Appendix A 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 all public comments received in response to the 60-day notice the Department of Labor's (Department) Employment and Training Administration (ETA) published in the *Federal Register* on September 7, 2018, at 83 FR 45469, which are referred to in Question 8 of the Supporting Statement. The Department received comments from twelve commenters. The comments have been considered, summarized, and addressed in this document.

I. Support for the Department's Proposed Revisions

Three commenters expressed general support for the Department's proposal to modernize and streamline the H-2B application forms. Specifically, the first commenter expressed support for the Department's efforts to streamline and improve the H-2B application forms, because the H-2B program provides employers with access to "critical" seasonal labor and helps workers secure "well-compensated seasonal jobs that allow them to provide for their families." The second commenter supported the Department's additions to the H-2B application forms, and commended what it called the Department's "critical change" in incorporating elements from the Form ETA-9141, *Application for Prevailing Wage Determination* (PWD application)[1] into the Form ETA-9142B, *H-2B Application for Temporary Employment Certification* (H-2B application)[2]. Two of these commenters supported the Department's efforts to streamline the H-2B process by proposing to issue electronic certifications.

The Department appreciates the commenters' acknowledgement of the reorganized information collection to aid the Department in its administration of the H-2B program. As mentioned, the Department is proposing to streamline its current collection of information, and better clarify existing employer obligations required by the Department's 2015 H-2B Rule (2015 Rule)[3] which the Department jointly issued with the Department of Homeland Security (DHS). *See* 20 CFR 655, Subpart A, 29 CFR 503. The proposed form revisions provide standardized appendices for the collection of information required by 20 CFR 655, Subpart A, increase program transparency, and include the consolidation of the H-2B forms under a single OMB Control Number 1205-0509.[4] The Department emphasizes that these proposed revisions do not create

[1] "PWD application" in this document refers to both the Form ETA-9141 request and the determination issued by the Department. Where clarity is required herein, "Form ETA-9141" is also used.
[2] "H-2B application" in this document refers to both the Form ETA-9142B and its appendices. Where clarity is required herein, "Form ETA-9142B" is also used to differentiate the form from its appendices. The collective forms, instructions, and appendices for this information collection are also referred to as the "H-2B forms."
[3] *See* 82 Fed. Reg. 24042 (April 29, 2015) and 20 CFR 655, Subpart A.
[4] On November 7, 2018, OMB approved the Department's request to consolidate the H-2B forms under OMB Control Number 1205-0509 by moving the Form ETA-9165, *Employer Provided Survey Attestations to Accompany*

new obligations for employers; rather, they reiterate and support compliance with existing regulatory requirements. As a result, the Department has determined that it will retain the majority of its proposed revisions. However, the Department has made some modifications to its original proposal in response to public comments requesting clarifications to the proposed information collection. This document discusses in detail the Department's decisions with respect to the modifications made to its proposed collections.

II. Timeframe for Implementation of the Department's Proposal

One commenter expressed concern about the timing of the Department's implementation of the proposed forms in light of DHS' opening of the second biannual H-2B program cap for Fiscal Year 2019, under which employers seeking visas under this second cap may file H-2B applications with the Department as early as January 1, 2019. The commenter requested that the Department make the proposed forms effective after January 1, 2019, to avoid interference with this peak filing timeframe.

The Department understands the commenter's concern, and can assure the commenter that the revised H-2B forms will not be available for the public's use on January 1, 2019. The Department published its 60-day proposal on September 7, 2018, which afforded the public 60 calendar days within which to provide comments to the Department. The Department published publication of the 30-day proposal in the *Federal Register* prior to the December 31, 2018 expiration of the H-2B forms. The Department's publication of the 30-day *Federal Register* affords the public another 30 calendar days to comment on the Department's proposal, which incorporates any changes resulting from public comments received during the 60-day period. During this period of the Paperwork Reduction Act (PRA) form revision process, the Department requests that OMB permit the Department to continue collecting information on the existing H-2B forms until OMB issues a final Notice of Action on the Department's proposed form revisions.

III. Burden Imposed by the Department's Proposed Revisions

Three commenters generally stated the Department underestimated the burden for completion of Form ETA-9142B and its appendices. The commenters did not provide specific input with respect to the Department's burden estimates in terms of particular forms or fields. The Department thoroughly assessed the overall burden associated with the filing of the Form ETA-9142B and its appendices, and provided a detailed breakdown of the estimated burden associated with each.

The Department's burdens are estimates of the total average time burden associated with the preparation and submission of the Form ETA-9142B and its appendices. The public may evaluate and comment on the accuracy of the Department's estimated burden(s) for the proposed collection of information, including the validity of the methodology and assumptions used. During the 30-day comment period, the public may submit further comments about the burden estimates to OMB as instructed by the *Federal Register* notice.

H-2B Prevailing Wage Determination Request Based on a Non-OES Survey, from OMB Control Number 1205-0516 and adding it under OMB Control Number 1205-0509.

In its 60-day notice, the Department estimated the burdens for completion of the H-2B forms, including the Form ETA-9142B and its appendices, would increase by an estimated 40 minutes.[5] As explained in the 60-day notice, the increase is attributable to the Department's proposal to standardize the collection of information for several H-2B regulatory requirements into appendices, which the Department believes will assist employers with form completion and compliance with regulatory requirements. As explained in the Supporting Statement accompanying this document and the 30-day *Federal Register* notice, the Department has further revised its burden estimate to include changes made after the 60-day comment period.

One commenter stated that the Department should prepare and post a list of proposed changes by form and reasoning for the change. Additionally, the commenter noted the "time burden for reviewing each form by line item to determine whether there is any change is significant and not adequately captured." To the extent the commenter requests the time burden for each form by line item for the public to determine if the change is significant, it is not feasible for the Department to provide a time burden for completing each form field or line item of each form for assessment. This is because, as previously mentioned, the burden estimate provided for each form is an average of the total time burden associated with preparation and submission of the individual form or form appendix. The Department's published revisions allow the public to compare the current form against the proposed changes. Additionally, this document discusses commenters' questions about specific sections of the forms. The 30-day comment period will afford the public an additional opportunity to provide specific feedback with respect to the burden associated with the proposed H-2B forms revisions, which the Department can consider to further refine its estimate(s).

A second commenter stated that the application forms serve an enforcement purpose and have little to do with the H-2B program's certification process, which will lead to confusion among employers and their counsel. The Department does not agree with the commenter. The Department's proposed revisions include the collection of information necessary to ensure the H-2B application submitted by the employer, including the nature of the employer's need for H-2B workers and all material terms and conditions of employment, meets regulatory requirements. The Department maintains that by collecting required information on standardized appendices, in lieu of various paper-based documents, employers and their counsel will have better awareness of the information the Department must receive to make a certification determination. The proposed revisions, especially to the *Appendix B*, clarify an employer's existing assurances and obligations to employ workers under an approved H-2B temporary labor certification.

A third commenter generally stated that the application forms are too complicated and need to be simpler to collect the right information. The commenter also stated that the application forms should collect the absolute minimum information needed to make the certification determination and lessen the public burden. As provided above, the Department believes its proposed revision collects information required by the H-2B regulations at 20 CFR 655, Subpart A, and organizes the H-2B form fields and their instructions in a more effective manner to better guide employers through each form's required collection and ensure more complete H-2B forms are submitted for review by the Department.

[5] *See* Supporting Statement for detailed information on the burden estimates.

The Department's revisions propose to collect the minimum information necessary to assess the employer's request for temporary labor certification under the H-2B program, including whether the employment of the requested H-2B worker(s) will adversely affect the wages and working conditions of similarly employed U.S. worker(s). The Department has made efforts to balance the collection of necessary H-2B program information with the associated public burden. This is apparent with the creation of the proposed appendices in standardized formats, which collect the information the Department currently receives in paper-based attachments that are diverse in content, difficult to modify, and resource-intensive for staff to review. While employers will need to adjust to using new standardized formats to enter information they currently provide in paper-based attachments, the Department believes the use of standardized appendices will reduce the submission of unnecessary information and communication exchanges with the Department to explain information provided in these various paper-based attachments.

A fourth commenter stated that the information contained in the Department's proposed revisions to the H-2B forms is duplicative of the information collected in the PWD application. The Department disagrees with the commenter. Under the H-2B regulations, an employer must file the Form ETA-9141 and obtain a PWD prior to submitting an H-2B application. However, some employers who obtain a PWD do not request H-2B temporary labor certification; and still other employers do not list all of the worksites covered by a PWD on a future-filed H-2B application. Thus, the collection of information on the Form ETA-9141 is sufficiently distinct from the collection of information on the H-2B application. More importantly, the Department's proposed collection of the PWD case number(s) will eliminate the need for the employer to submit a separate paper or electronic copy of the PWD concurrently with its H-2B application. Because an employer can file more than one Form ETA-9141 for use in connection with a future H-2B application filing, the Department's proposal permits an employer to disclose multiple PWD case numbers on a single application (*Appendix A*) rather than submitting separate paper or electronic copies of all Form ETA-9141s with the employer's H-2B application.

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

One commenter called for the Department to shut down the H-2B program in its entirety for reasons ranging from American citizens are being "scammed" by the program to it promotes "slave labor." This comment is out of scope for 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.
Two commenters generally questioned the Department's authority to make its proposed changes to the H-2B forms. One commenter stated that the Department's intent to streamline and clarify statutory and regulatory requirements in the proposed form package will have the undesired effect of changing the H-2B regulatory requirements outside of the rulemaking process, exceeding the Department's legal authority. A second commenter stated that it is difficult to identify any legitimate regulatory interest in obtaining the level of detail requested with the proposed revision.

The Department's proposed changes constitute form revisions that do not alter employers' substantive legal obligations under the INA and the accompanying regulations, jointly issued with DHS. Therefore, neither regulatory nor statutory amendments are necessary, as the revisions are within the Department's existing authority to administer the H-2B temporary labor certification process. Form changes under the Department's existing authority do not require the Department to engage in rulemaking under the Administrative Procedure Act (APA) and its associated notice and comment process. Rather, the Department has made available its proposed revisions for public inspection, as mandated by and in compliance with the PRA and its notice and comment process. The Department's proposal better organizes the collection of information in more usable and efficient formats, and codifies information it currently receives from employers as paper-based attachments into standardized appendices. The Department believes these standardized appendices will reduce employer confusion about H-2B regulatory requirements and the receipt of inaccurate and incomplete information.

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

A. Section A - Nature of H-2B Application

The Department proposed a new collection Item A.1, which requires an employer to indicate whether it is seeking to employ H-2B workers who will be exempt from the statutory numerical limit, or "cap," on the total number of foreign nationals who may be issued an H-2B visa or otherwise granted H-2B status. Two commenters stated that it is difficult for employers to answer the question at the point of the H-2B application filing, with one of the commenters stating that recruitment will be incomplete at the point of the application filing. Further, the second commenter stated that it would be beneficial, instead, for the Department to ask how many workers will be exempt from the labor certification. One of the commenters requested clarification of the instructions for this question. A third commenter stated that the instructions are unclear as to whether the question applies only when all H-2B workers under the application are exempt or if any of the workers associated with the application are exempt. A fourth commenter stated that the Department should clarify whether an employer should respond "Yes" if it is filing a petition which may include both cap-exempt and non-cap exempt workers.

In response to the comments received, the Department has clarified the Form ETA-9142B and its *General Instructions* to specify that a "Yes" response is required when the employer is seeking to employ ***any*** H-2B workers in cap-exempt status under the application. Thus, an employer is permitted to file a single H-2B application containing both cap-exempt and non-cap exempt workers, for which it would indicate "Yes" in question A.1, using the best information it has available at the time of filing the H-2B application. The employer's response will aid the Department in providing more accurate information to the public in terms of processing times and updates about the H-2B applications it receives and certifies.

One commenter stated that the Department has no statutory responsibility for the H-2B program's cap, and asks how the Department can require the question concerning cap-exemption when DHS has the responsibility for administering the H-2B cap. In the Department's consultative role to DHS for the H-2B program, the Department provides information to DHS on the applications it receives and the applications for which the Department grants temporary labor

certification. During peak filing season for the H-2B program, the collection of this information will assist the Department in processing its own workload and will assist DHS with the planning and timing of possible petitions it will receive under the biannual caps. Further, the Department's disclosure of this information will better inform Congress and the public about the anticipated demand for H-2B workers in relation to the statutory numerical limits.

