

PREVAILING WAGE POLICY FOR NONAGRICULTURAL IMMIGRATION PROGRAMS

I. Background

In arriving at prevailing wage determinations, the same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1B professionals in specialty occupations or as fashion models of distinguished merit and ability, and the H-2B temporary nonagricultural labor certification program. The implementation of the wage component of the Occupational Employment Statistics (OES) program requires that policy clarification and procedural guidance be issued to ensure consistency among State Employment Security Agencies (SESAs) in making prevailing wage determinations.

II. General Prevailing Wage Policy

A. Summary

In determining prevailing wages for the permanent and H-2B temporary labor certification programs and the H-1B program the regulatory scheme at 20 CFR 656.40 must be followed. Where a wage determination has been issued under the Davis-Bacon Act (DBA) or the Service Contract Act (SCA), or negotiated in a collective bargaining agreement, that rate shall be controlling. In the absence of a wage determination issued under the DBA, SCA, or a collective bargaining agreement, SESAs are to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program. In the absence of a wage determination under the DBA, SCA, or a collective bargaining agreement, if the employer provides the SESA with a survey, whether public or private, which meets the requirements described in item J of this General Administration Letter, that rate shall be used by the SESA as the prevailing wage determination in response to that particular request. Where no wage determination exists under any of the above sources and the SESA is aware of alternative sources of wage information, whether public or private, the SESA may utilize that wage data for prevailing wage purposes as long as it meets the criteria established in item J with regard to the adequacy of employer-provided wage data.

The methodology in any type of survey must reflect the average (arithmetic mean) rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wages paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. This will, by definition of the term arithmetic mean, usually require computing a weighted average. Surveys which list a median or modal

wage rate may not be used. The regulations also provide that the wage offered by the employer shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages. The 5 percent variance does not apply to prevailing wage determinations based on DBA or SCA determinations nor does it apply to wages set forth in negotiated union agreements.

However, SESAs and employers should be aware that the Department's enforcement policy under the H-1B program does not allow a 5 percent variance if back wages are assessed as a result of an investigation conducted of an H-1B employer. In the H-1B program, the required wage rate is the higher of either the "actual wage" (see §655.731(a)(1)) or the "prevailing wage" (see §655.731(a)(2)). Where the required wage is the prevailing wage and if an employer pays a rate that is no less than 95 percent of the prevailing rate of wages, no violation will be found. However, if the employer is found to have paid less than 95 percent of the prevailing wage, a violation will be cited and back wages will be assessed and due based on 100 percent, not 95 percent, of the prevailing rate. The 5 percent variance does not apply where the required rate is the actual wage.

In issuing wage determinations the SESAs may be required to convert an hourly rate to a weekly, monthly or annual rate, or to convert a weekly, monthly or annual rate to an hourly rate. As a matter of policy, such conversions shall be based on 2,080 hours of work in a year.

B. "Similarly Employed"

Section 656.40 defines "similarly employed" as having substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" means:

- (1) Having jobs requiring a substantially similar level of skills within the area of intended employment; or
- (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

Occupations within an OES code will be considered as meeting the criteria of similarly employed as defined above.

C. "Area of Intended Employment"

A clear understanding of the definition of "area of intended employment" is necessary to properly implement the regulation at 20 CFR 656.40. The definition of "area of intended employment" at 20 CFR 656.3 states that the:

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within the normal commuting distance of the place of intended employment.

A determination of the normal commuting distance is not necessary for places of employment within an MSA since any place within an MSA is deemed to be within normal commuting distance. Although not specifically mentioned in the definition of "area of intended employment," any place within a Primary Metropolitan Statistical Area (PMSA) is also deemed to be within normal commuting distance of the place of intended employment, since PMSAs are derived from MSAs. For prevailing wage purposes, however, commuting distance will not be extended to Consolidated Metropolitan Statistical Areas. Counties not within an MSA or PMSA have been combined into "Balance of State" areas within each State. The allocation of the counties into Balance of State areas included consideration of prevailing commuting patterns. Counties within each Balance of State area are, for prevailing wage purposes, within the same area of intended employment.

The same OES wage for the same occupation should be used by the SESA for every location within the MSA, PMSA, or appropriate Balance of State area. In cases of cross-State MSAs/PMSAs, the OES data incorporates survey findings from the entire cross-State area, and will show the same information for all States affected by the cross-State MSA/PMSA.

D. Nature of the Job

Under § 656.40, the relevant factors in arriving at a prevailing wage rate are the nature of the job and the geographic locality of the job. In determining the nature of the job, the first order of inquiry is to determine the appropriate occupational classification. The Dictionary of Occupational Titles (DOT) job description that corresponds to the employer's job offer will normally be used to assign to the job the relevant 9-digit DOT code. The relevant DOT code will then be cross walked to an SCA or OES occupational code, as appropriate. If the job opportunity does not exist in the DOT, the SESA should default directly to the relevant SCA or OES occupational code. In the case of combination jobs, e.g., engineer-pilot, the

prevailing wage determination should be based on the SCA or OES code for the highest paying occupation.

