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March 14, 2022

Via email to ETA.OFLC.Forms@dol.gov

Brian Pasternak
Administrator
Office of Foreign Labor Certification
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Agency Information Collection Activities for H-2B Foreign Labor Certification Program, 87 Fed. Reg. 1787

Dear Mr. Pasternak:

Texas RioGrande Legal Aid, Inc. (TRLA), joined by the Economic Policy Institute, writes in response to the notice and comment request from the Employment and Training Administration (ETA) of the Department of Labor (DOL) titled Agency Information Collection Activities for H-2B Foreign Labor Certification Program. *See* 87 Fed. Reg. 1787.

These comments address Form ETA-9165 and its instructions. This form is "used to collect information that permits ETA to determine whether an employer-provided survey can be used to establish a prevailing wage in the occupational classification in lieu of a prevailing wage determined using the Bureau of Labor Statistics Occupational Employment Wage Statistics (OEWS) program." Notice, 87 Fed. Reg. at 1788. ETA proposes to extend approval of this form and its instructions without change. *Id.*

For more than 50 years TRLA has provided free legal services to the indigent, including a substantial practice representing low-wage workers with workplace legal problems, from more than a dozen offices in a 68-county region of south and west Texas. TRLA also provides free employment-related legal services to Texas-based agricultural workers who work across the country and to agricultural workers who labor in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, and Tennessee through its Southern Migrant Legal Services office in Nashville, Tennessee. TRLA frequently represents H-2B visa holders who are victims of trafficking, forced labor, and other crimes.

These comments are based on TRLA's exhaustive five decades of experience representing low-wage workers, including many H-2B workers. That experience has shown that H-2B workers are unusually vulnerable to exploitation, trafficking, and forced labor. DOL should be taking steps to protect and increase the wages of this vulnerable group. But by proposing to extend the use of

Form ETA-9165 without changes, DOL is instead allowing H-2B employers to undercut local wages, harming both H-2B workers and U.S. workers in corresponding employment.

H-2B employers who want to pay less than the OEWS prevailing wage applicable to their jobs use Form ETA-9165 to request DOL's approval of surveys conducted by (most commonly) state colleges and universities, pursuant to 20 C.F.R. § 655.10(f)(1)(i). There is no reason for an employer whose job is covered by an applicable OEWS wage to provide its own wage survey except to obtain approval of a sub-OEWS wage rate. Given DOL's mission of protecting workers, Form ETA-9165 should be used to closely scrutinize all details of these surveys that undercut local wages. Instead, Form ETA-9165 provides a roadmap to quick approval of low-quality surveys.

For the reasons explained below, we urge DOL to revise Form ETA-9165 through notice-and-comment rulemaking and thereby take steps toward protecting low-wage workers.

1. **DOL should conduct notice-and-comment rulemaking on Form ETA-9165 and its governing regulations.**

As has recently been explained in the context of ongoing litigation against DOL and the Department of Homeland Security, DOL uses Form ETA-9165 to issue prevailing wage determinations in violation of its statutory directives in the Immigration and Nationality Act (INA), a congressional appropriations rider, its own regulations, and the Administrative Procedure Act (APA). A relevant brief from that litigation is attached and incorporated by reference. *See* Ex. 1, Mem. in Supp. of Pls.' Second Mot. for Prelim. Inj., *Williams v. Walsh*, No. 1:21-cv-01150-RC (D.D.C. Feb. 28, 2022).

As is explained more thoroughly in that briefing, the key regulation governing Form ETA-9165, 20 C.F.R. § 655.10(f)(4), was promulgated in violation of the APA, without allowing for notice and comment and without rational explanations for its policy decisions. DOL's unexplained about-faces from earlier regulatory decisions were arbitrary and capricious and violated the Third Circuit's decision in *Comité de Apoyo a los Trabajadores Agrícolas v. Perez* (*CATA III*), 774 F.3d 173 (3d Cir. 2014).

The current usage of Form ETA-9165 not only continues those legal problems but adds a new layer of violations. First, the form in practice loosens the regulatory requirements. Substantive changes to regulations should be subject to the notice-and-comment process. *See Chevron USA Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984); *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir 2012). Second, Congress has in recent years passed an appropriations rider requiring DOL to accept employer-provided H-2B prevailing wage surveys of "occupational classification[s]" if those surveys are "statistically supported." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 110, 134 Stat. 1182, 1564–65.[1] DOL has used guidance to equate the phrase "statistically supported" with the methodological requirements of 20 C.F.R. § 655.10(f)(4), and so with Form ETA-9165. See Emp't & Training Admin., Effects of the 2015 DOL Appropriations Act at 4 (Dec. 29, 2015), https://www.foreignlaborcert.doleta.gov/pdf/H-

[1] Identical language is included in the current draft of the Consolidated Appropriations Act for 2022, available at https://www.congress.gov/bill/117th-congress/house-bill/2471/text.

2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf. This interpretation of the rider's ambiguous language also required notice-and-comment rulemaking.

We therefore urge DOL to conduct the long-delayed notice-and-comment proceedings that H-2B prevailing wage surveys so desperately require—and for which this limited Paperwork Reduction Act process is no substitute.

2. **Permitting low-quality, biased employer surveys of dubious statistical validity to supplant the OEWS survey hurts workers' wages, in violation of DOL's statutory charge.**

DOL's central charge from Congress in administering the H-2B program is to issue H-2B visas only if workers "capable of performing such service or labor" cannot be found, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and if "the employment of [the H-2B worker] will not adversely affect the wages and working conditions of workers in the United States similarly employed," 8 U.S.C. § 1182(a)(5)(A)(i)(II). Both requirements trace back to the original 1952 text of the INA. *See* Pub. L. No. 414, §§ 101(a)(15)(H)(ii), 212(a)(14)(B), 66 Stat. 163, 168, 183. To come into compliance with these statutory directives, DOL should revise Form ETA-9165 to ensure that it conducts a searching inquiry into the reliability, accuracy, and statistical support of all employer-provided surveys. Revising Form ETA-9165 to conduct a robust inquiry into the "statistical support[]" of employer-provided surveys will also assist in carrying out the mandate of the appropriations rider. § 110, 134 Stat. at 1565.

Permitting employers to pay substandard wages based on surveys that are not statistically supported contravenes DOL's statutory charges. This is true because each prevailing wage determination in reliance on an employer-provided survey is "a final economic determination as to both the validity of the survey and the economic effect of the survey wage." *CATA III*, 774 F.3d at 185. If DOL is approving inaccurate surveys, it is blessing the underpayment of both U.S. and H-2B workers.

Employers use Form ETA-9165 to obtain DOL's approval to pay wages that are less than the OEWS wage. For example, TRLA often represents H-2B workers in the Louisiana crawfish industry. For years, Louisiana crawfish H-2B employers have submitted their own surveys, using Form ETA-9165. *See* Ex. 2, Louisiana Crawfish Surveys, 2017–21. These surveys have consistently allowed them to pay workers several dollars less per hour than would be required under the applicable OEWS rates. This pattern repeats in many jobs around the country.[2]

This is lawful *only* if the surveys approved using Form ETA-9165 are accurate. If the surveys are inaccurate (perhaps due to bias or lack of statistical controls), then DOL is blessing hiring H-2B workers at substandard rates, thereby undercutting U.S. workers' wages and foiling DOL's attempts to accurately determine whether U.S. workers are available for the job. *See* 20 C.F.R. § 655.0(a)(2).

[2] *See, e.g.*, Compl. ¶¶ 86–89, *Williams v. Walsh*, No. 1:21-cv-01150 (D.D.C. Apr. 27, 2021) (enumerating 2020 approved survey-based wages several dollars less per hour than OEWS wages for dozens of jobs across four states).

Form ETA-9165 is supposed to ensure that employer-provided surveys are of high enough quality, free from bias and with enough statistical support, that DOL can confidently rely on their conclusions. Unfortunately, the current iteration of Form ETA-9165 is not up to this task, meaning DOL routinely violates its statutory mandate.

3. Part D of Form ETA-9165 should be revised to inquire into the "occupational classification" surveyed, rather than the "job."

Current regulations require that surveys be "conducted across industries that employ workers in the occupation." 20 C.F.R. § 655.10(f)(4)(iv). The appropriations rider likewise requires DOL to accept certain surveys of "occupational classification[s]," rather than simply "position[s]." § 110, 134 Stat. at 1564. Form ETA-9165 does not inquire into broader, cross-occupational classifications; instead, it merely asks about "the job(s) included in the survey." Part D, Questions 1–2.

Advocates highlighted this problematic phrasing back in 2015. *See* Ex. 3, Advocate Comment. The problems addressed in that comment, which is incorporated herein by reference, have never been addressed.

This cross-industry requirement is important. Recall that DOL's statutory instructions regarding the H-2B program are to protect U.S. workers who are "similarly employed," 8 U.S.C. § 1182(a)(5)(A)(i)(II), and "capable of performing" the job, 8 U.S.C. § 1101(a)(15)(H)(ii)(b). If U.S. workers "capable of performing" the job are to be protected, the wages a would-be H-2B employer must offer are not the wages prevailing in one narrowly defined job position (wages low enough to have resulted in a labor shortage), but the wages prevailing over a broader occupational grouping that captures the market wage paid to those "similarly" (but not identically) employed. *See also* Ex. 1 at 11–12, 22–24.

DOL can begin to bring Form ETA-9165 into alignment with statutory and regulatory requirements by modifying Part D of Form ETA-9165 to inquire into the "occupational classification(s)" surveyed, with complementary instructions explaining that an occupational classification is a cross-industry group that is broader than a single "position" or "job." DOL could provide the SOC and O*NET systems as examples of occupational classifications. Part D should also require the surveyor to provide information about how, if classifications distinct from the familiar SOC or O*NET systems were used, the job description was standardized to apply across industries.

4. Part D of Form ETA-9165 should be revised to allow for a more searching inquiry into expanded geographic areas for surveys.

According to DOL guidance, surveys should be expanded beyond the geographic area of intended "only to the extent necessary to generate a sample size sufficient to satisfy the minimum sample size requirement."[3] The guidance goes on to lay out the method necessary to demonstrate that expanding the area is necessary:

[3] OFLC Frequently Asked Questions and Answers, Prevailing Wage, H-2B 2015 Wage Final Rule, No. 32 (Sept. 1, 2016), https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!870.

> If the surveyor determines after surveying the area of intended employment that the survey does not meet minimum sample size requirements, it must either conduct a new random sample of the expanded area (including the area of intended employment) or make a reasonable, good faith effort to survey all employers employing workers in the occupation and expanded area surveyed.

Id. In other words, surveyors must initially attempt to survey the area of intended employment; if that attempted survey does not meet requirements, a new survey may be conducted.

Form ETA-9165 does not carry out that guidance. Instead, Part D, at Questions 4, 4a, and 4b, asks if the survey was expanded, asks for the expanded area to be identified, and then provides check boxes for reasons to expand the survey ("to meet the 30 worker minimum" or "to meet the 3 employer minimum"). This truncated questioning allows employers across a state or other large geographic area to share any survey that finds low wages in any area of the state, without anyone ever attempting to determine whether a survey is possible in the particular geographic areas where those employers are located—or, more critically, whether wages might be higher in those areas.

Part D should be revised to carry out DOL's own guidance. If a survey was expanded beyond the area of intended employment, the form should inquire into what area of intended employment was originally surveyed and what the results of that initial survey were, both in terms of sample size and wage. To verify these representations, DOL should request a copy of the initial survey performed of the area of intended employment.

5. Part E of Form ETA-9165 should be expanded to properly enforce the requirement of surveying all employers or a random sample.

Form ETA-9165 is supposed to gather information about "sample size and source [and] sample selection procedures," ensuring that the relevant population was either "all employers employing workers in the occupation and geographic area surveyed" or "a randomized sampling of such employers." 20 C.F.R. § 655.10(f)(4)(i). This requirement is the very minimum of statistical reliability, recognizable from any introductory statistics class: A survey is statistically reliable if it includes everyone, or if it is selected randomly. It is not reliable if, for example, it includes only the first three people who speak up, or the three people who live closest to the surveyor.

DOL understands these basic statistical safeguards. In promulgating the regulatory requirements governing these surveys, DOL stated: "We are concerned that leaving random sampling as only an option rather than a requirement may result in employer-provided surveys that use selective sampling or other techniques that do not result in a reliable prevailing wage." 80 Fed. Reg. 24146, 24173 (Apr. 29, 2015).

Form ETA-9165 purports to fulfill this requirement by providing two boxes to check, one for "[a]ll employers employing workers in occupation(s)," and a second for "[a] sample of employers in the geographic area." Form ETA-9165, Part E, Question 3. If the employer selects the "sample" box, it must then fill out more information about the procedures used to randomize the sample; if it selects "all employers," nothing further is asked.

This failure to inquire about surveys of "all employers" leads to acceptance of statistically unreliable surveys. For example, in the most recent Louisiana crawfish wage survey, employers submitting Form ETA-9165 checked the "all employers" box, and then stated that there were 76 total employers in the group, of whom four responded. *See* Ex. 4, Form ETA-9165 for Crawfish Distributors, Inc. For context, the OEWS survey has a response rate around 70%.[4] The Office of Management and Budget requires plans for nonresponse bias analysis for agency surveys with response rates below 70%.[5]

A five-percent response rate should raise questions. Were good faith efforts to reach all employers really made? Are the small group of employers who responded representative of the 95% of employers who did not respond?

But Form ETA-9165 does not ask those questions. Instead, DOL assumed that the group of four necessarily constituted a random sample. *See* Ex. 5, Non-OES Checklist ("Phone/email of all employers; *obtained random sample* of respondents." (emphasis added)).

DOL knows better than to accept the assertion that any subgroup of employers is necessarily a random sample. In DOL's own words, "[p]roper randomization requires the surveyor to determine the appropriate 'universe' of employers to be surveyed before beginning the survey and to select randomly a sufficient number of employers to survey to meet the minimum criteria on the number of employers and workers who must be sampled, as discussed below." 80 Fed. Reg. at 24173. Indeed, if employers had asserted that the 2021 Louisiana crawfish survey was based on a random sample, Form ETA-9165 would have inquired into the "procedures used to randomize the sample." But because Form ETA-9165 asks nothing further if the "all employers" box is checked, DOL accepts these surveys of dubious statistical validity.

To address these problems, questions inquiring into contact method and follow-up efforts, discussed further below, should be added to Part E of Form ETA-9165. In addition, if response rates are below 70%, Form ETA-9165 should require a nonresponse bias analysis. That analysis should be performed by the surveyor, not the employer. As is discussed further below, it is unreasonable to assume that any given H-2B employer has the statistical background necessary to perform such an analysis. Additional ideas regarding how to address nonresponse should be solicited through notice-and-comment rulemaking.

6. Part E of Form ETA-9165 should be revised to inquire into methods used for contact attempts and follow-up efforts.

Relatedly, Form ETA-9165 does not make sufficient inquiries into the methods surveyors use to contact and follow up with potential respondents.