Two commenters stated that questions of cap-exempt versus non-cap exempt filings are matters for DHS' U.S. Citizenship and Immigration Services (USCIS) and its I-129 petition collection. Further, one of the commenters stated that the connection between this question and the Department's certification is not obvious and that the use of the terminology is imprecise as the commenter stated that "cap-exempt" refers to the returning worker exemption. The second commenter also stated that if the collection is for the Department's statistical purposes then the Department should modify the request, but did not provide sufficient specificity for the modification.

The Department agrees that whether any nonimmigrant worker is cap-exempt versus non-cap exempt is the responsibility of DHS, not the Department. DHS administers a number of statutory exemptions separate and apart from returning worker authorizations. The Department will not use the collection of this information to render the definitive determination regarding H-2B cap exemptions. Rather, this collection item seeks to determine the general nature of the application filing for purposes of workload planning and public disclosure of the demand for H-2B workers under the statutory numerical limits.

B. Section B - Temporary Need Information

The proposed revisions modified the 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. 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. In response to these comments, the Department has assessed that it does not have a practical utility for the continued collection of this information; therefore, the Department declines to modify its proposal to add the collection items back into the Form ETA-9142B.

For the Statement of Temporary Need, the proposed revisions required that disclosure of the employer's temporary need narrative begin in Item B.8 of the Form ETA-9142B and that separate attachments would not be accepted. Two commenters stated that the space provided in proposed Item B.8 is now too small, and one of these commenters stated the space limitation could hinder an employer's ability to fully explain its temporary need and any changes from the employer's prior application filing. The second commenter stated that the space provided in Item B.8 may disadvantage employers who need to provide detailed statements of temporary need and noted that the new form should allow for the submission of substantive attachments. A third commenter stated that the form does not provide character limits for the space, which does not allow employers to know the amount of space they have for their responses, and stressed it is

critical that the Department provide adequate space for employers who are first-time filers and those who need to fully explain any application changes, which may result in the Department's issuance of a Notice of Deficiency. A fourth commenter asked that the Department clarify in the instructions whether supporting evidence such as payroll summaries, gross revenues, and occupancy charts can be provided in addition to the brief written statement of temporary need, as the H-2B registration is currently not in effect.

The Department wishes to clarify for the commenters that filers should begin entering the Statement of Temporary Need on Item 8 of the Form ETA-9142B itself and use an addendum, as necessary, to complete the response to this item. For electronic filings, if the employer's statement exceeds the box character limit, the filing system will automatically provide the filer with an addendum for expanded space. For mailed or paper filings, if the employer's statement exceeds the box provided, the filer should add one clearly marked and easy-to-locate addendum to complete the response to this item. The employer should not submit other supplementary attachments or documentation supporting the Statement of Temporary Need at the time of filing the H-2B application. Thus, the Department has clarified the Form ETA-9142B and General Instructions to reflect the acceptance of one addendum permitting the employer to provide a complete response to Item B.8. The Department may request evidence that the fourth commenter references, including payroll summaries, gross revenues, and occupancy charts, during the course of processing the Form ETA-9142B or audit examination, but the employer is not required to provide this information to the Department at the time of the H-2B application filing.

One commenter also recommended the modification of a statement in the instructions for the Job Title field to state that the field entry on the Form ETA-9142B for Item B.1 must be the same as the Job Title, as compared to the Standard Occupational Classification (SOC) code title, issued by the Department in the PWD. The Department agrees with the commenter. The proposed General Instructions to the Form ETA-9142B already contains a statement noting the "entry in this field must be the same as the job title issued by the Department for the employer's job opportunity on the prevailing wage determination (PWD) Form ETA-9141."

One commenter noted that a collection item requiring employers to answer "Yes" or "No" to whether the job opportunity is a full-time position does not have an equivalent in the proposed form but indicated that the information is collected in other sections of the Form ETA-9142B or its appendices. The Department agrees with the commenter in that the Form ETA-9142B already collects the hours of work each week and the *Appendix B* requires the employer to attest that the job opportunity represents a full-time position. Therefore, the Department believes the continued collection of a separate "Yes" or "No" response on the Form ETA-9142B indicating the employer's intention to offer full-time employment is duplicative.

C. 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. 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."

The Department appreciates the comments but declines to make additional modifications to its proposal. With respect to the three fields noted above, the Department removed these fields because of its assessment that they do not provide practical utility in the H-2B labor certification process, and any use of this information to profile certain employers for potential H-2B non-compliance issues would be speculative. During an audit examination or other investigation by WHD, the Department can and does request additional information verifying whether the nature of the employer's need is temporary and whether the employer has bona fide need for the number of H-2B workers requested.

Two commenters requested the Department add a question to its proposed form asking whether the employer has engaged in bankruptcy proceedings in the prior five years, and then require the employer to include the details of any such bankruptcy case. The commenters asked that the Department require employers to specify the number of H-2B workers hired under previously approved labor certifications for the past three years. One commenter asked the Department to collect information on whether any party sued the employer in the past for wage payment issues or has a current wage and hour complaint filed against it. The other commenter, meanwhile, asked the Department to collect information on whether the employer timely paid wages owed to H-2B workers and U.S. workers similarly employed in each prior year the employer received certification under the H-2B program.

The Department does not have the authority to collect the referenced bankruptcy-related information to assess an employer's solvency. With respect to requesting from employers the numbers of workers hired under approved temporary labor certifications for the previous three years, the Department maintains records of the numbers of workers approved for an employer in prior years and uses the information in assessing whether the employer's need for the number of H-2B workers on the current application is bona fide and consistent with prior filings. The primary purpose of the Form ETA-9142B is to collect the minimum amount of information related to the employer, the job opportunity for which it desires to hire H-2B workers, and other supporting documentation required by the regulations at the time of filing. The commenters' suggestion regarding collecting information on the payment of past wages is beyond the scope of this form collection proposal.

D. Section E - Attorney or Agent Information

The Department's proposal continues to allow persons to identify themselves and their businesses under Section E of the Form ETA-9142B as authorized attorneys or agents acting on behalf of employers in the filing of the H-2B forms. One commenter stated that the form does not sufficiently accommodate agents that are entities rather than "natural persons."

The Department's collection in Section E requests both the name of the person and the name of the business entity. With the application filing, the Department receives a copy of the agent's agreement with the employer, which specifies the agent authorized to work on the employer's behalf. Both where the agent is an entity and where the agent is an individual, the Department will continue to require the collection of the name of the person to contact, on behalf of the employer, in reference to the processing of a request for temporary labor certification.

One commenter requested that the Department eliminate collection Item E.21 of the Form ETA-9142B, which asks agents to provide a copy of their current Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Certificate of Registration at the time of filing, if applicable. The commenter stated it is often difficult to determine whether and when an agent needs a Certificate of Registration and, for that reason, some agents obtain registrations that are only "protective filings." In response to this comment, the Department's declines to eliminate this collection item because the H-2B regulations expressly require the agent to provide a copy of its MSPA registration, if applicable, identifying the specific farm labor contracting activities that the agent is authorized to perform under the MSPA. *See* 20 CFR 655.8(b).

E. Section F - Employment and Wage Information

1. Job Opportunity and Minimum Requirements (Subsection F.a)

a. Collection of SWA Job Order Information

Two commenters stated that it would be helpful for State Workforce Agency (SWA) grantees to use a standardized job order format for the H-2B program. One of the commenters stated the proposed job order questions on Form ETA-9142B (F.a.1-3) are redundant because the employer is already required to submit the SWA job order with its application under 20 CFR 655.15(a). In response to these comments, there is no uniform job order form available because, as the preamble to the 2015 H-2B IFR indicates, the SWA labor exchange system is a State, not Federal, system. *See Temporary Non-Agricultural Employment of H2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042, 24061 (Apr. 29, 2015). The existing cooperative Federal-State model under the Wagner-Peyser system is much too decentralized to accommodate the requirement that SWAs use a specific form. Moreover, in deference to concerns about SWA administrative burden, the Department declines to create additional forms outside of the SWA's normal job order placement function. One of the commenters also recommended SWAs accept job orders early and hold them for receipt of the Department's Notice of Acceptance. The recommendation is beyond the scope of this proposal. In terms of Items F.a.1-3, the proposed collection includes those fields to assist the Department in matching the H-2B application with the information the SWA receives.

Item F.a.3 of the Form ETA-9142B proposes to collect the date on which the employer submits the job order to the SWA for review and recruitment of U.S. workers. One commenter recommended that the Department change the wording of this collection item to indicate the "anticipated" submission date of the job order. This commenter also suggested either making the field non-mandatory or suggested the Department implement a regulatory change to require

submission of the job order prior to the filing of the Form ETA-9142B. The commenter explains that the job order may be drafted online and not released until after the ETA-9142B is filed. A second commenter asked for clarification on the meaning of the word "submitted" in Item F.a.3, which asks for the date in which the job order was "submitted."

The Department will retain the collection of Item F.a.3 and the mandatory completion requirement of this item. The regulation at 20 CFR 655.15 requires the employer to submit the job order to the SWA serving the area of intended employment at the same time it submits its H-2B application to the Department. The submission date refers to the date the employer provides the job order to the SWA, and is not necessarily the same as the date the SWA creates or posts the job order. By including the name of the SWA and the date on which the job order was submitted to the SWA, the Department is able to more efficiently review applications for compliance with regulatory requirements and request input from the SWA on the material terms and conditions of employment, as required by the procedures set forth under 20 CFR 655.16. In response to the commenter that recommended the addition of the word "anticipated," the Department declines to make the requested modification. The preamble to the Department's 2015 H-2B IFR clarifies that employers will concurrently submit to both the Department and the SWA a document that outlines the material terms and conditions of the employer's job opportunity where a copy of the official job order from the SWA's job order system is not yet available. *Interim Final Rule*, 80 Fed. Reg. 24042 at 24059. As a matter of longstanding practice, the Department expects the employer to provide an exact copy of this draft job order on the format prescribed by the SWA. The employer must indicate in Item F.a.3 the date on which this draft job order is submitted to the SWA for review.

b. Collection of Wage Information and Earnings Records Requirements

Two commenters expressed concern that hourly wage information from the PWD application will not be linked to the Form ETA-9142B, and employers are not required to express the wage rate in Item F.b.8 as hourly. The commenters cite abuses in the carnival industry stating the Department has certified multiple applications with pay rates on a weekly basis. In response to the commenters, the Department generally issues prevailing wages as hourly rates of pay, but the regulation does not require employers to offer an hourly rate of pay, only that the offered wage equal or exceed the prevailing wage obtained from the National Prevailing Wage Center (NPWC), or the Federal, State or local minimum wage, whichever is highest. The Department evaluates the employer's offered wage against the prevailing wage, converting to an hourly wage rate when needed, thereby ensuring the wage rate offered exceeds the prevailing wage rate. Therefore, the Department declines to make the requested modification as such a clarification is beyond the scope of its existing regulatory authority.

One of the commenters recommended adoption of FLSA recordkeeping requirements for all H-2B employers, identifying the carnival industry as the most significant industry asserting exemptions from FLSA recordkeeping standards. The commenter notes that the carnival industry, which employs more than 5.3 percent of H-2B workers certified by the Department, should be required to preserve basic employment and earnings records for its H-2B workers. The Department's regulation already imposes recordkeeping standards on all H-2B employers similar to FLSA recordkeeping requirements. At a minimum, H-2B employers must retain

records of workers' earnings, hours offered and worked, location of work performed, reimbursement of transportation and subsistence costs incurred by the worker, along with evidence of its recruitment efforts. H-2B employers are required to submit records when selected for audit and retain all records for three years from the date of certification.

c. Collection of Work Experience Information

One commenter noted that the Occupational Network (O*NET) established that a high percentage of H-2B positions were Job Zone One positions requiring workers to possess little prior training or experience. The commenter further noted that H-2B employers continue to impose unnecessary experience requirements for these entry-level jobs, which effectively precludes entry-level U.S. workers from these job opportunities. The commenter recommended that the Department require employers to explain why the experience is required for the job.

