DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB61

Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program; Amendment of Effective Date

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (we or us) is amending the effective date of Wage Methodology for the Temporary Non-agricultural Employment H–2B Program; Final Rule, 76 FR 3452, Jan. 19, 2011 (the Wage Rule). The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H–2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H–2B status. The effective date of the Wage Rule was set at January 1, 2012. This Final Rule revises the effective date of the Wage Rule to 60 days after the publication date of this Final Rule.

DATES: The effective date of the final regulations published in the **Federal Register** on January 19, 2011, at 76 FR 3452, is September 30, 2011.

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Amendment of Effective Date of the Wage Rule

A. The Prevailing Wage Final Rule

We published the Wage Rule on January 19, 2011. Under the Wage Rule, the prevailing wage for the H–2B program is based on the highest of the following: The wage rate established under an agreed-upon collective bargaining agreement; the wage rate established under the Davis-Bacon Act (DBA) or the McNamara O'Hara Service Contract Act (SCA) for that occupation in the area of intended employment; or the arithmetic mean wage rate established by the Occupational Employment Statistics (OES) wage survey for that occupation in the area of intended employment. The Wage Rule also permits the use of private wage surveys in very limited circumstances. Lastly, the Wage Rule required the new wage methodology to apply to all work performed on or after January 1, 2012. We selected the January 1, 2012 effective date because ''many employers already may have planned for their labor needs and operations for this year in reliance on the existing prevailing wage methodology. In order to provide employers with sufficient time to plan for their labor needs for the next year and to minimize the disruption to their operations, the Department is delaying implementation of this Final Rule so that the prevailing wage methodology set forth in this Rule applies only to wages paid for work performed on or after January 1, 2012.'' 76 FR 3462, Jan. 19, 2011.

On January 24, 2011, the plaintiffs in *CATA* v. *Solis,* Civil No. 2:09–cv–240–LP (E.D. Pa.), filed a motion for an order to require the Department to comply with the court's August 30, 2010 order,[1] arguing that the Wage Rule violated the Administrative Procedure Act (APA) because ''it did not provide notice to Plaintiffs and the public that DOL was considering delaying implementation of the new regulation and because DOL's reason for delaying implementation of the new regulation is arbitrary.'' *CATA* v. *Solis,* Dkt. No. 103–1, Plaintiff's Motion for an Order Enforcing the Judgment at 2 (Jan. 24, 2011). On June 16, 2011, the court issued a ruling that invalidated the January 1, 2012 effective date of the Wage Rule and ordered us to announce a new effective date for the rule within 45 days from June 16. The basis for the court's ruling was twofold: (1) That the almost one-year delay in the effective date was not a ''logical outgrowth'' of the proposed rule, and therefore violated the APA; and (2) that the Department violated the INA in considering hardship to employers when deciding to delay the effective date. The court held that ''it is apparent that in this case the notice of proposed rulemaking was deficient.'' *CATA* v. *Solis,* Dkt. No. 119, 2011 WL 2414555 at *4. The court noted that the NPRM said nothing about a delayed effective date, and accordingly ''the public would * * * be justified in assuming that any delay in the effective date would mirror the minimal delays associated with the issuance of similar wage regulations over the past several decades.'' *Id.* In finding a violation of the INA, the court relied extensively on the 1983 district court decision in *NAACP* v. *Donovan,* 566 F. Supp. 1202 (D.D.C. 1983), which held that the Department could not phase in a wage regime based upon a desire to alleviate hardship on small businesses, because '' '[in] administering the labor certification program, DOL is charged with protection of workers.' '' *CATA* v. *Solis,* Dkt. No. 119, 2011 WL 2414555 at *4 (citing *NAACP* v. *Donovan,* 566 F. Supp. at 1206).

In response to the court's order, we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from this rulemaking. Because we anticipated the date of publication of the final rule to be on or about August 1, 2011, we said in the NPRM that the effective date of the Wage Rule would be on or about October 1, 2011. The Wage Rule would be effective for wages paid to H–2B workers and U.S. workers recruited in connection with an H–2B labor certification for all work performed on or after the new effective date.

II. Discussion of Comments

A. Overview of Comments Received

We received 59 comments in response to the NPRM. Forty-two of the comments were completely unique, one was a duplicate, and the remainder were a form letter or based on a form letter. Commenters represented individual employers, worker advocacy groups, business associations, agents, the Chief Counsel for the Office of Advocacy of the Small Business Administration (Chief Counsel for Advocacy, SBA), Members of Congress, and various interested members of the public. The comments are discussed in greater detail below.

