



DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 655 and 656

[Docket No. ETA-2021-0003]

RIN 1205-AC00

Request for Information on Data Sources and Methods for Determining Prevailing Wage Levels for the Temporary and Permanent Employment of Certain Immigrants and Non-Immigrants in the United States

AGENCY: Employment and Training Administration, Department of Labor

ACTION: Request for information (RFI).

SUMMARY: The Department of Labor (Department) invites interested parties to provide information on the sources of data and methodologies for determining prevailing wage levels covering employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, E-3 nonimmigrant visas. The information received in response to this RFI will inform and be considered by the Department as it reviews the final rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, published in the Federal Register on January 14, 2021, which may result in the development of a future notice of proposed rulemaking to revise the computation of prevailing wage levels in a manner that more effectively ensures the employment of certain immigrant and nonimmigrant workers does not adversely affect the wages of U.S. workers similarly employed.

DATES: Submit written comments on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit written comments electronically by the following method:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

Instructions. Include the docket number ETA-2021-0003 in your comments. All comments received will be posted without change to <http://www.regulations.gov>. Please do not include any personally identifiable or confidential business information you do not want publicly disclosed.

FOR FURTHER INFORMATION CONTACT: Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW, Room N-5311, Washington, DC 20210, telephone: (202) 693-8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889-5627.

SUPPLEMENTARY INFORMATION:

I. Background

The Immigration and Nationality Act (INA), as amended, assigns certain responsibilities to the Secretary of Labor (Secretary) relating to wages and working conditions of certain categories of immigrant and nonimmigrant foreign workers.¹ The Secretary issues permanent labor certifications for certain employment-based immigrants and certifies labor condition applications (LCAs) for the temporary employment of foreign workers in specialty occupations under the H-1B, H-1B1, and E-3 visa classifications.² A specialty occupation is an occupation that requires theoretical and practical application of a body of highly specialized knowledge and the

¹ There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons.

² 8 U.S.C. 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), (a)(15)(H)(i)(b1).

attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.³

The Department may issue a permanent labor certification only after a determination that employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.⁴ Employers seeking to employ an immigrant foreign worker on a permanent basis must attest that they will pay at least the prevailing wage and obtain a Prevailing Wage Determination (PWD) for the job opportunity from the Department.⁵ Similarly, employers seeking to employ a nonimmigrant foreign worker on a temporary basis under the H-1B, H-1B1, or E-3 programs must attest that they will pay the higher of the actual wage paid to employees with similar experience and qualifications or the prevailing wage for the occupational classification in the area of intended employment.⁶ These employers may obtain a PWD from the Department, but have the option to use other sources, including a compliant employer-provided wage survey, to determine the prevailing wage.⁷ A general overview of the labor certification and prevailing wage process, as well as further background on the rulemaking, is available in the Department's Final Rule published in the Federal Register on January 14, 2021, and will not be restated herein. 86 FR 3608, 3608-3611.

II. Prevailing Wage Background

A. The Department's Prevailing Wage Determination Methodology

The Department has long relied on BLS's OES data to establish prevailing wage levels. The OES is a comprehensive, statistically valid survey that is currently used for satisfying the Department's purposes in setting wages in most immigrant and nonimmigrant programs. The OES wage survey is among the largest continuous statistical survey programs of the Federal Government. BLS produces the survey materials and selects the nonfarm establishments to be

³ See 8 U.S.C 1184(i).

⁴ 8 U.S.C. 1182(a)(5)(A)(i)(II).

⁵ 20 CFR 656.10(c)(1), 656.15(b)(1), and 656.40(a).

⁶ 8 U.S.C. 1182(n)(1)(A), (t)(1)(A); 20 CFR 655.731(a).

