4510-FP-P

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**[DOL Docket No. ETA-2025-0008]**

**RIN 1205-AC24**

# Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States

**AGENCY:** Employment and Training Administration, Department of Labor.

**ACTION:** Interim final rule, request for comments.

**SUMMARY:** The Department of Labor (Department or DOL) is issuing this interim final rule (IFR) to amend its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H-2A nonimmigrant status (H-2A workers). Specifically, the Department is revising the methodology for determining the hourly Adverse Effect Wage Rates (AEWRs) for non-range occupations by using wage data reported for each U.S. state and territory by the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey. For the vast majority of H-2A job opportunities, the Department will use OEWS survey data to establish AEWRs applicable to five Standard Occupational Classification (SOC) codes combining the most common field and livestock worker occupations previously measured by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS), which covered six SOC codes. These AEWRs will be divided into two skill-based categories to account for wage differentials arising from qualifications contained in the employer's job offer. For all other occupations, the Department will use the OEWS survey to determine two skill-based AEWRs for each SOC code to reflect wage differentials. The threshold determination for assigning the SOC code(s) and

applicable skill-based AEWR will be based on the duties performed for the majority of the workdays during the contract period and qualifications contained in the employer's job offer. Finally, to address differences in compensation between most U.S. workers and H-2A workers who receive employer-provided housing at no cost, the Department will implement a standard adjustment factor to the AEWR to account for this non-monetary compensation that employers will apply when compensating H-2A workers under temporary agricultural labor certifications.

**DATES:** This rule is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].** Interested persons are invited to submit written comments on this rule on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments electronically by the following method: *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions on the website for submitting comments.

*Instructions:* Comments should be confined to issues pertinent to the interim final rule, identify the agency's name and public docket number ETA-2025-0008, explain the reasons for any recommended changes, and reference the specific section and wording being addressed, where possible.

Please be advised that the Department will post comments received that relate to this interim final rule to *https://www.regulations.gov,* including any personal information provided. The *https://www.regulations.gov* website is the Federal e-Rulemaking Portal and all comments posted there are available and accessible to the public. Please do not submit comments containing trade secrets, confidential or proprietary commercial or financial information, personal health information, sensitive personally identifiable information (for example, social security numbers, driver's license or state identification numbers, passport numbers, or financial account numbers), or other information that you

do not want to be made available to the public. Should the agency become aware of such information, the agency reserves the right to redact or refrain from posting sensitive information, libelous, or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; or that contain hate speech. Please note that depending on how information is submitted, the agency may not be able to redact the information and instead reserves the right to refrain from posting the information or comment in such situations.

**FOR FURTHER INFORMATION CONTACT**: For further information regarding 20 CFR part 655, 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, email: OFLC.Regulations@dol.gov.

**SUPPLEMENTARY INFORMATION:**

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**Table of Acronyms and Abbreviations**

AEWR Adverse Effect Wage Rate

ALS Agricultural Labor Survey

BLS Bureau of Labor Statistics

CFR Code of Federal Regulations

CO Certifying Officer

CPS Current Population Survey

CY calendar year

DHS U.S. Department of Homeland Security

DOL U.S. Department of Labor

DWL deadweight loss

E.O. Executive Order

ECI Employment Cost Index

ETA Employment and Training Administration

FLR Farm Labor Report

FLS Farm Labor Survey

FR Final Rule

FY Fiscal Year

GVW Gross Vehicle Weight

H-2ALC H-2A Labor Contractor

IFR Interim Final Rule

INA Immigration and Nationality Act

IRCA Immigration Reform and Control Act of 1986

NAICS North American Industry Classification System

NASS National Agricultural Statistics Service

NPC National Processing Center

NPRM Notice of Proposed Rulemaking

O*NET Occupational Information Network

OES Occupational Employment Statistics

OEWS Occupational Employment and Wage Statistics

OFLC Office of Foreign Labor Certification

OIRA Office of Information and Regulatory Affairs

OMB Office of Management and Budget

Pub. L. Public Law

RFA Regulatory Flexibility Act of 1980

RIA Regulatory impact analysis

SBA Small Business Administration

SOC Standard Occupational Classification

Stat. U.S. Statutes at Large

SWA State Workforce Agency

U.S. United States

U.S.C. United States Code

USCIS U.S. Citizenship and Immigration Service

USDA U.S. Department of Agriculture

WHD Wage and Hour Division

## I. Introduction

### A. Legal Authority

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an "H-2A" nonimmigrant visa classification for a worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature." 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.[1] The term "[a]gricultural labor or services" includes the types of labor and services "defined by the Secretary of Labor in regulations," as well as the Internal Revenue Code definition of "agricultural labor" at "section 3121(g) of title 26," the Fair Labor Standards Act definition of "agriculture" at "section 203(f) of title 29," and "the pressing of apples for cider on a farm . . . ." 8 U.S.C. 1101(a)(15)(H)(ii)(a).

The admission of foreign workers under this classification involves a multistep process before several Federal agencies. A prospective H-2A employer must first apply to the Secretary of Labor (Secretary) for a certification that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
>
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.
>
> 8 U.S.C. 1188(a)(1).

The INA prohibits the Secretary from issuing this certification—known as a "temporary labor certification"—unless both of the above referenced conditions are met, and none of the conditions in 8 U.S.C. 1188(b) applies concerning strikes or lock-outs, labor

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

certification program debarments, workers' compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC).[2] In addition, the Secretary has delegated to the Department's Wage and Hour Division (WHD) the responsibility under sec. 218(g)(2) of the INA, 8 U.S.C. 1188(g)(2), to assure employer compliance with the terms and conditions of employment under the H-2A program.[3] Since 1987, the Department has operated the H-2A temporary agricultural labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H-2A program are found at 20 CFR part 655, subpart B, and 29 CFR part 501.

When creating the H-2A visa classification, Congress charged the Department with, among other things, regulating the employment of nonimmigrant foreign workers in agriculture to guard against adverse impact on the wages of agricultural workers in the United States similarly employed. *See* 8 U.S.C. 1188(a)(1)(B). Congress, however, did not "define adverse effect and left it in the Department's discretion how to ensure that the [employment] of farmworkers met the statutory requirements" while serving "the interests of both farmworkers and growers—which are often in tension."[4] Thus, the Department has discretion to determine the methodological approach that best allows it to meet its statutory mandate.[5]

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[2] *See* Secretary's Order 06-2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010).

[3] *See* Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

[4] *AFL-CIO, et al. v. Dole*, 923 F.2d 182, 184, 187 (D.C. Cir. 1991). *See also Overdevest Nurseries v. Walsh*, 2 F.4th 977, 984 (D.C. Cir. 2021) (finding reasonable the Department's definition of "corresponding employment" to prevent adverse effect on workers similarly employed).

[5] *United Farmworkers v. Solis*, 697 F. Supp. 2d 5, 8–11 (D.D.C. 2010).

Since the Supreme Court's decision in *Loper-Bright Enterprises, et al. v. Raimondo*, 603 U.S. 369 (2024), courts have consistently found that the Department has discretion to determine the methods it uses to carry out its mandate to prevent adverse effect. In *Kansas, et al. v. U.S. Department of Labor* the district court noted the INA "affords the DOL considerable latitude to promulgate regulations that protect American workers from being adversely affected by the issuance of H-2A visas" and that the Department's "choice of [AEWR] methodology is really a policy decision taken within the bounds of a rather broad delegation."[6] The court in *Teche Vermillion v. Sugar Cane Growers Ass'n Inc. v. Su* similarly held that the INA "grants discretion to the DOL to implement a regulatory regime to address" adverse effect, does not "define the term 'similarly employed,'" and "does not direct the DOL how to determine whether the employment of an H-2A worker will 'adversely affect' the wages and working conditions of domestic workers" similarly employed.[7] Thus in *Teche* the court found that the INA "does not dictate the methodology that the DOL must use to determine the AEWR or otherwise limit the DOL to using a particular survey, such as the FLS," and that "[t]he only statutory constraints are the boundaries set by section 1188(a)(1)(B)."[8] While reiterating the Department's obligation to "balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic workers," the "choice of [AEWR] methodology . . ." to achieve those twin aims "is really a policy decision taken within the bounds of a rather broad congressional delegation" provided to the Department.[9]

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[6] 749 F. Supp. 3d 1363, 1374-75 (S.D. Ga. 2024) (quoting *Dole* at 187).

[7] *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, 749 F. Supp. 3d 697, 723 (W.D. La. 2024), *opinion clarified*, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024), and *amended*, No. 6:23-CV-831, 2025 WL 1969937 (W.D. La. July 16, 2025).

[8] *Id.* at 33.

[9] *Kansas, et al. v. U.S. Dep't of Labor*, 749 F.Supp.3d 1363, 1374 (S.D. Ga., Aug. 26, 2024), *citing AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991).

**B. The Role of AEWRs in the H-2A Program**

As explained in prior rulemakings, a "basic Congressional premise for temporary foreign worker programs . . . is that the unregulated use of [nonimmigrant foreign workers] in agriculture would have an adverse impact on the wages of U.S. workers, absent protection."[10] The AEWR is one of the primary ways the Department has historically met its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed, while ensuring that employers can access legal agricultural labor. The AEWR is a regulatory mechanism to prevent—not compensate for—adverse effects. The AEWR is not backward-looking or remedial, meaning it is not "predicated on the existence of wage depression in the agricultural sector and [DOL] is not statutorily required to identify existing wage suppression prior to establishing and requiring employers to pay an AEWR."[11]

Further, the INA does not require the Department to prove or rely on the existence of past adverse effect but instead is focused on prevent[ing] future adverse effect.[12] Regardless "of any past adverse effect that the use of low-skilled foreign labor may or may not have had on" wages, the AEWR is necessary to satisfy the Department's "forward-looking need to protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage

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[10] 85 FR 70445, 70449 (Nov. 5, 2020) (citation omitted).

[11] 85 FR at 70450; *see also, e.g.,* 75 FR 6884, 6895 (Feb. 12, 2010) (reiterating justification for protection against future adverse effect in 1989 rule); *id*. at 6891 ("By computing an AEWR to approximate the equilibrium wages that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H-2A program. In this sense, the AEWR avoids adverse effects . . ."); 73 FR 77110, 77167 (Dec. 18, 2008) (noting the D.C. Circuit observed there is no "statutory requirement to adjust for past wage depression"); 54 FR at 28046-47 (Jul. 5, 1989) ("IRCA only requires that the AEWR prevent future adverse effect from the use of foreign workers, not compensate for past effect.")

[12] *See, e.g.,* 54 FR at 28046-47; 75 FR at 6895 (reiterating justification for protection against future adverse effect in 1989 rule); 73 FR at 77167 (Dec. 18, 2008) (noting the D.C. Circuit observed there is no "statutory requirement to adjust for past wage depression").

stagnation or deflation."[13] As the Department has noted in prior rulemaking, there is no "reliable method available" to determine the existence of adverse effect in a particular area and occupation or agricultural activity and the absence of such a finding would not mean there has been no adverse effect, but merely that "imposition of the AEWR heretofore has been successful in shielding domestic farm workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers" into a particular area.[14]

In administering the H-2A program and carrying out the statutory mandate to prevent adverse effect, the INA does not require the Department to "determine the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose to guard against adverse impact on the wages of agricultural workers in the United States similarly employed."[15] Rather, the "'clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive'". "'Unreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.'"[16] The Department must also consider factors relating to the sound and effective administration of the H-2A program in deciding how to determine the most reasonable methodology for establishing the AEWR to effectuate its statutory mandate.[17]

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[13] 85 FR at 70450-70451.

[14] *Id.* at 70451, citing 54 FR 28037, 28045 (July 5, 1989).

[15] 88 FR 12760, 12761 (Feb. 28, 2023); *see also* 52 FR 11460, 11464 (Apr. 9, 1987) ("[T]he labor certification program is not the appropriate means to escalate agricultural earnings above the adverse effect level or to set an 'attractive wage.'"); *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013)(noting that "an agency has 'wide discretion' in making line-drawing decisions and '[t]he relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right.'")(quoting *WorldCom, Inc. v. FCC,* 238 F.3d 449, 462 (D.C.Cir.2001).

[16] *Id.* at 12772 (quoting 54 FR 28037, 28046 (Jul. 5, 1989)).

[17] 85 FR at 70450.

**C. Brief History of AEWR Methodologies**

Concerns about the potential adverse impact resulting from a large influx of temporary foreign workers, and development of methods to determine and establish AEWRs to prevent it, date back to the establishment of the Bracero Program and were at one point reflected in international agreements that pre-date the 1986 IRCA.[18] Since at least 1953, "employers seeking to import foreign nationals to work in various crop activities (in that case, under the Bracero program) were required to pay not less than a wage established by DOL."[19] The AEWR as a formal concept in the H-2 program was introduced in 1963, at which point the AEWR initially was based on the Census of Agriculture's average earnings for each state, which was conducted by the U.S. Census Bureau and provided data for 11 East Coast H-2 user states and was expanded and periodically adjusted thereafter.[20] As time passed, the establishment of AEWRs became more formalized, and AEWRs were computed and set for the entire H-2 program, with corresponding public notice and comment. *See*, *e.g.,* 29 FR 19101-19102 (Dec. 30, 1964); 32 FR 4569, 4571 (Mar. 28, 1967); and 35 FR 12394-12395 (Aug. 4, 1970).

Since 1987, following the IRCA amendments of 1986, the Department has operated the H-2A program under regulations promulgated pursuant to the INA and has, with brief interruption, set the AEWR for most agricultural workers at the average wage paid to similarly employed workers in a state or region, as determined by the USDA Farm Labor Survey (FLS). For more than two decades after IRCA, the Department's

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[18] *See* 54 FR at 28039. The first Bracero Program allowed farmers in the western United States to employ temporary foreign workers from Mexico to work on farms and railroads beginning in May 1917. Under these agreements, employers were required to obtain a certification from their local Employment Service office that there were not sufficient U.S. workers to fill the jobs they offered, and the contracts with Mexican workers had to offer the same wages that were paid "for similar labor in the community in which the admitted aliens are to be employed." *See* Emergency Immigration Legislation: Hearing before Committee on Immigration, United States Senate, 66th Congress, Third Session, on H.R. 14461, 66 Cong. 3 (1921) (*citing* Departmental Order of April 12, 1918, Concerning Admission of Agricultural Laborers. U.S. Department of Labor, Bureau of Immigration, Washington, April 12, 1918).

[19] 54 FR at 28039.

[20] *Id.* at 28040.

1989 Final Rule governed the H-2A program.[21] The 1989 Final Rule "dramatically expanded the use of the AEWR as a wage protection in the H-2A program in 49 States (excluding Alaska) and first began using the FLS to set the AEWR" as the average wage of farmworkers, which is the method still in use for most H-2A job opportunities.[22] This methodology was selected after a thorough consideration of alternatives and litigation directing the Department to provide a reasoned explanation for the chosen AEWR methodology.[23] The Department noted that the use of the FLS to set statewide AEWRs based on actual earnings of similarly employed workers was preferable to the prior method of basing AEWRs on the 1950s Census of Agriculture "that had been adjusted upward by various methods over the years."[24]

For a brief period, under a 2008 final rule (73 FR 77110), the Department determined the AEWR to be based on the OEWS survey. The Department explained that under that rule, the AEWR was set "using the [SOC] taxonomy" to "set a different AEWR for each SOC [occupation] and localized area of intended employment."[25] The Department also set the wage for each job opportunity at one of multiple wage levels "intended to reflect education and training," similar to the Congressionally-mandated prevailing wage methodology in the H-1B program.[26] The Department suspended this rule in 2009 citing administrative challenges and concerns that U.S. workers may in the future experience wage depression as a result of unchecked expansion of the demand for foreign workers.[27] Under the 2010 final rule (75 FR 6884), which has governed the

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[21] *See id.* at 28037.

[22] 84 FR 36168, 36186 (Jun. 26, 2019).

[23] *See* 54 FR at 28038 (discussing the Department's 1987 IFR methodology and related litigation and subsequent rounds of rulemaking to determine a reasoned AEWR methodology); *See also* 52 FR 20496 (Jun. 1, 1987) (1987 H-2A IFR); *AFL-CIO* v. *Brock,* 835 F.2d 912, 915 (D.C. Cir. 1987).

[24] *Id*. at 28039

[25] 84 FR at 36180.

[26] *Id.*

[27] 74 FR 45906 (Sep. 4, 2009).

program for more than a decade at various intervals, the Department returned to use of the FLS hourly wage data to determine the AEWR for field and livestock workers (combined), and produced "a single AEWR for all agricultural workers in a State or region, without regard to SOC code, and no AEWR in geographic areas not surveyed" (*e.g.*, Alaska and Puerto Rico).[28]

In response to public comments on previous proposed rules related to the methodology for determining the AEWRs, the Department considered and rejected several alternative methodologies, including: adding an enhancement to the USDA average wage[29]; tying the AEWR to an index like the Consumer Price Index or Employment Cost Index[30]; using various methods of setting AEWRs based on a uniform minimum wage untethered to labor market data, such as an enhanced federal minimum wage[31]; eliminating AEWRs and instead using only prevailing wages based on specific crop activities[32]; setting a cap or ceiling on the AEWR employers must pay[33]; and using

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[28] 88 FR at 12793-12794.

[29] *See, e.g.,* 54 FR at 28045, 28046-47, 28051 (rejecting use of an enhanced wage methodology for foreign workers because, absent data indicating a need to correct wage suppression, it could be inflationary and beyond the Department's authority.).

[30] *See, e.g.,* 85 FR at 70455 (rejecting use of the CPI because it measured changes in consumer prices, not changes in wages); 88 FR at 12773 (rejecting use of the ECI "or other broad indices" because they would provide only "a general measure of changes in the cost of labor across the private sector," rather than "actual wage data for agricultural workers in particular geographic areas.").

[31] *See, e.g.,* 88 FR at 12773 (rejecting use of a minimum wage or an enhanced minimum wage because these "predetermined wages would be untethered from data on wages employers pay to" similarly employed workers and the method would "immediately and dramatically reduce the wages of many H-2A and similarly employed workers . . .); 73 FR 77110, 77172 (Dec. 18, 2008) (rejecting a national uniform wage because it would "not reflect market wages" and "would prove to be below market rates in some areas and above market rates in other areas.").

[32] *See, e.g.,* 54 FR at 28045, 28047 (rejecting use only of a crop-specific minimum wage and stating an average AEWR wage is necessary to address "pockets of past adverse effect" that are difficult to measure but may persist); 88 FR at 12768 (Feb. 28, 2023)(rejecting similar methods for similar reasons, and noting the AEWR functions as "a prevailing wage defined over a broader geographic area and over a broader occupational span"); *See also* 87 FR 61660, 61687, 61701 (Oct. 12, 2022)(explaining prevailing wage rates are not available for all crop activities and locations in every year and the Department will not issue a specific prevailing wage determination where a compliant state-issued survey prevailing wage is unavailable).

[33] *See, e.g.,* 88 FR at 12773 (noting capped AEWRs would not reflect actual wage changes and "imposition of such a cap would produce wage stagnation" especially "in years when the wages of agricultural workers are rising faster . . .").

the highest AEWR among those reported by the FLS and OEWS at the local, state, and national levels[34], among other suggested alternative methods.

**D. Recent Rulemaking and Litigation**

As part of a comprehensive NPRM published in 2019, the Department proposed to establish occupation-specific statewide hourly AEWRs for non-range occupations (*i.e.*, all occupations other than herding and production of livestock on the range) using data reported by FLS for the SOC code in the State or region, if available, or data reported by the OES (now OEWS) survey for the SOC code in the State, if FLS data in the State or region was not available.[35] The Department explained that establishing AEWRs based on data more specific to the agricultural services or labor being performed under the SOC system would better protect against adverse effect on the wages of agricultural workers in the United States similarly employed. The Department expressed concern that the AEWR methodology under the 2010 Final Rule could have an adverse effect on the wages of workers in higher paid agricultural SOC codes, such as supervisors of farmworkers and construction laborers, whose wages may be inappropriately lowered by use of a single hourly AEWR based on the wage data collected for the six SOC codes covering field and livestock workers (combined) when the essence of the employer's job opportunity is equivalent to and should be treated like other jobs in the higher paid occupations outside of the field and livestock workers (combined) category.[36]

On September 30, 2020, USDA announced its intent to discontinue the FLS and that it would not publish the FLS in November 2020. Litigation challenging USDA's

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[34] *See, e.g.,* 88 FR at 12773-12774 (rejecting this method because it would increase regulatory complexity and unpredictability and would arbitrarily impose a wage that is highest among multiple data sources when the Department's preferred sources are available, without noting flaws in the methodology of the preferred sources or explaining how other sources would produce a more accurate wage, which may result in employers paying an "enhanced wage untethered to the best available information . . ." and "place unnecessary upward pressure on wages . . .").

[35] *See* 84 FR at 36171 (Jul. 26, 2019).

[36] *See* 84 FR at 36180-36185.

cancellation of the FLS data collection and November annual report publication followed and, on October 28, 2020, in *United Farm Workers, et al.* v. *Perdue, et al.,* No. 20-cv-01452 (E.D. Cal. filed Oct. 13, 2020), the court preliminarily enjoined USDA from giving effect to its decision to cancel the October 2020 FLS data collection and cancel its November 2020 publication of the FLS.[37] In light of USDA's action and subsequent litigation over the announcement, the Department determined it was necessary to bifurcate the 2019 H-2A NPRM's proposals and published an AEWR final rule on November 5, 2020 (2020 AEWR Final Rule), to establish a new hourly AEWR methodology with an effective date of December 21, 2020.[38]

Under the 2020 AEWR Final Rule, the Department used the 2019 USDA FLS wage report as the baseline for establishing the 2021 AEWRs for all field and livestock workers (combined) occupations in all states with annual wage data except Alaska, which constituted more than 95 percent of H-2A job opportunities. After a two-year "freeze," these AEWRs would then be adjusted annually based on the 12-month percent change in the BLS Employment Cost Index (ECI) beginning in 2023; an index the Department continues to use to adjust the monthly AEWR for job opportunities in the herding or production of livestock on the range. For all other occupations and geographic areas not covered in the FLS report (*i.e.*, Alaska and U.S. territories), the 2020 AEWR Final Rule set AEWRs using the statewide average hourly gross wage for the occupation, as reported by the BLS OEWS survey at the state or national level. If the job opportunity is classified in more than one SOC system code, the AEWR will be the highest rate among the applicable occupational codes.

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[37] *United Farm Workers, et al. v. U.S. Dep't. of Labor, et al.*, 598 F.Supp.3d 878, 888 (E.D. Cal. Apr. 1, 2022); *see also United Farm Workers, et al. v. U.S. Dep't of Labor, et al.*, 509 F.Supp.3d 1225, 1255 (E.D. Cal. Dec. 23, 2020) (enjoining the Department from implementing the November 2020 Final Rule).

[38] Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States,*85 FR 70445, 70447-70465 (Nov. 5, 2020).

The Department's 2020 AEWR Final Rule was challenged in *United Farm Workers, et al.* v. *Dep't of Labor, et al.,* No. 20-cv-01690 (E.D. Cal. filed Nov. 30, 2020). The 2020 AEWR Final Rule was enjoined and subsequently vacated and remanded to the Department for further rulemaking consistent with the court's opinion.[39] As a result of this litigation, the Department reverted back to the methodology used in the 2010 H-2A Final Rule and continued to do so until February 28, 2023, when the Department published the 2023 AEWR Final Rule (2023 AEWR Final Rule).[40]

Under the 2023 AEWR Final Rule, the Department established the AEWRs based on the annual average hourly gross wage in the State or region reported from the USDA FLS or the BLS OEWS survey. The Department adjusted the AEWRs for each State or region at least once in each calendar year. The OFLC Administrator published an announcement in the *Federal Register* to update the AEWRs based on the FLS, effective on or about January 1, and a separate announcement in the *Federal Register* to update the AEWRs based on the OEWS survey, effective on or about July 1.

The Department determined the AEWR for the six most common occupations—those within the FLS field and livestock workers (combined) category[41]—using, as its primary wage source, the annual average gross hourly wage reported by the FLS for the State or region. Hourly wage rates were calculated based on employers' reports of total wages paid and total hours worked for all hired workers during a particular survey reference week each quarter. In the event the FLS could not report the annual average hourly gross wage for the field and livestock workers (combined) category in a particular geographic area (*e.g.,* in Alaska, which is not covered in FLS data) or in the unanticipated

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[39] *Id.*

[40] 88 FR 12760.

[41] This currently includes the following 'big six' SOC occupational titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse (45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093); Agricultural Equipment Operators (45-2091); Packers and Packagers, Hand (53-7064); Graders and Sorters, Agricultural Products (45-2041); and Agricultural Workers, All Other (45-2099).

circumstance that the FLS survey became unavailable (*e.g.,* suspension of the survey), the Department would use, as its secondary source, the OEWS to determine a statewide AEWR for the field and livestock workers (combined) category. In circumstances where neither the FLS nor the OEWS survey reports a statewide annual average hourly gross wage for the field and livestock workers (combined) category in a particular State, or equivalent district or territory, the Department used the OEWS survey's national annual average hourly gross wage for the field and livestock workers (combined) category to determine the AEWR in that State.

For H-2A job opportunities that do not fall within the FLS field and livestock workers (combined) category, the Department used only the OEWS survey to determine SOC-specific AEWRs. Under this methodology, the AEWR for all non-range SOC codes outside the field and livestock workers (combined) category were computed as the statewide annual average hourly gross wage for the SOC code, as reported by the OEWS survey. If the OEWS survey did not report a statewide annual average hourly gross wage for the SOC code, the AEWR for that State was determined as the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey.

The 2023 AEWR Final Rule also required employers to pay the highest of all applicable AEWRs for job opportunities involving a combination of duties within multiple occupations, regardless of the amount of time a worker may spend performing such duties. Although the vast majority of H-2A job opportunities fall within the FLS field and livestock workers (combined) category and are subject to the single statewide AEWR determination, some H-2A job opportunities include duties that fall both within and outside of that category. In these circumstances and no matter how often a particular duty or work task is performed, the Department determined the AEWR based on the highest of the applicable FLS and OEWS rates that employers were required to advertise, offer, and pay for the entire work contract period.

Since its implementation on March 30, 2023, the Department has litigated substantive issues raised in lawsuits across several district courts challenging the methodology contained in the 2023 AEWR Final Rule. Generally, plaintiffs in these litigation matters claim that the methodology contained in the 2023 AEWR Final Rule exceeds the Department's statutory authority and is arbitrary and capricious. In *USA Farm Labor*, *Inc., et al. v. Su, et al.,* No. 1:23-cv-00096 (W.D. N.C. filed June 28, 2023), the plaintiffs include a group of 23 mostly small farms and agricultural businesses and one H-2A filing agent asserting that the Department violated the Administrative Procedure Act (APA) and that the 2023 AEWR Final Rule was arbitrary and capricious for the following reasons: (1) the Department exceeded its statutory authority in treating agricultural positions as being "similar" to nonagricultural positions for purposes of determining the AEWRs; (2) the Department failed to consider what a worker's primary job duties are in determining the AEWR in favor of a combination of duties rule where even minor or intermittent job duties would shift the determination from an FLS-based AEWR to an OEWS-based AEWR; and (3) the Department failed to consider the effect its chosen AEWR methodology will have on food prices and rule's effect on illegal immigration. Although plaintiffs' motion for a preliminary injunction was denied by the district court, the lawsuit remains an active appeal in the Fourth Circuit.

In *Florida Growers Association, Inc. et al.* (FGA)[42], the plaintiffs included a group of small farms, one national association, and several Florida grower associations. In their complaint, plaintiffs asserted that the Department violated the APA and that the 2023 AEWR Final Rule was arbitrary and capricious for the following reasons: (1) the Department impermissibly used OEWS-based AEWRs for jobs involving a "mix of duties" falling both inside and outside of the FLS combined field and livestock workers

[42] *Florida Growers Ass'n, Inc., et al. v. Su,* No. 8:23-cv-00889-CEH-CPT (M.D. Fla. 2024).

category for the purpose of attracting U.S. workers to these job opportunities, rather than to prevent an adverse effect on the pay of similarly employed U.S. workers; (2) the Department should have confined its use of OEWS data by examining the primary or main duties of the work to be performed or, alternatively, applying the applicable wage to the specific work considered to be similar employment, rather than the highest applicable AEWR to all workers at all times under the contract; and (3) the USDA FLS data is flawed in that it includes total compensation paid by a farm, including overtime, Christmas or birthday bonuses, and piece-rate payments, rather than straight hourly rates, does not include farm labor contractors, and fails to consider non-wage expenses of H-2A employers that the Department requires them to provide, including but not limited to, international and local transportation and employer-provided housing. Based on testimony provided by expert economists, the plaintiffs further asserted that the FLS-based data provides an accurate count of the number of persons employed in agriculture and the average wage rate across all skill levels and occupations, but fails to provide an appropriate entry-level or starting wage for H-2A employment.[43] After the court denied plaintiffs' motion for preliminary injunction, the case was briefed for summary judgment but later stayed pursuant to the Department's motion.[44]

In *Teche Vermilion Sugar Cane Growers Assoc. Inc.,* (*Teche Vermilion*)[45], the plaintiffs included two agricultural associations, a trade association, three farming businesses, and an individual owner and operator of two farms seeking preliminary and permanent injunctive relief against the rule's application and enforcement. In their complaint, the plaintiffs asserted that the Department exceeded its statutory authority and the 2023 AEWR Final Rule is arbitrary and capricious under the APA because the rule:

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[43] Complaint, *Florida Growers Ass'n, Inc., et al v. Su*, No. 8:23-cv-00889-CEH-CPT (M.D. Fla. Apr. 21, 2023), ECF No. 1.

[44] *Id*. at ECF No. 105.

[45] *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su,* No. 6:23-CV-831 (W.D. La. 2023).

(1) required employers to pay some H-2A workers' wages based on allegedly higher rates for "non-farm" U.S. workers not similarly employed; (2) failed to adequately address the rule's economic impact on small business, or consider other alternatives, under the Regulatory Flexibility Act (RFA); and (3) violated the Congressional Review Act mandate that the Department submit a rule exceeding an alleged $100 million in economic impact to Congress at least 60 days prior to its effective date. On September 18, 2024, the district court issued a preliminary injunction enjoining the Department from applying the 2023 AEWR Final Rule to the named plaintiffs and members of the association plaintiffs with respect to the hiring of H-2A workers who grow, harvest, and process sugar cane in Louisiana. In its ruling, the court stated that it cannot conclude that the Department's "use of non-farm wage surveys, such as the OEWS, to supplement data from the FLS in setting the AEWR for H-2A workers exceeds the DOL's statutory authority as long as its methodology is based on workers who are 'similarly employed.'"[46] However, the Court further noted that the Department failed to consider or adequately explain the basis for assigning the AEWR for non-farm heavy and tractor-trailer truck drivers to H-2A workers engaged in driving sugarcane trucks, including failing to assess any "differences in the 'work performed, skills, education, training, and credentials' of these two groups of workers."[47] On August 21, 2025, plaintiffs in *Teche Vermilion* filed a Motion for Entry of Final Judgment requesting that the court convert its preliminary injunction into a final judgment and to accordingly vacate the 2023 AEWR Final Rule.[48] On August 25, 2025, the Western District of Louisiana granted plaintiffs' unopposed Motion for Entry of Final Judgment and ordered the 2023 AEWR Final Rule

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[46] *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, 749 F. Supp. 3d 697 (W.D. La. 2024), opinion clarified, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024), and amended, No. 6:23-CV-831, 2025 WL 1969937 (W.D. La. July 16, 2025).

[47] *Id.* at 730-731.

[48] Motion For Entry of Final Judgment, *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, No. 6:23-cv-00831-RRS-CBW (W.D. La. Aug. 21, 2025), ECF No. 86.

vacated.[49] As a result of the 2023 AEWR Final Rule being vacated, the Department currently establishes a single AEWR for each state and covering all H-2A job opportunities, except Alaska and the U.S. territories, using the 2010 final rule methodology that is based solely on the FLS hourly wage data for field and livestock workers (combined). On August 28, 2025, the Department published a notice on the OFLC website announcing the court's vacatur and stating that the AEWRs for all H-2A job opportunities will be set according to the methodology set forth in the 2010 final rule.

## II. Good Cause Justification and Need for This IFR

### A. The Good Cause Exception under the APA, and the Two Separate and Independent Bases for the Department's Invocation of the Good Cause Exception

The Administrative Procedure Act (APA) provides an exception to ordinary notice-and-comment procedures "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). *See also* 5 U.S.C. 553(d)(3) (creating an exception to the requirement of a 30-day delay before the effective date of a rule "for good cause found and published with the rule"). Generally, the good cause exception for forgoing notice and comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm."[50] While emergency situations are the most common circumstances in which the good cause exception is invoked, the infliction of real harm that would result from delayed action even absent an emergency can be sufficient grounds to issue a rule without undergoing prior notice and comment.[51] And, as

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[49] Judgment, *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, No. 6:23-cv-00831-RRS-CBW (W.D. La. Aug. 21, 2025), ECF No. 87.

[50] *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004); *see also U.S. Corp.* v. *U.S. E.P.A.,* 595 F.2d 207, 214 (5th Cir. 1979) ("It is an important safety valve to be used where delay would do real harm.").

[51] *Nat. Res. Def. Council, Inc.* v. *Evans,* 316 F.3d 904, 911 (9th Cir. 2003) ("[W]e have observed that notice and comment procedures should be waived only when `delay would do real harm.' . . . `Emergencies,

the D.C. Circuit noted, economic harm may be a basis on which the good cause exception may be invoked.[52]

First, the Department has good cause to forgo the APA's notice-and-comment procedures and delayed effective date requirements under the "public interest" prong. Under the "public interest" prong of the good cause exception, "the question is not whether dispensing with notice and comment would be contrary to the public interest, but whether providing notice and comment would be contrary to the public interest."[53] This prong applies here because, as is explained in detail hereinafter, at Section II.B, the lack of a reasonable and viable AEWR methodology, when combined with the current and imminent labor shortage exacerbated by the near total cessation of the inflow of illegal aliens, increased enforcement of existing immigration law, and global competitiveness pressures described below, presents a sufficient risk of supply shock-induced food shortages to justify immediate implementation of this IFR (with a subsequent "final" final rule to follow the comment period).

