

SUPPORTING STATEMENT
ATTESTATION FOR EMPLOYERS SEEKING TO EMPLOY H-2B NONIMMIGRANT
WORKERS UNDER SECTION 205 OF DIVISION M OF THE CONSOLIDATED
APPROPRIATIONS ACT, 2018, PUBLIC LAW 115-141 (MARCH 23, 2018)
ICR Reference Number:

A. Justification.

This information collection request supports the Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program final rule being promulgated by the Department of Labor (DOL or Department) and the Department of Homeland Security (DHS). The regulatory requirements would be codified at 8 CFR part 214 and 20 CFR part 655. The Information Collection Request (ICR) includes a new form, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141 (March 23, 2018)* (Form ETA-9142-B-CAA-2).

Clearance for this ICR is sought using Paperwork Reduction Act (PRA) emergency procedures outlined in regulations at 5 CFR 1320.13. The President signed the Consolidated Appropriations Act, 2018 on March 23, 2018. Section 205 of Division M authorizes the Secretary of Homeland Security, in consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers, notwithstanding the otherwise established statutory numerical limitation. The Secretary of Homeland Security has decided after consultation with DOL to increase the H-2B cap for FY 2018 by up to 15,000 additional visas for American businesses that are likely to suffer irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on their respective petitions before the end of FY 2018. The exigency created by Consolidated Appropriations Act, 2018, Division M, section 205 to meet the high demand by American businesses for H-2B workers and the short period of time remaining in the fiscal year for U.S. employers to avoid the economic harms this legislation was intended to prevent requires initial clearance using expedited processes. The Department will subsequently seek public comment to revise and extend the information collection, as appropriate, using traditional processes.

A.1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.

The information collection is required by regulations exercising authority delegated to the Secretary of Homeland Security under section 205 of Division M of Public Law 115-141, and DOL's role under that authority. The H-2B Program generally is governed by a range of statutory authorities, including sections 101(a)(15)(H)(ii)(b) and 214(a) and (c) of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1011(a)(15)(H)(ii)(b) and 1184(a) and (c)) as well as regulatory authorities appearing at 8 CFR parts 103 and 214, 20 CFR part 655, and 29 CFR part 503. In general, before an employer may file a petition for any temporary or permanent skilled or unskilled foreign workers

with DHS, it must submit a request for certification to the Secretary of Labor containing the elements prescribed by the INA and implementing regulations.

The information contained in the Form ETA-9142-B-CAA-2, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018*, implements the Secretary of Homeland Security's determination that visas granted under the cap increase authorized by Public Law 115-141 should be made available to only those businesses with the most significant business needs, *i.e.*, those businesses that are likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested on their petition before the end of FY 2018. Employers must attest to that harm and that they will retain supporting documentation, as reflected in the accompanying rulemaking. Form ETA-9142-B-CAA-2 is used to implement this determination, as well as the requirements that certain employers conduct additional recruitment and retain documentation of those recruitment efforts.

The update to regulations at 8 CFR parts 103 and 214 and 20 CFR part 655 will require a new form (*Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141 (March 23, 2018)* Form ETA-9042-B-CAA-2) for an employer to submit to DHS, and that employer will use to attest that their business is likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested in its Form I-129 petition in FY 2018. The employer must file the attestation with DHS as part of its Form I-129 petition. In addition, an employer will need to advertise the positions to see whether they can locate U.S. workers who are willing, qualified, and able to perform the jobs. *See* § 655.41. Finally, the employer will need to retain documents and records proving compliance with this implementing rule, and must provide the documents and records to DHS and DOL staff upon request. *See* §§ 655.66.

A.2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

As noted above, the information collection is necessary to implement the temporary cap increase authorized by Public Law 115-141. DHS will review the Form ETA-9142-B-CAA-2 to assure that it is signed, completed, and is not, on its face, inconsistent with the documentation submitted in support of the application. In addition, the form and supporting documentation may be reviewed by DOL and DHS during an investigation or audit.

Employers and job seekers will use the job advertising as prescribed by the regulations to fill positions with U.S. workers to the extent possible and to help document the requisite labor shortages where they exist. Federal agencies and employers will use records covered by this ICR to document employer compliance with applicable statutory and regulatory standards.

A.3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the

decision for adopting this means of collection. Also, describe any consideration of using information technology to reduce burden.

This form and its accompanying instructions are available via the Internet and are fillable online through ETA's home page at <https://www.foreignlaborcert.doleta.gov/form.cfm>.

A.4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

The procedures and documentation requirements are sufficiently specific to avoid duplication of activities. The information collections covered by this request apply only to employers seeking H-2B workers as authorized by Public Law 115-141; consequently, there is no duplication of the information collection requirements.

A.5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.