Some of the comments were outside the scope of the proposed rule. The NPRM proposed a new effective date for the Wage Rule and specifically provided that any comments relating to the merits of the Wage Rule would be deemed out

[1] On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *CATA v. Solis,* 2010 WL 3431761 (E.D. Pa.) ruled that the Department had 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, and failing to consider comments relating to the choice of appropriate data sets in deciding to rely on OES data rather than SCA and DBA in setting the prevailing wage rates. The court ordered the Department to ''promulgate new rules concerning the calculation of the prevailing wage rate in the H–2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order.'' The order was later amended to provide additional time, until January 18, 2011, to promulgate a final rule.

of scope and would not be considered. Furthermore, the NPRM stated that under the court's order, we cannot consider specific examples of employer hardship to delay the effective date of a new wage rule. See *CATA* v. *Solis,* Dkt. No. 119, 2011 WL 2414555 at *4. Many comments went well beyond the scope of amending the effective date of the Wage Rule. Among the comments that we deemed out of scope were comments that challenged the merits of the Wage Rule and asserted that the Wage Rule and/or the proposed effective date of the Wage Rule would result in employer hardship, including inadequate time to plan or prepare for the change in wages, cancellation of contracts, lower profits, and financial insolvency. Because the district court was clear that our consideration of hardship to employers when setting the January 1, 2012 effective date was contrary to our responsibilities under the INA to protect the wages and working conditions of U.S. workers, we cannot consider these comments in this rulemaking. We also did not consider comments submitted before the comment period began or after the comment period closed.

B. Adequacy of Comment Period

Several commenters did not believe that the ten day comment period provided an adequate amount of time for the public to comment on the NPRM, and several specifically requested extending the deadline for submission of comments, including up to 120 days. An agency is only required to provide a ''meaningful opportunity'' for comments on a proposed rule. *See Grand Canyon Air Tour Coalition* v. *FAA,* 154 F.3d 455 (D.C. Cir. 1998). In *Florida Power & Light Company* v. *NRC,* 846 F.2d 765 (D.C. Cir 1988), the court used a reasonableness standard to uphold the agency's 15 day comment period. Although the agency in that case was attempting to meet a Congressional deadline, we are under an analogous constraint here given the judicial requirement of the *CATA* order that a new effective date be announced within 45 days. As was true in *Florida Power,* despite the truncated comment period, we received more than 40 substantive comments addressing every aspect of the issue. We issued an NPRM that simply proposed to move up the effective date of the Wage Rule by 3 months. Ten days is ample time for a member of the public to review the NPRM, which only consisted of 4 pages in the **Federal Register,** and formulate a meaningful response. The shorter timeframe is warranted here, given the limited scope of this rulemaking and the court's June 16, 2011 order that we announce a new effective date within 45 days. Because we had to draft an NPRM, review comments, draft a final rule and submit both the NPRM and the Final Rule for Executive Order 12866 review within the 45-day period ordered by the court, the ten-day comment period is the most generous period that we could provide.

C. Authority of CATA Decision

An employer expressed its disagreement with the June 16, 2011 *CATA* decision, stating that the Department's consideration of employer hardship was appropriate and that the court misunderstood the procedural requirements of the H–2B program. An employer association chided the Department for its ''wholesale endorsement of the decision,'' arguing that the court's holding that the Department is not permitted to consider employer hardship was ''meaningless dicta,'' that the *CATA* case was not a legitimate case or controversy but more akin to an ''advisory opinion'' because both the plaintiffs' and our interests were aligned, and that the INA does not make any reference good or bad to employer hardship. While we understand that there may not be agreement with the merits of the June 16, 2011 *CATA* decision, it is binding on the Department and we must act in accordance with it. As to the commenter's claim that the plaintiffs' and our interests are aligned in the *CATA* litigation, we have vigorously defended our positions at all stages of the *CATA* case, including opposing the plaintiffs' January 24, 2011 motion. *See CATA* v. *Solis,* Dkt. No.105, Defendants' Opposition to Plaintiffs' Motion for Order Enforcing the Judgment.