E. Determining Similar Levels of Skills

In determining which occupational categories in the area of intended employment require levels of skills similar to those involved in the employer's job offer, information contained in the Dictionary of Occupational Titles, the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and, in particular, the Guide to Occupational Exploration code can be very helpful. If it is necessary to use these guides, the process will lead to a DOT classification which must then be crosswalked to the appropriate SCA or OES code.

F. Expansion of the Area of Intended Employment

The OES survey data will represent all responding employers in the area of intended employment who employ workers in that OES occupational code. If the OES survey does not include enough responses in that area and occupation to allow BLS to publish the data, the OES system will first default to all MSAs, PMSAs, and Balances of State areas contiguous to the requested area within that State. If this still does not result in publishable data, the system will default to statewide information for that occupation. Because of the size of the sample, it is unlikely this will occur except in very unusual occupations or in small States.

G. Separate Wage Systems

It cannot be overemphasized that the nature of the employer is not a relevant factor in making prevailing wage determinations. As noted above, the relevant factors are the job and the geographic locality of the job.

It has been determined that the language on pages 122 and 123 of Technical Assistance Guide No. 656 Labor Certifications (TAG) which indicates that an employer may challenge a finding as to the prevailing wage for an occupation, such as school teaching, on the basis that there are separate prevailing wages applicable to employment in public and private schools, is not supportable by the regulation at § 656.40. As stated by the Board of Alien Labor Certification Appeals (BALCA) in *Hathaway Children's Service 91-INA-388, February 4, 1994*, in relevant part, "(t)he underlying purpose of establishing a prevailing wage is to establish a minimum level of wages for workers employed in jobs requiring similar skills and knowledge levels in a particular locality." Factors going to the nature of the employer, such as whether the employer is public or private, profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 656.40. Consequently, OES wage rates are based upon cross-industry surveys.

H. Skill Levels in Wage Determinations

The level of skill required by the employer for the job opportunity is to be considered in making prevailing wage determinations. The OES wage survey will produce two wage levels which distinguish between positions requiring significantly different degrees of skills in the occupation. The SESA will determine which of the two levels in the OES survey is appropriate, *i.e.*, a distinction must be made based on whether or not the job opportunity involved in the employer's job offer requires skills at a level I or a level II, as defined below.

To establish uniformity among SESAs in evaluating surveys and making prevailing wage determinations within the resources available for immigration programs, prevailing wage rates for the skill levels described below should be determined in an occupation when the SESA makes a prevailing wage determination.

1. Level I

Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgment and provide experience and familiarization with the employer's methods, practices, and programs. They may assist staff performing tasks requiring skills equivalent to a level II and may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

2. Level II

Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. They may supervise or provide direction to staff performing tasks requiring skills equivalent to a level I. These employees receive only technical guidance and their work is reviewed for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations.

If a baccalaureate degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation which requires an advanced degree (Masters or Ph.D.) shall be the rate for workers performing tasks requiring skills at a level II. In this case, the requirement

for advanced education substitutes for the skills required at a level II. Where an advanced degree is normally required for entry into the occupation, the wage rate for a job offer in that occupation which requires such a degree shall be the rate for workers performing tasks requiring skills at a level I, unless there are other requirements contained in the job offer or components thereof which require skills that are at a level II. For example, a job opportunity for a librarian, an occupation for which a Master's degree is normally required for entry into the occupation, would generally be considered to require skills at a level I, unless other requirements in the job offer or components thereof require skills at a level II.

Where State licensure is required for an individual to independently perform all of the duties encompassed by the occupation, such workers shall be considered to be performing work requiring skills at a level II, unless the employer can present sufficient evidence that the alien does not, in fact, independently perform all of the duties encompassed by the occupation.

I. Responses to Requests for Wage Determinations

To enable SESAs to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations will be in writing. The requests should specify the employer's title for the job, a brief description of the job duties, the education, training and experience requirements, and any other information deemed necessary by the SESA for case processing or tracking. The name and address of the employer, contact person and telephone number, and the city or county of intended employment, if different from the employer's address, should be indicated.

The SESA's responses shall state the specific wage rate applicable to the employer's job opportunity and indicate the source of such information. The response shall also specify in bold letters that the rate is valid for filing applications and attestations for 90 days from the date of the response.