There is ample data showing immediate dangers to the American food supply. The methodology for calculating AEWRs in the vacated 2023 AEWR Final Rule and even under current 2010 final rule, both of which used a single average gross hourly wage for the vast majority of H-2A jobs without regard to the qualifications of the employer's job offer or how much time a worker spends performing specific duties during a work contract period poses an imminent risk to the supply of agricultural labor by setting unreasonably high price floors on labor. This IFR addresses and solves this imminent threat by implementing an AEWR methodology that results in more precise

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though not the only situations constituting good cause, are the most common.' ") (citations omitted); *see also Buschmann* v. *Schweiker,* 676 F.2d 352, 357 (9th Cir. 1982) ("The notice and comment procedures in Section 553 should be waived only when `delay would do real harm' . . . The good cause exception is essentially an emergency procedure.") (citations omitted).

[52] *Sorenson Commc'ns v. F.C.C.*, 755 F.3d 702, 707 (D.C. Cir. 2014).
[53] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012).

market-based price floors that still serves its statutory function of protecting American workers, but also, ensures that American supermarkets and U.S. consumers will have access to safe, affordable and American-grown produce.

These types of risks to the American food supply have supported good cause in the past and support them now.[54] As explained in detail below, any delay in implementing this revised AEWR policy would cause or exacerbate imminent and significant economic harm to employers in the U.S. agricultural sector, to authorized U.S. workers performing agricultural labor, and to U.S. consumers of domestic agricultural crops and commodities. Employers in the U.S. agricultural sector are facing a structural, not cyclical, workforce crisis driven by both the lack of an available legal workforce that is relatively mobile and able to adjust to changes in labor demands as well as an ever hastening loss of the mobile illegal alien workforce that had flowed in and out of the United States through a previously porous border.[55] Nationwide illegal crossings are now at a rate 93% lower than the peak level reached during the prior four years, a rate that has held steady since June of 2025. As discussed below and based on the Department's most recent NAWS data on U.S. crop workers, much of this illegal inflow artificially boosted the supply of labor at relatively lower costs compared to the labor costs associated with a legal workforce. The near total cessation of the inflow of illegal aliens combined with the lack of an available legal workforce, results in significant disruptions to production costs and threatening the stability of domestic food production and prices for U.S consumers.

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[54] *See e.g.*, *Friendship Dairies, Inc. v. Butz*, 432 F. Supp. 508, 513 (E.D.N.Y.), aff'd, 573 F.2d 1290 (2d Cir. 1977) (finding that 10% increase in price of milk, among other things, was sufficient to support good cause because it evinced "substantial evidence of the serious problems confronting producers in the Order No. 2 area and of the potential for disruption of normal marketing channels . . . If the trend were allowed to continue, shortages of milk would have been the likely result"); *see also Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (approving good cause rescission of regulation requiring inspection of poultry because they would "ameliorate" "poultry shortages or increases in consumer prices").

[55] See CPB, *National Media Release: Trump Administration delivers 4 straight months of 0 releases at the border, nationwide crossings remain 93% lower than the peak under Biden Administration, https://www.cbp.gov/newsroom/national-media-release/trump-administration-delivers-4-straight-months-0-releases-border [INSERT PERMA LINK]* (last visited September 20, 2025).

Unless the Department acts immediately to provide a source of stable and lawful labor, this threat will grow as the tools Congress provided in H.R. 1, *One Big Beautiful Bill Act*, to enhance enforcement of the nation's immigration laws are deployed.

Second, as explained in Section II.C below, the Department has good cause under the "impracticability" prong to forgo the APA's notice-and-comment procedures and delayed effective date requirements due to USDA's decision to discontinue certain statistical surveys including the FLS, that was submitted to OIRA on August 11, 2025, and subsequently approved on August 12, 2025.[56] This discontinuation went into effect August 31, 2025, and created a regulatory gap for establishing the AEWRs under the H-2A program that this IFR will immediately fill. Under the 2010 H-2A Final Rule methodology that is currently in effect due to the court's vacatur of the 2023 AEWR Final Rule in *Teche Vermilion*, the Department relies on the annual results of the FLS published by USDA in November to establish the annual AEWRs on or before December 31 each year. USDA's August action to discontinue the FLS means the data collection for the October quarter, which captures employment and wage information for the July and October 2025 quarters, was canceled, as well as release of the annual report planned for the November 2025 cycle. Although the methodology to establish the AEWRs under this IFR is untethered from the continued use of annual FLS wage data, the Department notes that any delay implementing this IFR, in light of USDA's recent decision, will prevent the Department from complying with the regulatory requirement to establish new annual AEWRs.

Accordingly, because notice and comment rulemaking would be impracticable and against the public interest, the Department hereby promulgates this IFR pursuant to 5 U.S.C. 553(b)(B). For the same reasons, good cause exists for the IFR to take immediate

[56] The USDA later published notice of the discontinuation in the *Federal Register* on September 3, 2025, at 90 FR 42560.

effect, and therefore, the Department sets the Effective Date to [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] pursuant to 5 U.S.C. 553(d)(3).[57]

**B. First, The Good Cause Exception is Independently Supported Due to the Current Widespread and Novel Economic Hardship Faced By The Regulated Community**

**1. Background Regarding the Labor Market for Agricultural Work**

On January 20, 2025, President Trump issued Executive Order 14159, *Protecting the American People Against Invasion,* 90 FR 8443 (Jan. 29, 2025), in response to an "unprecedented flood of illegal immigration into the United States" in recent years under the Biden Administration. The Order directs federal agencies to "employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all inadmissible and removable aliens," including those who committed illegal entry, have undocumented unlawful presence, or have final orders of removal. *Id*. at Section 3(b). The Order also calls for the efficient and expedited removal of aliens from the United States who are recent entrants (*i.e.*, arrived within the last two years), enforcement of civil fines and penalties, and detention of all "removable aliens" until their removal proceedings are resolved or their removal from the country.

As noted in Presidential Proclamation 10888, *Guaranteeing the States Protection Against Invasion,* "[o]ver the last 4 years, at least 8 million illegal aliens were encountered along the southern border of the United States, and countless millions more evaded detection and illegally entered the United States." 90 FR 83334 (Jan. 29, 2025). In March 2025, the Department of Homeland Security (DHS) determined "that an actual or imminent mass influx of aliens is arriving at the southern border of the United States and presents urgent circumstances requiring a continued federal response." *Finding of Mass Influx of Aliens,* 90 FR 13622, 13622 (Mar. 25, 2025). Additionally, DHS has initiated

[57] The Department further avers that the public is encouraged to engage in post-promulgation notice and comment, and that it intends to issue a "final" final rule wherein the Department will take consideration of the comments.

voluntary departure efforts, including the use of a new mobile application ("CBP Home app"), consistent with Presidential Proclamation 10935, *Establishing Project Homecoming,* 90 FR 20357 (May 14, 2025).[58]

The size and scope of these recent emergency actions to secure the southern border of the United States and vigorously enforce the nation's immigration laws to protect the American people is producing measurable changes in migration and detention patterns. In its June 2025 monthly report, the United States Customs and Border Protection (CBP) reported historically low numbers of border encounters and parole releases, including zero illegal alien releases along the southwest border for the second consecutive month.[59] CBP also noted record lows of 25,228 nationwide encounters, 8,024 nationwide apprehensions by U.S. Border Patrol, and zero parole releases compared to 27,766 released in June 2024. And finally, CBP made only 136 apprehensions on June 28: the lowest single-day total in agency history. By August 12, 2025, CBP continued to report that zero illegal aliens were released into the country for the third consecutive month with illegal crossings in July 2025 dropping to the lowest level ever recorded.[60] This trend has continued, and illegal alien inflow stays at historic lows. On September 19, 2025, CBP reported a fourth straight month of zero releases at the border and illegal crossing rates remaining at 93% lower than the peak reached during the prior four

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[58] See CBP, *CBP Home: Assistance to Voluntarily Self Deport, https://www.dhs.gov/cbphome* [*https://perma.cc/CK3X-QM79*] (last visited June 17, 2025). The CBP Home app allows aliens to register to depart the United States voluntarily, provide required biographical information, and notify DHS after they have departed. DHS also offers financial and travel document assistance for some aliens who request it, provides a $1,000 stipend upon confirmation through the app that return has been completed, and rescinds civil monetary fines imposed for failure-to-depart after return has been completed. *See also* DHS, *DHS Announces It Will Forgive Failure to Depart Fines for Illegal Aliens who Self-Deport Through the CBP Home App* (June 9, 2025), *https://www.dhs.gov/news/2025/06/09/dhs-announces-it-will-forgive-failure-depart-fines-illegal-aliens-who-self-deport* [*https://perma.cc/8RBN-PACA*].

[59] U.S. Custom Border and Protection, Department of Homeland Security, press release entitled "Most secure border in history: CBP reports major enforcement wins in June 2025," July 15, 2025, available at https://www.cbp.gov/newsroom/national-media-release/most-secure-border-history-cbp-reports-major-enforcement-wins-june (last visited August 20, 2025).

[60] U.S. Custom Border and Protection, Department of Homeland Security, press release entitled "Another record-setting month at CBP: Border continues to be most secure in history," August 12, 2025, available at https://www.cbp.gov/newsroom/national-media-release/another-record-setting-month-cbp-border-continues-be-most-secure (last visited September 18, 2025).

years."[61] Further, the U.S. Border Patrol has reported an average of 204 apprehensions per day, a rate 96% lower than the daily average reached during the prior four years.[62] Finally, in addition to the near total cessation of illegal inflow, illegal aliens are self-deporting at a rate which has been increasing at a high rate each month. Because of the very nature of voluntary departure, it is difficult to ascertain the exact number of self-deportations, but the confirmed number of voluntary departures went from just 592 in February 2025, to 4,241 in July 2025.[63] This represents an increase of approximately 7.17 times over this period.

The efficacy of current immigration enforcement activities that prioritize a secure border is a direct result of the scope and speed of the federal government's response to the unparalleled scale of the illegal immigration crisis facing the United States.[64] These enforcement efforts will imminently intensify following the enactment of H.R. 1, *One Big Beautiful Bill Act*, on July 4, 2025, under which Congress is immediately expanding federal investment in border security, detention capacity, and interior operations during fiscal years 2025 and 2026.[65] As these resources are deployed to further strengthen the U.S. Southern Border and enforce immigration laws, and as more illegal aliens choose voluntary departure in response, the Department anticipates an imminent and significant

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[61] See CPB, *National Media Release: Trump Administration delivers 4 straight months of 0 releases at the border, nationwide crossings remain 93% lower than the peak under Biden Administration, https://www.cbp.gov/newsroom/national-media-release/trump-administration-delivers-4-straight-months-0-releases-border [INSERT PERMA LINK]* (last visited September 20, 2025).

[62] *Id*.

[63] *New ICE Data Shows Steady Rise in Immigrants Self-Deporting,* Newsweek (Sept. 4, 2025, 3:08 PM EDT), updated (Sept. 5, 2025, 3:36 PM EDT) (last visited September 20, 2025), https://www.newsweek.com/ice-data-immigrants-self-deportation-trump-administration-2124106.

[64] Relevantly, U.S. Immigration and Customs Enforcement (ICE), which has responsibility for enforcing immigration laws within the interior of the United States, reported a record high of 56,816 in detention as of June 2025, and that number is expected to significantly increase. U.S. Immigration and Customs Enforcement, Department of Homeland Security, Detention Management Reports, FY 2025, available at https://www.ice.gov/detain/detention-management#:~:text=Detention%20Statistics. Of that group, 16,173, or 28 percent of the detained population, had a criminal conviction. An additional 13,891 people — 24 percent — had pending criminal charges.

decline in the number of available illegal aliens who had, in significant part, previously worked unlawfully in the U.S. agricultural sector.

Agricultural employers, who have been incentivized to utilize illegal aliens for numerous reasons including the excessively high FLS-based AEWR, will imminently face severe challenges accessing a sufficient and legal supply of labor to sustain current food production levels. According to the Department's National Agricultural Worker Survey (NAWS)[66], agricultural employers are disproportionately and increasingly dependent on illegal aliens with approximately 42 percent of crop workers surveyed reported lacking authorization to work in the United States during FY 2021-2022; compared to 36 percent in FY 2017-2018. These workers, both illegal aliens and authorized U.S. crop workers, are also settled and relatively immobile. Data from NAWS further shows that, in 2021-2022, only 3 percent of all U.S. crop workers reportedly migrated by following the crops while 84 percent of these workers remain settled and did not migrate for work at all. U.S. crop workers are also aging, as approximately 36 percent of the crop workers interviewed were 44 years of age or older, compared to less than 15 percent in 2000, and they spent an average of 8 years working for the same employer, compared to 3 years in 2000.

In short, the agricultural sector is experiencing acute labor shortages and instability because it has long depended on a workforce with a high proportion of illegal aliens who previously cycled in and out of the U.S. through a porous border; now, however, those who might have cycled in cannot do so because of the now secure U.S. Southern Border. Further, the remaining workforce tends to be relatively immobile and

[66] *Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023). U.S. DOL, Employment and Training Administration. Available at: https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS Research Report 17.pdf.

unable to adjust quickly to shifting labor demands, resulting in significant disruptions to farmers' ability to meet seasonal labor needs.

Most concerning for the fragile agricultural workforce are the dwindling numbers of current U.S. crop workers who are planning to continue working in agriculture. According to the NAWS, just over one in every five U.S. crop workers surveyed were planning to remain in agriculture for up to 5 years, while approximately 53 percent reported that they could find a non-farm job within one month. Separately, with illegal border crossings at historic lows. Agricultural employers that have historically relied on such illegal aliens, are experiencing economic harm caused by mounting labor shortages. According to available studies, a hypothetical decision to heighten immigration enforcement actions could further reduce the supply of agricultural labor with an estimated loss of, at a relatively modest estimate, 225,000[67] agricultural workers.[68]

In addition, the Department does not believe American workers currently unemployed or marginally employed will make themselves readily available in sufficient numbers to replace large numbers of aliens no longer entering the country, voluntarily leaving, or choosing to exit the labor force due to the self-perceived potential for their removal based on their illegal entry and status. The supply of American agricultural workers is limited by a range of structural factors including the geographic distribution of agricultural operations, the seasonal nature of certain crops, and overall unemployment

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[67] The true number is likely much higher when accounting for illegal aliens who are not deported but choose not to work to avoid exposure to potential enforcement actions. *See e.g.*, *Chloe East*; *Annie L. Hines*; *Philip Luck*; *Hani Mansour* and *Andrea Velasquez*, (2023), The Labor Market Effects of Immigration Enforcement, *Journal of Labor Economics*, 41, (4), 957 – 996.

[68] Rice University's Baker Institute for Public Policy noted in a March 26, 2025, article that "over 8 million undocumented immigrants currently work in the U.S., contributing to the economy in key industries. Mass deportations could worsen labor shortages, with estimates suggesting a reduction of 1.5 million in construction, 225,000 in agriculture, 1 million in hospitality, 870,000 in manufacturing, and 461,000 in transportation and warehousing. This would likely lead to higher costs, increased inflation, and slower economic growth, with states like California, Texas, and Florida facing the greatest impact." See *Social and Economic Effects of Expanded Deportation Measures,* published by Tony Payan and José Iván Rodríguez-Sánchez of Rice University's Baker Institute for Public Policy at Social and Economic Effects of Expanded Deportation Measures | Baker Institute.

rate.[69] Furthermore, agricultural work requires a distinct set of skills and is among the most physically demanding and hazardous occupations in the U.S. labor market. These essential jobs involve manual labor, long hours, and exposure to extreme weather conditions—particularly in the cultivation of fruit, tree nuts, vegetables, and other specialty crops for which production cannot be immediately mechanized. Based on the Department's extensive experience administering the H-2A temporary agricultural visa program, the available data strongly demonstrates—- a persistent and systemic lack of sufficient numbers of qualified, eligible and interested American workers to perform the kinds of work that agricultural employers demand. In the most recent five years, for example, employer demand for H-2A workers has increased by 36 percent from 286,900 workers requested in FY 2020 to nearly 391,600 workers requested in FY 2024, and the Department has consistently certified at least 97 percent of employer demand for agricultural workers based on a lack of qualified, eligible, and interested U.S. workers. For FY 2025 and as of July 1, 2025, employers seeking H-2A workers have requested more than 320,700 worker positions and the Department has certified 99 percent of the demand based on a lack of qualified and eligible U.S. workers. Despite efforts to broadly advertise agricultural jobs, as required by the Department's regulations at 20 CFR 655.144, 150, 153, and 154, the most recent data confirm that domestic applicants are not applying for agricultural positions in sufficient numbers to meet the temporary or seasonal workforce needs of employers. Thus, based on the available evidence, the Department concludes that qualified and eligible U.S. workers, whether unemployed, marginally employed, or employed seeking work in agriculture, will not make themselves immediately available in sufficient numbers to avert the irreparable economic harm to

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[69] See Kelly Lester, *Harvest on Hold*, John Locke Society, April 28, 2025, at pp. 5; 23-28 (https://www.johnlocke.org/wp-content/uploads/2025/05/Agriculture-Crisis-Web.pdf); *see also*, .

agricultural employers who no longer have access to a ready pool of illegal aliens to fulfill their labor needs.

**2. Economic Forecasting Regarding Food Prices and Availability**

With the historic near total cessation of illegal border crossings— the Department must take immediate action to provide agricultural employers with a viable workforce alternative while concurrently averting imminent economic harm. Labor shortages can have an immediate effect on farm operations. For example, one study found that a mere 10 percent decrease in the agricultural workforce can lead to as much as a 4.2 percent drop in fruit and vegetable production and a 5.5 percent decline in farm revenue.[70] Given that approximately 42 percent of the U.S. crop workforce are unable to enter the country, potentially subject to removal or voluntarily leaving the labor force, these impacts will likely be dramatically higher. The study further estimated that a 21 percent shortfall in the agricultural workforce would result in an overall $5 billion loss just in terms of domestic fresh produce alone for U.S. consumers. Such significant economic impacts not only create tangible and imminent economic harms, but they structurally disrupt the ordinary operations of the U.S. agricultural sector, resulting in shortages of agricultural commodities that cannot be supplemented with imports in the near-term.

Given the scale, speed, and investment in the federal government's efforts to enforce immigration laws and restore the integrity of the U.S. border, the Department concludes that there will be significant labor market effects in the agricultural sector, which has long been pushed to depend on a workforce with a high proportion of illegal aliens. Because these illegal aliens often possess specialized skills suited to agricultural tasks and typically earn lower wages than authorized workers, their sudden and large-

70 Zachariah Rutledge and Pierre Mérel, "Farm Labor Supply and Fruit and Vegetable Production," American Journal of Agricultural Economics 105, no. 2 (August 15, 2022): 644–73, https://doi.org/10.1111/ajae.12332.

scale departure is expected to significantly increase labor costs for employers. These cost increases are very likely to limit the ability of agricultural operations to maintain current production levels or expand employment, resulting in downstream impacts on food supply and pricing.

Labor expenses are already a major component of U.S. agricultural production costs, especially in the specialty crop sectors where relatively large numbers of illegal aliens are employed. According to USDA's Economic Research Service (ERS), labor expenses (including noncash employee compensation) are forecasted to reach a record high in 2025, rising $2.9 billion (5.9 percent) in 2024 to $51.7 billion and then increasing an additional $1.8 billion (3.6 percent) to $53.5 billion this year, driven by wage increases and ongoing labor shortages.[71]

Although hired domestic farmworkers only comprise less than 1 percent of all U.S. wage and salary workers, these workers are essential to U.S. agriculture. Without immediate action from the Department to assist employers in securing a reliable workforce alternative, labor shortages will likely intensify, driving up production costs, limiting output in key sectors such as fruits and vegetables, and increasing reliance on imported food products. USDA Economic Research Service (ERS) estimates that hired farm labor costs account for nearly 15 percent of total cash expenses across the sector, with labor-intensive sub-sectors, such as nurseries, greenhouses, and other specialty crop growers, devoting over 40 percent of their total cash expenses on labor.[72]

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[71] *Farm Sector Income & Finances: Farm Sector Income Forecast* (Feb. 2025). U.S. Department of Agriculture, Economic Research Service.

[72] Subedi, Dipak & Giri, Anil K. (Oct. 2024). *Specialty Crop Farms Have Highest Labor Cost as Portion of Total Cash Expenses.* U.S. Department of Agriculture, Economic Research Service. Available at: https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=110172. USDA ERS noted that farm wages have significantly increased both in absolute terms and relative to other occupations. For example, back in 1990, the average farm wage for nonsupervisory crop and livestock workers in real values was just over half the average real wage in the nonfarm sector for private nonsupervisory occupations. By 2022 the ratio had increased to 60 percent, as the gap between farm and nonfarm wages narrowed. "Farm Labor," Economic Research Service, United States Department of Agriculture (USDA), last updated August 7, 2023, https://www.ers.usda.gov/topics/farm-economy/farm-labor/.

These sub-sectors of U.S. agriculture, which are heavily dependent on illegal aliens, are especially vulnerable to labor market imbalances and cost volatility. At the same time, American agriculture is under intense global pressure. In April 2025, for example, ERS reported that the number of farms in the United States continued its decline to 1.88 million in 2024, the lowest in more than a century, down from 2.04 million in 2017.[73] And finally, after decades of consistent trade surpluses, U.S. agriculture is expected to face the largest trade deficit on record at $49.5 billion, driven in part by increased imports of labor-intensive commodities from countries with significantly lower production costs.[74]

**3. The Flaws in the AEWR Wage Policy that Restrict Labor Supply and Need for a New AEWR Methodology**

As the U.S. agricultural workforce faces growing instability, employers' reliance on the H-2A visa program has expanded rapidly. Over the past decade, demand for nonimmigrant workers under the H-2A classification has quadrupled, and the program has become a critical legal workforce solution for employers, particularly in labor-intensive sectors such as specialty crops. However, the high costs to participate in the H-2A program—including the mandatory AEWRs on top of other non-wage costs such as housing, transportation, and fees—have become increasingly burdensome. These requirements go far beyond the compensation costs an employer would bear if they *could* hire enough qualified and eligible local U.S. workers, placing further financial strain on

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[73] USDA, Economic Research Service using data from USDA, National Agricultural Statistics Service, Census of Agriculture (through 2022) and Farms and Land in Farms: 2024 Summary (February 2025).

[74] Hill, Alexandra E. & Sayre, James E. *As Mexican Farmworkers Flock North, Will U.S. Farms Head South?* (Oct. 2024). Outlook for U.S. Agricultural Trade: May 2025. ARE Update 28(1): 9–12. Giannini Foundation of Agricultural Economics, University of California. ("In 2022, the average non-H-2A U.S. farm worker earned $15 an hour; H-2A workers in California (the state with the highest AEWR that year) were required to be paid at minimum $17.51; and H-2A workers in Alabama, Georgia, and South Carolina (the states with the lowest AEWR in 2022) were required to be paid at minimum $11.99. By comparison, the average hired farmworker in Mexico earned the equivalent of $1.59 an hour in 2022. In the highest wage-paying state in Mexico, Colima, the average worker earned $2.53 an hour, a quarter of the minimum AEWR in that year."). Available at: https://s.giannini.ucop.edu/uploads/pub/2024/10/29/v28n1_3.pdf.

farming operations of all sizes in an industry already facing a record trade deficit[75] and overall grim financial outlook.

Over the last 20 years, the national average FLS-based AEWR has more than doubled from $8.56 in 2005 to $17.74 in 2025. Between 2005 and 2018, the average annual increase in the AEWR was already 2.8 percent, but the pace of annual wage growth since that time has increased significantly. Since 2019, the average annual increase in the AEWR was 5.5 percent, nearly double the rate of change in the earlier period and far outpacing the 4.4 percent average annual hourly wage growth of all other non-farm private sector workers.[76] For 2025, the AEWRs across the country ranged from a low of $14.83 in the Delta Region covering the states of Arkansas, Louisiana, and Mississippi to a high of $19.97 in California. Notably, these rates *exceed* the local applicable minimum wage for domestic workers. These AEWR rates must be paid to workers in addition to the cost of other mandatory remuneration, benefits, and working conditions (*e.g.*, housing, transportation) that workers receive under the H-2A program. AEWRs have risen substantially across all regions of the United States with the southeastern states experiencing a nearly 10 percent increase over 2024. More than 35 percent of states experienced an AEWR wage increase between 50 cents and 99 cents per hour while an additional 37 percent of states experienced an increase between $1 and $1.50 per hour. Nearly two-thirds of all states have an AEWR between $17 and $20 in 2025, which is well above federal and state minimum wage levels. Put another way, the national average AEWR increased by a total of $4.40 per hour in the 15-year period from

[75] Kaufman, J., Jiang, H., & Williams, A. (2025). Outlook for U.S. agricultural trade: May 2025 (Report No. AES-132). U.S. Department of Agriculture, Economic Research Service and U.S. Department of Agriculture, Foreign Agricultural Service. This forecast projects the largest agricultural trade deficit in U.S. history, with the first four months of the year resulting in a $19.7 billion deficit that is expected to continue to grow.

[76] *Average Hourly Earnings of All Employees, Total Private* (Jun. 2025). Federal Reserve Bank of St. Louis. Available at: https://fred.stlouisfed.org/series/CEU0500000003.

2005 to 2019. However, the national average AEWR has increased by more than $3.75 per hour within just the last 5 to 6 years.

In its most recent May 2025 data release, USDA estimates that the national average hourly wage for field and livestock workers combined was $18.46 per hour based on data collected for the January 12 – 18 reference week, and $18.43 per hour based on data collected for the April 6 – 12 reference week, yielding a weighted average of $18.44 per hour, a further 4 percent increase over the current national average AEWR of $18.12 per hour.[77] In a sector where profits margins are already thin, such increases place agricultural employers at a competitive disadvantage, particularly when compared to growers in Mexico paying approximately $1 to $2 per hour.[78]

Additional upward pressure on labor costs—whether due to continued AEWR escalation or other regulatory requirements[79]—threatens the viability of farming operations, especially as substantial numbers of illegal aliens are removed or voluntarily

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[77] *See* May 2025 Farm Labor Report, National Agricultural Statistics Service (NASS), Agricultural Statistics Board, United States Department of Agriculture, (May 21, 2025).

78 For example, in 2023 and 2024, the U.S. farm sector reported overall declining profitability; the vast majority of farms earned $1,000,000 or less in gross sales. Stephanie Rosch, Christine Whitt, *2023 and 2024 Farm Sector Profitability: Issues for Congress* (Dec. 21, 2024), available at https://www.congress.gov/crs-product/R48278?. U.S. farms that earned $100,000 or less reported less than $2,000 in average net cash farm income in 2023 and 2024, and reported negative average net cash farm income in 2019-2021. *Id*. With respect to production expenses, labor costs (including noncash employee compensation) are forecast to be a record high in 2025, rising $2.9 billion (5.9 percent) in 2024 to $51.7 billion. They are forecast to rise by an additional $1.8 billion (3.6 percent) to $53.5 billion in 2025. See U.S. Department of Agriculture, Economic Research Service. (2025, February 6). *Farm sector income & finances: Farm sector income forecast.*

[79] According to a recent study conducted as a cooperative research grant through the USDA's Office of the Chief Economist, researchers analyzed relevant non-wage costs on employers participating in the H-2A program, including fees, transportation, housing, and other recruitment expenses, finding that the minimum cost of nonwage expenses for H-2A workers is approximately $10,000 per worker. For employers requesting 100 workers, the estimated DOL and DHS fees would cost $15.60 per worker ($11 per worker in labor certification and $4.60 per worker in nonimmigrant worker petition), while applying for 10 workers would cost four times more. In addition, informal surveys of large H-2A employers suggest a typical recruitment fee of $100– $250 per worker and $1,500–$3,500 per application in US agent costs. USDA estimates the cost of transporting H-2A workers to the United States from their home countries from $400 to $650 per worker with housing costs range between $9,000 and $13,000 per worker, making it the biggest nonwage expense for H-2A employers. See Marcelo Castillo, Philip Martin, and Zachariah Rutledge, Whither the H-2A Visa Program: Expansion and Concentration, published in Choices Magazine, Volume 39, Quarter 1 (June 2024) and available at https://www.choicesmagazine.org/choices-magazine/submitted-articles/whither-the-h-2a-visa-program-expansion-and-concentration (last visited September 14, 2025).

depart from the U.S. labor force.[80] Based on the Department's program experience, the combination of rapid increases in the AEWRs, additional non-wage costs to employ H-2A workers, and other increases in regulatory compliance costs has materially slowed the overall growth of employer labor demand in the last two years with respect to the total number of H-2A workers being requested for labor certification. For instance, for several years prior to 2023, the average annual rate of growth in employer demand for H-2A worker positions was almost 15 percent. However, the growth in employer demand for H-2A workers has dramatically slowed to 1.98 percent in 2023 (398,908), compared to 2022 (382,354), and a mere 0.42 percent in 2024 (391,590).[81]

Importantly, these rising AEWR levels have not resulted in a meaningful increase in new entrants of U.S. workers to temporary or seasonal agricultural jobs. Agricultural work remains physically demanding, often takes place in remote locations, carries health and safety risks, and typically lacks advancement opportunities—factors that continue to

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[80] The Department is also aware of the extensive discussions in Congress on the AEWR and various bipartisan bills introduced to immediately alter the methodology for determining the AEWRs in the H-2A program. For example, on January 18, 2024, the Supporting Farm Operations Act of 2024 was introduced to freeze the AEWRs in effect on December 31, 2023, through the end of 2025. See Support Farm Operations Act. S. 3848, H.R. 7046, 118th Cong. (2024). Available at: https://www.congress.gov/bill/118th-congress/senate-bill/874/text; In January 2024, 75 members signed a letter to leadership on the House and Senate Committees on Appropriations requesting that an H-2A wage freeze be included in the Fiscal Year (FY) 2024 appropriations bill. See Rep. Bill Huizenga, et al. Letter to Members of the Committee on Appropriations (Jan. 11, 2024). Available at: https://huizenga.house.gov/uploadedfiles/jan._11_ltr_to_appropriators_re_h2a_wage_2024.pdf. On May 22, 2025, more than 100 members of Congress once again wrote a similar letter to leaders on the House Subcommittee on Labor, HHS and Education urging an H-2A wage freeze be included in the FY 2026 appropriations legislation. Specifically, the House members noted that the "skyrocketing AEWR will only compound inflated input costs like energy and fertilizer, other guest worker expenses like transportation and housing, and burdens from several impending federal regulations and fees … If we do nothing, many of our constituents will be forced to shutter their businesses, despite good-faith efforts to ensure our national food security and feed families across our nation." See Rep. Bill Huizenga, et al. Letter to Chair and Ranking Member of the Subcommittee on Labor, HHS, and Education (Jan. 11, 2024). available at: https://huizenga.house.gov/uploadedfiles/final_h2a_wage_freeze_fy26.pdf.

[81] Concerns regarding the negative effects of rapidly rising AEWRs in recent years were also noted by a bipartisan Agricultural Labor Working Group (ALWG), which was formed in 2023 by the House Committee on Agriculture. In its final report released on March 7, 2024, the ALWG noted that the "strictures of current law are driving up costs in the H-2A program and acting as barriers to entry for the program." With unanimous support, the ALWG recommended a one-year freeze on the AEWRs and caps to increases and decreases to provide more stability and predictability related to an employer's wage obligations. See H. Rpt. Final Report with Policy Recommendations. House Committee on Agriculture, Agricultural Labor Working Group at 10. Available at: https://agriculture.house.gov/uploadedfiles/alwg_final_report_-_3.7.23.pdf.

discourage participation by the domestic workforce. Despite rising wages, such jobs are still not viewed as viable alternatives for many workers. At the same time, U.S. demand for fresh fruits and vegetables continues to grow, and the vast majority of this labor remains non-automated. Decline in the illegal alien population will only exacerbate this already pressing mismatch in the agricultural labor market and deprive growers of a relatively cheaper labor supply on which they have become economically reliant. (A substantial body of research estimates that illegal alien workers earn between four percent and 24 percent less than similarly situated legal workers, giving employers a strong financial incentive to hire illegal labor.)[82] Despite rising wages, there is no indication that unemployed or marginally attached U.S. workers are entering the agricultural labor force in meaningful numbers. Without swift action, agricultural employers will be unable to maintain operations, and the nation's food supply will be at risk.

Under such conditions, the current methodology for determining the AEWRs is an unworkable barrier to securing a legal agricultural workforce. The H-2A program should be a viable legal pathway—not a regulatory dead end. The Department has long recognized that "clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive" and that "[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile."[83] The unreasonably high FLS-based AEWRs were only workable because agricultural employers could turn to low-priced illegal aliens, but that is no longer the case. U.S. agricultural employers need a legal and stable

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[82] See Borjas, George J., and Hugh Cassidy, The wage penalty to undocumented immigration. *Labour Economics* 61 (2019): 101757; Donato, Katharine M., and Douglas S. Massey. "Effect of the Immigration Reform and Control Act on the wages of Mexican migrants. " *Social Science Quarterly* (1993): 523-541; Kossoudji, Sherrie A., and Deborah A. Cobb-Clark. "Coming out of the shadows: Learning about legal status and wages from the legalized population." *Journal of Labor Economics* 20, no. 3 (2002): 598-628; Rivera-Batiz, Francisco L. "Undocumented workers in the labor market: An analysis of the earnings of legal and illegal Mexican immigrants in the United States." *Journal of Population Economics* 12, no. 1 (1999): 91-116.)

[83] 54 FR at 28046.

workforce to support their farming operations, and persistent labor shortages and increases in production costs will only harm U.S. competitiveness, threaten food production, drive up consumer prices, and create instability in rural communities.

Thus, the Department concludes, based on all available evidence and studies, that immediate reform to the H-2A program's minimum wage policy, or the AEWRs, is necessary to avoid imminent widespread disruption across the U.S. agricultural sector. Without prompt action, agricultural employers will face severe labor shortages, resulting in disruption to food production, higher prices, and reduced access for U.S. consumers, particularly to fresh fruit and vegetables. Further, the Department concludes that qualified and eligible U.S. workers will not make themselves available in sufficient numbers, even at current wage levels, to fill the significant labor shortage in the agricultural sector. As discussed in detail below, the reforms contained in this IFR of the H-2A program's wage policy are urgently needed to restore the usability of the H-2A program and to provide a practical, lawful workforce alternative to illegal aliens. These changes ensure that agricultural employers offer fair wages to legally authorized workers—consistent with wages paid in comparable farm and non-farm jobs—while maintaining compliance with immigration law and supporting the stability of the nation's food supply.

As the regulatory impact analysis indicates, the Department anticipates negative impacts for certain populations associated with this regulation. In particular, certain current H-2A workers may experience reductions in wages as a result of lower prevailing wage rates. However, the Department expects that this effect will be mitigated by an increase in the number of certified H-2A job opportunities, which will create additional employment for new H-2A workers who may otherwise lack access to lawful agricultural employment in the United States. The Department also acknowledges that illegal aliens currently employed in agriculture may be adversely affected as growers shift toward reliance on the lawful H-2A program rather than illegal aliens.