D. Harm to H–2B and U.S. Workers

Two employer associations asserted that employers and workers stand and fall together—specifically, that there is no distinction between the benefit of employers and the benefit of workers and that a negative impact on the employer has an immediate negative effect on the workers. In an effort to illustrate that point, a number of employers and employer associations stated that the accelerated effective date would result in having to lay off their H–2B workers because they simply would not be able to afford the increase in wages based on the Wage Rule's new wage methodology. Additionally, some employers commented that as a result of their H–2B worker layoffs, they would be forced to lay off their U.S. workers who are in supervisory, support, and administrative positions.

Our responsibilities in the H–2B labor certification program first and foremost are to ensure that U.S. workers are given priority for temporary non-agricultural job opportunities and to protect U.S. workers' wages and working conditions from being adversely affected by the employment of foreign workers in such job opportunities. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b). Only when we certify that U.S. workers capable of performing the services or labor are not available and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers (*see* 8 CFR 214.2(h)(6)) may an employer file an H–2B visa petition to bring in temporary foreign workers. The court was quite clear that ''[d]elaying the implementation of the Wage Rule requires, by necessity, the continued payment of a lower, invalid wage to H–2B workers.'' *CATA* v. *Solis,* Dkt. No. 119, 2011 WL 2414555 at *4. The payment of this lower, invalid wage clearly has an adverse effect on the wages of similarly employed U.S. workers.

We do not dispute that the implementation of the Wage Rule, whether on the amended or original timeframe, regrettably may result in the layoffs of H–2B workers and possibly U.S. workers in positions that support those that are currently filled by H–2B workers. However, our role in the H–2B program, as further reinforced by the district court in *CATA,* is to protect the wages and working conditions of similarly employed U.S. workers—a constituency that few, if any, of the commenters acknowledge—but who are the very group the labor certification program was designed to protect.

E. Earlier Effective Date

Two worker advocacy organizations and a labor organization supported putting the Wage Rule into effect as quickly as possible. A worker advocacy organization specifically requested ''the earliest administratively practical effective date'' for the Wage Rule and that the effective date be no later than 30 days after the publication of the final rule resulting from this rulemaking—i.e., August 31, 2011. The commenter stated that it disagreed with our suggestion in the NPRM that the fact that the Congressional Review Act (CRA) applied to the Wage Rule provided any basis for delaying the Wage Rule another 60 days from the date of publication of the final rule resulting from this rulemaking. The commenter believes that we have the authority under the APA to set an immediate effective date for the Wage

Rule upon publication of the final rule resulting from this rulemaking. The commenter contends that we would have good cause for doing so, as more than six months have passed without any action from Congress to vacate the Wage Rule under the CRA, while ''H–2B workers continue to be paid unlawfully low wages.'' While the commenter agreed that the Department's ''administrative needs in implementation of [the Wage Rule] is an appropriate factor to consider in establishing the effective date,'' the commenter believes that:

> It would be administratively practicable for DOL to immediately issue bulk interim prevailing wage determinations by electronic mail notifying all applicants for H–2B prevailing wage determinations submitted since October 1, 2010 that if they employed any H–2B workers after August 1, 2011, they would be immediately required to pay the FLC Data Center Level 3 wage based on 2011 OES data for the SOC (ONET/OES) code on their initial prevailing wage determination for their geographic area until such time as DOL determined if there were higher Service Contract Act (SCA) or Davis Bacon Act (DBA) wage rates for their H–2B workers and other workers in corresponding employment. Employers could be directed to *http://www.flcdatacenter.com/OESWizardStart.aspx,* the Online Wage Library—FLC Wage Search Wizard, to mathematically calculate the appropriate prevailing wage rate pending an individualized further notice from DOL. Employers for whom SCA or DBA wages might be appropriate could be notified of procedures for submitting further information for determining those wage rates.

The same commenter also stated that if we have an internal computerized system for tracking H–2B certification applications and decisions, identifying employers with certifications for periods of employment on or after August 1, 2011 should be relatively straightforward. Additionally, the commenter raised the possibility of whether the existing computerized data for the H–2B prevailing wage determinations could be used to automatically recompute new prevailing wage rates at the July 2011 OES Level 3 wage rates, which would relieve employers from having to re-calculate the new wage rates themselves. Lastly, the commenter stated that if we already have a cross reference by SOC (ONET/OES) codes for employment involving potential DBA or SCA wage rates, ''that possibility could be specifically flagged only for those codes and a questionnaire seeking additional information in relationship thereto could be generated.''

