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Foreign Labor Certification

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Announcements

December 3, 2020. OFLC Announces Updates to Implementation of the Wage Protections Interim Final Rule; Compliance with District Court Orders

On December 1, 2020, the U.S. District Court for the Northern District of California issued an order in *Chamber of Commerce, et al. v. DHS, et al.*, No. 20-cv-7331, finding that the U.S. Department of Labor (the Department) failed to show it had good cause to forgo advance notice and comment under the Administrative Procedure Act for the Interim Final Rule (IFR), *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 FR 63872 (Oct. 8, 2020). The

court's order sets aside the IFR, which took effect on October 8, 2020 and implemented reforms to the prevailing wage methodology for the Permanent Employment Certification, H-1B, H-1B1, and E-3 visa programs. Similarly, on December 3, 2020, the U.S. District Court for the District of New Jersey issued a preliminary injunction in *ITServe Alliance, Inc., et al. v. Scalia, et al.*, No. 20-cv-14604, applying to the plaintiffs in that case.

The Department is taking necessary steps to comply with the courts' orders, including making required technical changes to the Foreign Labor Application Gateway (FLAG) system, in a manner that minimizes service disruptions for customers and OFLC staff. Specifically, the Department must make changes to the FLAG system modules to replace the 10/8/2020-6/30/2021 wage source year data that was implemented under the IFR with the OES prevailing wage data that was in effect on October 7, 2020. To reduce the risk of unintended system problems or errors while this occurs, employers and their authorized attorneys or agents may experience a brief delay in their ability to use the FLAG system to submit new *Labor Condition Applications for Nonimmigrant Workers* (LCAs), Form ETA-9035/9035E, and receive determinations on *Applications for Prevailing Wage Determination*, Form ETA-9141, where the Occupational Employment Statistics (OES) survey data is the prevailing wage source.

Implementation Timeframe for Technical Changes to FLC Online Data Center

- The OES prevailing wage data for each SOC and area of intended employment that was in effect on October 7, 2020 (*i.e.*, data for 7/1/2020-10/7/2020) has remained publicly accessible at <https://www.flcdatacenter.com/>.
- To limit any confusion for stakeholders, beginning at approximately 12:00PM (Noon) Eastern Time on December 4, 2020, this data source will be updated at <https://www.flcdatacenter.com/> to reflect the correct prevailing wage data for each SOC and area of intended employment through June 30, 2021.

Implementation Timeframe for Filing LCAs

- All Form ETA-9035/9035Es submitted using the FLAG system through 5:59AM Eastern Time on December 4, 2020, where the OES survey data is the prevailing wage source, will continue to be processed and issued a final determination without delay.
- Beginning around 6:00AM Eastern Time on December 4, 2020, the FLAG system will be temporarily unavailable to deploy necessary code changes to temporarily **disable** the OES prevailing wage calculator, which uses the 10/8/2020-6/30/2021 wage source year data to prepare Form ETA-9035/9035Es.
- Around 8:30AM Eastern Time on December 4, 2020, the FLAG system will be back online; however, employers and their authorized attorneys or agents will temporarily not be able to submit applications for processing where OES survey data is the prevailing wage source.
- Beginning around 8:30AM Eastern Time on December 9, 2020, employers and their authorized attorneys or agents will be able to submit new LCAs, Form ETA-9035/9035E, using the OES survey data that was in effect on October 7, 2020.

Implementation Timeframe for Processing Prevailing Wage Determinations

- OFLC's National Prevailing Wage Center (NPWC) has temporarily paused processing pending Form ETA-9141s for use in filing LCA and PERM applications. However, employers and their authorized attorneys or agents may continue to file new requests for a prevailing wage determination at any time.
- Beginning around 8:30AM Eastern Time on December 15, 2020, OFLC's NPWC will resume processing all pending and new Form ETA-9141s for use in filing LCA and PERM applications, and will use the OES survey data that was in effect on October 7, 2020 for prevailing wage determinations where the OES survey data is the prevailing wage source.

Opportunity to Request NPWC Review of a PWD Issued Under the IFR

Any employer desiring review of a PWD issued using the 10/8/2020-6/30/2021 wage source year data that was implemented under the IFR may make a request for review by the NPWC Director under 20 CFR 656.41 on or before January 4, 2021, and the Director will consider such request timely under 20 CFR 656.41(a).