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[4] U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, *Handbook of Methods* at 28 (Mar. 31, 2021), https://www.bls.gov/opub/hom/oews/pdf/oews.pdf.

[5] Office of Mgmt. & Budget, Standards and Guidelines for Statistical Surveys at 8 (Sept. 2006), https://www.samhsa.gov/data/sites/default/files/standards_stat_surveys.pdf.

Again, DOL understands the importance of these efforts. The regulations require "a reasonable, good faith attempt to contact" potential respondents. 20 C.F.R. § 655.10(f)(4)(i). The checklist used to evaluate surveys asks about the "[m]eans used to improve response rate such as follow up calls." Ex. 5. DOL has explained that a reasonably conducted survey might involve, for example, "follow-up by telephone with all non-respondents." 80 Fed. Reg. at 24173. But Form ETA-9165 does not ask enough questions to determine whether "a reasonable, good faith attempt[s]" were made.

For example, the 2021 Louisiana crawfish wage survey recites that "there are 76 possible licensed employers within Louisiana who employ workers in this occupation. Many of the licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents[.]" Ex. 2 at 7. This description does not even explain if contact was attempted with all 76 employers, much less what follow-up efforts were undertaken.

Meanwhile, an email exchange obtained from Louisiana State University via a public records request leaves the distinct impression that no follow-up efforts were performed. A week before the 2021 survey was finalized, a crawfish processor requested an update from LSU, noting that "there is at least the minimum responses needed." Ex. 6. It is unclear how, since the survey was purportedly independent, the crawfish processor knew the number of responses. The next day, the biology professor who ultimately signed off on the survey expressed hesitation, saying he thought they "should be working with Econ faculty for this." *Id.* The response: "They just need it done." *Id.* Four days later, the biology professor signed the survey form. *See* Ex. 2 at 6–7.

Form ETA-9165 does not contain any fields designed to collect information about the required "good faith" contact efforts, nor does it even mention follow-up contacts. Part E of the form should therefore be revised to ask:

- how contact information was obtained and verified;[6]
- the method used for initial contact with potential respondents;
- how much time was allowed to collect responses;
- what follow-up efforts were made to contact nonrespondents; and
- what other steps were taken to decrease nonresponse bias.

As is discussed further below, the surveyor should be the one required to provide this information, not the employer. The employer, after all, should not know the answers because the employer should not be involved in gathering the data. Again, further ideas for addressing the scope of contact efforts should be solicited through notice-and-comment rulemaking.

[6] At present, the form asks for the source of the "universe (number) of employers," Part E, Question 2, but it does not inquire as to the source of contact information. The difference is significant. A surveyor might, for example, reference public sources to determine the number of potential employers, but then request contact information for those employers from an employer association, creating the possibility of a skewed sample.

7. **Part E, Question 6 of Form ETA-9165 should be revised to enforce the requirement that data be collected across industries.**

As discussed above, regulations require that surveys be "conducted across industries that employ workers in the occupation." 20 C.F.R. § 655.10(f)(4)(iv). Rather than collecting information that would allow enforcement of this requirement, Part E, Question 6 of Form ETA-9165 asks employers to check Yes/No boxes to indicate if they complied. Asking employers to self-report compliance with the law does not collect the information that would allow DOL to check the veracity of their reports.

Employers submitting Form ETA-9165 know that the trick is to check the "Yes" box. For example, the 2021 Louisiana crawfish survey is limited to a single industry: crawfish. It makes no efforts to include even similar seafood processing jobs in the crab industry. Employers nonetheless check the "Yes" box for a cross-industry survey, and DOL accepts that representation, stating, "Occupation inherently limited." *See* Ex. 5.

But all jobs are "inherently limited" if defined narrowly enough. Truck driving can be limited by truck contents, janitorial services can be limited by type of building cleaned, and seafood processing can be limited by type of seafood. The question is whether those differences matter. For example, perhaps one type of truck driving, janitorial work, or seafood processing is unusually hazardous and requires not just a few more days of on-the-job training, but a six-month specialized apprenticeship that results in a unique certification and substantially higher wages. Meaningful implementation of the "across industries" regulatory language requires not simply accepting the statement that the job is limited, but inquiring why this is the exceptional case in which a cross-industry survey is inappropriate.

Form ETA-9165's Yes/No box about cross-industry surveys should therefore be replaced with an open-ended inquiry about what efforts were made to collect data across industries and which industries were surveyed. A follow-up question should then instruct that, if the survey was not collected across industries, the surveyor must explain why a cross-industry survey was not warranted. DOL should then closely scrutinize that response.

8. **Part E, Question 11 of Form ETA-9165 should be revised to require data collection only from non-H-2B workers.**

Part E, Question 11 of Form ETA-9165 asks if the survey "include[s] wages from workers in the occupation regardless of immigration status." This phrasing is purposeful and misleading. At first blush, it appears to be a laudable effort to protect noncitizen workers from discrimination. But a closer inquiry shows that the question's effect is to harm those very same workers.

The fight here is not about, for example, providing a voice to undocumented workers. It is about whether H-2B wages should be included in H-2B wage surveys. Where H-2B workers predominate in an occupation and area of employment, as they frequently do, employer surveys measuring the wages of those workers could "establish the parameters by which the wages of all workers would be measured." 76 Fed. Reg. 3452, 3467 (Jan. 19, 2011). If, year after year, a wage survey simply measures the wages authorized for H-2B workers the previous year, there

would be little upward movement of wages, which risks "creating a permanent subset of lower wages in that occupation or area of employment." *Id.*

To protect workers from this creeping wage stagnation, Question 11 should be revised to ask if the survey includes wages of H-2B workers; if it does, DOL should reject the request to set wages based on that survey.

9. Part F of Form ETA-9165 should be revised to either require attestations from the surveyor or to require the employer make a reasonable inquiry into the accuracy of the attestations.

Form ETA-9165 is supposed to contain "specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey." 20 C.F.R. § 655.10(f)(4). To that end, the regulations require that "the information provided by the employer must include the attestation that" the survey satisfies the regulatory criteria at 20 C.F.R. § 655.10(f)(4)(i)–(v).

Form ETA-9165 undermines that structure by requiring that the relevant information be provided solely by the employer submitting the form, and then worsens the problem by allowing the employer to declare merely that "to the best of my knowledge" the information provided "is true and accurate." *See* Form ETA-9165, Part F. This approach is not reasonably calibrated to provide DOL with the information it needs to assess the validity of the survey.

First and foremost, the *employer* should not be the one providing this information; the *surveyor* should be. Surveys must normally be "independently conducted and issued" by certain non-employer entities, such as a state university. 20 C.F.R. § 655.10(f)(1)(i). That means the employer is not allowed to be involved in the conduct of the survey—and yet the uninvolved employer is the one that certifies that the survey was done correctly. That makes no sense. Either DOL is assuming the employer is involved in conducting the survey (which violates the regulatory independence requirement), or it is requesting information from a party without knowledge (which is not reasonable).

DOL should adopt the obvious alternative of requiring the surveyors to attest as to the validity of their methods. DOL could do this easily with an attachment to Form ETA-9165 that requires an appropriate attestation as to the methods from the surveyor.

At a bare minimum, if DOL insists on relying solely on employer attestations, it should require employers to make a reasonable inquiry into the methods before signing. That attestation could draw on the example of Federal Rule of Civil Procedure 11(b), which requires certifications "to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*" (emphasis added).

* * *

Use of employer-provided surveys is resulting in unfairly low wages for both H-2B workers and U.S. workers in affected industries. Revising Form ETA-9165 would not entirely fix the

problem, but at least it would be a first step toward performing a searching inquiry into the statistical validity of these substandard surveys that harm workers. We appreciate the opportunity to comment on this important issue and hope that you will implement the suggestions described above, including via notice-and-comment rulemaking.

Sincerely,

TEXAS RIOGRANDE LEGAL AID, INC.

By:

Elizabeth Leiserson

Economic Policy Institute

Encl. (Ex. 1, Memo, *Williams v. Walsh*; Ex. 2, Louisiana Crawfish Wage Surveys (2017-21); Ex. 3, 2015 Advocate Comment; Ex. 4, ETA-9165 for Crawfish Distributors; Ex. 5, Non-OES Checklist; Ex. 6, LSU Email)

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY JANE WILLIAMS *et al.*,

Plaintiffs,

v.

MARTIN J. WALSH, in his official capacity as U.S. Secretary of Labor, *et al.*,

Defendants.

No. 1:21-cv-01150-RC

MEMORANDUM IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In Claim V of their Supplemental Complaint, Plaintiffs challenge the repeated issuance by Defendant Department of Labor (DOL) of H-2B prevailing wage determinations based on the 2021 Louisiana Crawfish Wage Survey (2021 Survey). Doc. 39 ¶¶ 30–32. As of the filing of the Supplemental Complaint, DOL had issued 21 prevailing wage determinations based on the 2021 Survey. Doc. 35-1 at 3. Each prevailing wage determination permits the petitioning H-2B employer to pay the average rate found by the 2021 Survey, $10.43 per hour, to crawfish peelers hired for the 2022 season. *Id.* Absent the 2021 Survey, each employer would have been required to pay the higher wages measured by the nationwide Occupational Employment Statistics (OES) survey conducted by the U.S. Bureau of Labor Statistics.[1] 20 C.F.R. § 655.10(b)(2). For each employer, the OES wage would have been between 6 and 42% higher than the 2021 Survey–based wage. Doc. 35-1 at 3.

These lowered wages harm Plaintiffs in two respects. First, the Plaintiffs who work for H-2B employers with approved survey-based wages will make several dollars less per hour in the upcoming crawfish peeling season than they would absent the challenged determinations. Second, because all Plaintiffs are employed in (or include members employed in) the Louisiana crawfish industry, they all suffer competitive harms and lose job opportunities whenever *any* lowered wages are approved in their industry.

Defendants contend that acceptance of the 2021 Survey is required first by a rider attached to DOL's annual appropriations package, *see* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 110, 134 Stat. 1182, 1565 [hereinafter the Rider], and second by two H-2B visa

[1] In the spring of 2021, the OES program changed its name to Occupational Employment and Wage Statistics (OEWS). Plaintiffs use the pre-2021 name (OES) for consistency with the administrative record.

regulations, 20 C.F.R. §§ 655.10(f)(1)(i) and (f)(4). *See* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program (2015 Wage Rule), 80 Fed. Reg. 24146 (Apr. 29, 2015). Neither is correct.

The Rider requires DOL to accept prevailing wage surveys that cover the "occupational classification of the position" and that are "statistically supported." § 110, 134 Stat. at 1565. The 2021 Survey satisfies neither requirement. First, it collects data only for the narrowly defined "position" of crawfish processor, not for the broader "occupational classification of the position." Second, the 2021 Survey was conducted without any of the reasonable safeguards that could potentially ensure statistical support. For example, it relies on four responses out of a universe of 76 but provides no information or analysis that would allow DOL to evaluate the efforts, if any, made by the surveyor to combat nonresponse bias or to ensure that the survey is representative of the population despite the 95% nonresponse rate.

Meanwhile, DOL cannot rely on the 2015 Wage Rule to fill in the statutory gaps in the Rider or as independent support for the decision to accept the 2021 Survey because the 2015 Wage Rule itself was promulgated in violation of the Administrative Procedure Act (APA). The public was not provided with notice or an opportunity to comment, and several of the Rule's provisions—including its permission for surveys of narrowly-defined job positions and its lax statistical standards—were published without rational explanation and so are arbitrary and capricious. And even if the 2015 Wage Rule *were* valid, the 2021 Survey does not meet even its low standards.

For these reasons, Plaintiffs request that the Court issue an order preliminarily enjoining DOL to (a) vacate all H-2B prevailing wage determinations issued in reliance on the 2021 Louisiana Crawfish Wage Survey, (b) for all affected employers, promptly issue revised prevailing wage determinations based on the "best information available," Rider, § 110, 134 Stat. at 1565, at

the time of the revised determination and without considering the 2021 Louisiana Crawfish Wage Survey, and (c) promptly notify all affected employers of the issuance of the revised prevailing wage determinations and their duty, pursuant to their certification at Form ETA9142B, Appendix B, Part B(5) to "offer a wage that equals or exceeds the highest of the new prevailing wage or the applicable Federal, State, or local minimum wage."

BACKGROUND AND STATEMENT OF FACTS

I. Plaintiffs

Plaintiffs Williams, Lewis, Johnson, and Lee are U.S. workers who have been employed in the Louisiana crawfish industry for many years, peeling and processing crawfish during a season that usually runs from February or March through June. Doc. 21-3, 21-4, 21-5, 21-6. All four work in Breaux Bridge, Louisiana. *Id.* Williams, Lewis, and Johnson work for Crawfish Distributors, Inc., a company that also imports H-2B workers to perform the same work as Plaintiffs. Doc. 21-3 ¶¶ 4, 7; 21-4 ¶¶ 6, 9; 21-5 ¶¶ 5, 8. Plaintiff Lee works peeling crawfish for CJ's Seafood Restaurant, a crawfish processor that competes with H-2B crawfish processors. Doc. 21-6 ¶ 4. Plaintiffs also include an organization with members who work in the Louisiana crawfish industry and an H-2B worker who has been employed as a crab and crawfish peeler in Louisiana, most recently in 2020. Doc. 21-7.

II. Statutory and Regulatory Framework

The H-2B visa program permits DHS to grant U.S. employers temporary visas for foreign workers only if "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers seeking H-2B visas must first obtain a "temporary labor certification" from DOL certifying that (i) U.S. workers are not available to fill the employer's job positions and (ii) the work terms offered will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(6)(iv)(A); *see*

also 8 U.S.C. § 1182(a)(5)(A)(i)(II); 20 C.F.R. § 655.1(a). To receive a temporary labor certification, a petitioning employer must offer certain minimum terms, including the prevailing wage applicable to the occupation and area of employment. 20 C.F.R. § 655.10(a).

A. Pre-2015 Rulemaking Efforts

DOL's first H-2B regulations, published in 2008, provided that, in the absence of a Collective Bargaining Agreement (CBA) wage, the H-2B prevailing wage would be set using data from the federal OES survey, which DOL mathematically subdivided to produce four "skill level" prevailing wages for each occupation in a geographic region.[2] Labor Certification Process and Enforcement for Temporary Employment (2008 Rule), 73 Fed. Reg. 78020, 78056 (Dec. 19, 2008). The Rule also gave employers the option of using their own surveys to set the prevailing wage for their jobs. *Id*.

DOL explicitly refused to consider comments regarding the wage provisions of the 2008 Rule. *Id.* at 78031. In part because of this refusal, Judge Pollak of the Eastern District of Pennsylvania determined that DOL had not complied with the Administrative Procedure Act (APA) in promulgating the 2008 Rule and ordered publication of a new rule within 120 days. *Comité de Apoyo a los Trabajadores Agrícolas v. Solis* (*CATA I*), No. 09-240, 2010 WL 3431761, at *25 (E.D. Pa. Aug. 30, 2010).

