



# H-2B Temporary Labor Certification Program Prevailing Wage Process and Standards *Stakeholder Webinars*

*2015 Wage Final Rule*

**Office of Foreign Labor Certification  
Employment and Training Administration  
United States Department of Labor**

# H-2B 2015 Regulatory Actions

Department published two regulatory actions with an immediate effective date of **April 29, 2015**

- **Interim Final Rule: Temporary Non-Agricultural Employment of H-2B Aliens in the United States**  
[www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09694.pdf)
- **Final Rule: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program** [www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09692.pdf](http://www.gpo.gov/fdsys/pkg/FR-2015-04-29/pdf/2015-09692.pdf)

# Obtaining a Prevailing Wage

## General Provisions

- Employers must request and obtain a prevailing wage determination (PWD) from the OFLC National Prevailing Wage Center (NPWC) before filing an H-2B job order with the State Workforce Agency (SWA)
- PWD must be valid on the date the job order is posted (*i.e., date Chicago NPC received the H-2B application and job order*)
- Except for emergency situations (20 CFR § 655.17), employers who fail to obtain a PWD will have their H-2B applications returned by the OFLC Chicago National Processing Center without review

**Important Note:** Employers are encouraged to file the ETA Form 9141 around 60 calendar days before the date the determination is needed

# Obtaining a Prevailing Wage

## Determining Prevailing Wages

1. A wage rate set forth in the rules/regulations of a professional sports league covering the job opportunity is considered prevailing
2. A wage rate set forth in a Collective Bargaining Agreement (CBA) covering the job opportunity is considered prevailing
3. If the job opportunity is not covered by a CBA, the prevailing wage shall be the arithmetic mean for the occupation in the area of intended employment using the BLS Occupational Employment Statistics Survey (OES)



Requests to use McNamara-O'Hara Service Contract (SCA) or Davis-Bacon Act (DBA) wages for H-2B prevailing wages are no longer permitted under the 2015 H-2B Wage Final Rule

# Obtaining an Offered Wage Rate

## Employer-Provided Surveys

4. If the job opportunity is not covered by a CBA or professional sports league's rules/regulations, the NPWC will consider an acceptable survey provided by the employer

### Qualifying Categories for Employer-Provided Surveys

- Survey independently conducted and issued by a state, including any state agency, state college, or state university;
- BLS-OES does not collect wage data for the occupation in geographic area of intended employment **OR** provides an arithmetic mean at the national level for occupation in the area of intended employment;
- Job opportunity is not included within an occupational classification of the SOC system **OR** is within an occupation of the Standard Occupational Classification (SOC) system designated as an “all other” classification.

# Obtaining an Offered Wage Rate

## Employer-Provided Surveys

- Currently, the Commonwealth of the Northern Mariana Islands is only geographic area where the OES does not collect wage data
- NPWC considers the occupation as eligible for a survey where the OES provides a mean wage at a “GeoLevel 4” signifying a national level wage

### Example:

Jobs classified as “Fishers and Related Fishing Workers” (SOC 45-3011) on the Eastern Shore of Maryland

<http://www.flcdatacenter.com>



The screenshot shows the website interface for the Foreign Labor Certification Data Center. A red arrow points from the 'Case Disclosure Data Archive' section to the search results. The results page displays the following information:

**Foreign Labor Certification Data Center**  
Online Wage Library  
www.flcdatacenter.com

**Wage Library**  
Quick Search  
Search Wizard

**Case Disclosure Data Archive**  
H1B Data  
H2A Data  
H2B Data  
Perm Data

**Also available:**  
File Archive

Skill Level  
Explanation

SVP Explanation

FLC Wage Data  
updated  
July 1, 2014

**FLC Wage Results** [New Quick Search](#) [New Search Wizard](#)

You selected the All Industries database for 7/2014 - 6/2015.

