, SWA prevailing wage forms should request sufficient information about the employer's job offer, including: the employer's title for the job; a brief description of the job duties; the education, training, and experience requirements; special skills, licenses, or certifications required; supervisory duties; and any other information deemed necessary by the SWA for case processing or tracking. The name and address of the employer, contact person and telephone number, and the city or county of intended employment, if different from the employer's address, should be indicated. Appendix G: Request for Prevailing Wage Determination – Terms and Definitions includes additional details and provides a checklist for SWA use.

656.10(f) requires that "supporting documentation must be retained by the employer for 5 years from the date of filing the Application for Permanent Employment Certification." Therefore, SWAs should include language on the Prevailing Wage Request Form such as: "The information provided is to be used to complete the Application for Permanent Employment Certification, Form ETA 9089, as appropriate. The employer is not required to submit this form with the application but is required to retain this document for a period of five years from the date of filing." If the state chooses to provide electronic copies, then it should add language to the effect that: "It is recommended that a copy of this Prevailing Wage Determination form be printed and placed in the application file."

#### **B. SWA Response**

The SWA's responses shall state the specific wage rate applicable to the employer's job opportunity and indicate the source of such information. The response shall also specify in bold letters that the rate is valid for filing

Revised May 9, 2005

applications and attestations for at least 90 days and not more than one year from the date of the determination.

Responses to requests for a prevailing wage determination should be sent to the employer or its representative in writing in a timely manner, preferably within 14 working days of receipt of the request. If the employer provides to the SWA its own published or privately-funded survey and requests SWA acceptance of the survey's use for prevailing wage purposes, responses to such requests should be sent to the employer or its representative in writing in a timely manner, preferably within 30 working days of the receipt of the request.

Lastly, it is important to note that §656.40(i) provides that a prevailing wage determination for labor certification purposes shall not permit an employer to pay a wage lower than that required under any other Federal, state, or local law. For example, if the wage rate in the OES or employer-provided survey is lower than the Federal, state, or local minimum wage, the response to the employer's request should indicate that the employer must offer and pay at least the minimum wage provided by Federal, state, or local law, whichever is higher. Since the OES wage data or data in an employer-provided survey are collected in the year or years prior to the data being available to the SWA, this may occur in some instances.

### **C. SWA Responsibilities**

It is incumbent upon SWAs to organize the prevailing wage function and establish controls that will enable them to provide information regarding a particular prevailing wage determination, to answer questions if it is required in an enforcement action conducted by the Department of Labor, and to provide information to the certifying officer to be used before the Board of Alien Labor Certification Appeals. Requests from employers for wage determinations shall be filed in writing with the organizational subcomponent of the SWA responsible for alien labor certification prevailing wage determinations. Only that component should respond to requests for wage information for immigration purposes. A dated copy of the prevailing wage determination provided to the employer should be maintained by the SWA for two years. The relevant portions of an employer-provided survey must also be maintained with the determination for the requisite period.

## **IV. Challenges to Prevailing Wage Determinations**

Employers who wish to challenge prevailing wage determinations must request a review of the determination in writing and within 30 days of the date of the determination. The request must be sent to the SWA that made the determination.

The employer's request for review must:

- clearly identify the prevailing wage determination for which review is sought;
- state the grounds for the request; and
- include all the materials submitted to the SWA up to the date that the determination was made.

Upon receipt of a request for review the SWA must:

- review the employer's request and accompanying documentation;
- add material that the employer may have omitted; and
- send a copy of the employer's appeal to the appropriate national processing center, e.g. Atlanta or Chicago.

The director of the national processing center will determine which certifying officer (CO) will review the employer's appeal. The CO will review the appeal solely on the basis of the information upon which the prevailing wage determination was made. The CO may:

- affirm the prevailing wage determination;
- modify the prevailing wage determination; or
- remand the matter to the SWA for further action.

If an employer desires further review after a CO's prevailing wage determination, a request for review by the Board of Alien Labor Certification Appeals must be made to the CO and in writing within 30 days of the date of the CO determination.

## Appendix A: OES Prevailing Wage Guidance

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O\*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

All prevailing wage determinations start with a Level I determination; therefore, the check sheet and worksheet have a 1 entered in the Wage Level Column.

### Step 1 – Enter the O\*NET Requirements on the Worksheet

- Use the O\*NET OnLine 'Find Occupations' feature (<http://online.onetcenter.org>) to determine the appropriate O\*NET-SOC code based on the job title provided on the prevailing wage determination request form.
- Enter the job title from the employer's job offer into the Quick Search box and click on Go.
- Select the O\*NET occupation that most closely matches the employer's request from the resulting list of occupations.
- Review the Tasks, Knowledge, Work Activities, and Job Zone information contained in the O\*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O\*NET education and experience requirements on the Worksheet.

### Step 2 – Complete the Experience Section of the Worksheet

Compare the overall experience described in the O\*NET Job Zone to the years of experience required by the employer on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer's experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short duration), enter a 0 in the Wage Level Column.
- SVP of 2 (experience requirement of anything beyond short duration and up to 1 month), enter a 1 in the Wage Level Column.

- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column.
- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column.