[2] These levels were artificial constructs. "The Level I wage [was] established by taking the arithmetic mean of the bottom one-third of the wage distribution; the Level IV wage rate [was] determined by establishing the arithmetic mean of the top two-thirds of the wage distribution; the Level II and Level III wages [were] derived from a formula established by section 212(p)(4) of the INA which provides for the reconstitution of two-level Government surveys and creation of two intermediate levels by dividing by the number three the difference between the initial two levels and adding the quotient to the first level to create Level II, and subtracting that quotient from the second level to create Level III." 2011 Wage Rule, 76 Fed. Reg. at 3460.

The new rule, published after notice and comment, eliminated the use of "skill levels" and set the prevailing wage for a job at the highest of any applicable (i) CBA wage, (ii) Service Contract Act (SCA) wage, (iii) Davis Bacon Act (DBA) wage, or (iv) mean OES wage. Wage Methodology for the Temporary Non-agricultural Employment H-2B Program (2011 Wage Rule), 76 Fed. Reg. 3452, 3484 (Jan. 19, 2011). The 2011 Wage Rule noted that use of these large federal surveys "is the most consistent, efficient, and accurate means of determining the prevailing wage rate for the H-2B program." *Id.* at 3465. The Rule prohibited use of employer-provided surveys where any of those four sources was available, explaining that "employer-provided surveys, generally, are not consistently reliable" and that "employers typically provide private surveys when the result is to lower wages below the [OES] prevailing wage rate. Such a result is contrary to the Department's role in ensuring no adverse impact." *Id.* at 3466. *See also id.* at 3463 (noting that offering a wage below the OES mean would necessarily "require [U.S. workers] to accept the job at a wage rate less than the market has determined is prevailing for the job. The net result is an adverse effect on the worker's income."). The 2011 Wage Rule permitted use of employer-provided surveys in two circumstances only: (i) where "there [was] no data from which to determine an OES wage and . . . there are no applicable CBA, DBA or SCA wages," or (ii) where the "job opportunity [was] not accurately represented within the job classification used in those surveys." *Id.* at 3467.

DOL delayed the effective date of the 2011 Wage Rule numerous times in response to employer lawsuits and congressional appropriations measures. *See* 76 Fed. Reg. 59896 (Sept. 28, 2011); 76 Fed. Reg. 73508 (Nov. 29, 2011); 76 Fed. Reg. 82115 (Dec. 30, 2011); 77 Fed. Reg. 60040 (Oct. 2, 2012); 78 Fed. Reg. 19098 (Mar. 29, 2013). Meanwhile, DOL continued to rely on the invalidated 2008 Rule. In 2013, the *CATA* Court responded to this multi-year delay by vacating

the skill level provisions of the 2008 Rule. *Comité de Apoyo a los Trabajadores Agrícolas v. Solis* (*CATA II*), 933 F. Supp. 2d 700, 716 (E.D. Pa. 2013).

In response, Defendants jointly issued an interim final rule, without affording the public prior notice or an opportunity to comment. Wage Methodology for the Temporary Non-Agricultural Employment H2B Program, Part 2 (2013 IFR), 78 Fed. Reg. 24047 (Apr. 24, 2013). The 2013 IFR was identical to the 2008 Rule with the sole exception that it used the mean OES wage rather than the four subdivided "skill level" wages. *Id.* at 24053. By tracking the 2008 Rule in all other respects, the 2013 IFR once again permitted the use of employer-provided surveys. *Id.* at 24054–55.

The Federal Register notice announcing the 2013 IFR invited the public to help DOL "collect additional data" about the use of employer-provided surveys:

> DOL and DHS invite comment on whether to permit the continued use of employer-submitted surveys, and especially seek input on the ways in which, if permitted, the validity and reliability of employer-submitted surveys can be strengthened. Are there methodological standards that can or should be included in the regulation that would ensure consistency, validity and reliability of employer-provided surveys? Are there industries in which employers historically and routinely rely on employer-submitted surveys that should be permitted to do so because of the well-developed, historical, industry-wide practice, or for other reasons? Are there state-developed wage surveys, such as state agricultural surveys, or surveys from other agencies, such as maritime agencies, that could provide data that would be useful in setting prevailing wages? Should employer surveys that include data based on wages paid to H-2B or other nonimmigrant workers be permitted in establishing a prevailing wage that does not adversely affect U.S. workers? If so, under what circumstances?

Id. at 24055. After responses to these questions were due, the number of employers seeking approval of surveys to avoid an applicable OES prevailing wage increased exponentially. In the 12 months before the 2013 IFR was published, only 49 employers submitted surveys for approval. *Comité de Apoyo a los Trabajadores Agrícolas v. Perez* (*CATA III*), 774 F.3d 173, 185 (3d Cir.

2014). In the nine months between July 1, 2013, and March 31, 2014, DOL approved 1,559 applications relying on employer-provided surveys—a 3,182% increase. *Id.* at 185–86.

The *CATA* plaintiffs returned to court, arguing that the 2013 IFR's reinstatement of employer-provided surveys was arbitrary and contrary to law. In December 2014, the Third Circuit agreed, noting that "employer surveys [provided] . . . a way to continue paying depressed skill-level wages," with 94% of surveys approved at a wage below OES Level II, and 21% below OES Level I. *Id.* at 185–86. After examining these statistics, the Third Circuit concluded that the 2013 IFR was both procedurally and substantively invalid. *Id.* at 187. The Court faulted DOL for "structurally encourag[ing] employers to rely on details of a private survey when there was a valid OES wage survey available." *Id.* at 189. In addition, the *CATA III* Court found that the 2013 IFR was contrary to law because allowing employers to pay survey wages below the OES mean wage permitted the very adverse effects that DOL is statutorily charged with preventing. *Id.* at 190–91. The *CATA III* Court vacated 20 C.F.R. § 655.10(f) and "direct[ed] that private surveys no longer be used" to set prevailing wages except in the two situations identified in the 2011 Wage Rule—i.e., "where an otherwise applicable OES survey does not provide any data for an occupation in a specific geographical location, or where the OES survey does not accurately represent the relevant job classification." *Id.* at 191.

B. The Promulgation of the 2015 Wage Rule

In response to the *CATA III* ruling, DOL stated that it "intend[ed] to publish a notice of proposed rulemaking on the proper wage methodology for the H-2B program, working off as a starting point [the 2011 Wage Rule]." 79 Fed. Reg. 14450, 14453 (Mar. 14, 2014). It did not do so. Instead, four months after *CATA III*, DOL and DHS jointly issued the 2015 Wage Rule, without prior notice or opportunity to comment. 80 Fed. Reg. 24146. Defendants did not invoke the good-

cause exception to excuse the lack of notice and comment, claiming instead that the 2013 IFR had satisfied their notice and comment obligations. *Id.* at 24153 n.17.

The 2015 Wage Rule again permits use of employer-provided surveys as substitutes for an applicable OES wage, though it requires such surveys to be conducted by a state agency, college, or university. *Id.* at 24184 (codified at 20 C.F.R. § 655.10(f)(1)(i)). The 2015 Wage Rule changed prior policy to permit employers to survey wages "the actual job duties to be performed by the H-2B workers," rather than survey the occupational classification that the position falls within. *Id.* at 24170–71. The 2015 Wage Rule also adopted new methodological requirements for surveys, codified at 20 C.F.R. § 655.10(f)(4).

C. The 2016 Appropriations Rider

Each year since the adoption of the 2015 Wage Rule, Congress has attached a Rider with containing ambiguous terms (italicized below) to DOL's annual funding provisions:

> The determination of prevailing wage for the purposes of the H-2B program shall be the greater of—(1) the actual wage level paid by the employer to other employees with similar experience and qualifications for such position in the same location; or (2) the prevailing wage level for the *occupational classification of the position* in the geographic area in which the H-2B nonimmigrant will be employed, based on the best information available at the time of filing the petition. In the determination of prevailing wage for the purposes of the H-2B program, the Secretary shall accept private wage surveys even in instances where Occupational Employment Statistics survey data are available unless the Secretary determines that the methodology and data in the provided survey are not *statistically supported*.

§ 110, 134 Stat. at 1564–65 (emphasis added).[3]

[3] *See also* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 110, 133 Stat. 2534, 2554; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 111, 132 Stat. 2981, 3065; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 112, 132 Stat. 348, 712; Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 112, 131 Stat. 135, 518–19; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 112, 129 Stat. 2242, 2599.

Since the Rider was first adopted, the DOL has interpreted the ambiguous term "occupational classification" consistent with its statement in the preamble of the 2015 Wage Rule allowing employers to survey the wages paid for a specific job or position. In addition, DOL equates the phrase "statistically supported" with the methodological requirements of the 2015 Wage Rule. *See* Emp't & Training Admin., Effects of the 2015 DOL Appropriations Act at 4 (Dec. 29, 2015), https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf [hereinafter DOL Appropriations FAQs].

D. The Louisiana Crawfish Surveys

Since at least 2017, Louisiana crawfish processors have obtained H-2B certifications based on the prevailing wage found by surveys of crawfish processors performed by Louisiana State University. Each year, those surveys were based on the responses from four or five out of more than 70 crawfish processors surveyed (a response rate of 5–7%). Ex. 1, 2017–21 Surveys; AR21–22 (2021 Survey).

For the upcoming 2022 season, DOL has certified Crawfish Distributors, Inc., the employer of Plaintiffs Williams, Lewis, and Johnson, to import H-2B workers at the prevailing wage found by the 2021 Survey—$10.43 per hour, a wage that is 29.5% and 9% below the two applicable OES wages for the relevant occupational categories. Doc. 35-1 at 3. DOL has also issued at least 19 other prevailing wage determinations to Louisiana crawfish employers based on the 2021 Survey, at rates up to 42% less than the applicable OES wages. *Id*.

Companies with approved prevailing wage determinations are currently advertising these crawfish processing positions to U.S. workers at the depressed $10.43 wage rate from the 2021 Survey. Ex. 2, Read Decl., ¶ 8, 2-001 to 2-054.

LEGAL STANDARD

In deciding whether to issue a preliminary injunction, a court must consider "whether (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest." *Sottera, Inc. v. FDA*, 627 F.3d 891, 893 (D.C. Cir. 2010) (cleaned up).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

In issuing prevailing wage determinations based on the 2021 Survey, DOL necessarily concluded that the survey complied with the requirements of the Appropriations Rider or the 2015 Wage Rule, or both. In so doing, DOL relied upon the 2015 Wage Rule to interpret two ambiguous terms in the Rider, "occupational classification" and "statistically supported." The portions of the 2015 Wage Rule used to interpret those terms in the Rider contradict the Rider itself. Those regulatory sections also violate the APA because the public was not provided with notice and an opportunity to comment and because they are arbitrary, capricious, and contrary to law. And even if the 2015 Wage Rule were a valid interpretation of the Rider, the 2021 Survey does not comply with its requirements. Thus, as set forth below, Plaintiffs are likely to succeed on the merits of their claim that the prevailing wage determinations were unlawful and should be vacated pursuant to 5 U.S.C. § 706(2).

A. DOL's Prevailing Wage Determinations Constitute Final Agency Actions that Plaintiffs Have Standing to Challenge.

"DOL's wage determinations predicated on private wage surveys are final agency actions." *CATA III*, 774 F.3d at 183. Plaintiffs have standing to challenge DOL's determinations permitting 19 different H-2B Louisiana crawfish processors, including the employer of three of the plaintiffs,

Crawfish Distributors, Inc., to pay wages for the 2022 season that are on average 34% below what Plaintiffs contend is the lawful OES wage. Doc. 35-1 at 3. That direct financial injury to Plaintiffs Williams, Lewis, and Johnson is more than sufficient to confer standing to challenge DOL's decision.

In addition, all of DOL's prevailing wage determinations based on the 2021 Survey will cause competitive harm to all Plaintiffs, who are regularly employed in the crawfish industry, because approval of a substandard wage rate for any Louisiana crawfish processors necessarily impacts both the wages that their non-H-2B competitors will pay and the workers' opportunity to apply for those jobs at higher wages. *See Feller v. Brock*, 802 F.2d 722, 729–30 (4th Cir. 1986) (finding that both apple pickers who work for orchards employing foreign workers and those working for other apple growers in the state have standing to intervene as of right into litigation over the proper wage rate for foreign apple pickers); *see also* 80 Fed. Reg. at 24158–59 (explaining why importation of H-2B workers can depress U.S. worker wages).

B. DOL's Interpretation of "Occupational Classification" Is Contrary to the Rider.

Defendants issued prevailing wage determinations based on the 2021 Survey by relying on an interpretation of the Rider's phrase "occupational classification" that permits employers to survey particular job positions rather than groups of jobs requiring substantially similar skills. That interpretation of the Rider, which is based on the 2015 Wage Rule, conflicts with the Rider's own language.

The Rider makes a clear distinction between "positions" and "occupational classifications." The first sentence of the Rider requires the prevailing wage to be the higher of either (1) the "actual wage level paid by the employer to other employees with similar experience and qualifications *for such position* in the same location;" or (2) the "prevailing wage level for the

occupational classification of the position in the geographic area." § 110, 134 Stat. at 1564–65 (emphasis added). "[I]t is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 120 (D.D.C. 2017) (quoting *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)). An "occupational classification" must therefore be something different and broader than a "position."

The 2021 Survey, however, surveys only the "position" of crawfish processor, rather than any broader "occupational classification" that includes that position. *Compare* AR21 (providing the "Survey Job Description" for crawfish processor) *with* 2011 Wage Rule, 76 Fed. Reg. at 3466 (stating that seafood processing jobs generally fall within SOC Code 51-3022, "Meat, Poultry, and Fish Cutters and Trimmers"). Though the Rider does not require use of the SOC system, the 2021 Survey makes no gestures whatsoever toward a broader occupational classification. It does not even survey the wages paid for similar seafood jobs such as crab and shrimp peeling. Because DOL approved the 2021 Survey despite the fact that it surveyed wages for a narrow "position," rather than the "occupational classification of the position," DOL violated the clear language of Rider. In the language of *Chevron*, the Rider "unambiguously forecloses the agency's interpretation." *Good Fortune Shipping SA v. Comm'r*, 897 F.3d 256, 261 (D.C. Cir. 2018) (quoting *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009)). For this reason alone, Plaintiffs are likely to prevail on the merits.

C. DOL's Interpretation of "Statistically Supported" Is Contrary to the Rider.

Next, Defendants issued prevailing wage determinations in reliance on the 2021 Survey without confirming that the Survey was, as the Rider requires, "statistically supported." Because the Rider does not lay out specific statistical standards, Defendants may adopt, under *Chevron* Step Two, a "reasonable" interpretation of the phrase, one that is not "arbitrary or capricious in

substance, or manifestly contrary to the statute" and that is "rationally related to the goals" of the Rider. *Id.* at 261 (citations omitted). DOL interprets the phrase "statistically supported" to mean "those methodological criteria for surveys set out in the 2015 Wage Rule," DOL Appropriations FAQs, *supra*, at 4, and accordingly tested only whether the 2021 Survey complied with the 2015 Wage Rule's requirements, *see, e.g.*, AR14–15. Because the regulatory requirements are not rationally related to the Rider's goals, Defendants failed to ensure the 2021 Survey was "statistically supported" prior to its approval.

