

**SUPPORTING STATEMENT**  
**ATTESTATION FOR EMPLOYERS SEEKING TO EMPLOY H-2B NONIMMIGRANT**  
**WORKERS UNDER SECTION 105 OF DIVISION O OF THE CONSOLIDATED**  
**APPROPRIATIONS ACT, 2021, PUBLIC LAW 116-260, AND PUBLIC LAWS 117-43**  
**and 117-70**  
**OMB 1205-0549**

---

**A. Justification.**

This information collection request (ICR) supports the Temporary Final Rule (TFR), *Exercise of Time-Limited Authority to Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, which was promulgated by the Department of Labor (DOL or Department) and the Department of Homeland Security (DHS) (collectively, the Departments). The regulatory requirements were codified at 8 CFR part 214 and 20 CFR part 655 and the information collection activities covered under *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers under Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, and Public Laws 117-43 and 117-70*, Form ETA-9142-B-CAA-5 (Form ETA-9142-B-CAA-5), along with other requirements (e.g., recruitment efforts; recordkeeping requirements), covered under Office of Management and Budget (OMB) Control Number 1205-0549 (OMB 1205-0549). This ICR seeks to revise OMB 1205-0549 to eliminate the requirement that employers complete and submit the Form ETA-9142-B-CAA-5 to DHS but extending the recordkeeping requirements for an additional three years.

**Background Information and General Instructions:**

On January 28, 2022, the Departments jointly published the TFR.<sup>1</sup> In the TFR, the Secretary of Homeland Security, after consultation with the Secretary of Labor, authorized the issuance of up to 20,000 additional H-2B visas for the first half of Fiscal Year (FY) 2022 for positions with start dates on or before March 31, 2021, to those employers that attested they were suffering irreparable harm or would suffer impending irreparable harm without the ability to employ all of the H-2B workers requested on their Form I-129. The Departments published the TFR in accordance with authority provided in Public Laws 117-43 and 117-70 (FY 2022 CR), which authorized the Secretary of Homeland Security to increase the number of H-2B visas available to U.S. employers in FY 2022 under the same terms and conditions authorized in section 105 of Division O of the 2021 Consolidated Appropriations Act, Public Law 116-260.<sup>2</sup> The authority in the FY 2022 CR permitted the Secretary of Homeland Security, after consultation with the

---

<sup>1</sup> See 87 FR 4722 (Jan. 28, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-01-28/pdf/2022-01866.pdf>.

<sup>2</sup> Pub. L. 117-70, Further Extending Government Funding Act, Division A, Further Continuing Appropriations Act, 2022, section 101 (Dec. 3, 2021) (amending the expiration date of Pub. L. 117-43 in section 106(3) from Dec. 3, 2021 to Feb. 18, 2022) and Pub. L. 117-43, Extending Government Funding and Delivering Emergency Assistance Act, Division A, Continuing Appropriations Act, 2022, Sections 101 and 106(3) (Oct. 3, 2021) (providing DHS funding and authorities, including authority under section 105 of title I of Division O of Pub. L. 116-260, through December 3, 2021).

Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, and Public Laws 117-43 and 117-70  
OMB Control Number: 1205-0549  
Expiration Date: July 31, 2022

Secretary of Labor, to provide additional H-2B visas for the first half of FY 2022, notwithstanding the otherwise-established statutory numerical limitation set forth in the Immigration and Nationality Act (INA), for eligible employers whose employment needs for FY 2022 could not be met under the general fiscal year statutory cap. The information collection activities covered under OMB 1205-0549 are required under this authority.

As with the previous H-2B supplemental cap rules, the Secretary of Homeland Security 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 2019, 2020, or 2021, with the exception that up to 6,500 visas will be exempt from the returning worker requirement and will be reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Triangle countries), as well as for nationals of Haiti.