Your search returned the following: [Print Format](#)

**Area Code:** 2400001  
**Area Title:** Upper Eastern Shore nonmetropolitan area  
**OES/SOC Code:** 45-3011  
**OES/SOC Title:** Fishers and Related Fishing Workers  
**GeoLevel:** 4  
**Level 1 Wage:** \$11.47 hour - \$23,858 year  
**Level 2 Wage:** \$14.59 hour - \$30,347 year  
**Level 3 Wage:** \$17.71 hour - \$36,837 year  
**Level 4 Wage:** \$20.83 hour - \$43,326 year  
**Mean Wage (H-2B):** \$17.71 hour - \$36,837 year

This wage applies to the following O\*Net occupations:  
**45-3011.00 Fishers and Related Fishing Workers**

Use nets, fishing rods, traps, or other equipment to catch and or other aquatic animals from rivers, lakes, or oceans, for human consumption or other uses. May haul game onto ship.  
**O\*Net™ JobZone: 1**  
**Education & Training Code: No Level Set**

# Employer-Provided Surveys

## Survey Standards & Methodology

- Must be conducted by a bona fide third party
- Must use the new ETA Form 9165, *Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey*
- Must include the wages of all workers in the occupation regardless of skill level or experience, education, and length of employment
  - Survey hourly wages must include all types of pay. Therefore, if employer guarantees a minimum hourly wage but pays other types of monetary compensation including tips, piece rate, commission, bonus, etc., this additional compensation must be included in the survey wage
- Specified expansion of area when needed
- Must be most recent version of the survey and must be data collected within 24 months of submittal

# Employer-Provided Surveys

## Standards for Bona Fide Third Parties

- A third party has no stake in the outcome of the survey, but only in producing a survey product that meets statistical and regulatory standards

**Important Note:** *Any H-2B employer or any H-2B employer's agent, representative, or attorney are not bona fide third parties*

- A state agency is also a third party and includes entities such as colleges, universities, agricultural extension services, and maritime agencies
- Employer associations could be considered bona fide third-parties
  - An employer association covering a mixture of employers who do and do not hire workers under H-2B will likely be appropriate
  - While one only covering those who hire H-2B workers will not
- The third party may be a company who produces the survey as a published work, to include continuous updates, or on commission



# Employer-Provided Surveys

## Completing the ETA Form 9165

- ETA Form 9165 is an attestation form which must be signed by the employer and submitted along with each new H-2B Application per the 2015 Final Rule. Include the survey documents as a separate file when uploading.
- ETA Form 9165 and instruction on how to properly complete the form are located at the following locations:

[http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9165.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9165.pdf)

[http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9165\\_General\\_Instructions.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9165_General_Instructions.pdf)

# Employer-Provided Surveys

## Completing the ETA Form 9165

- Attestation signed by employer
- Includes contact information from third party or state agency
- Consolidates information from the survey
- Specific to a particular survey and employer
- Uploaded with ETA Form 9141
- Employer must have documents supporting the entries. Include the survey documents as a separate file from the Form ETA-9165 when uploading.

# Employer-Provided Surveys

## Completing the ETA Form 9165

### A. Requestor Point-of-Contact Information (from Form ETA-9141, Section B)

1. Contact's last (family) name * Last (family) name of the requestor's point of contact - <i>Smith</i>	2. First (given) name * First name of the requestor - <i>John</i>	3. Middle name(s) * Middle name(s) of the requestor - <i>Doe</i>
4. Telephone number * Area code and number. Include country code, if applicable - <i>(123) 456-7890</i>	5. Extension	6. Fax Number Fax number, if applicable - <i>(123) 456-0955</i>
7. E-Mail Address Business e-mail address - <i>Smith.John.D@ACMSeafoodCorp.net</i>		

### B. Employer Information (from Form ETA-9141, Section C)

1. Legal business name * Full legal name of the business, person, association, firm, corporation, or organization – <i>ACME Corporation</i>	
2. Trade name/Doing Business As (DBA), if applicable Full trade name or "Doing Business As" (DBA) name, if applicable – <i>ACME Seafood</i>	
3. Telephone number * Area code and number for employer – <i>(800) 123-4567</i>	4. Extension
5. Federal Employer Identification Number (FEIN from IRS) * Nine-digit FEIN as assigned by the IRS - <i>52-6669999</i>	6. NAICS code (must be at least 4-digits) * Four to six-digit NAICS code - <i>1234</i>