The methodological criteria in the 2015 Wage Rule are, to say the least, not onerous. The 2015 Wage Rule requires an employer to complete Form ETA-9165 and "attest" that

> (i) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed or conducted a randomized sampling of such employers;
> (ii) The survey includes wage data from at least 30 workers and three employers; . . .
> (iv) The survey was conducted across industries that employ workers in the occupation; and
> (v) the wage reported in the survey includes all types of pay, consistent with Form ETA-9165.

20 C.F.R. § 655.10(f)(4).

First, the attestation requirement is diluted to the point of meaninglessness because Form ETA-9165 requires the employer (not the surveyor) to attest only "to the best of [its] knowledge" that the "information contained" in the Form is true and accurate. AR20. There is no reason to believe the employer would know the survey methods used, and nothing requires the employer to make any inquiry prior signing the certification. That self-evident gap is why, for example, Federal Rule of Civil Procedure 11(b) requires certifications "to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*." Relying an employer who may be entirely ignorant of the survey process to attest "to the best of [its]

knowledge" that the regulatory requirements are met is not a rational way to determine whether a survey is "statistically supported."

Second, even if Defendants could conclude that the criteria in § 655.10(f)(4) were satisfied, those criteria are not "rationally related," *Good Fortune Shipping SA*, 897 F.3d at 261, to the Rider's goal of ensuring statistical support. For any survey to be statistically supported, it must at a minimum include quality control mechanisms to minimize sampling and non-sampling bias. As the OES Handbook of Methods explains, sampling error reflects the fact that data from fewer than all of the subject population, no matter how perfectly chosen and accurately reported, may not be reflective of the whole, and that a different group of respondents might produce a different result. U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, *Handbook of Methods* at 28 (Mar. 31, 2021), https://www.bls.gov/opub/hom/oews/pdf/oews.pdf. All statistically supported surveys apply certain mathematical tests to measure sampling error by determining the level of confidence that the survey result is reflective of the whole. *Id.* at 28–29; *see also* Ex. 3, Shierholz Decl., ¶ 17.

Non-sampling error occurs because responses to a survey may not be accurate. Non-sampling error, or non-sampling bias, arises from such problems as "differences in respondents' interpretation of a survey question; an inability or unwillingness of the respondents to provide correct information; [and] errors made in recording, coding, or processing the data.." *Handbook of Methods*, *supra*, at 28.

A statistically supported survey like the OES takes steps to address and control for both sampling and non-sampling error. *Id.* at 7, 9–11, 27–29. The 2021 Survey, by contrast, took no steps to control for either sampling or non-sampling error. As a result, DOL's practice of relying

on the requirements of the 2015 Wage Rule utterly failed to ensure that the 2021 Survey was "statistically supported," in direct violation of the Rider.

Consider the problem of nonresponse, a "chronic" source of non-sampling bias "in virtually all large-scale surveys because it may introduce a bias in estimates if the nonrespondents tend to differ from respondents in terms of the characteristic being measured." *Handbook of Methods*, *supra*, at 16. For example, employers who use foreign workers may be eager to respond to a wage survey that they intend to use, while non-H-2B competitors, who have no use for the survey, may see little reason to spend the time necessary to respond. *See* Ex. 3 ¶ 20. If H-2B employers tend to pay less than their non-H-2B competitors (which is likely given that H-2B employers have historically been able to pay depressed wage rates based on the old skill-level wage calculation methodology, *id.* ¶ 11), the higher response rate from H-2B employers will skew the survey results downward. This is what is meant by non-response bias.

Defendants understand the importance of addressing nonresponse bias with common-sense measures such as following up. Defendants' checklist used to evaluate the 2021 Survey asks about the "[m]eans used to improve response rate such as follow up calls." AR33. The preamble to the 2015 Wage Rule states that a reasonably conducted survey might involve "follow-up by telephone with all non-respondents." 80 Fed. Reg. at 24173 (emphasis added). In 2011, DOL justified the use of DBA surveys to set prevailing wages in part because the DOL "mitigate[d] any potential bias" by "tak[ing] actions to improve completion rates," such as expanding community outreach, introducing online response tools, and engaging an auditor. 2011 Wage Rule, 76 Fed. Reg. at 3456. Indeed, the Office of Management and Budget generally requires agencies to design surveys "to achieve the highest practical rates of response" and plan for nonresponse bias analysis if the item response rate is below 70%. Office of Mgmt. & Budget, Standards and Guidelines for Statistical

Surveys at 8 (Sept. 2006), https://www.samhsa.gov/data/sites/default/files/standards_stat_surveys.pdf.

Defendants needed to analyze whether nonresponse bias rendered the 2021 Survey statistically unusable. As has been the case across several years of Louisiana-based crawfish surveys, the 2021 Survey relied on four employer responses out of a universe of 76—a response rate of 5%. AR21–22; *see also* Ex. 1. It is unclear from the surveyor's own description of his methodology whether he made any efforts to contact the other 95% of employers, much less whether he followed up with nonrespondents. *See* AR24 ("It was determined that there are 76 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents[.]"). For context, the response rate for OES surveys, which go to great length to protect against non-response bias, is around 70%. *Handbook of Methods*, *supra*, at 16. Additionally, there is reason to believe that the universe of employers who responded to the 2021 Survey are meaningfully different than at least some of the nonrespondents. All four respondents employ either H-2A or H-2B workers. AR24. But the nonrespondent group includes employers, like Plaintiff Lee's company, with only U.S.–based workers. And as discussed above, there is reason to believe H-2 employers pay less than their non-H-2 competitors. In all, the 2021 Survey contains the key hallmarks of a survey infected by serious nonresponse bias: a tiny response rate, coupled with a responding population that meaningfully differs from the nonrespondents.

But Defendants collected no information that would have allowed them to determine that the 2021 Survey was "statistically supported" despite its 5% response rate and skewed population. Instead, they merely asked the *employers submitting* the 2021 Survey to tick boxes on Form ETA-

9165 stating, "to the best of [their] knowledge and belief," that "the surveyor attempt[ed] to contact" either "[a]ll employers employing workers in occupation(s)" or "[a] sample of employers in the geographic area." AR20. A ticked "all employers" box for the 2021 Survey provides DOL with no information whatsoever about the nature of the contact or follow-up efforts. It does not even reliably establish that the surveyor tried to contact all 76 employers, rather than accepting a handpicked universe of four reliable respondents from previous years. Because Defendants did not collect *any* clarifying information regarding the methods used to collect data, let alone require the kinds of steps "to improve accuracy and . . . mitigate any bias" that DOL insisted on with the DBA survey, 2011 Wage Rule, 76 Fed. Reg. at 3456, relying on § 655.10(f)(4) and Form ETA-9165 utterly failed to ensure that the 2021 Survey was "statistically supported."

Or consider answer bias, another common form of non-sampling bias that arises when respondents provide incomplete or inaccurate information. Again, Defendants understand the importance of minimizing this form of error. For example, the preamble to the 2015 Wage Rule states that "[e]mployers responding to the survey may not report wages selectively or base responses on only a portion of the workers similarly employed in the occupation that is the subject of the survey." 80 Fed. Reg. at 24173. For DBA surveys, DOL even "engaged an outside contractor to randomly audit responses" and thereby improve accuracy. 2011 Wage Rule, 76 Fed. Reg. at 3456. But again, Form ETA-9165 requires only that the *employer offering* the 2021 Survey certify, to the best of *its* knowledge, that other responding employers included "the wages of all workers" and all "types of wages paid." AR20. Again, in the absence of a requirement that the employer make inquiries, the employer making the attestation has no way of knowing who the respondents were, whether they were truthful, or what efforts, if any, the surveyor made to protect against answer bias.

In place of any meaningful statistical controls, Defendants simply deemed the 2021 Survey statistically supported because it contains responses from at least three employers and thirty workers. 20 C.F.R. § 655.10(f)(4)(ii). According to the preamble to the 2015 Wage Rule, that requirement is "[c]onsistent with OES methodology" and "the minimum . . . required produce a reliable arithmetic mean wage." 80 Fed. Reg. at 24173. But as explained in the declaration of H. Sheirholz, *see* Ex. 3 ¶¶ 22–24, that is both a misrepresentation of OES procedures and untrue as a matter of basic statistics. While responses from three employers and thirty workers *may* yield a statistically supported result if adequate steps are taken to ensure that sampling and non-sampling errors have been addressed, the number is not a universal guarantee of statistical reliability; it is not even a primary quality requirement of the OES survey. *Id.* ¶ 23. But § 655.10(f)(4) and Form ETA-9165 omit all other potential statistical standards in favor of enforcing only the numerical minimum.

In sum, Defendants' choice to approve the 2021 Survey without adopting *any* reasonable or recognizable methodological standards was in no way "rationally related," *Good Fortune Shipping SA*, 897 F.3d at 261, to the Rider's goal of ensuring that only "statistically supported" surveys be approved.

D. The 2015 Wage Rule Is Procedurally Invalid Due to Lack of Notice and Comment.

Even if the portions of the 2015 Wage Rule that DOL relied upon to interpret the Rider and approve the 2021 Survey are not contrary to the Rider itself, they are still invalid because they were promulgated without notice and comment. While it is proper for an agency to fill substantive gaps in a statute via rulemaking, that rulemaking must still comply with the requirements of the APA. *Chevron USA Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984); *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir 2012).

Before issuing a final rule, an agency must give the public notice of a proposed rule and an opportunity to comment. 5 U.S.C. § 553(b). Notice and comment is excused only if the agency invokes "good cause" to deem the procedures "impracticable, unnecessary, or contrary to the public interest" and "incorporates the finding and a brief statement of reasons therefor in the rules issued." *Id.* § 553(b)(B).

The 2015 Wage Rule was issued as a final rule without a notice of proposed rulemaking and without an opportunity for public comment. Defendants explicitly stated that they were "not invoking the good cause exception to forego the APA's requirement of notice and comment."[4] 80 Fed. Reg. at 24153 n.17. Instead, they claimed that notice and comment was unnecessary because the public had had an opportunity to respond to the 2013 IFR—essentially arguing that the 2015 Wage Rule was a "logical outgrowth" of the 2013 IFR. *Id.*; *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (requiring "renewed notice . . . only if the final rule cannot fairly be viewed as a 'logical outgrowth' of the initial proposal"). This argument fails for two reasons.

First, the logical outgrowth doctrine is unavailable because the 2013 IFR was vacated by the Third Circuit, and the 2015 Wage Rule is a different rule issued in response to that vacatur order. *See AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 86 (D.D.C. 2007) ("[T]he Secretary has not identified, and this Court's independent research has likewise failed to uncover,[] any case in which the D.C. Circuit has applied the logical-outgrowth doctrine to a situation where the rule challenged is one that was reissued in amended form after having been vacated by a reviewing court."). In *AFL-CIO*, DOL issued a 2002 notice of proposed rulemaking (NPRM) governing

[4] Because the basis for invoking the good-cause exception must be "published with the rule," 5 U.S.C. § 553(d)(3); *see also Tri-Cty. Tel. Ass'n v. FCC*, 999 F.3d 714, 719 (D.C. Cir. 2021), Defendants may not now attempt to retroactively lay claim to the good-cause exception.

union trust reporting and, after receiving comments, promulgated a final rule; the D.C. Circuit then vacated the rule in 2005. *Id.* at 79–80. DOL returned to the drawing board and, in 2006, published a new final rule *without* notice and comment, expressing the "intention to follow the D.C. Circuit's 2005 ruling, at the same time addressing concerns that had been raised by the comments to the 2002 NPRM." *Id.* at 81. The Court unequivocally rejected DOL's attempt to rely on notice and comment relating to the 2002 rule issued pre-litigation to support the 2006 rule issued post-litigation. "To say that an interested party 'should have anticipated' the agency's subsequent action under these circumstances would be to expect that party not just to 'divine' how the agency would respond to the initial set of comments, but also to predict with some accuracy the contours of both the judicial decision and the agency's reaction to it." *Id.* at 86–87. The purposes served by notice and comment would be "undermined—not advanced" by such a holding. *Id.* at 87. "In order to . . . repromulgate the rule held invalid by the court, the agency had to engage in a 'new rulemaking in accordance with the [APA].' The APA puts the agency to a simple either/or choice: either notice-and-comment procedures or the good-cause exception." *Id.* at 84 (second alteration in original) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 798 (D.C. Cir. 1983), and citing *Mobil Oil Corp. v. EPA*, 35 F.3d 579 (D.C. Cir. 1994)).

Here, as in *AFL-CIO*, DOL is attempting to rely on comments made regarding a prior rule, the 2013 IFR, that was vacated. As in *AFL-CIO*, once the 2013 IFR was vacated, Defendants were required to restart notice and comment or invoke the good cause exception. They did neither, rendering the 2015 Wage Rule procedurally invalid.

Second, even apart from the holding in *AFL-CIO*, the portions of the 2015 Wage Rule used to interpret the Rider are not a logical outgrowth of the 2013 IFR or the general questions included in the preamble to that Rule. Those questions consisted of the following:

> Are there methodological standards that can or should be included in the regulation that would ensure consistency, validity and reliability of employer-provided surveys? Are there industries in which employers historically and routinely rely on employer-submitted surveys that should be permitted to do so because of the well-developed, historical, industry-wide practice, or for other reasons? Are there state-developed wage surveys, such as state agricultural surveys, or surveys from other agencies, such as maritime agencies, that could provide data that would be useful in setting prevailing wages? Should employer surveys that include data based on wages paid to H-2B or other nonimmigrant workers be permitted in establishing a prevailing wage that does not adversely affect U.S. workers? If so, under what circumstances?

78 Fed. Reg. at 24055. This list of open-ended questions does not "describe the range of alternatives being considered with reasonable specificity." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). The public could not discern from these questions that Defendants were contemplating allowing employers to survey particular positions rather than occupational classifications. The public did not know who Defendants would allow to conduct surveys, what limiting criteria might be adopted, or how Defendants would answer the question about including H-2B workers in the sample. Moreover, while the rule requested comments on how to make employer-provided surveys more reliable, it gave no indication what standards Defendants were proposing as a measure of reliability. And fundamentally, the questions themselves could not provide notice of Defendants' as-yet-unadopted rationale for answering those questions.

"If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Envtl. Integrity Proj. v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (emphasis in original). "The logical outgrowth doctrine does not . . . apply where interested parties would have had to divine the Agency's unspoken thoughts[.]" *Int'l Union, UMW v. MSHA*, 407 F.3d 1250, 1259–60 (D.C. Cir. 2005) (cleaned up). Because the 2013 IFR questions provided

no meaningful notice of the alternatives DOL was considering, they cannot satisfy the notice and comment requirements for the 2015 Wage Rule. Defendants therefore could not lawfully rely on the 2015 Wage Rule to guide their interpretation of the Rider and their approvals of the 2021 Survey.