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- At or below the level of experience and SVP range, make no entry in the Wage Level Column.
- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.
- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.
- Greater than the experience and SVP range, enter a 3 in the Wage Level Column.

Points should be added for the amount of experience only if the required work experience is above the starting point of the O\*NET job zone range. **Education required for the job is addressed in Step 3 of the worksheet, and therefore the years of education required should not be considered in Step 2. However, if education is considered as an equivalent amount of experience in Step 2, it should not also be considered in Step 3.**

### **Step 3** – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in the employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O\*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the PERM regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.



For professional occupations:

- If the education required on the prevailing wage determination request form is equal to or less than the usual education contained in Appendix D, make no entry in the Wage Level Column.
- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.
- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations, use the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O\*NET Job Zone for that occupation.

- If the education or training is equal to or less than what 'most occupations require' or the level that these occupations 'usually' require, make no entry in the Wage Level Column.
- If the education or training is more than what 'most occupations require' or the level that these occupations 'usually' require, enter a 1 on the worksheet in the Wage Level Column.
- If the education or training required on the prevailing wage determination request form is more than the level described by what 'some may require,' enter a 2 on the worksheet in the Wage Column.

***Experience required for the job is addressed in Step 2 of the worksheet, and therefore the years of experience required should not be considered in Step 3.***

**Step 4** – Complete the Special Skills and Other Requirements Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. An employer's requirement for an occupational license and/or certification should be evaluated to determine if they are indicators of a requirement for special skills warranting the award of a point or points on the worksheet. They may not necessarily be such an indicator.

- Make note of machines, equipment, tools, or computer software used. Consider how the employer's requirements compare to the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples. Consider whether the employer's requirements indicate the need for skills beyond those of an entry-level worker.
- In situations where the employer's requirements are not listed in the O\*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a specific skill not listed in the O\*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O\*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

**Note:** A language requirement other than English in an employer's job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers, and a point should be entered on the worksheet.

It is recognized, however, that there may be circumstances where a foreign language is required for the job, but that requirement does not sufficiently increase the seniority and complexity of the position such that a point must be added for the foreign language requirement (e.g. Specialty Cooks).

- If the employer's job opportunity requires the possession of a license or certification, the SWA must give careful consideration to the occupation in question and the education, training, and experience requirements of the license or certification to evaluate whether possession of a license or certification is an indicator that the offer of employment is for an experienced worker.
- An employer's requirement for the possession of an occupational license or certification does not constitute a situation where a point must automatically be awarded. The SWA should look at the employer's job description and stated requirements to evaluate, along with other factors, whether the position is closely supervised, involves only moderately complex duties, and allows limited exercise of independent judgment. If the license or certification is a normal requirement to perform the job duties as an entry level worker, no point should be added on the worksheet in the Wage Column, e.g., attorney, teacher, registered nurse.
- Some occupations have more than one license and the requirements of the license provide an indicator of the level of independent judgment and complexity of tasks required of the licensee, e.g. Journeyman Plumber or Master Plumber. The SWA must consider the education, training and

experience requirements of the license or certification to determine when points should be entered on the worksheet in the Wage Column.

If a substantial amount of work experience, education or training is required to obtain a license or certification and this results in the total amount of necessary work experience being on the high end of the O\*NET job zone range, **a point could be added either in Step 2 for the work experience, or Step 3 for the education or training, or in Step 4 for the license. A point or points should not be added in every step.**

**Step 5** – Complete the Supervisory Duties Section of the Worksheet

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement; and
- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O\*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column.

**Note:** Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance, an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level because the wages for supervisory occupations already account for the supervision of employees. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

The process described above should not be implemented in an automated fashion. The SWA must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.

**Appendix B: Check Sheet for Use in Determining OES Wage Level**

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Instruction	Wage Level Result
Step 1. Requirements				1
Step 2. Experience	Enter the years of experience required by the employer.	Job Zone (overall experience, job training)	If the years of required experience in the job order are greater than the low end of the O*NET usual requirements, enter 1, 2, or 3.	
Step 3. Education	Enter the education or training required by the employer.	Professional Occupations Appendix D  Other occupations - Job Zone (overall experience, job training, education)	If the years of required education in the job order are greater than the Categories for Professional Occupations OR O*NET usual requirements for non-professional occupations, enter 1 or 2.	
Step 4. Special Skills (Y/N)	Note special requirements from the job description or other special requirements including licensure or certification.	O*NET Tasks, Knowledge, and Work Activities.  National or state licensing/certification requirements.	Consider if skills, knowledge, work activities, tasks, licensure or certification requirements indicate a higher level of complexity or decision-making. Enter 1 or 2 as appropriate.	
Step 5. Supervisory duties (Y/N)	Note any supervisory duties indicated in the job duties or description.		If Yes, enter a 1 – UNLESS supervision is generally required by the O*NET occupation.	
			<b>Sum:</b>	

**Appendix C: Worksheet for Use in Determining OES Wage Level**

**Employer's Job Title:**

**O\*NET Title:**

**Date:**

**O\*NET Code:**

**Reviewer:**

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Comments	Wage Level Result
Step 1. Requirements				1
Step 2. Experience				
Step 3. Education				
Step 4. Special Skills and Other Requirements? (Y/N)				
Step 5. Supervisory duties (Y/N)				
			<b>Sum:</b>	

