

**U.S. Department of Labor
Employment and Training Administration
Office of Foreign Labor Certification
Frequently Asked Questions
H-2B Program – Employer-Provided Surveys
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H-2B Program – Employer-Provided Surveys

1. Why isn't the Department continuing to use employer-provided surveys when issuing prevailing wage determinations (PWDs) and temporary employment certifications in the H-2B program?

On December 5, 2014, the U.S. Court of Appeals for the Third Circuit issued a decision in *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014), which vacated the portion of the Department's H-2B Wage Rule (i.e., 20 CFR § 655.10(f)) and 2009 Wage Guidance permitting the use of employer-provided surveys to set the prevailing wage in the H-2B program. Accordingly, the Department immediately ceased issuing prevailing wage determinations in the H-2B program based on employer-provided wage surveys. In addition, the Department can no longer issue H-2B temporary employment certifications based on employer-provided wage surveys. The Department's guidance about this change appeared on the Office of Foreign Labor Certification Web site at www.foreignlaborcert.doleta.gov on December 9, 2014 and December 23, 2014.

2. How does the court's decision in *CATA v. Perez* affect the Department's regulations and rulemaking related to H-2B wages?

The Department's Interim Final H-2B Wage Rule, 78 Fed. Reg. 24047, (April 24, 2013) remains in effect, with the exception of the one provision vacated by the court's ruling (i.e., 20 CFR § 655.10(f)).

The Department is currently reviewing its options with respect to rulemaking related to setting the prevailing wage in the H-2B program.

3. I submitted my *Application for Prevailing Wage Determination*, ETA Form 9141, requesting consideration of an employer-provided survey for use in the H-2B program. Will the National Prevailing Wage Center (NPWC) use the survey I provided? If not, what will NPWC use to determine the prevailing wage?

Following the court's decision in *CATA v. Perez*, beginning on December 8, 2014, the NPWC ceased issuing prevailing wage determinations (PWDs) in the H-2B program based on employer-provided surveys. If an employer submits an ETA Form 9141 requesting use of an employer-provided survey, the NPWC will issue the PWD using the appropriate Occupational Employment Statistics (OES) wage for the occupation in the area of intended employment.

4. I have a Prevailing Wage Determination (PWD) based on an employer-provided survey issued by the NPWC before the *CATA v. Perez* decision. How will my recruitment and my certification be affected?

An employer who submitted an *Application for Prevailing Wage Determination*, ETA Form 9141, before December 8, 2014 and received a PWD based on an employer-provided survey may rely on that PWD for purposes of conducting the pre-filing recruitment (i.e., job order and newspaper advertisements) required in the H-2B program. However, as of December 8, 2014, the Department will not issue an H-2B temporary employment certification based on an employer-provided wage survey. Such a labor certification will be issued based on the OES mean wage for the occupation in the area of intended employment.

Before filing an *Application for Temporary Employment Certification*, ETA Form 9142, with the Chicago National Processing Center (NPC), the employer may request a modified PWD from the National Prevailing Wage Center (NPWC) using the redetermination process under 20 CFR § 655.10(g). The NPWC will accept and process such redetermination requests irrespective of the time limit requirements normally applicable to redetermination requests. Unless the employer requests consideration of an alternative source (i.e., McNamara-O'Hara Service Contract Act, Davis-Bacon Act, or a collective bargaining agreement), the NPWC will issue the modified PWD using the appropriate OES wage for the occupation.

Some employers who received a PWD before December 8, 2014 may choose to file an *Application for Temporary Employment Certification*, ETA Form 9142, based on an employer-provided survey in the H-2B program, rather than obtaining a modified PWD from the NPWC first. In those cases, where the application is otherwise acceptable, the employer will receive a supplemental prevailing wage determination (SPWD) from the NPWC based on OES, together with the H-2B certification. The employer has the option of requesting redetermination of the SPWD from the NPWC under 20 CFR § 655.10(g). If the NPWC affirms the employer's request for redetermination based on SCA, DBA, or a CBA, the employer should return the original certification to the Chicago NPC along with the modified SPWD; a new certification reflecting the redetermination will be issued.