E. The 2015 Wage Rule's Interpretation of "Occupational Classification" Is Arbitrary and Capricious.

Even if DOL's reliance on the 2015 Wage Rule to equate the term "occupational classification" with a "position" is not contrary to the Rider, *see supra* Part I.A, its narrow definition of the term to permit surveys such as the 2021 Survey that consider only "the actual job duties to be performed by the H-2B workers," 80 Fed. Reg. at 24170, is still arbitrary and capricious because the 2015 Wage Rule fails to provide a rational explanation for adopting that policy. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The requirement that surveys report the prevailing wage for an "occupational classification" is designed to complement the central congressional charges governing the H-2A program: the statutory instructions that H-2B visas issue only if U.S. workers "capable of performing such service or labor" cannot be found, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and "the employment of [the H-2B worker] will not adversely affect the wages and working conditions of workers in the United States similarly employed," 8 U.S.C. § 1182(a)(5)(A)(i)(II). Both requirements trace back to the original text of the Immigration and Nationality Act (INA) of 1952. *See* Pub. L. No. 414, §§ 101(a)(15)(H)(ii), 212(a)(14)(B), 66 Stat. 163, 168, 183.

The longstanding focus on workers "*capable of performing* such service or labor" (rather than workers "currently performing such service or labor") and on workers who are "*similarly*" (but not "identically") employed is critical. Congress recognizes that workers with a given set of skills can move among different jobs that call for substantially similar skills. For this reason, DOL

has long defined "similarly employed workers" as workers having "substantially comparable jobs in the occupational classification in the area of intended employment," 2011 Wage Rule, 76 Fed. Reg. at 3463 (emphasis added). Or to put it another way, workers in "jobs requiring substantially similar levels of skills," considered "across industries that employ workers in the occupation."[5]

If U.S. workers "capable of performing" the job are to be protected, the wages a would-be H-2B employer must offer are not the wages prevailing in one narrowly defined job position (which wages have resulted in a labor shortage), but the wages prevailing over a broader occupational grouping that captures the market wage paid to those "similarly" (but not identically) employed. DOL, like the entire federal government, has for decades used the OES's Standard Occupational Classification (SOC) categories to define the jobs with similar skills. *See* Office of Mgmt. & Budget, 1998 Standard Occupational Classification, 64 Fed. Reg. 53136 (Sept. 30, 1999) (mandating use of the SOC system for all federal agencies). Of course, nothing in the INA mandates that the SOC categories be used for H-2B prevailing wage surveys. Defendants could, with proper notice and comment, and a rational explanation, adopt some other set of occupational classifications. But the 2015 Wage Rule does not rationally explain Defendants' decision to abandon occupational classifications altogether and permit surveys of individual positions.

Defendants provide only two cursory explanations for their decision to permit surveys of particular job positions rather than the occupational classifications that those positions fall within.

[5] Emp't & Training Admin., Prevailing Wage Determination Policy Guidance at 15 (Nov. 2009), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf; Emp't & Training Admin., Prevailing Wage Determination Policy Guidance at 15–16 (May 9, 2005), http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf. One of the many irrationalities of the 2015 Wage Rule is that it, too, requires surveys to be "conducted across industries that employ workers in the occupation," 20 C.F.R. § 655.10(f)(4)(iv), while simultaneously allowing a single job to be surveyed, 80 Fed. Reg. at 24170–71. DOL neither acknowledges nor explains that contradiction.

First Defendants state that requiring *use of the OES taxonomy* would be "inconsistent with DOL's current practice in other immigrant and nonimmigrant programs." 80 Fed. Reg. at 24170. Defendants do not explain *how* the practice would be inconsistent, much less why that inconsistency is relevant given that other programs have entirely different wage structures.[6] And even if that rationale sufficed to permit use of an "occupational classification" taxonomy different from "the OES SOC taxonomy," it does not explain the decision to abandon surveying of "classifications" altogether.

Second, Defendants state that "where the survey reflects the actual job duties to be performed by the H-2B workers, it remains an adequate basis upon which to set the prevailing wage" and "will not have adverse effect on the wages of U.S. workers because it is an accurate representation of the wages paid to other workers performing the same duties." 80 Fed. Reg. at 24170–71. But that focus on workers "performing the same duties" is contrary to the previous 65 years of consistent policy (and the statutory mandate) of protecting workers "capable of performing" the duties. As explained above, allowing employers to survey and pay a lower wage associated with one narrow segment of an occupational category cannot possibly protect the full group of workers capable of performing the work from adverse effects *no matter how accurately the wage paid to that narrow segment is measured.* To the contrary, allowing employers access to foreign workers at a lower wage forces the U.S. workers capable of performing the job to either accept a wage below the one the market has determined is prevailing for their skills or face being replaced by H-2B workers. Either way, "[t]he net result is an adverse effect on the worker's

[6] For example, the H-2B visa's agricultural sibling, the H-2A program, most commonly uses a wage based on the Department of Agriculture's Farm Labor Survey (FLS), rather than the non-farm OES survey. *See* Adverse Effect Wage Rates for Non-Range Occupations in 2022, 86 Fed. Reg. 71282 (Dec. 15, 2021) (setting state-by-state wages for 2022 based on the FLS). But there is no employer-provided survey option in the H-2A system.

income." 2011 Wage Rule, 76 Fed. Reg. at 3463. By permitting surveys of a specific job position rather than the occupational classification of the position, DOL arbitrarily fails even to consider the potential of adverse consequences for similarly employed U.S. workers.

The decision to allow surveys of job positions rather than occupational classifications is arbitrary in another way. The 2015 Wage Rule abolished use of the SCA and DBA surveys in part because those surveys gave employers an "incentive to craft job descriptions to fit the relatively more narrow SCA and DBA occupational categories," in order to obtain a lower prevailing wage than the applicable OES wage. 80 Fed. Reg. at 24164. That, in turn, would "compromise[] protections otherwise afforded to U.S. workers seeking to perform similar work in the area of intended employment." *Id.* The 2015 Wage Rule concludes that the adverse effects on U.S. workers that result from crafting narrow job descriptions

> would be alleviated by relying solely on the SOC-based OES as the primary wage source for prevailing wage determinations in the H-2B program. SOC occupational titles are broadly defined, and therefore capture a wider range of job duties than do the SCA and DBA occupational titles.

Id. But if the narrower occupational categories in SCA and DBA surveys "compromise[] protections" for U.S. workers, the far narrower occupational definitions permitted for employer-provided surveys will compromise those protections even more. Here again, Defendants fail to acknowledge or explain the inconsistencies and contradictions in their policy choices.

For all these reasons, the portions of the 2015 Wage Rule that Defendants use to interpret the term "occupational classification" in the Rider are arbitrary and capricious, and the use of that Rule to approve the 2021 Survey is equally arbitrary and capricious.

F. Defendants' Explanation for Including H-2B Workers in Employer Surveys Is Arbitrary and Capricious.

DOL approved the 2021 Survey even though three of the four survey respondents employ H-2B workers. AR22. In the 2011 Wage Rule, DOL barred use of H-2B workers' wage data in

employer surveys on the grounds that it could lead to depressed or stagnating wages. 76 Fed. Reg. at 3467. The 2015 Wage Rule reverses that policy, stating that (i) the 2011 conclusion was not based on empirical data, (ii) including H-2B workers would "promote consistency" with the OES survey, and (iii) excluding H-2B workers might "effectively bar" H-2B employers from using surveys in the absence of an OES wage. 80 Fed. Reg. at 24172. None of these explanations provides a rational basis for abandoning the 2011 conclusion and so for allowing the 2021 Survey.

First, DOL's 2011 decision to exclude H-2B wage data was based on basic economic logic: Where H-2B workers predominate in an occupation and area of employment, as they frequently do, employer surveys measuring the wages of those workers could "establish the parameters by which the wages of all workers would be measured." 76 Fed. Reg. at 3467. If, year after year, a wage survey simply measures the wages authorized for H-2B workers the previous year, there would be little upward movement of wages, which could risk "creating a permanent subset of lower wages in that occupation or area of employment." *Id.* The 2015 Wage Rule does not offer any empirical evidence contradicting the reasoning behind the 2011 policy of excluding H-2B wages nor does it challenge the soundness of the logic. To the contrary, the 2015 Wage Rule endorses similar logic in discussing how "[m]arket signals such as labor shortages that would normally drive wages up may become distorted by the availability of foreign workers." 80 Fed. Reg. at 24158–59. Thus, the fact that the 2011 Rule did not cite empirical data to support excluding H-2B wages from employer-provided surveys is not a rational reason for changing the policy.[7]

[7] Defendants note in the preamble to the 2015 Wage Rule that some workers had complained in response to the 2013 IFR that "[t]he H-2B program has been adopted by some industries as a source of cheap labor at rates below the competitive market rates for such labor. State or maritime surveys that document the degree to which certain industries have been able to exploit nonimmigrant labor to pay below the prevailing market rates in that occupational classification should not be the basis for setting future wage rates." 80 Fed. Reg. at 24167. Defendants offer no

As for consistency with the OES survey, DOL fails to acknowledge a fundamental difference between employer-provided surveys and the OES survey. The OES survey is "among the largest continuous statistical programs of the Federal Government." *Id.* at 24154. The very size of the OES survey (and of the occupational categories it surveys) makes it unlikely that H-2B wages could dominate a survey result. By contrast, 75% of the respondents to the 2021 Survey were H-2B employers. AR22. Defendants failed to consider the size difference between the OES survey and employer-provided surveys in determining whether H-2B wages should be surveyed. That failure is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Finally, the fact that exclusion of H-2B wages from surveys could result in hardship for employers who then cannot submit surveys is irrational. Defendants admit that this rationale only applies to situations in which "the OES does not provide adequate information for the occupation or geographic location," 80 Fed. Reg. at 24172—meaning this rationale cannot justify including H-2B workers in employer-provided surveys authorized by § 655.10(f)(1)(i), which applies only where there *is* an available OES wage. Even in the rare situation where the OES does not provide a wage, the rationale is arbitrary. Courts have frequently noted that DOL's job is to protect the wages and working conditions of U.S. workers, not to accommodate employer hardship that may result from protecting U.S. workers. *See Fla. Sugar Cane League v. Usery*, 531 F.2d 299, 304 (5th Cir. 1976) ("To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible." (quoting *Elton Orchards v. Brennan*,

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response to that comment, instead claiming that permitting state surveys "has support in comments offered by worker advocates." *Id.* at 24170. Failure to respond to comments that are relevant and significant, like this one, is arbitrary. *See Prof. Pilots Fed'n v. FAA*, 118 F.3d 758, 763 (D.C. Cir. 1997).

508 F.2d 493, 500 (1st Cir. 1974))); *CATA v. Solis*, Civil Action No. 09-240, 2011 WL 2414555, at *4 (E.D. Pa. June 16, 2011) (rejecting DOL's attempt to rely on employer hardship); *NAACP v. Donovan*, 566 F. Supp. 1202, 1205–06 (D.D.C. 1983) (same). Including H-2B workers in employer surveys because doing otherwise might pose a hardship for a small group of employers is not a rational reason for a policy that depresses wages.

G. The 2015 Wage Rule Methodological Standards Are Arbitrary and Capricious.

As set forth above, the methodological standards adopted in the 2015 Wage Rule do not allow DOL to determine whether employer surveys are statistically supported. Adopting purported statistical standards that omit even the most basic statistical controls is arbitrary and capricious.

Additionally, as previously discussed, Defendants' rationale for their central statistical control—the three-employer, thirty-worker minimum—was factually incorrect. Defendants state, without support or attribution, that this minimum is "[c]onsistent with OES methodology." 2015 Wage Rule, 80 Fed. Reg. at 24173. This statement misrepresents the actual OES methodology, which uses that sample size as a minimum standard, but not a primary quality requirement. Ex. 3 ¶ 23. "[W]here an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned." *Resolute Forest Prods. v. USDA*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016).

The 2015 methodological standards are also arbitrary and capricious due to their failure to rationally explain the abandoning of the prior methodological standards set forth in DOL's Prevailing Wage Determination Policy Guidance (2009 Wage Guidance) (Nov. 2009), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf. The 2009 Wage Guidance required surveys to "identify a statistically valid methodology that was used to collect the data." *Id.*, App'x F at 2. It also required documentation of the "[m]ethodology used

for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage." *Id.*, App'x F at 3. DOL then found in 2011 that those standards resulted in surveys that were "not consistently reliable." 76 Fed. Reg. at 3465. But rather than responding rationally to that flaw by promulgating *more* stringent standards, Defendants replaced those old requirements, which at least placed some burden on the surveyor to provide relevant documentation that could guard against nonresponse and answer bias, with the far less stringent statistical standards of § 655.10(f)(4) and Form ETA-9165, which rely on the employer's untested assertions about the statistical methods. To do so was arbitrary and capricious.

H. The Approval of the 2021 Survey Violates the 2015 Wage Rule.

Finally, even if the 2015 Wage Rule is deemed consistent with the Rider and lawful under the APA, the 2021 Survey fails to comply with the requirements of the 2015 Wage Rule.

First, as discussed above, 20 C.F.R. § 655.10(f)(4) requires that "the information provided by the employer must include the attestation that" the five survey requirements have been satisfied. But employers submitting the 2021 Survey did so using Form ETA-9165, which contains a watered-down attestation "to the best of [the employer's] knowledge," without requiring any reasonable inquiry. AR20, 42.

Second, the 2021 Survey's reliance on four responses out of a universe of 76 does not reflect "a reasonable, good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed or . . . a randomized sampling of such employers." 20 C.F.R. § 655.10(f)(4)(i). DOL's generated checklist on this point (and on the subsequent point regarding the "[m]eans used to improve response rate such as follow up calls") reads: "Phone/email of all employers; obtained random sample of respondents." AR14–15, 32–33. First, as discussed above, there is no basis to conclude that a survey with a response rate of five percent in which the surveyor himself declares "[w]e surveyed a total of 4 employer respondents," AR44,

represents a good faith attempt to contact all employers. Second, contrary to DOL's apparent conclusions, the fact that fewer than all employers responded does not automatically convert the respondent group into a "random sample" under any reasonable statistical understanding of the term.

Third, the 2021 Survey was not "conducted across industries that employ workers in the occupation." 20 C.F.R. § 655.10(f)(4)(iv). It was conducted across the lone industry of crawfish processing. DOL uncritically accepted that approach, repeatedly parroting "Occupation inherently limited" in its notes. AR14, 32. But again, as discussed above, the surveyed occupation is limited only because DOL permitted it to be. All job positions are limited when defined narrowly enough. Had DOL required employers to survey a complete occupational classification—whether under the OES categories or some other system—the occupation would not have been "inherently limited."

In sum, because Plaintiffs are likely to show that the 2021 Survey does not comply with the Rider or 20 C.F.R. § 655.10(f)(4), DOL's prevailing wage determinations relying on the survey must be vacated pursuant to 5 U.S.C. § 706(2).

II. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

The 2022 Louisiana crawfish season will shortly begin in earnest. Doc. 21-3 ¶ 6; Ex. 2 ¶ 8, 2-001 to 2-054. Unless the prevailing wage determinations made in reliance on the 2021 Survey are vacated, Plaintiffs may never receive the wages they should be entitled to if they prevail in this action.

