Form ETA-9165 Comments from BBaker
OFLC/NPWC response to comments on 9165 received November 30, 2015

Section or line #	Comment/request	DOL response
None	The commenter suggests the Form ETA-9165 and supporting documents should be available to the public for 60 days before being accepted by the Department, arguing that doing so would support transparency and quality purposes enabling stakeholders can readily report problematic attestations and systematically track those complaints to see that they are properly addressed.	The Department is not accepting this suggestion. The Department has never required such a process in any of the prevailing wage programs that ETA administers, and declines to do so now. ETA analysts review surveys submitted across the immigrant and nonimmigrant programs within DOL's jurisdiction and possess the expertise needed to review an employer-provided survey to determine whether it meets methodological requirements. Any value of public posting before acceptance is outweighed by the costs and delays that such a requirement would impose.
B.6	The commenter suggests the NAICS should be required to be 6 digits, rather than 4 digits, so industry can be used when making a determination.	The Department is not accepting the suggested change to the number of digits of the NAICS code collected on the Form ETA-9165, as prevailing wage determinations are required to be cross-industry and not consider the nature of the employer. Moreover, the NAICS is primarily used for statistical purposes.
C.1	The commenter suggests the Department require a unique survey name, rather than allowing preparers to enter "Employer Commissioned" in Item C.1, arguing that the multitude of similar, generic entries will be will be confusing and untraceable. According to the commenter, surveys should be descriptively titled to include the employer name,	The Department will not be implementing this change as each prevailing wage request, including a request for consideration of an employer provided survey, is evaluated on a case-by-case basis. The employer's name is collected elsewhere on the Form ETA-9165, each prevailing wage request is given a unique number, and "employer commissioned"

	project name, year and sequence (e.g., EnployerLegalName**.**ExelonStation**.** 2015**.**1).	appropriately identifies an unnamed survey produced for that employer. Therefore, the requested change is unnecessary.
C.2	The commenter suggests there is no need to ask on the Form ETA-9165 if a CBA is in place because an employer whose position is covered by a CBA would not be likely to submit a survey.	The Department will not be implementing this change as this question was included to provide that employers are aware the existence of a CBA prohibits use of a survey.
Former C.4b	The commenter suggests that an employer-submitted survey not be permitted where there is an available OES mean wage for the occupation at the national level. In the commenter's view, this change is needed to provide that the job is open and offered to all American workers prior to an employer's request for H-2B visa workers, not just those in a small area.	The Department is not is not accepting this suggestion. Under the Section 112 of the 2016 Department of Labor Appropriations Act, (Division H, Title I 0f Public Law 114-113) (2016 DOL Appropriations Act), the Department is required to accept all private surveys that are "statistically supported." Due to this provision, the Department cannot limit the categories of permissible employer-submitted surveys to the three categories identified in 20 CFR 655.10(f)(1) for the period of the 2016 DOL Appropriations Act and cannot further limit surveys as the commenter recommends. Accordingly, DOL is eliminating the questions contained in box C4 on the Form ETA-9165.
Former C.4c	The commenter suggests that the employer be required to explain in detail how his/her job opportunity differs from any available occupational classification of the SOC system or how the job opportunity falls within the "all other" classification.	The Department is not accepting this suggestion. As discussed in response to the comment on Former C.4b, DOL cannot limit the categories of permissible employer-submitted surveys during the period of the 2016 DOL Appropriations Act. Accordingly, DOL is eliminating the questions contained in box C4 on the Form ETA-9165.
Former	The commenter suggests Item C.6a	The commenter appears to

C.6a (renumbered C.4)	is “ludicrous,” as the person or entity engaged to gather the data becomes the employer's agent or representative.	misunderstand the meaning of the requirement that all surveys be conducted by a bona fide third party and not an H-2B employer’s agent, representative, or attorney. As explained in the preamble to the 2015 H-2B Wage Rule, 80 FR 24146 (Apr. 29, 2015), this requirement does not bar an employer from paying an otherwise bona fide third party to conduct the survey if the surveyor provides no other services to H-2B employers. The requirement is maintained under the 2016 DOL Appropriations Act as part of the interpretation of what is required for a survey to be “statistically supported.”
Former C.6b and c (renumbered C.5 and 6)	The commenter asserts that “[m]erely requiring a name is gross negligence” and suggests requiring more detailed information for accountability and/or tracking.	The Department is not accepting this suggestion because the additional information recommended will not ordinarily be needed to assess the validity of the survey. The Form ETA-9165 collects the basic information and is accompanied by a copy of the survey or relevant portions of the survey. The Department may request additional information on a case-by-case basis if such information is needed to assess the validity of the survey.
C.7	The commenter suggests the Department require surveys to be based on wages paid **12 months or less** before the date on which the survey was submitted for consideration.	The Department is not accepting this suggestion, as the Form ETA-9165 reflects the required methodology for surveys. The methodological requirement that the data in the survey be based on wages paid not more than 24 months before the survey is submitted was adopted as part of the 2015 H-2B Wage Rule for the reasons stated therein. The requirement is maintained under

