

**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)**  
**OMB Control Number 1205-0531**

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**A. Justification.**

This is a request for the Office of Management and Budget (OMB)'s approval to revise Form ETA-9142-B-CAA-2. The Department of Labor is requesting authorization to require the retention of necessary documentation used in support of the filing of 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*.

**Background Information and General Instructions:**

The Department of Labor (DOL), as part of its effort to streamline information collection, clarify statutory and regulatory requirements, and provide greater transparency and oversight in the H-2B nonimmigrant visa application processes, engages in a notice and comment process to provide the public and Federal agencies with an opportunity to comment on proposed and/or existing information collection tools in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. § 3506(c)(2)(A)) (PRA). The notice and comment process ensures that required information can be collected in the appropriate format, the reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Clearance for Form ETA 9142-B-CAA-2 (OMB Control No. 1205-0531) was initially sought using PRA emergency procedures outlined in the regulations at 5 CFR 1320.13. Section 205 of Division M of the *Consolidated Appropriations Act, 2018*, Public Law 115–141 (March 23, 2018) (2018 Act), authorized the Secretary of the Homeland Security, in consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers in Fiscal Year (FY) 2018, notwithstanding the otherwise established statutory numerical limitation (H-2B cap). In consultation with the Secretary of Labor, the Secretary of Homeland Security increased the H-2B cap for FY 2018 by up to 15,000 additional visas for American businesses that were likely to suffer irreparable harm (i.e. permanent and severe financial loss) without the ability to employ all of the H-2B workers requested on their petition before the end of FY 2018.

As set forth in the recently published Temporary Rule: *Exercise of Time-Limited Authority to Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 83 FR 24905 (May 31, 2018), employers seeking authorization to employ H-2B workers under this time-limited authority were required to complete and submit Form ETA-9142-B-CAA-2 to the U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS). The regulation at 8 CFR 214.2(h)(6)(x)(C) implementing the 2018 Act provides: “USCIS will reject petitions [under the 2018 Act] that are received after the numerical limitation has been reached or after September 14, 2018, whichever is sooner.”

When DHS receives sufficient petitions to meet the H-2B cap within the first five business days of the cap being opened, it conducts a lottery to select which petitions it will accept for processing. On June 11, 2018, DHS announced that USCIS was no longer accepting petitions filed under the Temporary Rule increasing the FY 2018 numerical limit on H-2B nonimmigrant visas, because USCIS received a sufficient number of petitions to meet the expanded cap. USCIS rejected and returned any petitions received after June 6, 2018 that were not selected in the lottery, as well as any cap-subject petitions.<sup>1</sup> As required by the regulations, employers must maintain the records associated with the filing of Form ETA-9142-B-CAA-2 for three years from the date DOL certified the H-2B labor certification application. DOL is now seeking public comments in connection with Form ETA 9142-B-CAA-2's (authorized under 20 CFR 655.64 and 655.66) associated retention requirement.

Specifically, DOL requested comments on the burden associated with retaining all of the required documentation supporting Form ETA-9142-B-CAA-2, via a 60-day *Federal Register* notice it published in the *Federal Register* on August 30, 2018, at 83 FR 44305. This information collection package did not seek comment on the form itself, because the form is no longer in use. The instructions to the form provide supplemental information for the employer's reference only; they contain guidance on how to comply with the recordkeeping requirements (e.g., the documentation that needs to be preserved; retention period). Two comments were received in response to the 60-day notice; both comments were deemed out of scope. As a result, OFLC will not be making any further changes to the information collection.

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 retention of Form ETA-9142-B-CAA-2 and supporting documentation is required by regulations at 8 CFR Part 214 and 20 CFR Part 655, exercising authority delegated to the Secretary of Homeland Security and DOL's role pursuant to that authority under Section 205 of Division M of Public Law 115-141. Those regulations required 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*, Form ETA-9142-B-CAA-2) for employers to submit in FY 2018 to DHS. Employers used the form to attest that their businesses were likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested on the Form I-129 petitions and that they agreed to meet other program requirements. Employers were permitted to submit the form through September 14, 2018, or the date that the numerical limitation was reached, whichever occurred first. As the numerical limit was reached on June 6, 2018, employers were no longer able to submit the form after that point. Employers who submitted the form have already completed the assessment to determine whether their business