In the past, employers of temporary guestworkers have avoided liability for back wages when wages are paid at a rate approved by DOL but later found to be unlawful. *Morrison v. DOL*, 713 F. Supp. 664, 673–76 (S.D.N.Y. 1989); *Frederick Cty. Fruit Growers Ass'n v. McLaughlin*, 703 F. Supp. 1021, 1029 (D.D.C. 1989). Workers' resulting inability to recover the wages lawfully

due them was recently deemed evidence of irreparable harm in a challenge by H-2A farmworkers to DOL's wage rate determinations. *UFW v. DOL*, 509 F. Supp. 3d 1225, 1255 (E.D. Cal. 2020) (awarding preliminary injunctive relief in part because "these farmworkers will face barriers to obtaining any applicable back pay"). Similarly, in *Building & Construction Trades Department v. Donovan*, 543 F. Supp. 1282 (D.D.C. 1982), the Court recognized that allowing the challenged wage regulations to take effect would result in irreparable harm to workers who would be unable to recover lost wages even if the regulations were later invalidated by the Court. Because the workers' contracts containing wages set by the challenged regulations were legal and enforceable at the time of formation, the workers would likely have no legal recourse. *Id.* at 1292. Plaintiffs may face similar barriers to relief here.

In addition, Plaintiffs will suffer irreparable economic harm unless the wage determinations are vacated. Under the disputed wage determinations, Plaintiffs stand to earn up to 42% percent less than the average wage for their occupation in central Louisiana, as measured by the OES survey. Doc. 35-1 at 3. Ordinarily, economic injuries alone do not rise to the level of irreparable harm because "adequate compensatory or other corrective relief will be available at a later date." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). However, when "the plaintiff is so poor that he would be harmed in the interim by the loss of the monetary benefits," those economic losses are enough to establish irreparable harm. *Lee v. Christian Coalition of Am., Inc.*, 160 F. Supp. 2d 14, 31 (D.D.C. 2001) (citation omitted). This rationale encompasses "subsistence employees" who need "their meager wages to support their families." *Id.* at 32. Courts have found that even a modest denial of state subsidies of two or three dollars a month to persons living on "the margin of subsistence" can cause irreparable harm. *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Pa. 1997) (collecting cases). For low-income individuals, economic loss can mean inadequate access

to "food, shelter or other necessities." *Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted); *see also Paxton v. Sec'y of Health & Human Servs*., 856 F.2d 1352, 1354 (9th Cir. 1988) ("When a family is living at subsistence level, the subtraction of any benefit can make a significant difference to its budget and to its ability to survive."). Courts have widely recognized that the inability to afford necessities such as food or medical care constitutes irreparable harm because those losses, even if temporary, cannot be remedied by back payments. *See District of Columbia v. USDA*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020). Even assuming Plaintiffs' wages increase this year from their old rate of $9.50 to $10.43, those Plaintiffs' earnings will still be extremely modest. A full-time job at $10.43 per hour would be lower than the poverty line for a family of three if it lasted the entire year. *See* Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315, 3316 (Jan. 21, 2022) (setting poverty line at $23,030 annually for a household of three). Plaintiffs hold down that low-wage job for only a matter of months. Even assuming they can find other part-time or seasonal jobs during the off season, Plaintiffs are mired in the sort of severe poverty discussed in *Lee*, and continually struggle to make ends meet. Doc. 21-3 ¶ 9 ("If the wages at my seafood job were to get even lower, I don't know how I'd be able to get by."); Doc. 21-6 ¶ 7 ("[T]he amount I make is barely enough for me to make ends meet, and the job is only open for less than half the year."). As such, Plaintiffs' circumstances are readily distinguishable from instances involving short-term economic disruptions resulting from insufficiency of savings or unexpected loss of employment. *Acosta v. D.C. Gov't*, No. 20-1189 (RC), 2020 WL 2934820, at *4 (June 3, 2020) (Contreras, J).

III. The Balance of Harms and the Public Interest Both Favor Injunctive Relief.

The final two factors the Court must weigh in deciding whether to grant a preliminary whether the balance of equities tips in favor plaintiffs and whether the requested injunction would further the public interest. These factors merge when the Government is the opposing party. *Nken*

v. Holder, 556 U.S. 418, 435 (2009); *Guedes v. BATFE*, 920 F.3d 1, 10 (D.C. Cir. 2019). Under these factors, the court "weighs the harm to [Plaintiffs] if there is no injunction against the harm to the [agency] if there is." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2019).

In the absence of a preliminary injunction, Plaintiffs stand to lose thousands of dollars apiece in wages and "will face barriers or obtaining any applicable pack pay." *UFW*, 509 F. Supp. 3d at 1255. By contrast, any harm to Defendants is minimal. They will merely be required to issue new prevailing wage determinations to a few dozen employers in Louisiana, a task that should require a very small amount of administrative time.

Furthermore, the "issuance of a preliminary injunction would serve the public's interest in maintaining a system of laws" where Defendants must comply with their constitutional and legal obligations in promulgating rules. *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015); *Elec. Priv. Info. Ctr. v. DOJ*, 416 F. Supp. 2d 30, 42 (D.D.C. 2006). There is "generally no public interest in the perpetuation of unlawful agency action," but "substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citations and internal quotation marks omitted).

On the other hand, the public interest would *not* be served "facilitating avoidance of a fundamental public policy—fair wages" for vulnerable workers. *George v. Mitchell*, 282 F.2d 486, 493 (D.C. Cir. 1960).

CONCLUSION

For the above-stated reasons, Plaintiffs' motion for a preliminary injunction should be GRANTED.

Dated: February 28, 2022

Respectfully submitted,

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Louisiana CRAWFISH WAGE STUDY

August 15, 2017

Survey results of Louisiana crawfish processors conducted July 14, 2017 – August 14, 2017 to determine the average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish worker/dockworker/hand packer/packer/peeler/processor/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2016– December 31, 2016.

	Column "A"	Column "B"	Column "C"	Column "D"	
	Number of Respondents	Number of Employees	Total Compensation paid	Total Hours Worked	Average Hourly
A	1	65	204,951	25,500	$8.04
B	1	25	121,796	11,143	$10.93
C	1	55	162,000	17,800	$9.10
D	1	4	25,600	3,200	$8.00
E	1	43	150,216.	14,763	$10.18
TOTALS	5	192	$664,563	72,406	$9.18

Column "C" divided by Column "D" ($664, 563. /72,406.) = $9.18 per hour (average hourly wage rate).
Individual company names are not listed. Survey results can be provided by contacting Thomas Hymel, LSU Ag Center/Sea Grant at: thymel@agcenter.lsu.edu.

1. Respondents – Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Job description – Under direct supervision job duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steamroom, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/remove/discard defective and/or waste products, label, lift/carry, load /unload product and/or bait (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, ready for market, refrigerate or freeze immediately, repackage, rinse, seal, separate/sort, shrink wrap, transport product to vehicles, vacuum pack machine, wash, washing machine, weigh. And any other activities as related to crawfish processing.

3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4. All workers are seasonal usually January through July with the peak season being mid February - June. Some plants may process slightly earlier, or a little longer.

5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 74 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 5 employer respondents, and this survey represents 192 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B).

LSU AG CENTER/Sea Grant Marine Extension Program, Louisiana Direct Seafood Program

Thomas Hymel _____, Director August 15, 2017

The LSU Agricultural Center is a statewide campus of the LSU System and provides equal opportunities in programs and employment.

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Louisiana CRAWFISH WAGE STUDY

July 2, 2018

Survey results of Louisiana crawfish processors conducted May 15, 2018– July 2, 2018 to determine the average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish worker/dockworker/hand packer/packer/peeler/processor/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2017– December 31, 2017.

	Column "A"	Column "B"	Column "C"	Column "D"	
	Number of Respondents	Number of Employees	Total Compensation paid	Total Hours Worked	Average Hourly
A	1	65	170,852	19,452	$8.79
B	1	110	997,962	118,500	$8.43
C	1	8	40,960	5,120	$8.00
D	1	75	445,463	55,683	$8.00
TOTALS	4	258	1,655,237	198,755	$8.33

Column "C" divided by Column "D" ($1,655, 237/198,755) = $8.33 per hour (average hourly wage rate).
Individual *company names are not* listed. Survey results can be provided by contacting Thomas Hymel, LSU Ag Center/Sea Grant at: thymel@agcenter.lsu.edu.

1. Respondents – Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Job description – Under direct supervision job duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steamroom, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/remove/discard defective and/or waste products, label, lift/carry, load /unload product and/or bait (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, ready for market, refrigerate or freeze immediately, repackage, rinse, seal, separate/sort, shrink wrap, transport product to vehicles, vacuum pack machine, wash, washing machine, weigh. And any other activities as related to crawfish processing.

3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4. All workers are seasonal usually January through July with the peak season being mid February - June. Some plants may process slightly earlier, or a little longer.

5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 72 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents, and this survey represents 258 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B).

LSU AG CENTER/Sea Grant Marine Extension Program, Louisiana Direct Seafood Program

Thomas Hymel _____, Director July 2 , 2018

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Louisiana CRAWFISH WAGE STUDY

July 29, 2019

Survey results of Louisiana crawfish processors conducted June 27, 2019 – July 29, 2019 to determine the average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish worker/ dockworker/hand packer/packer/peeler/processors/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2018 – December 31, 2018.

	Column "A"	Column "B"	Column "C"	Column "D"	
	Number of Respondents	Number of Employees	Total Compensation paid	Total Hours Worked	Average Hourly
A	1	73	461,509.	49,640.	$9.30
B	1	35	301,856.	27,374.	$11.03
C	1	107	734,713.	77,040.	$9.54
D	1	108	888,001.	90,720.	$9.79
TOTALS	4	323	$2,386,079.	244,774.	$9.75

Column "C" divided by Column "D" ($2,386,079/244,774) = $9.75 per hour (average hourly wage rate). Individual company names are not listed. Survey results can be provided by contacting Thomas Hymel, LSU Ag Center/Sea Grant at: thymel@agcenter.lsu.edu.

1. Respondents – Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Job description – Under direct supervision job duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steamroom, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/remove/discard defective and/or waste products, label, lift/carry, load /unload product and/or bait or supplies (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, ready for market, refrigerate or freeze immediately, repackage, rinse, seal, separate/sort, shrink wrap, transport product to vehicles, vacuum pack machine, wash, washing machine/or other equipment required, and weigh. And any other activities as related to crawfish processing.

3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4. All workers are seasonal usually January through July with the peak season being mid February - June. Some plants may process slightly earlier, or a little longer.

5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 79 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents, and this survey represents 323 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B).

LSU AG CENTER/Sea Grant Marine Extension Program, Louisiana Direct Seafood Program

Thomas Hymel _____, Director July 29, 2019

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Louisiana CRAWFISH WAGE STUDY

June 1, 2020

Survey results of Louisiana crawfish processors conducted April 27, 2020 – June 1, 2020 to determine the average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish worker/ dockworker/hand packer/packer/peeler/processors/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2019 – December 31, 2019.

	Column "A"	Column "B"	Column "C"	Column "D"	
	Number of Respondents	Number of Employees	Total Compensation paid	Total Hours Worked	Average Hourly
A	1	81	557,844.	58,320.	9.56
B	1	31	220,883.	23,220.	9.51
C	1	207	1,600,441.	173,880.	9.20
D	1	78	512,472.	56,160.	9.12
TOTALS	4	397	2,891,640.	311,580.	9.28

Column "C" divided by Column "D" ($2,891,640/311,580.) = $9.28 per hour (average hourly wage rate). Individual company names are not listed. Survey results can be provided by contacting Thomas Hymel, LSU Ag Center/Sea Grant at: thymel@agcenter.lsu.edu.

1. Respondents – Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Job description – Under direct supervision job duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steamroom, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/remove/discard defective and/or waste products, label, lift/carry, load /unload product and/or bait or supplies (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, ready for market, refrigerate or freeze immediately, repackage, rinse, seal, separate/sort, shrink wrap, transport product to vehicles, vacuum pack machine, wash, washing machine/or other equipment required, and weigh. And any other activities as related to crawfish processing.

3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4. All workers are seasonal usually January through July with the peak season being mid February - June. Some plants may process slightly earlier, or a little longer.

5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 76 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents, and this survey represents 397 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B).

LSU AG CENTER/Sea Grant Marine Extension Program, Louisiana Direct Seafood Program

Thomas Hymel _____, Director June 1, 2020

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Crawfish Wage Survey
June 30, 2021

Survey results of Louisiana Crawfish processors conducted May 21, 2021 to June 21, 2021, to determine average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish-worker/ dockworker/ hand-packer/ packer/ peeler/ processors/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2020 to December 31, 2020.

	Column A	Column B	Column C	Column D	Avg. Hourly
	# of Respondents	# of Employees	Total Compensation	Total hours worked	
A	1	138	$813824	69280	$11.75
B	1	157	$1245700	125600	$9.92
C	1	112	$675473.71	56840	$11.88
D	1	240	$2496790.81	249600	$10.00
Totals	4	647	$5,231,788.52	501320	$10.43

Column C total $5,231,788.52 divided by Column D total 501320 provides result of $10.43

Survey results can be provided by contacting Dr. John Hamlin, Professor of Biology, Louisiana State University at Eunice (jhamlin@lsue.edu).

I.Respondents -Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Survey Job Description: Under direct supervision Job Duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steam room, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/ remove/ discard defective and/or waste products, label, lift/carry, load /unload product and/or bait or supplies (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, refrigerate or freeze immediately, ready for market, repackage, rinse, seal, separate/sort, shrink wrap, tag, trim, transport product to vehicles, use of other related equipment, vacuum pack machine, wash, washing machine, and weigh. And any other activities as related to crawfish processing.

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3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4.All workers are seasonal usually January through July with the peak season being mid February -June. Some plants may process slightly earlier, or a little longer.
5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort. to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 76 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents, and this survey represents 647 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B). Results include 3 respondents utilizing local and H2B Workers and 1 using H2A Workers.

John Hamlin

Dr. John Hamlin
Professor of Biology
Vice Chancellor Academic Affairs

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EXHIBIT 3

FRIENDS OF FARMWORKERS, INC.
Legal Services for Farmworkers

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Fax: (215) 733-0876
Direct: Arthur N. Read (215) 690-5687

September 14, 2015

Brian Pasternak
National Director of Temporary Programs
Office of Foreign Labor Certification, Room C-4312
Employment and Training Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, D.C. 20210

Via email: ETA.OFLC.Forms@dol.gov

Re: Comments Request for Information Collections in the H-2B Temporary Non-agricultural Employment-Based Visa Program on Form ETA–9165, Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey (OMB Control Number 1205–0516), which expires on October 31, 2015.

Dear Mr. Pasternak:

We submit these comments on behalf of the H-2B working group of the Low Wage Workers Legal Network ("LWWLN") in response to the Employment and Training Administration's ("ETA") request for comments concerning the information collection in the H-2B temporary non-agricultural employment-based visa program on Form ETA–9165, Employer-Provided Survey Attestations to Accompany H–2B Prevailing Wage Determination Request Based on a Non-OES Survey (OMB Control Number 1205–0516), 80 Fed. Reg. 42,124 (July 16, 2015).

