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

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SUPPORTING STATEMENT
OMB Control Number 1205-0404

PAPERWORK REDUCTION ACT SUBMISSION
Labor Certification for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Administrative Measures to Improve Program Performance

A. Justification

A.1 Circumstances Necessitating Data Collection

Foreign labor certification programs are administered by the Employment and Training Administration (ETA) of the Department of Labor (Department). The H-2A program requires State Workforce Agencies (SWAs) to initially process applications for labor certification filed by U.S. employers wishing to employ foreign workers temporarily in agricultural jobs. SWAs must conduct and monitor recruitment activities by employers seeking qualified U.S. workers on a temporary basis prior to filling the job openings with foreign workers.

The Department's regulation at 20 CFR 655.135(d) defines the 50 percent rule, which requires the employer, who received labor certification in the H-2A program, to provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the time of need for the foreign worker has elapsed. In 20 CFR 655.135(c) the employer is required to inform the SWA if the H-2A workers will be leaving their home country later than the third day preceding the employer's first date of need. Employers are reminded of this requirement in the Certification Letter (ETA-9144) they receive when the Department certifies their need for H-2A workers. This provision is necessary so that the SWA can begin its calculation of when to stop referring workers under the 50 percent rule and when the employer can cease accepting referrals.

The letter such employers must write creates a burden that must be accounted for under the Paperwork Reduction Act of 1995. This Information Collection Request (ICR) has been previously approved by OMB and needs to be extended beyond the current expiration date of October 31, 2012. The Department was going to discontinue this ICR and combine its requirements with those of other H-2A program requirements in 1205-0466 and on April 8, 2012 OMB approved such a merger in conjunction with a 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 was issued on April 26 by the court, enjoining the Department from implementing the 2012 H-2B Final Rule and the 1205-0466 ICR that was associated with it, which contained the merger of the two information collections. (*Bayou Lawn & Landscape Services, et al. v. Hilda L. Solis, et al*., 12-cv-00183-RV-CJK.) This required the

Department to separate the information collection instruments as they were prior to the most recent approval of 1205-0466 associated with rulemaking and obtain emergency approval and extension of both 1205-0466 and 1205-0404. However, the Department intends to once again combine the two collections into 1205-0466 now that the public has been given the appropriate notice and time to comment. The Department received emergency approval to do so from OMB on April 27, 2012. The Department subsequently put out the proposal to extend and then merge 1205-0404 into 1205-0466 for notice and comment on August 15, 2012 (77 FR 49025). No comments were received objecting to this merger. Once extended and merged, the Department will discontinue 1205-0404.

The Department is also taking this opportunity to separate out the three different information collections that were formerly all contained in 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. The 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

The departure date is used to start the running of the contract period for administration of the 50 percent rule. Title 20 CFR 655.135(d) stipulates that the employer must continue to provide employment to any qualified and eligible U.S. worker who applies to the employer until 50 percent of the work contract period, under which the foreign worker is in the job, has elapsed.

The notification required under the regulations is written by the employer and sent to the SWA if the foreign worker begins traveling to the employer's place of work any time after the three days prior to the first date of need specified in the work contract. The SWA uses the information to calculate the end of the 50 percent rule referral requirements.

A.3 Use of Technology to Reduce Burden

The collection of information does not involve the use of automated, electronic,

mechanical, or other technological collection techniques. However, depending on the SWA, employers can, in many cases, send their letters electronically by fax or email.

A.4 Efforts to Identify Duplication

ETA is not aware of any other program which requires employers to provide notification when H-2A workers depart for the employer's place of business.

A.5 Methods to Minimize Burden on Small Businesses

The information collection is required of small businesses. However, it must be complied with only if the foreign H-2A worker leaves for the employer's place of business later than three days before the date of need. There is no particular form for notification and it can be written in any format.

A.6 Consequences of Less Frequent Data Collection

There would be no means to know when to effectuate the program elements and policies described in item 2 above, i.e., administration of the 50 percent rule, to determine when the employer's obligation for conducting positive recruitment ends and when the employer is no longer required to maintain an active job order on file with the workforce office for the referral by the SWA of qualified U.S. workers.

A.7 Special Circumstances for Data Collection

Employers may file more than one application during a season or quarter. In such instances the employer may have to provide notice of the departure date more than once during a season or quarter.

A.8 Summary of Public Comments

The public was given a sixty day opportunity to comment on this collection by a Notice published in the *Federal Register* in August 15, 2012 (Vol. 77, p 49025). The Department received one comment from a farm worker advocacy group supporting the language contained in the ETA-9144 letter.

A.9 Payment of Gifts to Respondents

There is no payment to respondents.

A.10 Confidentiality Assurances

The Employment and Training Administration does not consider notification of the departure date to be sensitive information within the scope of the exceptions to the Freedom of Information Act or the Privacy Act.

A.11 Additional Justification for Sensitive Questions

There are no questions of a sensitive nature.

A.12 Estimates of the Burden of Data Collection

ETA estimates that under the departure date regulation at 20 CFR 655.135(c), the employers that file 7,218 H-2A applications for temporary agricultural workers will only have to notify the SWA of the actual departure date in about 5 percent of the cases, or about 361 employers in a given year. It is estimated that it takes employers about 15 minutes for an employer to comply with the departure date notification requirements. Therefore, it is estimated that it will take employers approximately 90 reporting hours to provide the notification required under the regulation. (361 x 0.25 = 90 hours)

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

Total Burden Cost: 90 hours x $74.66 = $6,719

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

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Reporting Hours: 90
Total Responses: 361
Total Respondents: 361

A.13 Estimated Cost to Respondents

1. Start-up/capital costs: There are no start-up costs, as the notification can even be handwritten.
2. Annual costs: There are no annual costs involved with operation and maintenance.

A.14 Estimates of Annualized Costs to Federal Government

The only cost to the Federal Government associated with administering the departure-date-notification rule is informing employers of their obligations under the rule at the time the approval letter, which transmits the certification, is sent to the employer. Included in the approval letter, which is about two pages in length, is one paragraph informing employers of their obligations with respect to notifying local employment service offices if the H-2A workers fail to depart for the employers place of business at least three days prior to the date of need. The approval letter takes about half an hour to prepare and mail. It is estimated that, at the most, five minutes of the half hour should be allocated to the paragraph pertaining to departure-date notification. There are approximately 7,218 employers on average each year which are certified to use the H-2A program and approximately 3,609 hours were spent in preparing and mailing approval letters to H-2A employers. One-sixth, or 601, of the 3,609 hours expended in preparing approval letters can be allocated to the paragraph pertaining to departure-date notification.

The average Federal Government cost for a year of operation, where salaries are involved, 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.

Therefore, the annualized cost to the Federal Government of a GS-12, Step 5 Analyst is estimated at $41,593 [601 hours x (40.95 x 1.69)].

Total cost to the Federal Government: $41,593

A.15 Changes in Burden

This submission, like the 2009 submission, bases the burden calculation on the number of employers who have to actually notify the SWA of departure dates. The annual burden for this information collection decreased slightly from 96 hours to 90 hours due to a slight decrease in the number of employers certified to employ H-2A workers.

A.16 Publication of Results

No collection of information will be published.

A.17 Approval Not to Display OMB Expiration Date

There are no forms associated with this information collection on which to publish the expiration date.

A.18 Exceptions to OMB Form 83-I

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

B. Collection of Information Employing Statistical Methods

No statistical methods are employed.