

**SUPPORTING STATEMENT FOR REQUEST FOR OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT OF 1995**

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SUPPORTING STATEMENT

APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION FOR H-2A PROGRAM ONLY

A. Justification

A.1. Circumstances that make the collection of information necessary.

The information collection for the H-2A Final Rulemaking is required by sections 214(c) and 218 of the Immigration and Nationality Act (INA) (8 U.S.C. 1184(c), and 1188) and Title 8 CFR § 214.2 (h). The INA requires the Secretary of Labor to certify, among other things, that any foreign worker seeking to enter the United States for the purpose of performing certain skilled or unskilled labor will not, by doing so, adversely affect wages and working conditions of U.S. workers similarly employed. The Secretary must also certify that there are not sufficient U.S. workers able, willing, and qualified to perform such skilled or unskilled labor. Before any employer may petition for any temporary skilled or unskilled foreign workers, it must submit a request for certification to the Secretary of Labor containing the elements prescribed by the INA and regulations, which differ depending on the visa program under which the labor is sought. The form currently in use for the temporary H-2A and H-2B programs is the ETA 750A (OMB control number 1205-0015). In addition, before the Secretary of Labor can certify that wages for U.S. workers have not been adversely affected, she must ensure that the wages being paid the foreign workers are the same as those being offered and paid to U.S. workers. In the past, this task was delegated to the State Workforce Agencies (SWA). However, extensive program experience has shown that these methods need to be updated. This, together with the recent policy changes have made it necessary for the Department of Labor (Department) to streamline the processes and has led to the development of new operations to take over these functions by utilizing old forms in a new manner or creating new forms.

The Department published two Notices of Proposed Rulemaking amending regulations at 20 CFR Part 655, which included a Paperwork Reduction Act notice for these forms. The NPRMs outlined in detail the process for seeking temporary labor certification for foreign workers to be employed in the U.S. under the H-2A and H-2B programs. The new Form ETA 9142 will be used to collect information to permit the Department to meet its statutory responsibilities for administering the H-2A and H-2B temporary labor certification programs. The H-2A program enables employers to bring nonimmigrant foreign workers to the U.S. to perform agricultural work of a temporary or seasonal nature as defined in 8 U.S.C. 1101 (a)(15)(H)(ii)(a). The H-2B program enables employers to bring nonimmigrant foreign workers to the U.S. to perform nonagricultural work of a temporary or seasonal nature as defined in 8 U.S.C. 1101 (a)(15)(H)(ii)(b). The Supporting Statement and hourly burden for that Final Rulemaking are in a

separate IC in ROCIS, but under the same ICR and OMB control number (1205-0466) as this IC.

Prior to submitting a request for certification to the Secretary of Labor, the employer must obtain a prevailing wage for the place of employment in order to ensure that wages are not being adversely affected by bringing in foreign workers. Under the current regulations, employers contact their local State Workforce Agency (SWA) to obtain a prevailing wage for any labor certification issued by the Department. The Department has decided to federalize this process because the database used by the SWAs for determining the prevailing wage is produced by the Department. The Employment & Training Administration's National Processing Center (NPC) in Chicago, Illinois will be performing the necessary research and analysis to determine the wage employers must pay their foreign workers. For the H-2A program the employer will be required to submit a portion of an already existing collection, the Form ETA-790 (OMB control number 1205-0134). For the H-2B program the employer will be required to submit the ETA-9141. Because the ETA-9141 is not required for the H-2A program, the Department is only submitting the new form (ETA-9142) required for the H-2A program for final approval in this submission. The ETA 9142 is attached to this Paperwork Reduction Act supporting statement.

A.2. How, by whom, and for what purpose the information is to be used.

In order to meet its statutory responsibilities under the INA, the Department needs to request a new collection of information pertaining to employers seeking to import foreign labor. The Department will use the information collected to determine eligibility of an employer for the H-2A nonimmigrant temporary agricultural worker.

A.3. Extent to which collection is automated, reasons for automation, and considerations for reducing impact on burden.

In compliance with the Government Paperwork Elimination Act, the Department anticipates approval by the Office of Budget and Management (OMB) for this form to be available via the Internet for manual filing by mail either by download only or a fillable-printable form. Eventually, the Department intends to make the forms fillable and fileable on-line, but will seek OMB approval for such an electronic version prior to introducing the form for public use.

