

SUPPORTING STATEMENT
ATTESTATION FOR EMPLOYERS SEEKING TO EMPLOY H-2B NONIMMIGRANT
WORKERS UNDER SECTION 105 OF DIVISION H OF THE CONSOLIDATED
APPROPRIATIONS ACT, 2019, PUBLIC LAW 116-6 (FEBRUARY 15, 2019)
ICR Reference No. 201904-1205-004

A. Justification.

This information collection request supports the Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program final rule being promulgated by the Department of Labor (DOL or Department) and the Department of Homeland Security (DHS). The regulatory requirements would be codified at 8 CFR part 214 and 20 CFR part 655. The Information Collection Request (ICR) includes a new form, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division H of the Consolidated Appropriations Act, Form ETA-9142-B-CAA-3.

Background Information and General Instructions:

Clearance for Form ETA 9142-B-CAA-is sought using PRA emergency procedures outlined in the regulations at 5 CFR 1320.13. Section 105 of Division H of the Consolidated Appropriations Act,, Public Law 116-6 ((February 15, 2019) (FY 2019 Omnibus), authorized the Secretary of the Homeland Security, in consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers in Fiscal Year (FY) 2019, notwithstanding the otherwise established statutory numerical limitation (H-2B cap). In consultation with the Secretary of Labor, the Secretary of Homeland Security increased the H-2B cap for FY 2019 by up to, but no more than, an additional 33,000 visas for employers who attest that they are likely to suffer irreparable harm (i.e. permanent and severe financial loss) without the ability to petition for workers who were issued an H-2B visa or otherwise granted H-2B status in FY 2016, 2017, or 2018. This increase is based on a time-limited statutory authority and does not affect the H-2B program in future fiscal years. The Departments are promulgating regulations to implement this determination. The exigency created by the FY 2019 Omnibus, to meet the high demand by American businesses for H-2B workers and the short period of time remaining in the fiscal year for U.S. employers to avoid the economic harms this legislation was intended to prevent requires initial clearance using expedited processes.

As set forth in the recently published Temporary Rule: *Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program* (temporary final rule), employers seeking authorization to employ H-2B workers under this time-limited authority are required to complete and submit Form ETA-9142-B-CAA-3 to the U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS). The regulations at 8 CFR 214.2(h)(6)(x)(C) implementing the FY 2019 Omnibus provides: “USCIS will reject petitions [under the FY 2019 Omnibus] that are received after the numerical limitation has been reached or after September 16, 2019, whichever is sooner.”

USCIS received more than enough petitions to meet the H-2B visa statutory cap for the second half of FY 2019 on February 19, 2019, which is 8 days earlier than when the cap for the second half of FY 2018 was reached, and is the earliest date the cap for the second half of the fiscal year has been reached since FY 2016. USCIS conducted a lottery on February 21, 2019 randomly to select a sufficient number of petitions to meet the cap. USCIS rejected and returned the petitions and associated filing fees to petitioners that were not selected, as well as all cap-subject petitions received after February 19, 2019.

As required by the regulations, employers must maintain the records associated with the filing of Form ETA-9142-B-CAA-3 for three years from the date DOL certified the H-2B labor certification application.

DOL will be seeking public comments in connection with Form ETA 9142-B-CAA-3's associated requirements (authorized under 20 CFR 655.67), in order to revise and extend the information collection, as appropriate, using traditional processes. Specifically, DOL has requested comments on the burden associated with reviewing instructions, completing and filing the attestation, performing any required steps, retaining all of the required documentation supporting Form ETA-9142-B-CAA-3, via a 60-day notice it included in the temporary final rule.

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

The information collection is required by regulations exercising authority delegated to the Secretary of Homeland Security under section 105 of Public Law 116-6, and DOL's role under that authority. The H-2B Program generally is governed by a range of statutory authorities, including sections 101(a)(15)(H)(ii)(b) and 214(c) of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1011(a)(15)(H)(ii)(b) and 1184(c)) as well as regulatory authorities appearing at 8 CFR parts 103 and 214, 20 CFR part 655, and 29 CFR part 503. In general, before an employer may petition for any temporary or permanent skilled or unskilled foreign workers, it must submit a request for certification to the Secretary of Labor containing the elements prescribed by the INA and implementing regulations.

