



## **DEPARTMENT OF LABOR**

### **Employment and Training Administration**

#### **20 CFR Part 655**

#### **RIN 1205-AB61**

### **Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date**

**AGENCY:** Employment and Training Administration

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** The Department of Labor (Department) is delaying the effective date of the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program final rule, in response to recently enacted legislation that prohibits any funds from being used to implement the Wage Rule for the first 6 months of fiscal year (FY) 2013. The Wage Rule revised the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status.

**DATES:** The effective date for the final rule amending 20 CFR part 655, published at 76 FR 3452, January 19, 2011, effective January 1, 2012, amended to September 30, 2011, at 76 FR 45667, August 1, 2011, delayed until November 30, 2011, at 76 FR 59896 (September 28, 2011), delayed until January 1, 2012, at 76 FR 73508 (November 29, 2011), and delayed until October 1, 2012 at 76 FR 82115 (December 30, 2011), is further delayed until March 27, 2013.

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#### **SUPPLEMENTARY INFORMATION:**

The Department published the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program final rule (the Wage Rule) on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which the Department calculates the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. However, due to a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,<sup>1</sup> the Department issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686 (June 28, 2011). After a period of public comment, a Final Rule was published on August 1, 2011, which set the new effective date for the Wage Rule of September 30, 2011 (the Effective Date Rule).

Both the Wage Rule and the Effective Date Rule were challenged in two separate lawsuits<sup>2</sup> seeking to bar their implementation. In consideration of the two pending challenges to the

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<sup>1</sup> CATA v. Solis, Civil Docket No. 09-240, Doc. No. 119, 2011 WL 2414555 (E.D. Pa. June 16, 2011).

<sup>2</sup> See Louisiana Forestry Association, Inc., et al. (LFA) v. Solis, et al., Civil Docket No. 11-1623 (W.D. La, Alexandria Division); and Bayou Lawn & Landscape Services, et al. (Bayou) v. Solis, et al., Civil Docket No. (N.D. Fla., Pensacola Division).

Wage Rule and its new effective date, and the possibility that the litigation would be transferred to another court,<sup>3</sup> the Department issued a final rule, 76 FR 59896, September 28, 2011, postponing the effective date of the Wage Rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705.

Thereafter, the Department postponed the effective date of the Wage Rule again, in light of the enactment on November 18, 2011, of the Consolidated and Further Continuing Appropriations Act, 2012, which provided that “[n]one of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [Wage Rule].” Public Law No. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011) (the November Appropriations Act). In delaying the Wage Rule’s effective date, the Department stated that although the November Appropriations Act “prevent[ed] the expenditure of funds to implement, administer, or enforce the Wage Rule before January 1, 2012, it did not prohibit the Wage Rule from going into effect, which was scheduled to occur on November 30, 2011. When the Wage Rule goes into effect, it will supersede and make null the prevailing wage provisions at 20 CFR 655.10(b) of the Department’s existing H-2B regulations, which were promulgated under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; final rule, 73 FR 78020, Dec. 19, 2008 (the H-2B 2008 Rule).” 76 FR 82115, 82116. Accordingly, the Department determined that it was necessary in light of the November Appropriations Act to delay the

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<sup>3</sup> On September 19, 2011, the plaintiffs in the CATA litigation moved to intervene in the LFA litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the CATA case remains pending. The plaintiffs’ motion to intervene was granted by the U.S. District Court in the Western District of Louisiana on Sept. 22, 2011, but was denied by the U.S. District Court in the Northern District of Florida on Nov. 23, 2011. Additionally, the motion to transfer venue was granted by the U.S. District Court in the Western District of Louisiana on Dec. 12, 2011 but was denied by the U.S. District Court in the Northern District of Florida on Dec. 12, 2011.

effective date of the Wage Rule in order to avoid the replacement of the H-2B 2008 Rule with a new rule that the Department lacks appropriated funds to implement. As a result, the Department issued a final rule, 76 FR 73508, on November 29, 2011 which delayed the effective date of the Wage Rule until January 1, 2012.

On December 23, 2011, President Obama signed into law the Consolidated Appropriations Act, 2012 (the December Appropriations Act), which provided that “[n]one of the amounts made available under this Act may be used to implement the [Wage Rule].” Similar to the November Appropriations Act, the December Appropriations Act prevented the expenditure of funds to implement the Wage Rule for the remainder of FY 2012. In light of the December Appropriations Act, the Department issued a Final Rule, 76 FR 82115, on December 30, 2011, which further delayed the effective date of the Wage Rule until October 1, 2012.

In anticipation of the enactment of H.J. Res. 117, which continues the Department’s appropriations from the December Appropriations Act until March 27, 2013 “under the authority and conditions provided” in the December Appropriations Act, H.J. Res. 117, Sec. 101(a), the Department must again delay the effective date of the Wage Rule to prevent the replacement of the H-2B 2008 Rule with a new rule that the Department lacks appropriated funds to implement. As noted with the previous delays in the effective dates, if the Wage Rule were to become effective on October 1, 2012 and H.J. Res. 117 becomes law, the Department would be unable to issue prevailing wage determinations under the H-2B 2008 rule. The Department of Homeland Security (DHS), under its regulations at 8 CFR 214.2(h)(6)(iii) and (iv) requires an employer seeking H-2B workers to obtain a labor certification from the Department. Because the Department would be legally precluded

from issuing prevailing wage determinations, temporary labor certifications for employers seeking H-2B workers could not be issued because the Department could not comply with its own regulations or those of DHS. As a result, the H-2B program would be held in abeyance for the first 6 months of FY 2013; therefore, the Department is extending the effective date of the Wage Rule until March 27, 2013.

The Department considers this situation an emergency warranting the publication of a final rule under the good cause exception of the Administrative Procedure Act. See 5 U.S.C. 553(b)(B) and 553(d)(3). In order to avoid an operational suspension during the first 6 months of FY 2013, the Department finds good cause to adopt this rule, effective immediately, and without prior notice and comment. See 5 U.S.C. 553(b)(B) and 553(d)(3). As such, a delay in promulgating this rule past the date of publication would be impracticable and unnecessary and would disrupt the program, leaving program users without access to the H-2B program.

**SIGNED:** at Washington, D.C. this 27<sup>th</sup> day of September, 2012.

Jane Oates

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