H-2A Temporary Agricultural Visa Program
Adverse Effect Wage Rate - Briefing Paper[1]

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Background

The Immigration Reform and Control Act (IRCA) of 1986 amended the Immigration and Nationality Act (INA or the Act) and established the H-2A program as a means of enabling U.S. employers to obtain an adequate supply of workers to perform agricultural labor or services on a seasonal or temporary basis. Bringing workers into the United States under the H-2A program is a process involving the Department of Labor (Department or DOL), Department of Homeland Security (DHS), and Department of State (DOS). Before the DHS can approve a petition from an employer to employ H-2A temporary agricultural workers, the Act requires that the DOL approve an employer's request for temporary labor certification, and sets out the explicit obligation for the Secretary of Labor to certify that:

> (A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and
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> (B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.[2]

DOL regulations governing the H-2A temporary labor certification process at 20 CFR part 655, subpart B, and 29 CFR part 501 require prospective employers to conduct recruitment for qualified U.S. workers and offer a minimum level of job, wage, and working condition guarantees and protections. For example, employers must offer, advertise, and pay at least the

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[1] To the maximum extent, the statements and citations contained in this briefing paper are all within the public domain and official regulatory record of the Department of Labor.

[2] *See* Section 101(a)(15)(H)(ii)(a) of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii)(a). *See also* 8 U.S.C. §§ 1184(c)(1) and 1188; 20 CFR 655, subpart B. The INA, as amended, requires the Secretary of Homeland Security to consult with appropriate agencies of the Government—in particular, the Department of Labor—before approving a petition from an employer for employment of H-2A nonimmigrant agricultural workers. 8 U.S.C. § 1184(c)(1). Section 218 of the INA, together with section 214, establishes the statutory structure for the program and provides that a petition to import H–2A workers may not be approved unless the petitioner has applied to the Secretary of Labor for a certification.

highest of the Adverse Effect Wage Rate (AEWR), the prevailing wage determined by a State Workforce Agency, the agreed-upon collective bargaining wage, the Federal and state minimum wage, or any other wage rate the employer intends to pay; provide three meals a day; obtain workers compensation insurance coverage; guarantee three-fourths of the total hours on a work contract; and provide workers who cannot reasonably return to their permanent place of residence with housing that meets minimum standards for health and safety. These and other regulatory requirements are intended to strike an appropriate balance between being responsive to the legitimate workforce needs of U.S. employers for agricultural labor and effectuating the DOL's statutory mandate to protect the wages and working conditions of similarly employed agricultural workers in the United States.

Historical Concerns About Adverse Effect

Concern about the potential adverse impacts resulting from a large influx of temporary foreign workers, and development of methods to determine and require AEWRs to prevent it, date back to the Bracero era and are rooted in international agreements that pre-date the 1986 IRCA. 54 FR 28037, 28039 (Jul. 5, 1989).[3] For example, in July 1942, the United States and Mexican governments negotiated a series of executive agreements to permit U.S. employers to employ temporary foreign workers only where such workers "shall not be employed to displace other workers, or for the purpose of reducing rates of pay previously established" (General Provision Number 4). Under these Bracero agreements, wages paid to Mexican workers were to be the same as those paid for similar work to other agricultural laborers under the same conditions within the same geographic area. In addition, amendments to the INA in 1952 (McCarran-Walter Act) established a legal foundation for the H-2 visa program requiring, among other provisions, that the Secretary of Labor certify to the Secretary of State and to the Attorney General that the employment of H-2 workers "will not adversely affect the wages and working conditions of the workers in the United States similarly employed."[4]

A "basic Congressional premise for temporary foreign worker programs . . . is that the unregulated use of [nonimmigrant foreign workers] in agriculture would have an adverse impact on the wages of U.S. workers, absent protection." 85 FR 70445, 70449 (Nov. 5, 2020)(citation omitted). The potential for adverse impact is "heightened in the H-2A program because the H-2A program is not subject to a statutory cap on the number of foreign workers who may be admitted to work in agricultural jobs" and "access to an unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the" wages of similarly employed U.S. workers "to stagnate or decrease." *Id.* at 70450. Agricultural workers

