



DECISION

May 22, 2023

MEMORANDUM FOR THE ACTING SECRETARY

FROM:

BRENT PARTON 
Acting Assistant Secretary

SUBJECT:

Request for Approval of the 30-Day Paperwork Reduction Act *Federal Register* Notice for 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)

EXECUTIVE SUMMARY

This memorandum requests your approval to publish the attached 30-day Paperwork Reduction Act (PRA) *Federal Register* notice (FRN) relating to the *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) information collection request (ICR), Office of Management and Budget (OMB) control number 1205-0554. The FRN informs the public of the Department of Labor's (DOL or Department) submission of proposed three-year extension of the information collection and related retention requirements associated with Form ETA-9142-B-CAA-7. **The FRN submitted for your approval is for a routine ICR renewal, involving an extension of the information collection activities covered under OMB control number 1205-0554 without substantive changes.**

The Department of Homeland Security (DHS) and the Department of Labor (DOL) jointly published a temporary final rule (TFR) authorizing an increase to the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to, but no more than, a total of 64,716 for the entirety of Fiscal Year (FY) 2023 to assist U.S. businesses that need workers to begin work on different start dates, in accordance with authority provided in Consolidated Appropriations Act, 2022, Public Law 117-103 (FY 2022 Omnibus),¹ and the Continuing Appropriations and

¹ Consolidated Appropriations Act, 2022, Pub. L. 117-103, Div. O, Tit. I, § 204 (2022).

Ukraine Supplemental Appropriations Act, 2023, Public Law 117-180 (FY 2023 authority),² and are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H-2B workers requested under the cap increase.

The FY 2023 Cap has been allocated in the following manner:

- For the first half of FY 2023, DHS made 18,216 visas immediately available upon publication of the TFR that are limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in fiscal years 2020, 2021, or 2022, regardless of country of nationality. These petitions had to request a date of need starting on or before March 31, 2023.
- For the second half of FY 2023, DHS will initially make available 16,500 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in FY 2020, 2021, or 2022, regardless of country of nationality. These petitions must request a date of need starting on or after April 1, 2023, through and including May 14, 2023.
- For the late second half of FY 2023, DHS will make available an additional allocation of 10,000 visas limited to returning workers, in other words, those workers who were issued H-2B visas or held H-2B status in FY 2020, 2021, or 2022, regardless of country of nationality. To assist employers needing workers to begin work during the late spring and summer seasons in the fiscal year (also referred to as “late season employers”), these petitions must request a date of need starting on or after May 15, 2023.
- DHS will make available 20,000 additional visas that are reserved for nationals of El Salvador, Guatemala, and Honduras (Northern Central American countries) and Haiti, as attested by the petitioner, regardless of whether such nationals are returning workers. These 20,000 visas will be available for petitioners requesting an employment start date before the end of FY 2023, up to and including September 30, 2023.

The TFR requires employers to complete a new DOL Form ETA-9142-B-CAA-7 attesting that the employer satisfies the irreparable harm standard and returning worker or NTC/Haiti criteria, and that the employer will comply with all applicable Federal, State, local laws and regulations including health and safety laws related to COVID-19 worker protections. In addition, employers filing the I-129 petition with DHS 30 or more days after the certified start date of work on the temporary labor certification (TLC) must attest that they will conduct additional recruitment, including:

- Submitting a job order to the applicable State Workforce Agency (SWA) to be posted for at least 15 calendar days;
- Contacting the nearest American Job Center (AJC) serving the local area for recruitment assistance; contacting and soliciting the return of former employees, including those the employer laid off or furloughed since January 1, 2021;
- Providing a copy of the job order to the applicable bargaining representative or posting the job order at the place(s) of employment in the manner described in 20 CFR 655.45(b);

² Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Pub. L. 117-180, Div. A, Tit. I, § 101(6) (2023).

- Where the occupation is traditionally or customarily unionized, providing written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) office covering the area of intended employment, and by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity;
- Contacting U.S. workers currently employed at the place of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment; and
- Where employers maintain a company website, posting the job opportunity in a conspicuous location on that site.

The TFR also clarified the definition of irreparable harm by affirmatively requiring employers to draft a written irreparable harm analysis prior to submitting Form ETA-9142-B-CAA-7 and affirming on the form that it has conducted the required analysis and will provide it to DOL or DHS upon request. This was done in response to DOL audits and investigations of employers that requested supplemental visas in recent years. Recent audits and investigations showed a considerable percentage of employers failed to demonstrate irreparable harm. Lastly, the TFR commits the Office of Foreign Labor Certification (OFLC) to conduct a significant number of audits of approved TLCs used in support of employer petitions.

