

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
OMB 1205-0547

A. Justification.

This information collection request (ICR) supports the Temporary Rule, *Exercise of Time-Limited Authority to Increase the Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 86 FR 28198 (May 25, 2021), promulgated by the Department of Labor (DOL) 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 originally included a 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-9142-B-CAA-4 (Form ETA-9142-B-CAA-4). The Form ETA-9142-B-CAA-4 is no longer in use as the supplemental cap was reached on August 13, 2021, as announced by DHS on August 19, 2021; thus employers no longer need to complete the attestation for submission to DHS. As a result, the burden that was originally approved by Office of Management and Budget (OMB) via emergency clearance when the rule was initially promulgated has been amended by reducing the burden hours, since the only remaining step for participating H-2B employers is to comply with record keeping requirements as specified below in this supporting statement.

Background Information and General Instructions:

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

The information collection activities were required under Section 105 of Division O of the *Further Consolidated Appropriations Act, 2021, Public Law 116-260* (FY 2021 Omnibus), which provided 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, increased 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 which attested that they would likely suffer irreparable harm. On May 25, 2021, the Departments published a temporary rule, *Exercise of Time-Limited Authority To Increase the*

Fiscal Year 2021 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers, in the *Federal Register* at 86 FR 28198, announcing this cap increase to allow U.S. employers to request these additional H-2B visas as of May 25, 2021.

As with previous H-2B supplemental rules, the Secretary of Homeland Security determined that the additional visas would need to be used by returning workers, that is, workers who were issued H-2B visas or otherwise granted H-2B status in FY 2018, 2019, or 2020, with one exception, which was new this year. The exception was that up to 6,000 of the 22,000 visas provided under the FY 2021 temporary rule would be available for nationals of El Salvador, Guatemala, or Honduras (Northern Triangle countries). Nationals of the Northern Triangle countries need not have been returning workers.

The Departments believe the temporary rule helps 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 was 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 FY 2021 for U.S. employers to avoid the economic harms and possible financial losses this legislation was intended to prevent, required 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.”

On June 3, 2021, USCIS announced that it received enough petitions to reach the cap for the additional 16,000 H-2B visas made available for returning workers only but continued to accept petitions for H-2B nonimmigrant workers for the additional 6,000 visas allotted for nationals of the Northern Triangle countries. On July 23, 2021, USCIS further announced that it received fewer petitions than needed to reach the 6,000 visas allocated for workers from the Northern Triangle countries by the July 8 deadline stated in the rule. In accordance with the temporary rule, all remaining visas were made available to eligible H-2B returning workers, regardless of their country of origin.

Subsequently, on August 19, 2021, USCIS announced that, as of August 13, 2021, it had received enough petitions on behalf of returning workers to reach the additional 22,000 H-2B visas made available under the FY 2021 temporary rule.¹ USCIS announced that it would reject and return any cap-subject petitions for H-2B returning workers received after August 13, together with any accompanying fees.

Employers that sought authorization to employ H-2B workers under this time-limited authority submitted Form ETA-9142-B-CAA-4 and the I-129 petition to U.S. Citizenship and Immigration Services (USCIS) in DHS; if they made the submission to USCIS 45 or more days after the

¹ See <https://www.uscis.gov/news/news-releases/us-departments-of-homeland-security-and-labor-issue-joint-rule-supplementing-h-2b-visa-cap>.

certified start date of work, as shown on their approved Application for Temporary Employment Certification, they were required to conduct additional recruitment to confirm that there were no qualified U.S. workers available for the positions.

These employers were, and continue to be, required to maintain the records associated with the filing of Form ETA-9142-B-CAA-4, including those related to the additional recruitment efforts, if applicable, for three years from the date DOL certified the H-2B temporary labor certification application.

Lastly, DOL sought public comments in connection with the associated requirements of Form ETA 9142-B-CAA-4, in order to revise and extend the information collection, as appropriate, using traditional notice and comment processes under the PRA. Specifically, DOL requested comments on the burden associated with this information collection, including the retention of all required documentation supporting Form ETA-9142-B-CAA-4, via a 60-day notice included in the temporary rule. A full discussion covering the comment consideration process in connection with this notice is included in the A.8 response of this supporting statement, below.

- 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. Employers were required to file Form ETA-9142B-CAA-4 with USCIS, as part of its Form I-129 petition. The information the Departments collected through Form ETA-9142-B-CAA-4, implemented 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 supported the implementation of requirements such as the additional recruitment that employers seeking these H-2B visas 45 or more days after the certified start date must conduct. Additionally, through this form, the employer attested 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, or that the H-2B worker(s) were among the 6,000 nationals of El Salvador, Guatemala, or Honduras (Northern Triangle countries) who are exempt from the returning worker requirement.