## Appendix D: Professional Occupations Education and Training Categories

Code	Definition
1	First professional degree. Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program.
2	Doctoral degree. Completion of the degree program usually requires at least 3 years of full-time equivalent academic work beyond the bachelor's degree.
3	Master's degree. Completion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree.
4	Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related non-managerial position.
5	Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
29-1081.00	Podiatrists	1
29-1131.00	Veterinarians	1
15-1011.00	Computer and Information Scientists, Research	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2
19-2011.00	Astronomers	2
19-2012.00	Physicists	2
19-3031.00	Clinical, counseling, and school psychologists	2
19-3031.01	Educational Psychologists	2
19-3031.02	Clinical Psychologists	2
19-3031.03	Counseling Psychologists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2
25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1072.00	Nursing Instructors and Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
25-1191.00	Graduate Teaching Assistants	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-1041.00	Epidemiologists	3
19-2041.00	Environmental Scientists and Specialists, Including Health	3
19-2042.00	Geoscientists, Except Hydrologists and Geographers	3
19-2042.01	Geologists	3
19-2043.00	Hydrologists	3
19-3011.00	Economists	3
19-3021.00	Market Research Analysts	3
19-3022.00	Survey Researchers	3
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3
19-3091.02	Archeologists	3

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
19-3092.00	Geographers	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3
21-1011.00	Substance Abuse and Behavioral Disorder Counselors	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1013.00	Marriage and Family Therapists	3
21-1014.00	Mental Health Counselors	3
21-1015.00	Rehabilitation Counselors	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
21-1091.00	Health Educators	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
25-9031.00	Instructional Coordinators	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.00	Chief Executives	4
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-1021.00	General and Operations Managers	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-2031.00	Public Relations Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.00	Financial Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4
11-9011.00	Farm, Ranch, and Other Agricultural Managers	4
11-9011.01	Nursery and Greenhouse Managers	4
11-9011.02	Agricultural Crop Farm Managers	4
11-9011.03	Fish Hatchery Managers	4
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4



<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4
13-1011.00	Agents and Business Managers of Artists, Performers, and Athletes	4
13-1111.00	Management Analysts	4
15-2011.00	Actuaries	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
25-2023.00	Vocational Education Teachers, Middle School	4
25-2032.00	Vocational Education Teachers, Secondary School	4
27-1011.00	Art Directors	4
27-2012.00	Producers and Directors	4
27-2012.01	Producers	4
27-2012.02	Directors - Stage, Motion Pictures, Television, and Radio	4
27-2012.03	Program Directors	4
27-2012.04	Talent Directors	4
27-2012.05	Technical Directors/Managers	4
27-2041.00	Music Directors and Composers	4
27-2041.01	Music Directors	4
27-2041.02	Music Arrangers and Orchestrators	4
27-2041.03	Composers	4
27-3020.00	News Analysts, Reporters and Correspondents	4
27-3021.00	Broadcast News Analysts	4
27-3022.00	Reporters and Correspondents	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5
11-9151.00	Social and Community Service Managers	5
13-1071.00	Employment, Recruitment, and Placement Specialists	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-1121.00	Meeting and Convention Planners	5
13-2011.01	Accountants	5

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
13-2011.02	Auditors	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2061.00	Financial Examiners	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.00	Network and Computer Systems Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2031.00	Biomedical Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5
17-2072.00	Electronics Engineers, Except Computer	5
17-2081.00	Environmental Engineers	5
17-2111.00	Health and Safety Engineers, Except Mining Safety Engineers and Inspectors	5
17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.00	Marine Engineers and Naval Architects	5
17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1010.00	Agricultural and Food Scientists	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1020.00	Biological Scientists	5
19-1020.01	Biologists	5
19-1023.00	Zoologists and Wildlife Biologists	5
19-1031.00	Conservation Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
21-1021.00	Child, Family, and School Social Workers	5
21-1022.00	Medical and Public Health Social Workers	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
23-2092.00	Law Clerks	5
25-2012.00	Kindergarten Teachers, Except Special Education	5
25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5
25-2043.00	Special Education Teachers, Secondary School	5
25-3011.00	Adult Literacy, Remedial Education, and GED Teachers and Instructors	5
25-4013.00	Museum Technicians and Conservators	5
25-9021.00	Farm and Home Management Advisors	5
27-1014.00	Multi-Media Artists and Animators	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5

<b>O*NET-SOC Code</b>	<b>O*NET-SOC Title</b>	<b>Education &amp; Training Category Code</b>
27-1024.00	Graphic Designers	5
27-1025.00	Interior Designers	5
27-1027.00	Set and Exhibit Designers	5
27-1027.01	Set Designers	5
27-1027.02	Exhibit Designers	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3043.00	Writers and Authors	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
29-2091.00	Orthotists and Prosthetists	5
29-9010.00	Occupational Health and Safety Specialists and Technicians	5
29-9091.00	Athletic Trainers	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5
53-2011.00	Airline Pilots, Copilots, and Flight Engineers	5

## Appendix E: SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

<i>Level</i>	<i>Time</i>
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

*Note: The levels of this scale are mutually exclusive and do not overlap.*

**Source:** *DICTIONARY OF OCCUPATIONAL TITLES (4th Ed., Rev. 1991) -- APPENDIX C*

## **Appendix F: Check Sheet for Employer-Provided Wage Surveys**

Employer-provided surveys cannot be considered if a union agreement covers the wage rates for the job opportunity where the worker will be employed.