Responses to requests for a prevailing wage determination should be sent to the employer or its representative in writing in a timely manner, preferably within 14 working days of receipt of the request. If the employer provides to the SESA its own published or privately-funded survey and requests SESA acceptance of the survey's use for prevailing wage purposes, responses to such requests should be sent to the employer or its representative in writing in a timely manner, preferably within 30 working days of the receipt of the request. If the employer's survey is not accepted, the response to the employer shall include the reasons why the survey is not acceptable (e.g., the survey presented only the median wage rate, or the geographic area covered by the survey is broader than that which is necessary to obtain a representative sample), and shall provide the

employer with the appropriate prevailing wage rate as derived from the SCA or OES survey data, as appropriate.

Lastly, it is important to note that §656.40(c) provides that a prevailing wage determination for labor certification [or labor condition application] purposes shall not permit an employer to pay a wage lower than that required under any other Federal, State, or local law. For example, if the OES wage rate is lower than the Federal, State, or local minimum wage, the response to the employer's request should indicate that the employer must offer at least the minimum wage provided by Federal, State, or local law, whichever is higher. Since the OES wage data is collected in the year prior to the data being available to the SESA, this may occur in some instances.

J. Use of Employer-Provided Published Wage Surveys or Employer-Conducted Surveys

In determining prevailing wage rates in the absence of a wage determination issued pursuant to the DBA, the SCA, or an applicable wage rate from a collective bargaining agreement, the SESA shall consider wage data that has been furnished by the employer, *i.e.*, wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer. The use of such employer-provided wage data is an employer option. However, if an employer wishes to use alternative wage data, it will be incumbent upon the employer to make a showing that the survey or other wage data meet the criteria outlined below. In all cases where an employer submits a survey or other wage data for which it seeks acceptance, the employer must provide the SESA with enough information about the survey methodology (e.g., sample frame size and source, sample selection procedures, survey job descriptions) to allow the SESA to make a determination with regard to the adequacy of the data provided and its adherence to these criteria. If the employer does not present sufficient information with its request, the SESA shall request such additional information from the employer as may be necessary to make the determination. Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the SESA cannot be taken into consideration in making a wage determination.

- (1) The data upon which the survey was based must have been collected within 24 months of the publication date of the survey or, if the employer itself conducted the survey, within 24 months of the date the employer submits the survey to the SESA.
- (2) If the employer submits a published survey, it must have been published within the last 24 months and it must be

the most current edition of the survey with wage data that meet the criteria under this section.

- (3) The survey or other wage data must reflect the area of intended employment. A valid arithmetic mean for an area larger than an OES wage area, whether an MSA, PMSA, or an OES Balance of State area, may only be used if there are not sufficient workers in the specific occupational classification relevant to the employer's job opportunity in the area of intended employment. However, the area of intended employment should not be expanded beyond that which is necessary to produce a representative sample. In all cases where an area that is larger than an OES wage area is used, the employer must establish that there were not sufficient workers in the area of intended employment, thus necessitating the expansion of the area surveyed.
- (4) The job description applicable to the employer's survey or other wage data must be an adequate match with the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purposes. Published wage surveys may not always present an arithmetic mean for job opportunities requiring skills at a level I and level II. In such instances, the arithmetic mean contained in the published survey that most closely conforms with the employer's job opportunity should be used as the basis for the prevailing wage determination. The job description submitted on the request for acceptance of an employer-provided survey or other wage data will be used in determining the appropriate level of skill to be applied.
- (5) The wage data must have been collected across industries that employ workers in the occupation.
- (6) The survey or other wage data must provide an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. In all cases where an employer provides the SESA with wage data for which it seeks acceptance, measures of central tendency other than the arithmetic mean, such as the median or modal wage rates, cannot be used as the basis for the prevailing wage determination.
- (7) In all cases where an employer provides the SESA with a survey or other wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with

recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data.

It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

K. Documentation Issues in Responding to Prevailing Wage Requests

It is incumbent upon SESAs to organize the prevailing wage function and establish controls that will enable them to provide information regarding a particular prevailing wage determination, to answer questions if it is required in an enforcement action conducted by the Department of Labor, and to adequately represent the certifying officer before the Board of Alien Labor Certification Appeals.

Requests from employers for wage determinations shall be filed in writing with the organizational subcomponent of the SESA responsible for alien labor certification prevailing wage determinations. Only that component shall respond to requests for wage information for immigration purposes. A dated copy of the prevailing wage determination provided to the employer should be maintained by the SESA for two years. The relevant portions of an employer-provided survey must also be maintained with the determination for the requisite period.

L. Challenges to Prevailing Wage Determinations

Employers who wish to challenge prevailing wage determinations made by SESAs in connection with temporary labor certification applications, labor condition applications, and attestations, may do so pursuant to the provisions of the Employment Service Complaint System. See 20 CFR part 658, subpart E. However, under the permanent labor certification program, there are regulatory provisions and procedures that allow employers to file challenges regarding prevailing wage determinations or findings made by SESAs directly with the regional certifying officer.