




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

FROM: Portia Wu 
Assistant Secretary

THROUGH: Michel Smyth
Departmental Clearance Officer

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

The Department of Labor (DOL) is requesting an emergency approval of a new information collection under 5 CFR 1320.13 of the Paperwork Reduction Act (PRA) regulations. This information collection is essential to the mission of DOL, and must be approved in an expedited fashion so as to continue providing the U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) with the necessary consultations under the H-2B statute that unemployed U.S. workers are not available to perform the services or labor, and assuring that the wages and working conditions of U.S. workers will not be adversely affected by the employment of H-2B workers before a petition can be approved H-2B visa program. The first step in DOL's labor certification is the issuance of a prevailing wage determination, which sets the wage the employer must use to recruit U.S. workers, and must pay foreign and 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 *Comite de Apoyo a los Trabajadores Agricolas et al v. Solis*, 774 F.3d 173 (3rd Cir., Dec. 5, 2014) (CATA III), which vacated the DOL's authority to accept employer-provided surveys to set the prevailing wage in the H-2B visa program for temporary non-agricultural foreign workers.

The Court's order vacated the portion of the H-2B regulations (20 CFR 655.10(f)) and 2009 Wage Guidance permitting the use of such surveys. This court decision, coupled with a subsequent decision in *Perez v. Perez*, No. 3:14-cv-682 (N.D. Florida, Mar. 4, 2015), which vacated the H-2B regulations in their entirety on March 4, 2014, ordered the Employment and Training Administration's Office of Foreign Labor Certification to cease accepting and processing all H-2B applications and prevailing wage determination requests.

In response to the Court's order, DOL and the DHS are issuing a final rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*.¹ The Departments are promulgating new regulations governing certification of the employment of nonimmigrant workers in temporary non-agricultural employment. The Wage Final Rule revises the methodology by which DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with the application for temporary labor certification. Specifically, for the purposes of an H-2B temporary labor certification, this final rule establishes that in the absence of a wage set in a valid and controlling collective bargaining agreement, the prevailing wage will be the mean wage for the occupation in the pertinent geographic area derived from the OES survey, unless the H-2B employer requests that the prevailing wage be based on an employer-provided survey that meets the new methodological criteria established in this final rule. In light of the court order, the final rule generally prohibits the submission of employer-provided surveys to set the prevailing wage except in limited circumstances. Included in the category of acceptable employer-provided surveys are those conducted by a state agency.

This Wage Final Rule includes a new reporting requirement, Form ETA-9165, which asks employers submitting a survey to set the prevailing wage to respond to a number of questions about the underlying methodology used to develop the wage survey. The responses to all of the questions on the form are intended to ensure that the third-party who conducts the survey for the H-2B employer complies with the new survey standards, that the employer is aware of the compliance standards and attests that they have been met. The form also permits the agency to more easily assess compliance. Once the survey is designed and conducted with the new standards in mind, the third-party surveyor should have at its ready disposal the responses to the questions in the new Form ETA-9165, and should be able to transmit them to the employer quickly so that the employer may complete the form.

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 Wage Final Wage rule is 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 new information request. Therefore, DOL requests that OMB approve this emergency request for the new information collection within 30 days, or in any event, prior to publication of the H-2B Wage Final Rule so that the new Form ETA-9165 can come into use no later than the effective date of the final rule. The final rule is being reviewed by OIRA simultaneously with this request under RIN number 1205-AB72, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*. The Wage Final Rule has a notice to the public contained within 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 Wage Final Rule, DOL will comply with the proper PRA procedures outlined in 5 CFR 1320 to extend this collection.

¹ Because of an adverse court decision concluding that DOL is without independent regulatory authority to issue rules in the H-2B program, see *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013), DOL is issuing the Wage Final Rule jointly with DHS.