

MEMORANDUM FOR RICHARD THEROUX  
Chief, Transportation and Security Branch

FROM MICHEL SMYTH  
Departmental Clearance Officer

DATE: April 26, 2012

SUBJECT Submission of 1205-0466 ICR Using Emergency Clearance Procedures

The Employment and Training Administration (ETA), Office of Foreign Labor Certification (OFLC), requests approval for emergency review and clearance, in accordance with 5 CFR 1320.13. This emergency clearance is needed to collect employer applicant data for the H-2A and H-2B Labor Certification Programs, authorized in sections 203(b)(3), 212(a)(5)(A), 212(m), (n), (t), 214(c), and 218 of the Immigration and Nationality Act (INA) (8 U.S.C. §§1153(b)(3), 1182(a)(5)(A), 1182(m), (n), (t), 1184(c), and 1188) and 8 CFR 214.2(h). These sections direct 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.

**Information Collection – 5 CFR 1320.13(a)(1)**

Before any employer may petition for any temporary or permanent 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 OFLC already has OMB approved forms (OMB Control Number 1205-0466, ETA Forms 9141 and 9142 with appendices) to collect data for labor certifications. On April 8, 2012, OMB approved changes to this Information Collection in conjunction with recent rulemaking resulting in a final rule published on February 21, 2012 (the 2012 H-2B Final Rule) (77 FR 10038). However, a lawsuit was brought in Federal court in the Northern District of Florida, Pensacola Division, against the Department and an order is expected to be issued by the court enjoining the Department from implementing the 2012 H-2B Final Rule. (*Bayou Lawn & Landscape Services, et al. v. Hilda L. Solis, et al.*, 12-cv-00183-RV-CJK). This requires the Department to revert back to the information collection instruments used in this collection prior to this most recent H-2B rulemaking. Specifically, ETA Form 9155, H-2B Registration, is no longer needed. ETA Form 9142 and Appendix B.1 must revert back to the specific information collected before the H-2B Final Rule. The combination of 1205-0404 and 1205-0466 will now be divided again into two separate ICs as it was in the past. (To ensure the public is fully aware of the intent to combine Control Numbers 1205-0466 and 1205-0404, the agency will publish a Federal Register

Notice to seek comments on the merger that specifically identifies each Control Number.) ETA Form 9141 also reverts back to the information collection before the H-2B Final Rule. The Appendix A.1 to ETA Form 9142 was removed from the Department's August 19, 2009 ICR and continues to be obsolete. As a result, DOL is asking for this emergency revision to use the former 1205-0466 instrument. The reason the forms must revert back to those in effect prior to the rulemaking is because the attestations that an employer using the H-2B program must make, which are listed in Appendix B.1, have changed substantially and the Department cannot require employers to make attestations that are not required by the current regulations, which will remain in effect if the rule is enjoined.

### **Emergency Clearance Justification – 5 CFR 1320.13(a)(2)**

The DOL cannot comply with the normal clearance procedures under 5 CFR 1320 because the pending lawsuit and, specifically, the preliminary injunction granted by the Court will prevent the Department from implementing the new program, thereby the new forms. This emergency clearance process is being sought at the request of the ETA to enable them to continue processing applications in the H-2A and H-2B labor certification programs without interruption. The burden to the applicant, estimated at 2.5 hours, covers the two forms needed to apply for labor certifications in both programs.

The ETA needs to continue to accept applications on and after April 27, 2012 (the date the H-2B Final Rule was set to become operative) to comply with DOL's responsibilities under the INA. DOL does not want to disrupt employers' seeking of the use of a labor certification to employ temporary foreign workers in the absence of qualified U.S. workers by having to shut down its programs awaiting approval of the information collection through normal procedures. **Unless emergency clearance is granted public harm is likely because DOL will no longer be able to render the services it is required to provide to the public under the INA. Moreover, whether the Court would have granted the preliminary injunction to prevent DOL from implementing its 2012 H-2B Final Rule was not an event DOL could have anticipated. As a result, DOL asks for an emergency processing under 5 CFR 1320.13(a)(2)(i) and (ii).**

In closing, the Department asks that this emergency request be approved, in order that the ETA can allow employers to continue to apply for and receive labor certifications for their temporary hiring needs.