**C. Second, the Good Cause Exception is Separately and Independently Supported by the Discontinuation of the FLS by the Department of Agriculture and the Court Ordered Vacatur of the 2023 AEWR Final Rule**

As discussed above, in Section I.D., on August 21, 2025, plaintiffs in *Teche Vermilion* filed a Motion for Entry of Final Judgment requesting that the court convert its preliminary injunction into a final judgment and to accordingly vacate the 2023 AEWR Final Rule.[84] On August 25, 2025, the Western District of Louisiana granted plaintiffs' unopposed Motion for Entry of Final Judgment and ordered the 2023 AEWR Final Rule vacated.[85] As a result of the vacatur, the methodology for determining the AEWRs reverted back to the 2010 H-2A Final Rule which sets the AEWRs based solely on the annual weighted average hourly wage for field and livestock workers (combined) as reported by the FLS and published in November each year by USDA.[86]

However, on August 11, 2025, USDA made the determination, based on its own statutory authority, to discontinue surveys and further administration of the FLS program and the request was subsequently approved by OIRA on August 12, 2025, with an immediate effective date of August 31, 2025.[87] As a result of this determination, USDA canceled the October quarter's data collection for the FLS that collects employment and wage information for the July and October 2025 quarters from farm establishments. Without the October data collection, USDA cannot produce a November 2025 report containing the annual gross hourly wage rates for field and livestock workers (combined) for each state or region based on quarterly wage data collected from employers during

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[84] Motion For Entry of Final Judgment, *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, No. 6:23-cv-00831-RRS-CBW (W.D. La. Aug. 21, 2025), ECF No. 86.

[85] Judgment, *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, No. 6:23-cv-00831-RRS-CBW (W.D. La. Aug. 21, 2025), ECF No. 87.

[86] 20 C.F.R. 655.103 (2010); 20 C.F.R. 655.120(c) (2010).

[87] https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=0535-0109#; 90 FR 42560 (Sep. 3, 2025).

calendar year 2025. Under the 2010 H-2A Final Rule methodology for establishing the AEWRs, the November 2025 FLS report would be used to establish and publish the hourly AEWRs for the next calendar year period on or before December 31, 2025, as required by the Department's regulations.[88]

Because the methodology for establishing the AEWRs under the 2010 H-2A Final Rule does not provide for the use of a data source other than USDA FLS, USDA's recent determination to discontinue administration of the FLS program created an imminent regulatory gap, leaving the Department without the means to establish updated AEWRs for the 2026 calendar year period. Given the requirement to publish updated AEWRs on or before December 31, 2025, immediate action is necessary.

In the absence of the FLS, the methodology for establishing the AEWRs under the 2010 H-2A Final Rule provides the Department with no other mechanism for establishing the annual AEWRs that it is required to publish pursuant to 29 CFR 655.120(c). Section 20 CFR 655.103 requires the Department to base the AEWR on the FLS survey "as published annually" based on USDA's "quarterly wage survey." However, as explained above, these data will not be published due to USDA's discontinuation of its FLS. There are no other provisions establishing what an "AEWR" is for purposes of 20 CFR 655.120(c).

The Department seeks to fill this imminent regulatory gap and promote long-term stability in administering the H-2A program by immediately adopting revisions to the AEWR methodology that rely on the BLS OEWS as the sole source of employment and wage information for establishing more precise skill-based AEWRs for all job opportunities specific to each state, which the FLS is not capable of reporting. Employers using the H-2A program depend on the existence of regularly published AEWRs to understand their minimum wage obligations to workers, and the Department has a

[88] 20 C.F.R. 655.120(c) (2010).

statutory mandate to protect the wages of similarly employed U.S. workers from adverse effect. The Department's inability to establish the AEWRs for calendar year 2026 would lead to a regulatory collapse of minimum wage requirements in the H-2A program as employers would face significant economic uncertainty with respect to what minimum wage requirements would apply and be enforced by the Department under their work contracts with farmworkers.[89]

In short, the status quo following the *Teche Vermilion* order to vacate the 2023 AEWR Final Rule and discontinuation of the FLS by USDA in August 2025 will lead to a disruptive and uncertain regulatory environment. This outcome would occur either if the Department did nothing, or if the Department opted to publish this rule via notice and comment instead of as an IFR. Therefore, good cause exists for the Department to provide a new methodology for determining the AEWRs so the Department can publish new AEWRs in time for employers to use by the start of 2026.

Recognizing the need to publish a notice in the Federal Register before the end of calendar year 2025, the Department has considered but rejected relying on the 2024 AEWRs and later switching to the IFR's proposed methodology. Crucially, because the FLS has been discontinued by USDA, there is no USDA data collection that could occur in time for the mandatory January 1, 2026 publication of the AEWRs. Because the Department will have to change to the OEWS in any event, it is clear that the benefits of making the switch immediately outweigh the minor costs. As explained in detail below, the Department has determined that the OEWS is a superior data source to the FLS for establishing more precise skill-based AEWRs covering all job opportunities specific to

[89] Moreover, in the absence of a FLS-based AEWR, the requirements set forth under the 2010 H-2A Final Rule at 20 CFR 655.120 provides that a regulated employer would have to offer the highest of "the AEWR [which no longer exists], the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment." While failure to publish an AEWR is problematic, in its own right, as a failure of the Department to satisfy a regulatory mandate, it would also lead to Federal or State minimum wages being the next highest rate in many instances.

each state and will possess an even higher degree of superiority once the anticipated expansion of the OEWS to collect information from farm establishments begins during calendar year 2026. The Department sees no benefit in continuing to rely, even temporarily, on AEWRs established under the 2010 Final Rule using a methodology and data sources that cannot produce more precise estimates of the average wages paid to U.S. workers similarly employed based on the skills and qualifications required by employers who are seeking to employ H-2A nonimmigrant workers, and then instituting a new methodology shortly thereafter during the peak filing months of November through March and after many employers have business contracts in place.[90]

Accordingly, in addition to, and as a separate and independent basis for good cause, (1) the *Teche* judgment that vacated the 2023 AEWR Final Rule and replaced it with the 2010 AEWR Final Rule, and (2) the discontinuance of the FLS creates a need for immediate action to ensure compliance with the regulatory requirement to establish updated AEWRs for 2026. The Department must take effective action by January 1, 2026, otherwise, the H-2A application environment will be subject to disruption and uncertainty. The Department explains in great detail why the methodology that this IFR implements is the best possible methodology. There is simply no good reason why the Department should opt for a different methodology on a temporary basis before switching to the new one. Indeed, such oscillations on a short-term basis would be disruptive.

**III. Implementation of This IFR**

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[90] Courts have frequently recognized that this kind of a "regulatory vacuum" militates in favor of finding good cause. *See e.g.*, *Am. Fed'n of Gov't Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) ("Although the trial judge indicated that he was only voiding the status quo order and was not mandating the action to be taken by the Department to comply with his injunction, the absence of specific and immediate guidance from the Department in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm and disruption to those northeastern processors whose inspection lines ran at varying speeds."); *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 20 (D.D.C. 2010) ("courts within this Circuit have considered the need for regulatory guidance as one factor in assessing whether an agency has "good cause" to forego notice and comment.") Indeed, as in *AFL-CIO v. Block*, the mere existence of an undesirable "backstop" does not weigh against a finding of good cause.

This IFR amends the AEWR methodology announced in the 2010 H-2A Final Rule and amends the regulatory text in 20 CFR 655.120(b) which had not been amended after the vacatur of the 2023 AEWR Final Rule. Any job orders for non-range job opportunities submitted to the OFLC National Processing Center (NPC) in connection with an *Application for Temporary Employment Certification* for H-2A workers before the effective date of this final rule will be processed using the 2010 H-2A Final Rule methodology, under which the AEWR for all non-range H-2A job opportunities is equal to the annual average hourly gross wage rate for field and livestock workers (combined) in the State or region as reported by FLS. That means employers must pay the wage rate listed in a currently certified job order to all H-2A workers and all workers in corresponding employment for the duration of the work contract period provided it is still higher than the applicable AEWR published under this IFR. *See* 20 CFR 655.120(b)(5)-(6). The methodology established by this IFR, as described in revisions adopted by the Department under 20 CFR 655.120(b)(1)(iii), applies to any job orders for non-range job opportunities submitted to the NPC in connection with an *Application for Temporary Employment Certification*, as set forth in 20 CFR 655.121, on and after the effective date of this IFR, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under 20 CFR 655.134.

In order for employers to understand their wage obligations upon the effective date of this IFR, the Department is listing below the statewide AEWRs for Skill Level I (Entry-Level) and Skill Level II (Experience-Level) qualifications applicable to the field and livestock workers (combined) category for each state pursuant to 20 CFR 655.120(b)(1)(i). In addition, the Department is listing in the last column the statewide downward compensation adjustments to the applicable AEWRs that can only be applied to H-2A workers who are provided with housing at no cost pursuant to 20 CFR 655.120(b)(3) of this IFR. For example, if employers are seeking to employ H-2A

workers in Alabama for jobs in any of the five SOC codes encompassed by the "field and livestock workers (combined)" category, their job orders would specify in the job order (i.e., Field A.8b of the Form ETA-790A) a wage offer to U.S. workers no less than $11.25 per hour where the duties and qualifications are commensurate with a Skill Level I position. For any H-2A worker(s) employed under the associated temporary agricultural labor certifications, employers would specify in Field A.8e or Addendum A of the job order wage offers to H-2A workers no less than $10.05 per hour ($11.25 per hour for Skill Level I minus $1.20 per hour adjustment).

Additionally, the Department has posted contemporaneously with the publication of this IFR, a Microsoft Excel file on the OFLC Foreign Labor Application Gateway (FLAG) System at https://flag.dol.gov/wage-data/adverse-effect-wage-rates enabling interested parties to locate, by State and SOC code, the AEWR applicable for Skill Level I (Entry-Level) and Skill Level II (Experience-Level) qualifications covering all other non-range job opportunities pursuant to 20 CFR 655.120(b)(1)(ii) of this IFR.

| Table—Statewide Hourly AEWRs Determined Under § 655.120 (b)(1)(i) and Compensation Adjustment for H-2A Workers ONLY | | | |
|---|---|---|---|
| State | Skill Level I (Entry-Level) | Skill Level II (Experience-Level) | H-2A Adverse Compensation Adjustment |
| Alabama | $11.25 | $14.95 | - $1.20 |
| Alaska | $14.79 | $20.01 | - $1.90 |
| Arizona | $15.32 | $18.01 | - $2.10 |
| Arkansas | $13.40 | $16.18 | - $1.13 |
| California | $16.45 | $18.71 | - $3.00 |
| Colorado | $16.28 | $20.02 | - $2.18 |
| Connecticut | $15.93 | $18.20 | - $2.06 |
| Delaware | $14.61 | $19.63 | - $1.85 |
| District of Columbia | $17.47 | $23.80 | - $2.64 |
| Florida | $12.47 | $15.06 | - $2.29 |
| Georgia | $12.27 | $16.22 | - $1.75 |

| Table—Statewide Hourly AEWRs Determined Under § 655.120 (b)(1)(i) and Compensation Adjustment for H-2A Workers ONLY | | | |
|---|---|---|---|
| State | Skill Level I (Entry-Level) | Skill Level II (Experience-Level) | H-2A Adverse Compensation Adjustment |
| Guam | $9.70 | $10.89 | - $2.35 |
| Hawaii | $14.36 | $18.49 | - $3.18 |
| Idaho | $12.92 | $17.07 | - $1.84 |
| Illinois | $15.48 | $18.75 | - $1.79 |
| Indiana | $14.93 | $19.22 | - $1.27 |
| Iowa | $14.20 | $18.87 | - $1.15 |
| Kansas | $12.69 | $18.14 | - $1.26 |
| Kentucky | $13.94 | $17.99 | - $1.24 |
| Louisiana | $9.59 | $14.84 | - $1.35 |
| Maine | $14.81 | $18.95 | - $1.60 |
| Maryland | $15.35 | $18.21 | - $2.31 |
| Massachusetts | $15.29 | $17.57 | - $2.42 |
| Michigan | $13.78 | $17.47 | - $1.32 |
| Minnesota | $14.60 | $19.33 | - $1.68 |
| Mississippi | $9.74 | $14.92 | - $1.15 |
| Missouri | $14.56 | $18.74 | - $1.28 |
| Montana | $13.03 | $18.48 | - $1.80 |
| Nebraska | $14.20 | $19.26 | - $1.24 |
| Nevada | $14.54 | $18.40 | - $2.15 |
| New Hampshire | $13.99 | $16.14 | - $1.96 |
| New Jersey | $16.05 | $19.41 | - $2.28 |
| New Mexico | $12.51 | $16.20 | - $1.44 |
| New York | $15.68 | $18.75 | - $2.40 |
| North Carolina | $12.78 | $16.39 | - $1.69 |
| North Dakota | $12.31 | $18.98 | - $1.27 |
| Ohio | $14.38 | $18.11 | - $1.23 |
| Oklahoma | $11.27 | $16.01 | - $1.22 |
| Oregon | $15.25 | $17.62 | - $2.11 |
| Pennsylvania | $13.88 | $17.99 | - $1.52 |

| Table—Statewide Hourly AEWRs Determined Under § 655.120 (b)(1)(i) and Compensation Adjustment for H-2A Workers ONLY | | | |
|---|---|---|---|
| State | Skill Level I (Entry-Level) | Skill Level II (Experience-Level) | H-2A Adverse Compensation Adjustment |
| Puerto Rico | $9.50 | $10.37 | - $0.71 |
| Rhode Island | $14.15 | $17.17 | - $1.87 |
| South Carolina | $12.14 | $15.92 | - $1.54 |
| South Dakota | $13.19 | $17.48 | - $1.20 |
| Tennessee | $12.44 | $16.64 | - $1.60 |
| Texas | $11.81 | $15.67 | - $1.84 |
| Utah | $12.48 | $16.86 | - $1.84 |
| Vermont | $15.96 | $19.23 | - $1.61 |
| Virgin Islands | $10.98 | $14.34 | - $1.59 |
| Virginia | $13.90 | $18.40 | - $2.08 |
| Washington | $16.53 | $19.00 | - $2.49 |
| West Virginia | $12.00 | $16.15 | - $1.12 |
| Wisconsin | $13.29 | $18.22 | - $1.29 |
| Wyoming | $11.34 | $17.23 | - $1.32 |

When the OFLC Administrator publishes subsequent updates to the AEWRs in the **Federal Register**, as required by 20 CFR 655.120(b)(4) of this final rule, the adjusted AEWRs will be effective as of the date of publication in the corresponding **Federal Register** notices. If the new AEWR applicable to the employer's certified job opportunity is higher than the highest of six applicable wage rates—the previous AEWR, the current prevailing hourly wage rate, the current prevailing piece rate, the current agreed-upon collective bargaining wage, the current Federal minimum wage rate, or the current State minimum wage rate, the employer must pay that adjusted AEWR upon the effective date of the new rate. *See* 20 CFR 655.120(b)(5). Conversely, if an updated AEWR for the occupational classification and geographic area is published in the *Federal Register* during the work contract, and the updated AEWR is lower than the rate guaranteed on the

job order, the employer must continue to pay at least the rate guaranteed on the job order. *See* 20 CFR 655.120(b)(6).

The Department also acknowledges that there are four different parties with potential reliance interests that are likely to be impacted by this IFR: (1) agricultural employers; (2) U.S. workers currently, or potentially, employed in the agricultural sector; (3) non-U.S. workers currently, or potentially, legally employed in the agricultural sector via the H-2A rules; and (4) the U.S. consumers of U.S.-grown agricultural commodities. The Department has carefully considered the impact of this IFR on each of these groups, especially in this IFR's economic analysis of transfers and rule familiarization costs. The Department acknowledges that the overall impact of this new methodology will be a reduction in the AEWRs, or minimum hourly wage rate floors for H-2A workers and workers in corresponding employment that are likely to result in wage transfers to employers as a result of adopting more precise skill-based AEWRs based on the actual qualifications of the job opportunity as well as the adverse housing adjustment factor. The Department acknowledges these reliance interests and has accounted for them in this IFR, but as an initial matter concludes that they are far outweighed by other reliance interests and other significant reasons that support the promulgation of this IFR.

First, the Department believes that, in many ways, the IFR serves these groups' reliance interests, including those of U.S. agricultural employers who, by virtue of being recurring seasonal users are the most likely participants in the H-2A system to have serious reliance interests. Most significantly, the discontinuation of the FLS by the USDA has created a regulatory vacuum that this IFR fills. The Department believes a key reliance interest among these recurring participants in the H-2A program is to have an AEWR that is published and can be used for facilitating the preparation of H-2A job orders and applications at the start of the calendar year, regardless of regulatory methodology that determines the AEWRs. By putting a new methodology in place before

the start of the calendar year, this IFR ensures that this reliance interest is not damaged by the regulatory vacuum caused by the discontinuation of the FLS. The Department believes that the analysis of rule familiarization costs thoroughly accounts for the reliance interests of U.S. agricultural employers and demonstrates that they are offset by the benefits of an increased supply of H-2A workers.

Moreover, the Department has demonstrated that changes to the AEWR methodology are necessary to use a more reliable and robust source of data and that more accurately accounts for both the wide array of occupations in the H-2A program, and the varying qualifications and skill levels of the work required by employers. Critically, the methodological changes contained in this IFR are more reflective of the market-based wages being paid to U.S. workers similarly employed, and reducing any distortion caused by the previous AEWR methodology that created exorbitant wages. Thus, the Department initially concludes that these changes will allow it to better carry out its statutory mandate in a manner that balances the needs and interests of workers and agricultural employers.

Turning to the potential reliance interest of U.S. workers in the current methodology, the evidence relied on throughout this IFR strongly indicates that such reliance is tethered to a labor market that is dramatically changing and increasingly unstable. As discussed, the current and imminent labor shortage and the subsequent natural correction of a labor market artificially impacted by illegal aliens cannot be avoided. The Department simply has no evidence of the existence of a substantial population of U.S. workers who are willing and able to accept wage rates that are reasonable and proportionate to agricultural work but are deterred from entering agricultural work by AEWR-priced H-2A workers. And such reliance interest is vitiated by the USDA's discontinuation of the FLS: even if the Department did nothing, the FLS will cease, thus making any reliance interest on it misplaced (and, as explained above, reinforcing the benefit of this IFR to reliance

interests by filling the regulatory gap). Such a slight-to-nil reliance interest is far outweighed by the duty the Department has to address the now correcting labor market, and implement the AEWR methodology laid out here, for those lawful H-2A workers, and all of the other evidence and reasons that are set forth in this IFR.

As to H-2A workers, to the extent such reliance exists, it is based on voluntary participation in *temporary* and *seasonal* work contracts authorized under the H-2A program. The Department initially concludes that if such a reliance interest could even be said to exist, it is too highly attenuated and speculative to be given much if any weight. The Department also acknowledges that U.S. workers in corresponding employment may have similar reliance interests, but these interests are outweighed by the evidence and reasons that support this IFR. And, the Department expressly acknowledges the bottom-line reliance interest that these workers may have – their level of expected remuneration in robust detail in this IFR's analysis of transfers. The Department has considered other potential reliance interests, such as a H-2A workers potential financial planning based on an expected level of compensation rooted in the FLS, but considers these of low weight for two reasons with respect to this IFR: first, because the USDA's discontinuation of the FLS already undermines this expectation regardless of this IFR; and second, because it is highly attenuated, relying on numerous logical steps for any particular individual. To the extent these are reliance interests at all, the Department does not consider them to rise to the level of serious reliance interests requiring further analysis but welcomes comment on this aspect of the IFR.

Finally, with respect to U.S. consumers of agricultural products, their potential reliance interests with respect to the H-2A program are that the program will supply a sufficient level of labor to maintain the production of agricultural commodities at a reasonable price. This IFR enhances this reliance interest by filling the aforementioned regulatory vacuum to ensure the stability of the H-2A system, by making the AEWR

more precise and tethered to the real world skill-level requirements of jobs, thereby allowing market forces to dictate the cost of labor, while also eliminating the 2010 AEWR rule that set an artificially and unreasonably high price floor for H-2A labor.

The Department welcomes public comment on what, if any, reliance interests exist among these groups, among specific subgroups or individuals that compose these groups, any groups with reliance interests that have not been identified, and any evidence or data that has probative value of any of these issues.

## IV. Discussion of Changes to the AEWR Methodology

### A. The Department Will Use the OEWS to Determine Skill-Based AEWRs for all Job Opportunities

As noted in prior rulemaking, the Department has always sought to use the best available information on occupational wages representing workers in the United States similarly employed. For the reasons discussed below, and in light of the determination that immediate reform to the H-2A program's minimum wage policy, or the AEWRs, is necessary to avoid widespread disruption across the U.S. agricultural sector, the Department is amending its methodology to use the average hourly gross wage reported by the BLS OEWS as the sole source of wages for establishing two skill-based AEWRs that account for wage differentials arising from qualifications contained in the employer's job offer for all job opportunities under the H-2A program. Although currently used to establish skill-based prevailing wages for all agricultural and nonagricultural job opportunities in other nonimmigrant and immigrant visa programs based on the collection of employment and wage information from non-farm establishments such as farm labor contractors, the Department is incorporating farm establishments into the OEWS sampling methodology beginning in FY 2026. Once data collection is initiated with the May 2026 semi-annual panel, the expanded OEWS survey collection may start to reflect occupational employment and wage information into the two skill-based AEWRs from

farm establishments on and after the May 2027 release. The Department concludes that this change will ultimately provide more accurate wage information based on a much larger and robust sample of the employer establishments employing workers to perform agricultural related services or labor covering a broader survey reference period across all states where employers may seek labor certification to employ foreign workers for temporary or permanent employment in the United States. The adoption of the OEWS as the sole source of employment and wage information will provide the Department with a single source of data, within its control, that can consistently and more precisely establish skill-based prevailing wages, including AEWRs, for all job opportunities specific to each state, which the FLS is not capable of reporting.

For many years, the Department has noted that wage data available in the FLS and the OEWS represent the best information available for determining the AEWRs in the H-2A program. The FLS collected employment and wage information based on a survey of farm and ranch establishments, which included any establishment with $1,000 or more in annual agricultural sales (or potential sales), semiannually in April and October.[91] The survey was conducted primarily by mail or online, with telephone follow-ups to obtain responses from nonrespondents, or, if needed, to clarify written responses. Beginning with the July and October 2021 timeframe, the FLS utilized a smaller national sample size of over 16,000 operations to align with reductions in funding for the statistical program and adjustments for declining survey participation rates. The survey requested that employers provide, in aggregate and by occupation, the total number of hired workers, the total hours worked by all hired workers, and the total weekly gross wages paid to all hired workers in each occupation during the second weeks of January, April, July, and October. Gross wages were defined as the total amount paid to workers

[91] The NASS Agricultural Labor Survey is typically conducted semi-annually in April and October, in all surveyed states except California. For the current survey iteration, California labor data were collected on a quarterly basis, through the California Employment Development Department (EDD) program.

before taxes and other deductions, including overtime, bonus pay, workers' shares of social security and unemployment insurance, and other in-kind payments (*e.g.*, agricultural products provided in lieu of wages), but not including benefits such as housing, meals, or insurance. USDA used these data to estimate the employment, average hours, and gross wages for a subset of six occupational classifications covering field and livestock workers (combined) and other hired workers in January and April (published in May) and in July and October (published in November). Separate estimates were published for each of the six individual occupations and for farm managers and supervisors at the national level, but not for each state or farm production region due to insufficient sample sizes. Further, because it collects aggregate data related to the gross wages paid to all hired workers in each occupation, as opposed to the gross wages paid to each hired worker in each occupation during the reference period, the FLS is not capable of reporting more precise wage estimates for any occupation-specific wage distribution to approximate wage differentials paid to U.S. workers similarly employed in a particular occupation and state.

Separately, the BLS OEWS survey remains the largest ongoing statistical survey program of the federal government, producing employment and gross wage estimates for more than 830 SOC codes, and is used as the primary wage source for establishing skill-based prevailing wage determinations at local and state geographic areas in other nonimmigrant and immigrant visa programs administered by the Department.[92] The OEWS survey primarily covers wage and salary workers in non-farm establishments and does not include the self-employed, owners and partners in unincorporated firms, household workers, or unpaid family workers.[93] Like the FLS, the survey is conducted

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[92] *See*, *e.g.*, 20 CFR 655.731(a)(2)(ii)(A) (H-1B program, for specialty (professional) workers) and 20 CFR 656.40(b)(2) (Permanent Labor Certification program, for permanent employment of foreign workers).

[93] Although the OEWS has not historically covered farm establishment, the survey was expanded in 2011 to cover farms as part of the Green Goods and Services program but subsequently cut as part of the

primarily by mail, with telephone follow-ups to nonrespondents, or, if needed, to clarify written responses. [94] Each year, two semiannual panels of approximately 179,000 to 187,000 sampled establishments are contacted, one panel in May and the other in November. Thus, the OEWS employment and gross wage estimates are constructed from a sample of about 1.1 million establishments collected over a 3-year period, which allows the production of data at detailed levels of geography, industry, and occupation and accounts for approximately 57 percent of employers in the United States.[95] OEWS data are published annually with a May reference date. Wages are defined as straight-time, gross pay, including piece rates, but, unlike the FLS, excludes other forms of pay such as overtime, shift differentials, and non-production or any year-end bonuses.[96] Further, because it collects the gross wages paid to each worker in each occupation during the reference period, the OEWS can consistently report more precise wage estimates for any occupation-specific wage distribution to approximate wage differentials paid to U.S. workers similarly employed in a particular occupation and state.

As explained through extensive rulemaking, the Department seeks to rely on the best available information to carry out its statutory mandate and has acknowledged that neither the FLS nor the OEWS are perfect as both surveys have shortcomings.[97] In a

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sequestration due to the Budget Control Act of 2011. *See* Stella D. Fayer, "Agriculture: Occupational Employment and Wages," *Monthly Labor Review*, DOL, BLS, July 2014, https://doi.org/10.21916/mlr.2014.25. The President's budget request for FY 2024 includes $1,137,000 to restore data collection for agricultural industries to the OEWS program. See Department of Labor, *FY 2024 Congressional Budget Justification, Bureaus of Labor Statistics,* https://www.dol.gov/sites/dolgov/files/general/budget/2024/CBJ-2024-V3-01.pdf.

[94] *Id.*

[95] *See Occupational Employment and Wage Statistics Frequently Asked Questions*, BLS. Available at: https://www.bls.gov/oes/oes_ques.htm (last modified Aug. 13, 2021).

[96] The OEWS uses the term "mean." However, for purposes of this regulation the Department uses the term "average" because the two terms are synonymous, and the Department has traditionally used the term "average" in setting the AEWR from the FLS.

[97] *See* 73 FR at 7713 where the Department notes that "the FLS and the OES survey are the leading candidates among agricultural wage surveys potentially available to the Department to set AEWRs. Neither survey is perfect. In fact, both surveys have significant shortcomings. On balance, however, the Department has concluded that in light of the current prevalence of illegal aliens in the agricultural labor market, AEWRs derived from OES survey data will be more reflective of actual market wages than FLS data, and thus will best protect the wages and working conditions of U.S. workers from adverse effects."

March 2024 study comparing occupational wage data collected across a wide array of government-based surveys, the Congressional Research Service (CRS) affirmed the Department's finding that the "FLS and the OEWS are the only data sources currently available that provide state- or region-level wage estimates for agricultural occupations."[98] In addition, in a survey of farm and ranch establishments that directly hire workers, CRS similarly observed that the FLS provides wage estimates only for field and livestock worker (combined) occupations and does not reflect wages paid by farm establishments for agricultural labor or services provided by workers who are employed by farm labor contractors, or non-farm support establishments, or any wage information for farm establishments in Alaska or the U.S. territories. Regarding the OEWS, CRS noted that the survey publishes wage estimates by occupation for a wide array of local, state, and national geographic areas across all non-farm industries, but does not publish wage estimates within the "Crop Production" or "Animal Production" industries that are generally covered by the FLS. However, with the discontinuation of the FLS by USDA and based on a determination to establish skill-based AEWRs that account for wage differentials arising from qualifications contained in the employer's job offer for all job opportunities under the H-2A program, the Department has determined that the OEWS survey is the best available alternative source of employment and wage information to use in determining the AEWRs. Accordingly, the Department has made corresponding revisions to 20 CFR 655.120 by removing references to the USDA FLS.[99] The

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[98] The CRS study compared the agricultural wage data currently used in calculating the AEWR with the wage data available from the Agricultural Resources Management Survey (ARMS), the Census of Agriculture (COA), the American Community Survey (ACS), the Current Population Survey (CPS), the Quarterly Census of Employment and Wages (QCEW), the National Economic Accounts, and the National Agricultural Workers Survey (NAWS). See Elizabeth Weber Handwerker, Measuring Wages in the Agricultural Sector for the H-2A Visa Program, Congressional Research Service, Report No. R47944 (March 5, 2024). Available at: https://www.congress.gov/crs-product/R47944.

[99] The Department has acknowledged in prior rulemaking that USDA controlled administration of the FLS, suspended the survey several times in the past, and retained discretion to unilaterally revise the survey methodology. See *United Farm Workers v. Perdue*, No. 1:20-cv-01452-DAD-JLT, 17-18 (E.D. Cal. Oct. 28, 2020) (citing USDA-DOL MOU at 2-6). The possibility of future instability in administration of the

Department will use the OEWS as the sole wage source for determining two skill-based AEWRs for all SOC codes, including those covered by the field and livestock workers (combined) category and those not included like first-line supervisors of farm workers or construction laborers where the duties, skills, and qualifications are the same or substantially similar to U.S. workers employed by non-farm establishments.

In this IFR and in light of the determination by USDA to discontinue the FLS based on its own statutory authority, the Department affirms the strengths of using the OEWS as an authoritative source of employment and wage information for determining skill-based AEWRs. For many reasons, the Department has determined that the OEWS remains the most comprehensive, reliable, and stable source of occupational employment and wage information available for determining skill-based AEWRs in the H-2A program. First, as use of the H-2A program has broadened to include on-farm and off-farm employment, the multisector reach of the OEWS survey does a better job of accurately reflecting market wage rates for occupations where workers are primarily employed in jobs outside the field and livestock workers (combined) category, such as first-line supervisors, heavy truck drivers, and construction workers because, as the Department previously concluded, these occupations "inherently include work both in and outside the agricultural sector."[100]

Second, unlike the FLS, the capability of the OEWS to consistently aggregate wage estimates at a statewide level will better protect against the potential for depressive wage effects, if any, that may occur due to large numbers of nonimmigrant agricultural workers employed in more concentrated local areas within a state. Specifically, when discussing its preference for using the OEWS because the survey reports wages for each

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FLS, was one reason the Department decided to leverage the OEWS as a secondary wage source for field and livestock workers (combined) job opportunities. See 88 FR at 12769 (Adopting proposal to "use the OEWS to determine a statewide AEWR" for field and livestock workers "in the unanticipated circumstance that the FLS survey becomes unavailable (*e.g.*, suspension of the survey) . . .").

[100] *Id.* at 12770.

occupational classification at a geographic level above a specific crop activity, the Department concluded that an "AEWR based on an occupational classification that accounts for significantly different job duties but remains broader than a particular crop activity or agricultural activity in a local area may better protect U.S. workers."[101] Thus, for many decades, the Department "consistently has set statewide AEWRs rather than substate. . . AEWRs because of the absence of data from which to measure wage depression at the local level" and because use of surveys reporting data at a broader geographic level "immunizes the survey from the effects of any localized wage depression that might exist."[102] As previously discussed regarding its sampling structure and methodology, the OEWS is capable of producing employment and wage estimates consistently at the statewide level and for any particular occupation or group of occupations, which more precisely estimates the wages paid of U.S. workers similarly employed in that state. Conversely, the FLS cannot report wage estimates for each state, except for California, Florida, and Hawaii, and cannot report wage estimates at the state or regional levels for any occupation outside the field and livestock worker (combined) category of occupations. Therefore, the Department concludes that the more precise statewide data available from the OEWS, whether for a particular occupation or group of occupations, better protects the wages of U.S. workers similarly employed where employers may be seeking to employ H-2A workers in that same occupation(s) within the state.

Third, the OEWS methodology incorporates a much larger sample size of establishments (1.1 million total non-farm establishments) [103] and generates higher survey response rates (approximately 65 percent)[104], as compared to smaller sample size

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[101] 84 FR at 36182 (*citation omitted*).

[102] 75 FR at 6895.

[103] *Id.* at 6, 10.

[104] Handwerker at 6.

(estimated 16,000 total farm establishments) and lower response rates (approximately 44 percent) of the FLS, which provides greater confidence to the Department in the accuracy of the employment and wage estimates produced by the BLS. Fourth, due to its larger sample size and time series panel methodology, the OEWS has the capability of consistently providing employment and wage estimates by SOC code at a state, regional, and national level. Conversely, as mentioned previously, the FLS can only produce employment and wage estimates by SOC code at a national level due to its significantly reduced sample size and methodology.[105] Fifth, due to its robust capacity to produce estimates at broad geographic levels spanning a three-year aggregated timeseries collection, the OEWS data are more reliable, representative, and generally experience lower rates of volatility on a year-over-year basis. While the FLS calculates annual findings from quarterly estimates of data collected during one calendar year cycle, each set of OEWS estimates used across other nonimmigrant and immigration visa programs is calculated from six panels of survey data collected over three years, which tends to moderate year-over-year fluctuations in wage rates.

Sixth, unlike the FLS, the OEWS survey produces wage estimates based on straight-time, gross pay, and excludes monetary compensation related to overtime pay, on-call pay, severance pay, shift differentials, year-end and other nonproduction bonuses, and employer costs for supplementary benefits (*e.g.*, uniform, tuition). As multiple states in recent years have enacted legislation requiring overtime pay for agricultural workers, employers have expressed concerns that the FLS is vulnerable to producing artificially high average wages because overtime pay and other forms of premium pay are not being excluded from the collection of gross compensation data from farm establishments. Thus, by adopting the OEWS as the wage source for estimating skill-based AEWRs, the

[105] *Id.* (Noting the FLS was expanded briefly from 2018 - 2020 to provide occupation-specific wages at a smaller geographic scale and with expanded sample sizes, but USDA reverted to smaller sample sizes and the prior survey scope after suspending the survey entirely in 2020).

Department is seeking to address this concern while achieving greater consistency in the computation of average hourly wage rates in the H-2A program with those already used in temporary and permanent visa programs where overtime pay is excluded from determining prevailing wages.