The Department understands the commenter's concerns, but declines to make additional modifications to the proposed form revisions. The regulations require that each job qualification and requirement be listed in the job order and be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The Department has significant experience in conducting this review and in making determinations on what is normal for a particular job opportunity based on a wide range of sources. The Department will continue to examine experience requirements in relation to available objective sources of such information including, but not limited to, O*NET, other job classification materials, and input from SWA's on experience requirements in a particular locality. In response to the commenter, O*NET defines Job Zone One occupations as those that normally require little or no preparation, which may range from a few days to a few months of training. However, consistent with the requirements set forth under 20 CFR 655.20(e), the Department has the authority to require the employer to submit documentation to substantiate the appropriateness of any job qualification or requirement specified in the job opportunity.

d. Collection of Job Duties Information

The Department's proposal continues to collect the job duties the H-2B workers will perform on the Form ETA-9142B, but clarifies that all job duties must be disclosed on the form and must be the same as the job duties from the PWD, which ensures the appropriate wage for the temporary labor certification. Information related to the job duties is required to be entered in Item F.a.4 of the Form ETA-9142B without separate attachments. Several commenters discussed the size of the box for job duties and asserted that the space provided on the form is too small for some employers to fully describe the duties to be performed. The commenters stated that the requirement is exacting and incongruous with the limited amount of form space provided and, further, stated that the Department did not provide a reason for the space limitation. One of the commenters requested that the Department permit an attachment if the description exceeds the character limit in the form. Several commenters stated that the description of job duties is important for enforcement purposes by the WHD, and the field entry does not permit employers to list everything, whereas, enforcement creates an incentive for employers to list every job duty and requirement to which employees will or might be subject. The commenters noted that, as

proposed by the Department, the field greatly limits an employer's ability to describe fully the job duties to be performed under the H-2B application. One of the commenters stated that the space limitation changes the H-2B program regulations and constitutes an unlawful restriction of employers' rights.

The Department wishes to clarify for the commenters that filers should begin entering the job duties on the form itself and use an addendum, as necessary, to complete the response to this item. For electronic filings, if the employer's job duties exceeds the box character limit, the filing system will automatically provide the filer with an addendum for expanded space. For mailed or paper filings, if the employer's job duties exceeds the box provided, the filer should add one clearly marked and easy-to-locate addendum to complete the response to this item. Thus, the Department has clarified the Form ETA-9142B and General Instructions to reflect the acceptance of one addendum permitting the employer to provide a complete response to Item F.a.4.

e. Collection of Hours and Work Schedule for the Job Opportunity

Regarding the proposed collection of hours of work per week in Item F.a.5 of the Form ETA-9142B, two commenters stated the Department should clarify in the form or instructions that collection of this information may be estimates so the numbers do not become restrictive. The commenters further stated there are some to many instances in which the job opportunity is exempt from overtime hours and pay. In response to comments on the collection of work hours, an employer seeking temporary labor certification must describe the job opportunity with sufficient information to fully apprise U.S. workers of the services or labor to be performed, including the hours and days of work each week. The collection of this information is essential to ensure the employer's job opportunity is based on full-time employment, which must total 35 or more hours of work per week. *See* 20 CFR 655.5.

Based on the Department's experience processing H-2B applications, employers already possess the details of the full-time work schedule of the job opportunity for which the employer is required to (1) recruit for U.S. workers, (2) pay the offered wage for hours worked, and (3) provide the job offer details to workers employed under the approved temporary labor certification. Therefore, in accordance with longstanding practice collecting this information, employers must continue to disclose the basic hours of work per week for the job opportunity, and the Department declines the commenters' suggestion to propose further modifications to either the form or General Instructions.

With respect to the commenters' statement regarding the disclosure of overtime hours, the Department agrees that this collection item can be difficult for employers to disclose due to complex statutory exemption provisions as well as the uncertain nature of business operations from week-to-week to guarantee a minimum number of overtime hours per week. Further, the Department acknowledges that the regulatory requirements for advertising the job opportunity requires disclosure of the work hours and days, and a statement that overtime will be available to workers, as applicable, and not disclosure of the overtime hours. *See* 20 CFR 655.18(b) and 655.41(b). Therefore, separately listing basic and overtime hours on the Form ETA-9142B is not necessary, and the Department has modified its proposed collection to eliminate this item.

Regarding the proposed collection of the hourly work schedule for the job opportunity in Item F.a.6 of the Form ETA-9142B**,** one commenter stated that it would be helpful for the fields to indicate that the hourly work schedule is inclusive of break and lunch periods. This commenter also suggested that the Department modify the form to permit employers to enter "A.M." or "P.M." in either field to account for different kinds of shift work. In response to these comments, the employer's entry of the hourly work schedule should reflect the normal start and end times of work each workday. Within the stated hourly work schedule, the employer is expected to comply with all applicable Federal and State laws and regulations governing breaks and lunch periods for workers, such that the Department does not believe such a clarification to the General Instructions is required. However, the Department agrees with the commenter's suggestion to provide greater flexibility in the disclosure of different kinds of shift work for employers' job opportunities, and has proposed modifications to the Form ETA-9142B, Item F.a.6, permitting an employer to select A.M. or P.M. when entering the hourly start and end times of work.

A second commenter stated that the proposed form does not specify the expected number of days of work per week and does not collect a daily work schedule. The commenter asserted that employers have incentive to understate the hours of work to avoid payment of the three-quarter guarantee, as required by 20 CFR 655.20(f). The commenter recommended the Department adopt a collection approach that is similar to the Form ETA-790, *Agricultural and Food Processing Clearance Order*, where agricultural employers seeking temporary labor certification in the H-2A program disclose the anticipated hours of work for each day per week. The commenter also requested the Department modify the General Instructions to specify that a worker cannot be penalized for refusing to work more hours in a day or week than the number specified on the Form ETA-9142B.

In response to these comments, the Department agrees that adopting the collection of work hours and days in a manner that is similar to what agricultural employers disclose in the Form ETA-790 is appropriate and better aligns with regulatory requirements for the employer to apprise U.S. workers of the expected hours and days of work each week. *See* 20 CFR 655.18(b) and 655.41(b). Therefore, the Department has proposed modifications to both the Form ETA-9142B and General Instructions to collect the anticipated hours of work each day of the workweek for the employer's job opportunity. Since some employers participate in both the H-2B and H-2A temporary labor certification programs, these modifications will achieve greater consistency in data collection and promote more uniform understanding of program requirements across temporary labor certification programs.

However, the Department does not agree with the commenter's suggestion to clarify the General Instructions to specify that a worker cannot be penalized for refusing to work more hours in a day or week than the number specified on the Form ETA-9142B. By reading and signing the Form ETA-9142B, *Appendix B*, the employer assures the Department, among other things, that it has not and will not (and has not and will not cause another person to) intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any person who, with respect to 8 U.S.C. 1184(c), 20 CFR 655, Subpart A, 29 CFR 503, or any other Department regulation promulgated thereunder, has filed a complaint; instituted or caused to be instituted any

proceeding; testified or is about to testify; consulted with a worker's center, community organization, labor union, legal assistance program, or attorney; or exercised or asserted on behalf of himself/herself or others any right or protection, as required by 20 CFR 655.20(n). The Department believes the Appendix B, rather than the General Instructions to the Form ETA-9142B, is the most appropriate place for employers to read, understand, and affirm assurance to this important protection for workers employed under the temporary labor certification.

f. Collection of Education Information

Regarding the proposed collection of education in Item F.a.7 of the Form ETA-9142B, one commenter recommended the addition of two items to collect detailed information about the education requirements for the job opportunity. First, the commenter suggested the Department include a new item to collect the "major(s) and/or field(s) of study required," which would permit the entry of multiple related majors and/or fields. Since Item F.a.7 is a required field, this new item would also appear to be a required entry on any positive education requirement. Second, the commenter suggested a new item to collect: if an employer selects "Other degree," the employer must specify the "other" diploma or degree required for the job opportunity. The Department appreciates the comments, but declines to make the suggested modifications to the Form ETA-9142B. In its proposal, the Department has made every effort to reduce employer-reporting burden and collect the minimum information required to meet its statutory and regulatory obligations. In describing the job opportunity for which the employer is seeking temporary labor certification, the Department maintains that collecting the minimum level of education (e.g., High School/GED, Associate's Degree, etc.) is sufficient for apprising U.S. workers of the minimum educational requirements and qualifications of the job opportunity.

g. Collection of Special Requirements Information

Two commenters stated that the form asks the employer to list special requirements and stated that the instructions can be read as "forbid[ing]" or excluding any skills and/or requirements except for the generic "special requirements issued by the Department for the employer's job opportunity." The commenters noted that the Department should be wary of adding any requirements that slow the prevailing wage process, given the timelines and deadlines for filing. Further, the commenters stated that it will be difficult for an employer to challenge an erroneous decision by the Department on whether a qualification is "normal and accepted" given the limitations on review. The commenters stated that if the Department intends to "change this process," it should engage in rulemaking. One commenter also asked that the Department allow employers to attach additional pages as necessary for completion of this field.

The Department's proposal continues the longstanding collection of any special requirements for the employer's job opportunity in Item F.a.10 of the proposed Form ETA-9142B. In response to the comments, the disclosure of this information on the PWD application is sufficiently distinct from the Form ETA-9142B, because the NPWC uses the information for purposes of ensuring occupational classification assigned to the employer's job opportunity, and corresponding prevailing wage determination, is accurate. However, the determination as to whether the employer's requirements and qualifications for the job opportunity, such as any special skills, licenses, certifications, or field(s) of training, are normal and accepted is a separate review

performed by the Department as a condition of granting temporary labor certification. In terms of an employer's ability to challenge a denial based on the Department's assessment of qualifications that are normal and accepted for the job opportunity, the Department reminds the commenter that the H-2B program includes various opportunities for administrative review, including the opportunity to appeal a denial of the labor certification. In response to the comment that the Department should avoid impacts to the pace of its prevailing wage process, the comment is beyond the scope of this H-2B form proposal. In terms of the section space, the form and the instructions for the proposal do not allow for use of additional attachments to complete this section.

h. Collection of Supervisory Status Information

One commenter objected to the removal of questions regarding the supervisory status of the job opportunity, citing the potential misclassification of workers. The Department agrees with the commenter and has proposed modifications to collect whether the job opportunity is supervisory and, if so, the number of employees the worker will be expected to supervise.

2. Place of Employment and Wage Information (Section F.b)

Two commenters stated it is unclear why Item F.b.8 requests the "Basic Wage Rate Paid to Nonimmigrant Workers" rather than to all workers. In response to these comments, the Department has modified the wording of this collection item by removing the words "to Nonimmigrant Workers" from the form and the corresponding General Instructions to clarify that the amount entered in this field is the basic rate of pay the employer will advertise and pay to H-2B and U.S. workers employed under the job opportunity and approved temporary labor certification.

This same commenter further stated that, with respect to the "Overtime Wage Rate Paid" field in Item F.b.8a, it is impossible to calculate the overtime premium without knowing the regular rate. The commenter asked if this field was for the disclosure of hours above 40 hours in a week. The Department has retained this field without modification, as the corresponding instructions to this field clarify that this field requests the listing of any overtime rate of pay (rather than overtime hours offered), and that listing of an overtime rate is only necessary if such a rate is offered.

Regarding the collection of other material terms and conditions of employment, one commenter expressed concern that the required disclosures in Item F.b.9a covering additional conditions about the wage rate to be paid is too small and narrowly focused. The commenter requested additional space and/or a separate section for employers to enter "non-mandatory" benefits such as bonuses, assistance in securing housing, transportation, free uniforms, advances in pay, etc. to more fully apprise workers of the job opportunity. Two other commenters asked for clarification on whether details regarding exempt and non-exempt status may be provided in Item F.b.9a. The Department agrees with the first commenter and has modified Section F of the Form ETA-9142B to include a new subsection d entitled "Other Material Terms and Conditions of the Job Offer." This new subsection contains six (6) conditional entries highlighting the other important material terms and conditions of the job offer that must be advertised to U.S. workers, as required by 20 CFR 655.41, and offers a space to provide information not already disclosed on the Form ETA-

9142B. These new collection items include the following: provision of daily transportation; availability of overtime; availability of on-the-job training; employer-provided tools, supplies, and equipment; provision of board, lodging, or other facilities; and deductions from the worker's pay. The Department has proposed modifications to the Form ETA-9142B and General Instructions to provide the public with an opportunity to comment on these changes in response to the first commenter and the clarification sought by two other commenters.

Regarding the collection of worksite information, the Department's proposal provided an entry for "Worksite Address 1" for the street address and collects "Worksite Address 2" for the continuation of the street address for the same worksite including the apartment, suite, and floor information. One commenter suggested that the Department remove the numbers after the titles to, instead, indicate "Worksite Address" in both lines, to avoid confusion with different worksite locations. The Department agrees with the commenter's recommendation and has made this change to the form.

