



November 11, 2010

Mr. Thomas Dowd, Administrator
Office of Policy Development and Research
Employment and Training Administration, USDOL
200 Constitution Avenue, NW.
Room N-5641, Washington, DC 20210

Re: ***Public Commentary from the Economic Policy Institute
Wage Methodology for the Temporary Non-Agricultural
Employment H-2B Program; Regulatory Information Number (RIN)
1205-AB61; 20 CFR Part 655; 75 Fed. Reg. 61758 (October 5, 2010).***

I. THE ECONOMIC POLICY INSTITUTE SUPPORTS THE PROPOSED RULE

The Economic Policy Institute **supports** the proposed rule amending 20 CFR §655.10. The new rule constitutes a significant improvement over the current rule establishing the method for prevailing wage determinations (PWD) for H-2B temporary nonimmigrant workers.

Under Department of Homeland Security regulations at 8 CFR §214.2(h)(6)(i)(A), H-2B nonimmigrant workers should only be authorized to enter and work in the United States if they will not be “displacing qualified United States workers available to perform such services or labor,” and if their “employment is not adversely affecting the wages and working conditions of United States workers.” Under 8 CFR 214.2 §(h)(6)(iii)(D), the Secretary of Labor is required to “establish procedures for administering the temporary labor certification program under his or her jurisdiction.” The labor certification program is the method utilized by the Department of Labor to determine if any U.S. workers could be displaced or have their wages and working conditions adversely affected.

The need for changes in the H-2B regulations is obvious from the fact that despite the unemployment and underemployment of 27 million Americans during this Great Recession, employers are still able to obtain labor certifications and visas to bring tens of thousands of low-wage workers into the U.S. from abroad. On the face of the matter it is almost impossible that the importation of landscape laborers, hotel and restaurant workers, and construction workers is not “displacing qualified United States workers available to perform such services or labor.” The unemployment rate for workers with a high school



diploma is above 10% and above 15% for workers without a high school diploma. More than a million construction workers are unemployed.

The proposed rule improves the methodology for making prevailing wage determinations and increases protections for U.S. workers from displacement and downward pressure on wages and working conditions. Nevertheless, as these comments will explain, under the proposed rule, 20 CFR §655.10(b)(1)-(3), employers and H-2B nonimmigrant workers will continue to negatively impact *some* U.S. workers, by “adversely affecting” their “wages and working conditions.” 8 CFR §214.2(h)(6)(i)(A).

For this reason, while EPI supports the proposed rule and considers it a vast improvement over the current regulations, it must be emphasized that even under the newly proposed rules the use of H-2B workers may create downward pressure on the wages of U.S. workers, adversely affecting their wages and working conditions. This effect would place the rule in conflict with the plain language of the regulatory requirement at 8 CFR §214.2(h)(6)(i)(A) and contradict the intent of the labor certification process. We believe more can and should be done to protect the wages of U.S. workers – wages that have largely remained stagnant in real terms during the last 30 years, despite dramatic increases in worker productivity.¹

II. THE PROPOSED RULE WILL LIFT MANY WORKERS OUT OF POVERTY

On page 61586 of the Notice of Proposed Rulemaking (NPRM),² the Department of Labor (DOL) analyzes and assesses the total cost burden that the proposed rule will have on small entities (i.e., small businesses). The DOL concludes that the “increased employment opportunities for U.S. workers and higher wages for both H-2B and U.S. workers provide[s] a broad societal benefit that...outweighs these costs.” We agree, and the tangible societal benefits the DOL refers to can be easily illustrated by example, using existing, publicly available data.

By far, the single most common occupation filled by H-2B workers is that of “Laborer, Landscape” (hereinafter, “landscaper”). DOL estimates that on average, the hourly wage increase for landscaping services workers will amount to \$3.60,

¹ Lawrence Mishel, Jared Bernstein and Heidi Shierholz, *The State of Working America, 2008 - 2009*, Economic Policy Institute, 2008, available at: <http://www.stateofworkingamerica.org> (last visited October 27, 2010).