A.4. Efforts to identify duplication – why similar information already available cannot be used for purpose described in A.2.

The Department did in fact identify duplication in the H-2A program and, therefore, decided not to utilize the second form originally submitted as part of this collection, the ETA-9141. The information required in the ETA-9142, for the most part, is sufficiently specific to avoid duplication of activities within or without

the Department in the H-2A program. Appendix A.1, however, does require an agricultural employer with many crop activities to fill in the appendix and list all of the crop activities and the wage paid per crop also designating if it is a piece rate crop activity. This information is similar to that required on the ETA 790 (1205-0134) question #11. This information needs to be requested again because the employer will not be submitting the ETA 790 with the ETA 9142. And when the Department receives the request for a prevailing wage it will not be connected to any official application. One employer may file several Applications for Temporary Labor Certification (ETA 9142). It would be extremely burdensome for the Department to later attempt to match up a prevailing wage request to the correct application filed by that employer. Similarly, several questions in ETA 9142 also duplicate information in the ETA 790. Specifically, they include employer name and address (which are basic identifiers needed on every application), work location, anticipated dates of employment, number of workers requested, and job description.

A.5. Efforts to minimize burden on small businesses.

The information collection is required of small businesses who want to import foreign labor. However, the recordkeeping requirements largely involve information that already exists in payroll and other records kept by most employers for other purposes.

A.6. Consequences to Federal program if collection not done or done less frequently and any technical or legal obstacles to reducing the burden.

The Department would be in direct violation of law and regulations if this information was not collected.

A.7. Special circumstances for conducting information collection.

There are no special circumstances that would require the information to be collected or kept in any manner other than those normally required under the Paperwork Reduction Act except the regulatory requirement that employers retain the records and supporting documents used to fill in the form for at least three years.¹

A.8. Summary of public comments.

The public was given the opportunity to comment for 60 days on the proposed form as part of the Notice of Proposed Rulemaking for the H-2A program (RIN 1205-AB55) [73 FR 8538, February 13, 2008] and then again with the publication of the NPRM for the H-2B program (RIN 1205-AB54) [73 FR 29942, May 22,

¹ Other Office of Foreign Labor Certification programs except the H-1b program and PERM program have a three year retention policy. The H-1B program requires employers to keep records and supporting documents for one year beyond the validity of the certified Labor Condition Application; PERM requires records be kept five years.

2008]. The comments are being responded to in the respective final rules. Some changes were made to the forms based on the comments.

A.9. Explanation of decision to provide any payment or gift to respondents.

No payments or gifts will be made to respondents.

A.10. Assurance of confidentiality provided to respondents.

The information collected is not exempt from disclosure under the Freedom of Information Act.

A.11. Justification for any sensitive questions.

The information collected does not involve sensitive matters.

A.12. Estimated hourly burden – H-2A Program only.

Based on previous program experience, the Department estimates it will receive approximately 7,725 submissions next year for the H-2A program.

I. The Hourly Burden

A. Determination of wages to be paid for labor certification purposes

In order to recruit U.S. workers and complete the ETA 9142, an employer must determine the appropriate wage to pay agricultural employees. The regulations require employers to obtain the appropriate wage in advance of recruitment by applying to the appropriate NPC and receiving a wage determination.

The employer will use an already existing information collection (ETA 790 OMB control number 1205-0134) to obtain the prevailing wage. Under the new regulations, however, the employer will submit this form twice: once to the NPC for the wage determination and a second time to the SWA for processing. The hourly burden for filling in the ETA 790 is accounted for in that information collection. The additional time to send the first page of the ETA 790 to the NPC is 10 minutes. The total annual burden of the required wage rate determinations is 1,288 reporting hours (7,725 x 10 minutes ÷ 60 minutes = 1,288 hours).

B. Application for Temporary Employment Certification

Employers submit an Application for Temporary Employment Certification (form ETA 9142) when they wish to employ a nonimmigrant foreign worker. The form takes approximately one hour to complete. The

Department estimates, based on its operating experience, that in the upcoming year employers will file approximately 7,725 applications for a total burden of 7,725 reporting hours (7,725 applications x 1 hour = 7,725 hours).