Current wage determination in the area under the Davis-Bacon or McNamara-O'Hara Service Contract Acts can be submitted.

Published surveys or surveys conducted by employers can be submitted.

Written documentation on the methodology of how the survey was conducted and the validity of the statistical methodology used to determine the wage must be made available when submitting a survey for consideration.

### **Surveys Must Meet the Following Criteria**

- Data on which the wage is based must have been collected within 24 months of the publication date of the survey or, if the employer itself conducted the survey, within 24 months of the date the employer submits the survey to the SWA.
- A published survey must have been published within 24 months of the date of submission and it must be the most current edition of the survey with wage data that meet the criteria under this section.
- The survey data must represent similar jobs in the area of intended employment - the area within normal commuting distance of the place (address) of intended employment. The area surveyed can be expanded if the employer can show that there are an insufficient number of workers in the original area.
  - If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
  - All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
  - The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.
- The survey's job description must match the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purposes.
  - The job description submitted on the request for acceptance of an employer-provided survey or other wage data will be used in determining the appropriate level of skill to be applied.

- Cross Industry Wage Data - The wage data must have been collected across industries that employ workers in the occupation.
- The survey should produce an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. If a mean is not available, the median can be used.
- The survey must identify a statistically valid methodology that was used to collect the data.

### **Suggested Survey Methodology**

The following are suggested actions that should be taken to conduct a valid wage survey:

Obtain a valid directory of employers in the area of intended employment (or expanded area) that would most likely employ the occupation to be surveyed.

Identify the industries in which the occupation is likely to be found. Use the industry/occupation matrix available from the state's labor market information agency.

Count (or estimate) the number of employers in the applicable area.

Decide how many employers must be contacted to produce usable wage results from at least three employers and at least 30 workers. Results for 30 workers is the minimum acceptable sample; for most occupations there should be wage data for many more workers.

Divide the number of employers to be contacted (the sample) by the number of employers in the applicable industry (the universe).

Use the number calculated in this last step to methodically select a random sample of employers to contact. For example, if the number is one-tenth, select every tenth employer in the universe or listing of employers in the industry.

Design a survey form which includes: the definition of the particular occupation (see Appendix G for Terms and Definitions), the number of workers in the occupation, and the wage rate.

Contact all the employers in the sample (call, write, or fax) to obtain the wage rate and employment data for the occupation surveyed.

Prepare a summary table of the data collected. There should be columns for: the employer, number of workers, the wage rate, and the product of multiplying the number of workers times the wage rate. There should be a row for each employer that responded to the survey. Add the data in the column showing the

number of workers to get the total number of workers. Add the data in the column showing the product of workers times wage rate.

Calculate the weighed mean by dividing the total product by the total number of workers.

### **Survey Documentation**

Provide documentation to include the:

- Sample frame size and source, sample selection procedures, survey job descriptions, and related information to allow a determination with regard to the adequacy of the data provided and its adherence to the criteria; and
- Methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample).



## Appendix G: Prevailing Wage Determination Request Form Suggested Items to Include and Definitions

In addition to information deemed necessary by the SWA for case processing or tracking, SWA prevailing wage forms should request sufficient information about the employer's job offer to describe the job duties, the area of intended employment and the work experience, education, and skills required of the worker. The chart below offers suggestions for the terms to include on the form.

<b>Term</b>	<b>Definition</b>
Job Title	Title of the job in the offer of employment
Job description or duties	A description of the actual work to be performed in the job offered. The description should be written in non-technical terms and should include the machines, equipment, tools, or computer software used. The description should also include any supervisory duties to be performed.
Education and Training Level	The minimum diploma, degree, or training required for a worker to satisfactorily perform the job described.
Field of Study	The field of study for the training or education required.
Length of Education or Training	The minimum number of months or years of education or training required.
Experience	The minimum number of months or years of experience necessary for the worker to carry out the duties of the job offered.
Field of Experience	The type of experience necessary for the worker to carry out the duties of the job offered.
Special Skills or other requirements	A description of any job-related skills or other requirements needed to perform the job offered. Examples of specific skills include: type 45 words per minute, lift over 40 pounds, or proficiency in computer program languages and/or platforms. Examples of other requirements might be: live on premises, proficiency in a language other than English, Federal or state licenses, certifications such as MCSE or permits.
Supervision	The number of workers supervised by the worker in the job offered and the level of supervision that supervises the worker in the job offered.