² 75 FR 61586



and the total annual average costs that will be incurred by small businesses is \$6,562.³

Between the fiscal years of 2000 – 2009, employers nationwide have requested nearly half a million H-2B visas for landscapers,⁴ and between FY 2007 – 2009, an average of 78,027 H-2B workers were certified per year to work in the field of “Landscaping Services.”⁵ These numbers are astonishingly high when you consider the unemployment rate in the industry: according to the Bureau of Labor Statistics (BLS), for 2009, the annual unemployment rate for non-supervisory grounds maintenance workers was 20.1% for wage and salary workers in the private sector, and 19.3% if you combine the private and public sector.⁶

For a sector with such high unemployment, the wages earned by these workers are unsurprisingly low. For example, in the Pittsburgh Metropolitan Statistical Area, according to the BLS’s Occupational Employment Statistics (OES), the Level 1 wage for landscaping and groundskeeping workers – also known as the first “tier” in the 4-tiered wage structure currently used to determine H-2B worker wages – is \$8.37 per hour, which amounts to an annual wage of \$17,410.⁷ If employers were required to pay a landscaper in Pittsburgh the current OES arithmetic mean wage (as the proposed rule would require) – the new prevailing wage would be \$11.92 per hour; or \$24,790 per year.⁸

For a family of four, the U.S. official Poverty Guidelines from the Department of Health and Human Services are set at \$22,050 per year,⁹ while the Census

³ 75 FR 61586

⁴ See, *H-2B Temporary Guest Workers* database, analyzing data from the Department of Labor, HD Net website, available at: <http://hd.net/h2b> (last visited October 27, 2010).

⁵ 75 FR 61582

⁶ Table 3. *Employed and experienced unemployed persons by detailed occupation and class of worker, Annual Average 2009* (Source: Current Population Survey). Unpublished data obtained from the Bureau of Labor Statistics, available upon request.

⁷ *Foreign Labor Certification Data Center, Online Wage Library*, available at: www.flcdatcenter.com (last visited October 27, 2010). For the national average wages in this occupation, see, *37-3011 Landscaping and Groundskeeping Workers, Occupational Employment and Wages, May 2009*, Occupational Employment Statistics, BLS, available at: <http://www.bls.gov/oes/2009/may/oes373011.htm> (last visited October 27, 2010).

⁸ *May 2009 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates; Pittsburgh, PA*, Occupational Employment Statistics, BLS, available at: http://www.bls.gov/oes/current/oes_38300.htm#37-0000 (last visited October 27, 2010).

⁹ *The 2009 HHS Poverty Guidelines*, U.S. Department of Health and Human Services, available at: <http://aspe.hhs.gov/poverty/09poverty.shtml> (last visited October 27, 2010).



Bureau's poverty line is \$21,954 per year.¹⁰ Thus, an H-2B landscaper with a salary set at the current Level 1 prevailing wage in Pittsburgh would earn a yearly salary that is \$4,544 below the Census Bureau's poverty line. But once the proposed rule comes into effect, under the OES arithmetic mean wage, the same H-2B worker would earn \$2,836 more than the poverty line – a salary that, while still very low, would lift the worker and their family out of poverty.

In the public comments submitted online, some employers, including landscaping businesses, complain about the estimated wage increases that will result from the proposed rule – specifically the estimated \$3.60 average hourly increase¹¹ (as the example shows, the difference between the Level 1 OES wage and the OES mean wage for landscapers in Pittsburgh is \$3.55; a difference of 5 cents from DOL's estimated average increase for the occupation). In effect, these employers argue that they should continue to have the right to recruit and import foreign workers to the United States – regardless of unemployment rates for unskilled laborers in various industries¹² – and to pay them far less than the average wage for similar U.S. workers. They make no attempt to explain how undercutting the wages of U.S. workers meets the purpose of the regulation, insuring that U.S. workers are not adversely affected by admission and employment of H-2B workers.

Some employer comments recently submitted suggest that what amounts to a nominal increase in labor costs will nevertheless raise their costs so substantially as to put them out of business. In fact, if the proposed rule's higher wage rates make some businesses raise their prices, it will only be because the new wage determinations reflect the actual, higher wage rates many of their competitors are already paying. The proposed methodology will do a much better job of providing a level playing field for employers who do and don't employ H-2B workers. According to research EPI published in 2009, the current rule puts many employers who pay the average rate prevailing in the locality at a 10% to 25% disadvantage in terms of labor costs in relation to H-2B employers. The H-2B program was never intended to be a subsidy program for low-road, bottom of the barrel employers.