⁷ 20 CFR 655.731(a)(2)(ii)(A) - (C).

surveyed using the list of establishments maintained by State Workforce Agencies (SWAs) for unemployment insurance purposes. The OES collects data from over one million establishments. Salary levels based on geographic areas are available at the national and State levels and for certain territories in which statistical validity can be ascertained, including the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. Salary information is also made available at the metropolitan and nonmetropolitan area levels within a State. Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Base rate, cost-of-living allowances, guaranteed pay, hazardous duty pay, incentive pay including commissions and production bonuses, tips, and on-call pay are included. The Department continues to believe the inclusion of all the features described above make the OES a valuable source for use in many of the Department's foreign labor programs.⁸

The Department incorporated the wage component of the OES survey into its prevailing wage guidance in 1997.⁹ At the time, the Department divided OES wage data into two skill levels: a Level I wage for "beginning level employees" and a Level II wage for "fully competent employees." Because the OES survey does not provide data about skill differentials within Standard Occupational Classification (SOC) codes, the Department established the entry and experienced skill levels mathematically.¹⁰ Specifically, under a Memorandum of Understanding, BLS computed a Level I wage calculated as the mean of the lowest paid one-third of workers in a given occupation and a Level IV wage calculated as the mean wage of the highest paid upper two-thirds of workers.¹¹

In the H-1B Visa Reform Act of 2004, Congress amended the INA to provide that where the Department "uses, or makes available to employers, a governmental survey to determine the

⁸ *Wage Methodology for the Temporary Non-agricultural Employment H-2B Program*, 76 FR 3452, 3458 (Jan. 19, 2011).

⁹ *Prevailing Wage Policy for Nonagricultural Immigration Programs*, General Administration Letter No. 2-98 (GAL 2-98) (Oct. 31, 1997), available at https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=942.

¹⁰ GAL 2-98 at 5.

¹¹ Intra-Agency Memorandum of Understanding executed by Mr. John R. Beverly, III, Director, U.S. Employment Service, ETA, and Ms. Katharine Newman, Chief, Division of Financial Planning and Management, Office of Administration, BLS (Sept. 30, 1998).

prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision.”¹² Further, the amendment provided that where the “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.”¹³

In order to implement the INA’s four-tier prevailing wage provision, the Department published comprehensive Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2005 Guidance), which expanded the two-tier OES wage level system to provide four “skill levels:” Level I “entry level,” Level II “qualified,” Level III “experienced,” and Level IV “fully competent.”¹⁴ The Department applied the formula in the INA to its two existing wage levels to set Levels I through IV.¹⁵ In 2010, the Department centralized the prevailing wage determination process for nonagricultural labor certification programs within OFLC’s National Prevailing Wage Center (NPWC).¹⁶ In preparation for this transition, the Department issued new Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (2009 Guidance).¹⁷ This guidance currently governs OFLC’s PWD process for the PERM, H–1B, H–1B1, and E–3 visa programs.

When assigning a prevailing wage using OES data, the NPWC examines the nature of the job offer, the area of intended employment, and the job duties for workers that are similarly

¹² *Consolidated Appropriations Act*, 2005, Pub. L. 108-447, div. J, tit. IV, § 423; 118 Stat. 2809 (Dec. 8, 2004).

¹³ See 8 U.S.C. 1182(p)(4).

¹⁴ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, at 7 (May 2005)(*hereinafter* 2005 Guidance), available at https://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf; see also 85 FR 63872, 63874-63876 for a discussion of the development of the prevailing wage determination process.

¹⁵ 2005 Guidance at 1.

¹⁶ See *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*, 73 FR 78020 (Dec. 19, 2008); *Prevailing Wage Determinations for Use in the H-1B, H-1B1 (Chile/Singapore), H-1C, H-2B, E-3 (Australia), and Permanent Labor Certification Programs; Prevailing Wage Determinations for Use in the Commonwealth of the Northern Mariana Islands*, 74 FR 63796 (Dec. 4, 2009).