The TFR sought to mitigate or prevent irreparable harm to certain U.S. employers by allowing them to hire additional H-2B workers within FY 2022. This increase in the H-2B visa cap for the first half of FY 2022 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 2022 CR to meet the high demand by U.S. employers for H-2B workers, and the short period of time remaining in the first half of FY 2022 for U.S. employers with a start date of need on or before March 31, 2022, to mitigate or avoid irreparable harm to their businesses, required initial clearance using emergency procedures. The regulations at 8 CFR 214.2(h)(6)(xi)(C) provide that U.S. Citizenship and Immigration Services (USCIS) would reject petitions filed pursuant to the TFR that were received after the numerical limitation has been reached or after March 31, 2022, whichever is sooner.

An employer seeking authorization to employ H-2B workers under this time-limited authority was required to submit the Form ETA-9142-B-CAA-5 and the I-129 petition to USCIS 45 or more days after the certified start date of work, as shown on the employer's approved *Application for Temporary Employment Certification*. In addition, the employer was required to conduct additional recruitment to confirm that there were no qualified U.S. workers available for the positions when submitting the I-129 more than 45 days after the certified start date of the H-2B temporary labor certification (TLC). The TFR also required the employer to maintain the records associated with the filing of Form ETA-9142-B-CAA-5, including those related to the additional recruitment efforts, for three years from the date DOL certified the *Application for Temporary Employment Certification*.

After March 31, 2022, employers are no longer permitted to submit the Form ETA-9142-B-CAA-5 along with I-129 petitions to USCIS when requesting approval to bring H-2B workers; as a result, the Department is eliminating the need to complete the form, thus removing it from OMB 1205-0549. Employers will only be required to retain records associated with the filing of the form and with the recruitment efforts conducted in connection with their requests under this TFR.

Lastly, the Department has sought public comments solely in connection with Form ETA-9142-B-CAA-5's recordkeeping requirements, and on the burden associated with retaining all required documentation supporting Form ETA-9142-B-CAA-5.

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 information collection is required by regulations exercising authority delegated to the Secretary of Homeland Security and the Secretary of Labor under the FY 2022 CR. 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 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 an *Application for Temporary Employment Certification* to the Secretary of Labor satisfying 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. Under 8 CFR 214.2(h)(6)(xi)(B)(2), the employer was required to file the Form ETA-9142-B-CAA-5 with USCIS as part of its Form I-129 petition. Through the Form ETA-9142-B-CAA-5, the Departments collected information necessary to ensure that employers seeking to hire H-2B workers under the supplemental cap met all requirements to hire H-2B workers included in the TFR. Specifically, through this form, employers attested that they met the irreparable harm standard, and that they sought to hire either returning workers or workers from the Northern Triangle countries or Haiti, as well as other program requirements. Employers that submitted the form and I-129 petition to USCIS, under the supplemental cap, 45 or more days after the start date of work were required to attest, through this form, that they would complete a new assessment of the labor market by taking certain enumerated recruitment steps. As of March 31, 2022, USCIS no longer accepts I-129 petitions filed under the supplemental cap; therefore, the Form ETA-9142-B-CAA-5 is no longer required and as a result, the Department is eliminating its use and the public cost and burden associated with it.

Finally, the employer is required to retain documents and records demonstrating compliance with the TFR and must provide the documents and records to DHS or DOL upon request. The retention of Form ETA-9142-B-CAA-5 and supporting documentation will continue to be required by regulations at 20 CFR 655.68. The Departments intend to conduct a significant number of audits and investigations to verify compliance with program requirements, including the irreparable harm standard and additional recruitment requirements. The requirement to retain the form and supporting documentation will assist the Departments in assessing employers' compliance with the TFR's requirements.

**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(a)(15)(H)(ii)(b), 1103(a)(6), 1184; Pub. L. 116-260, Pub. L. 117-43, and Pub. L. 117-70.

- 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 carry out the requirements created under the temporary cap increase authorized by the FY 2022 CR. After obtaining a TLC, employers that completed and submitted a signed Form ETA-9142-B-CAA-5 to USCIS must continue to retain that form, along with 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.*

The Form ETA-9142-B-CAA-5 and its instructions were available via the internet (<https://www.dol.gov/agencies/eta/foreign-labor/forms>), but have since been removed from the Department's website as USCIS is no longer accepting the form. The employer must retain a copy of the form, as it is submitted to USCIS, along with all necessary supporting documentation, 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 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 under the TFR; 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.