By raising the required wage to the level of the average that prevails in the locality, the proposed rule will have a significant positive impact on the quality

¹⁰ *Income, Poverty and Health Insurance in the United States: 2009 – Tables and Figures*, U.S. Census Bureau, available at: <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2009/tables.html> (last visited October 27, 2010).

¹¹ 75 FR 61586

¹² According to the BLS, the annual unemployment rate in 2009 for all salaried workers in “construction and extraction occupations” was 21%, for “construction laborers,” 24.8%, and 10.7% for “janitors and building cleaners.”



of life and the living standards of thousands of employees, both foreign and domestic. The NPRM correctly notes that these wage increases will help U.S. workers by improving their “ability to meet the cost of living and to spend money in their local communities,”¹³ which in turn will help sustain and create jobs in those communities.

III. WAGE RATES NEGOTIATED UNDER COLLECTIVE BARGAINING AGREEMENTS SHOULD ESTABLISH THE MINIMUM WAGE REGARDLESS OF WHETHER AN EMPLOYER IS A CONTRACTING PARTY TO THE AGREEMENT OR NOT

Subsection (b)(1) of the proposed rule sets the prevailing wage for employers at the rate negotiated in a collective bargaining agreement (CBA) between a union and an employer, if such an agreement exists (and is higher than any relevant DBA/SCA wage). EPI supports this. Allowing an employer to pay less than the collectively bargained wage would obviously undercut the union and its members and adversely affect their wages and working conditions.

However, many employers who solicit and hire H-2B workers will not be a signatory to a CBA. If a CBA exists between any employer and any group of workers in the same occupational category within the same geographical region or metropolitan statistical area, the workers covered by the CBA will experience downward pressure on their wages if the non-CBA employer pays its employees a lower wage. To compete, the CBA employer will have an incentive not to renew the agreement or to bargain for concessions from the union.

In addition, an adverse affect on the wages of U.S. workers will occur if a Davis-Bacon or Service Contract Act wage for the occupation in the region is lower than the wage negotiated in the CBA or, in the absence of a DBA or SCA wage, if the applicable OES mean wage is lower than the wage required by the CBA.

In order to avoid such a scenario, whenever a CBA covers workers in a particular geographic region and a specific occupational classification, the wage rate negotiated in the CBA should be established as the floor wage for that particular category of worker and should apply to **all** employers in the region who wish to hire H-2B workers – whether they are a signatory to the CBA that establishes such wage or not. If an applicable DBA or SCA wage is lower than the CBA wage rate, then the CBA wage rate should serve as the minimum wage in order to avoid any adverse affect on wages or working conditions. In other words, the

¹³ 75 FR 61583



highest applicable wage from the DBA, SCA, OES mean, federal or state minimum wage or CBA should serve as the minimum for the H-2B worker.

Unions that want to prevent an adverse effect on their members' wages would be responsible for submitting their contracts to the Department of Labor.

This solution would protect the integrity of all collective bargaining agreements across the country, and ensure that employers do not seek to undercut and undermine the rights of U.S. workers to collectively bargain and unionize by hiring foreign guestworkers willing to work for lower wages and poorer working conditions – because employers will be on notice they can no longer exploit systematic loopholes when determining prevailing wage levels that allow them to avoid paying U.S. and foreign workers the statutorily appropriate, or collectively bargained wage rates.

IV. WHEN APPLICABLE, THE USE OF DAVIS-BACON ACT AND SERVICE CONTRACT ACT PREVAILING WAGES SHOULD BE MANDATORY

EPI fully supports the proposed rule's requirement that the Davis-Bacon Act (DBA) or the McNamara-O'Hara Service Contract Act (SCA) be used to establish the minimum wage rate to be paid to H-2B workers if the occupational classification and geographic location of the position is one that is covered by either act (subject to any collective bargaining agreement which may exist in the region, if it sets a higher wage for the specific occupation, as described in the previous section). The current rule, under 20 CFR 655.10(b)(4), simply *permits* an employer to use a DBA or SCA established wage if one exists, but the proposed rule *requires* an employer to adopt the DBA or SCA wage rate as the prevailing wage.