¹⁷ Employment and Training Administration Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (revised Nov. 2009) (*hereinafter* 2009 Guidance), available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

employed.¹⁸ In particular, the NPWC uses the SOC taxonomy to classify the employer's job opportunity into an occupation by comparing the employer's job description, title, and requirements to occupational information provided in sources like the Department's Occupational Information Network (O*Net).¹⁹ Once the NPWC identifies the applicable SOC code, it determines the appropriate wage level for the job opportunity by comparing the employer's job description, title, and requirements to those normally required for the occupation, as reported in sources like O*Net. This determination involves a step-by-step process in which each job opportunity begins at Level I (entry level) and may progress to Level II (experienced), Level III (qualified), or Level IV (fully competent) based on the NPWC's comparison of the job opportunity to occupational requirements, including the education, training, experience, skills, knowledge, and tasks required in the occupation.²⁰ After determining the prevailing wage level, the NPWC issues a PWD to the employer using the OES wage for that level in the occupation and area of intended employment.

B. Procedural History Revising the Computation of Prevailing Wage Levels Based on the OES Survey

On October 8, 2020, the Department's Employment and Training Administration (ETA), published an Interim Final Rule (IFR), 85 FR 63872, revising the methodology the Department uses to determine prevailing wage levels for the H-1B, H-1B1, E-3, and PERM programs. Because the Department determined that the existing wage levels were artificially low and provided an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts earn, the Department revised wage provisions at 20 CFR 655.731 and 656.40 to adjust the existing wage levels. 85 FR 63872, 63877. Specifically, the Department adjusted the four wage levels, respectively, from approximately the 17th, 34th, 50th, and 67th

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 1-7; *see also* Occupational Information Network, *available at* <http://online.onetcenter.org>. O*Net provides information on skills, abilities, knowledge, tasks, work activities, and specific vocational preparation levels associated with occupations and stratifies occupations based on shared skill, education, and training indicators.

²⁰ 2009 Guidance at 6.

percentiles to approximately the 45th, 62nd, 78th, and 95th percentiles. 85 FR 63872, 63888-63894.

The Department also determined that it had good cause to issue the IFR without prior notice and opportunity for the public to comment. 85 FR 63872, 63898. The Department published the IFR with an immediate effective date, but provided for the submission of public comments during a prescribed 30-day public comment period that closed on November 9, 2020. During this 30-day period, the Department received 2,340 comments. Several commenters supported the IFR because they thought that it established wages more closely aligned with actual wage levels and would prevent abuse of the program by those employers and their clients seeking to use the H-1B program as a lower cost alternative to hiring U.S. workers. However, most commenters opposing the IFR expressed concern that the revised wage levels did not correspond to wages paid to U.S. workers similarly employed. Four groups of plaintiffs separately challenged the IFR and, in each case, the district court entered an order that set aside or enjoined the IFR on procedural grounds. 86 FR 3608, 3612.

On January 14, 2021, the Department published a final rule entitled *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, with an effective date of March 15, 2021. 86 FR 3608. With this final rule, the Department adopted a number of modifications to the wage methodology established by the IFR. In particular, the Department adjusted the Level I wage and the Level IV wage downward to the 35th percentile and 90th percentile, respectively. Under the final rule, the Department continues to calculate the two intermediate wage levels in accordance with 8 U.S.C. 1182(p)(4), establishing the prevailing wage for Levels I through IV, respectively, at approximately the 35th percentile, the 53rd percentile, the 72nd percentile, and the 90th percentile. 86 FR 3608, 3653-3654. However, the Department included two sets of transition periods under which these adjustments to the new wage levels will not begin until July 1, 2021. 86 FR 3608, 3642. For most job opportunities, the transition would occur in two steps and conclude on July 1, 2022. For job

opportunities that will be filled by workers who are the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or are eligible for an extension of their H-1B status under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106-313, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273 (2002), the transition would occur in four steps and conclude on July 1, 2024. 86 FR 3608, 3660.