The LWWLN is an affiliation of more than 350 legal advocates for low wage workers in over 130 organizations and 28 private law firms located in thirty-four states, the District of Columbia and Mexico. The H-2B working group has been collaborating to make the H-2B program less abusive to U.S. and foreign workers since 2007. The LWWLN appreciates the opportunity to comment on Form ETA–9165 and its instructions.

These comments are also submitted on behalf of the plaintiff organizations in CATA v. Perez and related litigation. Those organizations are: Comité de Apoyo a los Trabajadores Agrícolas (CATA), Pineros y Campesinos Unidos del Noroeste (PCUN), and Northwest Forest Worker Center. In addition, these comments are submitted on behalf of the following organizations who have been involved in representation of workers in *CATA v. Perez* and related litigation:

- Northwest Workers' Justice Project (Oregon)
- Friends of Farmworkers, Inc. (Pennsylvania)
- Southern Poverty Law Center
- Centro de los Derechos del Migrante, Inc.
- Florida Legal Services, Inc.
- North Carolina Justice Center

Regulatory Requirements

The proposed forms are intended to implement requirements of the Final Wage Rule, "Wage Methodology for the Temporary Non-Agricultural Employment H–2B Program," 80 Fed. Reg. 24,146 (Apr. 29, 2015) ("2015 Wage Rule"). DOL is, of course, aware that the commenters have challenged under the Administrative Procedure Act ("APA") that rule's authorization to employers to utilize employer provided wage surveys (public or private), except under the limited circumstance that no OES, DBA or SCA wage rate is available for the occupation in the area of employment. *See CATA v. Perez,* United States District Court for the District of New Jersey, Case 1:15-cv-04014-RBK-JS. Prior comments had been submitted on employer provided wage surveys in Regulations.gov document: ETA-2013-0003-0187 on June 10, 2013. *See* http://www.regulations.gov/#!documentDetail;D=ETA-2013-0003-0187.

Form ETA-9165 is intended to implement the requirement of 20 C.F.R. § 655.10 (f) Employer-provided survey which provides:

20 C.F.R. § 655.10 (f) *Employer-provided survey.*

(1) If the *job opportunity* is not covered by a CBA, or by a professional sports league's rules or regulations, the NPWC will consider a survey provided by the employer in making a Prevailing Wage Determination only if the employer submission demonstrates that the survey falls into one of the following categories:

(i) The survey was independently conducted and issued by a state, including any state agency, state college, or state university;

(ii) 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 employed in the SOC;

(iii) (A) The *job opportunity* is not included within an occupational classification of the SOC system; or

(B) The *job opportunity* is within an occupational classification of the SOC system designated as an "all other" classification.

(2) The survey must provide the arithmetic mean of the wages of all **workers similarly employed in the area of intended employment**, except that if the survey provides a median but does not provide an arithmetic mean, the prevailing wage

applicable to the employer's *job opportunity* shall be the median of the wages of workers similarly employed in the area of intended employment.

(3) Notwithstanding paragraph (f)(2) of this section, the geographic area surveyed may be expanded beyond the area of intended employment, but only as necessary to meet the requirements of paragraph (f)(4)(ii) of this section. Any geographic expansion beyond the area of intended employment must include only those geographic areas that are contiguous to the area of intended employment.

(4) In each case where the employer submits a survey under paragraph (f)(1) of this section, the employer must submit, concurrently with the ETA Form 9141, a completed Form ETA– 9165 containing specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey *job descriptions*, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey. In addition, the information provided by the employer must include the attestation that:

(i) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the **occupation** and geographic area surveyed or conducted a randomized sampling of such employers;

(ii) The survey includes wage data from at least 30 workers and three employers;

(iii) If the survey is submitted under paragraph (f)(1)(ii) or (iii) of this section, the collection was administered by a bona fide third party. The following are not bona fide third parties under this rule: Any H–2B employer or any H–2B employer's agent, representative, or attorney;

(iv) The survey was conducted across industries that employ workers in the **occupation**; and

(v) The wage reported in the survey includes all types of pay, consistent with Form ETA–9165.

(5) The survey must be based upon recently collected data: The survey must be the most current edition of the survey and must be based on wages paid not more than 24 months before the date the survey is submitted for consideration.

Shortcoming of ETA-9165 and its Instructions

Distinction between Occupations and Job Opportunities

The most fundamental flaw in the Form ETA-9165 is the failure to recognize and clearly define the distinction between an "**occupation**" and an individual employer's "*job opportunity*" or "*job description*." This is a particular concern in §D of the form which asks for the "Title of job(s) included in the survey" and for §E of the form which repeatedly refers to the "occupation" without defining that term or clarifying that it is broader than the employer's job

description. DOL **must make clear** that the "jobs included in the survey" and "duties of the job" in §§D 1 and 2 relate to the jobs and duties of the "occupation" being surveyed, **not the narrow job title and job duties specified in the employer's ETA-9142B §F.a.1 & 5.** The job title and duties in the ETA-9142B may, and likely are, only one of many jobs that would be included in the "occupation" that is being surveyed. The way the ETA-9165 is currently worded, an employer would likely think that §§D 1 and 2 are asking for the same information as §F a.1 & 5 of the ETA-9142B, and that that job was the same as the "occupation" inquired about in §E of the ETA-9165.

DOL has long recognized that a critical requirement for all prevailing wage determinations is that there is no adverse impact on "**similarly employed**" workers in the area of employment. The 2008 DOL H-2B rules contained an explicit definition of "similarly employed" at 20 C.F.R. § 655.10 (c) (2008) which provided:[1]

> (c) Similarly employed. For purposes of this section, "similarly employed" means having substantially comparable jobs in the occupational category in the area of intended employment, except that, if a representative sample of workers in the occupational category cannot be obtained in the area of intended employment, similarly employed means:
>
> > (1) Having jobs requiring a substantially similar level of comparable skills within the area of intended employment; or
> >
> > (2) If there are no substantially comparable jobs in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

20 C.F.R. § 655.10 (c) (2008). *See also* 20 C.F.R. § 656.40(b) (PERM Regulations) referenced at 80 Fed. Reg. at 24,158.

In order to implement the requirement of 20 C.F.R. § 655.10 (f)(2) that the "…survey must provide the arithmetic mean of the wages of all workers similarly employed in the area of intended employment," the ETA-9165 must require the third party (state related or private) to define not just the "job description" of the individual employer's "job opportunity," but also the "**occupation**" into which the "job opportunity" falls (which must be "across industries") and for which the prevailing wage survey is conducted. This requirement is fundamental to reining in the adverse impact on "**similarly employed**" workers in the area of employment. In the absence of such direction – i.e. the form as it presently exists – employers will likely assume that "occupation" in places like §E 5 and 6 means the same thing as the "job title" in §D1 with the

[1] Neither the April 29, 2015 H-2B Wage Rule nor the April 29, 2015 Interim H-2B General Rule - 80 Fed. Reg. 24,042 (Apr. 29, 2015) ("2015 H-2B IFR") - offer any explanation for the removal of a definition of "**similarly employed**" for purposes of prevailing wage determinations as set forth in the 2008 rule and there is no indication that DOL intended to make substantive changes in that definition. If DOL intended to do so, nothing in the Notice of Proposed Rulemakings since October 2010 have indicated an attempt to make substantive changes in that definition.

result that the survey will only survey individuals with that job title, not similarly employed individuals working in that "occupation." And, as a result, the survey will not protect the wages of "similarly employed" workers.

Section D 1 of the ETA-9165 should require the third party surveyor to identify a recognized "occupational" "title" (not a job title which confuses a job with an occupation) and §2 should list the "duties" of the occupation since it is the occupation and individuals performing the occupational duties that are to be surveyed (or randomly sample). Section D of the form should also require the employer to identify the industries employing individuals in the "occupation" so that DOL can be assured that the survey does indeed survey across industries as required by the regulations. Finally, while employers could, if they chose, use OES ONET SOC code definitions to identify the "occupation" being surveyed in §D.1, if some other recognized occupational classification is used instead, the third party surveyor should identify the source of or basis for the occupational definition used to survey "substantially comparable jobs" across industries. If, for example the survey uses the Dictionary of Occupational Titles (DOT) to identify the occupation, the DOT code should be include in §D1. If some other state or academic source for the occupational title is used, that source should be clearly identified.

For example, "North Carolina Sea Grant" has in the past performed wage surveys for North Carolina seafood processors who were otherwise grouped in SOC Code 51-3022 "Meat, Poultry, and Fish Cutters and Trimmers."[2] The DOL ONET OnLine provides a detailed analysis of the tasks performed under this occupational code. *See* http://www.onetonline.org/link/summary/51-3022.00. Similarly, the Louisiana Department of Agriculture & Forestry in the past performed wage surveys for Louisiana seafood processors who were otherwise grouped in SOC Code 53-7064 "Packers and Packagers, Hand."[3] The DOL ONET OnLine provides a detailed analysis of the tasks performed under this occupational code. *See* http://www.onetonline.org/link/summary/53-7064.00.

In each case, if the third party surveyor does not use the SOC Code "occupation," the ETA-9165 should, in §§ D.1 and 2, require the related third party surveyor to identify the "occupation" being surveyed either with reference to a published list of occupational definitions specifying the tasks and skills related to the occupational classification (e.g. a reference to the specific Dictionary of Occupational Titles code used if that is the source of the occupational classification), or in the absence of a published occupational definition, the third party surveyor should be required to explain the definition and the tasks and skill related to the occupational classification that the state related surveyor is proposing constitutes a separate occupation and how it differs in terms of "substantially similar level of comparable skills" from the broader SOC

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[2] *See e.g.* PWD Tracking Case Numbers: P-400-15118-753838; P-400-15118-329281; P-400-15055-463655; P-400-15054-503875; P-400-14324-607247; P-400-14301-693104; P-400-14286-153349; P-400-14295-240233; P-400-14286-284530; and P-400-14281-769797

[3] *See e.g.* PWD Tracking Case Numbers: P-400-14279-857845; P-400-14226-460032; P-400-14265-552588; P-400-14224-396262; P-400-14301-449412; P-400-14301-673392; P-400-14297-102993; P-400-14227-249323; P-400-14275-267544; P-400-14289-121532; P-400-14226-501950; P-400-14274-334977; P-400-14280-202288; and P-400-14227-178556.

Code classification which is otherwise appropriate. Such third party surveyors should further be required to identify each of the industries utilizing persons in that occupation and why it is appropriate to exclude similarly employed individuals working in industries which they have excluded from their occupational definition.

These changes are critical because DOL must have information regarding the "occupation" that is being surveyed and its defined tasks and skills to ensure that it is, indeed, an "occupation" that is being surveyed, not just a particular job within an occupation. A survey of a job within an occupation cannot, by definition, protect "similarly employed" workers as DOL has historically defined that term. Moreover, the ETA-9165 must provide DOL with sufficient information to judge if the surveyors are including within their occupational definition all of the "**similarly employed**" workers in the area of employment.

To summarize, the ETA-9165 and its instructions should be amended to clarify that:

1. §D 1. Should identify the source, title, and code of the **"occupation"** being surveyed and the instructions should make clear that, while the employer's job described in ETA-9142B §F.a.1 &5 must be included in the "occupation," the "occupation" is different from and broader than the employer's job because it includes other jobs using the same or similar skills.

2. §D 2. should identify the duties and or skills of the "**occupation"** and again the instructions should make clear that this is not the same as the employer's particular job opening.

3. §D should be amended to add a §D 3 which would require identification of the industries employing workers in the occupation.

4. §E. The Form and instructions to §E should make clear that the references to "occupation" in §E 1, 2, 3, 5, 6, 9, and 11 are references to the "occupation" described in §D.

Other Technical Issues with the ETA-9165:

1. Disclosure of Relationship to Employers

The instructions to the ETA-9165 at Part C.1 state

> Section C. Employer-Provided Survey Information. #1. Enter the complete name or title of survey. If the survey was commissioned by the employer and does not have a name, enter 'Employer Commissioned'.

The form should explicitly ask for all surveys, whether named or not, whether the survey was employer commissioned, and whether it was in whole, or in part, employer financed (either directly or indirectly through a trade group or other association of which the employer is a member). This should be true for state related surveys as well.

DOL's preamble to the 2015 H-2B wage rule notes:

> Even H–2B employers, representatives, agents, and attorneys who are not directly involved in the application for which the survey is submitted are barred from conducting a wage survey under this final rule because we conclude that H–2B employers and the entities that represent them are likely to share common

> interests and biases that may affect the reliability of such surveys. *See* 20 CFR 655.10(f)(4)(iii) of this final rule.

See 80 Fed. Reg. at 24,174. The additional questions listed above are necessary in order to ensure compliance with this statement. It cannot be assumed that all state related institutions are fully insulated from these bias issues where industry connected groups are involved in either the funding of the state related entity or are allowed to participate in the planning or conduct of the survey by such a state related agency. Full disclosure of all possible conflicts by third party state related surveyors is critical to the transparency of the process.

2. **Identification of State Official Approving Survey**

The instructions to the ETA-9165 at Part C.5 state:

> 5. If the survey was conducted by a state, including any state agency, state college or state university under question 4a, provide responses to questions 5a – 5b.
>
> 5a. Enter the name of the state agency, state college or state university. Please do not enter acronyms as these vary by state. Standard abbreviations, such as "Dept.," are acceptable.
>
> 5b. Enter the last (family) name then first (given) name of the state official approving the survey.

Part C.5.b. should require the official title / position of the state official approving the survey and contact information including phone number for that individual.

3. Disclosure of Whether data for survey was collected by any H-2B employer or any H-2B employer's agent

The instructions to the ETA-9165 at Part C.6 state:

> 6. If the survey is eligible under question 4b or 4c, provide responses to questions 6a-6b.
>
> 6a. Mark "Yes" or "No" as to whether the collection of data was collected by a third party permitted by ETA regulations at 20 CFR § 655.10(f) and no data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney.

This disclosure inquiry should be asked even if the survey is conducted under the auspices of a state related entity. Part C.6a should simply ask whether "…data for the survey was collected by any H-2B employer or any H-2B employer's agent, representative, or attorney."

4. Identification of Third Party Surveyor

The instructions to the ETA-9165 at Part C.6 state:

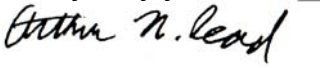
> 6c. Enter the last (family) name then first (given) name of the official representative of the third party surveyor who approved the survey.

Part 6.c. should include contact information including phone number for that individual.

CONCLUSION

DOL should restructure Parts D and E significantly in light of the comments on the need to identify a cross industry occupation rather than a job. The current Form ETA-9165 and its instructions are wholly inadequate to make a determination that there is no adverse impact on "**similarly employed**" workers in the area of employment

Very truly yours,



Arthur N. Read
General Counsel
Friends of Farmworkers, Inc.

