

Part A, Subpart III, Section 44701: “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

### Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*For the reasons discussed above, I certify this proposed regulation:*

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

### The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

#### § 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**Diamond Aircraft Industries GmbH Model (Diamond) DA 40 Airplanes Equipped With Certain Cabin Air Conditioning Systems:** Docket No. FAA-2011-0687; Directorate Identifier 2011-CE-017-AD.

#### Comments Due Date

(a) We must receive comments by August 12, 2011.

#### Affected ADs

(b) None.

#### Applicability

(c) This AD applies to Diamond Aircraft Industries GmbH Model DA 40 airplanes, all serial numbers that:

- (1) Are equipped with vapor cycle system (VCS) cabin air conditioning systems installed per Premier Aircraft Services Supplemental Type Certificate (STC) SA03674AT following DER Services Master Document List MDL-2006-020-1, Revision C, dated February 3, 2009; Revision D, dated April 22, 2009; Revision E, dated May 12, 2010; or Revision F, dated July 6, 2010; and
- (2) Are certificated in any category.

#### Subject

(d) Joint Aircraft System Component (JASC) Code 2150, Cabin Cooling System.

#### Unsafe Condition

(e) This AD was prompted by reports of damage around the VCS compressor mounting area found during maintenance inspections. We are proposing this AD to remove the VCS compressor and mount, as a result of excessive wear, which could result in the air conditioner compressor disconnecting in the engine compartment. This condition could result in engine stoppage or additional damage to the engine.

#### Compliance

(f) Comply with this AD within the compliance times specified, unless already done.

#### Required Actions

(g) Within the next 100 hours time-in-service after installation of the VCS installed per STC SA03674AT held by Premier Aircraft Services (originally held by DER Services) following DER Services Master Document List MDL-2006-020-1, Revision C, dated February 3, 2009; Revision D, dated April 22, 2009; Revision E, dated May 12, 2010; or Revision F, dated July 6, 2010, or within 30 days after the effective date of this AD, whichever occurs later, do the following actions following Premier Aircraft Service Work Instruction PAS-WI-MSB-40-2011-001, dated March 4, 2011; and Premier Aircraft Service Mandatory Service Bulletin No. PAS-MSB-40-2011-001, dated March 4, 2011:

- (1) Deactivate the VCS system.
- (2) Pull and collar the compressor breaker and place a placard above the breaker stating “INOP.”

(3) Remove the VCS compressor and associated mounting hardware.

(4) Revise the airplane weight and balance.

#### Special Flight Permit

(h) The compressor drive belt must be cut and removed before the airplane may be moved for one ferry flight to an approved repair facility to comply with the remainder of this proposed AD.

#### Alternative Methods of Compliance (AMOCs)

(i)(1) The Manager, Atlanta Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

#### Related Information

(j) For more information about this AD, contact Hal Horsburgh, Aerospace Engineer, FAA, Atlanta ACO, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474-5553; fax: (404) 474-5606; e-mail: hal.horsburgh@faa.gov.

(k) For service information identified in this AD, contact Premier Aircraft Service, 5540 NW. 23 Avenue Hangar 14, Ft. Lauderdale, FL 33309, telephone: (954) 771-0411; fax: (954) 334-1489; Internet: <http://www.flypas.com>. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

Issued in Kansas City, Missouri, on June 22, 2011.

**John Colomy,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

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### 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:** Proposed rule; request for comments.

**SUMMARY:** The Department of Labor (the Department or DOL) proposes to amend the effective date of Wage Methodology for the Temporary Non-agricultural Employment H-2B Program; Final Rule, 76 FR 3452, January 19, 2011, (the Wage Rule). The Wage Rule revised the methodology by which the Department calculates 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.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before July 8, 2011.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB61, by any one of the following methods:

- *Federal e-Rulemaking Portal* <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.

• *Mail or Hand Delivery/Courier:* Please submit all written comments (including disk and CD-ROM submissions) to Michael S. Jones, Acting Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. Because of the short timeframe for this rulemaking, as discussed in further detail below, the Department will not review comments received by means other than those listed above or that are received after the comment period has closed. While the Department is soliciting comments on the proposed effective date of the Wage Rule, we are not seeking comments relating to the merits of the provisions contained in the Wage Rule which already has been subjected fully to the notice and comment process. We will deem any such comments out of scope and will not consider them. Additionally, as the U.S. District Court for the Eastern District of Pennsylvania ruled in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP (E.D. Pa.), the Immigration and Nationality Act, as amended (INA) does not permit the Department to consider issues relating to employer hardship as a reason to delay the effective date of a new wage rule. See *CATA v. Solis*, Dkt. No. 119, Memorandum Opinion at 9 (June 15, 2011).

The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The

Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public on the <http://www.regulations.gov> Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments through the <http://www.regulations.gov> Web site.