On March 12, 2021, based on public comments received on the Department's proposal to delay the effective date of the rule for a period of 60 days to begin reviewing questions of fact, law, and policy raised in the final rule, the Department published a final rule delaying the effective date of the final rule until May 14, 2021. 86 FR 13995. The Department acknowledged concerns that were raised by the commenters as well as in pending litigation challenging the Department's IFR, and, subsequently, the final rule published on January 14, 2021. The Department explained that it had already begun its comprehensive review of this rulemaking and may need to take additional action as necessary to complete such a review. *See* 86 FR 13995, 13997. The Department subsequently issued a notice of proposed rulemaking on March 22, 2021, to further delay the effective date of the final rule by eighteen months or until November 14, 2022, along with corresponding proposed delays to the rule's transition dates. 86 FR 15154, 15154. The Department explained that the proposal is intended to provide a sufficient amount of time to thoroughly consider the legal and policy issues raised in the rule, provide time to compute and validate prevailing wage data and take other steps to allow for an orderly implementation, and offer the public, through the issuance of this RFI, an opportunity to provide information on the sources and methods for determining prevailing wage levels, which could be used to inform potential new proposal(s) to amend ETA's regulations governing prevailing wages for PERM, H-1B, H-1B1, and E-3 job opportunities. *See* 86 FR 15154, 15155.

III. Request for Public Comment

Through this RFI, the Department is soliciting public input on the available sources of data and methodologies that can be used in computing different levels of wages based on the OES wage survey, commensurate with experience, education, and level of supervision for a specific occupation and geographic area. Submissions may include, but are not limited to, written narratives that answer the questions presented in this RFI, quantitative or qualitative data analysis, reports or studies, and other estimation techniques and methodologies, whether published or unpublished, relevant to determining wage values or levels within a specific occupational wage distribution and geographic area.

Responses to this RFI are voluntary and may be submitted anonymously. Written narratives providing factual or evidence-based information should also provide citations of sources, and copies of and links to the source material should be provided. If primary sources are used, such as reports, research studies, or other sources of quantitative or qualitative data, the Department is requesting that responders provide details on the data-gathering techniques or methodologies and any supporting technical documentation. For example, input related to occupational wage sources and methods will be most useful if the responder explains, in detail, the type of information provided, the particular value of that information for determining prevailing wage levels, the methodology used to obtain the information, and the contexts in which the information can and cannot be obtained on a consistent basis. The Department also welcomes information that explains why a particular methodology or data source to determine wage values or levels should not be used.

Please do not include any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your response. The information received in response to this RFI will inform and be considered by the Department as it reviews the final rule published in the Federal Register on January 14, 2021, 86 FR 3608, which may result in the development of a future notice of

proposed rulemaking to revise the computation of prevailing wage levels in a manner that is consistent with the INA and more effectively ensures the employment of certain immigrant and nonimmigrant workers does not adversely affect the wages of U.S. workers similarly employed. Accordingly, the Department invites the public to answer one or more of the following questions in their submissions:

1. What sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate the wage level within an occupational wage distribution based on the OES wage survey and takes into account education, experience, and level of supervision for U.S. workers similarly employed across industries for specific occupation(s) and geographic area(s)?
2. Besides the OES wage survey, what other sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate wage levels, by occupation and geographic area, specifically for U.S. workers similarly employed at institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations and Governmental research organizations?
3. Should the Department continue to set wage levels at the same point within the OES distribution for all occupations and geographic areas or, alternatively, set wage levels at different points within the OES distribution for different groups of occupations and/or geographic areas? If the latter, what sources of data and methods are available that can be used alone, or in conjunction with other sources and methods, to approximate different wage levels for different groups of occupations, taking into account education, experience, and level of supervision for U.S. workers similarly employed across industries and geographic areas?
4. Other than computation of an arithmetic mean or specific percentile within an occupational wage distribution based on the OES wage survey, are there any other statistical approaches or

estimation techniques the Department should consider when computing the wage level(s) for occupation(s) and geographic area(s)?

IV. Conclusion

The Department invites interested parties to submit comments, information, data, and supporting materials based on the questions provided in this RFI. The Department has provided the list of questions above as a framework for the scope of this RFI and invites any submission that addresses those questions and provides useful information for the Department's consideration from all interested stakeholders, including members of the public, worker advocacy organizations and labor unions, employers, trade associations, public advocacy organizations, and others, including universities and research institutions, familiar with or interested in the prevailing wage determination methodology used in the PERM, H-1B, H-1B1, and E-3 programs.

Signed:

Suzan G. LeVine,

Principal Deputy Assistant Secretary for Employment and Training, Labor.

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