The Department's proposal also included a requirement for the employer to disclose a single or initial worksite on the Form ETA-9142B, and then use the *Appendix A* to disclose other locations where work will be performed if different than the one disclosed on the form. The General Instructions for completing Item F.b.10 included the following statement:

> Important Note: Where multiple worksites are involved, the employer must complete *Appendix A* of the Form ETA-9142B by identifying the physical location(s) where the services or labor is expected to be performed. The employer must indicate for each worksite (a) the street address; (b) city; (c) state; (d) county; and (e) Metropolitan Statistical Area (MSA) or the area of intended employment. The worksites disclosed in this section of the application, including the worksites disclosed in *Appendix A*, must be covered by a valid PWD issued by the Department on the Form ETA-9141."

One commenter suggested a minor change to indicate "the worksite disclosed" singular, instead of plural, to more accurately reflect that the Form ETA-9142B collects a single or initial worksite location and the *Appendix A* is used to disclose multiple worksites. The Department agrees with the commenter's suggestion and has proposed the requisite modification to the General Instructions. Further, to alleviate any confusion regarding the collection of worksite locations for the *Appendix A*, the Department has also removed corresponding references to the term "physical" and "the street address" in the General Instructions, since that level of geographic detail is not required to complete the *Appendix A*.

The same commenter recommended the Department add instructions to provide guidance that when it is not possible for the employer to identify the worksites at the time it is completing the Form ETA-9142B, the employer must ensure the worksites are located in an area of intended employment covered by a PWD. The commenter further requested the Department clarify that the MSA Name collected in Item F.b.7 is from the www.flcdatacenter.com. In response to the comments, the Department expects an employer to disclose, to the best of its knowledge at the time of filing the H-2B application, the worksites and geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and the locations where applicants likely have to reside to perform the services or labor. By signing the *Appendix B*,

employers are already assuring the Department that they will not place any H-2B workers employed pursuant to this application outside the area of intended employment or in a job classification not listed on the approved application unless the employer has obtained a new approved Form ETA-9142B. Therefore, the Department believes the requisite assurance language already exists to address the commenter's suggestion. Regarding the commenter's suggestion to clarify the MSA Name, the Department has modified the Form ETA-9142B and General Instructions to clarify that the MSA Name or OES Area Title must be entered into Item F.b.7. However, the Department declines to specify the website location of www.flcdatacenter.com for obtaining the MSA Name or OES Area Title, because this information could be moved to another website in the future or obtained directly from the Department's Bureau of Labor Statistics website.

The Department's proposal also included Items F.b.10(a)-(b), which provided employers with the flexibility to enter up to three PWD case numbers to cover all worksites disclosed on the Form ETA-9142B. One commenter agreed with this proposed change stating that the proposed Form ETA-9142B and *Appendix A* connect the wage and place of employment information from the associated PWD(s). Two commenters indicated that the purpose of these collection items was unclear. The commenters expressed the view that if an employer asks for and receives two PWDs, the latter should control. The commenters explained that employers may need to obtain PWDs to "pare down" or substantively change the content of their jobs, or request a PWD for a new job. The commenters stated that, if the Department retains the fields, employers need direction about when they must disclose the information for the PWD case number fields. A third commenter stated that the form requires a PWD case number for each worksite and seems to be missing a section for a corresponding county entry for each worksite. Further, a fourth commenter recommended that the instructions not state that "N/A" should be noted in these fields as they are optional and can be left blank. Conversely, a fifth commenter stated that sometimes multiple PWDs were required in filing the Form ETA-9142B because of limitations in the number of worksites that can be disclosed on the PWD application. This commenter requested a form modification to permit the entry of additional PWD case numbers.

In response to these comments, the Department's proposal provides employers, especially those in the reforestation and mobile entertainment industries, with the flexibility to enter up to three PWD case numbers to cover all the worksite locations disclosed on the Form ETA-9142B. This proposed collection is predicated on the Department's experience receiving multiple PWDs in connection with the submission of an employer's Form ETA-9142B. Based on a review of complex work itineraries covering area(s) of intended employment where multiple PWDs are required, the Department believes the inclusion of three PWD case numbers is sufficient and declines to propose the collection of a fourth PWD case number. A valid PWD must cover the geographic area(s) of intended employment in which work will be performed under the job opportunity, and the Department's proposed collection already provides for the county and MSA Name/OES Area Title that would be associated with the PWD. To reduce redundant entries of the same PWD case numbers covering multiple worksite locations, the Department has eliminated the collection of a PWD case number for each worksite location on the *Appendix A*. Further, the Department understands that employers can obtain multiple PWDs from the NPWC, but ultimately the employer must choose, at the time of filing, the valid PWDs it desires to use for purposes of filing the Form ETA-9142B; the Department cannot make that selection for the

employer. With respect to the commenter's suggestion to not permit "N/A" entries where multiple PWDs unnecessary, the Department declines to make the suggested change to the proposed form instructions. .

F. Section G - Other Supporting Documentation

One commenter stated that the wording of Item G.2 of the Form ETA-9142B does not clearly specify that a job contractor filing as a joint employer with its employer-client is required to respond to this collection item. The Department appreciates the comment but does not believe this clarification is necessary. Based on the Department's experience, H-2B employers subject to the MSPA understand the requirements of that Act and, if applicable, consistently provide the Department with a copy of their current Certificate of Registration identifying the farm labor contracting activities they are authorized to perform. A job contractor is a person, association, firm, or a corporation meeting the definition of an employer under 20 CFR 655.5, and is the employer identified in (1) Section C – Employer Information and (2) Section D – Employer Point of Contact Information of the Form ETA-9142B. As proposed, the language contained in Item G.2 is accurate and the Department declines to make any modifications to this required collection item.

G. Footer for the Form ETA-9142B

One commenter asked if the Determination Date is the "adjudication date" or the date when the "employer, attorney/agent" is notified of the Department's decision on the application. In response to the commenter's question, the Determination Date on the footer of the Form ETA-9142B and the appendices (except *Appendix B*) is the date the Department issues a final determination to grant or deny temporary labor certification.

VI. The Department's Proposed Changes to Form ETA-9142B, *Appendix A*

A. Comments Related to the Department's Authority to Collect Worksite Information

The Department received several comments with respect to the statutory or regulatory authority for proposing the collection of worksite information on the *Appendix A*. One commenter objected to the Department's proposed collection stating the requirement to disclose all intended worksites is not authorized by statute or regulation and conflicts with a Frequently Asked Question (FAQ) published by the Department related to "episodic employment" in the H-2B program. Three commenters questioned the Department's authority to mandate completion of the *Appendix A* without public notice and comment rulemaking. Two of these three commenters asserted that the proposed collection takes the definition of "worksite," which is not found in the regulation, and requires employers to submit information that creates "a binding norm involving serious social costs that can only be adopted through notice and comment rulemaking." The commenters added that it "is difficult to identify the Department's legitimate regulatory interest in obtaining information at this level of detail at the certification stage" given that "[t]he terms and conditions of employment are set at the level of the area of intended employment or more broadly at the metropolitan statistical area level." , A commenter stated that the *Appendix A* is not necessary to protect American jobs and "restricts the abilities of the employer and U.S.

workers in both H-2B and in non-H-2B jobs to earn what they can based on their labors." This commenter further asserted that the collection of worksite information on the *Appendix A* appeared to be "more geared to allowing government officials to locate the worksites for surprise inspections than to protecting the jobs [of] U.S. workers and their working conditions." A commenter also stated that the Department could collect the information requested in the proposed appendices by adding fields to the Form ETA-9142B.

In response to the comments received, the Department maintains that the proposed *Appendix A* does not impose any new regulatory requirements, but rather provides a new standardized format for collecting worksite information the Department has historically received from employers in a variety of paper-based attachments to the Form ETA-9142B. The Department's regulations define an area of intended employment as the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the employer is seeking temporary labor certification. *See* 20 CFR 655.5. Except where otherwise permitted by the regulation, employers must file one Form ETA-9142B for worksite(s) within one area of intended employment for each job opportunity. *See* 20 CFR 655.15(f). These regulatory requirements establish the foundation for ensuring employers advertise their job opportunities to U.S. workers, and that the advertisements disclose the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor. *See* 20 CFR 655.18(b)(4); 655.41(b)(2). Thus, the Department collects this information under its regulatory authority for purposes of reviewing and verifying regulatory compliance with the requirements for application filing, conducting positive recruitment, and offering wages at least equal to the prevailing wage in the occupation and area of intended employment.

The Department disagrees with the commenter's assertion that the proposed collection of information on the *Appendix A* conflicts with a previously published FAQ on worksites and area of intended employment in the H-2B program. We believe the commenter is referring to the 2015 H-2B IFR FAQ Round 17 (October 4, 2016), which provided an authoritative interpretation based on the Department's longstanding and consistently held approach that a "worksite" is any location where the worker performs one or more duties of the job opportunity. The current OMB-approved collection of worksite information, as well as the Department's proposed *Appendix A*, are consistent with this FAQ and employers are expected to disclose the geographic place(s) of employment with as much specificity as possible on the Form ETA-9142B. The Department understands that the level of geographic specificity covering the place(s) of employment is highly dependent on the circumstances of the employer's job opportunity. However, at a minimum, the *Appendix A* requests an affirmative response regarding the city, state, county, and MSA that will cover all the place(s) of employment for the employer's job opportunity. Employers, especially employers in the reforestation and mobile entertainment industries, commonly provide this level of information with the current Form ETA-9142B. Finally, the Department has a legitimate interest in knowing where work will be performed in order to ensure an adequate test of the labor market is conducted and there is no adverse effect on the wages and working conditions of U.S. workers similarly employed. In terms of adding the *Appendix A* collection as fields to the Form ETA-9142B, the *Appendix A* proposal replaces the information the Department currently receives as attachments to the Form ETA-9142B. The Department declines to add the *Appendix A* information as additional fields to the Form ETA-9142B.

B. Comments Related to Similar Worksite Information Collected on the Form ETA-9141

Two commenters stated that the Department's proposed *Appendix A* is unnecessarily duplicative because it proposes to collect information already provided by employers during the prevailing wage application process on the Form ETA-9141. One of the commenters suggested the Department collect worksite information only on the PWD application. A third commenter added that the proposed *Appendix A* is inconsistent with the general instructions for the PWD application, which does not require disclosure of the physical addresses for each worksite location. The Department appreciates the comments but declines to eliminate the *Appendix A*. The worksite information collected on the PWD application serves the unique purpose of determining a prevailing wage covering a broader geographic area of intended employment. Because obtaining a prevailing wage from the Department occurs well in advance of filing the Form ETA-9142B, employers often include worksite locations on the PWD application that will not be disclosed later at the time of filing the H-2B application for legitimate business reasons. Further, because worksite information disclosed on the Form ETA-9142B is used to verify compliance with regulatory requirements related to application filing, conducting positive recruitment, and the offered wage rates, employers must disclose more specific details about the worksite locations using the *Appendix A* than what is minimally required for the PWD application. Therefore, the collection of worksite information on the Department's proposed *Appendix A* is sufficiently distinct from the collection of worksite information on the PWD application.

One of the commenters also recommended that the Department seek to reduce the burden on employers to complete the *Appendix A* by making available the worksite information already entered into the electronic filing system from the PWD application, so the employer can select worksites with corresponding PWDs to include in the Form ETA-9142B. The Department agrees with the commenter's suggestion and will explore modifications to its electronic filing system that can help employers select worksites from the PWD containing a valid prevailing wage for reuse on the Form ETA-9142B and the *Appendix A*, as applicable. The Department believes the commenter's suggestion can be implemented for employers who file electronically, especially in conjunction with the Department's proposal to include the PWD case number(s) on the Form ETA-9142B. However, employers choosing to file by mail will need to enter the worksite information manually on the Form ETA-9142B and the *Appendix A*, as applicable.

C. General Comments Related to the Collection of Worksite Information

The Department received a number of comments expressing concerns that completion of the proposed *Appendix A* would place an unnecessary burden on employers, and stating the purported use and completion of this new form collection is not clear in the General Instructions. One commenter expressed a general concern that requiring employers to disclose the physical addresses of each additional worksite on the *Appendix A* could have "significant, negative and unanticipated consequences" on large groups of H-2B employers "with transitory/changing worksites." This commenter also asked if employers will be precluded from participating in the H-2B program if they do not list the specific address of each worksite on the *Appendix A*.