[3] The first Bracero Program allowed farmers in the western United States to employ temporary foreign workers from Mexico to work on farms and railroads beginning in May 1917. Under these agreements, employers were required to obtain a certification from their local Employment Service office that there were not sufficient U.S. workers to fill the jobs they offered, and the contracts with Mexican workers had to offer the same wages that were paid "for similar labor in the community in which the admitted aliens are to be employed." Emergency Immigration Legislation: Hearing before Committee on Immigration, United States Senate, 66th Congress, Third Session, on H.R. 14461, 66 Cong. 3 (1921)(citing Departmental Order of April 12, 1918, Concerning Admission of Agricultural Laborers. U.S. Department of Labor, Bureau of Immigration, Washington, April 12, 1918.

[4] *See* Pub. L. 414 (Jun. 27, 1952). Available at: https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg163.pdf.

are especially susceptible to adverse effect because they "generally comprise an especially vulnerable population whose low educational attainment . . . low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market" and, as a result, "their ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited." *Id.*

Since at least 1953, "employers seeking to import foreign nationals to work in various crop activities (in that case, under the Bracero program) were required to pay not less than a wage established by DOL." 54 FR at 28039. The AEWR as a formal concept in the H-2 program was introduced in 1963, at which point the AEWR initially was based on the U.S. Department of Agriculture (USDA) Census of Agriculture's average earnings for each state provided for 11 East Coast user states and was expanded and periodically adjusted thereafter. *Id.* at 28040. The AEWR protects U.S. and foreign agricultural workers by providing "a floor below which wages of U.S. and foreign workers cannot be negotiated, thereby strengthening the ability of this particularly vulnerable labor force to negotiate over wages with growers, who are in a stronger economic and financial position in contractual negotiations for employment." *Id.*

The AEWR is not backward-looking or remedial, meaning it is not "predicated on the existence of wage depression in the agricultural sector and [DOL] is not statutorily required to identify existing wage suppression prior to establishing and requiring employers to pay an AEWR." 85 FR at 70450.[5] Regardless "of any past adverse effect that the use of low-skilled foreign labor may or may not have had on" wages, the AEWR is necessary to satisfy DOL's "forward-looking need to protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation" *Id.* at 70450-70451. DOL has noted there is no "reliable method available" to determine the existence of adverse effect in a particular occupation and area and the absence of such a finding would not mean there has been no adverse effect, but merely that "imposition of the AEWR heretofore has been successful in shielding domestic farm workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers" into a particular area. *Id.* at 70451 (citation omitted).

DOL "consistently has set statewide AEWRs rather than substate. . . AEWRs because of the absence of data from which to measure wage depression at the local level" and because use of surveys reporting data at a broader geographic level "immunizes the survey from the effects of any localized wage depression that might exist." 75 FR 6883, 6895 (Feb. 12, 2010). DOL has noted in prior rulemakings that it prefers use of the USDA Farm Labor Survey (FLS) or Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) to determine AEWRs because both the FLS and OEWS surveys report wages at a level above the crop activity level, which is where DOL has determined there is the greatest potential for adverse effect, concluding that an "AEWR based on an occupational classification that accounts for

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[5] *See, e.g.,* 54 FR 28037, 28046-47 (Jul. 5, 1989); 75 FR 6884, 6895 (Feb. 12, 2010) (reiterating justification for protection against future adverse effect in 1989 rule); 73 FR 77110, 77167 (Dec. 18, 2008) (noting the D.C. Circuit observed there is no "statutory requirement to adjust for past wage depression"). *See also* 75 FR 6884, 6891 (Feb. 12, 2010) ("By computing an AEWR to approximate the equilibrium wages that would result absent an influx of temporary foreign workers, the AEWR serves to put incumbent farm workers in the position they would have been in but for the H-2A program. In this sense, the AEWR avoids adverse effects . . .").

significantly different job duties but remains broader than a particular crop activity or agricultural activity in a local area may better protect U.S. workers." 84 FR 36168, 36182 (Jul. 26, 2019) (citation omitted).

