

**Appendix B to Supporting Statement for H-2B Application for Temporary Employment
Certification and Related H-2B Forms
OMB Control No. 1205-0509**

OMB Control Number 1205-0509: Comment Responses

This is an appendix to the Office of Management and Budget's (OMB) Supporting Statement for the collection of information under the H-2B *Application for Temporary Employment Certification*, OMB Control Number 1205-0509, which includes application forms and general instructions. This appendix includes a summary of the public comments received in response to the 30-day notice the Department of Labor's (Department) Employment and Training Administration (ETA) published in the *Federal Register* on January 31, 2019, at 84 FR 798, which are referred to in Question 8 of the Supporting Statement. The Department received comment submissions from two commenters. This document addresses the submissions.

I. The Department's Authority to Revise the H-2B Forms

One commenter stated that the H-2B program negatively affects the wages of American workers and allows "slave wages." This comment is outside of the scope of the Department's consideration with its form revision proposal. As more fully stated in the Supporting Statement accompanying this document, the Immigration and Nationality Act of 1990 (INA) establishes the H-2B nonimmigrant visa classification for non-agricultural temporary workers.

II. Support for the Department's Proposed Revisions

The second commenter expressed general support for the Department's proposal to "collect complete and accurate information from employers applying for H-2B visas." The commenter expressed a general concern, without providing additional details, that employers are not doing enough to recruit U.S. workers and stated that H-2B workers are subject to abuse and exploitation.

The commenter also expressed support for specific parts of the proposed collection. The commenter agreed with the Department's collection of information in Section F, Employment and Wage Information, of the Form ETA-9142B including the following: the collection of the anticipated workday hours on the form, the collection of other material terms and conditions of a job offer, and the allowance of an attachment for employers to fully describe the job duties. In terms of the Form ETA-9142B appendices, the commenter expressed support for the *Appendix B* requirement that employers must initial each condition of employment. The commenter also expressed support for *Appendix C*, the collection of foreign labor recruiter information.

The Department believes its proposal collects necessary information to assess an employer's stated need for H-2B temporary foreign workers. The Department will continue to ensure that its H-2B collection obtains the information necessary to test the labor market for U.S. workers and to protect the wages and working conditions of similarly-employed U.S. workers.

III. The Department's Proposed Changes to the Form ETA-9142B and General Instructions

A. Section B - Temporary Need Information

The Department's proposed revisions modified Form ETA-9142B by removing the temporary need information boxes that required employers to indicate the visa classification categories, e.g., new employment, continuation of previously approved employment without change with the same employer, change in previously approved employment, new concurrent employment, change in employer, and amended petition.

During the 60-day public comment period, two commenters recommended the Department retain the visa classification categories on the form, with one of the commenters suggesting that the Department strengthen the General Instructions for these collection items. During the 30-day comment period, of the two comments received, the second commenter also recommended the Department retain the visa classification categories on the form. The commenter stated that the categories of information are useful indicators of whether a position is seasonal or temporary. The commenter asserted that without the category fields, it will be more difficult for the Department to make determinations about the nature and duration of the employment.

The Department has assessed the recommendations received during the 60-day and 30-day public comment periods, but declines to modify its proposal to add the collection items back into the Form ETA-9142B. As provided in response to the 60-day public comments, the Department has determined that it does not currently have a practical utility for the collection of this information.

B. Section C - Employer Information

The Department's proposed modifications to Section C of the Form ETA-9142B included removal of the following three collection items: the number of non-family full-time equivalent employees, the employer's annual gross income, and year the employer was established. During the 60-day public comment period, two commenters stated that the continued collection of this information is useful for the Department's Wage and Hour Division's (WHD) enforcement of the form, including Fair Labor Standards Act (FLSA) compliance. Both commenters recommended the Department continue collecting these three fields. Further, one of the commenters stated that the Department's form would benefit from additional questions to help the Department determine if the employer is likely to commit a wage and hour violation. The same commenter requested that the Department add questions to its collection based on the belief that employers request more workers than they actually need, and posited that requiring the employer to document the number of full-time workers it employs will help reduce the "abusive practice of over-asking for nefarious purposes." During the 30-day comment period, of the two comments received, the second commenter objected to the removal of the collection of the fields collecting the employer's number of non-family full-time equivalent employees, annual gross income, and year of establishment. The commenter stated that the fields were necessary for the Department's enforcement efforts and employer accountability. Further, the commenter stated that worker advocates have "long sought access to this type of data".

The Department declines to modify its proposal to include the collection of these fields. The Department has determined that it does not currently have a practical utility for the collection of the fields. Further, during an audit examination or an investigation by the Wage and Hour Division, the Department can request additional information, as needed, to verify that the employer's need for H-2B workers is temporary and that the employer has bona fide need for the number of H-2B workers requested.

IV. Union Notification

Of the two comments received, the second commenter also stated that the Department's regulations require employers to inquire with local unions about open positions, but the Department does not keep records of those inquiries. The commenter expressed concern that employers will not accurately determine whether an occupation is unionized and will fail to notify local unions of available positions.

In accordance with the Department's regulations at 20 CFR 655.33(b)(5), where an occupation is traditionally or customarily unionized, when the Department accepts an H-2B application for further processing, the Department's Notice of Acceptance will direct the State Workforce Agency to circulate a copy of the job order to the appropriate labor organizations. Further, the regulations at 20 CFR 655.45 require employers that are party to a collective bargaining agreement to provide written notice to the bargaining representative(s) in the job classification and area of intended employment by providing the *Application for Temporary Employment Certification* and the job order to the union. The regulations require that the employer confirm in the recruitment report it provides the Department that the bargaining representative was contacted and require the employer to retain documentation of the contact in its files, which may be requested upon audit or investigation.

The Department appreciates the comment and the commenter's concern that U.S. workers remain properly apprised of available positions. However, the comment is beyond the scope of this form revision proposal.