Eight other commenters expressed similar concerns that some employers, especially those in the landscaping industry, cannot practicably disclose all of their daily worksites on the *Appendix A* at the time of filing the H-2B application (e.g., due to an inability to secure contracts), and imposes a significant burden on such employers. Six of these commenters asserted that completion of the *Appendix A* would pose an impossible burden to employers in the forestry landscaping industries, because many of them would not know their final customer lists at the time of filing and it would be impossible to anticipate months ahead of time every place where services might be performed. One of these commenters stated that the worksites disclosed on the *Appendix A* would become outdated during the period of employment as workers perform work at worksites that are uncontemplated at the time of filing. Two other commenters added that if the information is required to be updated after filing the Form ETA-9142B, the duty to amend the filing would pose an overwhelming burden requiring employers to potentially report hundreds of locations per week.

Another one of these commenters stated that there is no benefit in evaluating more detailed geographic information within a county area disclosed on the *Appendix A* and that such information is already disclosed and reviewed by the Department on the PWD application. More specifically, this commenter stated that the collection of city and county information for each worksite is both irrelevant, since any place within a MSA is deemed to be within normal commuting distance of the place of employment, and contrary to the Department's goal of increasing administrative efficiency because the proposed collection would require the Department to review large volumes of new application pages. This commenter suggested that the Department designate the "City" field as optional on the *Appendix A*. Another commenter made a similar suggestion that the Department, at a minimum, not make the worksite city a mandatory field, and recommended the *Appendix A* be redesigned "to accept a county in lieu of a city and vice-versa." This commenter also suggested that the form and instructions clarify whether the employer can employ workers at a worksite not listed in the *Appendix A* where the worksite is within the area of intended employment. Finally, another commenter recommended the Department add a text field to allow employers to discuss additional worksites that have not been identified at the time of filing with language such as, "[a]dditional worksites will be in the area of intended employment pursuant to 20 CFR 655.5 and pursuant to the locations identified in the corresponding Form ETA-9141."

In response to commenters' concerns and suggestions, the Department's longstanding requirement is that an employer choosing to use the H-2B program must disclose, to the best of its knowledge at the time of filing the H-2B application, the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor. The Department recognizes that disclosure of worksite information on the *Appendix A* varies based on each employer's job opportunity, but this information represents an essential element for verifying compliance with regulatory requirements and demonstrating that the employer has bona fide need for workers to perform the services or labor described in the job opportunity. The regulation permits employers to employ workers at worksites within one area of intended employment, provided the workers will perform the same services or labor under the same terms and conditions, in the same occupation, during the same period of employment.

The Department also reminds the commenters that the proposed *Appendix A* is not intended to require an employer to list the physical addresses of each additional worksite. Consistent with the Department's longstanding practice of collecting information from employers with multiple worksites, the proposed *Appendix A* requires the employer to identify the city, state, county, and MSA Name/OES Area Title covering the worksites in the area of intended employment. Based on the Department's experience administering the H-2B program, employers have little difficulty providing this level of geographic information at the time of filing the Form ETA-9142B. For work that involves the disclosure of more complex itineraries covering multiple areas of intended employment, such as those in the reforestation and mobile entertainment industries, these employers consistently provide the Department with work itineraries as attachments that include the same level of geographic information as the Department is proposing on the *Appendix A.* If an employer cannot provide at least this geographic information covering all the physical worksites where work will be performed at the time of filing, the employer may have difficulty establishing that it has bona fide work to be performed and that the conditions of employment (e.g., offered wage) will not adversely affect U.S. workers similarly employed.

Although the Department declines to accept the commenters' suggestion to designate the city and county fields as optional, the Department understands the commenters' concerns and agrees that some employers, especially those in the landscaping industry delivering services to hundreds of client sites across numerous cities and towns within a county area, may find it impractical to enter only one city on the *Appendix A.* Therefore, the Department will propose a minor modification to the General Instructions to clarify that an entry of "Multiple Cities and Towns" on the *Appendix A* in the collection item for "City" is permissible to assist employers in those circumstances. However, for employers who know, at the time of filing, that work will be performed within a geographic area surrounding a specific city within a county area, the Department will continue to expect employers to disclose the name of that city on the *Appendix A.* At a minimum, the Department also expects employers to continue identifying each state and county within an MSA and/or OES Area Title on the *Appendix A* covering the job opportunity.

Further, the Department agrees with one of the commenter's suggestions and has proposed a new collection item on the *Appendix A* called "Additional Place of Employment Information," which will provide employers with a limited open text field to describe the worksite location based on the unique circumstances of their job opportunities. And finally, as noted above in Section V, Subsection E.2, the Department will remove an errant reference to "physical locations" in its Form ETA-9142B, General Instructions, for the *Appendix A* to alleviate any confusion regarding the collection of street address information.

D. Comments Related to Collection of Duration of Work and Total Workers Needed

One commenter expressed concern about the requirement on the *Appendix A* to enter the same number of workers and duration of work (i.e., begin and end dates) each time a worksite entry is disclosed. For employers seeking temporary labor certification for work that needs to be performed within the same area of intended employment, the commenter recommended that the "Total Worker" (Item 6), "Begin Date" (Item 7), and "End Date" (Item 8) fields be eliminated from the *Appendix A* to reduce data entry burden for these employers. The commenter reasoned

that these entries will be exactly the same as what was previously entered by employers in Items B.4, B.5, and B.6 of the Form ETA-9142B.

The Department understands the commenter's concerns and proposes to reorganize and clarify the collection requirements for the *Appendix A* to minimize redundant data collection from employers. Specifically, the Department has reorganized the collection of this information into a distinct section on the *Appendix A* entitled "Additional Work Itinerary Information." The information collected under this section will be conditional where the employer's work itinerary necessitates disclosure of a different number of workers and duration of employment for the additional places of employment disclosed on the *Appendix A*. Although these fields will predominantly be utilized for employers with more complex work itineraries covering multiple areas of intended employment, such as those in the reforestation and mobile entertainment industries, any employer can use these fields to fully disclose how many workers may be needed and when in each place of employment. However, employers seeking temporary labor certification where the same number of workers will be needed to perform work at multiple places of employment within the same area of intended employment during the same period of employment will not be required to repeat the same entries on the *Appendix A* as the employer discloses in Items B.4, B.5, and B.6 of the Form ETA-9142B.

To help employers understand these proposed modifications, the Department provides below a couple of examples, for illustrative purposes only, of how the *Appendix A* can be completed. For example, assume a Virginia employer is seeking temporary labor certification for 50 H-2B workers to perform landscaping work starting on April 1, 2019 through October 31, 2019. The employer enters the 50 workers needed and the beginning and end dates into Section B – Temporary Need Information of the Form ETA-9142B. The employer needs the workers to perform landscaping services during the same period of employment at hundreds of client worksites located in the Washington-Arlington-Alexandria area; a large MSA that covers more than a dozen different counties. Based on its unique business operations, the employer decides to assign 25 workers to perform work covering the southern part of the MSA in the Culpepper, Stafford, and Fredericksburg areas, and the other 25 workers to perform work in the northwestern part of the MSA in the Leesburg, Purcellville, and Ashburn areas. Each of these work areas within the MSA have centralized "pick-up points" where the crews meet every morning to obtain the physical worksite where landscaping work will be performed. In this example, the employer would complete the *Appendix A* as shown below:

City *	State *	County *	MSA Name/OES Area Title *	Additional Place of Employment Information §	Additional Work Itinerary Information §						
					Crew	Total Workers	Begin Date	End Date	Basic Wage Rate From:	Basic Wage Rate To:	Per
Multiple Cities and Towns	VA	Fredericksburg City	Washington-Arlington-Alexandria MSA	Various client worksites. Centralized pick-up point in Stafford, VA.	1	25	n/a	n/a	n/a	n/a	n/a
Multiple Cities and Towns	VA	Stafford	Washington-Arlington-Alexandria MSA	Various client worksites. Centralized pick-up point in Stafford, VA.	1	25	n/a	n/a	n/a	n/a	n/a
Multiple Cities and Towns	VA	Culpepper	Washington-Arlington-Alexandria MSA	Various client worksites. Centralized pick-up point in Stafford, VA.	1	25	n/a	n/a	n/a	n/a	n/a
Multiple Cities and Towns	VA	Loudon	Washington-Arlington-Alexandria MSA	Various client worksites. Centralized pick-up point in Leesburg, VA.	2	25	n/a	n/a	n/a	n/a	n/a
Multiple Cities and Towns	VA	Fairfax	Washington-Arlington-Alexandria MSA	Various client worksites. Centralized pick-up point in Leesburg, VA.	2	25	n/a	n/a	n/a	n/a	n/a

In another example, assume an Alaska employer is seeking temporary labor certification for 500 H-2B workers to perform seafood processing work starting on April 1, 2019 through October 1, 2019. The employer enters the 500 workers needed and the beginning and end dates into Section B – Temporary Need Information of the Form ETA-9142B. The employer needs the workers to perform seafood processing services in two distinct plants; one located in Sitka and the other in Bristol Bay. The employer enters the location of the Sitka plant into Section F.b of the Form ETA-9142B. Based on the employer's business operations, the Sitka processing plant needs 25 workers for the entire period of employment. However, the employer's Bristol Bay processing plant only needs 25 workers to start employment on April 1, but will need to employ the other 450 workers starting on June 1, to handle the salmon processing season through October 1, 2019. Because only seafood employers are permitted to stagger the entry of their H-2B workers on a single H-2B application, as set forth in 20 CFR 655.15(f), this employer would be permitted to complete the *Appendix A* as shown below:

1. City *	2. State *	3. County *	4. MSA Name/OES Area Title *	5. Additional Place of Employment Information §	6. Additional Work Itinerary Information §						
					Crew ID	Total Workers	Begin Date	End Date	Basic Wage Rate From:	Basic Wage Rate To:	Per
Sitka	AK	Sitka	Southeast Alaska Nonmetropolitan	Plant located on the west coast of Baranof Island	1	25	04/01/19	10/01/19	n/a	n/a	n/a
Naknek	AK	Bristol Bay	Balance of Alaska Nonmetropolitan Area	Plant located on Peninsula Highway in Naknek, AK 99633	2	25	04/01/19	10/01/19	n/a	n/a	n/a
Naknek	AK	Bristol Bay	Balance of Alaska Nonmetropolitan Area	Same as above	3	450	06/01/19	10/01/19	n/a	n/a	n/a

E. Comments Related to the Collection of Wage Information for Each Worksite Location

Regarding the collection of wage information on the proposed *Appendix A*, one commenter expressed concern that the requirement to disclose wage information for each place of employment will be burdensome because it is not a common practice for some H-2B employers, such as those in the landscaping industry, to offer varying wages based on multiple worksites contained within the same area of intended employment. Another commenter recommended that the Department eliminate the "From" and "To" fields under the "Basic Rate of Pay" (Item 9) and "Overtime Rate of Pay" (Item 9a), because employers operating in the same area of intended employment will offer the same minimum rate of pay as what was previously entered by employer in Items F.b.8 and F.b.8a of the Form ETA-9142B.

The Department appreciates the comment but is retaining, with modification, the proposal to provide employers with the flexibility to disclose additional wage information on the *Appendix A.* The collection of wage information permits the Department to compare the offered wages to the applicable prevailing wage rates covering each place of employment to ensure there is no adverse effect on the wages of U.S. workers similarly employed. Although some employers will offer the same wage for all places of employment located within the same MSA, the Department reminds the commenter that a single area of intended employment can involve multiple MSAs and multiple prevailing wage rates. In these circumstances, some employers need the flexibility of disclosing to the Department (1) a single wage offering to pay the highest of all the prevailing wage rates, or (2) multiple wages offering to pay at least the prevailing wage, in each MSA.

