



VIA ELECTRONIC SUBMISSION

June 9, 2013

Mr. Michael 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, D.C. 20210

**Re: Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program,
Part 2; Docket ID ETA-2013-0003; RIN 1205-AB69 and RIN 1615-AC02**

Dear Acting Administrator Jones:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's (DOL) Employment and Training Administration (ETA) and the U.S. Department of Homeland Security (DHS) in response to the above-referenced Interim Final Rule (IFR) published in the *Federal Register* on April 24, 2013, at 78 Fed. Reg. 24047.¹

About Associated Builders and Contractors, Inc.

ABC is a national trade association representing 22,000 members from more than 19,000 construction and industry-related firms. ABC and its 72 chapters help members win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers, whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar.

¹ ABC shares the concerns and recommendations provided in comments filed to this docket by the H-2B Workforce Coalition and incorporates them into this letter by reference.

Background

The H-2B visa is a temporary, nonimmigrant work visa authorized by DHS for nonagricultural workers. Under the H-2B program, U.S. employers may hire visa holders to meet peak load, seasonal, intermittent or one-time needs. DHS may issue a maximum of 66,000 H-2B visas annually. A limited class of H-2B visa holders do not count toward the annual cap. During construction worker shortages, ABC members have used the H-2B program to fill their labor needs.

DHS has delegated authority to DOL to establish wage rates for each occupation under the H-2B program. At a minimum, employers must pay a visa holder the established wage rate for his or her occupation. In 2008, DOL relied on a four-tier skill system to set wage rates for H-2B visa holders. The four-tier skill system was based on Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES).

DOL's wage methodology has been the subject of multiple legal challenges. On Aug. 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania ordered DOL to provide the public with an opportunity to comment on its methodology for calculating wages for the H-2B temporary nonagricultural worker visa program and to promulgate a rule that meets the requirements of the Administrative Procedure Act in 120 days.

On Oct. 5, 2010, DOL formally published its proposed rule. Rather than issue a notice requesting comment on the current methodology in accordance with the court order, the agency instead opted to propose a completely new wage methodology, which relies heavily on rates set by the Davis-Bacon Act wage determination process. The notice of proposed rulemaking rescinded the 2008 wage methodology, and replaced it with a system that would set wage rates as "the highest of the following: Wages established under an agreed-upon collective bargaining agreement (CBA); a wage rate established under the [Davis-Bacon Act] or [Service Contract Act] for that occupation in the area of intended employment; and the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment."² The employer would be required to pay the workers "at least the highest" rate among the "prevailing wage," as outlined above, and the federal, state and local minimum wages. ABC filed comments in response to the 2010 proposal objecting to the methodology (those comments are attached). The final rule, which mirrored the proposal, was published on Jan. 19, 2011.³ This methodology (2011 wage methodology) currently is being blocked in Congress by a continuing appropriations resolution that will not fund the implementation of the rule.

Because Congress currently is blocking the 2011 wage methodology via appropriations resolutions, DOL reverted to the 2008 wage methodology. However, on March 21, 2013, the U.S. District Court for the Eastern District of Pennsylvania held DOL could not rely on the four-tier wage system of the 2008 methodology, which establishes how prevailing wages are set using the BLS data. The court said in the 2011 rule that DOL had stated the 2008 wage levels were insufficient, thus it could not rely on those wage levels without a new finding that its early

² 75 Fed. Reg., at 61579.

³ 76 Fed. Reg., at 3452.

determination regarding insufficiency of the 2008 wage levels was flawed. The court gave the agency 30 days to cease using its 2008 wage methodology. DOL’s determination that the 2008 wage levels are insufficient was fatally flawed, arbitrary and capricious and we urge DOL to revisit that determination as part of the current regulatory process.

As a result of the DOL not being able to use the 2008 or 2011 wage methodologies, on April 24, 2013, DOL and DHS published the IFR.⁴ The agencies reported they were not subject to a notice and comment period as stated in the Regulatory Flexibility Act because they had good cause showing a general notice of proposed rulemaking would be impracticable and contrary to the public interest.

Under the April 24 IFR, the four-tier wage system from the 2008 wage methodology is replaced with an average OES wage. The rule also removes the “at least the highest” provision that is included in the 2011 wage methodology. The provision regarding wages established under an agreed-upon collective bargaining agreement (CBA) remains unchanged. However, if the employer is not covered by a CBA, then the employer is given the option to choose between one of the following wage methods: a wage rate established under the [Davis-Bacon Act] or [Service Contract Act] for that occupation in the area of intended employment; or the arithmetic mean wage rate established by the OES for that occupation in the area of intended employment.

ABC’s Comments in Response to DOL’s Interim Final Rule

ABC has a number of concerns with DOL’s and DHS’s April 24 IFR, each of which are addressed below. Primarily, ABC opposes the rule because it would be detrimental both to the long-standing success of the H-2B program and its participants—particularly small businesses.