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<sup>1</sup> See USCIS' June 11, 2018 announcement at <https://www.uscis.gov/working-united-states/temporary-workers/temporary-increase-h-2b-nonimmigrant-visas-fy-2018>.

would suffer irreparable harm and performed any required additional recruitment. Employers that filed Form ETA-9142-B-CAA-2 must continue to retain the signed attestation form and supporting documentation to prove compliance with the implementing regulation, and must provide the documents and records to DOL or DHS staff upon request. See 20 CFR 655.66. Attestation F on the form and the instructions to the form inform employers about this requirement and specify the documentation that must be retained for three (3) years from the date of the labor certification.

**Authority:** 8 CFR Part 103 and 214; 20 CFR Part 655, subpart A; 29 CFR Part 503; Sections 101(a)(15)(H)(ii)(b), 103(a)(6), and 214 of the INA; 8 U.S.C. §§ 1101, 1103(a)(6), 1184; Pub. L. 115-141

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.*

The information collection is necessary to implement the temporary cap increase authorized by Public Law 115-141. Employers that obtained a temporary labor certification (TLC) had to complete and submit a signed attestation form to DHS and must retain the required supporting documentation for three (3) years from the date the TLC was issued. Retaining these records for the specified period of time allows federal agencies and employers to comply with applicable regulatory standards.

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's instructions are available via the internet at [https://www.foreignlaborcert.doleta.gov/pdf/Form\\_ETTA-9142-B-CAA-2\\_GENERAL\\_INSTRUCTIONS\\_05.29.18.pdf](https://www.foreignlaborcert.doleta.gov/pdf/Form_ETTA-9142-B-CAA-2_GENERAL_INSTRUCTIONS_05.29.18.pdf). The form is no longer permitted to be submitted to DHS.

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 collection activities. The information collections covered by this request apply only to employers who sought H-2B workers as authorized by Public Law 115-141; consequently, there is no duplication of the information collection requirements.

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

The retention requirements apply to some small businesses that submitted applications to hire H-2B workers under the cap increase. Recordkeeping requirements may be satisfied in part by using information that already exists in payroll and other records kept by most employers for other general employment or business purposes.

DOL considered the memorandum issued to all heads of departments and agencies by OMB on June 22, 2012,<sup>2</sup> about Reducing Reporting and Paperwork Burdens. It would not be appropriate to include exemptions for small entities (including small businesses) from the recordkeeping requirements. The recordkeeping requirements are not disproportionately more burdensome for small entities than large ones.

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.

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.

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*

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<sup>2</sup> Office of Management and Budget Memorandum “Reducing Reporting and Paperwork Burden” (June 22, 2012), available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf>.

*circumstances that may preclude consultation in a specific situation. These circumstances should be explained.*

The use of PRA emergency processing authorities precluded subjecting this information collection to public comments at the time of its initial adoption. In a *Federal Register* notice published on August 30, 2018 (83 FR 44305), DOL provided for full public participation as it sought to revise the collection, and allowed for a 60-day period for public comments. DOL did not request comments in connection with the form or instructions; it solely requested comments on the recordkeeping requirement and the burden associated with this collection activity.

The Department received 2 public comments in response to this notice. The comments were considered but deemed to be out of scope as they did not provide recommendations or feedback on the revisions to the specific information collection tool covered under OMB Control Number 1205-0531, nor adhere to the scope of comments requested in the notices published in the *Federal Register*.

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

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

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

No assurances of confidentiality or privacy are provided.

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.

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

The employer must retain all supporting documentation and records relating to the attestation. These documents may include the new job order for the job opportunity placed with the State Workforce Agency and one newspaper advertisement, online or in print format, in addition to the business harm assessment analysis and supporting evidence that were required in connection with the attestation prior to the employer filing its petition with DHS. DOL estimates that it would take approximately one hour to retain these documents and records.

The wages used for the analysis come from DOL’s Bureau of Labor Statistics (BLS) Occupational Employment Survey for June 2017. From this survey, a mean hourly wage for a human resources (HR) specialist is \$31.20. The full cost to the employer includes all fringe benefits, as well as the wage. From the BLS Employer Costs for Employee Compensation for June 2017, the average percentage of benefits in total is 31.7 percent. Given a base wage of \$31.20, this would suggest an additional markup of \$14.35 in fringe benefits for a total compensation of \$45.55 ( $\$31.20 \times \$1.46$ ) for an HR specialist.

