

SUPPORTING STATEMENT
ATTESTATION FOR EMPLOYERS SEEKING TO EMPLOY H-2B NONIMMIGRANT
WORKERS UNDER SECTION 204 OF DIVISION O OF THE CONSOLIDATED
APPROPRIATIONS ACT, 2022, PUBLIC LAW 117-103, AND PUBLIC LAW 117-180.

A. Justification.

This information collection request (ICR) seeks an Extension of a currently approved ICR.

This information collection request (ICR) supports the Temporary Final Rule (TFR), *Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, which is being promulgated by the Department of Labor (DOL or Department) and the Department of Homeland Security (DHS) (collectively, the Departments). The regulatory requirements have been codified at 8 CFR part 214 and 20 CFR part 655. The ICR includes a form, *Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers under Section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117-103, and Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117-180*, Form ETA-9142-B-CAA-7 (Form ETA-9142-B-CAA-7), along with other requirements (e.g., recruitment efforts; recordkeeping requirements), which are covered under Office of Management and Budget (OMB) Control Number 1205-0554 (OMB 1205-0554).

Background Information and General Instructions:

On March 15, 2022, President Joseph Biden signed the *Consolidated Appropriations Act, 2022, Public Law 117-103* (Fiscal Year (FY) 2022 Omnibus), which contains a provision, section 204 of Division O, Title II, permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA. Specifically, section 204 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 [FY] 2022 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa in FY 2022 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 the H-2B numerical limitation. The Secretary of Homeland Security consulted with the Secretary of Labor, and the TFR implements the authority contained in section 204.

On September 30, 2022, Congress passed the *Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117-180* (Public Law 117-180) which authorizes the Secretary of Homeland Security to increase the number of H-2B visas available to U.S. employers in FY 2023 under the same terms and conditions provided in section 204 of Division O of the FY 2022 Omnibus. In other words, Public Law 117-180 permitted the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide up to

64,716 additional H-2B visas for FY 2023, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2023 cannot be met under the general fiscal year statutory cap.

Under the Public Law 117-180 authority, on December 15, 2022, DHS and DOL jointly published a TFR, *Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, in the *Federal Register* at 87 FR 76816, to authorize the issuance of no more than 64,716 additional visas for FY 2023 to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. The authority to approve H-2B petitions under this FY 2023 supplemental cap expires at the end of this fiscal year. Therefore, the United States Citizenship and Immigration Services (USCIS) will not accept H-2B petitions filed in connection with this FY 2023 supplemental cap authority on or after September 15, 2023.¹

In the TFR, the Secretary of Homeland Security, after consultation with the Secretary of Labor, authorized the issuance of no more than 64,716 additional visas for FY 2023 to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. In addition to making the additional 64,716 visas available under the FY 2023 time-limited authority, DHS exercised its general H-2B regulatory authority to again provide temporary portability flexibility by allowing H-2B workers who are already in the United States to begin work immediately after an H-2B petition (supported by a valid temporary labor certification) is received by USCIS, and before it is approved. The authority to approve H-2B petitions under this FY 2023 supplemental cap expires at the end of that fiscal year. Therefore, USCIS will not approve H-2B petitions filed in connection with this FY 2023 supplemental cap authority on or after September 15, 2023.

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 2020, 2021, or 2022, with the exception that up to 20,000 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 2023. This increase in the FY 2023 H-2B visa 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 2022 Omnibus and Public Law 117-180 to meet the high demand by U.S. employers for H-2B workers to mitigate or avoid irreparable harm to their businesses, required initial clearance using emergency procedures, especially as the Departments were required to give effect to the authority created by FY 2022 Omnibus and

¹ See 8 CFR 214.2(h)(6)(xiii)(C). See also United States Citizenship and Immigration Services, Temporary Increase in H-2B Nonimmigrant Visas for FY 2023, available at <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2023>.

Public Law 117-180 prior to their expiration on December 16, 2022. USCIS regulations at 8 CFR 214.2(h)(6)(xiii)(C) provide that USCIS will reject petitions filed pursuant to the TFR that are received after the numerical limitation has been reached or after September 15, 2023, whichever is sooner.

An employer seeking authorization to employ H-2B workers under this time-limited authority that submits the Form ETA-9142-B-CAA-7 and the I-129 petition to USCIS 30 or more days after the certified start date of work, as shown on the employer's approved *H-2B Application for Temporary Employment Certification*, 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 the Form ETA-9142-B-CAA-7, including those related to the additional recruitment efforts and a detailed written statement explaining how they meet the irreparable harm standard, for three years from the date DOL certified the *H-2B Application for Temporary Employment Certification*.

Lastly, DOL sought public comments in connection with Form ETA 9142-B-CAA-7 and associated requirements, in order to revise and extend the information collection, as appropriate, using traditional notice and comment processes under the PRA, via a 60-day notice that was included in the TFR.

