2015 Final Rule
Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program

Background

The Immigration and Nationality Act provides that the Secretary of the Department of Homeland Security (DHS) must consult with "appropriate agencies of the Government" before granting any H-2B visa petitions. Through regulation, DHS requires that an H-2B visa petition for employment in the United States must be accompanied by an approved temporary labor certification from the DOL and delegates enforcement authority for the H-2B program to DOL's Wage and Hour Division. As part of its labor certification responsibilities, DOL's Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC) determines whether U.S. workers capable of performing the jobs for which employers are seeking foreign workers are available, and whether the employment of the foreign workers will adversely affect the wages and working conditions of U.S. workers similarly employed. To ensure no adverse effect on the wages of U.S. workers, OFLC has been responsible for issuing prevailing wage determinations (PWD) for non-agricultural job opportunities since DOL first promulgated comprehensive H-2B program regulations in 2008. Beginning in January of 2009, OFLC began issuing PWDs in accordance with 2008 regulations and sub-regulatory Prevailing Wage Guidance.

In August of 2010, a Federal district court in Pennsylvania ruled that the Department violated the Administrative Procedure Act by failing to adequately explain its reasoning for using skill levels as part of the H-2B prevailing wage determinations, as well as its choice of wage data sets, and ordered the Department to promptly issue new prevailing wage regulations for the program. As a result of this court action, DOL published a new wage rule in 2011, adjusting its methodology and satisfying notice and comment requirements. However, due to Congressional riders blocking funding for its implementation, the 2011 wage rule was never implemented and the 2008 methodology continued in use until March of 2013 when the same district court vacated the four-tiered methodology. In April 2013, DOL and DHS jointly issued an Interim Final Rule (2013 IFR), removing the four-tiered component of the 2008 rule's methodology in favor of an arithmetic mean but otherwise leaving the 2008 rule's methodology in place, including the ability of OFLC to consider employer-provided wage surveys as potential sources for a PWD.

On December 5, 2014, the Federal district court in Pennsylvania vacated the provision of the 2008 rule that permitted use of employer-provided surveys and the sub-regulatory Prevailing Wage Guidance. On March 4, 2015, a different Federal district court in Florida determined that DOL lacks unilateral authority to issue any regulations in the H-2B program and vacated the 2008 regulations in their entirety and further enjoined DOL from its implementation. DOL is now publishing this Wage Methodology Final Rule as a companion to a related comprehensive H-2B Interim Final Rule to establish a complete prevailing wage methodology for the H-2B program, as well as define the circumstances under which employer-provided surveys can be accepted. The Final Rule stems from the 2013 Interim Final Rule and the public comments received in response.

Major Provisions of the 2015 Wage Methodology Final Rule

- *Retains the Occupational Employment Statistics (OES) mean as the default wage because there are virtually no skill-based differences in the generally low-skilled H-2B work, and the artificial imposition of skill levels fails to protect U.S. workers from adverse effect.*

- *Does not permit use of wage determinations under the Davis-Bacon Act (DBA) and the McNamara-O'Hara Service Contract Act (SCA) as wage sources to set the H-2B prevailing wage rate. SCA and DBA wages remain separately applicable to, and enforced in, H-2B work covered by a government contract.*

- *Continues the use of wage rates set by a collective bargaining agreement negotiated at arms' length, if any.*

- *Allows the use of employer-provided surveys only in the following limited circumstances:*
    - *For a geographic area where either the OES does not collect data or reports the mean wage rate at only the national level for the occupation;*
    - *If the job opportunity is not included within an occupational classification of the OES or is within an occupational classification of the OES designated as a general "all other" classification; or*
    - *If the survey is independently conducted and issued by a state.*
- *Employer-provided surveys in all permissible categories must meet enhanced methodological standards.*