The DOL has developed sectorally- and geographically-specific methodologies for assessing the prevailing wage rates found in the occupational classifications and regions covered by the DBA and SCA. As a result, the DBA and SCA wage rates represent the most complete and accurate data set for determining the appropriate compensation levels in occupations covered by the acts. Furthermore, the SCA and DBA wage rates include fringe benefits, a crucial part of the calculus that is missing from the OES prevailing wage rates. Thus, the DOL's conclusion that this requirement will better protect the wages of U.S. workers – by ensuring “that each PWD reflects the highest wage,” and “compliance with mandatory wage standards,” while “prevent[ing] the undercutting of wages in the local market”¹⁴ – is correct.

¹⁴ 75 FR 61580



V. THE DOL HAS ACTED RATIONALLY AND APPROPRIATELY BY REMOVING THE FOUR-TIERED OES PREVAILING WAGE DETERMINATION STRUCTURE

The DOL's decision to adopt the four-tiered prevailing wage structure created pursuant to the H-1B Visa Reform Act of 2004,¹⁵ and to require its application to prevailing wage determinations in the H-2B visa program, was irrational, arbitrary, and never justified by the Department.¹⁶ The four wage levels for each occupation superimposed on the OES prevailing wage data were designed to apply to the H-1B visa category – a high-skilled visa category where the vast majority of beneficiaries possess either a bachelors, masters, or doctoral degree.¹⁷ The four wage levels are intended to be “commensurate with” the workers’ “experience, education, and the level of supervision.”¹⁸ Four wage levels can arguably make sense in the H-1B context, if for no other reason than to account for the variation in levels of educational attainment amongst the beneficiaries who are granted an H-1B visa.

On the other hand, as the Department observes, “[t]he types of jobs found in the H-2B program involve few if any skill differentials necessitating tiered wage levels.”¹⁹ This is because the occupations filled by H-2B workers generally require little or no formal education or training –if some training is required, it can often be learned quickly and on the job (e.g., in the case of janitors, landscapers, amusement park and hotel staff) – and such positions offer little in the way of career advancement. As a result, employers routinely hire H-2B workers at the lowest prevailing wage level, because they are in fact searching for workers with only the most basic skills and no formal education. How has this impacted wages? The DOL reveals that “in about 96 percent of the cases, the H-2B wage is lower than the mean of the OES wage rates for the same occupation.”²⁰ EPI researcher Denise Velez examined hundreds of DOL wage determinations in 2008 and found that 98% were at least 10% below the OES mean wage for the occupation in that geographic area and 64% were at least 25% below the mean. This can only result in lowered wages for U.S. workers in occupations where H-2B workers are employed because they will be forced to

¹⁵ Immigration and Nationality Act (INA) §212(p)(4)

¹⁶ *CATA v Solis*, p. 36-37, AILA Infonet Doc No. 10100169. (Posted 10/01/10)

¹⁷ In FY 2009, 81 percent of workers with H-1B visas either possessed bachelor or a masters degree, and 13 percent had a doctorate. See, *Characteristics of H-1B Specialty Occupation Workers, Fiscal Year 2009 Annual Report*, April 15, 2010, U.S. Citizenship and Immigration Services, Department of Homeland Security, available at:

<http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf> (last visited October 27, 2010).

¹⁸ INA §212(p)(4)

¹⁹ 75 FR 61580

²⁰ 75 FR 61580, see n.2.



compete with H-2B workers for these jobs – and if U.S. workers don't accept the same, reduced wages as their foreign competitors – they won't get hired.

Under the current rule, employers know that they can offer wages lower than those prevailing in the area and simply import foreign workers if no U.S. workers are willing to accept the reduced wages. This denies job opportunities to domestic workers, many of whom struggle to make ends meet even at the prevailing wage. Especially during a time of catastrophic labor market slack like the present, when millions of U.S. workers are desperate for a job, allowing employers to advertise for workers at wages so far below the prevailing rate leaves some unemployed U.S. workers little choice but to accept depressed wages – which even if paid for 40 hours of work per week may not be enough to support the worker and their family.

