

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)
OMB Control Number: 1205-0535

A. Justification.

This information collection request (ICR) 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) (collectively, the Departments). The regulatory requirements are codified at 8 CFR part 214 and 20 CFR part 655. The ICR covers Form ETA-9142-B-CAA-3, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers under Section 105 of Division H of the Consolidated Appropriations Act, 2019.

Background Information and General Instructions:

Clearance for Form ETA 9142-B-CAA-3 was sought using Paperwork Reduction Act (PRA) emergency procedures outlined in the regulations at 5 CFR 1320.13. Section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116-6 (Feb. 15, 2019) (Fiscal Year 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).¹ In consultation with the Secretary of Labor, the Secretary of Homeland Security increased the H-2B cap for FY 2019 by no more than an additional 30,000 visas for employers that attest that they are likely to suffer irreparable harm (i.e., permanent and severe financial loss) without the ability to hire the H-2B workers for which they received a temporary labor certification for FY 2019 and that the workers who received the additional visas were 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 promulgated regulations to implement this determination. Due to 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, the Department required initial clearance using expedited processes.

As set forth in the May 2019 Final Rule: *Exercise of Time-Limited Authority to Increase the Fiscal Year 2019 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program* (final rule), 84 FR 20005, employers seeking authorization to employ H-2B workers under this time-limited authority were required to complete and submit Form ETA-9142-B-CAA-3 to the U.S. Citizenship and Immigration Services (USCIS) in DHS. The regulations at 8

¹ See [National Defense Authorization Act for Fiscal Year 2019](#), which allows certain H-2B workers in Guam and in the Commonwealth of the Northern Mariana Islands (CNMI) to qualify for an exemption to the “temporary need” requirement if they begin employment on or before Dec. 30, 2023.

CFR 214.2(h)(6)(x)(C) implementing the FY 2019 Omnibus provides: “USCIS will reject petitions filed pursuant to [the FY 2019 Omnibus] that are received after the numerical limitation has been reached or after September 16, 2019, whichever is sooner.”

On June 7, 2019, USCIS announced that on June 5, 2019, it had received “enough petitions to reach the additional maximum 30,000 visas made available for returning workers under the H-2B numerical limit (also called a cap) for fiscal year (FY) 2019.”² As a result, USCIS stopped accepting H-2B petitions subject to the congressionally-mandated cap and began to reject and return any cap-subjected petitions received after June 5, 2019.

As required by the regulations, employers must continue to 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 temporary labor certification application. DOL sought public comments in connection with Form ETA 9142-B-CAA-3’s associated requirements, in order to revise and extend the information collection, as appropriate, using traditional processes. Specifically, DOL requested comments on the burden associated with reviewing instructions, completing and filing the attestation, performing any required steps, and retaining all required documentation supporting Form ETA-9142-B-CAA-3, via a an-day notice published with the final rule. DOL received four submissions from commenters in response to the request. The comments did not provide specific feedback on Form ETA 9142-B-CAA-3 but rather generally discussed the rulemaking.

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 Secretaries of Homeland Security and Labor under section 105 of Division H of the FY 2019 Omnibus. 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 temporary nonagricultural 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 Form ETA-9142-B-CAA-3, *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 (Feb. 15, 2019)*, implements the determination that visas granted under the cap increase authorized by Public Law 116-6 should be made available only to businesses with the most significant business needs and should be limited to only

² See <https://www.uscis.gov/working-united-states/temporary-workers/temporary-increase-h-2b-nonimmigrant-visas-fy-2019>.

workers who have been granted H-2B status in FY 2016, 2017, or 2018. 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 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, 2019*, Form ETA-9142-B-CAA-3) for employers to submit to DHS. The employer was required to file the attestation with DHS, as part of its Form I-129 petition. Additionally, an employer had to attest that the H-2B worker(s) requested had been issued an H-2B visa(s) or changed to H-2B status during one of the last three fiscal years. Finally, the employer was, and is, required to retain documents and records proving compliance with the final rule and must provide the documents and records to DHS and DOL upon request. See 20 CFR 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*. Employers used the form to attest that their businesses were likely to suffer irreparable harm without the ability to employ all H-2B workers requested and that they agreed to meet other program requirements. Employers were permitted to submit the form until June 5, 2019. The attestation and relevant documentation proving business harm must have been filed with DHS along with the petition for a nonimmigrant worker under the H-2B program. Attestation G on the form and the instructions to the form inform employers about this requirement and specify the documentation that must be retained for three years from the date of the labor certification.