Finally, the employer was, and continues to be, required to retain documents and records

demonstrating compliance with the temporary 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 655.68, exercising authority delegated to the Secretary of Homeland Security and DOL's role pursuant to that authority under FY 2021 Omnibus. Employers relied on this 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 required to submit the form until August 19, 2021, when USCIS announced that the supplemental H-2B cap had 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 regulatory requirements associated with the temporary cap increase authorized by the FY 2021 Omnibus. After obtaining a temporary labor certification (TLC), employers were required to 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. Even though employers are no longer required to submit the form to USCIS, they remain responsible for keeping the form, along with any supporting documentation, along with their petitions for H-2B workers.

- 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.*

Form ETA-9142-B-CAA-4's instructions are available via the internet (<https://www.dol.gov/agencies/eta/foreign-labor>). A copy of this form, as it was submitted to USCIS, along with all necessary supporting documentation, must be retained by the employer, in the manner that the employer customarily does as part of its normal course of business, including electronic recordkeeping, if it chooses to do so, 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 to hire 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 have submitted 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, 2012,² about Reducing Reporting and Paperwork Burdens. It would not be appropriate to include exemptions for small entities (including small businesses) from the requirements under the time-limited authority that increased 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.*

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.*

² 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>.

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 comment at the time of its initial adoption. The notice included in the temporary rule published in the Federal Register on May 25, 2021 (86 FR 28198) invited public comments on the information collection tools covered under OMB 1205-0547, for a period lasting 60 days. Specifically, the notice requested feedback on burden estimates concerning reviewing instructions, performing required steps, and record keeping and the public compliance with such requirements. DOL received one comment submission in response. The comments received through that submission were not responsive to the specific request for feedback in connection with this information collection. The commenter provided unsolicited comments regarding the regulatory requirements implemented by the temporary rule, not the burden estimates for the information collection.³ In summary, the comments were out of scope.

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 Division 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*

³ The temporary rule was exempt from notice and comment requirements under Administrative Procedure Act (APA), 5 U.S.C. 553(b), as necessary to implement the FY 2021 Omnibus. See 86 FR 28216. However, the Department solicited comments on the information collection tool and burden associated with the temporary rule, as required under the PRA. See *id.* at 28229.

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 OMB 1205-0547 was originally approved for use, it included Form ETA-9142-B-CAA-4, recruiting requirements, the irreparable harm standard, and document retention obligations spelled out in the final rule referenced above in this supporting statement. 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 (\$43.79), 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, was \$32.84 per response.⁴ Additionally, employers were required to assess and document supporting evidence for meeting the irreparable harm standard.

After August 13, 2021, employers were no longer required to comply with most of these requirements; however, employers continue to be required to retain all records associated with these attestations and with their requests for H-2B workers based on the supplemental rule. DOL continues to estimate the average time burden for complying with the recordkeeping requirement at approximately 0.25 hour (15 minutes).

DOL continues to believe that an estimated 3,558 remaining unfilled certifications for the latter half of FY 2021 would include all potential employers that might request to employ H-2B workers under the rule. This estimated number of certifications represents 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 now estimates that the cost for HR specialists conducting the recordkeeping activities is \$38,973.

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

Estimated Annualized Respondent Hour and Cost Burdens

⁴ Calculation: \$43.79 (average per hour compensation for an HR specialist) × 0.25 (time burden for retaining records related to the returning worker requirements) = \$32.84.

Forms	Number of Respondents	Frequency	Total Number of Responses	Time Per Response (In Hours)	Total Burden Hours	Hourly Wage Rate*	Total Burden Costs
Record keeping	3,558	1	3,558	0.25	890	\$43.79**	\$38,973
Unduplicated Totals	3,558	1	3,558		890		\$38,973

*The national mean hourly wage for a human resources specialist is \$33.38 (*Occupational Employment and Wages, May 2020: 11-3121 Human Resources Specialists*, DOL, BLS, www.bls.gov/oes/current/oes131071.htm), while benefits averaged 31.2 percent of total employee compensation (*Employer Costs for Employee Compensation – June 2021*, U.S. Department of Labor, Bureau of Labor Statistics, www.bls.gov/news.release/eccec.nr0.htm). The estimated average hourly compensation for a human resources specialist, including wages and benefits, is \$43.79 (\$33.38 x 1.312).

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.*

Originally, DOL anticipated some additional costs would be incurred by DHS in adjudicating the Form ETA-9142-B-CAA-4. DOL, however, it expects these costs should have been 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 31,133 hours. This burden reduction results from the fact that as of August 13, 2021, employers were 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 August 19, 2021. The only remaining requirement is the record keeping requirement, which

DOL estimates will result in an approximate total of 890 burden hours. In addition, after the publication of the 60-day FRN, the Bureau of Labor Statistics updated hourly wages, which caused a change in the estimated cost associated with record keeping activities. The wage rate for recordkeeping-related activities decreased from \$48.40 per hour to \$43.79 per hour. See more information on the table in A.8 above.

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.