<b>EMPLOYMENT AND TRAINING ADMINISTRATION                  ADVISORY SYSTEM                  U.S. DEPARTMENT OF LABOR                  Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> H-2B Non-Agricultural Program
	<b>CORRESPONDENCE SYMBOL</b> OFLC
	<b>ISSUE DATE</b> April 4, 2007

**ADVISORY:** FOREIGN LABOR CERTIFICATION  
 TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 21-06

**TO:** OFLC-NATIONAL PROCESSING CENTER DIRECTORS  
 STATE WORKFORCE AGENCY ADMINISTRATORS

**FROM:** EMILY STOVER DeROCCO  
 Assistant Secretary 

**SUBJECT:** Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations

1. **Purpose.** To update procedures for State Workforce Agencies and ETA National Processing Centers to process H-2B labor certification applications in non-agricultural occupations.
2. **References.** Immigration and Nationality Act (INA) Section 101 (a)(15)(H)(ii)(b), Title 20 Code of Federal Regulations (CFR) Parts 652 and 655; Title 8 CFR 214.2 (h)(6); Federal Register Notice, Volume 70, Number 137, pages 41430-41438; General Administration Letter (GAL) 01-95, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations; GAL 01-95, Change 1, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations; and Field Memorandum (FM) 25-98, H-2B Temporary Non-Agricultural Labor Certification Program Requirements.
3. **Background.** The H-2B non-immigrant program permits employers to hire foreign workers to come to the United States (U.S.) and perform temporary non-agricultural services or labor on a one-time, seasonal, peakload, or intermittent basis. The H-2B visa classification requires a temporary labor certification from the Secretary of Labor advising the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS) as to whether qualified U.S. workers are available and whether the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers, or a notice that such certification cannot be made, prior to filing an H-2B visa petition with USCIS. Historically, H-2B applications for non-agricultural occupations were processed through the Employment and Training Administration's (ETA) Regional Offices.

<b>RESCISSIONS</b> GAL 01-95; GAL 01-95, Change 1; FM 25-98	<b>EXPIRATION DATE</b> Continuing
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However, in December 2004, the Department opened two new National Processing Centers (NPCs), one each located in Atlanta and Chicago. These Centers have been designated to process applications to employ foreign workers for temporary positions under the H-2B program. The Department published a notice in the Federal Register (Vol. 70, No. 137, pages 41430-41438) on July 19, 2005, clarifying that employers must file two (2) originals of the ETA Form 750, Part A, directly with the State Workforce Agency (SWA) serving the area of intended employment and, once reviewed, the SWA will send the complete application to the appropriate NPC. That process does not apply to employer applications for boilermakers, entertainers, logging, and professional team sports, which were given special filing instructions in the notice.

4. **Procedures for H-2B Applications.** Attachment A outlines procedures that the SWAs and NPCs must use in making temporary labor certification determinations under the H-2B program. This guidance replaces and supersedes prior operating procedures issued under GAL 01-95, GAL 01-95, Change 1, and FM 25-98. It works in concert with the new centralized filing process at the NPCs to ensure greater consistency in the processing of H-2B applications. Special handling procedures for certain non-agricultural occupations, such as forestry workers and boilermakers, will be issued through separate guidance letters by the National Office.
5. **Action Required.** NPC Directors and SWA Administrators are directed to provide Center and SWA staff involved in the processing of H-2B applications with a copy of these procedures.
6. **Inquiries.** Questions from State Workforce Agency staff should be directed to the appropriate NPC Certifying Officer.
7. **Attachments.**  
  
Attachment A: Procedures for H-2B Certification of Temporary Non-Agricultural Occupations

## ATTACHMENT A

### Procedures for H-2B Certification of Temporary Non-Agricultural Occupations

#### I. General Provisions

- A. The regulations of the United States Citizenship and Immigration Service (USCIS), 8 CFR Part 214.2(h)(6), apply to employers who wish to import non-agricultural workers to perform services or labor in temporary jobs within the United States (U.S.). Section 214(c)(1) of the Immigration and Nationality Act (INA) requires the Department of Homeland Security (DHS) to consult with appropriate agencies of the government before granting H-2B petitions;
- B. USCIS regulations state that employers who file H-2B petitions (except for temporary employment on Guam) must include a certification from the DOL stating that qualified workers are not available in the U.S., and the foreign worker's employment will not adversely affect the wages and working conditions of similarly employed U.S. workers;
- C. The H-2B non-immigrant program permits employers to hire foreign workers to perform temporary non-agricultural work within the U.S. on a one-time occurrence, seasonal, peakload, or intermittent basis (8 CFR 214.2(h)(6)(ii)(B));
- D. The DOL regulations at 20 CFR Part 655, Subpart A – Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging or Registered Nurses in the United States (H-2B Workers), govern the labor certification process for temporary employment in the U.S. under the H-2B classification, and requires that the Regional Administrator (now National Processing Center (NPC)) Certifying Officer of the Employment and Training Administration (ETA) issue temporary labor certifications on behalf of the Secretary of Labor;
- E. An H-2B temporary labor certification is advisory to USCIS and, where the employer is notified by the NPC Certifying Officer that certification is denied or cannot be made, the employer may submit countervailing evidence, according to 8 CFR Part 214.2(h)(6)(iv)(E), directly to USCIS. **There is no provision for reconsideration or appeal of the determination made by the DOL through the NPC Certifying Officer.**