The Department believes the proposed reorganization and clarification of the collection requirements for the *Appendix A* will address the commenter's concern regarding the burden of disclosing wage information for each place of employment. Specifically, the collection of wage information for each additional place of employment disclosed on the *Appendix A* will be conditional where the employer's work itinerary necessitates disclosure of a different wage than the one previously disclosed in Item F.b.8 of the Form ETA-9142B. For example, if a Georgia landscaping company is seeking temporary labor certification to perform work covering the additional counties of Cherokee, Clayton, and Fayette within the Atlanta-Sandy Springs-Roswell, GA MSA and a wage offer of $15.00 per hour disclosed in Item F.b.8 of the Form ETA-9142B will be paid for work performed in all locations, the employer would complete the *Appendix A* for the additional places of employment as shown below:

City *	State *	County *	MSA Name/OES Area Title *	Additional Place of Employment Information *	Additional Work Itinerary Information §						
					Crew	Total Workers	Begin Date	End Date	Basic Wage Rate		Per
									From:	To:	
Multiple cities and towns	GA	Cherokee	Atlanta-Sandy Springs-Roswell, GA MSA	Various client worksites located within the county	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Multiple cities and towns	GA	Clayton	Atlanta-Sandy Springs-Roswell, GA MSA	Various client worksites located within the county	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Multiple cities and towns	GA	Fayette	Atlanta-Sandy Springs-Roswell, GA MSA	Various client worksites located within the county	n/a	n/a	n/a	n/a	n/a	n/a	n/a

However, if this same Georgia landscaping company is seeking temporary labor certification to perform work covering Baldwin county in the Middle Georgia Nonmetropolitan Area, Washington county in the East Georgia Nonmetropolitan Area, and Jones county in the Macon, GA MSA, each of which have different prevailing wage rates, and discloses on the Form ETA-9142B the place of employment information for Baldwin county offering $14.00 in section F.b, the employer may complete the *Appendix A* based on its work itinerary as shown below:

City *	State *	County *	MSA Name/OES Area Title *	Additional Place of Employment Information §	Additional Work Itinerary Information §						
					Crew	Total Workers	Begin Date	End Date	Basic Wage Rate		Per
									From:	To:	
Multiple Cities and Towns	**GA**	**Washington**	**East Georgia Nonmetropolitan Area**	**Various client worksites located within the county area.**	n/a	n/a	n/a	n/a	**$11.00**	n/a	**HR**
Multiple Cities and Towns	**GA**	**Jones**	**Macon, GA MSA**	**Various client worksites located within the county area.**	n/a	n/a	n/a	n/a	**$12.00**	n/a	**HR**

The Department will propose to consolidate the wage information collection items by proposing the disclosure of only the basic rate of pay and converting the unit of pay field into code entries (e.g., "HR" hourly), rather than checkboxes. This proposed change better aligns with the information on work itineraries currently provided by these employers, which does not disclose overtime rates of pay, and saves additional form space on the *Appendix A* for employers to provide any additional information about the worksites covering the geographic area of intended employment.

F. Comments Related to Collection of the Number of Workers and Duration of Employment

Regarding the Department's proposed collection of the number of workers and duration of employment for each additional place of employment disclosed on the *Appendix A*, one commenter stated the size of the crew as well as the tasks performed at a particular jobsite,

including the timing of such work, are largely determined by seasonal conditions that cannot be predicted with certainty. This commenter suggested that the Department modify the proposed *Appendix A* to make the following fields optional: Item 6 – Total Workers, Item 7 – Begin Date, and Item 8 – End Date. A second commenter also expressed similar concerns with these same proposed collection items, stating that these items "present a substantial burden to job contractors and employers who are impacted by unpredictable events such as weather and market conditions." This commenter also stated determining the number of workers for each worksite, as well as the timing, with any degree of precision is not practicable, and suggested the Department eliminate these collection items.

In response to the comments, the Department proposes to reorganize and clarify the collection of information related to the number of workers and duration of employment for each additional place of employment disclosed on the *Appendix A*. Specifically, the Department proposes that the collection of these items be conditional where the employer's work itinerary necessitates disclosure of this information. For example, it is a longstanding requirement and common practice among employers in the reforestation, vegetation management, or mobile entertainment industries to provide work itineraries for their crews that disclose the number of workers and/or the duration of employment covering multiple areas of intended employment. The Department routinely receives paper-based work itineraries covering the same information as that proposed in *Appendix A*, and disagrees with the commenters that employers operating on work itineraries are not able to provide this information.

The primary purpose of the proposed *Appendix A* is to provide a more standardized and flexible format for some employers to fully disclose the details of their work itinerary. The Department maintains that this proposed collection is essential to fully apprise potential U.S. workers of the employer's job opportunities, and ensure the employment of H-2B workers will not have an adverse effect on the wages and working conditions of U.S. workers similarly employed in each area of intended employment. However, the Department did not intend to collect Items 6 to 8 of the *Appendix A* from all employers, particularly those performing work within a single area of intended employment based on the same number of workers disclosed in Item B.4 and during the same period of employment disclosed in Items B.5 and B.6 of the Form ETA-9142B. For these employers, particularly those engaged in the landscaping industry, the Department agrees that disclosure of this additional information on the *Appendix A* may be redundant and therefore an unnecessary required collection. Alternatively, in circumstances where the employer seeks temporary labor certification to perform work in a single area of intended employment using work crews that will be assigned to different counties, the Department's proposed modification still provides these employers with the flexibility to identify the work crew, number of workers assigned to that crew, and duration of employment in each county. The Department believes its proposed modification strikes an appropriate balance that can accommodate the employment needs of different employers seeking temporary labor certification.

G. Comments Related to the Collection of Worksite Information for Employers in the Reforestation Industry

One commenter expressed concerns with the proposed collection of information on the *Appendix A* for employers engaged in tree planting and reforestation activities under the H-2B program.

Specifically, the commenter stated that some of these employers have work itineraries involving more than 1,000 worksites and the proposed *Appendix A* did not appear to collect the information needed to properly disclose where the crew(s) would be performing work on the itinerary. The commenter further asked whether the electronic filing system supporting the new *Appendix A* will allow for duplicate entries where different crews are performing work at the same place and time, how many different worksites will be permitted on one application, and how will the employer be able to attach its work itinerary to the Form ETA-9142B.

A second commenter acknowledged that the proposed *Appendix A* did appear to require that employers in the reforestation industry provide the information (i.e., work locations and wages) that they currently provide as a separate addendum to the Form ETA-9142B, but instead using a new standard format. However, the commenter expressed concern that the *Appendix A* will require the disclosure of exact street address locations and precise dates to describe exactly where and when work will take place. The commenter further noted that these employers do not currently provide this level of detail to the Department, and that it would not be practicable for them to complete the *Appendix A* with exact street address locations and dates. The commenter concluded by recommending that the *Appendix A* be modified to collect the same information in the same format as these employers currently provide to the Department.

In response to the comments received, the Department proposes several modifications to the *Appendix A* to provide employers, especially those with operations involving more complex work itineraries, with sufficient flexibility to disclose worksite information they currently provide to the Department with a minimum amount of burden. First, the Department proposes to reorganize the information collection in a worksheet style format with column headings to make it much easier for employers to add worksite entries on the *Appendix A*. Second, because many employers in the reforestation industry have crews working on multiple itineraries under the same Form ETA-9142B, the Department proposes to add a new collection item called "Crew ID" to provide employers with the flexibility to disclose worksite information for each crew on the *Appendix A*. The proposed collection of a number or letter identifying each crew of workers, which is already provided to the Department by these employers, will eliminate the need for duplicate worksite entries where different crews are performing work in the same geographic area and at the same time, thereby reducing entry burden.

Third, the Department has consolidated the wage information collection items by proposing the disclosure of only the basic rate of pay and converting the unit of pay field into code entries (e.g., "HR" hourly), rather than checkboxes. This proposed change better aligns with the information on work itineraries currently provided by these employers and saves additional form space on the *Appendix A*. Fourth, the Department proposes to add a new collection item called "Additional Place of Employment Information" that will provide employers with an open text field to inform the Department of any other details about the geographic area of intended employment based on the unique circumstances of their job opportunities. For employers in the reforestation industry, the geographic locations of work are predominantly in nonmetropolitan areas and may involve tracts of land in counties that are identifiable only by forest grid identification numbers or even Global Positioning System (GPS) coordinates. This new collection item will provide these employers with flexibility to describe the geographic area where work is expected to be performed.

To help employers understand these proposed modifications, the Department provides below an illustration of how the *Appendix A* can be completed. For example, assume an employer is seeking temporary labor certification for 50 H-2B workers to perform tree planting and reforestation work starting on October 1, 2018 through December 31, 2018. The employer's request involves three distinct crews beginning work in Arkansas, but traveling on separate work itineraries into other states such as Louisiana, Mississippi, Alabama, and Missouri. Because these work itineraries involve multiple areas of intended employment and prevailing wages, the employer has decided to offer and pay at least the prevailing hourly wage covering each geographic location in which the crew will perform work.

As shown below, the employer can use the proposed *Appendix A* to disclose the work itinerary of each crew (i.e., Crew 1, Crew 2, and Crew 3), the size of each crew, the estimated duration of work and basic rates of pay in each geographic location. With respect to the worksite information, the employer has identified the state, county, and the MSA Name/OES Area Title. Because each of these geographic locations of work are in rural nonmetropolitan areas, the employer has entered the nearest city and used the proposed new "Additional Place of Employment Information" collection item to provide the GPS coordinates or other geographic information where the work is expected to be performed.

City *	State *	County *	MSA Name/OES Area Title *	Additional Place of Employment Information §	Additional Work Itinerary Information §						
					Crew	Total Workers	Begin Date	End Date	Basic Wage Rate From:	Basic Wage Rate To:	Per
Clinton	AR	Van Buren	North Arkansas Nonmetropolitan Area	Forest tracks located in close proximity to 1313 Pine Bluff Road, Clinton, MS 99999	1	25	10/01/18	10/16/18	$12.87	n/a	HR
Winfield	LA	Winn	Central Louisiana Nonmetropolitan Area	33"0'44.47 N, 94"'21 55.7' W	1	25	10/17/18	11/17/18	$16.56	n/a	HR
Carthage	MS	Leake	Southeast Mississippi Nonmetropolitan Area	SEC 18-T11-R7, 27-11-7, 3-10-9, 14-11-8	1	25	11/18/18	12/31/18	$15.00	n/a	HR
Hector	AR	Pope	West Arkansas Nonmetropolitan Area	SEC 2-TSN-R15E	2	10	10/01/18	10/16/18	$12.84	n/a	HR
Clarkesville	AR	Johnson	West Arkansas Nonmetropolitan Area	SEC 30-6N-12E	2	10	10/17/18	10/29/18	$12.84	n/a	HR
Ruston	LA	Lincoln	Northeast Louisiana Nonmetropolitan Area	SEC 30--3N-11E	2	10	10/30/18	11/10/18	$16.39	n/a	HR
Waynesboro	MS	Wayne	Southeast Mississippi Nonmetropolitan Area	SEC 13-4S-4W	2	10	11/11/18	12/15/18	$15.00	n/a	HR
Grove Hill	AL	Clarke	Southwest Alabama Nonmetropolitan Area	SEC 15-5S-4 W	2	10	12/16/18	12/31/18	$15.00	n/a	HR
Leslie	AR	Searcy	North Arkansas Nonmetropolitan Area	31.352938, -82.505713	3	15	10/01/18	10/25/18	$12.87	n/a	HR
Taylor	LA	Bienville	Northeast Louisiana Nonmetropolitan Area	31.211019, -82.846429	3	15	10/26/18	11/29/18	$16.39	n/a	HR
Oakdale	LA	Allen	Central Louisiana Nonmetropolitan Area	31.541549, -82.667846	3	15	11/30/18	12/31/18	$16.56	n/a	HR

In response to the commenter's concern regarding disclosure of street address information, the Department's proposed *Appendix A* did not contain a requirement for the collection of street address information. With respect to the duration of employment at each worksite location, the Department agrees with the commenter and will clarify in the General Instructions that it expects employers operating on work itineraries to continue to provide the *estimated* beginning and ending dates of work, meaning the employer must disclose these dates to the best of its knowledge at the time of filing the H-2B application.

As previously stated, the Department has proposed the *Appendix A* as a standardized format for collecting worksite information currently provided by employers with multiple worksites using a wide array of paper-based attachments to the Form ETA-9142B. Employers engaged in tree planting and reforestation activities often provide work itinerary information in these non-standardized attachments, which makes the review of these applications resource-intensive and challenging to verify compliance with regulatory requirements. Thus, the Department will only accept for review worksite information that is disclosed on the *Appendix A,* and the employer will be permitted to add as many worksite entries on the *Appendix A* as it deems necessary in order to fully disclose the itinerary for which it seeks temporary labor certification.