Authority: 8 CFR Parts 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 the FY 2019 Omnibus. Employers that obtained a temporary labor certification (TLC) had to complete and submit a signed attestation form to DHS and must retain the form and the required supporting documentation for three years from the date the TLC was issued. Retaining these records for the specified period of time allows federal agencies to assess compliance with applicable regulatory standards.

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

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

This form's instructions are available via the internet (<https://www.foreignlaborcert.doleta.gov/pdf/Form-ETA-9142-B-CAA-3-General-Instructions.pdf>). A copy of the form, that was fully completed and signed, and submitted to DHS, along with supporting documentation, must be retained for three years from the date the TLC was issued.

- 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 FY 2019 Omnibus; 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, 2012,³ 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. Employers must record and maintain files to ensure they have complied with the Departments' regulations and fulfilled their obligations as an H-2B employer. Should the Department's Wage and Hour Division (WHD) investigate an employer, these files would be essential to assess compliance.

³ Office of Management and Budget Memorandum "Reducing Reporting and Paperwork Burden" (June 22, 2012), <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 Final Rule invited public comments on the information collections for a period lasting 60 days. DOL received four (4) public submissions in response to the request for comments in connection with this information collection. The comments received were not responsive to the information collection. In summary, the comments were out of scope. One commenter mistakenly submitted documents with personal information with the intention, perhaps, to request a visa under the H-2B program. Another commenter expressed disagreement with the H-2B program as a whole and Congress' decision to allow DHS, in consultation with DOL, to increase the H-2B cap. The other two commenters praised the decision to raise the cap by an additional 30,000 visas, but expressed that the supplemental cap is not reflective of the actual demand by U.S. employers for this type of visa.

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 WHD investigation or an audit by the Office of Foreign Labor Certification. As a practical matter, information from an investigation file would be disclosed only 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.*

When the attestation form was originally approved for use, it included recruiting requirements, the irreparable harm standard, and document retention obligations spelled out in the final rule referenced above in this supporting statement. Initially, DOL estimated the time burden for completing and signing the form to be 0.25 hours and 0.5 hours for notifying third parties and retaining records relating to the returning worker requirements. Using the total hourly wage for an HR specialist (\$46.49), the estimated opportunity cost of time for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements, is \$34.87 per response.⁴ Moving forward, this burden and cost will no longer be incurred by the public as the employers will not be permitted to file the form nor prepare a business harm analysis.

Additionally, employers were required to assess and document supporting evidence for meeting the irreparable harm standard, and continue to be required to retain those documents and records. DOL continues to estimate the time burden for complying with the recordkeeping requirement is approximately 0.50 hour (30 minutes).

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 that might request to employ H-2B workers under the final rule. This number of certifications is a reasonable proxy for the number of employers that needed to review and sign the attestation. Using this estimate for the total number of certifications, DOL estimates that the cost for HR specialists conducting the recordkeeping activities is \$87,773.

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

⁴ Calculation: \$46.49 (average per hour wage for an HR specialist) × 0.75 (time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements) = \$34.87.

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
Returning Workers' attestation and record keeping	3,776	1	3,776	0.50	1,888	\$46.49	\$87,773
Unduplicated Totals	3,776	1	3,776	0.50	1,888	\$46.49	\$87,773

* 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) × 0.75 (time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements) = \$34.87.

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

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

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

DOL anticipates some additional costs will be incurred by DHS in adjudicating the 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 forms filed with USCIS in support of a petition for H-2B workers. DOL will not incur government costs associated with the employers' retention of the necessary information associated with this collection.

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

DOL is now reporting a reduction in the burden initially projected when the emergency request was filed. The burden hours for which emergency approval was initially sought has been

reduced by 19,824 hours. This burden reduction results from the fact that as of June 5, 2019, employers are no longer allowed to complete and submit the form, nor required to conduct a business harm assessment, because the supplemental cap was reached, as announced by DHS on June 7, 2019. The only remaining requirement is the recordkeeping requirement, which DOL estimates will result in 1,888 burden hours.

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-3 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.