C. Recruitment

Recruitment activities, including advertising for workers and placing job orders, is a usual and customary activity of employers. Therefore, under the regulations of the Office of Management and Budget at 5 CFR §1320.3(b), the resources expended by employers to comply with the recruitment provisions at § 655.102 of the proposed rule is excluded in compiling the paperwork burden estimates under the proposed rule.

Similarly, since the records required to be kept by the employer to demonstrate compliance with the advertising requirements or to prepare the required recruitment report must be retained by employers under the regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR §1602.14 (OMB Control No. 3046 -- 0040), promulgated pursuant to Title VII of the Civil Rights Act and the American With Disabilities Act, and 29 CFR §1627.3(b)(3) (OMB Control No. (3046 -- 0018), promulgated pursuant to the Age Discrimination in Employment Act, at 29 CFR §1627.3(b)(3), the burden to maintain such records can be excluded in compiling the paperwork burden under the proposed rule. For example, § 1602.14 requires the employer to keep “(a)ny personnel or employment record made or kept by an employer (including but not limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be kept for a period of one year from the date of making of the record or the personnel action involved, whichever occurs later. . . .”

The records that employers must maintain pursuant to 29 CFR §1627 (b) (3)(a)(1) that was promulgated pursuant to the Age Discrimination in Employment Act, includes but are not limited to the following:

- o Job applications, resumes or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual.
- o Promotion, demotion, transfer, selection for training, layoff, recall or discharge of any employee.

- o Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel and job openings.
- o Any advertisement or notice to the public or to employees relating to job openings, promotions, training programs, or to opportunities for overtime work.

However, the time required to prepare the required recruitment report is not excludable in compiling the burden under the regulation. Section 1602.14 does not require an employer to create any records, but rather requires an employer to preserve all personnel or employment records which the employer “made or kept.” Once made or kept (i.e., records received from others that are not immediately discarded), EEOC regulations requires that these records be preserved.

All employers that file applications under the H-2A process at 20 CFR §§ 655.101 and 107 must prepare and retain a summary report under § 655.102(k) signed by the employer describing the recruitment steps undertaken and the results achieved, including the number of hires, and if applicable, the number of U.S. workers rejected, summarized by the lawful job related reasons. The recruitment report may be requested by the Certifying Officer along with the resumes or applications of U.S. workers sorted by the reasons they were rejected during an audit under § 655.112. The Department estimates that it will take an average of 1 hour for an employer to prepare a recruitment report for each application it files. Because the Department anticipates that 7,725 Applications for Temporary Employment Certification will be filed with the Department of Labor, the total annual burden for preparing recruitment reports is estimated to amount to 7,725 recordkeeping hours (7725 applications x 1 hour = 7,725 hours).

D. Retention of Supporting Documentation

The Department estimates that employers will spend about 10 minutes per year per application to retain the required wage rate determination, Application for Temporary Employment Certification, and supporting documentation in the two years following the mandated one year retention for companies subject to Title VII and three years for all other employers. This results in an annual burden of 1,288 recordkeeping hours (7,725 applications x 10 minutes ÷ 60 minutes = 1,288 hours).

E. Audits – 20 CFR § 655.112

In a case where the Certifying Officer determines it to be appropriate, post-filing audits may be conducted and in some cases additional evidence will be requested from the employer. The Department estimates that it will audit thirty percent of all applications. The majority will require

the employer to submit additional documents, such as proof of advertising, the recruitment report, and possibly the ETA 790 and attachments. Such documents should be readily available to the employer because they are supposed to be collected during the process and retained for three years. The time required to review, copy, and send the items that are requested will average 30 minutes per audit for an annual burden of 1,159 reporting hours (7,725 applications x 30% x .5 hours = 1,159 hours).

Annual Burden Hours for H-2A Information Collections:

Prevailing wage – 1,288 Reporting Hours
Form ETA 9142 – 7,725 Reporting Hours; 9013 Recordkeeping
Hours
Audits – 1,159 Reporting hours

Average Time Per Application Process

Prevailing wage – 10 minutes
Form ETA 9142 – 2.17 hours
Audits – 30 minutes

II. Monetized Hourly Burden

Employers filing applications for temporary and permanent alien employment certification may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. However, the Department believes that in most companies a Human Resources Manager will perform these activities. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager (\$42.55), as published by the U.S. Department of Labor's Occupational Employment Statistics OnLine,² and increased by a factor of 1.42 to account for employee benefits and other compensation for a total hourly cost of \$60.42. Total annual respondent hour costs for all information collections are estimated as follows:

$$\text{H-2A } 19,185 \times \$60.42 = \$ 1,159,158$$

A.13. *Estimated cost burden to respondents.*

a) Start-up/capital costs: There are no start-up costs. There is no obligation to own a computer to participate in the program. Anyone without computer access can request the form from OFLC. However, to participate in the program the employer is required to generate records