VII. The Department's Proposed Changes to Form ETA-9142B, *Appendix B*

A. General Comments on the Appendix B

To obtain a temporary labor certification, the Department's regulations require employers and, if applicable, their authorized attorneys or agents to submit a completed Form ETA-9142B – *Appendix B* attesting to compliance with the terms, assurances, and obligations of the H-2B program. The Department's proposed revisions clarify existing assurances and obligations under the H-2B program and require that employers initial each condition of employment listed on the *Appendix B.* One commenter expressed support for the proposed revisions, noting that the *Appendix B* has been properly modified to include appropriate additional assurances, while a second commenter asked for an explanation as to why the employer's initials are now required in addition to their signature. A third commenter expressed support for the addition of the employer's initials.

In response to the second commenter, the Department's proposed revision requiring employers to initial each condition of employment listed on the *Appendix B* will strengthen program integrity by requiring employers positively affirm that they have read and understood each assurance and obligation listed on the *Appendix B* at the time of filing the Form ETA-9142B. The current design of the *Appendix B* requires employers to sign the last page, which can serve to dissuade employers from fully reading and understanding the assurances and obligations on the other pages of the *Appendix B* before affixing their signatures to the form. While failure to read the entirety of the form is, of course, no excuse for noncompliance, the Department believes this proposed revision will serve to protect the conditions of employment for workers and reduce the incentive for employers to claim lack of knowledge of program requirements during the course of an audit, enforcement, or investigative proceeding.

Two commenters stated that the continued use of the *Appendix B* to "clarify employer assurances and obligations" and for use in enforcement procedures is not appropriate. The commenters assert the attestations do not serve any purpose not already served by the regulations, that some of the attestations appear to "transmute 'all laws'" into requirements Congress did not authorize the Department to enforce, and that the Department does not have authority to impose criminal penalties based on these attestations or interpret and enforce state-created rights. The commenters further stated that clarifications of obligations is best accomplished through notice and comment rulemaking or FAQs, and the forms should only collect information needed to

process an employer's request for temporary labor certification. The commenters asked the Department to consider whether the attestations have any purpose and recommended the Department provide a simple statement of intent to comply with applicable regulations.

The Department disagrees with the commenters' assertions and declines to modify the proposed *Appendix B* in a manner that only requires employers and, if applicable, their authorized attorneys or agents to provide a statement of intent to comply with applicable regulations. The Department has the authority to determine the manner in which employers, who choose to use the H-2B program, commit to compliance with the assurances, obligations, and conditions of employment applicable to hiring H-2B workers and/or U.S. workers for job opportunities under the Form ETA-9142B. The *Appendix B* summarizes the program requirements in a manner that permits the employers to succinctly understand their obligations and responsibilities for deciding to participate in the H-2B program.

The assurances, obligations, and conditions of employment statements contained in the *Appendix B* serve to protect workers employed under the Form ETA-9142B from employers who are unaware of regulatory requirements or who seek to abuse the H-2B program. Specifically, in accordance with 29 CFR 503.19(d), the employer's submission of and signature on the approved Form ETA-9155, *Appendix B* of the Form ETA-9142B, and the USCIS I-129 petition constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program. Thus, the *Appendix B* is an essential component to the administration and enforcement of the H-2B program.

One commenter recommended the Department include two assurances on the *Appendix B* requiring employers to certify that (1) it has sufficient funds to pay the wage or salary offered to H-2B workers and that (2) it has paid all wages due to H-2B workers and U.S. workers similarly employed in past years. The commenter referenced an H-2B form, the Form ETA-750, which was used prior to the Department's 2008 H-2B program regulations. The commenter recommended that the Department include Form ETA-750, Item 23.a., on *Appendix B* for employers to attest, "By virtue of my signature below, I hereby certify the following conditions of employment. . . . I have enough funds available to pay the wage or salary offered the alien." The Department appreciates the commenter's suggestion, but declines to incorporate this change into the *Appendix B*. The proposed *Appendix B* provides the employer with its obligations under the current H-2B regulations. The Appendix B contains several regulatory wage guarantees and payroll assurances for workers, which the Department examines during the course of an audit examination or enforcement proceeding. Therefore, the Department declines to add this recommendation to the *Appendix B.* Further, the Department's understanding is that USCIS collects and reviews more detailed information concerning the employer's business operations, at the time of filing the I-129 petition, which may address the commenter's concern.

B. Comments on Section A, Attorney or Agent Declaration, of the Appendix B

In completing the proposed *Appendix B* for submission to the Department, an attorney or agent authorized to represent the employer must acknowledge in Section A that "to knowingly furnish materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by fines, imprisonment, or both

(18 U.S.C. 2, 1001, 1546, 1621)." One commenter suggested that this declaration statement contained in Section A of the *Appendix B* be modified to state "to knowingly and/or willfully furnish materially false information" (emphasis added) in order to more accurately reflect the legal standard in 18 U.S.C. 2, 1001, 1546, and 1621. The Department agrees with the commenter and will propose modifications to Section A, Attorney or Agent Declaration, in the *Appendix B.*

Two commenters stated that there is no basis in statute or regulation for the requirement in Section A of the *Appendix B* that an attorney or agent attest, "I hereby certify that I have provided to the employer the Form ETA-9142B and all supporting documentation for review." The Department disagrees with the commenters that there is no legal basis for an attorney or agent to assure that it has provided the Form ETA-9142B and all supporting documentation to the employer for review. By signing Section A of the *Appendix B*, the attorney is assuring that it has been designated by the employer to act on its behalf in connection with the H-2B application. The attorney is not preparing the Form ETA-9142B and all supporting documentation on its own, but rather is performing these activities in conjunction with its employer-client, who concurrently assures the Department that it has read and reviewed every page of the Form ETA-9142B and supporting documentation. The Department reminds the commenters that regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the H-2B application (*Appendix B*) and review all documentation submitted to the Department. *See* 20 CFR 655.7(b). This proposed language is not only consistent with the Department's regulatory requirements, but will strengthen program integrity by ensuring that employers, who designate attorneys or agents to act on their behalf, have full knowledge of the information and disclosures that are prepared on their behalf prior to the filing of the Form ETA-9142B and all documentation to the Department. The Department also believes this change will guard against the attempted shifting of culpability between employers and attorneys or agents during the course of administrative or investigative proceedings where program violations are discovered.

Finally, one commenter stated that the *Appendix B* does not sufficiently accommodate agents that are "entities rather than natural persons." The Department is not sure what specific concern the commenter is raising with respect to the disclosure of attorney or agent information on the *Appendix B.* The *Appendix B* collects both the name of the attorney or agent and the name of the law firm or business in which the attorney or agent is employed. Section E of the Form ETA-9142B collects more detailed information about the agent entity or business authorized to represent the employer in the filing of the H-2B application. Further, the Department also receives a copy of the agent's agreement with the employer or other documentation demonstrating the agent's authority to represent the employer, at the time of filing the Form ETA-9142B, which enables the Department to understand the type of agent (i.e., entity and/or person) and the nature of the agent's relationship with the employer. *See* 20 CFR 655.8(a). Therefore, the Department believes the proposed collection is sufficient to meet regulatory requirements and will not propose further modifications.

C. Comments on Section B, Employer Declaration, of the Appendix B

In completing the proposed *Appendix B* for submission to the Department, the employer must acknowledge in Section B that "to knowingly furnish materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is

a federal offense punishable by fines, imprisonment, or both (18 U.S.C. 2, 1001, 1546, 1621)." One commenter suggested that this declaration statement contained in Section B of the *Appendix B* be modified to state "to knowingly and/or willfully furnish materially false information" [emphasis added] in order to more accurately reflect the legal standard in 18 U.S.C. Section 2, 1001, 1546, and 1621. The Department agrees with the commenter and will propose the modifications to Section B, Employer Declaration, in the *Appendix B.*

The same commenter stated that the inclusion of the language "including every page of the Form ETA-9142B and supporting documentation" is unnecessary because the employer acknowledges it has read the application in an earlier section of the declaration. The commenter suggested the removal of the phrase, "including every page of the Form ETA-9142B." The Department appreciates the commenter's suggestion, but declines to adopt the proposed modification. As explained in the section on the Attorney or Agent Declaration of the *Appendix B* above, the employer is required to sign the H-2B application (*Appendix B*) and review all documentation submitted to the Department. *See* 20 CFR 655.7(b). This proposed language is not only consistent with the Department's regulatory requirements, but will strengthen program integrity by ensuring that employers, who designate attorneys or agents to act on their behalf, have full knowledge of the information and disclosures that are prepared on their behalf prior to the filing of the Form ETA-9142B and all documentation to the Department.

D. Comments on Assurances and Obligations Contained in Section B of the Appendix B

1. Assurance Number 3 - Availability of the Job Opportunity

The Department's proposal for the *Appendix B*, Item 3 requires the employer to assure that (1) the job opportunity was/is open to any qualified U.S. worker until 21 days before the date of need regardless of race, color, national origin, age, sex, religion, disability, or citizenship, and (2) U.S. workers who apply for the job will be hired, unless the employer has a lawful, job-related reason(s) for the rejection, and (3) the employer will retain records of all rejections. The Department received one comment on this assurance in which the commenter expressed support for the proposed modification to include the words "until 21 days before the date of need." The Department appreciates the commenter's support for the proposed revisions, which serves to clarify for employers the existing regulatory requirement that the job opportunity remain available for U.S workers until 21 days before the start date of need.

2. Assurance Number 5 – Wage Guarantees

The Department's proposal for the *Appendix B*, Item 5 requires the employer, in summary, to offer at least the wages certified by the Department on the Form ETA-9142B or the applicable Federal, State, or local minimum wage, whichever is highest, for the time period work is performed. If the Department issues a new or revised prevailing wage to the employer for the certified job opportunity, the employer must assure that it will offer at least that new or revised wage to worker, unless otherwise notified by the Department. In addition, the employer must assure that it will pay wages, free and clear, during the entire period of certified employment using a single workweek as its standard for computing wages due.

One commenter requested that the Department modify the language of the assurance to specify that employers pay the highest wage "for the time period certified" or "during the period of employment that is subject of this application." The Department has considered the commenter's suggestion and declines to modify the language of this assurance. The proposed language clearly requires the employer to offer a wage meeting regulatory requirements for the time period the work is performed, which is the same as the period of employment certified by the Department on the Form ETA-9142B. Other commenters noted that the Department does not have the regulatory authority to issue supplemental prevailing wage determinations and, therefore, the corresponding language contained in this assurance should be eliminated. The Department declines to accept the commenters' suggestion as the Department does have authority to issue supplemental prevailing wage determinations, and the proposed language is consistent with the information currently collected on the OMB-approved *Appendix B*.

3. Assurance Number 16 – Records of Workers' Earnings Statements

The Department's proposal for the *Appendix B*, Item 16 requires the employer, in summary, to keep a record of workers' earnings and provide the workers with earnings statements as required by 20 CFR 655.20(i) on or before each payday, which must be at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. One commenter asked that the Department modify the language of this assurance to specify that all H-2B employers, especially those in the mobile entertainment industry, must comply with recordkeeping requirements applicable to employers subject to the FLSA. The Department appreciates the comment but declines to modify the proposed assurance language. The FLSA operates independently of the H-2B program; the assurance in Item 16 is intended only to address an employer's H-2B recordkeeping requirements.

4. Assurance Number 17 – Transportation and Visa Fees

The Department's proposal for the *Appendix B*, Item 17 requires the employer, in summary, to disclose in the job order how it will provide transportation and subsistence costs to workers, including to and from the employer's place of employment, as required by 20 CFR 655.20(j). In addition, the employer must assure that all employer-provided transportation—including transportation to and from the worksite, if provided—must meet applicable safety, licensure, and insurance standards. Finally, the employer must assure that they will pay or reimburse the worker in the first workweek for the H-2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers).

Two commenters indicated that the language for this assurance must conform to the statute and that the Department cannot exceed the scope of the statute. In response to this comment, the Department's proposed language for this assurance reflects the regulatory requirements contained under 20 CFR 655.20(j). Further, the Department maintains that the *Appendix B*, including all the assurances contained therein, are within the scope of the Department's authority to require from employers who choose to participate in the H-2B program.

Two commenters stated that the assurance language should be modified to state that reimbursement for an H-2B worker dismissed from employment occur "before the end of the period of authorized admission," as required by the statute. The Department appreciates the comment but declines to make the requested modification. The Department maintains that the assurance language regarding reimbursement of workers dismissed from employment is consistent with the regulation at 20 CFR 655.20(j)(1)(ii). Specifically, if the worker is dismissed from employment for any reason by the employer before the end of the period of employment, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer.