The DOL also notes that “even if skill-based wage tiers were desirable as a theoretical matter, neither the OES nor any other comprehensive data series that we are aware of attempts to capture such variations.”²¹ The OES wage data do not differentiate the types of skills that would justify one particular wage level or tier over another, because, as the Department explains, “the actual OES survey instrument does not solicit data concerning the skill level of the workers whose wages are being reported.”²² In other words, there is no scientific correlation between the range of experience and skill level within an occupation and the four wage tiers in the 2005 regulations superimposed on the OES wage data.

The current rule allows employers to pay employees at the lowest rate because there generally is only one basic skill level and the other three tiers are fictions bearing no relation to the facts of the labor market. Abolishing the four-tiered system will cause the OES prevailing wage determination process to more accurately reflect the reality that there do not exist 4 skill levels for unskilled work.

**VI. USING ONLY THE MEAN WAGE AS DETERMINED BY THE OES
REPRESENTS A SIGNIFICANT IMPROVEMENT – BUT DOES NOT GO FAR
ENOUGH TO PROTECT THE WAGES, BENEFITS and EMPLOYMENT OF ALL
WORKERS**

As described in the preceding section, using the arithmetic mean of the BLS occupational employment survey wage data to determine the wage rate for H-2B workers when no CBA exists, or when the occupation is not covered under the

²¹ 75 FR 61580

²² 75 FR 61580



DBA or SCA (or no determination is available), is a significant improvement from the status quo and will afford U.S. workers more protections as far as their wages and working conditions are concerned. Nevertheless, it is insufficient to fully protect the wages and working conditions of all workers in particular occupational classifications where H-2B workers are employed. In particular, while the four-level system is an inappropriate way to determine prevailing wages, setting the prevailing wage at the mean will put strong pressure toward the mean on all wages in the occupation, regardless of the characteristics of the particular worker or job. That means that for those US workers who otherwise would have been paid above the mean, setting the prevailing wage at the mean will likely result in them eventually receiving lower wages. In fact, the only way to ensure that no US worker's wages are depressed by the H-2B program would be to set the prevailing wage at the highest wage in the occupation in the area of intended employment.

The statutory mandate to ensure that H-2B workers are admitted only if no "qualified U.S. workers are available to perform such services or labor" can only be met if the wage that employers must offer to U.S. workers to test the market is high enough to attract them. Setting the wage at the arithmetic mean is an improvement over current law, but is almost certainly too low to attract those available workers who are best qualified and who could normally demand the highest wage. The OES already reports the 90th percentile wage. We suggest that the Department could more completely test the market by setting the H-2B wage at that level. Moreover, given that the OES does not collect benefit data, it will often be the case that the arithmetic mean wage is less than the average worker's compensation and will depress the earnings even of the average worker. Setting the H-2B wage at the 90th percentile wage would protect against that effect.

VII. THE DEPARTMENT SHOULD CALCULATE AND ADD ON THE APPROPRIATE LEVEL OF FRINGE BENEFITS TO THE OES PREVAILING WAGE DETERMINATIONS

As discussed above, both the Davis Bacon and Service Contract Act wage determinations include an additional hourly monetary value that is owed to the worker in "fringe benefits." Under both Acts, the employer must pay the fringe benefits either in the form of a permissible fringe benefit listed by the applicable Act, or any combination of benefits thereof, or with an equivalent cash payment.²³ The lack of any fringe benefits in OES prevailing wage

²³ For the Davis-Bacon Act, see 40 USC §3141(2); and the Service Contract Act at 41 USC §351(a)(2).



determinations²⁴ constitutes a severe deficiency in the OES wage data that conflicts with 8 CFR §214.2(h)(6)(i)(A), which requires that H-2B workers not displace qualified United States workers or adversely affect the wages and working conditions of United States workers. Failure to account for fringe benefits undermines the statutory requirement that visas be issued only if no “unemployed persons capable of performing such service or labor” are available in the United States.²⁵