I. The Davis-Bacon Act

ABC would first like to applaud DOL and DHS for abandoning the “at least the highest” provision which was included in the 2011 wage methodology and any mandated use of Davis-Bacon wage rates.⁵ ABC does not support mandating Davis-Bacon wage rates or including them in an “at least the highest” provision. If the agencies mandate Davis-Bacon wage rates or include it in an “at least the highest” provision, it will artificially inflate wages and make the program unusable for small employers. Rather, for the reasons set forth below, Davis-Bacon should remain a voluntary option to employers, such as in the 2008 wage methodology.

A. Davis-Bacon Wage Rates Are Flawed and Inflated

Davis-Bacon rates are grossly inflated and requiring Davis-Bacon wage rates will render the H-2B program unusable by the vast majority of employers.

Under the Davis-Bacon Act, employers are required to pay “prevailing” wage and benefit rates to workers on federally funded construction projects. DOL has the sole

⁴ 78 Fed. Reg., at 24047.

⁵ 78 Fed. Reg., at 24054. DOL and DHS acknowledge the “at least the highest” provision is unworkable and any approach other than the voluntary application of DBA and SCA wage rates would impede DOL’s abilities.

responsibility for determining the prevailing wage rates. DOL's governing regulations require the agency to publish wage determinations that identify the classifications of workers (*i.e.*, carpenter, plumber, etc.) who perform work in each locality, as well as the applicable wage and fringe benefits that prevail for each classification in each locality.

DOL's Wage and Hour Division (WHD), a division of the agency focused on regulation rather than data collection, oversees the Davis-Bacon wage determination process. Despite repeated criticisms from the Government Accountability Office (GAO) and the DOL's Office of Inspector General of WHD's wage determination process,⁶ the agency has implemented few, if any, meaningful reforms in its administration of the act since the early years of the Reagan administration.

The heart of the problem with the Davis-Bacon wage determination process is the unscientific methodology used by WHD. Incredibly, WHD relies on *voluntary* wage surveys, which do not utilize statistically random samples. A 2011 GAO report found that "contractors have little or no incentive to participate in the Davis-Bacon wage survey" as it is currently administered. The report cited inability to provide all information requested and a justifiable lack of confidence in DOL's process as contributing factors.⁷ The surveys take years to be distributed, collected, calculated and completed.

Not surprisingly, unions and larger businesses, which have both the capacity to answer the surveys and a vested interest in inflating wage rates, are the most likely to respond to the surveys. Further, the survey form requires responders to provide specific information in a format that tracks how wages and fringe benefits are calculated and paid pursuant to a collective bargaining agreement. The vast majority of nonunion contractors do not calculate or pay wages and benefits in this manner and, as a result, have been deterred from participating in DOL's surveys. A GAO report stated that as a result "most nonunion contractors opt not to return the wage survey rather than attempt to break down their data to fit its format."⁸ Therefore, the majority of the wage survey responses and DOL's wage determinations are based on information provided by unions and union contractors, which in 2012 comprised only 13.2 percent of the private sector construction industry.⁹

DOL's procedures manual acknowledges the difficulty in getting responses from contractors, specifically nonunion contractors, and recognizes the issue of nonresponse as a potential source of survey bias. However, instead of addressing the issue of nonresponse, the agency changed their data collection standard in 2002, as WHD was unable to collect enough data to meet its current data collection standard. The WHD

⁶ U.S. Department of Labor, Office of the Inspector General, *Concerns Persist with the Integrity of Davis-Bacon Prevailing Wage Determinations (2004)*, Audit Report No. 04-04-003-04-420: <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf> and Government Accountability Office (GAO), *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, April 6, 2011, at <http://www.gao.gov/new.items/d11152.pdf>.

⁷ GAO, *supra* at 24.

⁸ GAO, *supra* at 26.

⁹ U.S. Department of Labor, Bureau of Labor Statistics, *Union Membership (Annual) News Release* (Jan. 2013): <http://www.bls.gov/news.release/union2.htm>.

changed its standard of data from requiring at least six workers from three different employers for each job classification to three workers from two different employers. The GAO report found the agency does not calculate response rates or conduct a nonresponse analysis, as the Office of Management and Budget recommends.¹⁰ Therefore, the department cannot determine if the survey results are representative of prevailing wage rates.

As described above, the flawed methodology under the Davis-Bacon Act leads to inflated wages that do not reflect the actual prevailing wages around the country.¹¹ This is evidenced in DOL's own cost projections in the 2011 wage methodology, which stated that the hourly wage rate for H-2B workers in the industry would be increased by an average of \$10.61 per hour.¹²

As a result of WHD's failed methodology, Davis-Bacon rates are outdated, inaccurate, inflated and chill the participation of small business contractors—which comprise the vast majority of the construction industry—in the public construction market. By mandating that employers pay the flawed Davis-Bacon wage rates in the H-2B program, the agencies would be importing these outdated, inaccurate and inflated wage rates into the program and, thus, render it unusable by the vast majority of employers.

