

SUPPORTING STATEMENT
ATTESTATION FOR EMPLOYERS SEEKING TO EMPLOY H-2B NONIMMIGRANT
WORKERS UNDER SECTION 105 OF DIVISION O OF THE FURTHER
CONSOLIDATED APPROPRIATIONS ACT, 2021, PUBLIC LAW 116-260
ICR Reference No. 1205-0NEW

A. Justification.

This information collection request (ICR) supports the *Exercise of Time-Limited Authority to Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program* Temporary 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 will be codified at 8 CFR part 214 and 20 CFR part 655. The ICR includes a new form, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers under Section 105 of Division O of the Further Consolidated Appropriations Act, 2021, Form ETA-9142B-CAA-4 (Form ETA-9142B-CAA-4).

Background Information and General Instructions:

Clearance for this new Form ETA 9142-B-CAA-4 is sought using Paperwork Reduction Act (PRA) emergency procedures outlined in the regulations at 5 CFR 1320.13.

The new information collection activities are required under Section 105 of Division O of the *Further Consolidated Appropriations Act, 2021, Public Law 116-260* (FY 2021 Omnibus), which provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in fiscal year 2021 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor, may increase the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(ii)(b)) in such fiscal year above such limitation by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.”

The Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 22,000 visas through the end of FY 2021 for certain H-2B workers for U.S. businesses who attest that they will likely suffer irreparable harm. On May 25, 2021, the Departments will publish a rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, in the *Federal Register* at [86 FR CITE] (cite forthcoming when the rule is published) announcing this cap increase to allow U.S. employers to request these additional H-2B visas as of May 25, 2021.

As with the previous H-2B supplemental rules, the Secretary of Homeland Security has determined that the additional visas will only be available for returning workers, that is workers

who were issued H-2B visas or otherwise granted H-2B status in FY 2018, 2019, or 2020, unless the worker is one of the 6,000 nationals of El Salvador, Guatemala, or Honduras (Northern Triangle countries) who are exempt from the returning worker requirement.

The rule seeks to prevent or alleviate irreparable harm to certain U.S. employers by allowing them to hire additional H-2B workers within FY 2021. This increase in the FY 2021 H-2B cap is based on a time-limited statutory authority and does not affect the H-2B program in future fiscal years. The exigency created by the FY 2021 Omnibus to meet the high demand by U.S. employers for H-2B workers, and the short period of time remaining in FY21 for U.S. employers to avoid the economic harms and possible financial losses this legislation was intended to prevent, requires initial clearance using emergency procedures. The regulations at 8 CFR 214.2(h)(6)(x) implementing the FY 2021 Omnibus provide: “USCIS will reject petitions filed pursuant to [the FY 2021 Omnibus] that are received after the numerical limitation has been reached or after September 30, 2021, whichever is sooner.”

An employer seeking authorization to employ H-2B workers under this time-limited authority, that submits the Form ETA-9142B-CAA-4 and the I-129 petition to U.S. Citizenship and Immigration Services (USCIS) in DHS, 45 or more days after the certified start date of work, as shown on its approved Application for Temporary Employment, is required to conduct additional recruitment to confirm that there are no qualified U.S. workers available for the positions.

Employers are also required to maintain the records associated with the filing of Form ETA-9142-B-CAA-4, including those related to the additional recruitment efforts, for three years from the date DOL certified the H-2B temporary labor certification application.

Lastly, DOL will be subsequently seeking public comments in connection with Form ETA 9142-B-CAA-4’s associated requirements, in order to revise and extend the information collection, as appropriate, using traditional notice and comment processes under the PRA. Specifically, DOL will be requesting comments on the burden associated with reviewing instructions, performing any required steps, and retaining all required documentation supporting Form ETA-9142-B-CAA-4, via a 60-day notice it included in the 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.*

This new information collection is required by regulations exercising authority delegated to the Secretary of Homeland Security and the Secretary of Labor under the FY 2021 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 update to regulations at 8 CFR part 214 and 20 CFR part 655 required the creation of a new form for employers to submit to USCIS. The employer is required to file the Form ETA-9142B-CAA-4 with USCIS, as part of its Form I-129 petition. The information the Departments seek to collect through the Form ETA-9142-B-CAA-4, implements the determination that visas granted under the limited cap increase authorized by the FY 2021 Omnibus should be made available only to U.S. employers under certain circumstances. Form ETA-9142-B-CAA-4 also support the implementation of requirements such as the additional recruitment that employers seeking these H-2B visas must conduct. Additionally, through this form, the employer has to attest that the H-2B worker(s) requested have been issued an H-2B visa(s) or changed to H-2B status during one of the last three fiscal years.