Reliance on the OES to determine prevailing wages – without adjustment – is not consistent with these requirements because the OES does not include fringe benefits. If the prevailing wages and benefits for a particular occupation in a particular SMSA are, for example, \$12.00 per hour plus \$3.00 per hour in pension and health benefit costs, but DOL determines the prevailing wage to be simply \$12.00, U.S. workers will be adversely affected. Employers will be encouraged to apply for H-2B workers, saving themselves \$3.00 in benefit costs and putting downward pressure on the locally prevailing compensation. When the employers advertise for local workers at \$12.00 an hour, with no benefits, they will under-price labor by 20% and discourage U.S. workers from applying for those jobs, leading to their displacement. H-2B workers, on the other hand, many of whom come from developing or underdeveloped countries, will be willing to accept the lower compensation, because it will likely be far more than they could earn in their country of origin.

The Bureau of Labor Statistics already collects the necessary data to determine the appropriate amount of fringe benefits that should be required as a supplement to the OES wages used to set a PWD. The *Employer Costs for Employee Compensation* (ECEC) report from the BLS “measures employer costs for wages, salaries, and employee benefits for nonfarm private and state and local government workers.”²⁶ The ECEC reports the total average wages and benefits paid by employers, and lists these data as they correspond to broad occupational employment categories. These data are also differentiated according to the average amount paid for the major categories of fringe benefits: paid leave, supplemental pay, insurance, retirement and savings and legally required benefits.²⁷ The ECEC also reports the average total compensation,

²⁴ *Occupational Employment Statistics, Frequently Asked Questions*, at 19, Bureau of Labor Statistics, U.S. Department of Labor, available at: http://www.bls.gov/oes/oes_ques.htm#Ques19 (last visited October 27, 2010).

²⁵ INA §101(a)(15)(H)(ii)(b)

²⁶ *Employer Costs for Employee Compensation – June 2010*, Bureau of Labor Statistics, U.S. Department of Labor, at 1, available at: <http://www.bls.gov/news.release/pdf/ecec.pdf> (last visited October 27, 2010).

²⁷ See Tables 4, 9, 10, 11, 12, and 14, *Employer Costs for Employee Compensation – June 2010*.



wages and salaries and total costs of fringe benefits paid by employers, broken down by geographic region, census division, and locality.²⁸

Using the aforementioned data sets from the ECEC, the DOL can determine the appropriate level of fringe benefits that must be offered and paid to H-2B workers. The ECEC provides data on health and retirement benefits, payroll taxes (called 'legally required' in the ECEC), wages and wage-related pay such as paid leave and supplemental pay. The wages reflected in the OES survey capture the wages and wage-related parts of total compensation. Employers paying wages will automatically be paying the 'legally required' payroll taxes. Therefore, the compensation missing is the cost of retirement and health benefits, which are about 11% of private sector compensation. The amount of pay reflecting these benefits that employers of H-2B workers need to pay can easily be determined by taking the ratio of the sum of health and retirement benefits to the wages paid (the sum of wages, paid leave and supplemental pay). This can be determined for an occupation and probably done at a regional level using data provided by BLS. This ratio when multiplied by the wage provided shows the amount of benefits that would be comparable to that earned in the private sector or civilian sector.

Although the occupational groups and geographic areas listed and reported in the ECEC are not as numerous and detailed as those in the OES's occupational categories and geographical areas, this should not deter the DOL from utilizing these data to calculate the percentage of wages that should be added on as fringe benefits to the OES wage. Only a percentage to be added on must be determined – not an exact dollar amount.

Thus, the ECEC data are sufficient to provide the DOL – by region and occupational group – an average, level of benefits received by employees in that job and in that area. Following precedent from the DBA and SCA, the fringe benefits could be paid by the employer through any combination of a variety of options, such as paid leave, health and life insurance, retirement and savings accounts, etc., or the employer could simply pay the benefits in cash.

A requirement that these fringe benefits be offered to H-2B workers would ensure that the wages and working conditions of U.S. workers are not adversely affected. This will encourage more U.S. workers to seek out, apply for and accept jobs in occupations that are not subject to Davis-Bacon or Service Contract Act wage protections.

