

**SUPPORTING STATEMENT  
FOR EMERGENCY REQUEST FOR OMB APPROVAL OF  
NEW INFORMATION COLLECTION  
UNDER THE PAPERWORK REDUCTION ACT OF 1995**

**TABLE OF CONTENTS**

---

| <b>SECTION</b>  | <b>PAGE</b> |
|---|-------------|
| <b>A. JUSTIFICATION.....</b>  | <b>2</b>    |
| A.1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY.....   | 2           |
| A.2. HOW, BY WHOM, AND FOR WHAT PURPOSE THE INFORMATION IS TO BE USED.....  | 3           |
| A.3. EXTENT TO WHICH COLLECTION IS AUTOMATED, REASONS FOR AUTOMATION, AND<br>CONSIDERATIONS FOR REDUCING IMPACT ON BURDEN.....  | 3           |
| A.4. EFFORTS TO IDENTIFY DUPLICATION – WHY SIMILAR INFORMATION ALREADY AVAILABLE<br>CANNOT BE USED FOR PURPOSE DESCRIBED IN A.2.....                                      | 3           |
| A.5. EFFORTS TO MINIMIZE BURDEN ON SMALL BUSINESSES.....  | 3           |
| A.6. CONSEQUENCES TO FEDERAL PROGRAM IF COLLECTION NOT DONE OR DONE LESS<br>FREQUENTLY AND ANY TECHNICAL OR LEGAL OBSTACLES TO REDUCING THE BURDEN.....                   | 3           |
| A.7. SPECIAL CIRCUMSTANCES FOR CONDUCTING INFORMATION COLLECTION.....   | 4           |
| A.8. PRECLEARANCE NOTICE AND SUMMARY OF PUBLIC COMMENTS.....  | 4           |
| A.9. EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS.....   | 4           |
| A.10. ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS.....   | 4           |
| A.11. JUSTIFICATION FOR ANY SENSITIVE QUESTIONS.....  | 4           |
| A.12. ESTIMATED HOURLY BURDEN.....  | 4           |
| A.13. ESTIMATED COST BURDEN TO RESPONDENTS.....   | 7           |
| A.14. ESTIMATED COST BURDEN TO THE FEDERAL GOVERNMENT.....  | 7           |
| A.15. REASONS FOR ANY PROGRAM CHANGES REPORTED IN ITEMS 13 OR 14 OF THE OMB FORM<br>83-1.....   | 8           |
| A.16. METHOD FOR PUBLISHING RESULTS.....  | 8           |
| A.17. IF SEEKING APPROVAL NOT TO DISPLAY THE EXPIRATION DATE FOR OMB APPROVAL, EXPLAIN<br>WHY DISPLAY WOULD BE INAPPROPRIATE.....   | 8           |
| A.18. EXPLANATION OF EACH EXCEPTION IN THE CERTIFICATION STATEMENT IDENTIFIED IN ITEM 19<br>“CERTIFICATION FOR PAPERWORK REDUCTION ACT SUBMISSIONS” ON OMB FORM 83-1..... | 8           |
| <b>B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS.....</b>  | <b>8</b>    |

**EMERGENCY SUPPORTING STATEMENT  
NEW INFORMATION COLLECTION REQUEST  
OMB CONTROL NUMBER 1205-NEW  
Employer-Provided Survey Attestation to Accompany  
H-2B Prevailing Wage Determination Request based on a non-OES Survey  
(20 CFR 655.10)**

**A. Justification**

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

The information collection (IC) is authorized 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 implementing regulations at 20 CFR 655.10 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.) temporarily for the purpose of performing certain 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 available to perform such skilled or unskilled labor. Before any employer may petition for any temporary 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 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).

Prior to submitting labor certification applications to the Secretary of Labor, employers must obtain a prevailing wage for the occupation in the area of intended employment in order to ensure that wages are not being adversely affected by paying foreign workers less than a prevailing wage. Form ETA-9141, *Application for Prevailing Wage Determination* (OMB Control Number 1205-0508) is used to collect the necessary information from employers to enable the Department of Labor (Department) to issue a prevailing wage for the occupation and location of the job offer.