Please use one of the following methods to submit a timely request for NPWC Director review:

- Online (preferred):** Please access your [Foreign Labor Application Gateway \(FLAG\)](#) System account to request review of a prevailing wage determination issued by the NPWC Director. In the Historical Cases table, search for the case number, then open the case details. In the Actions tab, select Request Redetermination. You will be prompted to add a case note and may upload a document if needed. Upon submission, your request will be routed to an analyst for review. You will receive an email confirmation that your request submitted successfully.
- Email:** FLC.PWD@dol.gov
In the email subject line, please include the phrase “IFR Request for Review” **followed by** the full case number on the Form ETA-9141.
- Mail:** Employment and Training Administration
Office of Foreign Labor Certification
National Prevailing Wage Center
200 Constitution Ave NW
Room N-5311
Washington, DC 20210
- Attn: IFR Request for Review
- Please include either the full case number in the cover letter of the request for NPWC Director review **or** a hard copy of the Form ETA-9141 issued under the IFR methodology.

November 23, 2020. OFLC Announces Webinar on December 9, 2020, to Update Stakeholders on the Process for Filing H-2B Applications With a Start Date of April 1, 2021, or Later

The Office of Foreign Labor Certification (OFLC) invites stakeholders to participate in a webinar that provides best practices and helpful tips for preparing H-2B Applications for Temporary Employment Certification (Form ETA-9142B and appendices). The webinar will discuss:

- Regulatory timeframes for filing applications with a start date of need of April 1, 2021, or later;
- Procedures OFLC uses to randomly select H-2B applications for review and processing; and
- Actions the Department is taking to prepare the [Foreign Labor Application Gateway \(FLAG\) System](#) to support the submission of applications beginning January 1, 2021.

Details of the webinars are as follows:

Date: December 9, 2020

Start Time: 2:30 EST

Link: <https://usdol.webex.com/usdol/j.php?MTID=m7935686fca176037f113697ee0501664>

Meeting password: hfGmm4EkT36

Call-in information: *Due to the size of the call, please use the following toll-free number for audio:

- Conference Number: 800-779-2595
- Participant Passcode: 7995398

Please note: Webinars are limited to 1,000 participants.

November 19, 2020. OFLC Posts New Adverse Effect Wage Rates Webpage

On November 5, 2020, the Department of Labor (Department) published a final rule updating the methodology for determining hourly Adverse Effect Wage Rates (AEWR) for non-range agricultural occupations in the H-2A visa program. See 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 (Nov. 5, 2020) (“2020 AEWR Final Rule”). The AEWR is the minimum wage rate the Department has determined must be offered and paid by employers to H-2A workers and workers in corresponding employment to ensure that the employment of H-2A workers does not adversely affect the wages of agricultural workers in the U.S. Beginning on December 21, 2020, H-2A job orders submitted for non-range occupations must comply with the new methodology.

The Office of Foreign Labor Certification (OFLC) has created a new webpage that consolidates AEWR information for the H-2A

program. This webpage contains the monthly AEW for range occupations, as well as the hourly AEWs for non-range occupations. The hourly AEWs for non-range occupations on the new webpage will apply to H-2A job orders submitted on or after December 21, 2020, when the 2020 AEW Final Rule becomes effective. During the transition to the new methodology, OFLC will also maintain a separate webpage that displays the hourly AEWs in effect for job orders submitted before December 21, 2020.

- [View the AEW page for current rates in effect through December 20, 2020](#)
- [View the AEW page for rates that will go into effect starting December 21, 2020](#)
- [View the published 2020 AEW Final Rule](#)
- [View the FAQs on the 2020 H-2A AEW Final Rule](#)

November 18, 2020. OFLC Releases the H-2B Foreign Labor Recruiter List for Fiscal Year 2020

The Office of Foreign Labor Certification (OFLC) has published an updated list of the names of foreign labor recruiters for the H-2B program as required by [20 CFR 655.9\(c\)](#).

The list contains the name and location of persons or entities identified on Appendix C of the Form ETA-9142B that were hired by, or working for, the recruiter that employers have indicated they engaged, or planned to engage, in the recruitment of prospective H-2B workers to perform the work described on their H-2B application.

The H-2B Foreign Labor Recruiter List includes only those names and locations associated with H-2B applications that were processed or issued a final decision during the October 1, 2019, through September 30, 2020, reporting period of FY 2020.