#### II. Standards for Determining the Temporary Nature of a Job Opportunity Under the H-2B Classification

- A. A job opportunity is considered temporary under the H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. It is the nature of the employer's need, not the nature of the duties, that is controlling (Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982));
- B. Part-time employment does not qualify as employment for temporary labor certification under the H-2B program. Only full-time employment can be certified;

- C. The Federal regulations at 8 CFR Part 214.2(h)(6)(ii) state that the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. If there are unforeseen circumstances where the employer's need exceeds one year, a new application for temporary labor certification is required for each period beyond one year. However, an employer's seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted;
- D. The employer's need for temporary non-agricultural services or labor must be justified to the NPC Certifying Officer under one of the following standards: (1) a one-time occurrence, (2) a seasonal need, (3) a peakload need, or (4) an intermittent need.
1. **One-Time Occurrence.** The petitioner must establish that either (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker(s);
  2. **Seasonal Need.** The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees;
  3. **Peakload Need.** The petitioner must establish that (1) it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and (2) the temporary additions to staff will not become a part of the petitioner's regular operation; or
  4. **Intermittent Need.** The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

### III. Application Filing Procedures

- A. An employer desiring to use foreign workers for temporary non-agricultural employment must file a complete ETA Form 750, Part A, Offer of Employment portion of the *Application for Alien Employment Certification with the State Workforce Agency (SWA) serving the area of intended employment*. If the application includes worksite locations within a Metropolitan Statistical Area (MSA) covering multiple SWAs, the employer may submit a single application to the SWA where the employment will begin. In those instances where the employment crosses NPC jurisdictions as well, the NPC that has jurisdiction over the SWA where the employment will begin shall process the application.

The U.S. Census Bureau maintains a current listing of all MSAs as well as maps by state at the following Web site:

<http://www.census.gov/population/www/estimates/metroarea.html>

- B. An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B program;
- C. Job contractors typically supply labor to one or more employers as part of signed work contracts or labor services agreements. The temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers;
- D. Every H-2B application shall include:
1. Two (2) originals of the ETA Form 750, Part A, Offer of Employment portion of the *Application for Alien Employment Certification*, signed and dated by the employer. Part B, Statement of Qualifications of the Alien, is not required to be completed;
  2. Documentation of any efforts to advertise and recruit U.S. workers prior to filing the application with the SWA;
  3. A detailed statement explaining (a) why the job opportunity and number of workers being requested reflect a temporary need, and (b) how the employer's request for the services or labor meets one of the standards of a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. This statement of temporary need must be submitted separately on the employer's letterhead with signature. A labor shortage, however severe, does not alone establish a temporary need. One of the four temporary need standards must be satisfied;
  4. Supporting evidence and documentation that justifies the chosen standard of temporary need must be submitted. Examples of supportive evidence or documentation for the most common standards of seasonal and peakload need include, but are not limited to, the following:
    - a. Signed work contracts, letters of intent from clients, and/or monthly invoices from previous calendar year(s) clearly showing that work will be performed for each month during the requested period of need on the ETA Form 750, Part A, Item – 18b. This type of documentation will demonstrate that the employer's need for the work to be performed is tied to a season(s) of the year and will recur next year on the same cycle;
    - b. Annualized and/or multi-year work contracts or work agreements that are supplemented with signed work contracts specifying the actual dates when work will commence and end during each year of service;
    - c. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer

attesting that the information being presented was compiled from the employer's actual accounting records or system. Employers should be prepared to provide the documents utilized to generate the summarized monthly payroll reports if requested by the NPC Certifying Officer.

**Examples of insufficient documentation:** Work contracts with no clear termination date and contracts with temporary workers. Applications supported solely by weather charts, event calendars, hotel occupancy rates, or annual/quarterly tax reports (e.g., IRS Form 941) will not be sufficient to prove a temporary need. Staffing charts, graphs, or other documentation, which do not correspond with the requested period of need on the ETA Form 750, Part A, Item – 18b, will also not be sufficient to prove a temporary need.

- E. To allow for enough time for the recruitment of U.S. workers and sufficient time for processing by the states and NPCs, the SWAs shall advise employers to file requests for temporary labor certification at least 60 days before the worker(s) is needed in order to receive a timely determination;
- F. Unless the NPC Certifying Officer specifies otherwise, the SWA shall return to the employer any request for temporary labor certification filed by the employer more than 120 days before the worker(s) is needed and advise them to re-file the application no more than 120 days before the worker(s) is needed. This is necessary since the availability of temporary U.S. workers changes over short periods of time and an adequate test of the labor market cannot be made during a longer period;
- G. More than one worker may be requested on the ETA Form 750, Part A, Item 18a, if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of intended employment during the same period. The total number of workers requested by the employer must also be specified in the advertisement and the job order required under Section IV of these instructions;
- H. If the employer's representative files the application, the employer must sign the "Authorization of Agent of Employer" statement on the ETA Form 750, which authorizes the agent to act on the employer's behalf. An attorney must file a Notice of Appearance (Form G-28) naming the attorney's client(s). The employer is fully responsible for the accuracy of all representations made by the agent on the employer's behalf;
- I. When the job opportunity requires work to be done at multiple locations either within the jurisdiction of the SWA or within a MSA that covers multiple SWAs, the application must include the names and physical addresses of each location. This requirement also applies to job contractors filing H-2B applications.