Distinguishing AEWRs from Prevailing Wages

Although the AEWR is most commonly the highest rate and, therefore, the rate an H-2A employer must pay, DOL also requires employers to pay a state-determined prevailing wage rate if that rate is available and the highest among the required wage sources. The prevailing wage is established at a narrower state or sub-state level and for specific crop or agricultural activities, or a distinct task within an activity, rather than for a broader occupation. In the H-2A program, prevailing wage determinations (PWD) are based on surveys conducted by the states under § 655.120(c), but prevailing wages are not used exclusively in the H-2A program and states have determined prevailing wages for state agricultural job orders for decades under the Wagner-Peyser Act regulations. DOL modernized the H-2A PWD standards in the 2022 H-2A FR (87 FR 61660) and the reforms made it easier for states to produce PWDs. However, states are not required to produce a PWD and often there is no PWD that applies to a job opportunity, in which case the AEWR typically applies as the highest of the required wage sources listed at § 655.120(a).

The role of the AEWR in DOL's "administration of the H-2A program is distinct from and complementary to local prevailing wage findings, which are specific to a particular crop or agricultural activity." 88 FR 12760, 12761 (Feb. 28, 2023)12761. Prevailing wages "can serve as an important additional protection for U.S. workers in crop activities and agricultural activities with piece rates or, in rare instances, higher hourly rates of pay." However, if there is no local PWD for the crop or activity, or there is a local PWD, "but that finding is lower than the prevailing wage of workers performing similar work within an occupational classification and broader geographic area (*e.g.,* statewide or regional), the AEWR establishes a wage floor that serves to prevent localized wage stagnation or depression relative to the wages of workers similarly employed in areas and occupations in which employers desire to employ H-2A workers." *Id.*

The AEWR acts as "a prevailing wage concept defined over a broader geographic or occupational field." 84 FR at 36180. The AEWR is most effective "in cases in which the local prevailing wage is lower than the wage considered over a larger geographic area (within which the movement of domestic labor is feasible) or over a broader occupation/crop/activity definition (within which reasonably ready transfer of skills is feasible)." 84 FR at 36180. Because the AEWR "is generally based on data collected in a multi-state agricultural region and an occupation broader than a particular crop activity or agricultural activity, while the prevailing wage is commonly determined based on a particular crop activity or agricultural activity at the state or sub-state level, the AEWR protects against localized wage depression that might occur in prevailing wage rates." *Id*.

Historical AEWR Methodologies

Congress has consistently not chosen to provide an explicit definition to the term "adverse effect" and left it to the Department's discretion to determine the most appropriate means of ensuring that the [employment] of temporary foreign workers met the statutory requirements. The INA does not require DOL to "determine the AEWR at the highest conceivable point, nor at the lowest, so long as it serves its purpose to guard against adverse impact on the wages of agricultural workers in the United States similarly employed." 88 FR at 12761. The INA requires DOL to "serve the interests of both farmworkers and growers—which are often in tension" and that is one reason "why Congress left it to [DOL's] judgment and expertise to strike the balance." *Id*. at 12772. DOL has acknowledged that the "clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive" and that "[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile." *Id.*