²⁸ Table 1. *Employer Costs for Employee Compensation and associated relative standard error in private industry in the United States and by geographic region, census division, and locality*, March 2009, Bureau of Labor Statistics, U.S. Department of Labor, available at: <http://www.bls.gov/opub/cwc/tables/cm20090921ar01t1.htm> (last visited October 27, 2010).



VIII. THE DEFINITION OF “WAGES” INCLUDES WAGES AND FRINGE BENEFITS

In the context of this commentary on the notice of proposed rulemaking, and specifically in regards to sections IV and VII of these comments, EPI assumes the definition of the terms “prevailing wage,” “wage rate,” “wage,” and “wages” in proposed rule 20 CFR §655.10 to include both the basic hourly rate of pay *and* fringe benefits, including, but not limited to: paid leave, vacation time, supplemental pay, health and life insurance, disability and sickness insurance, retirement, savings and pension plans. EPI’s understanding of these terms is consistent with the definition found in the Davis Bacon Act at 40 USC §3141(2)(A) and (B). Thus, any minimum or prevailing wage rate determination made under the proposed rule – whether derived from a collective bargaining agreement, the Davis-Bacon Act, the Service Contract Act or the BLS’s Occupational and Employment Statistics – should include the applicable fringe benefits provided for in the CBA, DBA or SCA, or be calculated from the ECEC when OES wages are used (as described in the preceding section).

Unfortunately, the NPRM offers no interpretive guidance and is silent on this matter. If the Department’s interpretation of the terms “prevailing wage,” “wage rate,” “wage,” and “wages” used within the rule differs from EPI’s interpretation or the definition in the DBA, namely, that the Department does not consider these terms to include fringe benefits, then EPI asserts that this fails to carry out fully the purpose of the rule, because the PWD would allow employment that adversely affects the wages and working conditions of U.S. workers, in conflict with 8 CFR 214.2 (h)(6)(i)(A). Not including fringe benefits, as discussed in section VII, will give employers an incentive to hire H-2B workers instead of U.S. workers in order to save labor costs associated with fringe benefits.

The only way to protect against this adverse effect on wages is to: (1) include the fringe benefits listed in the DBA and SCA wages when determining an appropriate minimum or prevailing wage for occupations that are covered by the Acts; or (2) require employers subject to a collective bargaining agreement to recruit for and pay any H-2B employee hired according to all the terms of the CBA, including those requiring the payment of any and all fringe benefits enjoyed by U.S. workers; or (3) when an occupation is not covered by a CBA or either Act, the Department should calculate the appropriate amount of fringe benefits to be added on to the OES-based minimum or prevailing wage determination by using data from the ECEC as described in section VII; or (4) in the alternative, set the OES-based minimum or prevailing wage determination at the 90th percentile wage instead of at the arithmetic mean.



IX. EMPLOYER WAGE SURVEYS SHOULD NOT BE A PERMISSIBLE METHOD FOR ESTABLISHING PREVAILING WAGES FOR H-2B EMPLOYEES

EPI commends and supports the DOL's removal of the use of employer surveys as an option for determining prevailing wages for H-2B workers. Such surveys are fundamentally flawed, regardless of the methodology used, because employer surveys are conducted and/or funded by the employer or its agent. Such an arrangement creates an obvious conflict of interest. We do not assume that all employers would game the system and pay H-2B workers as little as possible in order to cut labor costs. But in light of numerous documented abuses in the H-2B program and of H-2B workers,²⁹ neither can we expect or assume that employers will act in an impartial manner when attempting to establish the wage levels of their foreign guestworker employees.

In practice, the use of employer surveys has been one-sided and inherently unfair to workers and their labor unions, because only the employer's voice is heard and considered by the DOL. Labor unions and other employee representatives have not been allowed to submit their own wage surveys – which may reach different conclusions than those of employer-funded or conducted surveys.

