

duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of March, 2009.

Ivan Strasfeld,

Director of Exemption Determinations,
Employee Benefits Security Administration,
U.S. Department of Labor.

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DEPARTMENT OF LABOR

Employment and Training Administration

Wage and Hour Division

Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers

AGENCY: Employment and Training Administration, Department of Labor in concurrence with the Wage and Hour Division, Employment Standards Administration, Department of Labor.

ACTION: Notice of withdrawal of interpretation.

SUMMARY: The Department of Labor (DOL or the Department) withdraws for further consideration an interpretation of the Fair Labor Standards Act (FLSA) published on December 18 and 19, 2008. The interpretation, which was published at 73 FR 77148-52 (H-2A program) and 73 FR 78039-41 (H-2B program), articulated an opinion that the FLSA and its implementing regulations do not require employers to reimburse workers under the H-2A and H-2B nonimmigrant visa programs, respectively, for relocation expenses even when such costs result in the workers being paid less than the minimum wage. This interpretation is hereby withdrawn for further consideration by the Department and may not be relied upon as a statement of agency policy.

DATES: *Effective Date:* March 26, 2009.

FOR FURTHER INFORMATION CONTACT:

Richard Brennan, Director of Office of Interpretations and Regulatory Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3506, Washington, DC 20210; Telephone (202) 693-0051 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, requires covered employers to pay their nonexempt employees a federal minimum wage and overtime premium pay of time and one-half the regular rate of pay for hours worked in excess of 40 in a week. The agency responsible for administration of the FLSA is the Wage and Hour Division, Employment Standards Administration, of the Department of Labor. The FLSA and its regulations prohibit an employer from either deducting from an employee's pay or imposing an expense upon an employee for costs that are primarily for the benefit of the employer, if to do so results in an employee receiving less than the minimum wage. 29 U.S.C. 203(m); 29 CFR part 531. Thus, during the first workweek, workers must be compensated at a rate that would bring their wages up to minimum wage, taking into account pre-employment expenses that primarily benefit the employer. In *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), the U.S. Court of Appeals for the Eleventh Circuit held that, under the FLSA regulations, the transportation from Mexico to Florida and visa costs of

temporary nonimmigrant workers coming to the U.S. under the H-2A visa program, *see* 8 U.S.C.

1101(a)(15)(H)(ii)(a), were primarily for the grower's benefit because such costs were necessary and incident to the employment of such workers. A number of U.S. district courts have extended the *Arriaga* holding regarding the FLSA requirements to temporary nonimmigrant workers admitted into the U.S. under the H-2B visa program, 8 U.S.C. 1101(a)(15)(H)(ii)(b). *See, e.g., De Leon-Granados v. Eller & Sons Trees Inc.*, 2008 WL 4531813 (N.D. Ga., Oct. 7, 2008); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. Feb. 11, 2008); *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008); *Recinos-Recinos v. Express Forestry Inc.*, 2006 WL 197030 (E.D. La. Jan. 24, 2006); *but see Castellanos-Contreras v. Decatur Hotels LLC*, No. 07-30942 (5th Cir. Feb. 11, 2009), *pet. for reh'g filed* (Mar. 11, 2009), *rev'g*, 488 F. Supp. 2d 565 (E.D. La. 2007).

On December 18, 2008, DOL published final regulations revising the procedures for the issuance of labor certifications to employers sponsoring H-2A nonimmigrants for admission to perform temporary agricultural labor or services and the procedures for enforcing compliance with attestations made by those employers. 73 FR 77110. The H-2A Final Rule became effective on January 17, 2009. The preamble accompanying the H-2A Final Rule included a discussion of the *Arriaga* issue, concluding that the Eleventh Circuit's decision was wrongly decided and that inbound travel expenses of H-2A workers do not primarily benefit their employers. 73 FR 77148-52. DOL characterized this discussion as an interpretation of the FLSA, 73 FR 77151, and did not seek public comment on the issue when it issued the H-2A Notice of Proposed Rulemaking, 73 FR 8538 (Feb. 13, 2008). Prior to the issuance of the preamble discussion, courts uniformly had held that relocation expenses were primarily for the benefit of employers.

On December 19, 2008, DOL published final regulations revising the procedures for the issuance of labor certifications to employers sponsoring H-2B nonimmigrants for admission to perform temporary nonagricultural labor or services and the procedures for enforcing compliance with attestations made by those employers. 73 FR 78019. The Final Rule became effective on January 18, 2009. The preamble accompanying the Final H-2B Rule included a discussion of the *Arriaga* issue, concluding that the Eleventh Circuit's decision and the district court

decisions that followed its reasoning in the H-2B context were wrongly decided and that inbound travel expenses of H-2B workers do not primarily benefit their employers. 73 FR 78039-41. DOL characterized this discussion as an interpretation of the FLSA, 73 FR 78041, and did not seek public comment on the issue when it issued the H-2B Notice of Proposed Rulemaking, 73 FR 29941 (May 22, 2008). Prior to the issuance of the preamble discussion, courts uniformly had held that relocation expenses were primarily for the benefit of employers.