B. WHD's Failure to Provide Information on Job Duties for Each Davis-Bacon Wage Rate Will Unnecessarily Complicate Visa Wage Determinations

Under the Davis-Bacon Act, the job duties that apply to a particular job classification are determined by local practice. For example, a carpenter may hang sheet rock in one area, whereas that work may only be performed by sheet rock hangers in another jurisdiction. Where DOL determines that the prevailing wage rate for a classification is based on a union collective bargaining agreement, the job duties for that classification most likely also will be governed by the union's work rules in that collective bargaining agreement. Generally, union work rules require that only a certain job classification may perform certain work. For example, the work rules may require that only an electrician is permitted to install alarm systems, even though such work is performed by technicians in other jurisdictions.

While each DOL wage determination will list several different classifications of workers (painters, carpenters, laborers, etc.), limited information is available on the actual job duties or union work rules that apply to the classifications. Although the published wage determinations may identify the relevant local union for each of the listed job classifications, where the rate is based on the union's collective bargaining agreement,

¹⁰ GAO, *supra* at 19.

¹¹ See, e.g., *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages*, The Beacon Hill Institute, 2008 (finding Davis-Bacon wage methodology inflates wages on average by 22 percent) available at <http://events.abc.org/res.ashx?p=files/GovernmentAffairs/StateAffairs/DavisBaconPrevWage080207Final.pdf>, see also, ABC comments from 2010 proposal, 4.

¹² 75 Fed. Reg., at 61586.

DOL does not provide detailed information as to whether there are any work rule restrictions attached to those wage rates and, if so, what those work rule restrictions are.

DOL's failure to provide such information makes it difficult to determine the appropriate wage rate for many construction-related jobs. Moreover, because the methodology used by WHD is biased in favor of unionized contractors, in many instances union wage rates and work rules are deemed "prevailing," even though that is clearly not the case. Again, if WHD's methodology truly captured prevailing rates, union rates would prevail in very few regions, as only 13.2 percent of the private sector construction industry is represented by unions.¹³ Importing these problems into the foreign labor certification process essentially renders visas unusable by the vast majority of contractors, particularly smaller contractors.

II. Proposed Use of Average OES Wage Rate

ABC is a member of the H-2B Workforce Coalition and we join in their comments and concerns regarding costs imposed by the April 24 IFR and its impact on employers using the program. Specifically, the Coalition found employers could face an average increase of \$2.94 per hour by using the average OES wage rate proposed in the IFR versus the four-tier wage system employed in the 2008 methodology. According to the sample of 282 new prevailing wage determinations, employers are facing an average increase of 32.3 percent in H-2B wage rates. One employer is even facing a 111.1 percent increase in wage rates.

We agree these costs will negatively impact the program and that the most appropriate wage methodology is the one included in DOL's Dec. 19, 2008, H-2B rule entitled "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes." We urge the agencies to revisit DOL's prior conclusion that this methodology is insufficient as the analysis leading to that conclusion was fatally flawed, arbitrary and capricious. The agencies should rescind the methodology in the IFR and replace it with one similar to the 2008 methodology.

III. The Impact on Small Business Construction Companies

As outlined above, the wage determinations under the Davis-Bacon Act are based on a flawed methodology and lead to inflated wage rates that do not reflect the actual prevailing rate in most counties across the country. For that reason, we applaud DOL and DHS for abandoning the "at least the highest" provision which was included in the 2011 wage methodology and any mandated use of Davis-Bacon wage rates and urge the agencies to refrain from reinstating either requirement.

Other changes must be made to the IFR, however, as it will impose unnecessary costs on employers by relying on average OES wage rates versus the four-tier wage system employed in the 2008 methodology. To add to this problem, small businesses are struggling to remain afloat in a

¹³ U.S. Department of Labor, Bureau of Labor Statistics, *Union Membership (Annual) News Release* (Jan. 2013): <http://www.bls.gov/news.release/union2.htm>.

tumultuous economic environment. Put simply, the program's costs will be virtually impossible for smaller businesses to absorb.

The economic impact of DOL's IFR on the industry is complicated further by the fact that construction industry small businesses often operate on extremely low net margins. According to the Construction Financial Management Association Building Profits Magazine, in 2012 the average construction firm's overall net earnings margin before income taxes was only 2.3 percent.¹⁴ As this number suggests, the wage implications of DOL's proposed rule will certainly negatively impact this already cash-tight industry.

Construction companies have been hit especially hard by the current state of the economy. Industry firms already are confronting unprecedented strains on their cash flows, and it is an unfortunate reality that many small businesses have failed due to inadequate capitalization. The challenges faced in the current economic environment by construction industry small businesses that rely on the H-2B program will be significantly compounded by DOL's proposed rule. It is entirely possible that more small businesses will be forced to close their doors as a result.

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For the reasons outlined above and in the H-2B Workforce Coalition comments, ABC urges DOL and DHS make the aforementioned changes to the April 24 IFR.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Geoffrey Burr", with a long horizontal flourish extending to the right.

Geoffrey Burr
Vice President, Federal Affairs

¹⁴ Construction Financial Management Association, *Building Profits* (2013), at <http://www.cfmaonline.net/cfmaonline/20130304?pg=64#pg68>, 64.