#### IV. SWA Processing Instructions

- A. The SWA shall review the job offer for completeness. A job opportunity containing a wage offer below the prevailing wage will not be accepted. The SWA shall determine the prevailing wage, guided by the regulations at 20 CFR Part 656.40 and in accordance with Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Non-agricultural Immigration Programs, Revised May 9, 2005 ([http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf));

- B. If the job offer is less than full-time, offers to pay a wage below the prevailing wage, contains unduly restrictive job requirements or a combination of duties not normal to the occupation, or has terms and conditions of employment which otherwise inhibit the effective recruitment and consideration of U.S. workers for the job, or is otherwise unacceptable, the SWA shall advise the employer to correct the deficiencies before commencing the recruitment;
- C. When commencing recruitment, the SWA shall prepare a job order, using the information on the application, and place it into the SWA job bank system for 10 calendar days. During this period, the SWA should refer qualified applicants who contact the local offices and those in its active job files. If the application indicates that work will be performed in multiple locations within a MSA and one or more locations are outside the jurisdiction of the SWA, the SWA shall clear the job order for 10 calendar days with the appropriate state(s) where the work is to be performed and accept for referral to the employer qualified applicants from the state(s);
- D. During the 10-day posting of the job order, the employer shall advertise the job opportunity in a newspaper of general circulation for 3 consecutive calendar days or in a readily available professional, trade or ethnic publication, whichever the SWA determines is most appropriate for the occupation and most likely to bring responses from U.S. workers. If the job opportunity is located in a rural area that does not have a newspaper with a daily edition, the employer shall use a daily edition with the widest circulation in the nearest urban area or such other publication as determined by the SWA;
- E. The employer advertisement must:
1. Identify the employer's name and direct applicants to report or send resumes to the SWA for referral to the employer;
  2. Describe the job opportunity with particularity, including duties to be performed, work hours and days, rate of pay, and the duration of the employment;
  3. State the employer's minimum job requirements;
  4. Offer wages, terms, and conditions of employment which are not less favorable than those offered to the alien and are consistent with the nature of the occupation, activity, and industry; and
  5. State the total number of job openings the employer intends to fill.
- F. The employer shall document that union and other recruitment sources, appropriate for the occupation and customary in the industry, were contacted and either unable to refer qualified U.S. workers or non-responsive to the employer's request. Such documentation must be signed by the employer;
- G. The employer shall provide the SWA with copies of newspaper pages (e.g., tear sheets) or other proof of publication (e.g., affidavit of publication, invoices or other electronic verification) furnished by the newspaper for each day the advertisement was published. In addition, the employer shall submit to the SWA a written,



detailed recruitment report that is signed by the employer. The written recruitment report must:

1. Identify each recruitment source by name;
  2. State the name, address, and telephone number and provide resumes (if submitted to the employer) of each U.S. worker who applied for the job; and
  3. Explain the lawful job-related reason(s) for not hiring each U.S. worker.
- H. After the recruitment period, the SWA shall send the application, results of recruitment, prevailing wage findings, and all other supporting documentation to the appropriate NPC Certifying Officer;
- I. Based on the results of the employer's and SWA recruitment efforts, the NPC Certifying Officer shall determine whether there are other appropriate sources of workers from which the employer should have recruited in order to obtain qualified U.S. workers. If further recruitment is warranted, the NPC Certifying Officer shall return the application to the SWA with specific instructions for additional recruitment;

#### **V. NPC Temporary Labor Certification Determinations**

- A. The NPC Certifying Officer shall determine whether to grant or deny the temporary labor certification or to issue a notice that such certification cannot be made based on whether or not:
1. The nature of the employer's need is temporary and justified based on a one-time occurrence, seasonal, peakload, or intermittent basis. To determine this, the NPC Certifying Officer shall take into account the duration of the employment opportunity identified on the ETA Form 750, Part A, the employer's statement of temporary need, and all evidence and documentation submitted with the application intended to substantiate the chosen standard of temporary need.
  2. Qualified U.S. workers are available for the temporary job opportunity.
    - a. To determine if a U.S. worker is available, the NPC Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or at the employer's expense, if the prevailing practice among employers who employ workers in the occupation is to pay such relocation expenses;
    - b. The NPC Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker by education, training, experience, or a combination thereof, can perform the duties involved in the occupation as customarily performed by other U.S. workers similarly employed and is willing to accept the specific job opportunity; and

