

**APPENDIX A TO SUPPORTING STATEMENT
H-2B FOREIGN LABOR CERTIFICATION PROGRAM
H-2B APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION
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 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 January 12, 2022, at 87 FR 1787, which are referred to in Question 8 of the Supporting Statement.¹

The Department received four comment submissions from five commenters. The comments have been considered and are addressed in this document.

The Department has made clarifications to the Form ETA-9142B, *General Instructions*, in response to a public comment requesting clarification of the form instructions. The change to the Form ETA-9142B, *General Instructions*, is discussed in greater detail below. The Department has not made further changes to its proposal in response to the comments received.

I. The Department’s Authority to Revise the H-2B Forms

One comment from a private citizen expressed political opinions and general dissatisfaction with the immigration system and the hiring of foreign workers. The comment did not address the information collection.

The comment submission 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. The Department cannot address requests for notice and comment rulemaking through this form package.

II. The Department’s Proposed Changes to the Forms and Instructions

A. Form ETA-9142B – Section A

The Department’s existing Form ETA-9142B, Section A, asks the employer whether it will use the H-2B application to employ any H-2B workers who are exempt from the statutory numerical H-2B cap, with the option of a “Yes” or “No” response. Employers enter “Yes” or “No” in Section A based on the best information available to the employer at the time of filing; the

¹ <https://www.govinfo.gov/content/pkg/FR-2022-01-12/pdf/2022-00393.pdf>.

collection item has caused confusion for employers as to how they should complete the field and, further, as to the implications of completing the field entry with a “Yes” or “No” response. In an attempt to allay concerns of the “Yes” or “No” designation, with the form proposal, the Department has proposed to modify the field to collect information on the number of cap-subject or cap-exempt workers requested by the employer for the Form ETA-9142B filing.

A trade association commented on the proposed change of Section A to collect numbers instead of the selection of “Yes” or “No” for the response. The trade association states, at the time employers complete the Form ETA-9142B, “many practitioners and agents have not yet identified beneficiaries” and, therefore, the collection of numbers in Section A, will occur at a time when employers may not be aware of the numbers of cap-subject or cap-exempt workers. The trade association, therefore, maintains that the proposed change to collect numerical entries will not fulfill the Department’s intended purpose and, further, states that the numerical collection is unnecessary.

The Department appreciates the feedback regarding the proposed collection of the numbers of cap-subject and cap-exempt workers on the Form ETA-9142B in lieu of the current “Yes” or “No” response. Currently, collection of “Yes” and “No” in Section A enables the Department to estimate the potential number of cap-exempt and cap-subject applications. The Department uses the information collected in Section A, with the “Yes” or “No” designation, to assess its application filings in light of the semi-annual H-2B visa cap. While the “Yes” or “No” checkboxes have assisted the Department in having more information than it previously had, the Department has found through H-2B application processing that the checkboxes have inadvertently caused confusion with employers who, in some instances, attempt to split application filings into two separate filings for the same job opportunity. For example, instead of a single application filing for a job opportunity, employers are sometimes filing two applications and for the first application selecting “Yes,” the employer intends to employ cap-exempt workers for that application; and then for the second application selecting “No,” for the same job opportunity. In which case, the filings are for the same job opportunity and are duplicates, except for the Section A designation. This has led to processing difficulties, including the issuance of Notices of Deficiency and/or denials for duplicate application filings for the same H-2B job opportunity.

To lessen confusion, but still collect useful information and data, the Department is proposing to change the collection to a numerical collection for Section A. While the current collection allows the Department to project the potential number of cap-exempt and cap-subject applications, the proposed collection of numbers in Section A will allow the Department to estimate the potential numbers of cap-exempt versus cap-subject workers for its applications. This proposed collection will better inform the Department’s decisions regarding its processing resources and inform the Department’s advice to the Department of Homeland Security (DHS). 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 determining processing resources for its own workload and, as consultation with DHS occurs, will assist DHS with the planning and timing of possible petitions it will receive under the semi-annual 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.

Employers will complete Section A using estimates based on the best information they have available at the time of the H-2B application filing. The Department will not use the collection of the information in Section A to render the definitive determination regarding H-2B cap exemptions, which is for DHS to determine. Rather, this collection item seeks to obtain data for purposes of assessment of processing resources, consultation with DHS, and public disclosure of the demand for H-2B workers under the statutory numerical limits.

The Department asserts that the collection of numbers will lessen confusion for employers who file H-2B applications. With the proposed change, employers will estimate the numbers of cap-exempt and cap-subject workers based on their entry in Section B.4 of the form for “Number of Workers” and totaling the entry in Section B.4. The Section A entries are estimates only, and, as previously stated, are based on the best information the employer has at the time of filing and the entry in Section B.4.