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 Omnibus and Public Law 117-180. 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 an *H-2B 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 form for employers to submit to USCIS. Under 8 CFR 214.2(h)(6)(xiii)(B)(2), the employer is required to file the Form ETA-9142-B-CAA-7 with USCIS as part of its Form I-129 petition. Through the Form ETA-9142-B-CAA-7, the Departments collect information necessary to ensure that employers seeking to hire H-2B workers under the supplemental cap meet all requirements to hire H-2B workers provided in the TFR. Specifically, through this form, employers must attest that they meet the irreparable harm standard, and that they seek to hire either returning workers or workers from the Northern Triangle countries or Haiti, as well as other program requirements. Employers that submit the form and I-129 petition to USCIS 30 or

more days after the start date of work must also attest, through this form, that they will complete a new assessment of the labor market by taking certain enumerated recruitment steps.

Finally, the employer is required to retain documents and records demonstrating compliance with the TFR, including a detailed written statement explaining how it meets the irreparable harm standard, and must provide the documents and records to DHS or DOL upon request. The retention of the Form ETA-9142-B-CAA-7 and supporting documentation is required by 20 CFR 655.67. The Departments intend to conduct a significant number of audits focusing on irreparable harm and other worker protection provisions. The requirement to retain the form and supporting documentation assists 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, 1103(a)(6), 1184; Pub. L. 117-103; and Pub. L. 117-180.

- 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 2022 Omnibus and Public Law 117-180. After obtaining a temporary labor certification (TLC), employers must complete and submit a signed attestation (Form ETA-9142-B-CAA-7) 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 and its instructions are available via the internet (<https://www.dol.gov/agencies/eta/foreign-labor>). The form, once fully completed and signed, must be submitted to USCIS. The employer must retain a copy of the form, as it is submitted to USCIS, along with all necessary supporting documentation as specified in the TFR, 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 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.

DOL considered the memorandum issued to all heads of departments and agencies by OMB on June 22, 2012, about Reducing Reporting and Paperwork Burdens.² 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 take enforcement action or conduct integrity measures to ensure compliance with the terms of the attestation. In addition, 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 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,

² Office of Management and Budget Memorandum, Reducing Reporting and Paperwork Burden (June 22, 2012), available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf>.

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 December 15, 2022, invited public comments on the information collection for a period lasting 60 days. The Department received a total of 19 comments in response to the 60-day federal register notice provided with the rule, but all comments have been deemed out of scope. All comments received in response to the rule's solicitation for comments can be viewed at <https://www.regulations.gov/docket/ETA-2022-0008>.

- 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 includes attestations, including an attestation that the employer meets the irreparable harm standard, and document retention obligations spelled out in the TFR and described above. 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 (\$49.30), 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 \$36.98 per response.³

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 pursuant to the TFR. DOL estimates the average time burden for complying with the recordkeeping requirement is approximately 0.25 hour (15 minutes).

DOL believes that an estimated 4,312 remaining unfilled certifications for FY 2023 will include all potential employers that might request to employ H-2B workers under the TFR. 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 *Application for Temporary Employment Certification*. Using this estimate for the total number of certifications, DOL estimates that the cost for HR specialists conducting recordkeeping activities is \$53,145.

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-7	4,312	1	4,312	0.25	1,078	\$49.30**	\$53,145
Recruitment efforts	4,312	1	4,312	3	12,936	\$49.30	\$637,745
Record keeping	4,312	1	4,312	0.25	1,078	\$49.30	\$53,145
Returning Workers' attestation	4,312	1	4,312	0.5	2,156	\$49.30	\$106,291
Irreparable harm step	4,312	1	4,312	5	21,560	\$71.82***	\$1,548,439
Union Notification Requirement	4,312	1	4,312	0.17	733	\$49.30	\$36,137

³ Calculation: \$49.30 (average per hour wage, including benefits to wage multiplier, 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) = \$36.98.

Unduplicated Totals	4,312	1	4,312	9.17	39,541	Various	\$2,647,484
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* Bureau of Labor Statistics. U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Wage Statistics, May 2021, *Financial Analysts*, available at <https://www.bls.gov/oes/current/oes132051.htm>, and *Human Resources Specialists*, available at <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 the new attestation form and notifying third parties and retaining records related to the returning worker requirements.) = \$36.98.

***Calculation: \$49.53 (average per hour wage for a financial analyst, based on BLS wages) x 1.45 (benefits-to-wage multiplier) = \$71.82 (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) = \$359.10

†This estimate cannot be aggregated; DOL estimates that approximately 4,312 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-7. 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.*

There are no programmatic changes. The reduction in burden hours is to correct a calculation.

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 the Form ETA-9142-B-CAA-7 will not be published; however, DHS may publicly disclose information regarding the H-2B program consistent with applicable laws 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.