The information collection applies to some small businesses who seek to hire H-2B workers under the subject cap increase. However, the recordkeeping requirements may be satisfied using information that already exists in payroll and other records kept by most employers for other purposes.

The Department, in consultation with DHS, has reviewed the memorandum issued to all heads of departments and agencies by the Office of Budget and Management on June 22, 2012 about Reducing Reporting and Paperwork Burdens. It would not be appropriate to include exemptions for small entities (including small businesses) or streamline the forms, other than to ensure that H-2B visas made available by the cap increase are reserved for those entities (likely small entities) that would likely suffer irreparable harm in the absence of receiving H-2B workers. The collection is not disproportionately more burdensome for small entities than large ones because the form is easy to understand and provides all of the necessary information on the form itself. It is not possible to reduce the burden on small entities by shortening the form because the form collects only the minimum information needed to process the form and gather the necessary information for administration of the program. The use of electronically filed forms is also not feasible in this program because the form will go into use immediately, and will only be in use until the end of this fiscal year, making it economically prohibitive to spend taxpayer money to enable electronic filing.

A.6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

In the absence of this information collection, DOL would be unable to enforce compliance with the terms of the attestation, and DHS would be unable to ensure that visas made available by the temporary H-2B cap increase are reserved for those businesses that would likely suffer irreparable harm.

A.7. Explain any special circumstances that would cause an information collection to be conducted in a manner that requires further explanation pursuant to regulations 5 CFR 1320.5.

These data collection efforts do not involve any special circumstances.

A.8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years—even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The use of PRA emergency processing authorities has precluded subjecting this information collection to public comment at the time of initial adoption. The Department will provide for full public participation when seeking to extend the collection.

A.9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

There is no payment or gifts to respondents involved with this information collection.

A.10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

Employers who file labor certification applications, or labor condition applications for permanent or temporary employment of foreign workers; employers who file requests for prevailing wage determinations that may support an application for temporary and permanent labor certification; agents and foreign labor recruiters whom employers may engage in the recruitment of prospective H-2B workers with regard to labor certification applications filed in the H-2B temporary employment program and all persons or entities hired by or working for such recruiters or agents and any agents or employees of those persons or entities. The foreign worker is not identified on this application. Authority to maintain this system is derived from the Immigration and Nationality Act, as amended, 8 U.S.C. 1101(a)(15)(H)(i), and (ii), 1184(c), 1182(m) and (n), 1182(a)(5)(a), 1188, and 1288. Section 122 of Pub. L. 101 - 649. 8 CFR 214.2(h). 20 CFR 655 Subpart A. 20 CFR 655.9. The laws authorizing this program provides for compliance with the Privacy Act in all its aspects.

SORN DOL/ETA-7 (Foreign Labor Certification System and Employer Application Case Files) 81 FR 25765 identifies the categories of records in the system containing Office of Foreign Labor Certification (OFLC) records including records of a sensitive nature. ETA's (OFLC) Case Files are retained for a period of 5 years after close in accordance with Records Schedule Number DAA-0369-2013-0002. Paper files are retained on-site at national processing centers for six months from the date of final determination. OFLC will continuously scan or convert paper records into OFLC Archive and Scan database(s). Paper copies of employer applications that are scanned will be destroyed once converted to an electronic medium and verified, or when no longer needed for legal or audit purposes in accordance with the records schedule. Paper copies of case files that are not scanned are retained on-site for six months after close, and then transferred to Federal Records Center for duration of 5 year retention period.

A.11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

This information collection does not involve sensitive matters.

A.12. Provide estimates of the hour burden of the collection of information.

The new attestation form includes new recruiting requirements, assessment of likelihood of business harm, and document retention obligations. The Department estimates the time burden for completing and signing the form is 0.25 hour and 1 hour for retaining documents and records relating to recruitment. The employer must retain documents and records of a new job order for the job opportunity placed with the State Workforce Agency (SWA) and one newspaper advertisement, online or in print. The Department estimates that it would take up to one hour to file and retain documents and records relating to recruitment.

The wages used for the analysis come from Department's Bureau of Labor Statistics (BLS) Occupational Employment Survey for May 2017. From this survey, a mean hourly wage for a human resource specialist is \$31.84 and \$47.80 for a financial analyst. The full cost to the employer includes all fringe benefits as well as the wage. Using the BLS Employer Costs for Employee Compensation for December 2017, we calculated a benefits-to-wage multiplier of 1.46 to estimate the full wages to include benefits such as paid leave, insurance, and retirement. The total compensation is \$46.49 ($\31.84×1.46) for a HR specialist and \$69.79 ($\47.80×1.46) for a financial analyst.

Additionally, the new form requires that the petitioner assess and document supporting evidence for the likelihood of irreparable harm if the petitioner's business is unable to employ H-2B workers for the remainder of this fiscal year, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the total per hour wage for a financial analyst is \$69.79. The Department estimates the time burden for assessing and documenting supporting

evidence for the likelihood of irreparable harm described earlier in the preamble that may include a range of business information about operations, finance, and workforce planning is at least 4 hours and 1 hour for gathering and retaining documents and records relating to business harm.