We still consider the proposed 60 day delayed effective date to be necessary and appropriate, despite the commenter's proposal of various operational measures to implement the Wage Rule in a more expeditious manner. We do not dispute that the 60 day delayed effective date requirement of the CRA applied only to the publication of the Wage Rule in January 2011 and that we are not legally required under the CRA to delay by 60 days from the publication of this rulemaking the effective date of the rule. However, while we agree with the commenter that the Wage Rule should have the ''earliest possible administratively practical effective date,'' an effective date of 30 days after the publication of the final rule does not provide us with sufficient operational time to issue new prevailing wage determinations (PWDs) under the methodology prescribed by the Wage Rule.

Because the new wage methodology under the Wage Rule would take effect for all wages paid to H–2B workers and U.S. workers recruited in connection with an H–2B labor certification for all work performed on or after the new effective date, we will have to issue PWDs using the Wage Rule methodology not only for all applications received after the new effective date but also for existing certifications for which work is to be performed on or after the new effective date. What this means is that our National Prevailing Wage Center (NPWC) will have to issue approximately 4,000 supplemental prevailing wage determinations.[2] This is a manual process, as there is no way to automatically link the PWD requests that were submitted and processed in the iCert prevailing wage system with the actual H–2B applications that were subsequently filed and approved for work that will be performed on or after the effective date. Many of these requests involve multiple locations, some including dozens of locations, each of which requires a separate determination.[3] While the NPWC anticipates being able to issue all of these 4,000 supplemental wage determinations before October 1, to do so before August 31 is physically and operationally impossible.

We appreciate the commenter's suggestions for streamlining the PWD process in order to implement the new Wage Rule in the most expeditious manner possible. However, it is imperative that we issue individual PWDs for each employer that has an H–2B labor certification for work being performed on or after the new effective date to ensure the integrity and enforceability of the new prevailing wage. The commenter's suggestion that employers calculate their own prevailing wage would present us with substantial challenges in both implementation and enforcement. NPWC staff provide a level of consistency and accuracy that would not be replicable if responsibility for PWDs were devolved to hundreds, if not thousands, of individual H–2B employers and their various representatives. In the simplest scenario proposed by the commenter, an employer with limited or no previous knowledge of the prevailing wage determination process would have to follow our instructions to use an unfamiliar set of online tools to determine their correct prevailing wage. In addition to possible errors caused by lack of familiarity with the system, further complications could arise for employers with certified occupations that are a blend of two unique occupations or with multiple areas of intended employment. There is potential for employer error at every step that could result in the unintentional payment of an incorrect wage rate to thousands of H–2B workers. Moreover, our ability to enforce an employer's failure to pay the correct wage would be compromised if we could not definitively show that the employer knew what the proper wage was (*see* 20 CFR 655.65(e)), which would be quite difficult, given the practical challenges just discussed.

Moreover, obtaining the appropriate SCA and DBA wages for the job opportunity is not as simple a process as obtaining the OES wage, since the SCA and DBA wages are determined in a completely different manner and updated on a completely separate timeframe. We make SCA and DBA wage rates available to Federal contracting officers and the public through the *http://www.wdol.gov* Web site. While it is easy to use this Web site to locate wage determinations, selecting the appropriate occupations or job classification from the wage determination presents additional opportunities for employer error. Occupations under the SCA are determined using the Dictionary of Occupational Titles (DOT). Employers would be required to review the

[2] It has not been possible to perform recalculations of the prevailing wage before July 1, as the wages in OES are updated on or about that date each year, and were not available before that date for use in the H–2B program.

[3] Until we have reviewed all affected applications some of which are still in the process of adjudication we will not know the exact number of determinations that that the NPWC must issue.

definitions in the DOT and determine the appropriate SCA occupation for their specific job opportunity. For example, an employer seeking to hire H–2B workers for its restaurant could be presented with SCA wage rates for a ''Cook I,'' ''Cook II,'' and ''Food Service Worker'' on the same wage determination. The employer would be required to analyze the DOT to determine the appropriate occupation.