The regulations allowed employers to submit wage surveys as long as they meet with the criteria set forth in the regulations at 20 CFR 655.10(f). However, the court in *Comite de Apoyo a los Trabajadores Agricolas et al v. Solis*, 774 F.3d 173 (3rd Cir., Dec. 5, 2014) vacated the DOL's authority to accept employer-provided surveys in the H-2B visa program for temporary non-agricultural foreign workers. In order to strengthen the reliability and validity of employer-provided surveys and comply with the court order, the Department, in a Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, has prohibited reporting wages based on skill levels in employer provided surveys. In addition, ETA has codified the standards it will use to assess employer provided surveys that may be relied on to set the prevailing wage. In addition, the Department is establishing a new information collection, the Form ETA-9165, *Employer-Provided Survey Attestation to Accompany H-2B Prevailing*

*Wage Determination Request Based on a Non-OES Survey*, in order to increase compliance with the new standards applicable to employer-provided surveys and to assist the Department in reviewing those surveys.

*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 and must ensure that the wages being paid will not adversely affect U.S. workers. The Department will use the information collected to determine the adequacy of the data provided and validity of the methodology used in conducting the survey submitted by an employer in 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 intends to make the instrument in this collection an electronically fillable PDF at <http://www.foreignlaborcert.doleta.gov/form.cfm>. The form will be filed electronically, but only as a scanned attachment to the employer provided survey because it must be signed by the employer prior to submission.

*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 Form ETA-9165 is sufficiently unique 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 information requested involves information that already exists in the survey voluntarily being submitted at the election of the employer.

*A.6. Consequences to Federal program if collection not done or done less frequently and any technical or legal obstacles to reducing the burden.*

The Department would be unable to adequately determine that the methodological standards imposed in the Final Rule governing employer-provided surveys would be met. Employers choose whether or not to submit employer-provided surveys. The Department must ensure that surveys meet regulatory requirements without expending inordinate resources in verifying compliance with the regulations.

*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.

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

In order to have the information collections take effect on the same dates as all other parts of the Final Rule, DOL submitted an ICR to OMB under the emergency processing procedures codified in regulations 5 CFR 1320.13. 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.

*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.*

DOL offers no assurances of confidentiality to those responding to this information collection. The information collected is not exempt from full disclosure under the Freedom of Information Act. Generally, however, the Department is required under the Privacy Act to withhold the disclosure of personally identifiable information to the extent such information is supplied in response to the information collection.

*A.11. Justification for any sensitive questions.*

The information collected does not involve sensitive matters.

*A.12. Estimated hourly burden.*

Based on previous program experience, the Department estimates it will receive approximately 9,253 requests for prevailing wage determinations in the H-2B program each year of which 3 percent will request the use of an employer-provided survey or a State survey and need to attach the Form-ETA 9165 for a total of 278 Form ETA-9165s being filed each year. The total hourly burden for this information collection is 348 hours and explained below.

I. Prevailing Wage Requirements 20 CFR 655.10

A. Requests for Prevailing Wage Determinations. 20 CFR 655.10(c)

The burden for this section of the regulation is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

B. Employer-provided wage surveys 20 CFR 655.10(f)

An employer may choose to submit an employer-provided survey to establish the prevailing wage for an occupation in the area of intended employment. The Final Rule requires that any employer who submits an employer-provided survey attest that the survey meets the requirements of the regulations. The attestation is made on Form ETA-9165. Form ETA-9165 contains specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

The Department estimates it will receive 278 employer-provided surveys each year and that it will take respondents an average of 75 minutes to complete the Form ETA-9165 for a total of 348 reporting hours. The Department views the burden on respondents to complete the Form ETA-9165 as a two-step process. We conclude that third-party surveyors will take, on average, 50 minutes to compile the information necessary for the employer to complete Form ETA-9165. In turn, we conclude that employers will take, on average, 25 minutes to complete and sign Form ETA-9165 once the third-party surveyor supplies the necessary information.

C. Submission of supplemental information by employer 20 CFR 655.10(g)

Employer-provided surveys are filed with the Department's National Prevailing Wage Center (NPWC). If the NPWC informs the employer its survey is not acceptable, the employer may submit supplemental information to the NPWC. The burden for this section of the regulation is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

A. Appeals 20 CFR 655.10(g)(3)

An employer who does not agree with a prevailing wage determination may apply for a new wage determination, appeal under 20 CFR 655.11, or acquiesce to the initial PWD. The burden calculations for applying for a new wage determination and appealing under 20 CFR 655.11 are accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

B. Retention of documentation 20 CFR 655.10(j)

The employer must retain the Prevailing Wage Determination for 3 years from the date of issuance or the date of a final determination on the Application for Temporary Employment Certification, whichever is later. The burden calculation for the retention requirement is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508). The employer is not required to retain the survey or the Form ETA-9165.