Prior to IRCA, DOL "established AEWRs in only 14 'traditional user' States, leaving the prevailing wage and Federal and State minimum" as the only protection in many states. 84 FR at 36185.[6] Beginning in 1987, after the IRCA amendments of 1986, DOL has operated the H-2A program under regulations it promulgated pursuant to the INA and has, with brief interruption, set the AEWR for most agricultural workers at the average wage paid to similarly employed workers in a state or region, as determined by the USDA FLS. For more than two decades after IRCA, DOL's 1989 Final Rule governed the H-2A program. *See* 54 FR at 28037. DOL's post-IRCA rules "dramatically expanded the use of the AEWR as a wage protection in the H-2A program in 49 States (excluding Alaska) and first began using the FLS to set the AEWR" as the average wage of farmworkers, which is the method still in use for most H-2A job opportunities. *Id.* This methodology was selected after a thorough consideration of alternatives and litigation directing DOL to provide a reasoned explanation for the chosen AEWR methodology.[7] DOL noted that the use of the FLS to set statewide AEWRs based on actual earnings of similarly employed workers was preferable to the prior method of basing AEWRs on the 1950s Census of Agriculture "that had been adjusted upward by various methods over the years." *Id*. at 28039.

Under a short-lived 2008 FR (73 FR 77110), DOL determined the AEWR based on the OEWS survey, "using the [Standard Occupational Classification (SOC)] taxonomy" to "set a different AEWR for each SOC [occupation] and localized area of intended employment." 84 FR at 36180. DOL also set the wage for each job opportunity at one of multiple wage levels "intended to reflect education and experience," similar to the Congressionally-mandated prevailing wage methodology in the H-1B program. *Id.* DOL suspended this rule in 2009, after encountering multiple administrative difficulties, problems related to employer job misclassification, and concluded that "the shift from the AEWR as calculated under the 1987 Rule to the recalibration

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[6] 47FR 37980 (Aug. 27, 1982); 48 FR 232 (Jan. 4, 1983). Although computation of the AEWRs occurred for all 50 states, DOL published AEWR's in the *Federal Register* only for those states in which H-2 visas have been or were expected to be used. 20 CFR 655.207 (1982). The AEWR's for 1982 ranged from $3.35 to $4.73.

[7] *See* 54 FR at 28038 (discussing DOL's 1987 IFR methodology and related litigation and subsequent rounds of rulemaking to determine a reasoned AEWR methodology). *See also* 52 FR 20496 (Jun. 1, 1987)(1987 H-2A IFR); *AFL-CIO* v. *Brock,* 835 F.2d 912, 915 (D.C. Cir. 1987).

of the prevailing wage as the AEWR of the 2008 [FR] resulted in a substantial reduction of farmworker wages . . .” 74 FR 45906 (Sept. 4, 2009).

Under the 2010 FR (75 FR 6883), which governed the program for more than a decade, the AEWR was the hourly rate for field and livestock workers (combined), determined using only the FLS, regardless of occupation, which produced “a single AEWR for all agricultural workers in a State or region, without regard to SOC code, and no AEWR in geographic areas not surveyed” (*e.g.*, Alaska). 88 FR at 12793-12794. The 2023 AEWR FR revised this methodology by adding the OEWS as the primary wage source to determine the AEWR for job opportunities in higher-paid jobs that do not fall within the common ‘big six’ field and livestock worker (combined) occupations, such as truck drivers and construction workers. These workers are not represented in the FLS and so use of an occupation-specific OEWS wage better ensures employment of H-2A workers in these jobs will not have an adverse effect on the wages of similarly employed U.S. workers. The 2023 FR also provides for OEWS-based AEWRs in areas where the FLS does not report a wage.

The now-vacated 2020 FR (85 FR 70445) set the AEWR for the ‘big six’ occupations at the current AEWR rates, based on 2019 USDA FLS data, and provided for those AEWRs to adjust annually after a two-year wage freeze, using the BLS Employment Cost Index (ECI), Wages and Salaries. For all other SOC codes, and for geographic areas not included in the FLS, the 2020 FR set the AEWR at the statewide or national OEWS-based average wage for the occupation. The 2020 FR was vacated as a result of litigation in which the court determined “plaintiffs were likely to succeed on their claims that [DOL] failed to justify freezing wages for two years, and failed to properly analyze the economic impact of the 2020 [FR] on farmers,” and that DOL “failed to adequately explain its departure from its longstanding use of the FLS. . .” 88 FR at 12763. As a result, DOL returned to the longstanding AEWR methodology of the 2010 FR until publication of the 2023 FR that revised the methodology as described above.