A similar challenge exists with DBA wage rates. DBA wage rates reflect the area practice concept which makes it difficult for someone inexperienced with those wage rates to determine which rate applies. For example, in some areas of the country, a rate is established for ''welders,'' and in other areas welders receive the rate prescribed for the craft to which performance of the welding is an incidental operation, depending on whether it is the practice in the area to treat welding as a separate occupation. Therefore, we do not believe that employers could easily select the correct prevailing wage rate for the job opportunity without this specialized knowledge. The commenter implicitly acknowledges this complexity, as it offers no proposal for obtaining those wages in an expedited manner; instead, it proposes that employers be required to immediately begin paying the OES Level 3 wage and that the NPWC would determine the applicability of the SCA or DBA wage at a later date. This would serve further to undermine our ability to enforce the payment of the prevailing wage as of the new effective date if either the SCA or DBA wage eventually were found to be the highest wage (*see* 76 FR 3484 (Jan. 19, 2011) (to be codified at 20 CFR 655.10(b)(2)), because the employer may not have been aware at the time that the work was performed after the new effective date that either the SCA or DBA wage was the prevailing wage.

We do not think it appropriate to issue ''interim'' wage determinations and then issue corrected wage determinations at a later date, possibly requiring employers to pay make-up pay at a later date, or for workers to have their pay adjusted downward. Sound program administration and basic fairness require us to provide employers with a prevailing wage determination on which they can rely in time for them to make any needed adjustments in their payroll systems and pay the correct new wages when they are due. Issuing prevailing wage determinations as quickly as possible but in time for employers to implement them on the effective date avoids confusion for both employers and workers, and also reduces the necessity of enforcement actions and the possibility of litigation.

F. Later Effective Date

Two employer associations asserted that the court in *CATA* did not mandate an earlier effective date but merely required that the effective date be subject to notice and comment. One employer suggested that any new wage changes apply to H–2B visas released after the new effective date. We do not believe, based on the *CATA* decision and on our mandate to ensure that the employment of foreign workers in temporary non-agricultural positions does not adversely affect similarly employed U.S. workers, that we can further delay implementing the Wage Rule beyond the time that it takes to issue and implement the new prevailing wage determinations, as described above. While the court did not order us to issue any particular effective date, its decision made it clear that the court was concerned with the ''critical importance of avoiding the depression of wages paid to U.S. and to H–2B workers, and * * * the already protracted delay in implementing a valid prevailing wage regime.'' *CATA* v. *Solis,* Dkt. No. 119, 2011 WL 2414555 at *5. Applying the Wage Rule's prevailing wage methodology only to H–2B visas issued after the new effective date would result in what the court in *CATA* specifically sought to avoid—prolonging the payment of a lower, invalidated wage to H–2B workers. We believe that, under the court's decision, we must do all we can that is administratively and operationally feasible to minimize the period in which these payments continue.

G. Impact of Changing the Prevailing Wage for Existing Certifications

Several commenters objected to the application of the Wage Rule's prevailing wage methodology to existing certifications. An employer association asserted that we would be acting in conflict with our regulations providing that the prevailing wage would be valid throughout the intended of period employment. Similarly, another employer association claimed that allowing the new prevailing wage methodology to apply to existing certifications would violate the attestation on older versions of the ETA Form 9142, Appendix B.1 that ''the offered wage equals or exceeds the highest of the prevailing wage, the applicable, Federal, State, or local minimum wage, and the employer will pay the offered wage during the entire period of the approved labor certification.''

In the fall of 2010, the *CATA* plaintiffs moved for additional relief including seeking an order requiring the Department to condition future H–2B certifications on employer agreement to pay the wage rate under the Wage Rule once it became effective. We opposed this order, arguing that the regulation at 20 CFR 655.10(d) meant that once an employer had received a prevailing wage determination in any year, it is entitled to use that prevailing wage throughout the duration of its H–2B certification. In a November 24, 2010 ruling, the court rejected that argument:

> Nothing in § 655.10(d), nor any related regulation, prevents the DOL from devising interim measures to reduce the impact of the deficient methodology. Thus an employer must pay a valid wage for the duration of employment, but it does not follow that an employer must continue paying that wage after it has been deemed to be the product of an invalid regulation.

CATA v. *Solis,* Dkt. No. 97, 2010 WL 4823236 at *2 (footnote omitted). Although the court did not order us to take any specific action, we reconsidered our position in light of the court's ruling that the current wage methodology is invalid and that we have the authority to require employers to pay wages other than those issued in a prevailing wage determination. Accordingly, in these special circumstances, we decided that it is not appropriate to allow wage determinations made under the invalidated current methodology to continue to govern the payment of wages beyond the effective date of the Wage Rule.