By publishing the foreign labor recruiter list, OFLC is ensuring greater transparency for the H-2B worker recruitment process and facilitating information sharing between the U.S. Department of Labor and other agencies.

- [View the foreign labor recruiter list](#)
- [View FAQs regarding the foreign labor recruiting list](#)

November 18, 2020. OFLC Releases Public Disclosure Data and Selected Program Statistics for Fiscal Year 2020

The Office of Foreign Labor Certification (OFLC) has released a comprehensive set of public disclosure data (through the fourth quarter of fiscal year 2020) drawn from employer applications requesting prevailing wage determinations and labor certifications for the PERM, LCA (H-1B, H-1B1, E-3), H-2A, H-2B, CW-1, and Prevailing Wage programs.

The public disclosure files include all final determinations OFLC issued for these programs during the October 1, 2019, through September 30, 2020, reporting period of fiscal year 2020.

OFLC has also released selected program statistics for the fourth quarter of fiscal year 2020 for the PERM, LCA (H-1B, H-1B1, E-3), H-2A, H-2B, CW-1, and Prevailing Wage programs.

- View the [public disclosure files](#) and corresponding record layouts containing detailed descriptions of each available data element.
- View the [selected program statistics](#) containing key program information.

November 2, 2020. U.S. Department of Labor Issues Final Rule to Update Adverse Effect Wage Rate Methodology To Protect American Workers and Help American Farmers

The U.S. Department of Labor today announced a final rule that updates the methodology for determining the annual Adverse Effect Wage Rates (AEWRs) in the H-2A visa program.

The AEWR is a minimum wage rate that provides a floor below which the wages of agricultural workers cannot be negotiated. Requiring employers to pay the AEWR when it is the highest applicable wage is the primary way the Department meets its statutory obligation to certify that the employment of foreign workers will not adversely affect workers in the United States similarly employed. The new rule improves the consistency of the AEWRs, provides stronger protections for workers, and establishes better stability and predictability for employers in complying with their wage obligations.

For the vast majority of agricultural jobs, the rule uses the average hourly wages for field and livestock workers (combined), as reported by the U.S. Department of Agriculture's Farm Labor Survey published in November 2019, as the AEWRs for field and livestock worker occupations through calendar year 2022. Beginning in 2023, and annually thereafter, the Department will adjust these AEWRs by the percentage change in the Bureau of Labor Statistics' (BLS) Employment Cost Index for wages and salaries for the preceding 12-month period.

For all other agricultural jobs, the Department will set and annually adjust the AEWRs using the average hourly wages for the occupational classification reported by the BLS Occupational Employment Statistics (OES) Survey program. These agricultural jobs are often supervisory or higher skilled/uniquely skilled, such as construction jobs, which pay higher wages than typical farming occupations. Using the OES survey to establish AEWRs for these higher-skilled jobs will allow the Department to consistently establish occupation-specific AEWRs that better reflect the wages paid for such jobs and better protect against adverse effect on similarly employed United States workers.

The changes implemented in this rule also address stakeholder concerns about the potential for significant and unpredictable wage changes from year-to-year associated with the Department's prior AEWR methodology, while ensuring better wage protections for United States workers similarly employed in higher-skilled agricultural jobs. More predictable wage adjustments in the H-2A program will help American farmers plan and budget for their workforce needs, and ensure that wages in the H-2A program keep pace with steadily increasing wages in the wider economy. By taking this action, the Department is protecting U.S. workers and helping farmers keep food on America's tables.

The Department intends to issue a second final rule to finalize the remainder of the July 29, 2019, proposed rule that will govern other aspects of the certification of agricultural labor or services performed by H-2A workers, and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers.

A copy of the final rule is available on the Office of Foreign Labor Certification's (OFLC) website. The final rule will publish in the *Federal Register* at a later date.

- [View the final rule to be published in the *Federal Register*](#)

Although the Office of the Federal Register may make minor technical edits to the version of the final rule posted with today's announcement, the substance of the final rule will remain the same. The version to be published in the *Federal Register* will be the official version that amends the current regulations.

OFLC has also prepared Frequently Asked Questions (FAQ) to help stakeholders better understand the H-2A AEWR final rule:

- [View the FAQs on the H-2A AEWR final rule](#)

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