# Employer-Provided Surveys

## Completing the ETA Form 9165

### C. Employer-Provided Survey Information

1. Survey name or title *	
Complete name or title of survey- If the survey was commissioned by the employer and does not have a name, enter 'Employer Commissioned'	
2. A collective bargaining agreement is applicable to the job opportunity? Mark "Yes" or "No"	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No *If you mark yes, a survey may not be submitted.
3. A professional sports league's rules or regulations are applicable to the job opportunity? * Mark "Yes" or "No"	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No *If you mark yes, a survey may not be submitted.
4. The survey falls within the following permissible category for submission (select only one) * Mark the appropriate category applicable to the survey. Only one category may be selected.	
*If you select 4a., complete question 5, if you select 4b. or 4c., move on to question 6.	
<input checked="" type="checkbox"/> 4a. The survey was independently conducted and issued by a state, including any state agency, state college, or state university.	
<input type="checkbox"/> 4b. The survey is submitted for a geographic area where the OES does not collect data, or in a geographic area where the OES provides an arithmetic mean only at a national level for workers in the SOC.	
<input type="checkbox"/> 4c. The job opportunity is not included within an occupational classification of the SOC system; or the job opportunity is within an occupational classification of the SOC system designated as an "all other" classification	
5. If the survey was independently conducted by a state, including any state agency, state college or state university under question 4a, provide responses to questions 5a-5b. §	
5a. Name of state agency, state college or state university.	
Louisiana Department of Agriculture and Forestry	
5b. Name of the state official approving the survey.	
Contact's last (family) name	First (given) name
<u>Doe</u>	<u>Jane</u>

# Employer-Provided Surveys

## Completing the ETA Form 9165

### C. Employer-Provided Survey Information *(continued)*

6. If the survey is eligible under question 4b or 4c, provide responses to questions 6a-6c §	
<hr/>	
6a The collection of data was collected by a third party permitted by ETA regulations at 20 CFR 655.10(f)(4)(iii) and no data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney. Mark "Yes" or "No"	<input type="checkbox"/> Yes <input type="checkbox"/> No  If you mark yes, your survey will be found to be unacceptable and will be rejected under 20 CFR § 655.10(f)(4)(iii) since C.4a was marked Yes for a state survey and C.5 was completed.
6b Name of third party surveyor.	
	<u>N/A</u>
6c Name of the official representative of the third party surveyor who approved the survey.	
Contact's last (family) name	First (given) name
<u>N/A</u>	<u>N/A</u>
7. The survey is based on wages paid 24 months or less before the date on which the survey was submitted to ETA. * Mark "Yes" or "No"	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If you mark no, your survey will be found to be unacceptable and will be rejected under 20 CFR § 655.10(f)(5)
8. This is the most recent edition of the survey. (Answer "yes" if this is the only edition of the survey.) *	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If you mark no, your survey will be found to be unacceptable and will be rejected under 20 CFR § 655.10(f)(5)