To calculate the cost for the new attestation form, the new recruiting requirements, assessment of likelihood of business harm, and document retention obligations, we multiplied the hourly compensation rate of a HR specialist (SOC: 13-1071) by the time required to review and sign the attestation (15 minutes), and prepare and retain additional recruitment documentation (1 hour). We multiplied the hourly compensation rate of a financial analyst (SOC 13-2051) by the time required to prepare and retain evidence demonstrating that the employer is “likely to suffer irreparable harm (that is, permanent and severe financial loss)” in the absence of all the H-2B workers it requested in FY 2018 (5 hours). Therefore, the total cost of this ICR is \$1,252,124.25.

Between October 1, 2017, and April 15, 2018, the Department approved a total of 4,978 certifications for 86,391 H-2B positions with work start date between April and September in 2018. Therefore, we estimated that the average number of H-2B positions per certification is 17.35 (=86,391/4,978) and the number of certifications that would have been filled with the second semi-annual statutory cap of 33,000 is 1,902 (=33,000/17.35). We believe that the remaining certifications of 3,076 (= 4,978 – 1,902) represents the pool of employers with approved certifications that may apply for additional H-2B workers.

The burden for this ICR is summarized in the following table:

Estimated Annualized Respondent Hour and Cost Burdens

Forms	Number of Respondents	Frequency	Total Number of Responses	Time Per Response (In Hours)	Total Burden Hours	Hourly Wage Rate*	Total Burden Costs
Form ETA-9142-B-CAA-2	3,076	1	3,076	0.25	769	\$46.49	\$35,750.81
Recordkeeping for Recruitment	3,076	1	3,076	1	3,076	\$46.49	\$143,003.24
Recordkeeping and 3 rd party disclosure for business harm	3,076	1	3,076	5	15,380	\$69.79	\$1,073,370.20
Unduplicated Totals	3,076	1	3,076	6.25	19,225	--	\$1,252,124.25

* Bureau of Labor Statistics. Occupational Employment Statistics: May 2017 National Occupational Employment and Wage Estimates; Management Occupations. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2017-18 Edition*, Human Resources Specialists, on the Internet at <https://www.bls.gov/ooh/management/human-resources-specialist.htm>.

A.13. Provide an estimate for the total annual cost burden to respondents or record keepers resulting from the collection of information. (Do not include the cost of any hour burden already reflected on the burden worksheet).

1. Start-up/capital costs: There are no start-up costs.
2. Maintenance and operations costs: **\$912,003.24**

Employers will place a new job order for the job opportunity with the SWA serving the area of intended employment for at least 5 days beginning no later than the next business day after submitting a petition for an H-2B worker and the attestation to U.S. Citizenship and Immigration Services (USCIS). DOL estimates that an HR specialist (or another equivalent occupation) would spend 1 hour to prepare a new job order and submit it to the SWA. $\$46.49$ (total per hour wage for an HR specialist) \times 3,076 certifications \times 1 hour (time burden for placing a job order with the SWA) = $\$143,003.24$.

DOL estimates the total cost of placing a new job order is \$143,003.24.

Employers will also place one newspaper advertisement during the period of time the SWA is actively circulating the job order for intrastate clearance. DOL estimates that a standard job listing in an online edition of a newspaper is $\$250^*$. Calculation: $\$250$ (cost of one online newspaper job listing) \times 3,076 certifications = $\$769,000$.

DOL estimates the total cost associated with one online newspaper job listing is \$769,000.

* Source: The Washington Post, Online Only Job Listings (35 days), page 4 available at: https://www.washingtonpost.com/wp-stat/ad/public/static/media_kit/16-3729-01-jobs.pdf.

A.14. Provide estimates of annualized costs to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

The Government anticipates some additional costs in adjudicating the additional Form ETA-9142-B-CAA-2 submitted as a result of the increase in cap limitation for H-2B visas. However, DHS expects these costs to be covered by the fees associated with the forms I-907 and I-129 filed with USCIS in support of an H-2B petition.

A.15. Explain the reasons for any program changes or adjustments reported on the burden worksheet.

This is a new information collection.

Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141 (March 23, 2018)

ICR Reference Number:

May 2018

A.16. For collections of information whose results will be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

The information on the Form ETA-9142-B-CAA-2 will not be published, however DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations.

A.17. If seeking approval not to display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

ETA will display the OMB approval number and expiration date.

A.18. Explain each exception to the topics of the certification statement identified in “Certification for Paperwork Reduction Act Submissions.”

There are no exceptions sought.

B. Collection of Information Employing Statistical Methods

This information collection does not employ statistical methods.