While these commenters may not agree with the district court's rationale, as discussed above, the decision is nevertheless binding. As to the commenter's concern that an employer would be in violation of the attestation on the previous version of the ETA Form 9142, Appendix B.1, we do not consider the attestation to be inconsistent with an employer's payment of a higher wage rate once the Wage Rule takes effect. The attestation only requires that the offered wage equal or exceed the highest of the prevailing wage or applicable minimum wage and that the employer pay the offered wage during the time period the work is performed. If the prevailing wage increases as a result of the Wage Rule taking effect, then the employer's offered wage would need to increase in accordance with that change.

Additionally, a commenter stated that because employers have a protected property interest in the validity of the prevailing wage throughout the period of intended employment, we would be

denying the employer due process to take away that right without notice and an opportunity for an individual hearing. The commenter's concerns about due process are not warranted. As a threshold matter, due process applies only to individualized determinations, and not to legislative rulemaking. *See United States* v. *Florida East Coast Railway,* 410 U.S. 224, 244–46 (1973). We are not required to provide a hearing before taking an action that affects the property interest of a class of individuals or regulated entities. *See McMurtray* v. *Holladay,* 11 F.3d 499, 504 (5th Cir. 1993). In any event, when employers operating under current certifications are notified of the new prevailing wage, the notice will provide them with appropriate appeal rights under section 655.11, so that they can challenge the correctness of their individualized prevailing wage determination.

Another employer association claimed that because an employer would have advertised and tested the labor market at a wage rate that is different than the new prevailing wage under the Wage Rule, the employer could be accused of applying a wage that is higher than the wage that was advertised to domestic workers, which could result in a revocation of the employers' petition by DHS. The commenter relies on what it deems to be the Department of State's interpretation that an employer may not pay above the prevailing wage that was advertised at the time the H–2B job was advertised per regulation. Along the same lines, one commenter called for the Department to provide extra time to re-apply to USCIS for continued certification under the new prevailing wage, and another commenter stated that any new changes to the wage rates must not require employers to complete the recruitment phase or obtain a new foreign labor certification once these steps have already been completed.

The Department of State and USCIS, each of which play a role in the H–2B process, are aware of the unique circumstances of this supplemental wage determination process as outlined in the Wage Rule and in this Final Rule. We contacted each agency about this issue. The Department of State advised us that it might not issue a visa in some circumstances where the visa has not yet been issued but the wage will be higher than stated on the petition. However, because this is a regulatory change mandated by an agency with the authority to do so—namely, the Department—this is not in itself a basis for petition revocation. USCIS advised that, while circumstances vary, they generally cannot deny or revoke a nonimmigrant visa petition for this reason. We will continue to advise both the Department of State and USCIS as the supplemental wage determinations are issued.

III. Administrative Information

A. Executive Orders 12866 and 13563

Under Executive Order (E.O.) 12866 and E.O. 13563, we must determine whether a regulatory action is significant and therefore, subject to the requirements of the E.O.s and subject to review by the Office of Management and Budget (OMB). Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities (also referred to as ''economically significant''); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

We have determined that this Final Rule is not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866. We have, however, determined that this Final Rule is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this Final Rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) at 5 U.S.C. 603 requires agencies to prepare a regulatory flexibility analysis to determine whether a regulation will have a significant economic impact on a substantial number of small entities. Section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis if the regulation is not expected to have a significant economic impact on a substantial number of small entities. Further, under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 (SBREFA), an agency is required to produce a compliance guidance for small entities if the rule has a significant economic impact. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), under the RFA at 5 U.S.C. 605(b), and certified that this rule will not have a significant economic impact on a substantial number of small entities.

We received a comment from the Chief Counsel for Advocacy, SBA, in which the Chief Counsel contended that we did not adequately provide a factual basis for the RFA certification and that the certification did not take into consideration the economic impact that this unexpected change in the effective date of the Wage Rule will have on small businesses. The Chief Counsel for Advocacy, SBA strongly encouraged us to complete an Interim Regulatory Flexibility Analysis of the NPRM. Several associations also asserted that we failed to consider the impact of this rulemaking on small businesses.