And finally, although it does not primarily survey farm establishments, farm labor contractors, which are covered by the OEWS, are increasingly utilized by agricultural employers, to employ workers to provide agricultural labor or services similar to that of workers employed by fixed-site agricultural employers thus making use of the OEWS data important to determining representative, market-based wages. Agricultural labor contractor employment has grown in recent years[106] and H-2 labor contractors (H-2ALCs) represent an increasing share of the H-2A worker positions certified by the Department.[107] For example, from FY 2020 through FY 2023, the Government Accountability Office (GAO) found that H-2ALCs "accounted for 42 percent of the jobs

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[106] *Farm Labor* (Jan. 8, 2025). USDA (Noting From 2013 to 2023, agricultural employment increased most "in crop support services (which added about 17,400 jobs, a 6 percent increase). Available at: https://www.ers.usda.gov/topics/farm-economy/farm-labor; *NAWS Data Finder: U.S. Crop Workers' Employer Type, All Available Years*. U.S. DOL, National Agricultural Workers Survey (indicating the total share of FLC employment in agricultural recently has risen from 14.99% in the 2014-18 period to 16.95% in the 2019-22 period). Available at: https://www.dol.gov/agencies/eta/national-agricultural-workers-survey/naws-data-table/naws-data-finder-results; 88 FR 12760, n. 71 (*citations omitted*) (noting the USDA Economic Research Service (ERS) reported that H-2ALCs (also known as Farm Labor Contractors (FLC)) have become the dominant employer type in the vegetable and melon sector – among the most labor-intensive agricultural sectors in the United States. Specifically, USDA ERS noted that "the number of certifications obtained by both individual employers and FLCs increased every year between 2011 and 2019; however, the number of certifications obtained by FLCs increased faster, which led contractors to overtake individual employers in 2016. The share of certifications obtained by FLCs steadily increased from 17 percent in 2011 to its maximum of 57 percent in 2018, decreasing slightly to 53 percent in both share and number in 2019." Noting also that the Department's own review of H-2A applications covering all agricultural sectors certified by OFLC during the most recent 3 fiscal years covering October 1, 2019, through September 1, 2022, indicated the proportion of H-2A worker positions certified for employers operating as H-2ALCs increased from 36 percent in FY 2020 to more than 43 percent in FY 2022. In FY 2020, of the 275,430 worker positions certified nationally, 99,505 (or 36.1 percent) were issued to H-2ALCs. From October 1, 2021, through September 1, 2022, for FY 2022, of the 352,103 worker positions certified nationally, 151,706 (or 43.1 percent) were issued to employers operating as H-2ALCs).

[107] 88 FR 12760, n. 60 (Noting, for example, the proportion of all H-2A worker positions certified by the Department for employment in non-range occupations with employers qualifying as H-2A Labor Contractors (*i.e.*, farm labor contractors) has increased significantly from 33.1 percent in FY 2016 (54,787 positions out of 165,741 positions) to 42.6 percent in FY 2021 (135,314 positions out of 317,619 total positions) and 43.1 percent through August FY 2022 (151,439 positions out of 351,268 total positions)).

approved during the period" in the H-2A program[108] and the USDA found that "the FLC share of H-2A workers increased from 15 percent to 42 percent from FY 2010 to FY 2019."[109] FLC employment is increasingly common in specific sectors, such as the vegetable crop sector (40%), and fruit and nut crop sector (57%)[110] and data shows "vegetable and melon farming or fruit and tree nut farming accounted for most of the approved H-2A applications," according to GAO and USDA research.[111] FLCs may also be more commonly employed in support of smaller farms, as "smaller farms turn to FLCs because H-2A visa programs can be difficult to navigate" for these employers.[112] Based on a review of the Department's more recent public H-2A labor certification records for FY 2024 and FY 2025, H-2ALCs continued to account for a significant percent of all H-2A jobs certified as more than 163,200 of the 379,300 jobs, or 43 percent of the total, were approved during FY 2024 for H-2ALCs. In addition, from October 1, 2024, through June 30, 2025, more than 134,200 of the 317,400 H-2A jobs certified, or 42 percent of the total, were approved during FY 2025 for H-2ALCs.[113] In comparison, the now-

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[108] *H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and Enforcement* (Nov. 2024), 9. U.S. Government Accountability Office. GAO-25-106389. Available at: https://www.gao.gov/assets/gao-25-106389.pdf.

[109] *Id.* (citing *Examining the Growth in Seasonal Agricultural H-2A Labor*, Economic Information Bulletin No. 226, U.S. Department of Agriculture, Economic Research Service (Washington, D.C.: Aug. 2021)).

[110] *See Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023), 2, 26 (Finding H-2ALC employees now constitute 22 percent of all crop workers, 28% of all crop harvesters, 40% of vegetable crop sector workers, and 57% of fruit and nut crop workers). Available at: https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf.

[111] *H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and Enforcement*, 10 (Nov. 2024). U.S. GAO, GAO-25-106389. Available at: https://www.gao.gov/assets/gao-25-106389.pdf; Castillo, et al. *Examining the Growth in Seasonal Agricultural H-2A Labor* (Aug. 2021), EIB-226, USDA, ERS (Finding the vegetable and melon sector is "the largest H-2A employer . . . since 2016," and "FLC prominence" in this sector is due to "contract labor play[ing] an important role in production of these crops." The report also found "fruit and tree nuts led other sectors…(behind vegetable and melons) in number of H-2A certifications . . . with an annual rate of growth of 20 percent . . ." and noted "FLCs are the dominant H-2A employers in fruit and tree nuts."). Available at: https://ers.usda.gov/sites/default/files/_laserfiche/publications/102015/EIB-226.pdf?v=97406.

[112] *Id.*

[113] Based on a review of public H-2A labor certification disclosure records certified by the Department and available on the OFLC Performance Data website for FYs 2024 and 2025, Quarter 3, at https://www.dol.gov/agencies/eta/foreign-labor/performance.

discontinued FLS suffered from the flaw of not surveying at all the large proportion of agricultural labor that is supplied by FLCs.[114]

The Department's concern expressed in prior rulemaking that the OEWS, as currently administered, may not survey a sufficient cross-section of agricultural workers to represent market-based wages,[115] is being addressed outside this IFR, as the Department will ensure long-term stability in determining the AEWRs using a more comprehensive OEWS data set based on a more robust, accurate, and reliable set of wage data from farm establishments. Specifically, the Department is working collaboratively with USDA, due to its expertise in identifying farm establishments, to initiate expansion of the OEWS survey universe of employers in FY 2026 by incorporating employers in key agricultural industries, such as crop and animal production sectors, into its semi-annual sampling methodology and model estimation procedures. As the semi-annual panels begin to incorporate employment and wage estimates from these farm establishments on and after May 2026, the OEWS survey will increasingly strengthen its ability to provide more accurate and reliable information to the Department and the general public on the employment and average wages paid to U.S. workers similarly employed in agricultural related occupations. Taking into consideration the decision to establish more precise skill-based AEWRs for each state, the strengths of the OEWS to produce occupation-specific wages that accounts for wage differentials for every state, and planned expansion of the survey to incorporate farm establishment data into its time series methodology, the Department concludes that the resulting employment and wage estimates will better reflect wages paid to U.S. workers performing agricultural related labor or services across all types of establishments and covering a broad geographic area

[114] *See e.g.*, 90 FR at 42561.

[115] *See e.g.*, 75 FR at 6899.

at the state level, leading ultimately to more comprehensive and accurate wage data that cannot be reported by the FLS.

As previously discussed, Congress has delegated broad discretion to the Department in determining the sources and methods that best allows it to meet its statutory mandate, while striking a reasonable balance between the statute's competing goals of providing employers with an adequate supply of legal agricultural labor and protecting the wages and working conditions of workers in the United States similarly employed. For all the reasons previously stated, the Department concludes that the policy decision to use the unique strengths of the OEWS for establishing skill-based AEWRs, which are not available through the FLS, and inclusive of its planned expansion to collect employment and wage information from farm establishments, will provide one comprehensive source of more accurate and representative market-based wages, based on samples of employers and workers covering all agricultural related occupations and types of establishments, thereby better approximating the actual wages of U.S. workers similarly employed based on the duties and qualifications associated with the agricultural work being performed.

**B. The Department Will Determine the AEWRs at Two Skill Levels to Better Reflect the Average Wages Paid to U.S. Workers Similarly Employed.**

As discussed in detail below, the Department will determine the AEWRs using the best available data from the OEWS that reasonably reflects labor market dynamics and most closely approximates the average wages earned by U.S. workers performing similar work and possessing the same or substantially similar qualifications (*e.g.*, job requirements, experience, tools) as those employers expect of H-2A workers.

Under revisions adopted in this IFR at 20 CFR 655.120(b)(1)(i) and (ii) and (b)(2), the Department will determine the AEWRs for H-2A job opportunities using the annual average hourly gross wage in the U.S. state or territory according to two skill or

qualification levels: Skill Level I (Entry-Level) and Skill Level II (Experience-Level). A Skill Level I AEWR is associated with job offers containing qualifications commensurate with entry-level positions where workers need no formal education or specialized training credentials. In addition, employers typically require no or very little work-related experience under the Occupational Information Network (O*NET)[116] system (*e.g.*, up to 2 months of related work experience cultivating diversified vegetable crops) or, alternatively, may require a short demonstration (*e.g.*, several weeks of on-the-job training) on how to perform the work by a more experienced employee, lasting anywhere from a few days to a few weeks. Employers seeking employees for this level of position require them to follow instructions from a supervisor or team leader on the employer's agricultural methods and practices, use common equipment and tools to successfully perform the work, and help others as part of a work crew. Work performed by these employees is closely monitored, tracked, and assessed for quality, accuracy, and production results. In accordance with new paragraph (b)(2)(i), a Skill Level I AEWR will be computed as the average hourly gross wage paid to the lower one-third of all workers in the five SOC codes comprising the field and livestock workers (combined) category or, for occupations outside of that category, the average hourly gross wage paid to the lower one-third of all workers in the specific SOC code assigned to the employer's job opportunity. A Skill-Level I AEWR is computed at the equivalent of the 17$^{th}$ percentile of the occupational wage distribution, which is similar to the skill-based prevailing wages for other nonimmigrant and immigrant visa programs administered by the Department.

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[116] The O*NET system was created for the general public to provide broad access to the O*NET database of occupational information. O*NET is a database of information on skills, abilities, knowledges, work activities, and interests associated across more than 820 occupational classifications based on the 2018 version of the Standard Occupational Classification system. This information can be used to facilitate career exploration, vocational counseling, and a variety of human resources functions, such as developing job orders and position descriptions and aligning training with current workplace needs. Additional information on the O*NET system is available at https://www.onetonline.org (last visited August 21, 2025).

A Skill Level II AEWR is associated with job offers containing qualifications commensurate with experience-level or qualified employees who possess, either through education, training, or experience, demonstrated skills or knowledge to perform the work covering the SOC code(s). Depending on the occupational classification, these positions may normally require some formal education or training credentials or certificates. In addition, employers typically require work-related experience at a level that is normal for the occupation under the O*NET system (*e.g.*, 3 months of related work experience harvesting apples) and generally do not require a short demonstration on how to perform the work by a more experienced employee. Employers who hire employees into this level of position may also expect workers to perform moderately complex tasks (*e.g.*, harvesting "first pick" apples for firmness, color, and placement on the tree) and follow instructions from a supervisor or team leader on the employer's agricultural methods and practices, use common equipment and tools to successfully perform the work, and help others as part of a work crew. Work performed by these employees is not as closely monitored as employees in Skill Level I, but production may still require some level of tracking and assessment of quality when immediate delivery is to market. In accordance with new paragraph (b)(2)(ii), a Skill Level II AEWR will be computed as average hourly gross wage paid to all workers in the five SOC codes comprising the field and livestock workers (combined) category or, for occupations outside of that category, the average hourly gross wage paid to all workers in the specific SOC code assigned to the employer's job opportunity. A Skill-Level II AEWR is computed at the equivalent of the 50$^{th}$ percentile of the occupational wage distribution, which is similar to the skill-based prevailing wages for other nonimmigrant and immigrant visa programs administered by the Department.

The description and application of each skill level adopted in this IFR is based on the totality of the circumstances of an employer's job offer and designed to be consistent

with skill-based levels required under the INA and used by the Department in its prevailing wage determinations for employers seeking to hire H-1B temporary nonimmigrant workers and permanent immigrant workers, as discussed further below.[117] In other words, if this same agricultural employer sought labor certification from the Department to sponsor a foreign worker for permanent year round work to support its farming operation, the Department would conduct a similar assessment of the qualifications contained in the employer's job offer and assign a market-based wage that best approximates the average wage paid to U.S. workers similarly employed in the geographic area. The Department concludes employers seeking temporary nonimmigrant workers under the H-2A visa classification should receive an AEWR determination that also takes into account the qualifications of the employer's job offer to better effectuate the requirement to, protect the wages of U.S. workers similarly employed and more closely align the wage standard in the H-2A program with the wage standards in other employment-based immigration programs which use skill-based wage levels.[118]

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[117] *See* Section 212(p)(4) of the INA stating, in pertinent part, that "[w]here 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." Although this provision was enacted in the context of the H-1B temporary nonagricultural visa classification, and also applies to the PERM immigrant visa program, it is the only paragraph in Section 212(p) that does not reference any specific immigration programs to which it applies, and there is no legislative history indicating that it was meant to apply only to the H-1B program. For more detailed information regarding the four skill levels utilized by the Department, please see *Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs*, Revised November 2009 located at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

[118] Under 8 U.S.C. 1182(a)(5)(A) of the Immigration and Nationality Act (INA or Act), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that: (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed. Additionally, under 8 U.S.C. 1182(n)(1), no alien may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following: (A) The employer - (i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H–1B nonimmigrant wages that are at least (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and (ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

For the reasons discussed below, and after the appropriate SOC code(s) are assigned to the job opportunity, the State Workforce Agency (SWA) and OFLC Certifying Officer (CO) will make an AEWR determination for the U.S. state or territory using one of two skill levels based on a comparison of the qualifications (*e.g.*, education, and training) contained in the employer's job offer that it expects employees to possess for acceptable work performance. Although the vast majority of certified H-2A job opportunities are concentrated in the five field and livestock worker (combined) occupational category, the market for agricultural labor or services is far more diversified and covers a broad spectrum of occupations with differing degrees of job qualifications that generate different levels of wage compensation. Despite a common stereotype that agricultural jobs are "unskilled" and typically do not require formal education or training credentials or certificates like the specialty occupations in the H-1B temporary nonimmigrant and PERM immigrant program, the Department has previously noted, as far back as 2008, that the "farm labor market is not a monolithic entity," but is comprised of "a number of occupations and skills" distributed across "a matrix of markets" and a "spectrum of occupations, skill or experience levels . . ."[119] In fact, based on a review of H-2A labor certification records for FY 2024, the Department issued labor certifications across more than 60 different SOC codes containing a wide array of qualifications ranging from crop and nursery work to supervisors, animal trainers, equipment mechanics and technicians, heavy truck drivers, and commercial pilots.

The methodology adopted in this IFR also addresses some of the more substantial concerns expressed by users of the H-2A program—agricultural employers and associations—who have long contended that the AEWR cannot be an accurate reflection of market wages paid to similarly employed workers if the Department fails to

[119] 73 FR at 8550.

differentiate wage data based on the "level of skill or experience required for a position."[120] Many stakeholders have urged the Department to adopt a tiered wage system, accounting for "experience, skill, responsibility, and difficulty variations within each occupation," similar to the system mandated by Congress in the H-1B nonimmigrant program.[121] The Department agrees and acknowledges that it is generally accepted that differences in wages among workers within a given occupation can be attributed to a number of characteristics and qualifications such as education, work experience, complexity of tasks, training, and requirements like licensure, as well as characteristics like union v. non-union and full-time v. part-time or temporary.[122] While it is administratively infeasible to precisely pinpoint every reason that workers within a given occupation receive significantly different pay, the Department concludes that the existence of wage differences can be attributed, to a large degree, to these characteristics and qualifications possessed by incumbent workers performing work within a given occupation. This is supported by the Department's extensive experience assessing the duties and qualifications of job opportunities, including those from employers in the agricultural sector, applying for labor certification to employ foreign nationals temporarily under the H-1B visa classification or in permanent employment in the United

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[120] 75 FR at 6899.

[121] *Id.* at 6900.

[122] *See, e.g., Introducing Modeled Wage Estimates by Grouped Work Levels*, U.S. DOL, BLS (noting "wages tend to increase along with the progression in work level" necessitating information about "differences in pay for entry, intermediate, and experienced work levels."). Available at: https://www.bls.gov/opub/mlr/2022/article/introducing-modeled-wage-estimates-by-grouped-work-levels.htm; *How Much Could I Be Earning? Using Occupational Employment and Wage Statistics Data During Salary Negotiations*, BLS ("Where an individual's wage should fall within the national distribution depends on a number of factors. Of course, experience and education are factors."). Available at: https://www.bls.gov/oes/earnings.pdf; *Modeled Wage Estimates for Entry, Intermediate, and Experienced Grouped Work Levels*, BLS (Explaining use of wage modeling to group "occupations like food preparation workers and nursing assistants" into two wage levels corresponding with "entry and experienced levels."). Available at: https://www.bls.gov/mwe/factsheets/grouped-work-levels-factsheet.htm; Torpey, Elka, *Same Occupation, Different Pay: How Wages Vary* (2015), BLS ("Large differences in wages may be the result of a combination of factors, such as industry of employment, geographic location, and worker skill.") Available at: https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm; *Learn More, Earn More: Education Leads to Higher Wages, Lower Unemployment*, BLS. Available at: https://www.bls.gov/careeroutlook/2020/data-on-display/education-pays.htm.

States. Specifically, for more than 20 years, the Department has used one of four skill-based wage levels for a given occupational classification based on a comparison of the qualifications contained in the employer's permanent or temporary H-1B job offer related to the occupational duties or tasks, knowledge, skills, and specific vocational preparation (i.e., education, training, and experience) generally required of prospective applicants for acceptable performance in the position. A detailed description of the tasks, knowledge, and skills in the employer's job opportunity, including level of complexity, judgement, supervision and understanding required to perform the duties, help determine the appropriate skill-based prevailing wage for these job opportunities. Further, information contained in the O*NET related to education, and training provides guidance in determining whether the job offer is for an entry-level, qualified, experienced, or fully competent employees; each of which corresponds to higher skill-based wage levels as minimum qualifications in the employer's job offer increases.

Additionally, the BLS has noted that work experience and training contributes to wage differentials, with "experienced workers usually earn[ing] more than beginners," and recent data suggests work experience may be a significant factor in within-occupation wage differentials in agriculture.[123] Wages may also differ within an occupation based on required skills and the wage may increase where there is a

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[123] Torpey (2015) ("Large differences in wages may be the result of a combination of factors, such as industry of employment, geographic location, and worker skill."). Available at: https://www.bls.gov/careeroutlook/2015/article/wage-differences.htm; *Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023), 28. U.S. DOL – ETA (A survey of agricultural workers indicated "[h]ourly wages increased with respondents' number of years working for their current employer" and varied from "$13.72 per hour" for workers with 1 – 2 years of experience in the job to "$15.56 per hour" for workers with 11 or more years in the job.). Available at: https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf; Sullivan, Paul, *Empirical Evidence on Occupation and Industry Specific Human Capital* (Jun. 2010), Labour Economics, 17:3 (In "occupations such as craftsmen . . . workers realize a 14% increase in wages after five years of occupation specific experience . . . sales workers . . . realize large wage gains as they accumulate general work experience."). Available at: https://www.sciencedirect.com/science/article/abs/pii/S0927537109001286?via%3Dihub/.

requirement for "in-demand skills . . ."[124] Additionally, workers who "hold professional certification or licensure may earn more than other workers in the same occupation . . ."[125] Within a particular occupation, and even with the same employer, wages may also differ based on complexity of tasks and level of responsibility.[126] Even in lesser skilled occupations, the Department believes these factors can explain much of the identified within-occupation wage differentials.[127]

Within the agriculture sector, the amount of time spent working on a farm and the number of years of experience performing agricultural work have a positive correlation to the average wages or earnings received.[128] Based on a review of the evidence available, the Department concludes that wage differentials within a given agricultural occupation do exist, and that varying degrees of work-related experience among employed U.S. agricultural workers are reflected by differences in wages paid to such workers by employers. For example, the most recent data available from the NAWS for 2021-2022 indicates that "[h]ourly wages increased with respondents' [crop workers] number of

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[124] *Id.*; Levenson, Alec & Zoghi, Cindy, *The Strength of Occupation Indicators as a Proxy for Skill* (Mar. 2007), 2, 8. BLS ("[T]here is considerable within occupation variation in skills . . . , there are differences among workers in their ability to perform tasks of high complexity, and there are differences among jobs in the level of task complexity and responsibility bestowed on the worker."). Available at: https://www.bls.gov/osmr/research-papers/2007/pdf/ec070030.pdf.

[125] *Id.*

[126] *See, e.g.*, Torpey (2015)(Stating "[j]obs for a specific occupation often have similar position descriptions, but individual tasks may vary" and "jobs involving more complex tasks or greater responsibility may have higher wages than those that don't . . ."); Autor, David H. and Handel, Michael J. (2013), *Putting Tasks to the Test: Human Capital, Job Tasks and Wages*, National Bureau of Economic Research ("Job tasks . . . vary substantially within and between occupations, are significantly related to workers' characteristics, and are robustly predictive of wage differentials both between occupations and among workers in the same occupation."). Available at: https://ideas.repec.org/a/ucp/jlabec/doi10.1086-669332.html.

[127] *National Compensation Survey* (May 2013), 60. BLS (Stating job levels for blue collar jobs may increase progressively based on factors like required knowledge of "rules, materials, processes, procedures, operations, and tools necessary" to perform tasks like "fabricat[ing], install[ing], repair[ing], maintain[ing] . . ." equipment and should be increased most significantly when the job requires, for example, knowledge of complex procedures and methods "gained through job experience to permit independent performance of nonstandard assignments . . ." or requires "specialized training or experience . . ."). Available at: https://www.bls.gov/mwe/factsheets/ncs-leveling-guide-for-evaluating-your-firms-jobs-and-pay.pdf.

[128] *Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023), at 28. U.S. DOL ETA. Available at: https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2017.pdf.

years working for their current employer." The report noted that workers "who had been with their current employer 1 to 2 years earned an average of $13.72 per hour, those working for their current employer 3 to 5 years earned an average of $14.53 per hour, and those with 6 to 10 years earned an average of $14.81 per hour . . ." and workers "who had worked for their current employer 11 years or more earned the highest hourly wage, an average of $15.56 per hour."[129] Additionally, the report indicates that 23 percent of workers had worked at least 11 or more years with their current employer and the average number of years worked with the current employer was 8 years.[130]

This suggests that relying on unsegmented aggregate OEWS data (i.e., the arithmetic mean of all hired workers in a given occupational wage distribution) would tend to overstate wages for similarly employed American agricultural workers with less experience and understate wages for similarly employed American agricultural workers with more experience. Within the OEWS data set that covers a far larger sample size of employer establishments than both the NAWS and FLS discussed previously, BLS publishes an occupational profile containing the average wage paid to all workers in the SOC code and shows a distribution of wages in percentiles, which provides information on the spread of wages based on the percentage of workers earning at or below a given percentile. The wages presented at different points within an occupational wage distribution positively correlate to important worker characteristics such as education and experience. As the BLS describes, "someone new to the field may expect wages near the 10th or 25th percentile, whereas those with more experience and education could expect wages near the 75th or 90th percentile."[131] To further illustrate the point that material wage differentials exist within agricultural occupations, the table below displays the

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[129] *Id.* at 28.

[130] *Id.* at 32.

[131] *See How Much Could I Be Earning? Using Occupational Employment and Wage Statistics Data During Salary Negotiations*, BLS, https://www.bls.gov/oes/earnings.pdf.

national average OEWS-based hourly wage rates associated with the top 10 SOC codes typically certified in the H-2A program at the 10th, 25th, 50th, and 75th percentiles in the occupational wage distribution.

| Occupation Title (SOC Code) | National Average Hourly Wage Distribution, May 2024 | | | |
|---|---|---|---|---|
| | 10th Percentile | 25th Percentile | 50th Percentile | 75th Percentile |
| Farmworkers and Laborers, Crop, Nursery, and Greenhouse (45-2092) | $15.51 | $16.48 | $17.16 | $18.73 |
| Agricultural Equipment Operators (45-2091) | $15.02 | $17.62 | $20.47 | $23.41 |
| Farmworkers, Ranch, and Aquacultural Animals (45-2093) | $13.03 | $15.01 | $17.38 | $21.29 |
| Heavy Truck and Tractor-Trailer Drivers (53-3032) | $18.58 | $22.71 | $27.62 | $31.50 |
| Construction Laborers (47-2061) | $16.44 | $18.32 | $22.47 | $28.32 |
| Shuttle Drivers and Chauffeurs (53-3053) | $13.21 | $15.13 | $17.63 | $21.40 |
| Graders and Sorters, Agricultural Products (45-2041) | $14.66 | $16.13 | $17.03 | $18.28 |
| Helpers – Carpenters (47-3012) | $15.16 | $17.24 | $20.00 | $22.49 |
| Helpers—Installation, Maintenance and Repair Workers (49-9098) | $13.83 | $16.23 | $18.68 | $22.40 |
| Packers and Packagers, Hand (53-7064) | $13.01 | $15.13 | $17.10 | $19.69 |

Upon review, the data in the table clearly demonstrates that material wage differentials are present in both common higher-skilled agricultural SOC codes, such as heavy truck and tractor-trailer drivers and first-line supervisors of farm workers, and the relatively lower-skilled occupations that make up the five most common field and

livestock workers (combined) category of occupations, which includes Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092), Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093), Agricultural Equipment Operators (45-2091), Packers and Packagers, Hand (53-7064), and Graders and Sorters, Agricultural Products (45-2041). For example, the wage estimates for heavy truck drivers (SOC 53-3032) range from $22.71 per hour at the 25th percentile to $27.62 per hour at the 50th percentile, or mean, of all workers in the occupational distribution. The wage differential is significant at more than $4.91 per hour between these two wage measurement points in the occupational wage distribution. In the field and livestock worker (combined) category of occupations, the wage data at these same percentiles indicates more narrow wage differentials for crop farmworker occupation (45-2092) ranging from $16.48 to $17.16 per hour, with a differential of $0.68 per hour; wages for agricultural equipment operators (45-2091) ranging from $17.62 to $20.47, with a differential of $2.85 per hour; and wages for ranch and aquacultural farmworkers (45-2093) ranging from $15.01 to $17.38 per hour, with a differential of $2.37 per hour.

The Department also notes that evidence exists that wage differentials are present at a statewide geographic level and even for the most common occupation certified in the H-2A program, Farmworkers and Laborers, Crop, Nursery, and Greenhouse (45-2092). As an example, the table below displays the statewide average OEWS-based hourly wage rates associated with SOC code 45-2092 for the top 10 states of certified employment in the H-2A program at the 10th, 25th, 50th, and 75th percentiles in the occupational wage distribution.

| U.S. State of Certified Employment | Statewide Average Hourly Wage Distribution Farmworkers and Laborers, Crop, Nursery, and Greenhouse (45-2092) | | | |
|---|---|---|---|---|
| | 10th Percentile | 25th Percentile | 50th Percentile | 75th Percentile |
| Florida | $12.64 | $13.36 | $14.32 | $16.19 |

| U.S. State of Certified Employment | Statewide Average Hourly Wage Distribution Farmworkers and Laborers, Crop, Nursery, and Greenhouse (45-2092) | | | |
|---|---|---|---|---|
| | 10th Percentile | 25th Percentile | 50th Percentile | 75th Percentile |
| Georgia | $12.00 | $13.37 | $13.94 | $17.96 |
| California | $16.34 | $16.72 | $17.20 | $18.63 |
| Washington | $16.44 | $16.67 | $17.83 | $21.00 |
| North Carolina | $13.28 | $14.44 | $16.20 | $17.31 |
| Michigan | $13.94 | $15.58 | $17.52 | $18.80 |
| Louisiana | $10.96 | $12.86 | $14.50 | $16.06 |
| Texas | $11.10 | $12.97 | $15.28 | $16.76 |
| Arizona | $14.84 | $16.21 | $16.43 | $17.45 |
| New York | $15.78 | $17.20 | $18.93 | $21.98 |

Upon review, the data in the table above also shows that wage differentials are present in the most common agricultural occupation certified under the H-2A program. Across the top 10 states of intended employment for H-2A workers, the average wage differential between the 25th and 50th percentiles for the Farmworkers and Laborers, Crop, Nursery, and Greenhouse occupation is approximately $1.28 per hour. These wage differentials are more salient in most, but not all, of the top 10 states. For example, the wage estimates for this occupation in Texas range from $12.97 per hour at the 25th percentile to $15.28 per hour at the 50th percentile, or mean, of all workers in the occupational distribution. The wage differential is significant at more than $2.31 per hour between these two wage measurement points in the occupational wage distribution. In addition, a wage differential of more than $1.00 per hour is also present for workers performing similar agricultural work within the states of Washington, North Carolina, Michigan, Louisiana, and New York. However, Arizona shows a narrower wage differential of $0.22 per hour where wage estimates showed $16.21 per hour at the 25th percentile and $16.43 per hour at the 50th percentile or mean.

Thus, based on the broad distribution of wages paid to U.S. workers similarly employed across the most common occupations and geographic areas certified under the H-2A program, the Department can reasonably conclude that material wage differences within agricultural occupations exist and are positively correlated with differences in the characteristics and qualifications of incumbent workers employed by employers in these occupations. Accordingly, continued use of a single average hourly wage for all workers for a given occupation is not appropriate when the employer's need for the agricultural labor or services to be performed does not require qualifications commensurate with the average of all incumbent workers employed who may possess eight or more years of experience. In other words, imposing a single AEWR computed based on all workers paid within the occupation, regardless of the qualifications contained in an employer's job offer, is not sufficiently precise to reflect market-based wages paid to U.S. workers similarly employed, resulting in a wage floor that is either artificially too high or too low in relation to the nature of the employer's qualifications. As previously discussed, due to its sampling size and methodology that allows for collecting employment and gross wages paid to each worker in each occupation during the reference period, the OEWS can consistently report more precise wage estimates for any occupation-specific wage distribution to approximate wage differentials paid to U.S. workers similarly employed in a particular occupation and state, which the FLS cannot report at any level.

When AEWRs are artificially set too far above market conditions in relation to the agricultural duties and qualifications required by employers, the resulting increases in production costs can harm U.S. workers similarly employed as employers scale down or, worse yet, shut down operations and become "priced out" of participating in the H-2A program. Conversely, when the AEWRs are set artificially below market conditions in relation to the minimum job qualifications required by employers, U.S. workers similarly employed may be harmed by employers choosing not to hire qualified and eligible U.S.

workers in favor of H-2A workers, which may lead to requiring that U.S. workers accept below-market wages as a condition of employment.

The Department notes that the policy rationale for adopting two skill levels is to approximate, as accurately as possible and using the best available information, the average of wages paid to U.S. workers similarly employed in the occupation and geographic area based on the qualifications contained in the employer's job offer for which the services of H-2A workers are being requested for temporary agricultural labor certification. When the average wages better reflect these market conditions, they do not represent below-average AEWRs. Rather, these AEWRs reflect the actual average wages that are prevailing in the occupation and geographic area for that particular kind of job. The Department's use of a single AEWR for work performed within a particular occupation or category of occupations, regardless of qualifications, fails to account for the fact that individual jobs within a broad occupational classification require relatively more or less experience and skill to perform than others and may adversely affect U.S. workers who are similarly employed performing such jobs.

The Department also concludes that adoption of this AEWR methodology will address concerns raised in the recently settled *Teche Vermilion* litigation regarding the 2023 AEWR Final Rule's methodology under 8 U.S.C. § 1188(a)(1)(B) and the lack of clarity or nuance regarding the way the Department determines whether a "H-2A job . . . ha[s] sufficient common characteristics with a non-H-2A job" such that "the wages and working conditions of one job impact the wages and working conditions of the other."[132] As previously explained, the Court noted the INA "does not require that DOL base the AEWR on average wage rates for jobs or occupations that are the same or identical," but does require "that the jobs be sufficiently comparable that the wage rates and working

[132] *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, 749 F. Supp. 3d 697 (W.D. La. 2024), opinion clarified, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024), and amended, No. 6:23-CV-831, 2025 WL 1969937 (W.D. La. July 16, 2025).

conditions of the H-2A job at issue can adversely impact the wage rates and working conditions of domestic workers employed in the non-H-2A job," thereby assuring the AEWR "correlate[es] to whether the employment of an H-2A worker adverse[ly] impacts similarly employed domestic workers."[133] In considering whether workers are similarly employed when establishing AEWRs, the court concluded the Department should consider factors like duration of time spent in duties, the work environment, the totality of required tasks, and required credentials to determine whether the jobs have "sufficient common characteristics" or if "the nature of the work, qualifications, and experience required for jobs performed by two groups of workers are sufficiently different . . ."[134] The Court issued an injunction in that case because it determined that plaintiffs were likely to succeed on their claim that the Department exceeded its statutory authority because it failed to explain how non-agricultural heavy truck drivers and agricultural sugar cane haulers in Louisiana are similarly employed. Specifically, the court thought that the Department failed to consider whether there are "material difference[s] between the 'work performed, skills, education, training, and credentials' between the jobs . . ."[135] and whether "the nature of the work, qualifications, and experience required for jobs performed by two groups of workers are sufficiently different," such that "the wages and working conditions of one group of workers is not likely to adversely affect the wages and working conditions of the other group of workers."[136]

Although the OEWS "captures no information about actual skills or responsibilities of the workers whose wages are being reported . . ." the Department has extensive experience issuing skill-based wage levels by evaluating the employer's job opportunity in relation to detailed occupational information contained in the O*NET

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[133] *Id.* at 724, 729.

[134] *Id*.

[135] *Id.* at 729.

[136] *Id.* at 724.

system as well as educational requirements in sources like the BLS, with the generally accepted principle that workers in jobs possessing relatively higher qualifications tend to earn higher wages than workers in those same jobs that possess lower levels of qualifications.[137] The AEWR methodology adopted in this IFR is administratively similar to the current prevailing wage determination methodology utilized in the H-1B temporary nonimmigrant and PERM immigrant visa programs, where an assessment of the employer's job duties, qualifications, and nature of the work are the primary determinants of a four-tiered wage level determination. The use of a four-tiered wage level structure that is currently in effect for these visa programs is mandated by Congress in the H-1B Visa Reform Act of 2004.[138] Both Congress and the Department's regulations and guidance require the use of four wage levels that most reasonably reflect the qualifications (*i.e.*, education, experience, and level of supervision) contained in the employer's job offer.

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, first in 2005 and revised guidance in 2009, which expanded the existing two-tier OEWS wage level system to provide four "skill levels": Level I "entry level," Level II "qualified," Level III "experienced," and Level IV

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[137] *See* 76 FR at 3453.