The information contained in the Form ETA-9142-B-CAA-3, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under the FY2019 Omnibus*, implements the Secretary of Homeland Security's determination that visas granted under the cap increase authorized by Public Law 116-6 should be made available to only those businesses with the most significant business needs, *i.e.*, those businesses that attest that they are likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested on their petition before the end of FY 2019, and that they will retain documentation evidencing such harm, as reflected in the accompanying rulemaking. Form ETA-9142-B-CAA-3 is used to implement this determination.

The update to regulations at 8 CFR part 214 and 20 CFR part 655 will require a new form (*Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division H of the Consolidated Appropriations Act of 2019*, Form ETA-9042-B-CAA-3) for employers to submit to DHS, and that employers will use to attest that their businesses are likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested in the Form I-129 petitions in FY 2019. The employer would file the attestation with DHS, as part of their Form I-129 petition. In addition, an employer will need to attest that the H-2B worker(s) named in the petition had been issued an H-2B visa(s) or changed to H-2B status during one of the last three fiscal years, and provide documentation of the H-2B admission or status with their H-2B petition. See § 655.41. Finally, the employer will need to retain documents and records proving compliance with this implementing rule, and must provide the documents and records to DHS and DOL staff upon request. See §§ 655.67.

The retention of Form ETA-9142-B-CAA-3 and supporting documentation is required by regulations at 8 CFR Part 214 and 20 CFR Part 655, exercising authority delegated to the Secretary of Homeland Security and DOL's role pursuant to that authority under *Section 105 of Division H of the Consolidated Appropriations Act of 2019*, . Those regulations required a new form (*Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division H of the Consolidated Appropriations Act of 2019*,, Form ETA-9142-B-CAA-3) for employers to submit in FY 2019 to DHS. Employers use the form to attest that their businesses were likely to suffer irreparable harm without the ability to employ all of the H-2B workers requested on the Form I-129 petitions and that they agreed to meet other program requirements. Employers are permitted to submit the form through until the date the numerical limitation is reached, whichever occurred first. Employers that filed Form ETA-9142-B-CAA-3 must retain the signed attestation form and supporting documentation to prove compliance with the implementing regulation, and must provide the documents and records to DOL or DHS staff upon request. See 20 CFR 655.67. Attestation F on the form and the instructions to the form inform employers about this requirement and specify the documentation that must be retained for three (3) years from the date of the labor certification.

Authority: 8 CFR Part 103 and 214; 20 CFR Part 655, subpart A; 29 CFR Part 503; Sections 101(a)(15)(H)(ii)(b), 103(a)(6), and 214 of the INA; 8 U.S.C. §§ 1101, 1103(a)(6), 1184; Pub. L. 116-6.

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

The information collection is necessary to implement the temporary cap increase authorized by Public Law 116-6. Employers that obtained a temporary labor certification (TLC) had to complete and submit a signed attestation form to DHS and must retain the required supporting documentation for three (3) years from the date the TLC was issued. Retaining these records for the specified period of time allows federal agencies and employers to comply with applicable regulatory standards.

- 3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also, describe any consideration of using information technology to reduce burden.*

This form's instructions will be made available via the internet. The form, once fully completed and signed, must be submitted to DHS.

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

The procedures and documentation requirements are sufficiently specific to avoid duplication of collection activities. The information collections covered by this request apply only to employers who seek H-2B workers as authorized by Public Law 116-6; consequently, there is no duplication of the information collection requirements.

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

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

DOL considered the memorandum issued to all heads of departments and agencies by OMB on June 22, 2012,¹ about Reducing Reporting and Paperwork Burdens. It would not be appropriate to include exemptions for small entities (including small businesses) from the recordkeeping requirements. The recordkeeping requirements are not disproportionately more burdensome for small entities than large ones.

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

In the absence of this information collection, the Department will be unable to meet its statutory and regulatory mandates if this information is not collected. Employers must record and maintain files to ensure they have complied with the Department's regulations and fulfilled their obligations as an H-2A employer. Should the Wage and Hour Division (WHD) of the Department investigate an employer, these files would be essential to assess compliance.

¹ Office of Management and Budget Memorandum "Reducing Reporting and Paperwork Burden" (June 22, 2012), available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf>.

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

These data collection efforts do not involve any special circumstances.

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

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

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

The use of PRA emergency processing authorities precluded subjecting this information collection to public comments at the time of its initial adoption. The Temporary Rule does invite public comments on the information collections for a period lasting 60-days. Any public comments will be considered when the agency submits a subsequent ICR related to ongoing information collections.