In particular, the Chief Counsel for Advocacy, SBA, claimed that we offered no data or other analysis in support of the factual basis used to support the certification as required by the RFA beyond the statement ''[w]hile the change in the effective date of the Wage Rule that is being proposed in this NPRM may change the period in which the total cost burdens for small entities would occur, the Department believes that the amount of the total cost burdens themselves would not change.'' [4] An employer association stated that if the effective date moves to October 1, 2011, its average member's payroll would increase from $79,840 to $159,680 and that their ''total cost of labor'' would likely double or even triple these figures. Another employer association argued that if the period that the Wage Rule is in effect is increasing, the total cost burden would increase along with the extended period, as the difference in implementing the Wage Rule on October 1, 2011 as opposed to January 1, 2012 would be $1,872 per worker.

We disagree with the Chief Counsel for Advocacy, SBA's assessment that we did not provide a factual basis for the certification. As we stated in the NPRM, we already established in the Wage Rule that we believed that the Wage Rule was

[4] 76 FR 37686, 37688–89 (June 28, 2011).

not likely to impact a substantial number of small entities, and we provided an extensive analysis in the Wage Rule to support this conclusion. See 76 FR 3452, 3473–3482 (Jan. 19, 2011). Changing the effective date of the Wage Rule does not change the total cost burden for small entities as calculated under the Wage Rule. The total cost burden for small entities under the Wage Rule accounted for the increase in wage costs as a result of the new wage methodology (e.g., a $4.83 increase in the weighted average hourly wage for H–2B workers (and similarly employed U.S. workers hired in response to the recruitment required as part of the H–2B application))[5] and the cost of reading and reviewing the Wage Rule—neither of which accounted for or were impacted by the original January 1, 2012 effective date of the Wage Rule. While we found that the Wage Rule has a significant economic impact[6] (contrary to a commenter's assertion that we did not make such a finding), we found that the Wage Rule did not impact a substantial number of small entities, as the small entities that have historically applied for H–2B workers represent relatively small proportions of all small businesses—i.e., less than 10% of the relevant universe of small entities in a given industry.[7] The H–2B employers that the commenters cite are already captured by these numbers, as the determination of the number of small entities affected by the Wage Rule neither accounted for, nor was affected by, the original January 1, 2012 effective date of the Wage Rule. We do not dispute that as a result of the Wage Rule, employers may in the short term experience an increase in costs, but the increase in total costs of the H–2B program as a result of the Wage Rule during the first year of its implementation and annually thereafter would be the same, regardless of whether it goes into effect October 1, 2011 or January 1, 2012. Therefore, the RFA analysis in the Wage Rule continues to be an accurate analysis of the impact of the Wage Rule on small businesses and would remain unaffected by the change in the effective date of the Wage Rule.

The Chief Counsel, Office of Advocacy, SBA, also stated that ''[t]here is nothing cited in the Proposed Rule that negates the agency's previous concern noted in the Wage Rule about the impact of the wage modification on small businesses, other than a court order mandating a new effective date,'' a sentiment that was echoed by a number of associations. However, the Chief Counsel is mistaken, as the NPRM clearly states that the need for the rulemaking arose from the *CATA* litigation under which the court specifically found that we violated the INA in considering hardship to employers (regardless of size) when deciding to delay the effective date. We do not dispute the Chief Counsel's observations that ''[s]mall businesses have made plans, commitments, and have expended money for the current year based on the January 1, 2012, effective date announced in the Wage Rule nearly six months ago'' but, as we discussed in the Wage Rule's RFA analysis, the rule does not impact a significant number of small businesses. Moreover, the court in *CATA* has explicitly prohibited us from considering these employer hardships when setting the effective date of the Wage Rule. Additionally, as we have explained above, we continue to rely on the total cost burden provided in the Wage Rule's RFA analysis, as it is not impacted by the change in the effective date of the Wage Rule.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The Final Rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary.

D. Small Business Regulatory Enforcement Fairness Act of 1996

We have determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, we are not required to produce any compliance guides for small entities as mandated by the SBREFA. We have similarly concluded that this Final Rule is not a major rule requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. We received two comments that suggested that the earlier effective date of the Wage Rule would exacerbate the already negative impact that higher wages resulting from the Wage Rule would have on competition, employment, and investment and, in particular, the crab meat processing industry, as cheaper foreign crabmeat will completely displace domestically produced crabmeat in local markets. Another employer echoed this concern for the manufacturing industry in general, stating that the change in effective date would result in job losses either because the company fails or moves its operations outside the U.S.