[138] *Consolidated Appropriations Act,* 2005, Pub. L. 108-447, div. J, tit. IV, 423; 118 Stat. 2809 (Dec. 8, 2004), (Mandating that "[w]here 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." The legislation mandates how the four levels for H-1B prevailing wages are to be calculated by mathematically by manipulating the Department's then-existing two level wages). 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. *See* 8 U.S.C. 1182(p)(4); *See also* 73 FR at 77177 (Noting "that the skills-based wage levels are not determined by surveying the actual skill level of workers, but rather by applying an arithmetic formula" and that "Congress has explicitly endorsed the use of such an arithmetic approach . . .").

"fully competent."[139] Although the higher-skilled specialty occupations of the H-1B and PERM visa program possess much greater variation in salaried wages based on experience, education, and levels of supervision for Congress to mandate no less than a four-tiered wage level structure, the Department's experience reviewing agricultural job orders shows that many occupations are primarily differentiated based on prior related experience, credentials or certificates necessary to utilize equipment, tools, and supplies, and the level of communication and close supervision workers need to perform the work. Given that four levels of distinction may present challenges to administer due to the unique nature of agricultural job opportunities, as compared to other higher-skilled specialty occupations, the Department has decided to adopt the two most pertinent skill levels of the existing four-tiered wage level structure when determining the AEWRs based on the qualifications contained in an employer's H-2A job offer: the Level I "entry level" that represents the mean of the lower one-third of workers in a given occupational wage distribution, and the Level III "experienced" that represents the mean of all workers in a given occupational wage distribution, which is a computation that has been used to set AEWRs in the H-2A program for many decades to determine the AEWRs. Because the statute uniquely mandates that qualifications contained in an employer's job offer must be "normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops," a Level III wage will continue to provide the most reasonable computation of the AEWRs in circumstances where the employer's desired qualifications align with what is normally required for a given occupation based on the O*NET system.

Thus, the Department concludes that use of an AEWR determination methodology that takes into account the qualifications contained in the employer's job

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[139] Employment and Training Administration*; Prevailing Wage Determination Policy Guidance, Nonagricultural Programs* (Rev. Nov. 2009). Available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

offer – similar to the assessment conducted in determining prevailing wages in the permanent and H-1B programs - provides a more reasonable, consistent, and administratively feasible approach that better reflects market-based wages paid to U.S. workers similarly employed than the current methodology of providing a single average hourly gross wage without any consideration of the qualifications required by employers who are seeking temporary agricultural labor certification to employ H-2A nonimmigrant workers.

**C. The Department Will Assess the Duties and Qualifications of the Employer's Job Offer When Assigning the Most Applicable SOC Code(s).**

**1. Consideration of Duties Performed for the Majority of the Workdays During the Contract Period**

To reduce the potential for inconsistent assignments of a SOC code(s) to the employer's job opportunity by SWAs and COs, address concerns raised in recent litigation against the 2023 AEWR Final Rule, and promote a more effective administration of the H-2A program, the Department is adopting in this IFR, standards by which the SWAs and COs will determine the appropriate SOC code(s) based on the duties performed for the majority (meaning more than 50 percent) of the workdays during the contract period, including those duties closely and directly related, and qualifications contained in the employer's job offer. Specifically, as described in new paragraph (b)(7), when the employer identifies on the H-2A job order (Form ETA-790A) the duties that it expects workers to perform for the majority of the workdays during the contract period, the SWA and CO will assess such duties and, in combination with any necessary job qualifications, assign the SOC code that best represents the employer's job opportunity.

For many decades, the assessment of job duties and qualifications contained in the employer's job offer by the SWA and CO, and assignment of the SOC code, was based on the occupational classification that best represented most of the work to be performed

for purposes of apprising prospective qualified and eligible U.S. workers of the job opportunity. The assignment of the SOC code did not have an impact on the employer's wage obligations because a single AEWR based on the field and livestock worker (combined) category of occupations was determined for all H-2A job opportunities, regardless of duties to be performed and level of skill or qualifications required in the job offer. However, under the 2023 AEWR Final Rule, the Department bifurcated the determination of the AEWRs by issuing an FLS-based AEWR when the duties identified in the H-2A job order covered one or more of the SOC codes encompassed by the field and livestock workers (combined) category of occupations under the FLS. When the duties identified in the H-2A job order were not encompassed by one or more SOC codes within the FLS-based field and livestock workers (combined) category of occupations, the Department began issuing an OEWS-based AEWR for that specific SOC code assigned to the employer's job opportunity. In addition, when the duties identified in the H-2A job order could not be encompassed within a single SOC code, the employer was required to offer, advertise, and pay all workers performing such duties the highest AEWR across all the applicable SOC codes, regardless of the amount of time a worker(s) spent performing such duties during the certified period of employment. *See* § 655.120(b)(5). In other words, although the vast majority of H-2A job opportunities certified by the Department are encompassed within one or more SOC codes covered by field and livestock workers (combined) category of occupations under the FLS and are subject to the single statewide AEWR determination, still other H-2A job opportunities include duties that fall both within and outside of the field and livestock workers (combined) category and, no matter how often a particular duty or work task is performed by a worker, the Department determines the AEWR based on the highest of the applicable FLS and OEWS-based wage rates that must be paid to workers employed

under the temporary agricultural labor certification for the entire certified period of employment.

The Department has determined that the standards associated with the assignment of a SOC code(s) to the employer's job opportunity, which is inextricably linked to the AEWR determination that imposes substantive wage obligations on employers, needs revision. In *USA Farm Labor, Inc.,* plaintiffs expressed concern that the 2023 AEWR Final Rule standards required the SWAs and COs to assign a SOC code with a higher AEWR to an employer's job opportunity, such as construction laborer or heavy truck driver, even where a worker(s) will only be expected to perform such work on a minor or intermittent basis, and that any "job duty consistent with a higher paid occupation will trigger a higher AEWR without regard to how much time a worker spends performing that duty."[140] Plaintiffs in *Florida Growers Association, Inc.*, raised similar concerns with the court and suggested the Department confine its use of OEWS-based AEWR determinations by examining the primary or main duties of the work to be performed or, alternatively, applying the applicable wage to the specific work considered to be similar employment, rather than the highest applicable AEWR to all workers at all times under the contract. And finally, in *Teche Vermilion*, the court determined the plaintiffs were "likely to succeed on the merits of their claim that the Final Rule exceeds DOL's authority under section 1188(a)(1)(B) because it bases its revised AEWR methodology for H-2A sugarcane truck drivers on the average of wages of domestic, non-farm transportation workers who are not similarly employed."[141]

Upon careful consideration, the Department agrees that assigning a SOC code and determining the AEWR for an employer's job opportunity based solely on any duty to be performed, regardless of the amount of time a worker(s) is expected to perform such duty

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[140] *USA Farm Labor, Inc. v. Su*, Memorandum in Support of Plaintiff's Motion for Summary Judgment at 3, No. 1:23-cv-00096-MR-WCM (W.D.N.C. 2023).
[141] *Id.* at 43.

during a certified period of employment and without a full consideration of the qualifications necessary to perform such work, has led to stakeholder concerns regarding inconsistent SOC code assignments from the SWA and the CO that are not reflective of wages paid to U.S. workers similarly employed, and has resulted in the imposition of excessively higher wage obligations on employers covering the entire certified period of employment that cannot be reasonably justified. It is the Department's view that the standards contained in the 2023 AEWR Final Rule must be reconsidered. Assignment of a SOC code and determination of the applicable FLS or OEWS-based AEWR should not be based on *any* duty identified in the employer's job offer while essentially disregarding the preponderance of other duties and qualifications the employer expects workers to perform and possess to meet the needs of its agricultural operations. Upon review, the Department thinks that the approach in the 2023 AEWR Final Rule was insufficiently justified and not necessary for the Department to protect against adverse effects. The Department reasoned that assignment of higher-skill, higher-paid SOC code(s) was necessary whenever *any* job duty performed for *any* amount of time fell, for example, outside of the field and livestock workers (combined) category of occupations because: (1) an FLS-based AEWR for this job would adversely affect workers in higher paid occupations like construction or heavy trucking;[142] (2) employers may combine two job opportunities into one application and have certain workers perform exclusively the

[142] 88 FR at 12783 ("Use of the highest applicable wage in these cases reduces the potential for employers to offer and pay workers a wage rate that, while appropriate for the general duties to be performed, is not appropriate for other, more specialized duties the employer requires.").

higher-skill duties;[143] and (3) the policy is simpler and more administratively feasible and would not require additional recordkeeping on employers.[144]

Upon review, the Department has concluded that the 2023 AEWR Final Rule did not adequately explain similarly employed workers' wages would be impacted if an H-2A worker whose duties involve mostly performing field and livestock work with a minimal amount spent hauling crops using trucks, for example, were paid the FLS-based AEWR without considering the amount of time or duration workers spent performing such tasks and the qualifications identified in the employer's job offer. Further, this standard was not consistent with the Department's stated intent in the 2023 AEWR Final Rule to undertake a "case-by-case" review of the "totality of the information in an H-2A application and job order" based on a consideration of whether the "qualifications, requirements, and other factors are consistent with that occupation" like "the type of equipment involved . . . [and] the location where the work will be performed . . ."[145]

The Department has also reconsidered its reasoning from the 2023 AEWR Final Rule that payment of a higher-skill occupation wage for the entire employment period is necessary in all cases where a minor duty falls within that category in order to prevent misclassification of the employer's job opportunity. The central inquiry in assigning one or more SOC code(s) to an employer's job opportunity and determining the AEWR is whether two sets of workers (*i.e.*, H-2A and U.S. workers) are or will be similarly employed, such that employment of the H-2A workers below the AEWR would

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[143] *Id.* at 12781 ("[A]ssigning an SOC code based on the 'primary duties' or the percentage of time identified for each duty in an employer's job opportunity description could permit or encourage employers to combine work from various SOC codes, interspersing higher-skilled, higher-paying work among many workers so that the higher-paying work is never a duty performed by any one employee more than the specified percentage.").

[144] *Id.* at 12783 ("[U]se of the highest applicable wage imposes a lower recordkeeping burden than if the Department permitted employers to pay different AEWRs for job duties falling within different SOC codes on a single *Application for Temporary Employment Certification*." A "'percentage per duty' disclosure requirement would increase administrative burden for employers (*e.g.*, substantial recordkeeping to ensure that the actual work each worker performed aligns with the percentages disclosed). . .").

[145] *Id*. at 12780.

adversely affect U.S. workers similarly employed. The Department's existing regulatory mechanisms to enforce prohibitions on misclassification of workers are adequate and appropriate, and the lack of objective data or other evidence supporting concerns about misclassification of workers or misrepresentation of a job opportunity supports such conclusion.[146]

Additionally, without objective data or other evidence supporting the aforementioned concerns, the Department believes there is insufficient grounds for assigning an employer's job opportunity to a SOC code with an excessively higher AEWR based on a single statement of duties or use of a particular vehicle, regardless of the amount of time a worker(s) may spend performing such duties or the relative importance of that duty to the broader job opportunity.

And finally, the Department concludes that imposition of the standard in the 2023 AEWR Final Rule based on ease of employer recordkeeping burdens was not sufficiently justified in comparison to the actual wage obligations being imposed on employers impacted by the application of this standard. The Department agrees with the court's reasoning in *Teche Vermillion* that the standard of assigning the SOC code to the employer's job opportunity warranted more careful consideration of the unrecoverable compliance costs imposed on employers relative to the non-quantified benefits discussed by the Department in the vacated 2023 AEWR Final Rule.

For the reasons discussed above, the Department is adopting a revised standard to ensure that SOC code assignments and AEWR determinations for employer job orders are based on an assessment of the duties performed for the majority of the workdays during the contract period, including those closely and directly related duties, and the

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[146] In addition, the Department's regulations have long required an H-2A employer to pay at least the AEWR to any U.S. worker who in fact performs the same work as the H-2A workers for time so spent, regardless of the worker's qualifications or skill level, further protecting against the potential harm from misclassification. *See* 20 C.F.R. 655.103(b) (definition of *corresponding employment*); *Overdevest*, 2 F.4th 977.

qualifications necessary for workers to perform the work. This standard will provide a straightforward method for the SWAs and COs to use when assigning SOC code(s) and will more effectively ensure occupational classifications are based on consideration of the totality of the circumstances related to the employer's job opportunity. Specifically, when the employer identifies on the H-2A job order the duties that it expects workers to perform for more than 50 percent of the workdays during the contract period and such duties, or a combination thereof, fall within one or more SOC codes within the field and livestock workers (combined) category, the SWA and CO will assess such duties and, taking into consideration any necessary job qualifications, assign the SOC code that best represents the employer's job opportunity within that category. When the job duties performed for the majority of the workdays during the contract period are within the field and livestock workers (combined) category and the employer's job order discloses duties from other occupations that are not encompassed by this category of occupations, the job opportunity will still be assigned a SOC code within the field and livestock workers (combined) category, provided that these other duties are performed for less than the majority of the workdays during contract period. The Department reminds stakeholders that all job duties disclosed on the job order, regardless of the amount of time workers are expected to perform them, must still qualify as agricultural labor or services as defined in the statute and regulations. *See generally* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (limiting H-2A eligibility to "agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature").

As an example, where a fixed-site grower identifies on the H-2A job order that workers will perform duties related to the planting, cultivating, and harvesting of sugarcane for the majority of the workdays during the contract period, which is typically

assigned SOC code 45-2091 (Agricultural Equipment Operators) within the field and livestock worker (combined) category with one AEWR, and occasionally transport harvested sugarcane using heavy trucks along public roads to local processing mills, which was assigned SOC code 53-3032 (Heavy and Tractor-Trailer Truck Drivers) under the 2023 AEWR Final Rule with a different and higher AEWR, the fact that the workers may be expected to operate and drive heavy trucks for any amount of work time during the certified period of employment will no longer be dispositive in assigning the SOC Code and determining the AEWR for the employer's job opportunity. Rather, the Department will consider the totality of circumstances of the employer's job opportunity, including the nature and duration of the duties to be performed and the qualifications that workers must possess to perform the duties prescribed. Under this IFR, consideration of duties disclosed on the job order that the employer expects workers to perform for the majority of the workdays during the contract period will ensure an appropriate consideration of the totality of the H-2A job opportunity, with a clear focus on the majority duties of the job and the relation of job duties to each other, and establish a method SWAs and COs can use to more clearly make determinations of similarly employed workers for the purpose of determining the wage rate necessary to prevent adverse effect on those workers.

The Department also notes that adoption of this standard is similar to the assessment performed by the SWA and the CO when determining whether an employer's job opportunity qualifies under the standards and procedures, including a determination of the applicable monthly AEWR, for employers seeking to hire foreign temporary agricultural workers for job opportunities in herding and production of livestock on the range. Specifically, under 20 CFR 655.210(b), the employer's job order must include, among other required conditions, a statement that workers will spend the majority (meaning more than 50 percent) of the workdays during the contract period engaged in

the herding or production of livestock on the range. Any job duties performed at a place other than the range ( *e.g.,* a fixed site farm or ranch) must be performed on no more than 50 percent of the workdays in a work contract period, and duties at the ranch must involve the production of livestock, which includes duties that are closely and directly related to herding and/or the production of livestock. Provided that an employer's job offer meets this majority of workdays standard, the SWA and CO will typically assign SOC code 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals) to the employer's job opportunity and evaluate the wage offer based on a determination of the monthly AEWR applicable to work performed on the range.

Further, adoption of this standard is similar (but not identical) to the primary duties assessment stipulated by WHD regulations and guidance related to FLSA exemptions. For example, the Department uses a primary duties test in determining whether an employee is exempt from the FLSA's minimum wage and overtime pay requirements because the employee is employed in a bona fide executive, administrative, or professional capacity. *See* 29 U.S.C. 213(a)(1). The FLSA regulations at 29 CFR Part 541 define a "primary duty" as "the principal, main, major or most important duty that the employee performs . . . with the major emphasis on the character of the employee's job as a whole." 29 CFR 541.700(a).[147] WHD notes in its regulations that the "amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee" and thus "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement," though the amount of time an employee spends on exempt duties alone "is not the sole test." 29 CFR 541.700(b). When "an employee concurrently (or

[147] *See also* 5 CFR 831.802 (OPM regulations) (stating that "if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties" and defining primary duties as duties "paramount in influence or weight…that… constitute the basic reasons for the existence of the position . . . Occupy[ing] a substantial portion of the individual's working time over a typical work cycle" and "assigned on a regular and recurring basis.").

simultaneously) performs both exempt and nonexempt duties," the "character of the employee's job as a whole" determines the primary duty.[148] For example, an employee would not qualify for the FLSA exemption for executive employees if the employee's "primary duty is ordinary production work or routine, recurrent, or repetitive tasks . . . even if they also have some supervisory responsibilities."[149] Additionally, in determining whether an employee's primary duty is exempt work, WHD also considers ordinarily non-exempt duties to be exempt under the FLSA if they are "directly and closely related" to exempt duties, meaning "relate[d] to exempt work and contribut[ing] to or facilitat[ing] performance of exempt work," such as duties that "arise out of exempt duties and routine work without which exempt work cannot be performed properly."[150] Finally, the FLSA primary duty standard looks at "whatever length of time is appropriate to capture the character of the employee's job as a whole, not a day-by-day scrutiny of the tasks performed."[151]

The adoption of a majority duties standard in this IFR will be administratively feasible and not impose unnecessary recordkeeping burdens on employers. To implement this new standard, the Department will provide guidance in the form of frequently asked questions that can help employers understand how to use the existing the H-2A job order form to specify the majority duties, including those closely and directly related duties, and then distinguish those from other duties that the worker(s) are expected to perform during the period of employment. The frequently asked questions the Department will provide to employers seeking temporary agricultural labor certification are procedural and non-substantive clarifications of existing OMB-approved information

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[148] WHD Field Operations Handbook, Ch. 22, *Executive, Administrative, Professional, Computer, and Outside Sales Exemptions: FLSA Section 13(a)(1) (29 U.S.C. 213(a)(1))*, § § 22b01(c)(1), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch22.pdf; 29 CFR 541.106.

[149] WHD Field Operations Handbook at § 22b01(c)(3).

[150] *Id.* at § 22a06(d).

[151] *Id.* at § 22a03.

collection that will help employers better organize and identify the duties and tasks already being disclosed on the H-2A job order that will assist the SWA and CO in assigning the SOC code that best represents the employer's job opportunity. The requirement that employers keep accurate and adequate records with respect to each worker's earnings, including records showing the nature and amount of the work performed, and make these records available for inspection and transcription by the Department and by the worker and representatives designated by the worker, in accordance with § 655.122(j)(1)-(2) remains unchanged. As provided in the Department's existing regulations, depending on the nature of the violation, failure to maintain and produce compliant records or failure to accurately describe the nature and extent of job duties may result in debarment under § 655.182(d)(1)(vi), (vii), and (d)(4) or (d)(5). *See also* 29 CFR § 501.20.

In summary, the Department concludes that adoption of a majority duties standard, including those duties closely and directly related, together with the clarification of the SOC coding process, will help to ensure consistent coding based on consideration of the totality of the employer's job opportunity and will provide more reasonable determinations of workers who are similarly employed. More consistent occupational classification, in turn, will ensure AEWR determinations and corresponding wage obligations of employers are accurate with the "clear congressional intent . . . to make the H-2A program usable, not to make U.S. producers non-competitive" and that "[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile."[152]

[152] 88 FR at 12772 (*citing* 54 FR 28037, 28046 (Jul. 5, 1989)).

**2. Additional Guidance on Assigning SOC Codes Based on the Duties and Qualifications in the Employer's Job Opportunity**

To address the need for consistent occupational coding related to an employer's job opportunity, the Department is providing additional guidance regarding the methods by which the CO will assign H-2A job opportunities to one or more SOC occupation codes based on an assessment of the duties that employers expect workers to perform for the majority of the workdays during the contract period, including those duties closely and directly related, and qualifications contained in the employer's job order seeking temporary agricultural labor certification to employ H-2A workers. When determining the AEWR, the SWA and the CO must first determine the appropriate occupational classification, or SOC code(s), for the employer's job opportunity by comparing the duties and requirements contained in the employer's job order to the SOC definitions, skill requirements, and tasks that are listed in O*NET.[153] The Department is taking the opportunity in this rulemaking to clarify how the CO and SWA will evaluate the scope of duties identified within an employer's job offer for purposes of determining the applicable SOC code(s), particularly as it relates to certain driving, supervisory, and other farm maintenance duties performed by workers.

Prior to the 2023 AEWR Final Rule, assignment of SOC codes was less significant to the employer's AEWR obligations because all job opportunities were issued an FLS-based AEWR covering the field and livestock workers (combined) occupations. The assignment of SOC codes became more significant in AEWR determinations under the 2023 AEWR Final Rule, which specified that when the employer's job requires duties that cannot be encompassed within a single SOC occupational classification, the employer must pay the highest AEWR for the applicable

[153] 88 FR at 12779.

SOC codes. For example, if the employer's job order required heavy trucking duties and crop harvesting duties, the Department assigned two SOC codes—53-3032 encompassing heavy truck drivers and 45-2092 encompassing crop farmworkers—and assigned the highest AEWR, which in most cases was the occupation-specific OEWS wage applicable to SOC 53-3032, rather than the FLS field and livestock workers (combined) wage applicable to SOC 45-2092. The Department concluded that for "these mixed job opportunities . . . using the AEWR for the higher paid SOC code is necessary to prevent adverse effects on the wages of workers in the United States similarly employed resulting from inaccurate SOC code assignment."[154]

However, the statute does not define or dictate how the Department is to apply the term "similarly employed" for purposes of ensuring no adverse effect on wages and working conditions and does not require that such a determination be predicated on workers employed in an identical job. It does, however, specify that the Secretary "shall apply the normal and accepted qualifications required by non-H-2A-employers in the same or comparable occupations and crops."[155] When evaluating an employer's job offer, the Department has historically interpreted the term "qualification" to mean a characteristic, excluding the job duties or work tasks to be performed, that is necessary to the individual's ability to perform the job in question. Such characteristics include, but are not limited to, the ability to use specific tools, vehicles, or equipment as well as any education or training required for performing duties or work tasks under the employer's job opportunity.[156]

In the absence of other reliable and objective sources of information related to the job qualification of a specific crop, the Department has a long-standing practice of using

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[154] *Id.* at 12777.

[155] *See* 8 U.S.C. § 1188(c)(3)(A)(ii).

[156] See 80 FR 24062.

O*NET's SOC-based taxonomy for assessing whether an employer's job qualification is bona fide and consistent with the normal job qualifications of employers and workers performing substantially similar work in jobs covered by a particular occupational classification. This analysis can further aid the Department in assigning an appropriate AEWR, better tailored to protecting workers in the U.S. similarly employed than the considerations used under the 2023 AEWR Final Rule. Specifically, duties and responsibilities in an H-2A employer's job opportunity that have common characteristics and qualifications (*e.g.*, work tasks, requirements, tools), or those that are substantially alike in substance or essentials, as the duties and responsibilities performed by workers employed in jobs covered by a particular SOC code, would indicate (among other factors as described herein) that the particular SOC code is appropriate to assign to the H-2A job opportunity. Conversely, if the job duties or work tasks, requirements, tools, or other qualifications in the employer's job opportunity seeking temporary labor certification to employ H-2A workers are substantially different from those identified in a specific SOC code within the O*NET taxonomy, that SOC is unlikely to be appropriate to assign to the H-2A job opportunity.

O*NET remains a primary reference source used by the CO and SWA to assess the scope of duties and qualifications identified within an employer's H-2A job opportunity for purposes of determining its occupational classification (*i.e.,* SOC code). O*NET "was first conceived of as a conceptual model of information on occupational and worker requirements and attributes . . . designed to replace the outdated *Dictionary of Occupational Titles* . . ." the predecessor to O*NET, and was first released as the O*NET '98 database.[157] O*NET is a taxonomy of occupational characteristics organized around job-oriented and worker-oriented descriptors, such as detailed work tasks or activities,

[157] Boes, Ron, Frugoli, Pam, Lewis, Phil, and Litwin, Karen (Oct. 2001), *O*NET Database Release 4.0: Content Model and Database Summary, The Evolution of O*NET*, 2. National O*NET Consortium. Available at: https://www.onetcenter.org/dl_files/summary_only.pdf.

job requirements (*e.g.*, education, training, licensure, experience), organizational context, and tools and technology that are common to the occupation and may influence the scope of work performed and the capacity to acquire knowledge and skills required for effective work performance.[158] Detailed occupational information is collected using multiple independent methods such as surveying a national sample of employer establishments and their workers; surveying samples of occupational experts; and collecting data from occupational analysts, who are provided with updated data from surveys of workers.

The O*NET structure allows occupational information to be aggregated and applied across multiple jobs, sectors, or industries where the work tasks and activities performed by workers, as well as the requirements to perform such work, are substantially similar.[159] For example, SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) includes a wide range of distinct jobs such as field irrigation workers, greenhouse workers, and orchard workers, where the underlying characteristics of work (*i.e.*, tasks, requirements, tools) across these distinct jobs are substantially similar to one another. Thus, although workers under any particular SOC code may be performing work across dozens of different job titles and in potentially different sectors or industries, the characteristics and qualifications of the work performed are common or substantially alike in substance or essentials.

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[158] *See The O*NET Content Model* (explaining the O*NET content model, which "provides a framework that identifies the most important types of information about work and integrates them into a theoretically and empirically sound system" that "allows occupational information to be applied across jobs, sectors, or industries (cross-occupational descriptors) and within occupations (occupational-specific descriptors)" and "enable the user to focus on areas of information that specify the key attributes and characteristics of workers and occupations."). Available at: https://www.onetcenter.org/content.html. For a detailed description of the development of the Content Model, *see* Peterson, N.G., et al. (1999). *An Occupational Information System for the 21st Century: The Development of O*NET*. American Psychological Association.

[159] *See*, *e.g.*, *A Database for a Changing Economy: Review of the Occupational Information Network (O*NET)* (2010), 22-23. National Research Council, Washington, D.C.: National Academies Press (Describing the O*NET content model as "a taxonomy of occupational descriptors" with "occupations as the unit of analysis . . . rather than the job or position" and noting the occupation "is broader than a specific job or specific position," "is not idiosyncratic to a particular organization, industry, or setting," and may "include several jobs if the general responsibilities, activities, and requirements for the various jobs are substantially similar.").

In addition, the O*NET provides relevance and importance scores for specific work tasks that reflect the percentage of current workers who believe that a particular duty or work task is relevant and important to his or her current job. For purposes of classifying an employer's job opportunity under one or more SOC codes, these scores provide an understanding of the full scope of job duties considered "core" or primary tasks to the occupation, and which tasks are "supplemental" or directly and closely associated to workers similarly employed in the occupational classification. O*NET classifies tasks as "core" when at least 67 percent of current workers surveyed believe that the task is relevant and which the average current worker believes the task is important to extremely important (*i.e.*, >=3.0 based on a scale where 1 = Not Important to 5 = Extremely Important) to their job. Supplemental tasks are those tasks performed within the occupational classification where less than 67 percent of current workers surveyed believe that the task is relevant and which the average current worker believes is relatively less important to their job.

For example, the task of "load agricultural products into trucks, and drive trucks to market or storage facilities" is considered a core task to the SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) with a relevance score of 78 and an importance score of 3.3. This means that 78 percent of current Farmworkers and Laborers surveyed reported that this task is relevant, and the average worker believed it is frequently important to their job but not necessarily performed on a day-to-day basis. However, the task of "move containerized shrubs, plants, and trees, using wheelbarrows or tractor" is considered supplemental because, although the average worker believed it is an important task, only 37 percent of current Farmworkers and Laborers surveyed reported this task as relevant to their day-to-day work. Thus, the combination of the "core" and "supplemental" work tasks identified in O*NET for a particular SOC code helps establish a data-driven foundation for evaluating the scope of duties that are

normally performed by workers, even across multiple distinct jobs, who are similarly employed under that occupational classification.

Finally, O*NET collects information pertaining to "tools and technology" that are deemed essential to effective performance within a distinct job under the SOC code. In other words, the machines, equipment, vehicles, software, and other tools identified are specific to the occupational classification, reflect those items necessary for an incumbent worker to carry out the tasks, whether "core" or "supplemental," and expressed in a language understood by workers who perform work in the job, sector, or industry. In addition, the identified tools and technology often have an expectation of a training requirement that can range from a short-term demonstration of use or on-the-job training to more formal education or vocational training. For example, SOC code 45-2091 (Agricultural Equipment Operators) identifies a combination of more than 64 different categories of tools that workers may use to perform their jobs, including a wide array of harvesting equipment, trucks and tractor-trailers, spreaders, and loaders, where employees in this occupational classification need anywhere from a few days to a few months of training, and accordingly a more experienced incumbent worker usually provides a short demonstration on proper use and care of the equipment. Thus, when all these components within the taxonomy are considered in their totality, O*NET represents the best available information for the CO and SWA to use in evaluating an employer's job opportunity for purposes of classifying the agricultural labor or services into one or more SOC codes and determining the applicable AEWR.

In determining the appropriate occupational classification, the CO will continue to evaluate each job opportunity on a case-by-case basis, considering the totality of the information in an H-2A application and job order, to determine the appropriate SOC code. In making a determination of the SOC code(s), the CO and SWA will continue to compare the duties and qualifications contained in the job order with the definitions,

work tasks, job requirements, and tools that are listed in O*NET's SOC-based taxonomy. Where similar information appears in more than one SOC code (*i.e.,* overlapping work tasks), such as transporting workers or agricultural commodities or maintaining and repairing farm buildings or equipment, the CO and SWA will continue to consider other factual qualifications presented in the job order (*e.g.,* types of vehicles or minimum experience or licensure requirements) that can provide context for determining which SOC code or codes best represent the employer's job opportunity. To the maximum extent practicable, where the duties performed for the majority of the workdays during the contract period, including those duties closely and directly related, and qualifications presented in the job order are sufficiently comparable to agricultural work performed on or off farm (*e.g.*, workers primarily engaged in harvesting sugarcane and will also transport the cut cane off farm to a mill for processing), the CO and SWA will assign one SOC code contained within an agricultural-related major occupational grouping (*e.g.*, 45-0000 Farming, Fishing, and Forestry Occupations) or other grouping of specific occupations directly and closely associated with the agriculture, forestry, fishing, and hunting industry sector (*i.e.*, North American Industry Classification System code 11[160]) or the cluster of agricultural careers[161] identified by O*NET. Job duties or work tasks presented in the job order that are characterized as irregular, sporadic, or intermittent will not be considered by the CO and SWA for purposes of determining its occupational classification or SOC code.

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[160] O*NET classifies occupations according to industry groups where businesses or organizations have similar activities, products, or services. The occupations designated by O*NET as falling within the Agriculture, Forestry, Fishing, and Hunting Industry are based on the percentage of workers employed in that industry. For more information, see the O*NET website at https://www.onetonline.org/find/industry?i=11.

[161] Based on the National Career Clusters® Framework, O*NET organizes occupations containing the same field of work that require similar skills into career clusters as a taxonomy that helps inform the design and implementation of education, employment and job training programs that can help focus program planning towards individuals obtaining the necessary knowledge, competencies, and training for success in a particular career pathway. For more information on the occupations organized into the Agriculture Career Cluster, see the O*NET website at https://www.onetonline.org/find/career?c=050100. For more information on the National Career Clusters Framework, see the Advance CTE website at https://careertech.org/career-clusters.

For job opportunities involving driving duties, the CO and SWA will continue to look at qualifications such as the type of equipment involved (*e.g.,* pickup trucks, custom combine machinery, or semi tractor-trailer trucks; makes and models of machines to be used), the location where the work will be performed (*e.g.,* on a farm or off), and any other requirements contained in the job order to determine the appropriate SOC code and applicable AEWR. Based on a review of the O*NET core and supplemental work tasks, an employer's job opportunity can specify a wide array of driving responsibilities across one or more of the five SOC codes comprising field and livestock worker occupations (combined) that would continue to be subject to a single AEWR. Workers employed in jobs covered by these SOC codes are primarily engaged in agricultural work (*e.g.*, planting, cultivating, harvesting) and perform other tasks that are directly and closely related, such as driving duties.

Specifically, a worker engaged in harvesting, whether by hand or machinery, is typically performing other relevant and important tasks covered by the field and livestock worker (combined) category of occupations, such as "load[ing] agricultural products into trucks and drive trucks to market or storage facilities," which is encompassed by SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse); "driv[ing] trucks to haul crops, supplies, tools, or farm workers," which is encompassed by SOC code 45-2091 (Agricultural Equipment Operators); and "patrol[ing] grazing lands and driv[ing] trucks or tractors to distribute feed to animals or move equipment and animals from one location to another," which is encompassed by SOC code 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals). With respect to the types of equipment (*i.e.*, tools), O*NET identifies as necessary for the performance of duties associated with these work tasks includes operating All-Terrain-Vehicles, sport utility vehicles, light trucks (*i.e.*, less than 26,001 Gross Vehicle Weight), multi-purpose agricultural tractors, dump trucks, and heavy tractor-trailers (*i.e.*, at least 26,001 Gross

Vehicle Weight). Finally, performance of these driving duties and operation of the types of equipment identified do not normally require formal education (*e.g.*, post-secondary) or training (*e.g.*, apprenticeship) or credentialing (*e.g.*, CDL license) under these SOC codes. Therefore, where the work tasks presented in an employer's job order require workers to be engaged in agricultural work for the majority of the workdays during the contract period and perform driving duties using any of the types of equipment identified without the requirement for formal education, training, or credentialing and possess three months or less of related experience, the CO and SWA will, absent additional job details that might indicate otherwise, assign one of the five SOC codes comprising field and livestock worker occupations (combined), as applicable, that best represents the employer's job opportunity and subject to a single AEWR.

In contrast, a H-2A job opportunity that requires a worker to possess a CDL with more than three months to one year of related experience and whose duties, including those duties closely and directly related, for the majority of the workdays during the contract period involve driving a heavy tractor-trailer combination to deliver agricultural products over public roads through weigh stations to storage or market, including other essential work tasks such as checking all load-related documentation for completeness and accuracy, operating Citizen Band radios or Global Positioning System equipment to exchange necessary information with supervisors or other drivers, coupling and uncoupling trailers, maintaining vehicle logs, and obtaining customer signatures for delivery of goods, may be assigned SOC code 53-3032 (Heavy and Tractor-Trailer Truck Drivers) even if such worker is also expected to perform some hand-harvesting work during a minor portion of the work contract period. In this scenario, the requirement under paragraph (b)(7) applies when determining the employer's H-2A wage obligation as the AEWR applicable to SOC code 53-3032, absent additional job details that might

indicate otherwise, best represents the agricultural labor or services to be performed under the employer's job opportunity.

