

**SUPPORTING STATEMENT FOR REQUEST FOR OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT OF 1995; H-2B Application for
Temporary Employment Certification**

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SUPPORTING STATEMENT

H-2B APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION

A. Justification

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

The information collection (IC) is required by sections 101(a)(15)(H)(ii)(b) and 214(c) of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1011(a)(15)(H)(ii)(b) and 1184(c)) and 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 (U.S.) 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 unemployed U.S. workers available to perform such skilled or unskilled labor. 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.

The information contained in the ETA Forms 9142B, *H-2B Application for Temporary Employment Certification*, is the basis for the Secretary's determination that the hiring of foreign workers is not having an adverse affect on wages and determining that no U.S. workers are available. The ETA Form 9142B is used to collect information to permit the Department to meet its statutory responsibilities for administering the H-2B temporary labor certification programs. 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).

On April 8, 2012, OMB approved changes to this Information Collection Request (ICR) in conjunction with recent rulemaking resulting in a final rule published on February 21, 2012 (the 2012 H-2B Final Rule). 77 FR 10038. All comments, documents, and forms related to the ICR approved in conjunction with the 2012 H-2B Final Rule can be found on <http://www.reginfo.gov>. However, a lawsuit was brought in Federal court in the Northern District of Florida, Pensacola Division, against the Department and an order was issued on April 26, 2012 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.) The rule was never implemented. The Department has stated that for the present time employers should file their H-2B labor certification applications under the Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 78020, Dec. 19, 2008 (the 2008 H-2B Rule). While this preliminary injunction necessarily calls into doubt the underlying authority of the Department of Labor to fulfill its responsibilities under the Immigration and

Nationality Act and Department of Homeland Security regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers, on the presumption that the Department has the continuing obligation to issue certifications, it must do so by reverting back to the information collection instruments used in this collection prior to the 2012 H-2B Final Rule. The Department received emergency approval to do so from OMB on April 27, 2012 and the ICR now expires on October 31, 2012. The Department is required to seek notice and comment on the further extension of the appropriate forms.

As a result of the injunction, DOL is seeking to use the forms appropriate to the H-2B program from those that were part of 1205-0466 prior to the 2012 H-2B rulemaking. The ETA 9142, *Application for Temporary Employment Certification* and Appendix B.1, will now be in ICR 1205-NEW1. The reason the forms must revert back to those in effect prior to the 2012 H-2B Final Rule is because the attestations that an employer using the H-2B program must make, which were listed in Appendix B.1, are substantially distinct and the Department can not require employers to make the attestations found in the 2012 Final Rule.

The Department is taking this opportunity to separate out the three different ICs that were formerly all contained in 1205-0466 as well as discontinue 1205-0404 by merging it into the new 1205-0466. Specifically, 1205-0466 will contain forms and most regulatory information collection requirements applicable to the H-2A program. The ETA Form 9142 and Appendix A.2 (to now be referred to only as Appendix A) will be known as the ETA Form 9142A, *H-2A Application for Temporary Employment Certification and Appendix A*. Because 1205-0404 is a small ICR having to do specifically with the notification requirements of the 50 percent rule in the H-2A program, it will be merged with the new 1205-0466. This ICR, 1205-NEW1, will contain forms and most regulatory information collection requirements applicable to the H-2B program. The ETA Form 9142 and Appendix B.1 (to now be referred to only as Appendix B) will be known as the ETA Form 9142B, *H-2B Application for Temporary Employment Certification and Appendix B*. The ETA Form 9141, *Application for Prevailing Wage Determination*, which is applicable to the H-2B, H-1B, H-1B1, E-3, and PERM programs, will go into its own ICR, 1205-NEW2.

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 must request information from employers seeking to hire and import foreign labor. The Department uses the information collected to determine eligibility of an employer for the H-2B nonimmigrant temporary nonagricultural worker program.

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 eventual electronic filing of the form in this collection. At this time the ETA Form 9142 is available as a fillable PDF form at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142.pdf, but is not yet available for electronic filing. Until the form is fully operational as fillable and electronically fileable, the form will continue to be available online in fillable-printable format so that it can be submitted to the Department by mail for manual filing.

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

The information requested on the ETA Forms 9142 is sufficiently diverse to avoid duplication of activities within the Department for the H-2B program.

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

The information collection is required of small businesses who want to hire and 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.

Employers choose how frequently they apply for benefits. The Department cannot issue such benefits without collecting at least basic information on the employer.

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 forms for at least three years.

A.8. Preclearance notice and summary of public comments.

The public was given 60 days to comment on this collection by way of a Notice published in the *Federal Register* on August 15, 2012 (Vol. 77, p 49025 et seq). No comments were received.