**Docket:** For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at <http://www.regulations.gov> and enter RIN 1205-AB61 in the search field. The Department will also make all the comments it receives available for public inspection during normal business hours at the Employment and Training Administration (ETA) Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

#### 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

On January 19, 2011, the Department published the Wage Rule. Under the Wage Rule, the prevailing wage for the H-2B program is based on the highest of the following: wages established under an agreed-upon collective bargaining agreement; a 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 requires the new wage methodology to apply to all work performed on or after January 1, 2012. The Department 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.

#### B. The Need for New Rulemaking

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,<sup>1</sup> 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

<sup>1</sup> On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa.) ruled that the Department had violated the Administrative Procedure Act in 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 the Department with additional time, until January 18, 2011, to promulgate a final rule.

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 15, 2011, the court issued a ruling that invalidated the January 1, 2012 effective date of the Wage Rule and ordered the Department to announce a new effective date for the rule within 45 days from June 15. 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, Memorandum Opinion at 8 (June 15, 2011). 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, Memorandum Opinion at 10 (June 15, 2011) (citing *NAACP v. Donovan*, 566 F. Supp. at 1206).

### C. The Effective Date

The Department proposes that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from this rulemaking. The Department anticipates the date of publication of the final rule to be on or about August 1, 2011; thus, the effective date of the Wage Rule would be on or about October 1, 2011. Because the Wage Rule, which was published on January 19, 2011, would have required at least a 60-day delayed effective date from the date of publication since it is considered to be a major rule under the Congressional Review Act (CRA), 5 U.S.C. 801, *et seq.*,<sup>2</sup> the Department

believes that it would be appropriate to apply a 60-day delayed effective date to the final rule that sets the effective date of the Wage Rule. The Wage Rule will 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. A 60-day delayed effective date also would provide the Office of Foreign Labor Certification (OFLC) within the Department with the time it needs to implement the wage rule, as OFLC must issue new prevailing wages for approved work performed on or after the new effective date. In order to accomplish this, OFLC must identify all certified H-2B applications which contain dates of work to be performed on and after the new effective date of the wage rule. This universe of certifications must then be issued new prevailing wage determinations in accordance with the wage rule's methodology. This is a labor intensive activity, as OFLC will have to determine and issue the new determinations before the new effective date proposed in this rulemaking for each of these employers. OFLC has determined the universe of applications to be large, and therefore will require the 60-day delayed effective date in order to complete this task.

As mentioned above, the purpose of this rulemaking is to solicit comments on the proposed effective date of the Wage Rule; therefore, any comments relating to the merits of the provisions contained in the Wage Rule will be deemed out of scope and will not be considered. Furthermore, pursuant to the district court's order, the Department cannot consider specific examples of employer hardship to delay the effective date of a new wage rule. See *CATA v. Solis*, Dkt. No. 119, Memorandum Opinion at 9 (June 15, 2011).

### II. Administrative Information

#### A. Executive Orders 12866 and 13563

Under Executive Order (E.O.) 12866 and E.O. 13563, the Department must

likely to result in —(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act." 5 U.S.C. 804(2). As part of the Department's Executive Order 12866 analysis, OMB determined that the Wage Rule would likely result in transfers in excess of \$100 million annually. See 76 FR 3468, Jan. 19, 2011.

determine whether a regulatory action is significant and therefore, subject to the requirements of the E.O. 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. The Department has determined that this NPRM is not an economically significant regulatory action under sec. 3(f)(1) of E.O. 12866. The Department, however, has determined that this NPRM is a significant regulatory action under sec. 3(f)(4) of the E.O. and, accordingly, OMB has reviewed this NPRM.

#### 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. In the Wage Rule, the Department stated that it believed that the Wage Rule was not likely to impact a substantial number of small entities; however, in the interest of transparency, the Department prepared a Final Regulatory Flexibility Analysis (FRFA) to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. See 76 FR 3473, Jan. 19, 2011. While the change in the effective date of the Wage Rule that is being proposed in this NPRM may change the

<sup>2</sup> Under the CRA, a major rule is defined as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is

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. Accordingly, 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.

*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 proposed 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*

The Department has determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any compliance guides for small entities as mandated by the SBREFA. The Department has similarly concluded that this proposed 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.

*E. Executive Order 13132—Federalism*

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

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

*F. Executive Order 13175—Indian Tribal Governments*

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have Tribal implications. The proposed 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 the Department to assess the impact of this proposed rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale.

The Department has assessed this proposed rule and determines that it will not have a negative effect on families.

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

The proposed 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 proposed 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 proposed rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the proposed rule carefully to eliminate drafting errors and ambiguities.

*J. Plain Language*

The Department drafted this NPRM in plain language.

*K. Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts 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 Department's collection instructions; respondents provide requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department properly assesses 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 the Department 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>.

**III. Change of Effective Date of Wage Rule**

The Department therefore proposes to amend the “DATES” section of the Wage Rule to read “This Final Rule is effective [60 DAYS FROM THE DATE OF PUBLICATION OF THE FINAL RULE RESULTING FROM THIS RULEMAKING].”

Signed in Washington this 24th day of June, 2011.

**Jane Oates,**

*Assistant Secretary, Employment and Training Administration.*

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