		the 2016 DOL Appropriations Act as part of the interpretation of what is required for a survey to be "statistically supported."
C.8	The commenter asserts that "[m]ore than one edition of a survey provides an opportunity for manipulation and should not be permitted."	The Department is not accepting this suggestion. This question provides that where a surveyor updates its survey (e.g., annually), the employer must submit the most recent version of the survey.
D.1	The commenter asserts that the Department should require a survey to include only one job title and that job title must be the same as the Bureau of Labor Statistic's Standard Occupation Classification (SOC) or the U.S. Department of Labor's O*NET OnLine or My Next Move.	The Department is not accepting this suggestion. There is no requirement for an employer to use the SOC taxonomy. The survey taxonomy need only align with the job duties to be performed by the H–2B workers under the application. Also, there is no requirement that a survey be limited to a single job title; one survey may appropriately cover multiple job titles, each reported separately within the survey.
D.2	The commenter suggests that D.2 should read, "*Provide a detailed description of ALL job duties that will be required to be performed by the H-2B worker,*" and states that the question undermines the SOC system.	The Department is not implementing this change. The commenter has misunderstood the duties being listed. These are the duties the surveyor used when conducting the survey. The survey position description is compared to the employer's job duties listed on the form ETA-9141 to determine if the survey solicited wage information for similarly employed workers. Surveys are not required to use the SOC taxonomy.
D.3	The commenter asserts that "intended area of employment" is vague and open to interpretation and manipulation by an employer.	The Department defines "area of intended employment" in its regulations, as it is a key concept applied to wage rates and recruiting.

D.4 all and E all	The commenter questions certain methodology requirements (e.g., the requirement for random sampling or surveying all employers who employ workers in the geographic area and occupation, a 30 worker minimum, 3 employer minimum, and the requirement to include the wages of all workers in the occupation without regard to skill level or experience, education, and length of employment). The commenter suggests that more detailed information is required to evaluate the survey identified on the Form ETA-9165 (e.g., the sources used to determine the number of employers in the area to be surveyed must be submitted with the Form ETA-9165). The commenter asserts that the Form ETA-9165 switches between the terms in Section D "job title" to "occupation" in Section E and asserts that the term “occupation” may be overbroad.	The Form ETA-9165 reflects the required methodology for surveys as adopted in the 2015 H-2B Wage Rule for the reasons explained therein. The methodological standards from that rule are maintained as the interpretation of what is required for a survey to be “statistically supported.” The Form ETA-9165 accompanies copies of relevant portions of the survey, enabling review of the details of the surveyor’s compliance with methodological requirements. The term “job title” is not used on the Form ETA-9165. The term “job opportunity” is used when referring to the job for which the employer is seeking to hire H-2B workers. The term “occupation” is used to refer to the taxonomy used in the survey instrument. We disagree that the term “occupation” is overbroad. In each case that a survey is submitted, ETA analysts conduct a comparison between the “occupation” in the survey and the job duties of the “job opportunity” to determine if the survey solicited wage information for similarly employed workers.
F	The commenter suggests that the employer should be fully responsible for the accuracy of the information and the phrase "*to the best of my knowledge*" should be deleted from the declaration. Also, the commenter asserts there should be additional penalties for fraudulent and/or incomplete attestations (e.g., permanent debarment from the H-2B program).	Although the employer did not conduct the survey, it must complete the attestations on Form ETA-9165, asserting compliance, and assume responsibility for its compliance. We decline to expand the declaration to make an employer responsible for misrepresentations by parties about which the employer did not and could not have known. The prevailing wage provision is one

		part of the Department's H-2B regulations, which include criteria for and scope of debarment.
All	According to the commenter, it is "gross negligence" that the Employer Attestation does not require the identity of survey participants to be revealed for validity, transparency and accountability purposes.	Some employers provide a list of participants surveyed while others do not; for those who do not, the employer usually refers to a state database which has a list of registered/licensed employers they will survey for cross industry. The Department may request additional information on a case-by-case basis if such information is needed to assess the validity of the survey.