For job opportunities that involve driving farmworkers from place to place from assigned housing to and from the farm property, the CO will consider factors such as the type of vehicle (*e.g.,* a farm truck or van or a hired van or bus, such as a Calvans vehicle), the location where the farmworker transport will be performed (*e.g.,* around the farm, including on private roads, or on public roads), and any qualifications and requirements for the transport (*e.g.,* type of driver's licensure, gross vehicle weight, vehicle maintenance responsibilities, paperwork requirements) to determine the appropriate SOC code to assign to the employer's job opportunity. For instance, the Department notes that it is a common practice for employers to provide workers with multi-purpose vehicles (*e.g.*, sport utility vehicles, heavy or light trucks) for use in transporting crops, supplies, equipment, tools, or other farmworkers, including vehicles needed to drive from employer-provided housing to the worksites on an as-needed basis, during the work contract period. These vehicles typically have a capacity of less than 13 tons and do not require the equivalent of a commercial drivers' license to operate on or off the farm properties. Therefore, driving duties associated with these types of qualifications are all within the five SOC codes comprising field and livestock worker occupations (combined). In addition, the fact the workers may also use these same vehicles, at their discretion, to transport themselves to the grocery store, bank, or laundry facilities, is not a relevant factor that would warrant the CO and SWA assigning another SOC code outside of the five SOC codes comprising field and livestock worker occupations (combined).

In contrast, an H-2A job opportunity that requires a worker to possess more than three months to one year of related experience and whose duties, including those duties closely and directly related, for the majority of the workdays during the contract period involve picking up farmworkers, according to a regular schedule, from employer-

provided housing or a centralized pick-up point, in a van or bus used only for passenger transport, on public roads (*e.g.,* from a motel to the farm), driving them to the place(s) of employment to perform hand-harvest work, and communicating with other drivers and/or farm supervisors to receive information and coordinate vehicle movements for passenger pick-up/drop-off services, may be assigned SOC code 53-3053 (Shuttle Drivers and Chauffeurs) even if such worker is also expected to perform some hand-harvesting work. In this scenario, the requirement under paragraph (b)(7) applies when determining the employer's H-2A wage obligation as the AEWR applicable to SOC code 53-3053, absent additional job details that might indicate otherwise, best represents the agricultural labor or services to be performed under the employer's job opportunity.

For job opportunities involving supervisory duties, O*NET core and supplemental work tasks associated with the five SOC codes comprising field and livestock worker occupations (combined) provide a reasonable degree of flexibility for workers to direct, monitor and oversee the work of other workers employed in the job opportunity without the higher-skills and requirements associated with formal supervision. For instance, workers employed in jobs covered by these SOC codes who are engaged in field and livestock related work can also perform tasks identified by O*NET, such as "direct and monitor the work of work crews, casual and seasonal help during planting, weeding, and harvesting; inform farmers or farm managers of crop progress; record information about crops, livestock, plants, pesticide use, growth, production, and costs; and maintain inventory and order materials," which are all encompassed, in some manner, by SOC codes 45-2091 (Agricultural Equipment Operators), 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse), and 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals). Directing, monitoring and overseeing the work of other workers commonly means assisting the farmer or farm managers in assigning tasks, issuing equipment, communicating in a manner that ensures the effective performance of work;

collecting and recording worker productivity or progress using paper or electronic devices; and performing basic training or direction to workers on agricultural techniques, as necessary. Therefore, where the work tasks presented in an employer's job opportunity require workers to be engaged in field and livestock related work for the majority of the workdays during the contract period and perform other supervisory related duties, the CO and SWA will, absent additional job details that might indicate otherwise, assign one or the five SOC codes comprising field and livestock worker occupations (combined) that best represents the employer's job opportunity and subject to a single AEWR.

In contrast, an H-2A job opportunity that requires a worker to possess one or two years related experience for the purpose of performing duties for the majority of the workdays during the contract period involving the planning or scheduling work crews according to personnel and equipment availability, including transportation to-and-from worksite(s), training and monitoring workers to ensure that safety regulations are followed, warning or disciplining those who violate safety regulations, preparing and maintaining time, attendance, or payroll reports, recording and maintaining personnel actions, such as performance evaluations, hires, promotions, or disciplinary actions, and conferring with farmers and farm managers to evaluate weather or soil conditions and develop or modify work schedules and activities, may be assigned SOC code 45-1011 (First-Line Supervisors of Farming, Fishing, and Forestry Workers) even if such worker is also expected to perform some hand-harvesting work. In this scenario, the requirement under paragraph (b)(7) applies when determining the employer's H-2A wage obligation as the AEWR applicable to SOC code 45-1011, absent additional job details that might indicate otherwise, best represents the agricultural labor or services to be performed under the employer's job opportunity.

For job opportunities involving farm maintenance duties, O*NET core and supplemental work tasks associated with the five SOC codes comprising field and

livestock worker occupations (combined) permit a worker primarily engaged in performing field and livestock related work to also perform other relevant and important tasks such as "adjust, repair, and service farm machinery and notify supervisors when machinery malfunctions," which is encompassed by SOC code 45-2091 (Agricultural Equipment Operators); "repair and maintain farm vehicles, implements, and mechanical equipment; maintain and repair irrigation and climate control systems, and repair farm buildings, fences, and other structures," which are encompassed by SOC code 45-2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse); and "inspect, maintain, and repair equipment, machinery, buildings, pens, yards, and fences," which is encompassed by SOC code 45-2093 (Farmworkers, Farm, Ranch, and Aquacultural Animals). With respect to the types of equipment, O*NET identifies a wide array of tools necessary for the performance of maintenance duties ranging from basic hand tools, plows and posthole diggers to backhoes, land levelers and power tools. Further, performance of these tasks and use of these tools do not require any formal education or training and, in many cases, are commonly used on farms and ranches to build, maintain, and repair minor agricultural structures such as livestock pens, existing farm buildings, and temporary or permanent fencing around the property. Therefore, where the work tasks presented in an employer's job opportunity require workers to be engaged for the majority of the workdays during the contract period in field and livestock related work and perform related maintenance duties, including building minor agricultural structures and fencing around the property, using any of the types of equipment identified and without the requirement for formal education, training, or extensive work-related experience, the CO and SWA will, absent additional job details that might indicate otherwise, assign one or the five SOC codes comprising field and livestock worker occupations (combined) that best represents the employer's job opportunity and subject to a single AEWR.

However, the Department continues to receive H-2A applications, for example, related to ranch livestock confinement or grain bin elevator construction on farms that require a few months to one year of previous experience where workers are expected to perform duties such as reading and following plans and measurements; aligning and sealing structural components (*e.g.,* walls and pipes), sometimes by welding; building frameworks (*e.g.,* walls, roofs, joists, studding, and window and door frames); installing metal siding, windows, ceiling tiles, and insulation; and pouring concrete. These construction duties are consistent with SOC code 47-2061 (Construction Laborers), not with SOC code 45-2093 where the duties involve maintaining and repairing farm buildings. In addition, the location of the work—on a farm or off a farm—or type of structure to be constructed—a livestock confinement building or a retail building—does not alter the essential duties, skills, and other qualifications required of the worker. In this scenario, where a H-2A job opportunity's tasks, qualifications, and requirements indicate skilled construction work will be performed, the requirement under paragraph (b)(7) applies when determining the employer's H-2A wage obligation as the AEWR applicable to SOC code 45-2067, absent additional job details that might indicate otherwise, best represents the agricultural labor or services to be performed under the employer's job opportunity.

With respect to the maintenance of farm equipment or other vehicles, the Department reiterates that some on-farm mechanics may perform only the type of routine maintenance consistent with the O*NET work tasks and other qualifications (*e.g.*, tools and job requirements) encompassed by the five SOC codes comprising field and livestock worker occupations (combined). The Department continues to receive H-2A applications for mechanics and service technicians where workers are expected to possess one or two years related experience for the purpose of being engaged for the majority of the workdays during the contract period in duties such as the following: diagnose, repair, and

overhaul engines, transmissions, components, electrical and fuel systems, etc. on tractors, irrigation systems, generators and/or other farm equipment; make major mechanical adjustments and repairs on farm machinery; repair defective parts using welding equipment, grinders, or saws; repair defective engines or engine components; replace motors; fabricate parts, components, or new metal parts using drill presses, engine lathes, welding torches, and other machine tools (grinders or grinding torches); test and replace electrical circuits, components, wiring, and mechanical equipment using test meters, soldering equipment, and hand tools; read inspection reports, work orders, or descriptions of problems to determine repairs or modifications needed; and maintain service and repair records. The Department notes that duties of this type and scale, whether performed on equipment or other vehicles (*e.g.*, trucks, automobiles, and buses used to support the farming operations) that are powered by diesel or gas, are encompassed within 49-3041 (Farm Equipment Mechanics and Service Technicians), and not within the routine general maintenance or repair tasks identified by O*NET associated with the five SOC codes comprising field and livestock worker occupations (combined).

Finally, as in current practice, if the CO determines that the employer's wage offer is less than the wage rate that must be offered to satisfy H-2A program requirements (*e.g.,* the wage offer is less than the highest of the wage sources listed in 20 CFR 655.120(a), including the AEWR determination applicable to the H-2A job opportunity), the CO will issue a Notice of Deficiency alerting the employer to the issue and providing an opportunity for the employer to amend its wage offer. If the employer chooses not to amend its wage offer, the CO will deny the application for failure to satisfy criteria for certification, and the employer may appeal the final determination. If the SOC code assigned to the H-2A job opportunity is material to the CO's final determination, the employer may contest the SOC code assessment on appeal.

The Department anticipates the additional clarifying guidance contained in this interim final rule regarding occupational classification in the H-2A program will reduce the risk of CO or SWA misclassification of job opportunities, ensure greater consistency and predictability for employers to prepare their job offers, and provide more accurate, market-based wages are used to determine the AEWRs that protect the wages paid to agricultural workers in the H-2A program reflect market wages paid to workers in the U.S. similarly employed.

**D. The Department Will Determine a Single AEWR Covering the Five Most Common Field and Livestock Worker (Combined) Occupations**

Under the 2023 AEWR Final Rule, the Department determined a single AEWR for any job opportunity where the duties to be performed cover one or more of the following six SOC codes reported by the FLS: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093); Agricultural Equipment Operators (45-2091); Packers and Packagers, Hand (53-7064); Graders and Sorters, Agricultural Products (45-2041); and All Other Agricultural Workers (45-2099). In adopting this approach, the Department reasoned that the broad, overlapping nature of tasks listed in the Occupational Information Network (O*NET) for these six field and livestock workers (combined) SOC codes is consistent with the most common tasks performed by workers in agricultural operations and the variety of duties employers may require of field and livestock workers during a typical workday or intermittently during the period of employment. Further, in response to public comments, the Department concluded that establishing a single AEWR for this group of six SOC codes provided a reasonable amount of flexibility with respect to the type of duties a field and livestock worker may perform without added recordkeeping, administrative burden, or uncertainty regarding wage obligations.

Although this IFR affirms the policy decision to establish a single AEWR covering the most common field and livestock worker (combined) occupations, for the reasons stated below, the Department is making a minor change to remove SOC code 45-2099, All Other Agricultural Workers, from the AEWR computations. Specifically, the Department is removing reference to the USDA FLS under 655.120(b)(1)(i) in determining the AEWR for the field and livestock workers (combined) category and concludes that this change will produce more accurate wage estimates of workers in the United States performing agricultural work that is encompassed by the most common field and livestock worker (combined) occupations for which employers are seeking temporary agricultural labor certification.

First, based on how the SOC system is administered, the employment and wage information associated with workers classified within 45-2099, All Other Agricultural Workers, represents too broad a spectrum of jobs that are not common or prevalent in the agricultural labor market. According to the BLS, for example, the SOC system is used "to classify workers and jobs into occupational categories for the purpose of collecting, calculating, analyzing, or disseminating data."[162] Jobs within the labor market that have similar duties, and in some cases, similar skills, education, and/or training, are organized into a distinct detailed SOC code.[163] Under the SOC system, workers are assigned a SOC code based on the job duties or work tasks performed and, in some cases, on the skills, education or training needed to perform the work.[164]

Because the goal of the SOC system is to classify all jobs into an occupational classification where work is performed for pay or profit, there are circumstances in which the duties and tasks performed by workers are too diverse, less prevalent or emerging

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[162] *See 2018 SOC Manual*, 1. Available at: https://www.bls.gov/soc/2018/soc_2018_manual.pdf.

[163] *Id*.

[164] *Id*. at 23.

within the labor market where assignment to a detailed occupation is not practicable. When these circumstances occur and workers do not perform job duties described in any distinct detailed occupation, the SOC system classifies the worker's duties performed as one contained within an "All Other" SOC code.[165] For example, the SOC code 45-2099, Agricultural Workers, All Other, which broadly covers all agricultural workers not otherwise captured by the more detailed SOC codes in the entire 45-0000 series of farming, fishing, and forestry related occupations, provides no sample job titles or any other detailed description to understand what kind of field or livestock work duties, if any, are being performed by workers and classified within this "All Other" SOC code.

Further, based on the May 2024 OEWS data release, the 45-2099 SOC code only accounted for 4,980 jobs nationwide; approximately 1.1% of the estimated 442,050 jobs in the 45-0000 series that encompasses all farming, fishing, and forestry occupations. Similarly, according to the FLS November 2024 annual report, the 45-2099 SOC code only accounted for an average of 7,000-8,000 jobs nationwide; approximately 1.1% of the estimated 710,000-720,000 field and livestock worker (combined) employment during the July and October 2024 reference quarters. Thus, the relevant data demonstrate that employment of workers classified within this "All Other" SOC code are not common or prevalent within the agricultural labor market.

Second, because the 45-2099, Agricultural Workers, All Other SOC code covers a broad spectrum of jobs that are not common in the agricultural labor market, the Department cannot effectively determine whether an employer's job qualification(s) and requirement(s) to perform work that could be classified under this SOC code and are normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops, as required by statute and regulations.

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[165] *Id.*

*See* 8 U.S.C. 1188(c)(3); 20 CFR 655.122(b). Specifically, O*NET, which is based on the SOC system and collects detailed occupational data related to common work tasks, skills, licensure, education, experience, and other job qualifications and requirements, is an essential tool of independent worker-centric information the Department has historically used to evaluate whether the job qualifications and requirements contained in an employer's job offer are normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops, as required by statute and regulations. *See* 8 U.S.C. 1188(c)(3); 20 CFR 655.122(b). Because the work performed contains too wide a range of characteristics that do not fit into any other detailed occupational code, the O*NET does not consistently report such essential information for "Agricultural Workers, All Other" that can be used to effectively determine compliance with program requirements. Although the employer may be required to submit documentation to substantiate the appropriateness of any job qualification, the lack of such essential information in the O*NET prevents the CO and the SWA from determining whether the employer's documentation is sufficient to meet program requirements, as there is no independent source of data the CO and the SWA can use to assess any particular job qualification or requirement specified in the employer's job offer.

Finally, due to the way the SOC coding system is administered and the lack of essential information in O*NET to assess whether job qualifications or requirements specified in the employer's job offer meet program requirements, the 45-2099, Agricultural Workers, All Other SOC code offers very little practical utility for OFLC and the SWA with respect to classifying the duties or work tasks for which employers are requesting temporary labor certification. Based on a review of public H-2A labor certification records submitted under the 2023 AEWR Final Rule on and after April 1, 2023, through March 30, 2025, OFLC issued 44,014 temporary agricultural labor

certifications covering more than 742,600 worker positions classified within approximately 75 different SOC codes. Of these totals, only 20 H-2A labor certification records covering 125 worker positions were granted temporary agricultural labor certification where the duties or work tasks to be performed were classified as SOC 45-2099, Agricultural Workers, All Other. However, based on careful quality review of these H-2A labor certification records, each of these applications were improperly coded by OFLC and the SWA and the duties or work tasks to be performed should have been more appropriately classified within one of the detailed occupations within the SOC system. Therefore, the change being made through this IFR should have little to no impact on the wages required to be paid to H-2A workers and other workers in corresponding employment.

Thus, based on how the SOC coding system is administered, relevant data, and the experience of OFLC processing employer job orders in the H-2A program, the Department concludes that employment and wage information associated with workers classified within SOC code 45-2099, All Other Agricultural Workers, does not provide practical utility for its continued use in the field and livestock workers (combined) category due to the broad spectrum of unknown duties and tasks performed by workers classified within this SOC code. In addition, due to the significantly small percentage of employment this SOC code represents within the agricultural labor market, the Department concludes that the removal of this SOC code will not have an adverse effect on the amount of flexibility an employer needs with respect to the type of duties a field and livestock worker may perform without added recordkeeping, administrative burden, or uncertainty regarding wage obligations. Even with the removal of SOC code 45-2099 (Agricultural Workers, All Other), the Department maintains that each of the remaining five SOC codes constituting field and livestock workers (combined) already encompass a wide array of work tasks and responsibilities, some of which overlap and mutually

support one another (*i.e.,* the same or substantially similar duties, requirements, or tools are included in more than one of the five SOC codes).

Accordingly, under this IFR, the Department has modified paragraph (b)(1)(i)(A) to state that it will determine a single statewide AEWR at two skill levels for any job opportunity where the duties to be performed cover one or more of the following five SOC codes representing the field and livestock workers (combined) category: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093); Agricultural Equipment Operators (45-2091); Packers and Packagers, Hand (53-7064); and Graders and Sorters, Agricultural Products (45-2041). In the rare circumstances in which there is no statewide wage reported by OEWS field and livestock workers (combined) category, the Department will use the national annual average gross hourly wage reported by the OEWS for the particular SOC code and skill level, which will ensure an AEWR determination can be made each year. Thus, the Department has also revised paragraph (b)(1)(i)(B) to reflect use of a national annual average gross hourly wage reported by the OEWS in these circumstances and, with this modification, has removed paragraph (b)(1)(i)(C).

**E. The Department Will Determine a SOC-Specific AEWR for All Other Occupations.**

For H-2A job opportunities that do not fall within the five SOC codes that constitute the field and livestock workers (combined) category, the Department will use the OEWS survey to determine SOC-specific AEWRs. Under this IFR and as described in revised paragraph (b)(1)(ii)(A), the AEWRs at two skill levels for all non-range SOC codes where the primary duties, including those duties that are directly and close related, that fall outside the field and livestock workers (combined) category will be the statewide annual average hourly gross wage for the SOC code, as reported by the OEWS survey. If

the OEWS survey does not report a statewide annual average hourly gross wage for the SOC code and at the skill level, as described in paragraph (b)(1)(ii)(B), AEWR for that State and skill level will be the national annual average hourly gross wage for the SOC code, as reported by the OEWS survey.

As previously discussed, the OEWS has practical utility to the agency in circumstances where the agricultural labor or services to be performed qualify under the H-2A program but are not adequately represented by the five most common field and livestock worker (combined) occupational wages. For instance, as discussed in the 2023 AEWR Final Rule, the OEWS is a useful wage source for those occupations that constitute a small percentage of agricultural labor or services and a larger subset of non-agricultural labor or services (*e.g.,* construction workers) or provide agricultural support services to farms (*e.g.*, farm equipment mechanics) or where the work is generally not performed on farms or ranches such that wages are not representative of those covered by the most common farm and livestock worker (combined) occupations (*e.g.,* logging occupations). These positions are often filled as contract positions through non-farm establishments, rather than direct on-farm hired positions, for which the OEWS survey consistently covers in its sampling frames, and for which the cross-industry reach of this survey inherently covers the same or substantially similar work both in and outside the agricultural sector. And finally, H-2ALC participation in the H-2A program has grown significantly since 2010 and the employment of H-2A workers by non-farm establishments remains a high percentage of all H-2A worker positions certified by the Department. [166]

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[166] A recent Government Accountability Office (GAO) report noted that "from FY 2020 through FY 2023, direct-hire employers submitted most of the applications (84 percent, on average) that OFLC approved, which accounted for 57 percent of the jobs approved during the period. Farm labor contractors (FLC) submitted 15 percent of approved applications and accounted for 42 percent of the jobs approved during the period." GAO further found "that the average number of jobs per approved application was over four times higher for FLCs (54 jobs) when compared to direct-hire employers (13 jobs)." Government Accountability Office, *H-2A Visa Program: Agencies Should Take Additional Steps to Improve Oversight and*

As discussed previously, the available program data supports the Department's determination that OEWS wage data collected from non-farm establishments, such as farm labor contractors or H-2ALCs, who employ workers to perform duties not covered by the five field and livestock workers (combined) category SOC codes, is an appropriate source of actual market wages in agriculture to determine the AEWRs for all other SOC codes. The Department's decision to expand the OEWS survey to cover farm establishments will further strengthen the survey for positions that are outside the field and livestock worker (combined) SOC codes by ensuring that the employment and wages associated with any direct on-farm employees are incorporated into the annual wage estimates. The more robust employment and wage estimates resulting from this expansion will have a corollary benefit of enhancing the accuracy of prevailing wage determinations in the H-2B temporary non-agricultural labor certification program, and other nonimmigrant and immigrant programs, where workers are performing the same or substantially similar work for employers who otherwise cannot qualify under the H-2A program and where prevailing wage determinations are predominantly based on the wages collected from non-farm establishments. Where the primary duties, including those duties closely and directly related, fall outside the five field and livestock worker (combined) category, the Department recognizes that the AEWRs determined for these SOC codes, even at two skill levels, may result in higher wages, depending upon geographic location and the specific SOC code. These relatively higher AEWRs, however, will most likely be the result of administering a more robust and accurate set of occupational data from the OEWS that is better representative of the actual wages paid to

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*Enforcement*, GAO-25-106389 (Nov. 14, 2024). More recently and based on a review of H-2A applications covering all agricultural sectors certified by OFLC covering October 1, 2023, through June 30, 2025, the proportion of H-2A worker positions certified for employers operating as H-2ALCs remained high. In FY 2024, of the 384,865 worker positions certified nationally, 163,844 (or 43 percent) were issued to H-2ALCs. From October 1, 2024, through July 1, 2025, for FY 2025, of the 317,459 worker positions certified nationally, 134.209 (or 42.3 percent) were issued to employers operating as H-2ALCs. *See https://www.dol.gov/agencies/eta/foreign-labor/performance* (accessed July 28, 2025).

workers in these relatively higher skill jobs, and thus will provide appropriate protection against adverse effect.

Finally, the Department will continue to determine the AEWRs for the SOC covering a statewide geographic area. In the temporary nonimmigrant and permanent immigrant programs, the Department generally establishes prevailing wages based on the OEWS for the SOC in one or more metropolitan or non-metropolitan areas or statewide in circumstances where localized prevailing wages cannot be reported due to small sample sizes. For the H-2A program, however, the Department will use a statewide wage both to more closely align with the geographic areas historically used by the Department under the H-2A program and to protect against potential wage depression from a large influx of nonimmigrant workers that is most likely to occur at the local level.

As explained in prior rulemakings, the concern about localized wage depression is more pronounced in the H-2A program due to both the vulnerable nature of agricultural workers and the fact that the H-2A program is not subject to a statutory cap, which allows a potentially unlimited number of nonimmigrant workers to enter a given local area.[167] In the rare circumstances in which there is no statewide wage, use of the national annual average gross hourly wage reported by the OEWS for the particular SOC code and skill level will ensure an AEWR determination can be made each year for each SOC code outside of the field and livestock workers (combined) category.

**F. The Department Will Establish a Standard AEWR Adjustment to Account for Non-Wage Compensation Benefits Provided to H-2A Workers**

Under this IFR, the Department is implementing a standard downward adjustment to the hourly AEWRs that accounts for the compensation disparity U.S. workers face when H-2A workers are being paid for work performed under the same work contract but, unlike most U.S. workers, receive additional non-wage compensation in the form of

[167] *See, e.g.,* 75 FR at 6895.

free housing. Those U.S. workers who are reasonably able to return to their permanent places of residence at the end of each workday, must continue to bear these essential costs from their wages, despite often being offered and often paid the same wages as H-2A workers. Thus, the result is an adverse disparity in compensation where the effective wage rate of U.S. workers is lower than that mandated for H-2A workers under the same work contract, which the Department views as prohibited by the statute that this IFR seeks to correct.

The evidence available to the Department supports a conclusion that U.S. workers face significant burdens for housing costs from their earned wages. Specifically, domestic farm workers face significant challenges finding and maintaining affordable housing. Rural housing that is close in proximity to agricultural operations is often in short supply and decades of underdevelopment and regulatory requirements have contributed to rising costs, and available evidence demonstrates that this situation is placing an increasing burden on domestic farmworker family incomes. Due to the unique nature of agricultural work, employers face significant costs investing in housing units for temporary workers that may only be used during specific seasons of the year and, where H-2A workers are employed, employers are required to provide housing at no charge to H-2A workers and any migrant domestic farm workers. *See* 20 CFR 655.122(d)(1). Unfortunately, local domestic farmworkers, who may want to seek out temporary agricultural jobs where H-2A workers will be employed, are competing in an uneven playing field as they must accept employment under at least the same terms of the work contract - often at the same wage - while continuing to pay and maintain their own housing out of their earned wages. Therefore, as discussed in detail below, the Department seeks to address this adverse compensation effect due to the importation of H-2A workers while ensuring that the wage offers to any U.S. workers to perform the same agricultural labor or services are protected.

While it is challenging to obtain accurate data, the most recent data from the NAWS offers some practical evidence in favor of a wage policy that can account for the adverse compensation effect domestic farm workers face when H-2A workers are admitted into the United States to perform the same agricultural labor or services and provided housing at no cost. In 2021-2022, approximately 90 percent of crop workers reported living in housing not owned or administered by their current employer, and only 7 percent of crop workers who do not migrate live in employer-provided housing free of charge. In fact, even among crop workers who migrate, only 12 percent reported living in employer-provided housing free of charge, signaling that the vast majority of crop workers across the United States pay for their housing costs, including those that cannot return to their primary residence after the end of the workday.[168]

Among crop workers who reported paying for their housing, approximately 61 percent paid $600 or more per month, 21 percent paid $400–599 per month, and another 56 percent interviewed reported living in housing rented from someone other than their employer (e.g., non-employer or non-relative).[169] With more than 85 percent of crop workers reporting an hourly wage as the basis for their pay and earning an average of $14.53 per hour[170], the available evidence from the NAWS demonstrates that the majority of crop workers are paying the equivalent of $138 per week ($600 housing cost per month divided by 4.345 weeks per month) or $3.45 per hour of their average hourly wage ($138 per week divided by 40 hours of work per week) for their housing. Housing is generally considered affordable when a person spends 30 percent or less of their income on housing. With nearly 41 percent of crop workers reportedly earning less than $25,000 annually and most paying more than $600 or more per month, domestic farm workers are

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[168] *Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023), pg. 20-21.

[169] *Id*. at pg. 22, 84.

[170] *Id*. at pg. 3.

experiencing a significant housing cost burden that is not similarly born by H-2A workers.

Other available reports and studies covering specific state or local areas also support the conclusion that housing poses a significant cost burden on the earnings of domestic farm workers. For example, based on an assessment of historical NAWS data and a survey of farm workers, the Housing Assistance Council (HAC) found that farm workers face challenges locating and retaining affordable housing. Specifically, due to their low wages, HAC found that farm workers pay a median monthly housing cost of approximately $380 with "approximately 34 percent of these farmworkers were cost-burdened, paying more than 30 percent of their monthly income for housing. Among all surveyed cost-burdened households, over 85 percent included children."[171] Within California, the National Farm Worker Ministry, which is a faith-based organization dedicated to advancing the rights of farm workers, recently observed that in "Santa Maria, Santa Barbara County, California, an area with a high number of farm workers, the median rent was $2,999 in March 2024. The average annual pay of a farm worker in Santa Barbara County in 2024 was $41,031 or $82,062 per year for two working parents. This means half of a family's income is going towards rent."[172]

In another study measuring the impact of housing on domestic farm workers conducted by the University of California at Davis, economists utilized a 5-year sample from the American Community Survey to identify farm workers by industry and occupation for the purpose of measuring housing affordability at the state and county in California for comparison to the NAWS data. These economists found that "sixty-seven

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[171] Housing Assistance Council, *No Refuge from the Fields*, a report of HAC's farmworker housing survey, available at https://www.ruralhome.org, (last visited August 10, 2025).

[172] National Farm Worker Ministry, *Issues Affecting Farm Workers: Housing*, available at https://nfwm.org/farm-workers/farm-worker-issues/housing. (last visited August 10, 2025).

percent of farmworker families live in rented housing units, and 27.5 percent are severely rent burdened paying more than 50 percent of their income. We find that 54.5 percent of farmworker families are rent cost burdened."[173] And finally, in a 2023 report sponsored by the Oregon Housing and Community Services, researchers conducted a survey of farm workers in Hood River, Marion, Morrow, and Yamhill counties of Oregon and found that "nearly all farmworker households are cost burdened" by housing across the four counties.[174]

Employers have likewise cited the high costs associated with the employment of H-2A workers as one of the primary challenges to using the program. The employment of H-2A workers is generally more costly than hiring local domestic farm workers due to the other program costs and non-wage compensation benefits employers provide, which includes paying for transportation from the foreign worker's home country and return, daily transportation of foreign workers from housing to the worksites, and the costs associated with housing H-2A workers. These costs and non-wage compensation benefits provided to H-2A workers, which are not afforded to local U.S. workers, are above and beyond paying H-2A workers at least the hourly AEWR, which is almost always greater than federal and state minimum wage rates and often greater than any local or regional market-based wages for similar agricultural work.

Given the evidence presented that U.S. workers face an adverse compensation effect relative to the employment of H-2A workers, who are provided housing at no

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[173] Alexis Vivas Flores and Timothy Beatty, *Measuring Housing Affordability for Domestic Farmworkers in California: Are They Facing a Housing Affordability Crisis*?, Selected Paper prepared for presentation at the 2024 Agricultural & Applied Economics Association Annual Meeting, New Orleans, LA, July 28-30, 2024, available through AgEcon Search at http://ageconsearch.umn.edu (last visited August 10, 2025).

[174] Jamie Stamberg, Beth Goodman, Jennifer Cannon, and Ariel Kane, *Cultivating Home: A Study of Farmworker Housing* (Oregon: Oregon Housing and Community Services, May 2023). The researchers note that, on average, farmworker households have incomes of between approximately 25 percent and 37 percent of the Median Family Income (MFI) covering this geographic area, and typically, a household needs to earn about 60% of MFI to afford market-rate rent. This fact alone led the researchers to conclude that nearly all farmworker households were cost-burdened by their housing.

charge, the Department is adopting a standard adjustment factor to the AEWRs that accounts for this non-monetary compensation benefit. Specifically, under 20 CFR 655.120(b)(3) of this IFR, the OFLC Administrator is establishing a downward annual AEWR compensation adjustment factor for each State, which can only be applied to H-2A workers sponsored under the *Application for Temporary Employment Certification,* and computed as an equivalent hourly rate based on the weighted statewide average of Fair Market Rents (FMRs) for a four-bedroom housing unit available from the Department of Housing and Urban Development (HUD).[175] Further, to ensure this downward adjustment is reasonable and not unduly burdensome on the earnings of H-2A workers, the standard hourly adjustment factor will not exceed 30 percent of the hourly AEWR determined for the employer's job opportunity. The policy rationale behind the 30 precent standard adopted in this IFR is to ensure the AEWRs that will apply to H-2A workers are set at a level that best approximates the maximum value of compensation these workers may be provided by employers related to their housing. Within federal housing programs, this standard is a widely accepted benchmark for defining housing affordability and identifying households experiencing housing cost burden.[176] Within its Section 8 Housing Choice Voucher Program, HUD uses this standard as a basis for paying housing subsidies where program beneficiaries pay a limited percentage of their adjusted gross incomes (i.e., typically 30 percent) for rent, with the balance of the rent

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[175] The Department recognizes that some U.S. workers in corresponding employment may reside in H-2A employer-provided housing but believes that such circumstances are uncommon and these workers face similar adverse compensation effects as local U.S. workers. Accordingly, the Department will not apply the downward adjustment to the AEWR for non-H-2A workers, even if these workers reside in employer-provided housing.

[176] See McCarty, Maggie and Daniels, Mary and Keightley, Mark, "Housing Cost Burdens in 2023: In Brief," Congressional Research Service, Report No. R48450 (March 11, 2025). The report notes that "federal housing policies typically deem housing to be "affordable" if it costs no more than 30% of family income (adjusted for family size). According to this metric, families that pay more are considered to be 'cost burdened,' and those that pay more than half of their incomes are considered 'severely cost burdened.'" For a more comprehensive discussion on the history of the 30 percent standard, see Pelletiere, Danilo and Pelletiere, Danilo, Getting to the Heart of Housing's Fundamental Question: How Much Can a Family Afford? A Primer on Housing Affordability Standards in U.S. Housing Policy. Available at SSRN: https://ssrn.com/abstract=1132551 or http://dx.doi.org/10.2139/ssrn.1132551.

paid by the federal program. And finally, to ensure employers continue to offer and pay any U.S. worker the full market-based AEWR determined under 20 CFR 655.120(b)(1)(i) and (ii), the standard hourly adjustment factor will only apply to the AEWR established separately for H-2A workers sponsored under the *Application for Temporary Employment Certification*.

In establishing this annual adverse compensation adjustment, the Department is relying on the weighted statewide average of Fair Market Rents (FMRs) for a four-bedroom housing unit available from HUD. FMRs represents the most comprehensive and reliable data on housing rental costs and are consistently published annually by HUD's Office of Policy Development and Research, in collaboration with the Economic and Market Analysis Division, using a combination of local surveys and the American Community Survey (ACS). For its low-income affordable housing programs, HUD establishes FMRs at various percentiles, including the 50$^{th}$, percentile of gross rents, taking into account both rent and the cost of necessary utilities (except telephone, cable or satellite television, and internet services).[177] With limited exceptions, HUD provides estimates for FMRs for all OMB-defined Metropolitan Statistical Areas (MSAs) and any non-metropolitan area counties, which provides the Department with the most comprehensive set of data upon which to estimate the average rental payments for housing. Because 56 percent of U.S. crop workers interviewed for the 2021-2022 NAWS reported living in housing rented from someone other than their employer (e.g., non-employer or non-relative), the Department can conclude that FMRs available through

[177] Fair Market Rents (FMRs) are used to determine payment standard amounts for the Housing Choice Voucher program, initial renewal rents for some expiring project-based Section 8 contracts, initial rents for housing assistance payment (HAP) contracts in the Moderate Rehabilitation Single Room Occupancy program (Mod Rehab), rent ceilings for rental units in both the HOME Investment Partnerships program and the Emergency Solutions Grants program, maximum award amounts for Continuum of Care recipients and the maximum amount of rent a recipient may pay for property leased with Continuum of Care funds, and flat rents in Public Housing units. For a more information, see the HUD Office of Policy Development and Research website at https://www.huduser.gov/portal/datasets/fmr.html. (last visited August 11, 2025).