This collection required that the petitioner assess and document supporting evidence for the likelihood of irreparable harm if the petitioner’s business were unable to employ H-2B workers, and retain those documents and records. All eligible employers have already completed the attestation and the required assessment analysis to establish irreparable harm to their businesses and conducted any required additional recruitment. The only requirement remaining under this collection is to retain the supporting documentation relating to business harm and additional recruitment. Using the same methodology previously described for wages, DOL estimates the time burden for retaining documents and records relating to business harm and documents related to additional recruitment is approximately one hour.

To calculate the cost for document retention obligations, we multiplied the hourly compensation rate of an HR specialist (\$45.55) by the time required to 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 and to retain the documents related to additional recruitment (1 hour).

Based on certification data in FY 2018 from DOL’s Office of Foreign Labor Certification, DOL estimates there were a total of 5,177 certifications that DOL granted with an expected work start date occurring between April and September in FY 2018. This number of certifications can be used as a proxy for the number of employers that DOL projects needed to review and sign the attestation. Therefore, the total cost of this Information Collection Request (ICR) is \$235,812.35. However, it is likely a significant overestimate, because it includes employers who received approved petitions under the initial April-September cap and, therefore, did not need to seek workers under the expanded cap, as well as employers who were not likely to suffer irreparable harm.

The Department associates no PRA reporting burden with this collection, as responses would only be provided in response to an investigation conducted by the Wage and Hour Division to determine whether an employer has complied with specific requirements. See 5 CFR 1320.4(a)(2).

*The following table can be used as a guide to calculate the total burden of an information collection.*

Estimated Annualized Respondent Hour and Cost Burdens

Activity	Number of Respondents	Frequency	Total Number of Responses	Time Per Response (In Hours)	Total Burden Hours	Hourly Wage Rate*	Total Burden Costs
Recordkeeping	5,177	1	5,177	1	5,177	\$45.55	\$235,812.35
<b>Duplicated Totals</b>	---	--	<b>5,177</b>	<b>1</b>	<b>5,177</b>	--	<b>\$235,812.35</b>

\* Bureau of Labor Statistics. Occupational Employment Statistics: June 2017 National Occupational Employment and Wage Estimates; Management Occupations. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2016-17 Edition*, Human Resources Managers, available at <https://www.bls.gov/ooh/management/human-resources-managers.htm>.

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: None

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.*

DOL anticipates some additional costs were incurred by DHS in adjudicating the additional Form ETA-9142-B-CAA-2 submitted as a result of the increase in cap limitation for H-2B visas. DOL, however, expects these costs were covered by the fees associated with the forms I-907 and I-129 filed with USCIS in support of an H-2B petition. DOL will not incur government costs associated with the employers' retention of the necessary information associated with this collection.

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

DOL is revising this information collection. The previously reported burden estimate has changed due to an increase on the estimated number of respondents (from 3,076 respondents to

5,177 respondents). The total estimated time burden hours, however, have been considerably decreased, because the requirements to complete and submit the attestation to DHS/USCIS, conduct additional recruitment, and conduct the business harm assessment have already been completed. As a result, DOL projects a decrease of the total annual burden for this collection of the previously approved 19,225 burden hours to 5,177 burden hours. DOL is proposing to revise this information collection to eliminate the burden associated with preparing and submitting the attestation to DHS/USCIS, as USCIS is no longer accepting these forms in connection with the petitions employers filed as a result of the temporary final rule that went into effect on May 31, 2018. DOL is also proposing to eliminate the requirement of conducting a business harm analysis and additional recruitment in support of the attestation, because these activities have already been completed by all eligible employers. DOL is further revising the collection by updating the PRA Statement in the instructions for the form, to reflect the updated burden estimates.

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 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.

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 displays, and will continue to display, the OMB approval number and expiration date.

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

DOL is not seeking any exception to the certification requirements.

## **B. Collections of Information Employing Statistical Methods**

This information collection does not employ statistical methods.