# Employer-Provided Surveys

## Completing the ETA Form 9165

### D- Relationship to job opportunity listed on the Form ETA-9141

1. Title of job(s) included in the survey * <b>Include title of the job(s) included in the survey – Shrimp/Seafood Processing Worker/Dockworker</b>	
2. Duties of the job(s) included in the survey (submit an attachment if more space is required): * - <b>Describe the duties of the job(s) included in the survey. This should be a list of tasks performed by those in the position(s) being surveyed. Any specific requirements such as licenses should be listed here as well.</b>  <b>Under direct supervision, job duties of a worker is to bag, box, bread, butterfly/slice/split/stuff) case, clean shrimp, cleanup/maintain work site and sanitize, count, de-head, devein, dock work, dump containers or sacks, fill baskets/boxes/sacks/tables/troughs, freeze, grade, handle, ice pack, label, lift, load/unload (docks, racks, trucks, etc.), package, pallets (for shipping), peel, pick trash or remove foreign matter/and any shrimp not completely peeled, prepare, process, refrigerate /freeze immediately, remove/discard waste products, repackage, rinse, seal, separate/sort, use vacuum pack machine, wash, weigh, any other activities related to shrimp processing plants.</b>	
3. Identify the area of intended employment, as that term is defined in 20 CFR 655.5, covered by the survey. * <b>Area of intended employment, as defined in 20 CFR § 655.5, means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity. <b>Delcambre, Iberia Parish, Louisiana.</b></b>	
4. The survey was expanded to include workers beyond the area of intended employment * <b>Mark "Yes" or "No"</b>	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
4a. If yes to question 4, the geographic area surveyed was § <b>Keep in mind that any expansion must include areas contiguous to the area of intended employment. <b>Contacted all shrimp processors statewide in Louisiana.</b></b>	
4b. If yes to question 4, the survey was expanded beyond the area of intended employment (check all that apply) § <input type="checkbox"/> to meet the 30 worker minimum. <input checked="" type="checkbox"/> to meet the 3 employer minimum. <input type="checkbox"/> The area surveyed was expanded for another reason. Provide below: <b>As defined in 20 CFR § 655.10(f)(3).</b>	

# Employer-Provided Surveys

## Completing the ETA Form 9165

### E. Survey Methodology

1. It was determined that <u>  25  </u> employers employ workers in the occupation and geographic area surveyed. <b>Enter number of employers who employ workers in the occupation and geographic area surveyed.</b>	
2. The following sources were used to determine the number of employers employing workers in the occupation and geographic area surveyed: * <b>List the sources used to determine the number of employers employing workers in the occupation and geographic area surveyed as defined in 20 CFR § 655.10(4).</b>  <b>Louisiana Department of Agriculture and Forestry database containing all companies who are holders of appropriate Louisiana certification to purchase, process, and sale fresh and frozen shrimp.</b>	
3. Did the surveyor attempt to contact all employers employing workers in the occupations in the geographic area surveyed or a sample of employers in the geographic area? * <b>The surveyor made a reasonable, good faith attempt to contact all employers as defined in 20 CFR § 655.10(4)(i).</b>	<input checked="" type="checkbox"/> All Employers <input type="checkbox"/> Sample
3a. If a sample, was the sample selected randomly? § <b>As defined in 20 CFR § 655.10(4)(i).</b>	<input type="checkbox"/> Yes <input type="checkbox"/> No
3b. If a sample, provide a brief summary of the procedures used to randomize the sample: § <b>Provide procedures and details of the methodology implemented to ensure a randomized sample of all workers within the area of intended employment as defined in 20 CFR § 655.10(4)(i).</b>	
4. The surveyor attempted to solicit responses from <u>  25  </u> employers in conducting the survey. * <b>Enter number of employers the surveyor attempted to solicit responses.</b>	

# Employer-Provided Surveys

## Completing the ETA Form 9165

### E. Survey Methodology (continued)

5. For each responding employer, the survey includes the wages of all workers in the occupation regardless of skill level or experience, education, and length of employment. * As defined in 20 CFR § 655.10(4)(v).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
6. The survey includes data collected across industries that employ workers in the occupation. * As defined in 20 CFR § 655.10(4)(iv).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
7. The survey reflects the mean wage for all workers it covers. * Mark "Yes" or "No" – If Yes, complete 7a. As defined in 20 CFR § 655.10(2).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
7a. The mean wage is <u>\$8.06 per hour</u> (specify whether hourly, weekly, or monthly). §	
8. The survey reflects the median wage for all workers it covers. * Mark "Yes" or "No" – If Yes, complete 8a. As defined in 20 CFR § 655.10(2).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
8a. The median wage is <u>N/A per N/A</u> (specify whether hourly, weekly, or monthly). §	
9. The hourly, weekly, or monthly wage reported from the survey is based on data from <u>19</u> employers (minimum of 3), and reflects wages from <u>536</u> workers (minimum of 30) within the occupation in the geographic area surveyed. * 20 CFR § 655.10(4)(ii)	
10. The hourly, weekly, or monthly wage rate reported by the survey includes all types of wages paid to workers, including base rate of pay, commissions, cost-of-living allowance, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonus, and tips. * As defined in 20 CFR § 655.10(4)(v).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
11. The survey includes wages from workers in the occupation regardless of immigration status. * As defined in 20 CFR § 655.10(4)(v).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No



