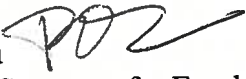




MEMORANDUM FOR: Employment and Training Administration Desk Officer
Office of Management and Budget

FROM: Portia Wu 
Assistant Secretary for Employment and Training

THROUGH: Michel Smyth
Departmental Clearance Officer

SUBJECT: Request for Emergency Approval of an Information
Collection under the Paperwork Reduction Act in
Conjunction with Comprehensive Rulemaking in the H-2B
Temporary Labor Certification Program for Non-Agricultural
Foreign Workers

The Department of Labor (DOL) is requesting an emergency approval of a revised information collection under the Paperwork Reduction Act (PRA) regulations, 5 CFR 1320.13. This information collection is essential to the mission of DOL, and must be approved in an expedited fashion so as to continue providing the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), with the consultation and advice required by Immigration and Nationality Act section 214(c)(1) and federal regulations at 8 CFR 214.2(h)(6). Under those provisions, an employer filing a petition with USCIS to import H-2B workers must first obtain a certification from the Secretary of Labor that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Emergency processing is necessary because regular PRA procedures outlined in 5 CFR 1320 would prevent the agency from responding to an unanticipated event, the adverse court decision in *Perez v. Perez*,¹ which held that DOL does not have authority to promulgate regulations and vacated the 2008 regulations, codified at 20 CFR part 655, subpart A, under which the Department had been operating. Adhering to standard PRA timeframes would leave the program with no authorizing regulation, resulting in public harm.

In *Perez v. Perez*, the district court ruled that the Department of Labor is without independent regulatory authority to issue rules in the H-2B program, and vacated the H-2B regulations. The Court's order prevents the Employment and Training Administration's Office of Foreign Labor Certification from accepting or processing H-2B applications except during the brief stay granted by the Court until April 15, 2015. In response, DOL and DHS are issuing a joint interim final rule, *Interim Final Rule – Temporary Non-Agricultural Employment of H-2B Aliens in the United States* ("H-2B Comprehensive IFR" or "IFR"). The new, joint regulation governs certification of the employment of nonimmigrant workers performing temporary non-agricultural

¹ *Perez v. Perez*, 14-cv-682-MCR-EMT (N.D. Florida, Mar. 4, 2015).

labor. The H-2B Comprehensive IFR replaces the 2008 regulations with the regulations the Administration promulgated in 2012, with slight modifications. The 2012 rule was never implemented because it was preliminarily enjoined,² and later vacated,³ by the U.S. District Court for Northern District of Florida, the same district court that recently vacated the 2008 rule in *Perez v. Perez*.

The H-2B Comprehensive IFR updates the current information collection in OMB Control number 1205-0509. It also includes a new reporting requirement (first proposed in the 2012 regulations under OMB control number 1205-0466), Form ETA-9155, *H-2B Registration*, which asks employers, before they file an H-2B labor certification application, to register as H-2B participants. As part of the registration process, DOL will adjudicate each employer's "temporary need." Registered employers will go on to file the Form ETA-9142B, *H-2B Application for Temporary Employment Certification*. Registration, which will be valid for up to 3 years, will streamline the processing of applications by eliminating the need for analysts to adjudicate an employer's temporary need with each application filed. In addition to the ETA 9155 and ETA 9142B, the information collection package includes an Appendix B (declarations of attorney/agent and employer, including employer assurances); a Seafood Industry Attestation implementing the H-2B staggered entry provision in the Consolidated and Further Continuing Appropriations Act of 2015, Pub.L. 113-235; and a Supporting Statement. The IFR also creates new worker rights and employer obligations, which are reflected on an amended Appendix B. These additional information collections require clearance by the Office of Management and Budget (OMB) and because of the exigent circumstances, DOL is requesting processing under emergency procedures.

DOL has taken all necessary steps to consult with interested agencies and members of the public in order to minimize the burden of the collection of information. The H-2B Comprehensive IFR had previously been submitted to the public as an NPRM and then a Final Rule, where all comments received from the NPRM were taken into account. The IFR is now on a very fast track for interagency clearance, and we anticipate clearance to publish the rule towards the end of April. This timeframe does not permit DOL to engage in the normal procedures for approval of a revised information request. Therefore, DOL requests that OMB approve this emergency request for the revised information collection in OMB control number 1205-0509 within 30 days, or in any event, prior to publication of the H-2B Comprehensive IFR so that the new Form ETA-9155 and revised Appendix B can come into use no later than the effective date of the IFR. The IFR is being reviewed by OIRA simultaneously with this request under RIN number 1205-AB76, *Interim Final Rule – Temporary Non-Agricultural Employment of H-2B Aliens in the United States*. The H-2B Comprehensive IFR has a notice in the Administrative Section of the preamble that informs the public of the emergency approval of this information collection as required under 5 CFR 1320.13(d). Within six months of the publication of the H-2B Comprehensive IFR, DOL will comply with the proper PRA procedures outlined in 5 CFR 1320 to extend this collection.

² *Bayou Lawn & Landscape Services. v. Solis*, 12-cv-00183-MCR (N.D. Fla., April 26, 2012), affirmed, 713 F.3d 1080 (11th Cir. 2013).

³ *Bayou Lawn & Landscape Services. v. Perez*, 12-cv-00183-MCR-CJK (N.D. Fla., December 18, 2014).