It would not be appropriate to include exemptions for small entities (including small businesses) from the requirements under the TFR. 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 attestations, and DHS would be unable to ensure that visas made available by the temporary H-2B cap increase are reserved for those businesses that meet the irreparable harm standard.

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 publications 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 TFR published in the *Federal Register* on January 28, 2022, at 87 FR 4722, invited public comments on the information collections for a period lasting 60 days. After the TFR was published in the *Federal Register*, the Department received a recommendation letter from the American Federation of Labor and Congress of Industrial Organizations, that after further review, was determined to be out of scope of the type of comments the Department was soliciting at the moment concerning the information collection activities resulting from the TFR. Specifically, the letter provides general recommendations for comprehensively improving the H-2B program. The Department will not be making any changes to this information collection

based on this submission, but will consider these recommendations in the future, should the Department determine to pursue regulatory actions in connection with the H-2B program.

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 Departments unless requested. 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 included attestations, such as a statement that the employer met the irreparable harm standard, and document retention obligations spelled out in the TFR and described above. 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 (\$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, was estimated, at the time the rule was published, at \$36.60 per response.<sup>3</sup> The Bureau of Labor Statistics has since updated the hourly wages, which caused a change in the estimated cost associated with record keeping activities. The wage rate for recordkeeping-related activities increased from \$48.40 per hour to \$49.30 per hour.

Additionally, employers were required to assess and document supporting evidence for meeting the irreparable harm standard. Employers were, and continue to be, required to retain all records associated with these attestations and with their requests for H-2B workers pursuant to the TFR. DOL continues to estimate the average time burden for complying with the recordkeeping requirement is approximately 0.25 hour (15 minutes).

<sup>3</sup> Calculation: \$48.40 (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) = \$36.60.

At the time the rule was published, DOL believed that an estimated 1,226 remaining unfilled certifications for the latter half of FY 2022 would include all potential employers that might request to employ H-2B workers under the TFR. This number of certifications was considered a reasonable proxy for the estimated number of employers that would need to review and sign the attestation based on the average number of workers requested on each H-2B *Application for Temporary Employment Certification*. For purposes of extending the validity of this information collection to continue to enforce the recordkeeping requirement, the Department will continue to use this estimate for the total number of certifications, as well as estimating that the monetized value of the time burden for HR specialists conducting the recordkeeping activities is approximately \$15,110.45.

As explained above in this supporting statement, the Departments are no longer enforcing the requirement for employers to complete and submit the form to USCIS, nor to conduct additional recruitment steps under the TFR since USCIS ceased to accept these petitions filed under the TFR on March 31, 2022, as detailed in the regulations. As a result, the Department is only reporting the burden and costs associated with the recordkeeping activities, covered under OMB 1205-0549.

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
Record keeping activities	1,226	1	1,226	0.25	306.5	\$49.30**	\$15,110.45
<b>Unduplicated Totals</b>	<b>1,226</b>	<b>1</b>	<b>1,226</b>	<b>0.25</b>	<b>307 (Round ed in ROCIS)</b>	<b>\$49.30</b>	<b>\$15,110.45</b>

\* Bureau of Labor Statistics. U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics *May 2021, Human Resources Specialist*: <https://www.bls.gov/oes/current/oes131071.htm>.

\*\* Calculation: \$49.30 (\$34.00 mean hourly wage \* 1.45 benefits-to-wage multiplier = \$49.30) x 0.75 (time burden for retaining records related to the returning worker requirements.) = \$36.98.

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-5 and enforcing the terms and conditions, and attestations made by the employers when filing these petitions. 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.*

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 10,728 hours. This burden reduction results from the fact that as of March 31, 2022, employers were no longer allowed to complete and submit the form, nor required to conduct a business harm assessment, as stipulated under the regulations. The only remaining requirement is the record keeping requirement, which DOL estimates will result in an approximate total of 306.5 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 increased from \$48.40 per hour to \$49.30 per hour. See more information on the table in A.12 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-5 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.



Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116-260, and Public Laws 117-43 and 117-70  
OMB Control Number: 1205-0549  
Expiration Date: July 31, 2022

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.