# Employer-Provided Surveys

## Completing the ETA Form 9165

### F- Employer Declaration

**I declare** under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained therein is true and accurate. *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a felony punishable by a \$250,000 fine or 5 years in the Federal penitentiary or both (18 U.S.C. 1001).*

1. Last (family) name * <b>Last (family) name of the person with authority to sign on behalf of the employer – Smith</b>	2. First (given) name * <b>First (given) name of the person with authority to sign on behalf of the employer - John</b>	3. Middle name(s) *- <b>Middle name of the person with authority to sign on behalf of the employer - Doe</b>
4. Title * - <b>Job title of the person with authority to sign on behalf of the employer - Human Resources Manager.</b>		
6. Signature * - <b>Person with authority to sign on behalf of the employer must sign – John D. Smith</b>	6. Date Signed *- <b>The person with authority to sign on behalf of the employer must date the application – mm/dd/yyyy</b>	

# Employer-Provided Surveys

## Which Workers are Surveyed?

- All workers in the occupation regardless of skill level or experience, education, and length of employment
- Must include workers from various industry sectors where the occupation is found
- May not limit participants based upon factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm
- Data collection for a survey must be conducted without regards to the immigration status of workers in the sample

**Important Note:** *Wages reported in an employer-provided survey must include all types of pay for the occupation: base rate of pay, commissions, cost-of-living allowance, deadheading pay, guaranteed pay, hazard pay, incentive pay, longevity pay, piece rate, portal-to-portal rate, production bonus, and tips and the surveyor must convert into the hourly rate*

# Employer-Provided Surveys

## When can a Survey Area be Expanded?

- Only if sample based upon the area of intended employment cannot be used . . .
  - Fewer than 30 workers wages
  - Fewer than 3 employers
  - Other statistically valid reason such as a dominant employer
- Smallest area to meet standards
- Contiguous area; areas with economic and commuting ties have priority
- May cross state lines
- For work locations in one of the Office of Management and Budget (OMB) Consolidated Areas (CAs), this is usually the most appropriate first expansion



# Employer-Provided Surveys

## How Recent Must the Wages Be Collected?

- Age of Data
  - Must be most recent publication of the survey
  - Must be based on wages paid no more than 24 months before the date of **submittal**

# Obtaining an Offered Wage Rate

## Receiving a PWD and Validity Period

- All employer requests for a PWD will be processed on a First-In-First-Out basis (*i.e., no expedited processing*)
- NPWC will issue a PWD, indicate the wage source, and return the ETA Form 9141 electronically to the employer
- NPWC will specify the validity period of the PWD, which must be no more than 365 days and no less than 90 days from the determination date
- Employer must retain for 3 years from the date of issuing the PWD or the date of a final determination on the H-2B application, whichever is later

# Request for Review/Appeal of a PWD

- More streamlined appeal process - requests for redetermination step is removed with the 2015 regulations
- Employer may request review directly with the NPWC Director within 7 business days from the date the PWD was issued through the appeal process in 20 CFR § 655.13.
- If the employer disagrees with the NPWC Director's final determination, the employer has 10 business days from the date of the final determination to request review by BALCA.

# Disclaimer

**This presentation is intended for training use only and does not carry the force of legal opinion.**

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