

**JUSTIFICATION FOR EMERGENCY REQUEST FOR OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT OF 1995
OF A NON-SUBSTANTIVE CHANGE TO AN ALREADY APPROVED
INFORMATION COLLECTION**

OMB Control Number: 1205-0466

Title: Application For Temporary Employment Certification, Appendix B.2

Justification: On August 30, 2010, the U.S. District Court in the Eastern District of Pennsylvania in Comite´ de Apoyo a los Trabajadores Agricolas (CATA) v. Solis, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), ordered the Department to “promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act no later than 120 days from the date of this order.” In order to comply with the Court-mandated deadline, the Department issued a Notice of Proposed Rulemaking (NPRM), Wage Methodology for the Temporary Non-agricultural Employment H-2B Program, 75 FR 61578, Oct. 5, 2010. The NPRM proposed to define the prevailing wage, the rate an employer must offer and pay to its workers to avoid adverse effect, as the highest of the wage rates for the job opportunity under the Davis-Bacon Act (DBA), the McNamara-O’Hara Service Contract Act (SCA), a collective bargaining agreement (CBA), as applicable, or the Occupational Employment Statistics (OES) wage survey and to eliminate the stratification of the OES wage data into wage tiers representing four skill levels, requiring instead the use of the arithmetic mean in OES.

In a November 24, 2010 opinion in the CATA litigation, the Court issued a ruling on the Plaintiff’s request that the Court prohibit the Department from issuing H-2B temporary labor certifications unless each employer requesting an H-2B certification first

promised to pay a prevailing wage set by the new prevailing wage methodology as soon as that methodology became available. Although declining to issue an order compelling the Department to issue conditional certifications, the Court determined that nothing in the current H-2B regulations prohibits the Department from issuing labor certifications on the condition that the employer will pay the prevailing wage determined under the new prevailing wage methodology and held that the Department had the authority to adopt intermediary measures to minimize the adverse effect of prevailing wage determinations issued under an invalid methodology.

The Department expects to publish the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program Final Rule (Wage Final Rule) on or before January 18, 2011, which will establish a final prevailing wage determination methodology. Because, if approved by the Office of Management and Budget, the wages resulting from the Final Rule methodology will be significantly higher than the wages under the current methodology and because it is apparent that the wages paid under the current methodology do not reflect the real prevailing wages paid to U.S. workers in many occupations and areas, the Department has decided to require a conditional certification. The Department will issue a Federal Register Notice as soon as possible after the approval of this request, announcing that each employer who files an H-2B application (or on whose behalf an H-2B application is filed) on or after the date of the Notice will only be granted certification if the employer agrees to pay at least the prevailing wage provided by the Office of Foreign Labor Certification's National Processing Center (NPC) in accordance with the new prevailing wage methodology (as promulgated by the Wage Final Rule) for any work that is performed on or after the

effective date of the Final Rule. We will provide employers with the prevailing wage rate under the Wage Final Rule after it is published and before it becomes effective. Before the effective date, the H-2B employer is only required to pay at least the prevailing wage determined under the current methodology.

In order to effectuate the new requirement that the employer pay the prevailing wage determined under the new wage methodology, the employer must attest to the Department that it agrees to do so. The current information collection, however, does not contain such an attestation. Therefore, the Department proposes to add an additional appendix with this attestation for employers who file an H-2B application (or on whose behalf an H-2B application is filed) to sign indicating their agreement to pay the wage rate determined under the Final Rule on and after its effective date. See ETA Form 9142 - Appendix B.2. Once the Wage Final Rule is fully implemented, this Appendix will no longer be required as employers will receive prevailing wage determinations issued using the new prevailing wage methodology.