The Department's review of employer wage surveys has also been problematic. The DOL must expend valuable staff time in order to review employer surveys that are not entirely standardized, that vary in quality and accuracy, and which are redundant to the work that DOL has already done in collecting vast amounts of representative wage data. In fact, the DOL "has concluded that the review of such surveys is an inefficient and unnecessary expenditure of government resources." We agree. From EPI's perspective, the inherent conflicts of interest preclude the use of employer surveys. In any event, to the extent DOL believes that in some cases, "private surveys can provide useful information," we would argue, as has DOL, that "the cost of reviewing the surveys far outweighs their

²⁹ E.g., see, *H-2B Visa Program: Closed Civil Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*, U.S. Government Accountability Office, GAO-10-1053, September 30, 2010, available at: <http://www.gao.gov/new.items/d101053.pdf> (last visited October 27, 2010); *Close to Slavery: Guestworker programs in the United States*, Southern Poverty Law Center, March 2007, available at: http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf (last visited October 27, 2010); and *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*, Centro de los Derechos del Migrante, Inc. and American University Washington College of Law, July 2010, available at: http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrcl_picked_apart.pdf?rd=1 (last visited October 27, 2010).



utility.”³⁰ The DOL’s cost-benefit analysis is another fair and reasonable justification for eliminating the use of employer surveys.

X. THE PROPOSED REGULATION WILL NOT LEAD TO A LOSS OF PRODUCTION FOR EMPLOYERS BUT WILL LEAD TO GREATER RECRUITMENT OF U.S. WORKERS

The increased wage rates that result from the proposed rule will not lead, as some commenters have suggested, to a net loss of production because of excess employer capacity that goes unused – also known as “deadweight loss.” For Fiscal Years 2007-2009, “employers applied for an average of 236,706 certified H-2B positions per year,”³¹ and the H-2B yearly cap of 66,000 was reached in each of the three years. Thus, demand for H-2B workers has far exceeded statutory limits, even during the years of the current economic collapse or “Great Recession” (the worst recession since the Great Depression). Given this excess employer demand for H-2B workers, which has persisted even through two years of a catastrophic labor surplus, it is safe to assume that the production foregone by employers unwilling to pay a higher prevailing wage as determined by this proposed rule will be replaced by other employers who would otherwise have failed to receive the visas they requested because the statutory cap was exhausted. There is no reason to believe that such high demand for H-2B workers will not continue. In fact, if the economy continues to recover and grow, it is reasonable to conclude that demand will increase.

Instead of a loss of production, H-2B workers will be hired by the employers that need them the most and can pay the increased wages and costs associated with the H-2B application and recruitment process – resulting in a more efficient, market-based allocation of visas. The employers who do not wish to pay the new prevailing wages in addition to the fees and costs of the H-2B program will, under the proposed rule, have a greater incentive to hire U.S. workers, and to recruit them more extensively, perhaps even beyond the local region in which the employer is located or conducts its business operations.

In any case, if reduction in employer demand for H-2B visas results it will be minimal,³² and will not result in a level of demand that is lower than the 66,000 visas allowed by the annual H-2B cap. DOL correctly concludes that, “any loss of production resulting from some employers dropping out of the program will be

³⁰ 75 FR 61581

³¹ 75 FR 61583

³² See, DOL calculation, 75 FR 61583.



offset by production by other employers that would then be able to employ H-2B workers." EPI agrees and supports this conclusion.

If the U.S. economy and American employers truly need H-2B workers because bona fide labor shortages exist – then, according to the basic law of supply and demand – wage increases are natural and expected. When workers and labor are in short supply, wages should increase in order to attract workers to fill unoccupied positions. The fact that unemployment rates are at astronomical levels for major H-2B occupations such as landscape laborers, and that wages have not significantly increased in real terms within these occupations – while demand for H-2B workers has not subsided – is a sign that employers are gaming the system in order to hire a low-wage, flexible and indentured workforce which they prefer over U.S. workers. This has an adverse affect on the wages and working conditions of U.S. workers.

XI. CONCLUSION

For the reasons outlined in this comment, the Economic Policy Institute supports the Department of Labor's proposed rulemaking. We believe the proposed rule will have a positive impact on the wages and working conditions of H-2B and U.S. workers. The proposed rule should, however, be strengthened by taking into account prevailing fringe benefits or by setting a more protective prevailing wage, determined not by calculating the average locally prevailing rate but rather by adopting the wage paid to workers at the 90th percentile, as determined by the OES.

Sincerely,

Ross Eisenbrey
Vice President
Economic Policy Institute

Daniel Costa
Immigration Policy Analyst
Economic Policy Institute