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 full disclosure under the Freedom of Information Act. No assurance of confidentiality is provided.

A.11. Justification for any sensitive questions.

The information collected does not involve sensitive matters.

A.12. Estimated hourly burden.

Based on recent program experience, the Department estimates it will receive approximately 5,387¹ ETA Form 9142B submissions for the H-2B program. The total hourly burden is 15,333 hours.

A. H-2B Application for Temporary Employment Certification

Employers submit an H-2B Application for Temporary Employment Certification (ETA Form 9142B) when they wish to employ a nonimmigrant foreign worker in the H-2B visa classification on a temporary basis to perform nonagricultural labor and/or services. The basic form takes approximately one hour to complete aside from the temporary need statement. The Department estimates, based on its operating experience, that in the upcoming year employers will file approximately 5,387 applications for a total burden of 5,387 reporting hours (5,387 applications x 1 hour = 5,387 hours).

B. Temporary Need Statement

In order to qualify for the H-2B program, an employer must demonstrate it has a temporary need (20 CFR 655.6 and 655.21). The Department of Homeland Security's (DHS) regulations at 8 CFR 214.2(h)(6)(ii)(B) define four different types of temporary need. Therefore, an employer is required to fill in a section of the ETA Form 9142B with a narrative statement explaining and justifying its temporary need. The Department estimates that it will take each applicant one-half hour to prepare the narrative for a total burden of 2,694 reporting hours (5,387 applications x 0.5 hours = 2,694 hours).

C. Recruitment

¹ The Department's estimate is derived by averaging the number of applications received over a three year period from 2009 through 2011.

Recruitment activities, including advertising for U.S. workers and placing a job order with a State Workforce Agency, are usual and customary activities of employers under the H-2B program. 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 20 CFR 655.15 of the 2008 H-2B Rule are excluded in compiling the paperwork burden estimates.

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 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. 0304-0018), 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 regulations. For example, 29 CFR 1602.14 of the EEOC regulations 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), 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 regulations. Section 1602.14 of

the EEOC regulations 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 which are not immediately discarded) EEOC regulations requires that these records be preserved.

All employers that file applications under the H-2B process at 20 CFR 655.20 must prepare and retain a recruitment report under § 655.15(j) 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 under § 655.23(c) – request for additional information and during an audit under § 655.24. 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, and, if requested by the Certifying Officer, sort the resumes or applications it received by the reasons they were rejected. Since the Department anticipates that 5,387 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 5,387 recordkeeping hours (5,387 applications x 1 hour = 5,387 hours).

D. Retention of Supporting Documentation

The Department estimates that employers will spend about 10 minutes per year, per application, to retain an application and required 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 as required in 20 CFR 655.15(c) of the 2008 H-2B Rule. This results in an annual burden of 898 recordkeeping hours (5,387 applications x 10 minutes ÷ 60 minutes = 898 hours).

E. Informing DOL and DHS of H-2B Worker Abscondment or Termination

Employers are required, pursuant to 20 CFR 655.22(f) of the 2008 H-2B Rule, to inform the Department and the Department of Homeland Security (DHS) of the termination of workers for cause and abandonment of the job by workers in writing within two business days of the termination or five days of discovering the abandonment. Based on program experience during the last three years, the Department estimates that it will receive letters/emails from employers in 215 cases and that it will take employers 15 minutes to compose and send such letters/emails for a total of 54 reporting hours (215 cases x 0.25 = 54 hours).

F. Notification Requirements

The Department's 2008 H-2B regulations require employers to notify its H-2B workers of their duty to depart the United States after the contract period ends (20 CFR 655.22(m) of the 2008 H-2B Rule). The 2008 H-2B regulations also requires employers to contractually prohibit their foreign labor recruiters from charging the H-2B workers any recruitment fees (20 CFR 655.22(g)(2)).

The Department estimates that it will take each employer approximately 2 minutes to orally inform its H-2B workers of their duty to leave the U.S. during the workers' orientation at the beginning of the contract period for a total burden of 180 third party disclosure hours (5,387 applications x 2 minutes ÷ 60 minutes = 180 hours).

The Department estimates that it will take 5 minutes for employers to ensure that the contracts they have with foreign labor recruiters comply with 20 CFR 655.22(m) each time they submit an application to the Department. The total burden will be 449 third party disclosure hours (5,387 applications x 5 minutes ÷ 60 minutes = 449 hours).

G. Post-Certification Processes

If an employer receives a denial of its request for a labor certification or a partial certification, the employer may appeal the Department's final determination in accordance with the requirements of section 20 CFR 655.33. Based on program experience, the Department estimates that it will receive approximately 95 appeals annually and that it will take employers 2 hours to prepare and send the Request for Review for a total hourly burden of 190 reporting hours (95 appeals x 2 hours = 190 hours).