II. Total Annual Burden Hours

348 Reporting Hours (232 hours for third-party surveyor to compile information and transfer it to employer; 116 hours for employer to complete and sign the form)  
0 Recordkeeping Hours  
0 Third Party Disclosure Hours

348 Total Burden Hours  
556 Total Responses  
556 Total Respondents

Estimated Time Reporting Burden Per Form ETA-9165 is 1.25 hours

III. Total Hourly Cost

Employers filing applications for temporary employment certification for foreign workers 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 itself. As noted above, however, the burden on respondents to complete the Form ETA-9165 will be a two-step process, and we estimate that a Survey Researcher (SOC code 19-3022) will spend, on average, 50 minutes to compile the information necessary to complete the new form and transmit it to the employer, and that an employer's Human Resources Manager (SOC code 11-3121) will spend, on average, 25 minutes to complete the form and sign it. In estimating employer staff time costs, the Department used the national cross-industry mean hourly wage rate for a Survey Researcher (\$25.58) and a Human Resources Manager (\$53.45), based on the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,<sup>1</sup> and increased these wages by 1.43 percent to account for employee benefits and other non-wage compensation. Therefore, the total hourly cost of a Survey Researcher is \$36.58 and the total hourly cost of a Human Resources Manager is \$76.43. These

<sup>1</sup> Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2013 National Occupational Employment and Wage Estimates; Management Occupations.

compensation numbers were multiplied by the total hourly annual burden (as pro-rated above) for the information collection for the H-2B foreign labor certification program in order to arrive at total annual respondent hourly costs for all information collections under this extension request. The resulting cost estimate for all respondents to complete the Form ETA-9165 is \$17,353. [(232 hours x \$36.58) + (116 hours x \$76.43)].

*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 program. Anyone without computer access can request the form from the Department's Office of Foreign Labor Certification.

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. However, employers who choose to commission private surveys will incur costs. The cost of conducting a wage survey by a third party can vary widely depending on various factors, such as the scope of the survey, the survey methodology used, the number of respondents, and the nature of the sample. After reviewing pricing information provided by some survey service providers, DOL estimates that it would take a manager (SOC code 11-0000) 8 hours at \$76.00 per hour to review and a survey researcher (SOC code 19-3022) a total of 40 hours at \$36.58 per hour to randomly select at least 3 employers and 30 employees (8 hours), collect their wage data (16 hours), calculate the hourly average wage (8 hours), and write a report and provide it to the employer (8 hours). Therefore, the direct cost of conducting a wage survey by a third party is estimated at \$2,071.20 (=  $\$76 \times 8 + \$36.58 \times 40$ ). DOL also adds 10 percent to \$2,071.20 to account for a profit for the third party surveyor. The full cost of conducting a wage survey is \$2,278.32 (=  $\$2,071.20 \times 1.1$ ). Because surveys are valid for two years and some employers will use state produced surveys, DOL assumes that 93 employers will conduct a private wage survey by a third-party each year that is valid for two years. The cost to the employers will be \$211,884 annually ( $\$2,278.32 \times 93$ ).

*A.14. Estimated cost burden to the Federal government.*

The average Federal Government cost<sup>2</sup> 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 prevailing wage

---

<sup>2</sup> The Federal Government cost estimates are based on the U.S. Office of Personnel Management 2014 Salary Tables. Please see: <http://www.opm.gov/oca/11tables/index.asp>. The cost estimate for the adjudication of prevailing wage applications with private surveys in the H-2B program uses wage data from the locality pay schedule for the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA area to reflect the locations of ETA's National Prevailing Wage Center.

determinations that contain employer-provided wage surveys in the H-2B program is estimated at \$3,216 and is calculated as follows:<sup>3</sup>

|  |         |
|--|---------|
| <u>Staff Cost for Reviewing the Form ETA-9165</u>                | \$3,216 |
| Staff (GS-12, Step 5 x 1.69 FLFTE) @ 10 minutes                  |         |
| $\$69.40 \times 278 \times 10 \text{ minutes} \div 60 = \$3,216$ |         |

**TOTAL COST TO FEDERAL GOVERNMENT \$3,216**

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

This ICR is a new information collection.

*A.16. Method for publishing results.*

The information from the Form ETA-9165 will not be published.

*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 all affected 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.

---

<sup>3</sup> The Department expects that its cost of evaluating employer-provided surveys will decrease as a result of the new Form ETA-9165. However, the Department did not assess its cost in evaluating employer-provided surveys in 2008, (73 FR 29942 (NPRM); 73 FR 78020 (final rule), the first time regulations permitting the submission of employer-provided surveys were established. As a result, we are unable to assess the cost-savings that we expect as a result of the new Form ETA-9165.