The methodology in the 2020 FR was intended to reduce complexity and employer burdens, ease spiking growth in the AEWR, and provide more stable and predictable AEWR growth in future years by pegging the AEWR to the ECI. DOL intended to prevent “[l]arge and unpredictable wage fluctuations” in the AEWR year-to-year, noting the AEWR had recently outpaced both inflation and the rate of wage increases for “workers more generally in the U.S. economy.” 85 FR at 70452. DOL concluded the methodology would reduce unnecessary complexity and avoid “potential for significant wage reductions” under more complicated methodologies, like use of the OEWS to determine an AEWR for specific occupations and areas. *Id*. at 70452. DOL also reasoned use of the ECI may be preferable to reliance on the FLS survey, which has been suspended several times in the past and over which DOL has no control. Finally, DOL noted use of the ECI would provide predictability and consistent wage increases for all agricultural workers. DOL emphasized it had not “concluded that the wages established by the FLS data . . . were flawed” but merely determined “greater certainty going forward is necessary.” *Id*.

Current AEWR Methodology

Under the current rule, (88 FR 12760 (Feb. 28, 2023)), DOL establishes the AEWRs based on data from the USDA FLS or the BLS OEWS survey.[8] For non-range H-2A occupations (*i.e.,* occupations other than herding and production of livestock on the range), DOL currently determines the AEWR for the six most common agricultural occupations[9] using the "gross average hourly wage rate for field and livestock workers (combined)," as determined by the USDA FLS.[10] These job opportunities constitute approximately 98 percent of all H-2A job opportunities.

If the FLS does not report a wage finding for the field and livestock workers (combined) occupational group (*e.g.,* Alaska, where FLS does not survey), the OEWS serves as a wage source for a 'big six' job opportunity and the AEWR will be the OEWS statewide annual average hourly gross wage for the field and livestock workers (combined) category. For job opportunities not within the 'big six' occupations (*e.g.*, supervisors, truck drivers, construction workers), DOL issues an occupation-specific, OEWS-based AEWR in each State or equivalent district or territory. For example, a truck driver would receive an AEWR based on the statewide OEWS average hourly wage for the specific occupation. If the OEWS does not report a state-level wage, DOL uses the national OEWS wage for the occupation to determine the AEWR.

When a job opportunity constitutes a combination of a 'big six' occupation and an occupation not within the 'big six,' the AEWR is the highest of the applicable FLS and OEWS rates. While most job opportunities are clearly within or outside of the 'big six' occupations, some employers "submit H-2A applications for job opportunities that require workers to perform a variety of duties (*e.g.,* general crop tasks . . . and construction work . . ." 88 FR at 12777. For these mixed job opportunities, use of the AEWR for the higher paid SOC code is necessary to prevent adverse effects on the wages of similarly employed U.S. workers and "reduces the potential for employers to misclassify workers and imposes a lower recordkeeping burden than if [DOL] permitted employers to pay different AEWRs for job duties falling within different occupational classifications" on a single H-2A application. 85 FR at 70460.

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[8] **Note:** OFLC does not administer or control the FLS or OEWS surveys or the methodology used to conduct the surveys. This is important because stakeholders often request changes to the survey methodology, rather than a wholesale change to the method of determining AEWRs. DOL also has no control over whether or when the survey is conducted and the USDA has suspended the survey in the past. Notably, in 2020, during DOL's H-2A rulemaking, the USDA announced its intent to suspend the 2020 FLS data collection that was necessary to determine AEWRs. USDA had suspended FLS data collection on at least two prior occasions, in 2009 and 2011.

[9] The FLS-based AEWRs apply to job opportunities in the following 'big six' SOC occupational titles and codes: Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45-2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45-2093); Agricultural Equipment Operators (45-2091); Packers and Packagers, Hand (53-7064); Graders and Sorters, Agricultural Products (45-2041); and All Other Agricultural Workers (45-2099).