HUD represents the most reasonable source of housing data to use in computing an annual adverse compensation adjustment under this IFR.

The Department notes that HUD publishes population-weighted FMR's for one-bedroom, two-bedroom, three-bedroom or four-bedroom housing units covering all MSA and non-MSA areas. The Department is adopting FMRs associated with 4-bedroom housing units with a reasonable assumption of 2 beds per room for a maximum occupancy capacity of 8 individuals. The selection of this housing unit size and capacity is consistent with the average occupancy per housing unit in the H-2A program. Based on an analysis of H-2A housing data associated with labor certification applications processed from FY 2020 through FY 2024, the average occupancy capacity per housing unit, which includes all forms of housing, was approximately 7 to 8 individuals.[178] The adjustment value per week will be calculated by dividing the applicable weighted average statewide FMR (at the 50$^{th}$ percentile) by 4.345 (average number of weeks per month), and then the proceeding value will be divided by 8 (assumption of two workers per bedroom in a four-bedroom home). The adjustment per worker per week will then be divided by 40 hours (industry adopted standard work week) to arrive at the hourly adjustment rate. This hourly adjustment rate will be subtracted from the appropriate AEWR (depending on state, SOC code, and experience level) to arrive at the final hourly rate to be applied each pay period. In addition, the Department is adopting an average FRM across each state because employer-provided housing for workers employed under temporary agricultural labor certifications are commonly located in non-metropolitan and

[178] Based on OFLC public disclosure data, the Department has computed the following: FY 2020, 15,191 housing records covering 45,552 units at 379,114 occupancy capacity for an estimated 8 persons per unit; FY 2021, 19,212 housing records covering 74,367 units at 472,506 occupancy capacity for an estimated 6 persons per unit; FY 2022, 22,299 housing records covering 77,088 units at 536,238 occupancy capacity for 7 persons per unit; FY 2023, 22,716 housing records covering 67,515 units at 528,784 occupancy capacity for 8 persons per unit; and FY 2024, 26,998 housing records covering 77,464 units at 600,582 occupancy capacity for 8 persons per unit. See https://www.dol.gov/agencies/eta/foreign-labor/performance (last visited August 11, 2025).

metropolitan statistical areas. For example, among employers in the 10 largest states employing H-2A workers during FY 2024, more than 67 percent of all housing units used to house approximately 60 percent of all H-2A workers were located in metropolitan statistical areas while the remaining 33 percent were located in rural non-metropolitan statistical areas.[179]

Although precise and local market-based data specific to the costs of temporary agricultural housing in rural areas is limited, the Department believes that the FMRs serve as a reasonable proxy for estimating housing costs. While FMRs vary across any given state, most agricultural workers are typically mobile across a wide area of intended employment, which often covers a number of counties, and the complexities associated with estimating multiple local area based FMRs would make such an option almost impracticable for the Department to administer and enforce. Of note, HUD publishes the FMRs at both the 40$^{th}$ and 50$^{th}$ percentiles. Although HUD utilizes the 40$^{th}$ percentile for purposes of administering its housing voucher programs, the Department has chosen in this IFR to use the statewide average of the 50$^{th}$ percentile FMRs, as calculated by HUD, and weighted based on state population. This methodological approach reasonably reflects the central tendency of FMRs across a given state without being influenced by outliers in certain local or regional area housing costs and is an easily understood statistical concept. As such, the Department proposes using a statewide average FMR to set a uniform "adverse effect adjustment" to the AEWRs. This will provide H-2A

[179] During FY 2024, more than 67 percent of all certified H-2A worker positions and employer-provided housing for these workers were in metropolitan statistical areas across the following 10 largest states using the H-2A program: Florida (75 percent or 11,979 units with a maximum occupancy of 90,837 persons); Georgia (12 percent or 342 units with a maximum occupancy of 4,698 persons); California (97 percent or 3,765 units with a maximum occupancy of 21,716 persons); Washington (71 percent or 9,661 units with a maximum occupancy of 74,112 persons); North Carolina (51 percent or 3,062 units with a maximum occupancy of 30,398 persons); Michigan (49 percent or 1,437 units with a maximum occupancy of 11,787 persons); Louisiana (71 percent or 847 units with a maximum occupancy of 9,804 persons); Texas (19 percent or 413 units with a maximum occupancy of 2,123 persons); Arizona (97 percent or 2,549 units with a maximum occupancy of 13,579 persons); and New York (79 percent or 831 units with a maximum occupancy of 8,196 persons). Based on an analysis of public H-2A labor certification records from the DOL Office of Foreign Labor Certification at https://www.dol.gov/agencies/eta/foreign-labor/performance.

employers within a given state or region, with a predictable, consistent rate that better accounts for non-wage compensation.

The Department recognizes that 20 CFR 655.122(d)(1) currently requires that employers "provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day." Unlike the statute's express mandate that the Secretary deny labor certification to employers who fail to provide workers' compensation insurance at no cost to the worker, no similar statutory mandate exists with respect to the provision of housing. *Compare* 8 U.S.C. 1188(b)(3) *with* 8 U.S.C. 1188(c)(4). Rather, Section 218(c)(4) of the INA, 8 U.S.C. 1188(c)(4), requires only that H-2A employers "furnish housing in accordance with regulations" and permits them to satisfy this obligation either by providing housing that meets applicable Federal temporary labor camp standards or by securing housing that meets local rental or public accommodation standards. The statute does not expressly require that such housing be provided at no cost to the worker as a condition of labor certification.

However, given the evidence presented in this IFR that U.S. workers face adverse effect in their wages relative to H-2A workers who are provided housing at no charge, the Department is adopting a standard adjustment factor to the AEWRs to account for this non-monetary compensation benefit. The Department clarifies that this downward AEWR adjustment factor, computed annually for each State under 20 CFR 655.120(b)(3), is not inconsistent with § 655.122(d)(1). The adjustment does not authorize an employer to charge workers rent or otherwise deduct housing costs from the wages of H-2A workers or of workers in corresponding employment who are not reasonably able to return to their residence within the same day. Rather, it ensures that the AEWR reflects the value of this non-wage compensation benefit, so that the effective

level of compensation does not create adverse effect on the wages of U.S. workers similarly employed, consistent with 8 U.S.C. 1188(a)(1)(B).

In adopting this approach, the Department also invites public comment on whether the regulatory "no cost" mandate under § 655.122(d)(1) remains appropriate in light of the rising costs and other obstacles (e.g., zoning restrictions, permits) faced by employers in locating sufficient and affordable worker housing. The Department also seeks comment on whether alternative approaches would better align with the statutory text while continuing to ensure that the wages of U.S. workers similarly employed are not adversely affected by the employment of H-2A workers.

**G. The Department Will Publish OEWS-Based AEWRs to Coincide with the BLS Publication Schedule**

Under the 2023 AEWR Final Rule, the OFLC Administrator was required to publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to each AEWR as a notice in the Federal Register. The OFLC Administrator published the updated AEWRs through two announcements in the Federal Register, one for the FLS-based AEWRs (*i.e.,* effective on or about January 1) and a second for the OEWS-based AEWRs (*i.e.,* effective on or about July 1), due to the different time periods for release of these two wage surveys. The publication of two distinct AEWR updates within a single calendar year cycle, combined with other regulatory requirements (e.g., payment of the highest AEWR across all applicable SOC codes regardless of time spent performing any duty), created burden and costs on some employers with respect to their wage obligations to workers.

Given the policy decision to determine the AEWRs for all H-2A job opportunities using occupational wage data reported by the OEWS, the Department will now simplify publication of the updated AEWRs for non-range occupations through a single Federal Register Notice on or about July 1 each year. Although the Department typically

discloses updated OEWS data on the BLS website in May each year, the BLS requires a short amount of time to create customized wage data files that are required by the OFLC Administrator to administer the revised AEWR methodology in this IFR and the prevailing wage requirements covering other immigrant and nonimmigrant employment-based visa programs.

In addition, with the adoption of an annual statewide AEWR compensation adjustment for housing that is provided to H-2A workers at no charge, the Department will align the timeframes for obtaining the FMR data from HUD and computing the statewide equivalent hourly rates for publication in the same notice in the Federal Register as the AEWRs. Accordingly, the Department has made minor modifications to 20 CFR 655.120(b)(4) to state that the OFLC Administrator will publish a notice in the Federal Register, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR and corresponding housing compensation adjustment for each State that will become effective as of the date of publication of the notice in the Federal Register.

**H. The Department Requests Comments on All Aspects of Its Revised Methodology for Establishing the AEWRs**

The Department invites comments on all aspects of the AEWR methodology changes contained in this IFR. In particular, the Department is interested in comments on the use of the OEWS and the combined use of occupational wages collected for farm and non-farm establishments through the OEWS, determining the AEWRs at two skills levels based on job qualifications and the thresholds (the lower one-third and the average wage); the conditions for assigning the most representative SOC code based on the primary and directly and closely related duties and qualifications contained in the employer's job offer, including any alternative sources of reliable and comprehensive occupational information beyond the O*NET system; modifying the most common field

and livestock workers (combined) occupations for assigning a single AEWR by removing SOC code 45-2099, Agricultural Workers All Other; and the use of a non-wage compensation factor, the specifications for adopting a standard non-wage compensation adjustment factor to the AEWR that employers may offer only to H-2A workers provided housing at no charge, the data source used to establish the adjustment factor, and the level at which the adjustment factor has been sent. Comments supported by reliable and objective data or other quantifiable studies will be more helpful to the Department in drafting a final rule than comments consisting of qualitative anecdotal evidence. The Department is open to making changes in the final rule based on the comments it receives on this IFR.

**V. Severability**

To the extent that any portion of this IFR is declared invalid or unenforceable by a court, the Department intends for all other parts of this IFR that can operate in the absence of the specific portion that has been invalidated, to remain in effect. Thus, the Department notes that the existing severability clause under 20 CFR 655.190[180] applies because each provision within this IFR is capable of operating independently from one another. The assignment of the SOC code(s) for the employer's job opportunity specified at 20 CFR 655.120(b)(7), which involves a comparison the duties and qualifications contained in the job order to the SOC definitions, skill requirements, and tasks that are listed in the O*NET system, is an independent assessment performed by the SWA and the CO before determining the applicable AEWR and that assessment has no impact on the actual computation of the AEWRs by the BLS. Further, computation of the AEWRs

[180] The Department acknowledges that it has proposed retaining the severability provision in the Notice of Proposed Rulemaking, *Recission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*, published July 2, 2025. 90 FR 28919. The Department will review any relevant comments received in connection with that NPRM and, prior to finalizing, will consider whether any changes or amendments need to be made to the provision. As described below, however, the existing 655.190 applies to this IFR because each provision is capable of operating independently from one another.

at two skill levels, as specified in 20 CFR 655.120(b)(2), using the OEWS survey is a statistical process conducted by the BLS annually that is independent of any other provision contained in this IFR. And finally, the standard adjustment factor to the AEWRs specified at 20 CFR 655.120(b)(3) is based on annual data obtained from HUD and used to independently compute an equivalent hourly rate based on the weighted statewide average of FMRs for a four-bedroom housing unit. The implementation of these statewide equivalent hourly rate adjustments, which apply only to the minimum wages offered to H-2A workers, has no influence on the assignment of the SOC code(s) by the SWA and the CO for the employer's job opportunity and does not affect the computation of the AEWRs by the BLS.

Thus, even if a court decision invalidating a portion of this IFR results in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of this IFR continue to operate, to the extent possible, in tandem with the reverted provisions, as specified in 20 CFR 655.190. It is the Department's intent that the remaining provisions of the regulations should continue in effect if any provision or provisions are held to be invalid or unenforceable. It is of great importance to the Department and the regulated community that even if a portion of this IFR were held to be invalid or unenforceable that the larger program could operate consistent with the expectations of employers and workers.

## VI. Administrative Information

### A. Executive Order 12866: Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review, and 14192 (Unleashing Prosperity Through Deregulation)

#### 1. Introduction

Under E.O. 12866, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) determines whether a regulatory action is

significant and, therefore, subject to the requirements of the Executive Order and review by OMB. Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public+ health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. A regulatory impact analysis (RIA) must be prepared for a regulatory action that is significant under section 3(f)(1). OIRA has reviewed this rule and designated it a significant regulatory action under 3(f)(1) of E.O. 12866.

The Secretary of Homeland Security, in consultation with the Secretary of Labor and Secretary of Agriculture, has approved this rule consistent with section 301(e) of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1188.[181]

E.O. 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Improving Regulation and Regulatory Review, 76 FR 3821, 3821 (Jan. 21, 2011), E.O. 13563 recognizes that some costs and benefits are difficult to quantify and provides that, where appropriate and

[181] Although this provision vests approval authority in the "Attorney General," the Secretary of Homeland Security now may exercise this authority. *See* 6 U.S.C. §§ 202(3)-(4), 251, 271(b), 291, 551(d)(2), 557; 8 U.S.C. § 1103(c) (2000).

permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. *Id.*

This IFR also furthers the goals of E.O. 14192, *Unleashing Prosperity Through Deregulation*.[182] In relevant part, the E.O. articulates the executive branch policy to "be prudent and financially responsible in the expenditure of funds, from both public and private sources, and to alleviate unnecessary regulatory burdens placed on the American people." This executive branch policy is advanced by federal agencies reassessing their regulations and eliminating unnecessary and burdensome requirements that are not squarely authorized by Federal law to "significantly reduce the private expenditures required to comply with Federal regulations to secure America's economic prosperity and national security and the highest possible quality of life for each citizen."[183] Specifically, the E.O. directs federal agencies, including the Department, to "ensure that the total incremental cost of all new regulations, including repealed regulations, being finalized this year, shall be significantly less than zero, as determined by the Director of the Office of Management and Budget (Director), unless otherwise required by law or instructions from the Director."[184] This IFR is expected to be an E.O. 14192 deregulatory action , generating $$246 million in annual cost savings (taking the form of reduced deadweight loss). The primary purpose of this IFR is to implement or interpret the immigration laws of the United States (as described in section 101(a)(17) of the INA, 8 U.S.C. 1101(a)(17)) or any other function performed by the United States Federal Government with respect to aliens.[185]

**2. Summary of the Analysis**

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[182] *See* 90 FR 9065 (Jan. 31, 2025).
[183] *Id.* sec. 1.

[184] *Id.* sec. 3(b).

[185] *See* OMB Memorandum M-25-20, Guidance Implementing Section 3 of Executive Order 14192, titled "Unleashing Prosperity Through Deregulation" at 5–6 (Mar. 26, 2025).

The Department estimates that the IFR will result in costs and transfers. It also anticipates the IFR will generate economic benefits that substantially outweigh these costs. As shown in Exhibit 1, the IFR will impose an annualized cost of $0.78 million and a total 10-year cost of $0.55 million (7 percent discount rate). The IFR will generate annualized transfers from H-2A workers to H-2A employers of $2.46 billion and total 10-year transfers of $17.29 billion (7 percent discount rate).

**Exhibit 1: Estimated Monetized Costs and Transfers of the Final Rule ($2025 millions)**

| | **Costs** | **Transfers** |
|---|---|---|
| **Undiscounted 10-Year Total** | $0.55 | $24.157.10 |
| **10-Year Total with a Discount Rate of 3 percent** | $0.55 | $20,781.20 |
| **10-Year Total with a Discount Rate of 7 percent** | $0.55 | $17,296.86 |
| **10-Year Average** | $0.05 | $2,415.71 |
| **Annualized at a Discount Rate of 3 percent** | $0.06 | $2,436.23 |
| **Annualized with at a Discount Rate of 7 percent** | $0.08 | $2,462.68 |

The total cost of the IFR reflects only rule familiarization. Transfers arise from changes to the AEWR methodology, specifically establishing new AEWRs for non-range H-2A occupations based on employee skill level, and adjustments for employer-provided housing. See the costs and transfers subsections below for a detailed explanation.

The Department expects the IFR to generate significant economic benefits well in excess of familiarization costs. Assuming a relatively elastic supply of H-2A labor for the

relevant wage ranges,[186] the Department estimates that the IFR's lower AEWR would lead farmers to hire approximately 119,000 additional H-2A workers producing $0.2 billion in annual economic benefits resulting from new, mutually beneficial transactions that otherwise would not have occurred. In other words, the Department anticipates substantial incompletely-quantified benefits, including avoiding crop losses, preserving farm viability, stabilizing the food supply, supporting rural economies, and facilitating workforce transition.

**3. Need for Regulation**

As discussed above, Executive Order 14159 directs agencies to "employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all inadmissible and removable aliens," including those who entered illegally, lack lawful status, or are subject to final orders of removal.

Agricultural employers are facing immediate challenges due to the expected lack of availability of illegal aliens. According to the Department's National Agricultural Worker Survey (NAWS)[187] agricultural employers are disproportionately dependent on illegal aliens: approximately 42 percent of crop workers reported lacking authorization to work in the United States during FY 2021-2022. With illegal border crossings at record lows—agricultural employers, who have historically been incentivized to rely on such workers because of high AEWRs mandated to use the H-2A program, will experience economic harm caused by mounting labor shortages.

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[186] The supply of H-2A workers is considered highly elastic because the Adverse Effect Wage Rate (AEWR) offered in the United States is significantly higher than the wages these workers could earn in their home countries for similar work. This large wage differential creates a strong incentive for foreign agricultural workers to enter the U.S. labor market whenever positions are available. Economists routinely and uncontroversially assume perfect elasticity of labor when assessing the effect of AEWRs. *See, e.g.*, Zachariah Rutledge, et. al, Adverse Effect Wage Rates and US Farm Wages, Amer. J. of Agr. Econ. June 9, 2025, available at: *https://onlinelibrary.wiley.com/doi/10.1111/ajae.12557*.

[187] *Findings from the National Agricultural Workers Survey (NAWS) 2021-2022: A Demographic Employment Profile of United States Crop Workers* (Sept. 2023). U.S. DOL, Employment and Training Administration. Available at: https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS Research Report 17.pdf.

In addition, the Department does not believe American workers currently unemployed or even marginally employed will make themselves readily available in sufficient numbers to replace the departing illegal aliens. The supply of American agricultural workers is limited by structural factors including the geographic distribution of agricultural operations, and the seasonal nature of certain crops, and the relatively low unemployment rate.[188] Furthermore, agricultural work requires a distinct set of skills and is among the most physically demanding and hazardous occupations in the U.S. labor market. These essential jobs involve manual labor, long hours, and exposure to extreme weather conditions—particularly in the cultivation of fruit, tree nuts, vegetables, and other specialty crops for which production cannot be immediately mechanized. Based on the Department's extensive experience administering the H-2A temporary agricultural visa program, the available data strongly demonstrate—even absent intensified enforcement—a persistent and systemic shortage of qualified and eligible American workers.

Despite efforts to broadly advertise agricultural jobs as required by regulation, the most recent data confirm that domestic applicants are not applying in sufficient numbers to meet employer demand. Thus, based on the available evidence, the Department concludes that qualified and eligible U.S. workers—whether unemployed, marginally employed, or employed and seeking work in agriculture—will not make themselves immediately available in sufficient numbers to avert the potential adverse consequences to the stability of the United States food supply and irreparable economic harm to agricultural employers as the illegal alien labor force decreases.

**4. Analysis**

a. Analysis Considerations

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[188] See Diane Charlton, ("The Farm Workforce Modernization Act and warnings from previous immigration reforms, Applied Economic Perspectives, August 2023, at pp. 6 - 7, The Farm Workforce Modernization Act and warnings from previous immigration reforms )

The Department estimated the costs and transfers associated with the IFR relative to the existing baseline, which reflects current practices under the H-2A program as stipulated in 20 CFR part 655, subpart B and 29 CFR part 501. The existing baseline aligns with the 2023 AEWR Final Rule,[189] which uses the average annual hourly wage for field and livestock workers (combined) as determined by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS). Furthermore, the AEWRs are established using statewide or national average annual hourly wages derived from the Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) program, particularly for non-range agricultural occupations that are underrepresented or inadequately reported by the FLS.

In accordance with the regulatory analysis guidance specified in OMB's Circular A-4 and consistent with methodologies used in prior rulemakings, this analysis emphasizes the probable effects of the IFR, particularly concerning costs and transfers borne by affected entities. The analysis encompasses a ten-year period (2025 through 2034) to adequately capture significant costs and transfers that may manifest over time. The Department expresses all quantifiable impacts in 2025 dollars, using discount rates of 3 percent and 7 percent, as prescribed by Circular A-4.

| **Exhibit 2: Number of Affected Entities by Type (CY 2015–2024 Average)** | |
|---|---|
| **Entity Type** | **Number** |
| Annual Unique H-2A Applicants | 8,530 |

**Growth Rate**

[189] There is virtually no difference between aligning the baseline with the 2023 AEWR Final Rule versus the 2010 AEWR as baseline because they used the same methodology to set the AEWR for the vast majority of job. Under the recently vacated 2023 AEWE, which still appears in the E-CFR, 98 percent of H-2A jobs would continue to be assigned the FLS-based AEWR and a few high-skilled agricultural jobs would be subject to the OEWS-based AEWR.

To derive realistic growth rates, the Department applied an autoregressive integrated moving average (ARIMA) model to H-2A program data from FY 2015 to FY 2024. This model forecasts growth in both the number of workers and applications while estimating geometric growth rates. The Department executed multiple ARIMA models for each dataset and evaluated performance using standard goodness-of-fit metrics. The varying models yielded comparable measures, allowing projection of workers and applications through 2034.

The resulting average geometric growth rate is estimated at 5.41 percent for H-2A applications and 3.34 percent for certified H-2A workers. The Department applied these estimates to historical program data from FY 2015 to 2024 for H-2A applications and certified H-2A workers (see Exhibit 3). These growth rates were then used to project H-2A program participation and the associated costs and transfers under the final rule. To the extent that recent and ongoing migration- and immigration-opposing government interventions have spillover effects on the H-2A program, this approach to quantifying costs, transfers and benefits will yield overestimates.

**Exhibit 3: Historical H-2A Program Data**

| Fiscal Year | Applications Certified | Workers Certified |
|---|---|---|
| 2015 | 9,516 | 162,156 |
| 2016 | 10,705 | 194,595 |
| 2017 | 11,628 | 232,230 |
| 2018 | 13,180 | 262,791 |
| 2019 | 14,040 | 271,686 |

| | | |
|---|---|---|
| 2020 | 13,580 | 283,845 |
| 2021 | 15,606 | 315,695 |
| 2022 | 17,432 | 355,894 |
| 2023 | 20,061 | 366,995 |
| 2024 | 21,633 | 370,836 |

**Hourly Compensation Rates**

The Department used the hourly compensation rate presented in Exhibit 4 to estimate rule familiarization costs (see Subject-by-Subject Analysis). BLS's OEWS data show that the mean hourly wage of Human Resources Specialists is $38.33.[190] The Department applied a 42-percent benefits rate[191] and a 17-percent overhead rate,[192] resulting in a fully loaded hourly wage of $60.94 [= $38.33 + ($38.33 × 42%) + ($38.33 × 17%)].

| **Exhibit 4: Compensation Rates ($2025)** | | | | |
|---|---|---|---|---|
| **Occupation** | **Base Hourly Wage Rate (a)** | **Loaded Wage Factor** | **Overhead Costs (c)** | **Hourly Compensation Rate** |

[190] BLS, Occupational Employment and Wage Statistics, SOC Code 13-1071, May 2024, Occupational Employment and Wage Statistics (last visited August 21, 2025).
[191] BLS, "National Compensation Survey, Employer Costs for Employee Compensation," https://www.bls.gov/ecec/data.htm (last visited August 21, 2025). For private sector workers, wages averaged $31.10 per hour worked in 2024, while benefit costs averaged $13.10, which is a benefits rate of 42 percent.
[192] Cody Rice, U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002, https://www.regulations.gov/document/EPA-HQ-OPPT-2014-0650-0005 (last visited May 8, 2025).

| | | (b) | | (d=a+b+c) |
|---|---|---|---|---|
| HR Specialist | $38.33 | $16.10 ($38.33 x 0.42) | $6.52 ($38.33x 0.17) | $60.95 |

**b. Subject-by-Subject Analysis**

In this section, the Department reviews rule familiarization costs, unquantifiable costs, transfers from H-2A workers to U.S. employers, and partially-quantified benefits arising from the IFR.

**Costs**

This section summarizes the costs associated with the IFR.

**Quantifiable Costs**

*Rule Familiarization*

Upon implementation of the IFR, H-2A employers will be required to review and understand the new regulatory framework. This requirement will incur a one-time cost in the first year of enforcement. To project the first-year costs of rule familiarization, the Department applied the growth rate of H-2A applications (6.7%) to the average annual unique H-2A applicants from 2015 to 2024 (8,530), resulting in an estimate of 9,102 unique H-2A applicants. This figure was multiplied by the estimated time required for rule review (1 hour)[193] and then multiplied by the hourly compensation rate of Human Resources Specialists ($60.95 per hour). This calculation yields a one-time undiscounted cost of $554,689 in the first year of the rule's enactment. The annualized cost over the

[193] This estimate reflects the nature of the final rule. As a rulemaking to amend parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

ten-year span is projected at approximately $65,026 (3% discount rate) and $78,975 (7% discount rate).

**Unquantifiable Costs**

*Payroll and Other Transition Costs*

The implementation of the IFR will result in new AEWR wage rates for certain Standard Occupational Classification (SOC) codes and geographic combinations, diverging from the baseline. H-2A employers will need to revise payroll systems to incorporate these new AEWR wage rates. The Department does not quantify this cost, anticipating it to be de minimis, as employers must already update payrolls in response to the annual release of AEWR wage rates. Consequently, employers are adequately equipped to make these updates swiftly and at minimal cost when AEWR wage rates change.

Furthermore, the IFR may incur additional transition costs for certain employers in terms of recruitment and training if they choose to hire U.S. workers for positions traditionally filled by H-2A workers.

**Transfers Associated with the AEWR Housing Adjustment**

This section outlines the transfers resulting from IFR revisions to the AEWR wage structure. Transfers are defined as reallocation of payments between groups without changing total societal resources. (or, if resources do change, it is through incentive effects captured through more extensive analysis). Specifically, this analysis identifies wage transfers from H-2A workers to U.S. employers, resulting from the changes outlined in this IFR.

As articulated in Section 218(a)(1) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. 1188(a)(1), the admissibility of an H-2A worker is contingent upon the Secretary of Labor's determination that "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to

perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." In compliance with this statutory requirement, the Department, per 20 CFR 655.120(a) and 655.122(l), mandates that employers offer and pay a wage that is the highest among the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The IFR maintains this broad wage-setting framework but introduces modifications to the methodology employed in establishing AEWRs.

Another source of transfers arises from the Department's implementation of a downward adjustment to the hourly AEWR to account for the disparity in compensation between U.S. workers and H-2A workers, the latter of whom receive non-wage compensation in the form of employer-provided lodging.

To address this disparity, the Department established a standardized AEWR adjustment factor reflecting the value of employer-provided housing. The calculation for the housing adjustment is derived from annual fair market rents data published by the U.S. Department of Housing and Urban Development (HUD).[194] Since HUD releases this data by county, the Department utilizes county population weights to derive statewide average Fair Market Rents (50th Percentile Rents). Exhibit 5 demonstrates the Department's methodology using 2014 housing figures as an example. The Department's approach assumes an occupancy of 8 individuals in a four-bedroom accommodation and 172 hours worked per worker on average per month.

| **Exhibit 5: Housing Adjustment Example ($2025)** | | | | |
|---|---|---|---|---|
| **Year** | **Fair Market Rent (4-Bedroom Unit) ($)** **(a)** | **Number of Occupants** **(b)** | **Monthly Hours Worked** **(c)** | **Hourly Housing Adjustment ($)** **d = a/(b*c)** |

[194] https://www.huduser.gov/portal/datasets/fmr.html

| | | | | |
|---|---|---|---|---|
| 2014 | $1,390 | 8 | 172 | $1.07 |

Utilizing the aforementioned formula, the estimated hourly employer compensation from the housing premiums for the fiscal years 2014 through 2024 are presented in Exhibit 6.

**Exhibit 6: Annual Housing Premium by Year (FYs 2014–2024) ($2025)**

| Year | Hourly Housing ($) | Baseline Annual National AEWRs ($)[195] |
|---|---|---|
| 2014 | 1.07 | 10.54 |
| 2015 | 1.12 | 10.83 |
| 2016 | 1.17 | 11.32 |
| 2017 | 1.24 | 11.73 |
| 2018 | 1.29 | 11.99 |
| 2019 | 1.35 | 12.58 |
| 2020 | 1.43 | 13.25 |
| 2021 | 1.48 | 13.79 |
| 2022 | 1.54 | 14.63 |
| 2023 | 1.70 | 15.81 |
| 2024 | 1.89 | 16.66 |

To project total housing premiums, the Department multiplied the hourly housing cost by the total number of certified H-2A workers, calculated over 40 hours per week for

[195] The Department calculated Average Annual AEWRs using annual reported state AEWRs reported in the Federal Register and weighing the state-level figures based on the number of certified H-2A workers in each state to create a national estimate. For example, see. *Federal Register, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2014 Adverse Effect Wage Rates*

26 weeks.[196] The preliminary estimate for the total housing premium in 2024 is approximately $729 million. To project future housing transfers, the Department applied an ARIMA model, utilizing data from the H-2A program spanning FY 2014 to 2024.[197] The forecast incorporates geometric growth rates derived from certified H-2A workers and applications. Each model specification is fitted to historical data to generate out-of-sample forecasts for the subsequent decade. The compound annual growth rate (CAGR) for each model is computed between the first forecast year (2025) and the last (2034), and the average CAGR across all models is taken to smooth out model-specific discrepancies, providing a singular and robust estimate of anticipated long-term growth. The average growth rate is then applied to the most recent observed value (2024) using the formula:

$$Future\ Value_t = Base\ Value_{2024} \times (1 + \bar{r})^{t-2024}$$

Where $\bar{r}$ signifies the average CAGR. This methodology results in a consistent projection path for 2025-2034 that reflects the central tendency of the ARIMA forecasts while maintaining smooth year-to-year progressions. The results indicate an average CAGR of 6.56 percent for housing and 3.34 percent for workers.

**Exhibit 7: Estimated Annual Housing Transfers by Year (FYs 2025–2034) ($2025)**

| Year | Estimated Hourly Housing ($) | Estimated H-2A Workers Certified | Estimated Housing Transfers ($) |
|---|---|---|---|
| 2025 | 2.00 | 383,210 | 798,987,601 |
| 2026 | 2.13 | 395,996 | 877,978,389 |
| 2027 | 2.27 | 409,209 | 964,778,490 |
| 2028 | 2.41 | 422,863 | 1,060,159,962 |

[196] 40 represents the average number of hours worked per week and 26 the average duration of work (in weeks) of an H-2A worker.

[197] To forecast future housing costs, we estimate a set of ARIMA models with alternative lag structures: (0,2,0),(0,2,1), (0,2,2),(1,2,1),(1,2,2), (2,2,2).

| | | | |
|---|---|---|---|
| 2029 | 2.56 | 436,973 | 1,164,971,190 |
| 2030 | 2.73 | 451,554 | 1,280,144,432 |
| 2031 | 2.90 | 466,620 | 1,406,704,115 |
| 2032 | 3.08 | 482,190 | 1,545,775,944 |
| 2033 | 3.28 | 498,279 | 1,698,596,914 |
| 2034 | 3.49 | 514,905 | 1,866,526,315 |

The Department employed multiple ARIMA models across the dataset, assessed fit using standard metrics, and found consistent results across specifications. The total estimated housing transfer over a ten-year period is approximately $12.66 billion (undiscounted), with discounted values at $10.88 billion (3%) and $9.03 billion (7%). The annualized transfer over this period totals approximately $1.28 billion (3%) and $1.29 billion (7%).

**Transfers Associated with AEWR Determination Methodology**

The second category of transfers arises from modifications to the AEWR methodology to account for qualifications specified in employers' job offers. The existing baseline aligns with the 2023 AEWR Final Rule, which uses the average hourly gross wage for field and livestock workers (combined) as determined by the U.S. Department of Agriculture's (USDA) Farm Labor Survey (FLS). The Department believes that this revised approach provides a more consistent, market-based assessment of wages paid to similarly employed U.S. workers. Under this policy, the Department will establish AEWRs for H-2A positions using the state or territorial average hourly wage, separated into two qualification levels: Skill Level I (Entry-Level) and Skill Level II (Experience-Level).

This dual-skill level policy seeks to approximate average wages paid to U.S. workers engaged in similar occupations within the relevant geographic area based on the qualifications specified in the employers' job offers for which H-2A workers are sought

for temporary agricultural labor certification. Skill Level I AEWR corresponds with entry-level positions where workers are expected to have no formal education or specialized training. Conversely, Skill Level II AEWR corresponds with offers requiring qualifications reflective of experienced or trained employees.

To estimate total wage transfers, the Department used OEWS state wage data. The analysis first estimated the mean of the lower third of the wage distribution, which may approximately equal the 17th percentile. Since the Bureau of Labor Statics does not publish the 17th percentile data directly, an approximation is calculated using a linear interpolation between the 10th and 25th percentile. Therefore, the full wage for the entry level is calculated as follow:

$$Wage_{Entry} = AEWR - \left[H_{10} + \frac{17-10}{25-10} * (H_{25} - H_{10})\right]$$

Where $H_{10}$ and $H_{25}$ are equal to the 10th and 25th percentile.

The experienced-worker wage is determined as the difference between the baseline AEWR and the mean wage:

$$Wage_{Experience} = AEWR - H_{MEAN}$$

The overall total wage is a weighted average of these entry-level and experienced wages, with 92% weight on the entry-level wage and 8% on the experienced-worker wage:

$$Total\,Wage\ = 0.92 \times Wage_{ENTRY} + 0.08 \times Wage_{Experience}$$

We chose 92% given the fact that roughly 92% of all H-2A Visas were paid the AEWR. We then assume the other 8% would be paid the higher wage level.