The only data offered by one of the commenters in support of these statements is an undated study on Maryland's crabmeat processing industry.[8] This study not only appears to challenge the underlying merits of the Wage Rule, which would make it out of scope for purposes of this rulemaking, but also is premised on the assumption that absolutely no U.S. workers would be willing to work in any positions formerly held by H–2B workers, thereby resulting in major job losses in Maryland's crabmeat processing industry and in the loss of related jobs affected by the crabmeat processing industry. Given that the increase in wages not only would ensure against adverse effect but may also have the effect of causing U.S. workers to become more interested in these jobs, the study's assumption that no U.S. workers would ever replace the H–2B workers is fundamentally flawed. Therefore, neither of these commenters makes a sufficient case that changing the effective date of the Wage Rule would result in significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

E. Executive Order 13132—Federalism

We have reviewed this Final Rule in accordance with E.O. 13132 on federalism and have determined that it does not have federalism implications. The Final Rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and

[5] 76 FR 3452, 3475 (Jan. 19, 2011).

[6] See *id.* at 3476.

[7] *Id.*

[8] Lipton, Douglas D. Analysis of Economic Impact of H–2B Worker Program on Maryland's Economy.

responsibilities among the various levels of government as described by E.O. 13132. Therefore, we have determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175—Indian Tribal Governments

We reviewed this Final Rule under the terms of E.O. 13175 and determined it not to have tribal implications. The Final Rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires us to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. We have assessed this Final Rule and determined that it will not have a negative effect on families.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

The Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988—Civil Justice

The Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the Final Rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the Final Rule carefully to eliminate drafting errors and ambiguities.

J. Plain Language

We drafted this Final Rule in plain language.

K. Paperwork Reduction Act

As part of our continuing effort to reduce paperwork and respondent burden, we conduct a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This process helps to ensure that the public understands the collection instructions; that respondents provide requested data in the desired format; that reporting burden (time and financial resources) is minimized; that collection instruments are clearly understood; and that we properly assess the impact of collection requirements on respondents.

The PRA requires all Federal agencies to analyze proposed regulations for potential time burdens on the regulated community created by provisions within the proposed regulations that require the submission of information. These information collection (IC) requirements must be submitted to the OMB for approval. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l) or it is exempt from the PRA.

The majority of the IC requirements for the current H–2B program are approved under OMB control number 1205–0466 (which includes ETA Form 9141 and ETA Form 9142). There are no burden adjustments that need to be made to the analysis. For an additional explanation of how we calculated the burden hours and related costs, the PRA package for information collection OMB control number 1205–0466 may be obtained at *http://www.RegInfo.gov.*

IV. Change of Effective Date of Wage Rule

In the final rule published January 19, 2011, 76 FR 3452, under the **DATES** section, the effective date of the final rule is amended to read as follows:

This final rule is effective September 30, 2011.

Signed in Washington, this 26th day of July 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–19319 Filed 7–29–11; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9534]

RIN 1545–BD81

Methods of Accounting Used by Corporations That Acquire the Assets of Other Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the methods of accounting, including the inventory methods, to be used by corporations that acquire the assets of other corporations in certain corporate reorganizations and tax-free liquidations. These regulations clarify and simplify the rules regarding the accounting methods to be used following these reorganizations and liquidations.

DATES: *Effective date:* These regulations are effective on August 31, 2011.

Applicability date: For dates of applicability, see §§ 1.381(a)–1(e), 1.381(c)(4)–1(f), 1.381(c)(5)–1(f), and 1.446–1(e)(4)(iii).

FOR FURTHER INFORMATION CONTACT: Cheryl Oseekey at (202) 622–4970 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1. On November 16, 2007, the IRS and the Treasury Department published a notice of proposed rulemaking (REG–151884–03) in the **Federal Register** (72 FR 64545). This notice of proposed rulemaking, while continuing most of the provisions of the regulations originally issued under sections 381(c)(4) and 381(c)(5) of the Internal Revenue Code (Code) regarding the methods of accounting to be used by a corporation that acquires the assets of another corporation in a section 381(a) transaction, proposed to clarify and simplify those existing regulations. The IRS received no comments in response to the notice of proposed rulemaking. No public hearing was requested or held. The proposed regulations, as revised by this Treasury decision, are adopted as final regulations.

Explanation of Provisions

The final regulations differ somewhat in organization and format from the notice of proposed rulemaking. These changes are intended to be editorial in