[10] Because there is no FLS wage available for Alaska or Puerto Rico, the AEWR for the 'big six' SOC codes in these areas is set by the weighted average hourly wage rate determined by the BLS OEWS survey.

Comparison of USDA FLS and DOL OEWS Data

DOL has used the USDA FLS to determine the AEWR for more than three decades. Outside of three instances in which USDA suspended the survey, "USDA has conducted the FLS since 1910, consistently collecting and reporting wage data for field and livestock workers (combined) in 49 States, and USDA has developed extensive expertise analyzing, measuring, and assessing the accuracy and reliability of its annual wage estimates." 88 FR at 12768. The primary disadvantages of the FLS are that it excludes contract and custom workers (*e.g.*, workers employed by farm labor contractors (FLCs)), does not adequately survey higher paid occupations like construction laborers, does not consistently provide state-level wage data, and DOL has no direct control over the methodology, computation of wage results, or publication schedule.

Despite these issues, DOL has determined that the FLS is the best wage source for job opportunities in the most common 'big six' occupations because "the FLS is the most comprehensive survey of wages paid by farmers and ranchers." *Id*. The FLS consistently reports data for the entire U.S. and for 15 multi-state regions and the 3 single states of Florida, California, and Hawaii. 84 FR at 36181. Since 2014, the FLS has collected data by SOC code, "the same taxonomy that is used for the [OEWS] survey." *Id*. The FLS "also captures seasonal peaks in farmworker wages by measuring wages quarterly" and "provides the most up-to-date data on worker wages by using only single-year data." 88 FR at 12761.[11] Another significant advantage of the FLS is its broad geographic scope, which is "consistent with both the nature of agricultural employment and the statutory intent of the H-2A program," reflecting the migratory pattern of many workers providing agricultural labor or services across wide areas, and Congress's recognition of "this unique characteristic of the agricultural labor market with its statutory requirement that employers recruit for labor in multi-State regions as part of their labor market before receiving a labor certification . . ." *Id*. at 12768 (citation omitted). The scope of the FLS "provide[s] protection against wage depression that is most likely to occur in particular local areas where there is a significant influx of foreign workers" and "serves to prevent adverse effect on the wages of farmworkers . . . by establishing a prevailing wage defined over a broader geographic area and over a broader occupational span (*i.e.,* the six SOC codes covering all field and livestock workers (combined), rather than a narrow crop or job description)." *Id.* The FLS-based AEWR also "may serve 'to mobilize domestic farm labor in neighboring counties and States to enter the subject labor market over the longer term and obviate the need to rely on . . . foreign labor on an ongoing basis.'" *Id.*

Apart from the FLS, the BLS "OEWS survey is the only comprehensive and statistically valid source of wage data for agricultural occupations and geographic areas common in the H-2A program" and it is the "wage source most consistent with the SOC-based wage collection of the FLS." 88 FR at 12770. The OEWS survey collects "gross wage data from [FLCs] that support fixed-site agricultural employers." *Id.* The "OEWS is more accurate than the FLS for higher-paid SOC codes" outside of the big six occupations (*e.g.* supervisors) that "the FLS does not adequately or consistently survey," and the OEWS "better protect[s] against adverse effects for those SOC codes." *Id*. 12762. The OEWS is also a good AEWR source for H-2A FLC job

[11] The scope, purpose, and statistical methodology for each FLR is extensively outlined in USDA's "Methodologies and Quality Measures Report," which is published concurrently with each FLS publication.

opportunities, which represent "an increasing share of the H-2A worker positions certified by" DOL. *Id*. at 12770. Unlike the FLS, the OEWS does not survey fixed-site employers "that are directly engaged in the business of crop production and employ the majority of field and livestock workers." 85 FR at 70458. However, the OEWS does "include SOC codes that are more often contracted-for services (*e.g.,* construction supporting farm production) than farmer-employed positions, which makes the OEWS data collection from [FLCs] a more direct, relevant data source for determining AEWRs for these SOC codes than the FLS." 88 FR at 12771.