While the Department appreciates the comment, the Department declines to make changes to the proposal because the Department believes the benefits of the proposal will assist both employers, by reducing confusion with their application filings, and the agency, with its planning and advice to DHS. Employers are reminded that the Department will not hold the employer to its estimates in Section A, beyond its review of the entries and totals in Section A and Section B.4 of the form during application adjudication. Further, the Department’s certification approval will be for the number the Department enters on the Form ETA-9142B, *Final Determination*, approval form and not the numbers the employer enters into Section A of the Form ETA-9142B.

B. Form ETA-9142B, General Instructions – Section F.b.9

The Department’s proposed changes included changes to overtime disclosures in Section F of the Form ETA-9142B. The proposed Form ETA-9142B, *General Instructions*, in Section F.b.9 “Additional Conditions for Wage and Overtime Rates” added a statement for “premium rates” for overtime. The proposed instructions stated that an overtime premium rate “is an additional amount paid to employees for hours worked exceeding a certain number in a day, week, or pay period.” A trade association commented that the Form ETA-9142B, *General Instructions*, under Section F.b.9 fails to define the term “premium rate,” in reference to overtime, which the commenter stated was confusing. The commenter asked the Department to revise the reference to overtime rates in the Form ETA-9142B, *General Instructions*, to reduce confusion with use of the term “premium rate.” The commenter suggested that the instructions be clarified to state that overtime is “calculated as time and a half (sic).”

In response to the comment, the Department has revised Section F.b.9 of the Form ETA-9142B, *General Instructions*, to clarify the overtime rate instructions. Where the instructions originally made reference to “premium rate” as “an additional amount paid to employees for hours worked exceeding a certain number in a day, week or pay period,” in response to the comment, the Department has clarified “premium rate” in the form instructions stating that “premium rate” refers to overtime paid at time-and-a-half or any amount higher than the wage rate. The

Department has clarified in the form instructions with its 30-day proposal that the premium rate may be time-and-a half, as established by the Fair Labor Standards Act, or may be a higher overtime rate as required by State or local law.

C. Form ETA-9142B, Appendix B

The Department further proposed to modify the collection for the Form ETA-9142, *Appendix D*, to collect information for “other joint employers” in addition to the current collection for job contractor end-clients with *Appendix D*. With the proposed modification, the Department specified that the filer would need to complete the joint employer information in *Appendix D*, and also, each joint employer would need to complete a signed *Appendix B* with the application filing, agreeing to the employer assurances and obligations in *Appendix B*. A trade association commented requesting a revision to the Form ETA-9142B, *Appendix B*, to add an additional signature field to allow joint employers to sign a single form, where joint employers are filing the H-2B application.

The Department appreciates the suggestion for the addition of another signature block for *Appendix B* for instances in which there are joint employer filings, but the Department declines to implement the suggestion at this time. Aside from the logistics of each joint employer signing a single form for submission with the H-2B application filing, *Appendix B* requires each employer to initial each line of the *Appendix B* attestations. In the event of joint employer H-2B application filings, if an additional signature block were added as suggested, each employer would need to both sign the *Appendix B* and, also, initial each line item declaration for each *Appendix B* attestation. To implement the suggestion, more extensive form changes warranting the redesign of *Appendix B* would be necessary to collect both the signatures and line-item initials of each joint employer on a single *Appendix B* form.

Accordingly, the Department declines to make any changes in response to comments on the *Appendix B* proposed in 60-day notice. Although the change might assist a small portion of applicants, the change is not feasible at this time.

D. H-2B Registration

A trade association urged the Department to fully implement the H-2B registration process. The trade association stated that implementation of the registration process for the H-2B program would help employers avoid having to demonstrate temporary need for each H-2B application. This comment is outside of the scope of the form proposal. Upon implementation of the H-2B registration process, the Department will inform the public through a separate notice in the *Federal Register*. The Department has not operationalized the registration process through a separate notice in the *Federal Register*, and as such, 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.

E. Form ETA-9165

A legal aid society and policy institute co-authored the fourth comment concerning the Form ETA-9165. The Department received a separate comment submission from a worker advocacy group that stated its support for the opinions expressed by the legal aid society and policy institute with regard to the Form ETA-9165.

Authority for the Form ETA-9165: The comment questioned the Department’s authority to use the Form ETA-9165. The comment referenced “ongoing litigation against [the Department] and the Department of Homeland Security” and attached a legal brief filed February 28, 2022, from *Williams, et al. v. Walsh, et al.*, No. 1:21-cv-01150-RC (D.D.C.) in support of its opposition to the Department’s use of the Form ETA-9165. As its main premise, the comment states that the Department should “conduct notice-and-comment rulemaking on Form ETA-9165 and its governing regulations.”

The comment incorporated by reference the legal brief it attached to make the argument that the regulatory underpinning for the Form ETA-9165, 20 CFR 655.10 of the Department’s H-2B regulations, was “promulgated in violation of the [Administrative Procedure Act (APA)], without allowing for notice and comment and without rational explanation for its policy decisions” and, therefore, the comment opposes the Department’s continued use of the current Form ETA-9165.