² Source: Bureau of Labor Statistics 2006 wage data.

and retain them. The only necessary supplies needed to store and maintain the records are filing cabinets and filing folders. The Department estimates that the initial cost to employers is minimal because it is a customary and usual business practice for businesses to have storage space. However, there is a one-time fee the H-2A applicant must pay the Department after its application has been approved. The proposed rule stipulates that the applicant who receives an approved labor certification must pay \$100 plus \$10 for each foreign worker requested with an overall cap of \$1,000 per application. Assuming a 100% approval rate and the same amount of foreign workers as in previous years at 80,284, the Department estimates the maximum cost to employers will be \$1,575,340 [(7,725 applicants x \$100) + (80,284 foreign workers x \$10)]

b) Annual costs: There are no annual costs involved with operation and maintenance because ETA will be responsible for the annual maintenance costs for the free downloadable forms and, subject to OMB approval, the web-based data collection and reporting system.

A.14. Estimated cost burden to the Federal government

The average Federal Government cost for a year of operation is estimated on an hourly basis multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, otherwise known as Fully Loaded Full Time Equivalent (FLFTE). The index is derived by using the Bureau of Labor Statistics' index for salary plus benefits and the Department's internal analysis of overhead costs averaged over all employees of OFLC. The total cost to the Federal Government for the H-2A program is estimated at \$1,692,591 calculated as follows:

Estimated Hours - Data Entry/Review

<u>NPC Staff Cost for Determining Prevailing Wage</u>	\$199,537
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 30 minutes	
$\$51.66 \times 7,725 \times .5 \text{ hours} = \$199,537$	
 <u>SWA Cost to Post Job Order and Refer Applicants</u>	 \$399,074
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1 hour	
$\$51.66 \times 7,725 = \$399,074$	
 <u>Data Entry</u>	 \$ 950
(A small (1%) sampling of applications will be data entered for statistical purposes)	
Clerical (GS-6, Step 3 x 1.69 FLFTE) @ 30 minutes	
$\$24.67 \times 77 \text{ applications} \times .5 \text{ hour} = \950	
 <u>Staff Cost for Adjudicating Applications</u>	 \$598,610

Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1.5 hours
\$51.66 x 7,725 x 1.5 hours = \$598,610

Staff Cost for Audited Applications \$485,459
(30% of applications are audited)
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 3 hours
\$51.66 x 2,318 x 3 hours = \$359,244
Manager (GS-14, Step 5 x 1.69) @ 45 minutes
\$72.60 x 2,318 x .75 hours = \$126,215

Estimated Total Cost for H-2A
Staff = \$1,683,630
Printing/Mailing = \$ 8,961
\$1,692,591

A.15. Reasons for any program changes reported in Items 13 or 14 of the OMB Form 83-1.

The increase in burden through the use of a new form, ETA-9142, occurred because the form currently in use for the temporary H-2A and H-2B programs, ETA 750A (OMB control number 1205-0015), is no longer sufficient for the Secretary of Labor's foreign worker certification responsibilities. Thus the Department of Labor proposes that information previously collected by ETA 750A would now be collected by ETA-9142 for the H-2A and H-2B programs.

A.16. Method for publishing results.

OFLC discloses information about applicants to the public on its public access webpage at <http://www.flcdatacenter.com/CaseData.aspx>. For the H-2A program, the name and address of the employer, the number of foreign workers requested and certified, the occupation, rate of pay and hours per week guaranteed along with final determination by the Department and the dates certification begins and ends are all disclosed on the website.

A.17. If seeking approval not to display the expiration date for OMB approval, explain why display would be inappropriate.

The Department will display the expiration date for OMB approval on the form.

A.18. Explanation of each exception in the certification statement identified in Item 19 "Certification for Paperwork Reduction Act Submissions" on OMB Form 83-1.

The Department is not seeking any exception to the certification requirements.

B. Collection of Information Employing Statistical Methods

No statistical methods are employed.