- c. To determine if U.S. workers are available for job opportunities that will be performed in more than one location, workers must be available in each location on the dates specified by the employer.
  3. The employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. To determine this, the NPC Certifying Officer shall consider such factors as local or regional labor market information, special circumstances of the industry, organization, and/or occupation, the prevailing wage rate for the occupation in the area of intended employment, and prevailing working conditions, such as hours of work; and
  4. The job opportunity contains requirements or conditions which preclude consideration of U.S. workers or which otherwise prevent their effective recruitment, such as:
    - a. The job opportunity is vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage or the job is at issue in a labor dispute involving a work stoppage;
    - b. The job opportunity's terms, conditions, and/or occupational environment are contrary to Federal, state, or local law;
    - c. The employer has no location within the U.S. to which domestic workers can be referred and hired for employment;
    - d. The employer will not pay a wage or salary for the job to be performed;
    - e. The job's requirements are unduly restrictive or represent a combination of duties not normal to the occupation; or
    - f. The employer has not recruited U.S. workers according to DOL policies and procedures.
- B. If the NPC Certifying Officer issues a notice that a certification is denied or cannot be made, the Final Determination letter shall:
  1. Detail the reasons why certification cannot be made;
  2. If applicable, address the availability of U.S. workers in the occupation as well as the prevailing wages and working conditions of similarly employed U.S. workers in the occupation;
  3. Indicate the specific DOL policies the employer should have, but did not, follow; and
  4. Advise the employer of the right to appeal by submit countervailing evidence directly to the USCIS.
- C. If the NPC Certifying Officer issues a temporary labor certification, it shall be for the entire duration of the temporary employment opportunity identified on the ETA Form 750, Part A. If extraordinary circumstances establish a need that requires

the non-agricultural services or labor for more than one year, a new application must be filed;

- D. The date on the temporary labor certification shall be the beginning and ending dates of certified employment and the date certification was granted. The beginning date of certified employment may not be earlier than the date certification was granted.

#### VI. Document Transmittal

- A. After making a temporary labor certification determination, the NPC Certifying Officer shall notify the employer, in writing, of the final determination;
- B. If certification is granted, the NPC Certifying Officer shall send the certified application containing the official temporary labor certification stamp and a Final Determination letter to the employer or, if appropriate, the employer's agent or attorney. The Final Determination letter shall direct the employer to submit all documents together with the employer's petition to the appropriate USCIS Office;
- C. If a notice is issued that certification has been denied or cannot be made, the NPC Certifying Officer shall return one copy of the *Application for Alien Employment Certification*, ETA Form 750, supporting documents, and the Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney.

#### VII. Appeal of Notice that a Certification cannot be Made

- A. The finding by the NPC Certifying Officer, that a certification cannot be made, is the final decision of the Secretary of Labor and is **advisory** to the USCIS. **There is no provision for reconsideration or appeal of the decision within DOL;**
- B. In accordance with the USCIS regulations at 8 CFR Part 214.2(h)(6)(iv)(E), the employer may submit countervailing evidence directly to the USCIS that qualified persons in the U.S. are not available, that the employer's need for the duties to be performed is represented as temporary, that wages and working conditions of U.S. workers will not be adversely affected, and that the DOL's employment policies were observed.

#### VIII. Validity of Temporary Labor Certifications

A temporary labor certification is valid only for the number of aliens, the occupation, the area of employment, the specific occupation and duties, the period of time, and the employer specified on the *Application for Alien Employment Certification*, ETA Form 750.

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**Office of Information and Regulatory Affairs (OIRA)**  
**Executive Order Submissions Under Review**  
**April 16, 2015**

**Department of Labor**

**AGENCY:** DOL-ETA **RIN:** [1205-AB69](#)  
**TITLE:** Wage Methodology for the Temporary Nonagricultural Employment H-2B Program, Part 2  
**STAGE:** Final Rule **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [04/13/2015](#) **LEGAL DEADLINE:** Judicial

**AGENCY:** DOL-ETA **RIN:** [1205-AB76](#)  
**TITLE:** Temporary Non-Agricultural Employment of H-2B Aliens (H-2B Comprehensive Rule)  
**STAGE:** Final Rule **ECONOMICALLY SIGNIFICANT:** Yes  
**RECEIVED DATE:** [04/13/2015](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-ETA **RIN:** [1205-AB59](#)  
**TITLE:** Equal Employment Opportunity in Apprenticeship Amendment of Regulations  
**STAGE:** Proposed Rule **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [09/19/2014](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-MSHA **RIN:** [1219-AB76](#)  
**TITLE:** Proximity Detection Systems for Mobile Machines in Underground Mines  
**STAGE:** Proposed Rule **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [03/28/2015](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-OSHA **RIN:** [1218-AB76](#)  
**TITLE:** Occupational Exposure to Beryllium  
**STAGE:** Proposed Rule **ECONOMICALLY SIGNIFICANT:** Yes  
**RECEIVED DATE:** [09/04/2014](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-OWCP **RIN:** [1240-AA10](#)  
**TITLE:** Black Lung Benefits Act: Medical Evidence and Benefit Payments  
**STAGE:** Proposed Rule **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [01/17/2015](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-OS **RIN:** [1290-AA26](#)  
**TITLE:** Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges  
**STAGE:** Final Rule **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [01/23/2015](#) **LEGAL DEADLINE:** None

**AGENCY:** DOL-OS **RIN:** [1290-ZA02](#)  
**TITLE:** Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"  
**STAGE:** Notice **ECONOMICALLY SIGNIFICANT:** No  
**RECEIVED DATE:** [03/06/2015](#) **LEGAL DEADLINE:** None

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