H-2B Survey Quality: The comment challenged the use of surveys for H-2B prevailing wage determinations, reliance on employer-provided survey information, the H-2B survey review process, and, therefore, the use of the Form ETA-9165 form to collect survey details for the H-2B survey review process. The comment asserted that the Department should revise the Form ETA-9165 “to ensure that it conducts a searching inquiry into the reliability, accuracy, and statistical support of all employer-provided surveys.” The comment stated that the “Form ETA-9165 is supposed to ensure that employer-provided surveys are of high enough quality, free from bias and with enough statistical support, that [the Department] can confidently rely on their conclusions,” and further states that the form does not reach that objective. The comment references the role of H-2B surveys in determining worker wages and stresses the importance of reliable survey instruments.

The comment asserted that the Department should revise the Form ETA-9165 “to ensure that it conducts a searching inquiry into the reliability, accuracy, and statistical support of all employer-provided surveys.” The comment stated that the “Form ETA-9165 is supposed to ensure that employer-provided surveys are of high enough quality, free from bias and with enough statistical support, that [the Department] can confidently rely on their conclusions” and further states that the form does not reach that objective.

Form ETA-9165 Section D - Occupational Classification: The comment asked the Department to modify Section D of the Form ETA-9165 to “inquire into the ‘occupational classifications’ surveyed, with complimentary instructions explaining that an occupational classification is a cross-industry group that is broader than a single ‘position’ or ‘job’.” The comment further asked for the Department to provide the Standard Occupational Classification (SOC) codes and O*NET systems as examples of occupational classifications. In addition, the comment stated

that Section D should “require the surveyor to provide information about how, if classifications distinct from the familiar SOC or O*NET systems were used, the job description was standardized to apply across industries.” Further, the comment states that H-2B surveys should be expanded beyond the geographic area of intended employment and the Form ETA-9165 does not adequately question employers about expansion of the geographic area, if any. The comment further asks the Department to verify the performance of the survey.

Form ETA-9165 Section E - Expansion to Enforce Survey: The comment stated that the Department does not ask adequate enough questions with the Form ETA-9165 to evaluate the survey instrument. The comment provided suggestions for changes to the form for use in evaluating the adequacy of the survey instrument.

Form ETA-9165 Section E - Methods for Survey Contact Attempts: The comment stated that the Form ETA-9165 does not sufficiently inquire into the methods of surveyors to contact potential respondents.

Form ETA-9165 Section E - Enforce Requirement that Data Be Collected Across Industries: The comment stated that Form ETA-9165 has a “Yes” or “No” checkbox for the question of whether the survey was conducted across industries that employ workers in the occupation. The comment questions the reliability of employers who self-report their compliance with survey requirements.

Form ETA-9165 Section F – Require Attestations from Surveyor or Employer’s Reasonable Inquiry: The comment stated that the Form ETA-9165 undermines the H-2B survey structure by requiring “that the relevant information be provided solely by the employer submitting the form, and then worsens the problem by allowing the employer to attest to the truthfulness and accuracy of the information provided on the form. The comment states that the surveyor, not the employer, should provide the survey details to the Department.

In response to the commenters, this entirety of the comment is outside of the scope for consideration of the Department’s proposed information collection. The comment asks the Department to engage in notice and comment rulemaking for the Form ETA-9165. The Department’s form package proposal does not alter employers’ substantive legal obligations under the INA and the Department’s accompanying regulations, which were jointly issued with DHS. Therefore, regulatory amendments are not necessary, as the form is within the Department’s existing authority to administer the H-2B temporary labor certification process, and that process includes determination of the prevailing wage. Form changes under the Department’s existing authority do not require the Department to engage in rulemaking under the APA and its associated notice and comment process. Rather, the Department has made available its proposed revisions for public inspection, in compliance with the Paperwork Reduction Act and its notice and comment process.

The Department’s proposal for the Form ETA-9165 made non-substantive form changes removing the Public Burden Statement from the form to the form instructions. The Department did not make substantive changes to the Form ETA-9165 with this proposal and the comment received is not directly related to the Department’s proposal, but instead, relates to the

Department's evaluation of H-2B surveys, survey methodology, surveyor requirements, and the determination of H-2B prevailing wages. The Department declines to make changes to the Form ETA-9165.² Aside from the commenters' request for notice and comment rulemaking to implement the suggested form changes, the Department maintains that some of the suggestions would create redundancy with the survey instrument itself. The commenter should note, the Department requests information on the Form ETA-9165 as a preliminary review of survey information; however, the Department also receives survey instruments for assessment and evaluation for H-2B prevailing wage determinations that are survey-based.

² The Department intends to seek transfer of the Form ETA-9165 from OMB Control Number 1205-0509 to Control Number 1205-0508 with the Form ETA-9141, *Application for Prevailing Wage Determination*. The Form ETA-9165 is reviewed with the Form ETA-9141 and used as a tool in the prevailing wage determination process. As a result of the proposed transfer of the form and its accompanying requirements to the Form ETA-9141 information collection request, the public will have an additional opportunity to review and comment on the Form ETA-9165.