This matter concerns important issues as to whether various pre-employment expenses incurred by workers lawfully may result in workers' weekly wages being reduced below the minimum wage. Because of the reach of FLSA coverage, any interpretation of FLSA regulations has wide-ranging effects; the interpretation of section 203(m) of the FLSA and its regulations in the preamble of the H-2A and H-2B Final Rules may have ramifications well beyond the workers and employers subject to the H-2A and H-2B rules. Indeed, the H-2A and H-2B preamble interpretation of the FLSA is not codified in any regulatory requirement set out in the H-2A and H-2B rules, and DOL did not seek public comment on the issue from the H-2A and H-2B regulated communities. DOL is especially sensitive to potential adverse impacts an interpretation, which was included in the preamble in order to state a policy position of the prior Administration, might have on our Nation's most vulnerable workers, including low-wage U.S. workers and foreign guest workers. For these reasons, DOL believes that this issue warrants further review. Consequently, in accordance with authority granted under the FLSA, 29 U.S.C. 203(m) and 259, as well as the INA, 8 U.S.C. 1101(a)(15)(h)(ii)(a), 1101(a)(15)(h)(ii)(b), 1103(a)(6), 1184(c), 1188; 8 CFR 214.2(h); and 20 CFR 655.50(a), DOL withdraws the FLSA interpretation at 73 FR 77148-52 and at 73 FR 78039-41 for further consideration and the interpretation may not be relied upon as a statement of agency policy for purposes of the Portal-to-Portal Act, 29 U.S.C. 259 or otherwise.¹ After reconsideration of this issue, DOL will provide the public with interpretive guidance through a

mechanism established for disseminating the Department's opinions and interpretations of the FLSA.

Signed in Washington, DC, this 20th day of March 2009.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

Shelby Hallmark,

Acting Assistant Secretary, Employment Standards Administration.

[FR Doc. E9-6623 Filed 3-25-09; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

Workforce Investment Act; Lower Living Standard Income Level

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Determination of Lower Living Standard Income Level.

SUMMARY: Under Title I of the Workforce Investment Act (WIA) of 1998 (Pub. L. 105-220), the Secretary of Labor annually determines the Lower Living Standard Income Level (LLSIL) for uses described in the law. WIA defines the term "Low Income Individual" as one who qualifies under various criteria, including an individual who received income for a six-month period that does not exceed the higher level of the poverty line or 70 percent of the LLSIL. This issuance provides the Secretary's annual LLSIL for 2009 and references the current 2009 Health and Human Services "Poverty Guidelines."

DATES: *Effective Date:* This notice is effective on the date of publication in the **Federal Register**.

ADDRESSES: Send written comments to: Mr. Samuel Wright, Department of Labor, Employment and Training Administration, 200 Constitution Avenue, NW., Room C-4510, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Please contact Mr. Samuel Wright, Telephone (202) 693-2870; Fax (202) 693-3015 (these are not toll free numbers).

SUPPLEMENTARY INFORMATION: It is the purpose of the Workforce Investment Act of 1998 "to provide workforce investment activities, through statewide and local workforce investment systems, that increase the employment, retention, and earnings of participants, and increase occupational skill attainment by participants, and as a result, improve

the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation."

The LLSIL is used for several purposes under WIA. Specifically, WIA Section 101(25) defines the term "low income individual" for eligibility purposes, and Sections 127(b)(2)(C) and 132(b)(1)(B)(v)(IV) define the terms "disadvantaged youth" and "disadvantaged adult" in terms of the poverty line or LLSIL for state formula allotments. The Governor and state/local workforce investment boards (WIBs) use the LLSIL for determining eligibility for youth, eligibility for employed adult workers for certain services and for the Work Opportunity Tax Credit (WOTC). We encourage the Governors and state/local WIBs to consult WIA regulations and the preamble to the WIA Final Rule (published at 65 FR 49294 August 11, 2000) for more specific guidance in applying the LLSIL to program requirements. The Department of Health and Human Services (HHS) published the annual 2009 update of the poverty-level guidelines in the **Federal Register**, Vol. 74, No. 14, January 23, 2009, pp. 4199-4201. The HHS 2009 Poverty guidelines may also be found on the Internet at: <http://aspe.hhs.gov/poverty/09fedreg.pdf>. ETA plans to have the 2009 LLSIL available on its Web site at [<http://www.doleta.gov/llsil/2009/>].

WIA Section 101(24) defines the LLSIL as "that income level (adjusted for regional, metropolitan, urban and rural differences and family size) determined annually by the Secretary [of Labor] based on the most recent lower living family budget issued by the Secretary." The most recent lower living family budget was issued by the Secretary in the fall of 1981. The four-person urban family budget estimates, previously published by the Bureau of Labor Statistics (BLS), provided the basis for the Secretary to determine the LLSIL. BLS terminated the four-person family budget series in 1982, after publication of the fall 1981 estimates. Currently, BLS provides data to ETA through which ETA develops the LLSIL tables, as provided in the Appendices.

ETA published the 2008 updates to the LLSIL in the **Federal Register** of April 25, 2008, at 73 FR 22435 and the corrections to tables 4 and 5 in the **Federal Register** of June 10, 2008, at 73 FR 32740. These notices again updates the LLSIL to reflect cost of living increases for 2008, by applying the percentage change in the most recent 2008 Consumer Price Index for All Urban Consumers (CPI-U) for an area, compared with the 2007 CPI-U to each

¹ On March 17, 2009, DOL proposed to suspend the H-2A Final Rule. 74 FR 11408. The proposed suspension is open to public comment, but regardless of the outcome of the notice of proposed rulemaking, the Department withdraws for further consideration the interpretation of the FLSA that appeared in the preamble to the H-2A Final Rule.