Finally, the employer is required to retain documents and records demonstrating compliance with the rule and must provide the documents and records to DHS or DOL upon request in the course of an audit or investigation. The retention of Form ETA-9142-B-CAA-4 and supporting documentation is required by regulations at 20 CFR Part 655.68, exercising authority delegated to the Secretary of Homeland Security and DOL's role pursuant to that authority under FY 2021 Omnibus. Employers will use the form to attest that their businesses are likely to suffer irreparable harm without the ability to employ all H-2B workers requested and that they agree to meet other program requirements. Employers must submit the form until USCIS announces that the additional H-2B cap has been reached or until the deadline for accepting the form has been reached.

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. 116-260.

- 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 2021 Omnibus. After obtaining a temporary labor certification (TLC), employers must complete and submit a signed attestation (Form ETA-9142-B-CAA-4) to USCIS and retain that form, along with the required supporting documentation, for three years, from the date the TLC is 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 will be made available via the internet (<https://www.dol.gov/agencies/eta/foreign-labor>). The form, once fully completed and signed, must be submitted to USCIS. A copy of the form, as it is submitted to USCIS, along with all necessary supporting documentation, must be retained for three years from the date DOL issues the TLC.

- 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 distinct 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 2021 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 requirements associated with this information collection apply to some small businesses that will submit applications to hire H-2B workers under the cap increase. Recordkeeping requirements, for example, 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 requirements under this time-limited authority that increases the H-2B visa cap. The requirements are not disproportionately more burdensome for small entities than large ones.

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

In the absence of this information collection, DOL and DHS would be unable to enforce compliance with the terms of the attestation, and DHS would be unable to ensure that visas made available by the temporary H-2B cap increase are reserved for those businesses that would likely suffer irreparable harm.

- 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.*

¹ 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>.

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 preclude subjecting this information collection to public comments at the time of its initial adoption. The Temporary Final Rule published in the Federal Register on May 25, 2021 invites 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 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.*

The attestation form includes irreparable harm standard and document retention obligations spelled out in the rule referenced above in this supporting statement. DOL estimates 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 (\$48.40), 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 \$36.60 per response.²

Additionally, employers are required to assess and document supporting evidence for meeting the irreparable harm standard. Employers are also required to retain all records associated with these attestations and with their requests for H-2B workers based on the supplemental rule. DOL estimates the average time burden for complying with the recordkeeping requirement is approximately 0.25 hour (15 minutes).

We believe that an estimated 3,558 remaining unfilled certifications for the latter half of FY 2021 will include all potential employers that might request to employ H-2B workers under the rule. This number of certifications is a reasonable proxy for the estimated number of employers that will need to review and sign the attestation based on the average number of workers requested on each H-2B TLC application. Using this estimate for the total number of certifications, DOL estimates that the cost for HR specialists conducting the recordkeeping activities is \$43,052.

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

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
Completing Form ETA-9142-B-CAA-4	3,558	1	3,558	0.25	890	\$48.40	\$43,052
Recruitment efforts	3,558	1	3,558	3	10,674	\$48.40	\$516,622

² Calculation: \$48.80 (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) = \$35.16.

Record keeping	3,558	1	3,558	0.25	890	\$48.40**	\$43,052
Returning Workers' attestation	3,558	1	3,558	0.50	1,779	\$48.40	\$86,104
Irreparable harm step	3,558	1	3,558	5	17,790	\$67.37* **	\$1,198,512
Unduplicated Totals	3,558†	1	3,558	9.00	32,023	Various	\$1,887,342

* 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/2018/may/oes132051.htm>.

**Calculation: \$48.40 (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.) = \$36.60.

***Calculation: \$46.46 (average per hour wage for a financial analyst, based on BLS wages) x 1.45 (benefits-to-wage multiplier) = \$67.37 (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) = \$336.85.

†This estimate cannot be aggregated; DOL estimates that approximately 3,558 will file this attestation form and comply with all requirements.

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-4. DOL, however, expects these costs will be 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.*

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-4 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.