EXHIBIT 4

OMB Approval: 1205-0509
Expiration Date: 05/31/2022

Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey
Form ETA-9165
U.S. Department of Labor

This form is for use with Non-Occupational Employment Statistics (Non-OES) surveys. Please read and review the Form ETA-9165 form instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. Those items marked with an asterisk (*) are required and must be completed. Items marked with the section symbol (§) are conditional and are to be completed if the required if the condition is met.

A. Employer Point-of-Contact Information

1. Contact's Last (family) Name *	2. First (given) Name *	3. Middle Name(s) §
Young	Danielle	Toups
4. Telephone Number *	**5. Extension §**	**6. Fax Number §**
(337) 466-3722		(337) 466-3792
7. E-Mail Address *		
danielle@dtyounglaw.com		

B. Employer Information

1. Legal business name *	
Crawfish Distributors, Inc.	
2. Trade name/Doing Business As (DBA), if applicable §	
3. Telephone number *	4. Extension §
(504) 858-8322	
5. Federal Employer Identification Number (FEIN from IRS) *	6. NAICS code (must be at least 4-digits) *
[redacted]	311710

C. Employer-Provided Survey Information

1. Survey name or title *	
Crawfish Wage Survey	
2. Is there a collective bargaining agreement (CBA) applicable to the job opportunity? *	☐ Yes ■ No
3. Are professional sports league's rules or regulations applicable to the job opportunity? *	☐ Yes ■ No
4. Is the surveyor an H-2B employer or the agent, representative, or attorney for any H-2B employer? *	☐ Yes ■ No
5. Enter the complete name of the third-party surveyor (individual or organization/association). *	
Louisiana State University Eunice Division of Sciences & Mathematics	
6. Enter the name of the official representative of the third party surveyor who approved the survey. *	
Dr. John Hamlin, Professor of Biology	
a. Contact's Last (family) Name *	b. First (given) Name *
Hamlin	John
7. Is the survey based on wages paid 24 months or less before the date of survey submission to ETA? *	■ Yes ☐ No
8. Is this the most recent edition of the survey? (If this is the only edition, answer "yes".) *	■ Yes ☐ No

OMB Approval: 1205-0509
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U.S. Department of Labor

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

1. Title(s) of the job(s) included in the survey *
cannery worker/crawfish-worker/dockworker/hand-packer/packer/peeler/processors/seafood processor or processing, etc.

2. Duties of the job(s) included in the survey *(attach additional sheets as necessary)* *

Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steam room, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs, freeze, grade, handle, ice pack, inspect for defects/remove/discard defective and/or waste products, label, lift/carry, load/unload product and/or bait or supplies (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, refrigerate or freeze immediately, ready for market, repackage, rinse, seal, separate/sort, shrink wrap, tag, trim, transport product to vehicles, use of other related equipment, vacuum pack machine, wash, washing machine, and weigh. And any other activities as related to crawfish processing.

3. Identify the area of intended employment covered by the survey. *
(Please refer to the instructions for the definition of area of intended employment)

St. Martin and Acadia Parishes, State of Louisiana

4. Was the survey expanded to include workers beyond the area of intended employment? * ■ Yes ☐ No

4a. If yes to question 4, provide the geographic area surveyed §

The State of Louisiana

4b. If yes to question 4, indicate the reason(s) the survey was expanded beyond the area of intended employment *(check all that apply)* §

☐ to meet the 30 worker minimum. §
■ to meet the 3 employer minimum. §

E. Survey Methodology

1. For the geographic area surveyed, provide the universe (number) of employers determined to employ workers in the Occupation, including employers who were not surveyed. * seventy-six (76)

2. For the geographic area surveyed, provide the sources used to determine the universe (number) of employers who employ workers in the occupation: *

The surveyor obtained a listing from the Department of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana.

3. For the geographic area surveyed, did the surveyor attempt to contact: ? * *(Choose only one)*

■ All employers employing workers in occupation(s) ☐ A sample of employers in the geographic area

3a. If a sample, was the sample randomly selected? § ☐ Yes ☐ No

3b. If a sample, provide a brief summary of the procedures used to randomize the sample: §

4. The total number of employers from whom the surveyor attempted to solicit a survey response: * seventy-six (76)

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U.S. Department of Labor

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. *	■ Yes ☐ No
6. The survey includes data collected across industries that employ workers in the occupation. *	■ Yes ☐ No
7. The survey reflects the mean wage for all workers it covers. *	■ Yes ☐ No
7a. The mean wage is § $ 10 . 43	7b. Per: *(Choose only one)* § ■ Hour ☐ Week ☐ Month
8. The survey reflects the median wage for all workers it covers. *	■ Yes ☐ No
8a. The median wage is § $ 10 . 875	8b. Per: *(Choose only one)* § ■ Hour ☐ Week ☐ Month
9. The hourly, weekly, or monthly wage reported from the survey:	
a. Is based on data provided by how many employers? * *(Minimum of 3 employers)* 4	b. Reflects wages from workers within the occupation in the geographic area surveyed? * *(Minimum of 30 workers)* ■ Yes ☐ No
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. *	■ Yes ☐ No
11. Does the survey include wages from workers in the occupation regardless of immigration status? *	■ Yes ☐ No

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 materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by fines, imprisonment or both (18 U.S.C. 2, 1001, 1546, 1621).*

1. Last (family) Name *	2. First (given) Name *	3. Middle Name(s) §
Gaspard	Jason	Paul
4. Title * Owner		
5. Signature * Jason Gaspard		6. Date Signed * 7/7/21

G. Public Burden Statement (1205-0509)

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The respondent's reply to these reporting requirements is required to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 25 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification • U.S. Department of Labor • Box 12-200 • 200 Constitution Ave., NW, • Washington, DC 20210. **Do NOT send the completed application to this address.**

LSUE

Division of

Sciences & Mathematics

Crawfish Wage Survey
June 30, 2021

Survey results of Louisiana Crawfish processors conducted May 21, 2021 to June 21, 2021, to determine average wage, including all types of pay (such as base rates of pay, commissions, cost of living allowance, deadheading pay, hazard pay, incentive pay, guaranteed pay, piece rate, production bonus and all other possible forms of pay) for all workers in this job classification, regardless of skill level, experience, education or length. These positions require minimal experience usually only two or three weeks, varying by employer. Employers have a variety of job titles including but not limited to the following various titles: cannery worker/crawfish-worker/ dockworker/ hand-packer/ packer/ peeler/ processors/seafood processor or processing, etc. All surveyed are working in the same job activity and titles can be used interchangeably. This survey was compiled for the 12 month period of January 1, 2020 to December 31, 2020.

	Column A	Column B	Column C	Column D	Avg. Hourly
	# of Respondents	# of Employees	Total Compensation	Total hours worked	
A	1	138	$813824	69280	$11.75
B	1	157	$1245700	125600	$9.92
C	1	112	$675473.71	56840	$11.88
D	1	240	$2496790.81	249600	$10.00
Totals	4	647	$5,231,788.52	501320	$10.43

Column C total $5,231,788.52 divided by Column D total 501320 provides result of $10.43

Survey results can be provided by contacting Dr. John Hamlin, Professor of Biology, Louisiana State University at Eunice (jhamlin@lsue.edu).

I.Respondents -Companies included in the survey are holders of appropriate Louisiana certification to purchase, process, and sell crawfish products. These companies hire workers to process and clean the crawfish using a variety of steps listed in the job description below, and then package into containers to sell.

2. Survey Job Description: Under direct supervision Job Duties may include any/or all of the following: Bag, bait (chop or prepare), box/case, clean, cleanup work site and sanitize, conveyor belt/steam room, count, cut, dehead, dock work, dump containers and/or sacks, examine product to meet specifications, extract meat from carcass or shell (using hands, hand tools or knives), fill baskets, boxes, sacks, tables, and troughs , freeze, grade, handle, ice pack, inspect for defects/ remove/ discard defective and/or waste products, label, lift/carry, load /unload product and/or bait or supplies (from docks, rack, trucks, etc.), move, obtain/distribute, pack/package (place or pour into bags, containers, sacks, etc.), pallet, peel (removing shell), pick or remove trash/foreign matter, pregrade, prepare, process, purge, refrigerate or freeze immediately, ready for market, repackage, rinse, seal, separate/sort, shrink wrap, tag, trim, transport product to vehicles, use of other related equipment, vacuum pack machine, wash, washing machine, and weigh. And any other activities as related to crawfish processing.

Louisiana State University Eunice
PO Box 1129
Eunice, LA 70535-1129

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3. Employer may use any/or all of the above job duties listed in the description above, depending on each individual processing plant.

4.All workers are seasonal usually January through July with the peak season being mid February -June. Some plants may process slightly earlier, or a little longer.
5. How survey was conducted: We obtained a listing from the Dept of Health & Hospitals that included all licensed crawfish processors within the State of Louisiana. In an effort. to mask dominant employers, and due to remote plant locations, we have surveyed statewide. Attempts were made to contact all processors that processed crawfish. Both local/domestic and H2B employee wages are included in these results. It was determined that there are 76 possible licensed employers within Louisiana who employ workers in this occupation. Many of these licensed plants are currently inactive. Initial contact was made via phone or email. We surveyed a total of 4 employer respondents, and this survey represents 647 workers employed within the crawfish industry during peak season. (result must include at least 3 employers/and 30 workers, both local and H2B). Results include 3 respondents utilizing local and H2B Workers and 1 using H2A Workers.

Dr. John Hamlin
Professor of Biology
Vice Chancellor Academic Affairs

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EXHIBIT 5

H 2B: P 400 21189 451473

Non-OES Checklists

← Back

Non-OES Checklist

Checklist Type H-2B Survey

Question	Answer	Rejection	Comments	Regulation Citations
Does the survey identify the entity that conducted the survey?	Yes		LSU Eunice Div. of Sciences and Mathematics	§65 10(f)(4)(iii)
Was the survey conducted by a bone fide third party? The following entities are bona fide third parties 1) A state agency, which can include state colleges, universities, agricultural extension services, and maritime agencies; or 2) An organization covering a mixture of employers, most of whom do not employ H-2B workers 3) A person or company who produces the survey to include published works with or without continuous updates or on commission.	Yes			§655.10(f)(4)(iii)
Does this survey provide the exact time period (e.g., MM/DD/YYYY to MM/DD/YYYY) when wages were paid to the workers included in the wage data?	Yes		1/1/2020 - 12/31/2020	
Does the survey describe the survey universe? It must show that it includes all workers in the occupation and area of intended employment regardless of 1) skill level or experience education and length of employment or) immigration status (includes foreign and U.S. workers)	Yes		Licensed crawfish processors in the state of LA.	§ 6 10(f)(4)(iv)
Did the survey attempt to get wages for workers in jobs from all industry sectors where the occupation is found in the area of intended employment?	Yes		Occupation inherently limited.	
Does the survey show that it includes all types of employers in the area of intended employment? This is regardless of entity characteristics 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.	Yes		Occupation inherently limited.	
The survey either: made a reasonable good faith attempt to contact all employers employing workers in the occupation and geographic area surveyed; OR -conducted a randomized sampling of such employers. If the sample was randomized, include a description of the method for randomizing the selection. Also, the survey identifies the sample size and sample source from which the survey or obtained the sample	Yes		Phone/email of all employers; obtained random sample of respondents.	§ 655.10(f)(4)(i)(ii)

Question	Answer	Rejection	Comments	Regulation Citations
Does the survey identify the number of employers that the surveyor determined employed workers within the occupation and geographic area surveyed? Does it state the number of employers from which the surveyor attempted to solicit responses?	Yes		76	
Does the survey include a description of how the survey was conducted? 1) How the estimate of the total employment in the AIE and the occupation was made 2)How selected employers were contacted 3) Means used to improve response rate such as follow up calls	Yes		Phone/email of all employers; obtained random sample of respondents.	
The survey identifies the geographic area from which the surveyor procured its data	Yes		Acadia Parish; Iberia Parish; Lafayette Parish; St. Martin Parish – MSA does not cross state lines. Expanded to State.	§ 655.10(f)(1)-(2)
If the geographic area was expanded beyond AIE, describe why the surveyor determined it was necessary to expand the area surveyed. A sample based on the AIE may be inadequate, and require expansion, for the following reason(s): 1) Survey resulted in wage data from fewer than 30 workers 2) Survey resulted in wage data from fewer than 3 employers 3) Other statistically valid reason such as a dominant employer in the AIE.	Yes		Employer sample.	
If the surveyed area needs to be expanded, did survey adhere to the following? 1) Smallest area to meet standards 2) Contiguous area; areas with economic and commuting ties have priority 3) 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	Yes			
This survey includes job title(s) and the detailed job duties descriptions of the workers included in the survey	Yes			§ 655.10(f)(4)(iv)
The survey indicates that the wage reported in 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.	Yes			§ 655.10(f)(4)(v)
This survey indicates the wage reported in the survey reflects the average wage per worker. It is not an average of the average wage each employer pays.	Yes			
This survey calculates a total for workers' compensation by converting all forms of compensation into an hourly pay.	Yes			
This survey includes all wages, without regard for skill level, experience, education, and length of employment. This means that the survey does not adjust or otherwise manipulate the wages based on those factors	Yes			
This survey provides the arithmetic mean of the wages of all workers similarly employed in the AIE or a median if a published survey does not have a mean.	Yes		10.43/hr	

Display Survey Name	Crawfish Wage Survey 6/30/2021
Reject Survey	No
Rejection Message [G.8]	

EXHIBIT 6

From: Carey Lawson
To: John Hamlin
Subject: Re: Crawfish Prevailing Wage Survey
Date: Saturday, June 26, 2021 11:13:28 AM

They just need it done

From: John Hamlin <jhamlin@lsue.edu>
Sent: Thursday, June 24, 2021 3:42 PM
To: Carey Lawson <clawson@lsue.edu>
Subject: Re: Crawfish Prevailing Wage Survey

I wanted to talk about it. I thought you should be working with Econ faculty for this.

Get Outlook for iOS

From: Carey Lawson <clawson@lsue.edu>
Sent: Thursday, June 24, 2021 3:28:49 PM
To: John Hamlin <jhamlin@lsue.edu>
Subject: Fw: Crawfish Prevailing Wage Survey

We're you able to pull together a letter from data I sent?

From: Adam Johnson <bayoulandseafood@yahoo.com>
Sent: Wednesday, June 23, 2021 7:15 AM
To: Carey Lawson <clawson@lsue.edu>
Cc: Kody Bieber <kody@bieberfarms.com>; Earl Toups <josephtoups35@yahoo.com>; Doug Guillory <doug@ricelandcrawfish.com>; Frank Randol <randols@aol.com>
Subject: Crawfish Prevailing Wage Survey

EXTERNAL EMAIL: Do not click links or attachments unless you recognize the sender and know the content is safe.

Good morning,

Please send an update on the crawfish prevailing wage determination. It seems that there is at least the minimum responses needed (net of the one corrected survey). We have a very short window to get this done. We appreciate all that you have done.

Sincerely,

Adam J. Johnson

Bayou Land Seafood, LLC

337-667-6118