**Exhibit 8: Wage Transfer Estimates ($2025)**

| Year | Total H-2A Workers Certified | Hourly Wage Entry ($) | Hourly Wage Experience ($) | Hourly Wage Total ($) | Total Wage Transfers ($) |
|---|---|---|---|---|---|
| 2014 | 137,601 | 1.96 | -0.73 | 1.74 | 249,400,656 |
| 2015 | 162,156 | 2.02 | -0.69 | 1.80 | 304,092,787 |
| 2016 | 194,595 | 2.15 | -0.52 | 1.94 | 392,496,418 |
| 2017 | 232,230 | 2.20 | -0.56 | 1.98 | 477,327,411 |
| 2018 | 262,791 | 2.18 | -0.81 | 1.94 | 530,625,900 |
| 2019 | 271,686 | 2.49 | -0.68 | 2.23 | 631,308,989 |
| 2020 | 283,845 | 2.55 | -0.52 | 2.30 | 679,910,519 |
| 2021 | 315,695 | 2.30 | -0.66 | 2.06 | 676,814,801 |
| 2022 | 355,894 | 1.82 | -1.24 | 1.58 | 583,474,128 |
| 2023 | 366,995 | 2.02 | -1.02 | 1.77 | 677,384,528 |
| 2024 | 370,836 | 2.13 | -0.89 | 1.89 | 727,237,161 |

Wage transfers for 2024 are approximately $727 million. Forecasting for subsequent years, the Department applied the same methodology to project $H_{17}$, $H_{MEAN}$ and AEWR with respective CAGRs of4.1, 3.9, , and 4.15 percent, respectively.

**Exhibit 9: Projected Wage Transfer Estimates ($2025)**

| Year | Estimated H-2A Workers Certified | Estimated Wage Entry ($) | Estimated Wage Experience ($) | Estimated Wage Total ($) | Estimated Total Wage Transfers ($) |
|---|---|---|---|---|---|
| 2025 | 383,210 | 2.21 | -0.90 | 1.96 | 783,018,058 |
| 2026 | 395,996 | 2.32 | -0.90 | 2.06 | 847,914,598 |
| 2027 | 409,209 | 2.42 | -0.89 | 2.16 | 918,150,315 |
| 2028 | 422,863 | 2.53 | -0.89 | 2.26 | 994,161,745 |
| 2029 | 436,973 | 2.65 | -0.88 | 2.37 | 1,076,420,926 |
| 2030 | 451,554 | 2.77 | -0.87 | 2.48 | 1,165,438,271 |
| 2031 | 466,620 | 2.90 | -0.85 | 2.60 | 1,261,765,674 |
| 2032 | 482,190 | 3.03 | -0.84 | 2.72 | 1,365,999,865 |
| 2033 | 498,279 | 3.17 | -0.82 | 2.85 | 1,478,786,038 |
| 2034 | 514,905 | 3.32 | -0.80 | 2.99 | 1,600,821,767 |

The total estimated skill-level wage transfer over the ten-year period is projected at approximately $11.5 billion (undiscounted), with discounted values of $939 billion (3%) and $8.26 billion (7%). Annualized transfers are $1.16 billion (3%) and $1.176 billion (7%).

**Exhibit 10: Total Transfers ($2025)**

| Year | Estimated Total Housing Transfers ($) | Estimated Total Wage Transfers ($) | Estimated Total Transfers ($) |
|---|---|---|---|
| 2025 | 798,987,601 | 783,018,058 | 1,582,005,658 |
| 2026 | 877,978,389 | 847,914,598 | 1,725,892,987 |
| 2027 | 964,778,490 | 918,150,315 | 1,882,928,805 |
| 2028 | 1,060,159,962 | 994,161,745 | 2,054,321,707 |
| 2029 | 1,164,971,190 | 1,076,420,926 | 2,241,392,116 |
| 2030 | 1,280,144,432 | 1,165,438,271 | 2,445,582,703 |
| 2031 | 1,406,704,115 | 1,261,765,674 | 2,668,469,789 |
| 2032 | 1,545,775,944 | 1,365,999,865 | 2,911,775,809 |
| 2033 | 1,698,596,914 | 1,478,786,038 | 3,177,382,952 |
| 2034 | 1,866,526,315 | 1,600,821,767 | 3,467,348,082 |

Results indicate average annual undiscounted transfers of $2.42 billion. Over 10 years, transfers total $24.16billion undiscounted, or $20.78billion (3%) and $17.3 billion (7%). Annualized totals are $2.43billion (3%) and $2.46 billion (7%).

The decrease (or increase) in the AEWRs also represents a wage transfer from corresponding workers, not only H-2A workers. However, the Department lacks sufficient information about the number of corresponding workers or their wage

structures to measure these impacts.[198] Recruitment reports submitted for certification cover only the initial recruitment period (through 50% of the contract period) and do not capture all potentially affected workers already employed.

Because available data are limited, the Department cannot reasonably quantify transfer impacts to corresponding workers. Likewise, it cannot estimate how much of the transfer remains within the U.S. economy, although it is likely that a substantial share does, as employers reinvest in land, equipment, crop diversification, and local supply chain activities.

The Department invites comments on data sources or methods to better estimate corresponding worker impacts and transfer effects under the revised AEWR methodology.

**Quantitative Benefits Analysis**

The Department further expects the IFR to generate substantial economic benefits that exceed familiarization costs. To quantify these benefits, the Department must adopt several key assumptions. First, the Department assumes that lowering the AEWR increases H-2A employment—growers employ more H-2A workers when the cost of doing so falls because the demand for H-2A labor can be assumed to be downwardly sloped.[199] Given the large wage differential between U.S. farm jobs and typical wages in workers' home countries, the supply of foreign labor can reasonably be modeled as perfectly elastic at the competitive wage. In this framework, lowering the AEWR does

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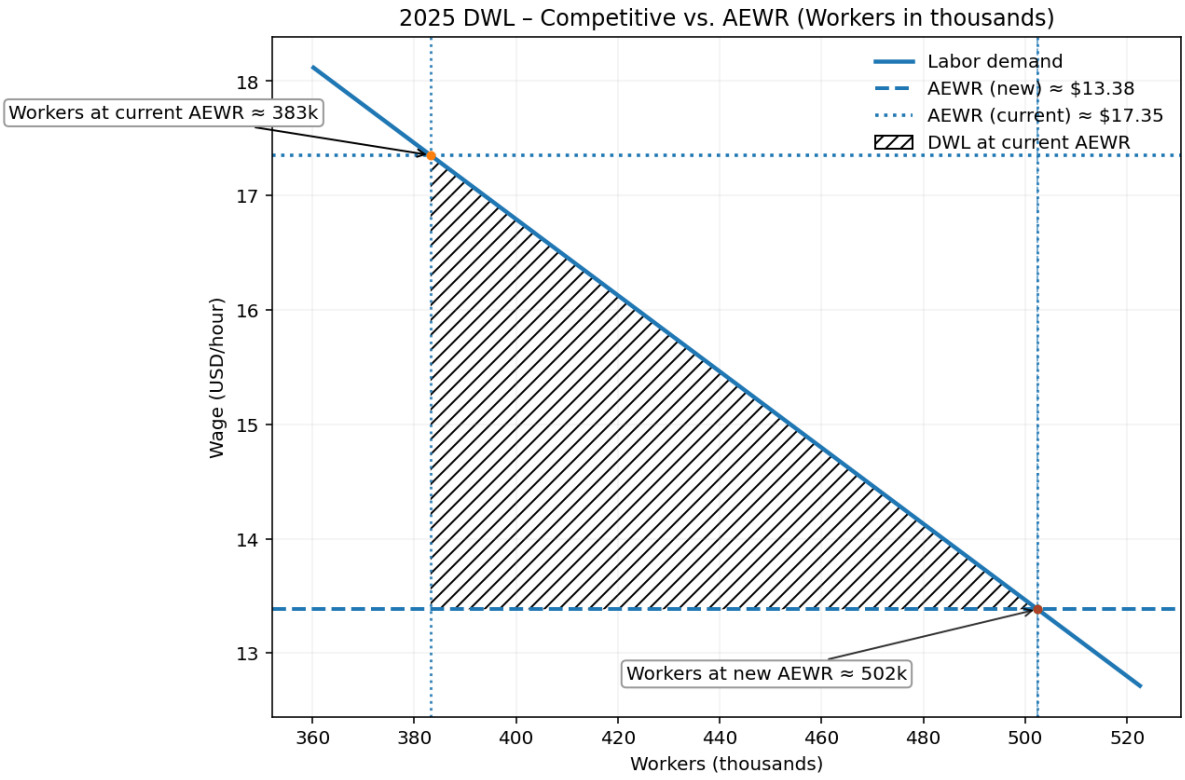
[198] The Department considers corresponding workers to be U.S. workers employed by an H-2A employer in any work included in the ETA-approved job order or in any agricultural work performed by the H-2A workers during the period of the job order. U.S. workers may include individuals who are either born in the United States, or individuals who are naturalized U.S. citizens. Authorized workers in the H-2A program refers to either a U.S. citizen/national, a lawful permanent resident, or a foreign national who is not an "unauthorized alien" and holds a valid H-2A visa classification. Unauthorized workers are individuals who are not legally permitted to work in the United States under the H-2A program.

[199] *See,* Zachariah Rutledge, et. al, Adverse Effect Wage Rates and US Farm Wages, Amer. J. of Agr. Econ. June 9, 2025, available at: *https://onlinelibrary.wiley.com/doi/10.1111/ajae.12557*.

not reduce labor supply, but instead allows employers to hire more workers[200]Second, we assume that farms can expand output along a linear demand curve (see diagram below); diminishing marginal returns on a fixed farm reflect the sector's capacity to expand production when affordable labor is available. Under these assumptions lower wages would translate into new employment opportunities for H-2A workers. The associated increase in output can be estimated by applying an empirical estimate of demand elasticity.




We have assumed perfect elasticity of labor supply and a long-run labor demand elasticity of –0.8, and seek comment on whether this figure is realistic. lowering the AEWR from $17.35 to $13.38 would raise projected employment from about 383,000 to 502,000 workers, an increase of roughly 119,000 workers. To get the total number of increased workers following formula is used (where $AEWR_{avg}$ is the average of $AEWR_{new}$ and $AEWR_{old}$):

[200] *See* Paik, Song YI. 2021. *The impacts of agricultural minimum wage on US agricultural employment*.

Increased workers =1 -0.8·(Projected workers)·($AEWR_{new}$-$AEWR_{old}$)/$AEWR_{avg}$:

Given the new AEWR change of $3.97/hour (= $17.35/hour - $13.38/hour), the net deadweight loss reduction per worker-hour would be approximately $1.99.[201] Multiplying by the additional 123 million hours yields an estimated annual benefit of $246 million.

The same effect could, alternatively, be quantified with a more itemized approach, estimating revenue changes and then subtracting off various categories of opportunity cost associated with the production process that ultimately yields the sales revenue. Under a standard 40-hour workweek and a 26-week employment schedule, an increase of 119,000 H-2A workers corresponds to an additional 123 million hours of farm labor. According to MacDonald et al. (2018)[202], specialty crop farms in 2015 required 14.4 hours of labor to generate $1,000 in sales, implying an average revenue of about $69 per labor hour. An additional 123 million hours of farm labor each year could therefore produce $8.54 billion in additional farm revenue. This revenue estimate may have a tendency toward understatement, as cash grain farms are approximately 288% more productive per hour than specialty crop farms.[203] Itemized estimates of associated production-process costs are not available for this alternative quantification's necessary next step of subtraction.

**Extended (Qualitative) Discussion of Benefits**

The Department also anticipates several significant benefits. that are incompletely quantified due to the use, above, of a *long-run* labor demand elasticity. The first is the avoidance of irreversible crop losses**.** By potentially lessening near-term wage spikes that

[201] This estimate reflects a linear demand curve, as diagrammed above, and would have a tendency toward overstatement of deadweight loss if the underlying demand curve is instead non-linear.

[202] MacDonald, J. M., Hoppe, R. A., & Newton, D. (2018). Three decades of consolidation in U.S. agriculture. *Economic Information Bulletin*. https://doi.org/10.22004/ag.econ.276247.

[203] *Id.*

can render hiring prohibitively expensive, farms are better positioned to maintain adequate staffing levels during crucial planting, growing, and harvesting periods. This reduces the risk of irreversible crop destruction and protects food security.

The rule also plays a vital role in the preservation of farm viability**.** By mitigating unsustainable short-term wage increases, the rule can help prevent farm closures, bankruptcies, and asset liquidations—particularly for small and mid-sized operations that often lack substantial financial reserves. Maintaining farm stability preserves agricultural diversity.

Furthermore, the adjustment contributes to the stabilization of food supply chains**.** Ensuring that agricultural production remains uninterrupted supports not only farmers but also downstream industries, including food processing, transportation, and retail. This continuity is essential for minimizing the likelihood of shortages, price volatility, and disruptions throughout the supply chain, which can affect consumers and businesses alike.

The IFR also offers significant **s**upport for rural economies. By preventing sudden contractions in farm payrolls, the rule helps sustain local spending, tax revenues, and business activity, vital to rural communities.

Lastly, the IFR facilitates an orderly workforce transition**.** By moderating wage adjustment, the rule provides time for farms to recruit, relocate, and train authorized domestic workers without destabilizing production. This aligns with the long-term goal of fostering a fully authorized agricultural workforce, effectively shifting reliance away from illegal labor practices and enhancing the stability and legality of the agricultural labor market.

The Department believes that the anticipated benefits of the IFR exceed its costs.

**c. Regulatory Alternatives**

The Department considered two regulatory alternatives. The first alternative would apply the Skill Level I (Entry-Level) AEWR rate to all positions, rather than using the two-skill AEWR methodology in the IFR. In this alternative, the transfer estimates applied to the majority of H-2A workers in are also applicable to the remaining H-2A workers that would be considered experienced workers under the Department's preferred methodology. To calculate the total impact of the first regulatory alternative, the Department used the same methodology described in the Transfers Associated with AEWR Determination Methodology section, resulting in estimated average annual undiscounted transfers of $2.55 billion. The total transfer over the 10-year period was estimated at $25.50 billion (undiscounted), or $21.95 billion (3%) and $18.27 billion (7%). Annualized transfer over ten years are $2.57 billion (3%) and $2.60 billion (3%).

Under the second regulatory alternative, the Department would replace the 4-bedroom fair market rent with the 0-bedroom (i.e., efficiency) fair market rent for 2 people. For 2024, this change would increase the housing premium to $3.54, which is approximately $613 per month—closer to Farmers.gov housing cost estimates[204] of approximately $9,000 to $13,000 per worker per year. Under the IFR methodology, the Department estimated a housing premium of $1.75, which is equal to a rent of approximately $70 per week and $300 per month. The Department estimated average annual undiscounted transfers of $3.88 billion. The total transfer over the 10-year period was estimated at $ 38.82 billion undiscounted, or $ 33.31 billion (3%) and $ 27.64 billion (7%). Annualized transfer over ten years are $3.91billion (3%) and $3.94 billion (3%).

Exhibit 11 summarizes the estimated transfers associated with the three considered revised wage structures over the 10-year analysis period. Transfers under the IFR and both regulatory alternatives are transfers from H-2A employees to H-2A employers.

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[204] https://www.farmers.gov/working-with-us/h2a-visa-program

| Exhibit 11:<br>Estimated Monetized Transfers of the Interim Final Rule ($2025 Millions) | | | |
|---|---|---|---|
| | **Interim Final Rule (Transfers from Employees to Employers)** | **Regulatory Alternative 1 (Transfers from Employees to Employers)** | **Regulatory Alternative 2 (Transfers from Employees to Employers)** |
| Total 10-Year Transfer | $24,157.10 | $25,503.49 | $38,817.90 |
| Total with 3% Discount | $20,781.53 | $21,946.32 | $33,314.66 |
| Total with 7% Discount | $17,296.86 | $18,273.50 | $27,642.21 |
| Annualized Undiscounted Transfer | $2,415.71 | $2,550.35 | $3,881.79 |
| Annualized Transfer with 3% Discount | 2,436.23 | $2,575.78 | $3,905.49 |
| Annualized Transfer with 7% Discount | $2,462.68 | $2,601.74 | $3,935.63 |

The Department prefers the chosen approach of the IFR because it better accounts for the wages of workers in higher skilled positions and is more representative of lodging conditions for H-2A workers.

**B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act of 1996, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking) Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121 (Mar. 29, 1996), hereafter jointly referred to as the RFA, requires agencies to prepare an initial regulatory flexibility analysis (IRFA) when proposing, and a final regulatory flexibility analysis (FRFA) when issuing, regulations that will have a significant economic impact on a substantial number of small entities.

Because public notice was not required for this IFR, the Department was not obligated to prepare a regulatory flexibility analysis.[205] Nonetheless, The Department conducted the analysis below of the effect on small entities from the IFR and, based on that analysis, concludes that this rule will have a significant economic impact on small farms that employ H-2A workers.

**Initial Regulatory Flexibility Analysis (IRFA)**

**1. Why Action Is Being Considered**

As described throughout the preamble for this IFR, in the Department's view, immediate reform to the H-2A program's minimum wage policy, or the AEWRs, is necessary to avoid widespread disruption across the U.S. agricultural sector. Without prompt action, agricultural employers will face severe labor shortages, resulting in disruption to food production, higher prices, and reduced access for U.S. consumers. Further, the Department initially finds that qualified and eligible U.S. workers will not make themselves available in sufficient numbers, even at current wage levels, to fill the

[205] *See, e.g., Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1124 (9th Cir. 2006) ("When the agency validly invokes the "good cause" exception, the RFA does not apply.").

significant labor shortage in the agricultural sector that will result from the sealing of the border and potential further enforcement of immigration laws. The reforms contained in this IFR of the H-2A program's wage policy are urgently needed to restore the usability of the H-2A program and to provide a practical, lawful workforce alternative to illegal aliens being removed. These changes ensure that agricultural employers offer wages to legally authorized workers that are consistent with wages paid in comparable farm and non-farm jobs, while maintaining compliance with immigration law and supporting the stability of the nation's food supply.

**2. Objective of the IFR**

The primary objectives of the IFR are to restore the usability of the H-2A program, ensure a stable food supply for the United States, and (relevant to the RFA) avert irreparable economic harm to agricultural employers as large numbers of illegal aliens exit the labor force.

(**3) Class of Small Entities** A small entity is one that is independently owned and operated and that is not dominant in its field of operation. 5 U.S.C. 601(3); 15 U.S.C. 632. The definition of small entity varies from industry to industry to properly reflect industry size differences. 13 CFR 121.201. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry.

Using the U.S. Department of Agriculture (USDA) farm size definitions and data, the Department has conducted a small entity impact analysis. This analysis is focused on farms because over three quarters of affected entities are primarily engaged in growing crops and raising animals for sale. The Department lacks data on individual entities that participate in the H-2A program. Therefore, the Department is using USDA data as a proxy for H-2A participants. USDA data includes the number of farms that hire farm workers, number of hired farm workers, and annual revenue disaggregated farm size. Using this data allows the Department to estimate the per-small farm rule familiarization

cost and the cost savings of the IFR as a percent of revenue. The Department notes that all hired farm workers are not H-2A workers and that only a small share of U.S. farms utilize the H-2A program.

**(4) Impact on Small Entities**

**a. Familiarization with Regulatory Change**

Upon effective implementation of the IFR, H-2A employers will be required to become acquainted with the new regulatory framework. The Department estimated this cost for a hypothetical small entity by multiplying the time required to read the new rule (1 hour) by the average hourly compensation rate of a human resources specialist ($60.95, as calculated above). Thus, the resulting cost per small entity is $60.95 ($60.95 × 1 hour). This cost occurs only in the year the IFR is published.

**b. Cost Savings**

As explained in the E.O. 12866 section above, the Department identified wage transfers from H-2A workers to U.S. employers that will result from the following provisions in the IFR:

- Wage transfers that account for the compensation disparity U.S. workers face when H-2A workers are paid for work performed under the same work contract but, unlike U.S. works, receive additional non-wage compensation in the form of free housing.
- Wage transfers associated with modifications to the AEWR determination methodology that account for different skill levels delineated in employers' job offers.

The Department estimated that the above provisions will result in annualized transfers of $2.46 billion discounted at 7 percent over 10 years. The Department also estimated that there will be an annual average of 446,180 certified H-2A workers over the

next 10 years. This translates into a wage transfer from the average H-2A worker to U.S. employers of $5,513 per year.

**Method Used to Estimate the Impact on Small Entities**

The Department used the following steps to estimate the cost of the IFR per small entity as a percentage of annual receipts. First, the Department used the USDA size definitions to determine the size thresholds of small entities. The USDA defines a "small family farm" as a farm having a gross cash farm income (GCFI) of less than $350,000 per year. Next, the Department obtained data on the number of farms and annual revenue by size from the USDA's 2022 Census of Agriculture.[206] Then, the Department divided the estimated first-year cost per entity ($60.95) by the average annual receipts per small farm ($47,062) to determine whether the IFR rule familiarization cost would have a significant economic impact on small entities.[207]

To estimate the cost savings per small farm, the Department first determined the average number of hired farm workers per small farm (2.5) by dividing the number of hired farm workers on small farms (669,690) by the number of small farms that hire farm labor (268,931). The Department then estimated the average number of hired H-2A workers per small farm (0.41) by multiplying the average number of hired farm workers per small farm (2.5) by the percent of the farm workforce that are H-2A workers (16.3%).[208] The Department then multiplied the average number of hired H-2A workers per small farm (0.41) by the annualized discounted cost savings per H-2A worker ($5,513) to estimate the savings per small farm ($2,238). Then, the Department divided the estimated cost savings per small farm by the average receipts per small farm to determine whether the IFR will have a significant economic impact on small farms**.**

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[206] U.S. Department of Agriculture, "2022 Census of Agriculture,"

[207] For purposes of this analysis, the Department used a 3-percent threshold for "significant economic impact." The Department has used a 3-percent threshold in prior rulemakings.

[208] The percent of the farm workforce that are H-2A workers (16.3%) was derived by dividing the number of H-2A workers in 2022 (355,894) by the number of hired farm workers in 2022 (2,184,493).

**Estimated Impact of the IFR on Small Entities**

As shown in Exhibit 12, the first-year cost for rule familiarization is not expected to have a significant economic impact (3 percent or more) on small farms. The first-year cost for rule familiarization is estimated to be 0.1 percent of the average receipts per small farm. As also shown in Exhibit 12, the annualized cost savings are estimated to have a significant economic impact on small farms that employ H-2A workers. The annualized cost savings are estimated to be 4.8 percent of the average receipts per small farm. The Department therefore estimates the total annualized transfers for small farms that hire farm labor to be $601.8 million or 24.5% of total transfers.

Exhibit 12: Crop and Animinal Production

Small Business Size Standard: GCFI less than $350,000

| | Number of Farms[1] | Annual Receipts[2] | Average Receipts per Farm[3] | Average Number of H-2A Farm Workers per Farm[4, 5] | Annualized Transfer per H-2A Worker[6] | First Year Cost per Farm | First Year Cost per Farm as Percent of Receipts[7] | Annualized Savings per Small Farm with 7% Discounting[8] | Annualized Savings per Small Farm as Percent of Receipts[9] |
|---|---|---|---|---|---|---|---|---|---|
| Enterprises with GCFI below $350,000 | 1,614,764 | $75,993,303,000 | $47,062 | 0.41 | $5,513 | $61 | 0.1% | $2,238 | 4.8% |

[1] Source: U.S. Department of Agriculture, Census of Agricutlure.

[2] Source: U.S. Department of Agriculture, Census of Agricutlure. Receipts are defined by gross cash farm income (GFCI).

[3] Annual receipts ÷ Number of firms

[4] Number of hired farm workers on small farms (669,690) ÷ Number of small farms that hire farm labor (268,931) xPercent of the farm workforce that are H-2A workers (16.3%)

[5] Source: U.S. Department of Agriculture, Census of Agricutlure.

[6] Total annualized savings with 7% discounting ($2,460,000,000) ÷ Average number of H-2A workers (446,180)

[7] First year cost per firm with 7% discounting ÷ Average receipts per small farm

[8] Averagae number of H-2A farm workers per small farm (0.41) xAnnualized transfer per H-2A worker ($5,513)

[9] Annualized savings per small farm with 7% discounting ÷ Average receipts per small farm

**(5) Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Proposed Rule**

The Immigration and Nationality Act requires a prospective employer seeking to employ foreign nationals in agricultural employment of a temporary or seasonal nature to first apply to the Department for a labor certification. When creating the H-2A visa classification, Congress charged the Department with, among other things, a unique responsibility to regulate the employment of nonimmigrant foreign nationals in agriculture to guard against adverse impact on the wages of agricultural workers in the United States similarly employed. Thus, the statute delegates broad discretion to the Department in determining the sources and methods that best allows it to meet its

statutory mandate, which this IFR adopts through the determination of AEWRs applicable only to employers seeking temporary agricultural labor certification under the H-2A visa classification. As such, the standards adopted in this IFR do not duplicate, overlap, or conflict with any other Federal rules.

**(6) Alternatives to the Proposed Rule** As explained in the RIA, the Department considered two regulatory alternatives. The first alternative would apply the Skill Level I (Entry-Level) AEWR rate to all positions, rather than using the two-skill AEWR methodology in the IFR. The Department estimated that this alternative would result in annualized transfers of $2.60 billion discounted at 7 percent over 10 years. Given the projected annual average number of certified H-2A workers over the next 10 years (446,180), the Department estimated a wage transfer from the average H-2A worker to U.S. employers of $5,831 per year. The Department then multiplied the average number of hired H-2A workers per small farm (0.41) by the annualized discounted cost savings per H-2A worker ($5,831) to estimate the cost savings per small farm from this alternative ($2,367). As shown in Exhibit 13, the annualized cost savings of this alternative are estimated to have a significant economic impact on small farms that employ H-2A workers. The annualized cost savings of this alternative are estimated to be 5.0 percent of the average receipts per small farm.

Exhibit 13: Crop and Animinal Production

Small Business Size Standard: GCFI less than $350,000

| | Number of Farms[1] | Annual Receipts[2] | Average Receipts per Farm[3] | Average Number of Hired Farm Workers per Farm[4, 5] | Annualized Transfer per H-2A Worker[6] | Annualized Savings per Small Farm with 7% Discounting[7] | Annualized Savings per Small Farm as Percent of Receipts[8] |
|---|---|---|---|---|---|---|---|
| Enterprises with GCFI below $350,000 | 1,614,764 | $75,993,303,000 | $47,062 | 0.41 | $5,831 | $2,367 | 5.0% |

[1] Source: U.S. Department of Agriculture, Census of Agricutlure.

[2] Source: U.S. Department of Agriculture, Census of Agricutlure. Receipts are defined by gross cash farm income (GFCI).

[3] Annual receipts ÷ Number of firms

[4] Number of hired farm workers on small farms (669,690) ÷ Number of small farms that hire farm labor (268,931) x Percent of the farm workforce that are H-2A workers (16.3%)

[5] Source: U.S. Department of Agriculture, Census of Agricutlure.

[6] Total annualized savings with 7% discounting ($2,601,700,000) ÷ Average number of H-2A workers (446,180)

[7] Averagae number of H-2A farm workers per small farm (0.41) x Annualized transfer per H-2A worker ($5,831)

[8] Annualized savings per small farm with 7% discounting ÷ Average receipts per small farm

Under the second regulatory alternative, the Department would replace the 4-bedroom fair market rent with the 0-bedroom (i.e., efficiency) fair market rent for 2 people. The Department estimated that this alternative would result in annualized transfers of $3.94 billion discounted at 7 percent over 10 years. Given the projected annual average number of certified H-2A workers over the next 10 years (446,180), the Department estimated a wage transfer from the average H-2A worker to U.S. employers of $8,821 per year. The Department then multiplied the average number of hired H-2A workers per small farm (0.41) by the annualized discounted cost savings per H-2A worker ($8,821) to estimate the cost savings per small farm from this alternative ($3,580). As shown in Exhibit 14, the annualized cost savings of this alternative are estimated to have a significant economic impact on small farms that employ H-2A workers. The annualized cost savings of this alternative are estimated to be 7.6 percent of the average receipts per small farm.

Exhibit 14: Crop and Animinal Production

Small Business Size Standard: GCFI less than $350,000

| | Number of Farms[1] | Annual Receipts[2] | Average Receipts per Farm[3] | Average Number of Hired Farm Workers per Farm[4, 5] | Annualized Transfer per H-2A Worker[6] | Annualized Savings per Small Farm with 7% Discounting[7] | Annualized Savings per Small Farm as Percent of Receipts[8] |
|---|---|---|---|---|---|---|---|
| Enterprises with GCFI below $350,000 | 1,614,764 | $75,993,303,000 | $47,062 | 0.41 | $8,821 | $3,580 | 7.6% |

[1] Source: U.S. Department of Agriculture, Census of Agricutlure.

[2] Source: U.S. Department of Agriculture, Census of Agricutlure. Receipts are defined by gross cash farm income (GFCI).

[3] Annual receipts ÷ Number of firms

[4] Number of hired farm workers on small farms (669,690) ÷ Number of small farms that hire farm labor (268,931) x Percent of the farm workforce that are H-2A workers (16.3%)

[5] Source: U.S. Department of Agriculture, Census of Agricutlure.

[6] Total annualized savings with 7% discounting ($3,935,630,000) ÷ Average number of H-2A workers (446,180)

[7] Averagae number of H-2A farm workers per small farm (0.41) x Annualized transfer per H-2A worker ($8,821)

[8] Annualized savings per small farm with 7% discounting ÷ Average receipts per small farm

The Department prefers the chosen approach of the IFR because it better accounts for the wages of workers in higher skilled positions and is more representative of lodging conditions for H-2A workers.

## C. Review Under the Paperwork Reduction Act

The purpose of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et

seq., includes minimizing the paperwork burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information, including publishing for public comment a summary of the collection of information and a brief description of the need for and proposed use of the information.

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

A Federal agency may not conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the PRA and it displays a currently valid OMB control number. The public is also not required to respond to a collection of information unless it displays a currently valid OMB control number. In addition, notwithstanding any other provisions of law, no person will be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

The Department has determined that the changes adopted in this IFR will not result in changes to the information collection covered under H-2A Temporary Agricultural Labor Certification Program, OMB Control Number 1205-0466 (OMB 1205-0466), which would not require soliciting public comments in order to seek OMB approval of any clarifying changes and de minimis adjustment in burden the proposed changes might cause to existing information collection tools covered under this control number. The Department intends to collect the information it currently requires in order

to process H-2A job orders and applications for agency decision making and will provide a set of frequently asked questions that will be available on the agency website to help respondents better organize information related to job duties and requirements that employers already disclose on existing fields in the forms.

**D. Review Under Executive Order 13132**

E.O. 13132, *Federalism*, 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The E.O. requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The E.O. also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.

The Department has examined this IFR and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**E. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

The Department has reviewed this IFR in accordance with E.O. 13175 and has determined that it does not have tribal implications. This proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and tribal governments.

**F. Review Under Executive Order 12988**

With respect to the review of existing regulations and the promulgation of new

regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law, this IFR meets the relevant standards of E.O. 12988.

**G. Review Under the Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in $100 million or

more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. By its terms, however, UMRA does not apply to rules issued without notice and comment. Accordingly, the requirements of URMA are not applicable to this IFR.

**H. Review Under Executive Order 12630**

Pursuant to E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, 53 FR 8859 (Mar. 18, 1988), the Department has determined that this IFR would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

**I. Review Under the Treasury and General Government Appropriations Act, 1999**

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed IFR would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, the Department has concluded that it is not necessary to prepare a Family Policymaking Assessment.

**J. Review Under the Treasury and General Government Appropriations Act, 2001**

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002). The Department has reviewed this IFR under the OMB guidelines and has concluded that it is consistent with applicable policies in those guidelines.

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

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

For the reasons stated in the preamble, the DOL amends 20 CFR part 655 as follows:

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

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

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

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

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

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

2. Amend § 655.120 by revising paragraph (b) to read as follows:

### § 655.120 Offered wage rate.

* * * * *

(b) *AEWR determinations.* (1) Except for occupations governed by the procedures in §§ 655.200 through 655.235, the OFLC Administrator will determine the AEWRs as follows:

(i) For occupations included in the field and livestock workers (combined) category:

(A) If a statewide annual average hourly gross wage in the State at each skill level, as required by paragraph (b)(2) of this section, is reported by the Occupational Employment and Wage Statistics (OEWS) survey, that wage shall be the AEWR for the State; or

(B) If a statewide annual average hourly gross wage in the State at either skill level is not reported by the OEWS, the AEWR for the occupations shall be the national annual average hourly gross wage at that skill level, as reported by the OEWS survey.

(ii) For all other occupations:

(A) The AEWR for each occupation shall be the statewide annual average hourly gross wage for that occupation in the State at each skill level, as reported by the OEWS survey; or

(B) If a statewide annual average hourly gross wage in the State at either skill level is not reported by the OEWS survey, the AEWR for each occupation shall be the national annual average hourly gross wage for that occupation at that skill level, as reported by the OEWS survey.

(iii) The AEWR methodologies described in paragraphs (b)(1)(i) and (ii) of this section shall apply to all job orders submitted, as set forth in § 655.121, on or after October 2, 2025, including job orders filed concurrently with an *Application for Temporary Employment Certification* to the NPC for emergency situations under § 655.134.

(iv) For purposes of this section, the terms *State* and *statewide* include the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

(2) The OFLC Administrator shall determine the AEWRs described in paragraphs (b)(1)(i) and (ii) of this section at two skill levels.

(i) Skill level I shall be computed as the arithmetic mean of the first one-third of the wage distribution for the occupation(s); and

(ii) Skill level II shall be computed as the arithmetic mean of the entire wage distribution for the occupation(s).

(3) Notwithstanding 20 CFR 655.122(d), the OFLC Administrator shall establish a downward annual AEWR compensation adjustment for each State computed as an equivalent hourly rate based on the weighted statewide average of fair market rents for a four-bedroom housing unit available from the Department of Housing and Urban Development, provided that such adjustment shall not exceed 30 percent of the AEWRs determined under paragraphs (b)(1)(i) and (ii) of this section. The statewide annual hourly AEWR based on this compensation adjustment shall be determined separately and only apply to H-2A workers sponsored under the *Application for Temporary Employment Certification*.

(4) The OFLC Administrator will publish a notice in the Federal Register, at least once in each calendar year, on a date to be determined by the OFLC Administrator, establishing each AEWR and corresponding housing compensation adjustment under this section. The updated AEWR and corresponding housing compensation adjustment under this section will be effective as of the date of publication of the notice in the Federal Register.

(5) If an updated AEWR for the occupational classification and geographic area is published in the Federal Register during the work contract, and the updated AEWR is higher than the highest of the previous AEWR; a prevailing wage for the crop activity or

agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area; the agreed-upon collective bargaining wage; the Federal minimum wage; or the State minimum wage, the employer must pay at least the updated AEWR beginning on the date the updated AEWR is published in the Federal Register.

(6) If an updated AEWR for the occupational classification and geographic area is published in the Federal Register during the work contract, and the updated AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(7) The occupational classification and applicable AEWR shall be determined based on the majority (meaning more than 50 percent) of the workdays during the contract period the worker will spend performing the agricultural labor or services, including duties that are closely and directly related, and the qualifications on the job order.

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**Susan Frazier**,

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