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

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

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

No assurances of confidentiality or privacy are provided. The information collected is not submitted to the Department unless requested as part of a Wage and Hour investigation. As a practical matter, information from an investigation file would only be disclosed in accordance with the Freedom of Information Act.

11. *Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the*

questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

This information collection does not involve sensitive matters.

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

The attestation form includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hour and 0.5 hour for notifying third parties and retaining records relating to the returning worker requirements. Using the total per hour wage for an HR specialist (\$46.49), the opportunity cost of time for an HR specialist to complete the attestation form and notifying third parties and retaining records relating to the returning worker requirements, is \$34.87 per response.²

Additionally, the form requires that the petitioner assess and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the total per hour wage for a financial analyst is \$69.79.³ DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records. Therefore, the total opportunity costs of time for a financial analyst to assess, document, and retain supporting evidence is \$348.95 per response.⁴

As discussed previously, we believe that the estimated 3,776 remaining unfilled certifications for the latter half of FY 2019 would include all potential employers who might request to employ H-2B workers under this rule. This number of certifications is a reasonable proxy for the number of employers who may need to review and sign the attestation. Using this estimate for the total

² Calculation: \$46.49 (average per hour wage for an HR specialist) x 0.75 (time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements.) = \$34.87.

³ Calculation: \$47.80 (average per hour wage for a financial analyst, based on BLS wages) x 1.46 (benefits-to-wage multiplier) = \$69.79.

*U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics *May 2017, Financial Analysts*: <https://www.bls.gov/oes/2017/may/oes132051.htm>.

⁴ Calculation: \$69.79 (fully loaded hourly wage for a financial analyst) x 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is likely to suffer irreparable harm) = \$348.95.

number of certifications, DOL estimates that the cost for HR specialists is \$131,660 and for financial analysts is \$1,317,635 (rounded).⁵ The total cost is estimated to be \$1,449,295.⁶

The burden for this ICR is summarized in the following table

Table 1
Estimated Annualized Respondent Hour and Cost Burdens

Forms	Number of Respondents	Frequency	Total Number of Responses	Time Per Response (In Hours)	Total Burden Hours	Hourly Wage Rate*	Total Burden Costs
Form ETA-9142-B-CAA-3	3,776	1	3,776	0.25	944	\$46.49	\$43,887
Returning Workers' attestation and record keeping	3,776	1	3,776	0.50	1,888	\$46.49	\$87,773
3 rd party disclosure for business harm	3,776	1	3,776	5	18,880	\$69.79	\$1,317,635
Unduplicated Totals	3,776	1	3,776	5.75	21,712	Various	\$1,449,295

* Bureau of Labor Statistics. U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2017, *Financial Analysts*: <https://www.bls.gov/oes/2017/may/oes132051.htm>.

**Calculation: \$46.49 (average per hour wage for an HR specialist) x 0.75 (time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements.) = \$34.87.

***Calculation: \$47.80 (average per hour wage for a financial analyst, based on BLS wages) x 1.46 (benefits-to-wage multiplier) = \$69.79.

****\$69.79 (fully loaded hourly wage for a financial analyst) x 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is likely to suffer irreparable harm) = \$348.95.

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

1. Start-up/capital costs: There are no start-up costs.
2. Maintenance and operations costs: None

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

⁵ Calculations: Cost for HR Specialists: \$46.49 (fully loaded hourly wage for an HR specialist) x 3,776 certifications x .75 hours = \$131,660.

Cost for Financial Analysts: \$69.79 (fully loaded hourly wage for a financial analyst) x 3,776 certifications x 5 hours = \$1,317,635.

⁶ Calculation: \$131,660 (total cost for HR specialists) + \$1,317,635 (total cost for financial analysts) = \$1,449,295.

DOL anticipates some additional costs will be incurred by DHS in adjudicating the additional Form ETA-9142-B-CAA-3 submitted as a result of the increase in cap limitation for H-2B visas. DOL, however, expects these costs were covered by the fees associated with the forms I-907 and I-129 filed with USCIS in support of an H-2B petition. DOL will not incur government costs associated with the employers' retention of the necessary information associated with this collection.

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

This is a new information collection.

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

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

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

ETA will display, the OMB approval number and expiration date.

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

DOL is not seeking any exception to the certification requirements.

B. Collections of Information Employing Statistical Methods

This information collection does not employ statistical methods.