Two commenters stated that part of the assurance requiring that all employer-provided transportation comply with all applicable Federal, State, or local laws or regulations is too broad, and requested that the Department clarify that the term "applicable" means "applicable to the employer." The Department appreciates the comments but declines to make the requested clarification. The regulatory requirement at 20 CFR 655.20(j)(1)(iii) clearly states that the transportation itself (i.e., the means and mode of transportation) provided by the employer must comply with all applicable laws and regulations and provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396. However, in considering the comments on this assurance, the Department is proposing a minor editorial modification to align with the exact language in the regulation. Specifically, the Department's proposed language states "All employer-provided transportation must comply with all applicable Federal, State, **or** local laws and regulations" (emphasis added). The Department will modify its proposal to remove the "or" and replace it with "and" to conform to the regulatory language in 20 CFR 655.20(j)(1)(iii).

One commenter noted that some employers may have a combination of providing and reimbursing transportation for workers and may not have details on where international workers are coming from and how they intend to travel. The commenter recommended that the Department allow for disclosure of a combination of transportation, and that the amount of transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The Department appreciates the comment but declines to make the requested modifications. The language of this assurance—by stating either advancing payment, paying directly, or reimbursing such expenses to the worker—already contemplates that employers may have different approaches for transportation and subsistence. Further, the Department's proposed language on this assurance summarizes the underlying regulatory requirements at 20 CFR 655.20(j), rather than repeating all of the details contained in the regulation. Thus, the Department believes the proposed language concerning the transportation and subsistence guarantees on the *Appendix B* is sufficient to ensure employers understand their obligations.

5. Assurance Number 19 – Providing Workers a Copy of Job Order

The Department's proposal for the *Appendix B*, Item 19 requires the employer to provide a copy of the job order to all H-2B workers and U.S. workers employed under the Form ETA-9142B. In particular, the employer must provide a copy of the job order to all H-2B workers no later

than when the worker applies for a visa if located abroad, or no later than the time of the job offer by the subsequent H-2B employer, if the H-2B worker is changing employment from one H-2B employer to a subsequent H-2B employer. *See* 20 CFR 655.20(l). The employer must provide a copy of the job order to U.S. workers employed under the Form ETA-9142B no later than on the day work commences. *See* 20 CFR 655.20(l). One commenter stated that the format of the job order is different for each state and that the state job orders "may contain an abbreviated version of the employment offer due to electronic capacity restrictions." The commenter further noted that the state is not required to provide a copy of the job order to the employer, and instead, the employer must apply to open a job order with the SWA. Based on the above information, the commenter suggested that the Department change the proposal to require employers to provide a copy of the "job offer" and not the job order.

The Department appreciates the comment, but declines to make the requested modification because such a change would require the Department change existing regulatory requirements. The regulations expressly require that the employer provide a copy of the job order to all H-2B workers and U.S. workers employed under the Form ETA-9142B. *See* 20 CFR 655.20(l). Further, the job order is defined as the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 20 CFR 655, Subpart A and 29 CFR part 503 that is posted between and among SWAs on their job clearance systems. *See* 20 CFR 655.5.

VIII. The Department's Proposed Changes to the Form ETA-9142B – *Appendix C*

One commenter stated that the instructions for the *Appendix C* appear to require the employer to disclose every foreign labor recruiter, along with each member of their staff. The commenter further noted that large organizations engaged in foreign labor recruitment employ 20 or more employees during the peak season. The commenter indicated that requiring the disclosure of all individuals would place an added burden on employers, who have to determine the accuracy of this information at the time of filing the Form ETA-9142B and input the extended data on the *Appendix C*. The commenter suggested that the instructions be modified to limit disclosure to just the owner(s) or primary management staff of the foreign labor recruitment organization.

The Department declines to limit its information collection to the owner(s) or primary management staff of the foreign labor recruitment organization. The regulations expressly require the employer to disclose, at the time of filing the Form ETA-9142B, the identity and geographic location of persons and entities hired by or working for the foreign labor recruiter, and any of the agents or employees of those persons and entities who will recruit or solicit prospective H-2B workers. *See* 20 CFR 655.9(b); 20 CFR 655.15(a). The preamble to the regulation further explains that the term "working for" includes any persons or entities engaged in recruiting prospective foreign workers for the H-2B job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter downstream in the recruitment chain. *Interim Final Rule*, 80 Fed. Reg. 24042 at 24057. The Department expects this information to be disclosed by the employer and, if applicable, its authorized attorney or agent, to the best of their knowledge at the time of filing the Form ETA-9142B.

A second commenter suggested that the Department add several fields to the *Appendix C*. The first field would ask whether the recruiter registered as a recruiter in the country of recruitment, requiring a "Yes" or "No" response. The second field would ask whether a subcontractor is being used in recruitment, requiring a "Yes" or "No" response. If a "Yes" response is recorded for the second field, a third field would require the submission of another attachment containing the contact information as required for recruiters in the proposed *Appendix C*. The Department appreciates the suggestions, but declines to include these additional fields on the *Appendix C*. The Department is proposing to collect the information necessary to ensure compliance with regulatory requirements, and requesting an employer to identify whether each named recruiter is registered in the country of recruitment is unduly burdensome and beyond the scope of this form collection. Further, identifying whether any persons and entities hired by or working for the foreign labor recruiter are "subcontractors" is not essential to the Department's proposed collection of information. As a third commenter noted, the Appendix C is appropriate to the Department's implementation of the requirement to maintain a foreign labor recruiter registry. We expect that the employer will properly disclose on the *Appendix C* all persons and entities hired by or working for the foreign labor recruiter, including any of the agents and employees of those persons and entities.

IX. The Department's Proposed Form ETA-9142B – *Labor Certification Determination*

One commenter expressed support for the Department's proposal to create a one-page Final Determination form, Form ETA-9142B – *Labor Certification Determination*, that will be completed by the Department and electronically issued to the employer and, if applicable, the employer's authorized attorney or agent. The Department appreciates the commenter's support of the proposal to promote greater efficiency in issuing temporary labor certification decisions, generate savings by eliminating the issuance of certifications on expensive security paper, and minimize delays associated with employers filing H-2B petitions with DHS.

A second commenter raised a few questions about the use of the *Labor Certification Determination* form in the H-2B visa admissions process. Specifically, the commenter requested written acknowledgement from DHS' USCIS that the Department's proposed *Labor Certification Determination* form is acceptable for purposes of meeting USCIS filing requirements, including I-129 petition filing requirements. The commenter also asked whether a copy of the Form ETA-9142B will be required for USCIS Service Center adjudication or whether the one-page *Labor Certification Determination* form will suffice when the original labor certification is a filing requirement. Finally, the commenter asked the Department what, if any, security measures will accompany the emailing of the *Labor Certification Determination* form and the process for replacement if the form is not received.

In response to the questions posed by the commenter, the new *Labor Certification Determination* form will serve as official notice from the Department certifying that a sufficient number of qualified U.S. workers are not available to fill the employer's job opportunity, and the employment of the H-2B temporary workers in such labor or services will not adversely affect the wages and working conditions of U.S. workers similarly employed. The *Labor Certification Determination* form will contain succinct, essential information about the certified application and be issued in a secure Adobe PDF format electronically or, in circumstances where the

employer or, if applicable, its authorized attorney or agent, is not able to receive the temporary labor certification documents electronically, issued on standard paper in a manner that ensures next day delivery. The Department will also issue a copy of the certified Form ETA-9142B, including all applicable appendices, to the employer or, if applicable, its authorized attorney or agent, using the same delivery methods. The Department has extensive experience processing electronic applications, and routinely receives and sends official communications (e.g., Notices of Acceptance and Deficiency) using email addresses disclosed on the Form ETA-9142B as a standard practice. In circumstances where electronic documents are not received by email, including the new *Labor Certification Determination* form, the employer and, if applicable, its authorized attorney or agent will continue to contact the Office of Foreign Labor Certification's Chicago National Processing Center's helpdesk at tlc.chicago@dol.gov to request the documents.

As stated in the Department's proposal, the employer will use the *Labor Certification Determination* form, as well as any other required documentation, to support the filing of an I-129 petition with USCIS. The Department is working collaboratively with USCIS to share information in a manner that can permit employers to submit only the *Labor Certification Determination* notice, along with a copy of the signed and dated Form ETA-9142B – *Appendix B*, with the I-129 petition documentation. However, the Department reminds the commenter that USCIS has authority to determine what minimum information and documentation are required to support the I-129 petition. If USCIS continues to require that employers submit a full copy of the certified Form ETA-9142B and all applicable appendices, in addition to the one-page *Labor Certification Determination* form and the *Appendix B*, the employer must comply with those filing requirements. Finally, to clarify that the purpose of this form is only for approving an employer's request for temporary labor certification, the Department is making a minor editorial change to the name from Form ETA-9142 – *Labor Certification Determination* to Form ETA-9142B – *Final Determination: H-2B Temporary Labor Certification Approval*.

X. Form ETA-9142B – *Seafood Attestation*

The Department did not receive any comments regarding the collection of information on the Form ETA-9142B – *Seafood Attestation*. The Department has not modified its proposal.

XI. Form ETA-9155 – *H-2B Registration* and General Instructions

The Department did not propose changes to the Form ETA-9155 – *H-2B Registration* or its General Instructions. One commenter recommended the Department add a statement to this form specifying that the SOC code and SOC occupation title on the *H-2B Registration* do not have to be identical to the corresponding entries on the Form ETA-9142B, provided the job title and duties on the *H-2B Registration* and Form ETA-9142B match exactly. The commenter indicated this clarification may avoid confusion if the registration is issued by the Department for the same position with the exact job duties, but with a different SOC code and SOC occupation title. A second commenter asked if the inclusion of the Form ETA-9155 means filers are to start using the form and asks the Department to explain the relationship, if any, between the H-2B registration and the USCIS I-129 Detailed Statement of Need for the 1-129. The same

commenter asked what constitutes "Other Temporary Need" because there is no definition of this term in the 2015 H-2B IFR.

Upon implementation of the H-2B Registration process, OFLC will publish a separate *Federal Register* notice. As provided in the Supporting Statement, where OFLC has not operationalized the registration process through a separate notice in the *Federal Register*, H-2B applications are exempt from the registration requirements under 20 CFR 655.11, and the adjudication of the employer's temporary need will continue to occur based on information collected on the Form ETA-9142B. In response to the comments received, the Department expects the employer to identify the SOC code and job title on the *H-2B Registration* that is closely and directly related to the expected services or labor to be performed, and for which the employer may file a future request for temporary labor certification. The Department has long recognized that each employer may enter slight variations in the title of a job (e.g., maid, housekeeper/maid, housekeeper I) across different forms, provided the services or labor to be performed and SOC code designation are the same. In accordance with 20 CFR 655.11(h)(1), an employer receiving approval from the Department will be eligible to seek H-2B workers "in the occupational classification" for the anticipated number of positions and period of need stated on the approved *H-2B Registration*. Thus, the Department declines the commenter's suggestion because the regulations expressly require the SOC code designation to be the same between the *H-2B Registration* and Form ETA-9142B. The commenter also asks that the Department further align the Form ETA-9155 worksite collection with the Form ETA-9142B. The Department declines to make that change at this time.

Regarding the relationship between the H-2B registration and the USCIS I-129 petition temporary need statement, the Department reminds the commenter that USCIS is the final arbiter of determining whether the nature of an employer's need for H-2B workers is temporary. In accordance with 20 CFR 655.11, an employer filing the *H-2B Registration* must submit documentation showing the number of positions to be filled in the first year of registration, the period of employment, and how the employer's need for the services or labor is non-agricultural and temporary. The Department proposes collecting this information to make a determination that the nature of the employer's need is temporary and justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as set forth in 8 CFR 214.2(h)(6)(ii)(B) and 20 CFR 655.6. Although the information contained on the USCIS I-129 petition temporary need statement may be substantially similar to the information provided on the *H-2B Registration*, USCIS has authority to determine the documentation needed to support the employer's I-129 petition, including whether information related to the nature of the employer's need to employ nonimmigrant workers under the H-2B visa classification must be provided. And finally, the Department acknowledges that there are only four temporary need categories, and a minor editorial change will be proposed to remove the words "or Other Temporary Need" under Item B.9 of the *H-2B Registration*. This minor change will better align this form collection item with the general instructions and provide greater consistency with the same collection item on the Form ETA-9142B.

XII. Form ETA-9165 – *Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey* and General Instructions

The Department did not receive any comments regarding the collection of information on the Form ETA-9165 or its General Instructions. The Department has not modified its proposal.