The Department uses audits and debarment to increase program integrity. These integrity measures require the employers to respond to notices by the Department. However, all of these responses are exempt from the hourly burden calculations. Title 5 CFR 1320.3(h)(6) and (9) exempt from collection requests that require facts or opinions be submitted, which are addressed to a single entity and facts or opinions obtained or solicited through non-standardized follow-up questions designed to clarify responses to approved collections of information. Likewise 5 CFR 1320.4(a)(2) exempts administrative actions such as audits of specific individuals or entities.

H. Supervised Recruitment

In cases where the employer violated the terms of the program and the Department determines it to be appropriate, some employers will be required to be supervised during their next participation in the program (20 CFR 655.30 of the 2008 H-2B Rule). Program experience has shown that the Department requires employers to conduct supervised recruitment in less than half of one

percent of the applications. The time required to conduct such recruitment will average 2.5 hours per application for an annual burden of 67 reporting hours (5,387 x 0.5% x 2.5 hours = 67 hours) with some employers expending five hours, while the majority expending one-half hour to place the advertisement, receive and analyze resumes and interview candidates. Employers will also be required to provide a recruitment report to the Certifying Officer that on average will take one hour to prepare for an annual burden of 27 reporting hours (5,387 x 0.5% x 1 hour = 27 hours). Therefore, it is estimated that the total annual burden associated with conducting supervised recruitment will amount to 133 reporting hours (95 + 38 = 133 hours).

Annual Burden Hours for H-2B Information Collections:

8,419 Reporting
6,285 Recordkeeping Hours
<u>629 Third party disclosure hours</u>
15,333 Total Hours

Average Time Per Application Process:

ETA Form 9142 – 1.5 hours
Other H-2B ICs – 25 minutes

Total Responses: 32,686

Total Respondents: 5,387

V. Total Hourly Cost

Employers filing applications for temporary 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 national cross-industry mean hourly wage rate for a Human Resources Manager (\$52.21), based on the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,² and increased it by a factor of 1.43 to account for employee benefits and other compensation for a total hourly cost of \$74.66. This number was multiplied by the total hourly annual burden for the information collection for each foreign labor certification program in order to arrive at total annual respondent hourly

² Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2010 National Occupational Employment and Wage Estimates; Management Occupations

costs for all information collections under this extension request. The total annual respondent hourly costs are estimated as follows:

$$\text{Total Burden Cost: } 15,333 \times \$74.66 = \$1,144,762$$

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 programs. Anyone without computer access can request the forms from OFLC. However, to participate in the program employers are required to generate records 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.

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-2B program is estimated at \$734,308 calculated as follows:

Estimated Hours - Data Entry/Review

SWA Cost to Post Job Order and Refer In-person Applicants \$278,292
Staff (Equivalent of GS-12, Step 5 x 1.69 FLFTE) @ 1 hour
 $\$51.66 \times 5,387 = \$278,292$

Data Entry \$22,150
(A small amount of information on the applications will be data entered for statistical purposes)
Clerical (GS-6, Step 3 x 1.69 FLFTE) @ 10 minutes
 $\$ 24.67 \times 5,387 \text{ applications} \times 10 \div 60 = \$22,150$

<u>Staff Cost for Adjudicating Applications</u>	\$417,439
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1.5 hours	
\$51.66 x 5,387 x 1.5 hours = \$417,439	

<u>Staff Cost for Supervised Recruitment</u>	\$6,427
(0.5% of applications are required to do supervised recruitment)	
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 2.5 hours	
\$51.66 x 27 x 2.5 hours = \$3,487	
Supervisor (GS-14, Step 5 x 1.69) @ 1.5 hours	
\$72.60 x 27 x 1.5 hours = \$2,940	

<u>Estimated Total Cost for H-2B</u>	
Staff	= \$724,308
Printing/Mailing	= \$ 10,000
	=====
Total Cost to Federal Government	\$734,308

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

This ICR is new, but contains some of the burden formerly in 1205-0466.

A.16. *Method for publishing results.*

OFLC discloses information about employer applicants to the public on its public access webpage at <http://www.flcdatacenter.com/CaseData.aspx>. For the H-2B program, the name, address, phone number, agent, and contact person of the employer; the number of foreign workers requested; the occupation; the salary proposed; and the prevailing wage, along with final determination by the Department are all disclosed on the website. The Department is also contemplating creating a Labor Certification Registry to allow all the data we collect to be made available online and in downloadable formats – while protecting any personally identifiable information as well as any governing legal constraints such as the Privacy Act, the Trade Secrets Act and the Confidential Information Protection and Statistical Efficiency Act.

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 forms.

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

This information collection does not employ statistical methods.