BACKGROUND/DISCUSSION

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant visa classification for a foreign worker “coming temporarily to the United States to perform . . . temporary [nonagricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). The INA sets the annual number of foreign workers who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status at 66,000, to be distributed semi-annually beginning in October and April. *See* 8 U.S.C. §§ 1184(g)(1)(B) and (g)(10). With certain exceptions, up to 33,000 foreign workers may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a FY, and the remainder is available for employers seeking to hire H-2B workers during the second half of the FY.

Employers must petition DHS for classification of prospective temporary workers as H-2B nonimmigrants. *See* 8 U.S.C. § 1184(c)(1). The INA provides that the Secretary of Homeland Security must consult with “appropriate agencies of the Government” before granting any H-2B visa petitions. *Id.* DHS regulations provide that an H-2B petition must be accompanied by an approved TLC from DOL issued pursuant to regulations established at 20 CFR part 655, subpart A. *See* 8 CFR 214.2(h)(6)(iii)(A), (C)-(E), and (h)(6)(iv)(A); 8 U.S.C. §§ 1103(a)(6) and 1184(c)(1). The TLC serves as DHS’s consultation with DOL regarding whether: (i) a qualified U.S. worker is available to fill the petitioning H-2B employer’s job opportunity, and (ii) a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 8 CFR 214.2(h)(6)(iii)(A) and (D); 8 U.S.C. § 1184(c)(1). DOL regulations require an employer seeking an H-2B TLC to test the labor market by recruiting U.S. workers for the position(s) in which it intends to employ H-2B workers. *See, e.g.,* 20 CFR 655.16 and 655.40 through 655.46. The outcome of this labor

market test forms the basis of DOL's determination as to whether there are sufficient qualified U.S. workers available to fill the employer's job opportunity.

On March 15, 2022, President Joseph Biden signed 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 FY in which returning workers were exempt from the H-2B numerical limitation.

On September 30, 2022, Congress passed the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117-180 (FY 2023 authority). Section 101(6) of Division A of Public Law 117-180 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.

The Secretary of Homeland Security consulted with the Secretary of Labor, and the TFR implements the authority contained in the FY 2022 Omnibus and FY 2023 authority.

The Departments jointly published the TFR to exercise this authority. In addition to provisions that will be administered by DHS, the TFR requires employers to complete the Form ETA-9142-B-CAA-7 attesting that the employer has and will satisfy criteria required to obtain supplemental H-2B visas, and submit this form, along with a valid TLC, with the petition submitted to DHS. Employers must attest that they will comply with health and safety laws and laws related to COVID-19 worker protections and any right to time off or paid time off for COVID-19 vaccination, or to reimbursement for travel to and from the nearest available vaccination site, and that they will notify any H-2B workers, in a language the workers understand, as necessary or reasonable, that they have equal access to COVID-19 vaccines and vaccine distribution sites.

The TFR requires employers to retain documents and records demonstrating compliance with the TFR for three years from the date of the certification, and provide the documents and records upon the request of DHS or DOL. OFLC and the Wage and Hour Division (WHD) may use their existing audit or investigation authority to review and verify employer attestations. Under the TFR, OFLC committed to perform a significant number of audits used to access the supplemental visa allocation to ensure employer compliance with attestations required under this TFR. To make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will share information regarding Form ETA-9142-B-CAA-7 with DOL, consistent with a memorandum of agreement between DHS and DOL, that will support DOL's identification of TLCs used to access the supplemental visa allocation, for closer examination of TLCs through the audit process.

In accordance with the PRA, OFLC is requesting approval to publish the enclosed FRN to announce extensions to its information collection activities covered under OMB control number 1205-0554 without substantive changes and provide the public and other Federal agencies with an opportunity to submit comments.

The Department previously enclosed a 60-day FRN in the TFR it published in the *Federal Register* on December 15, 2022, at 87 FR 76816. The Department received a total of nineteen comments in response to the 60-day FRN provided with the rule, but all of the comments have been deemed out of scope. OFLC did not propose any substantive changes at the 60-day stage; the FRN published along with the rule was required to preserve the public's ability to continue to use this form when requesting additional H-2B visas under the TFR, and comply with the rest of the requirements (e.g., recordkeeping) associated with this information collection, beyond the limited six (6) month period of approval OMB granted after the Department filed a request for emergency clearance when it submitted the TFR to OMB.

This FRN informs the public of the Department's intent to request a three-year extension of the form, as well as the other burden requirements associated with the TFR. OFLC is publishing this 30-day FRN to allow the public an additional opportunity to submit comments regarding this information collection to OMB. The Form ETA-9142-B-CAA-7 and the rest of the requirements covered under OMB control number 1205-0554 are set to expire on June 30, 2023.

OFLC is requesting that OMB approves the information collection for the maximum three-year period. Should the information collection expire, the requirements, which ETA seeks to continue to implement, would expire as well, and the Departments would not be able to administer oversight of the H-2B program, which includes integrity actions and investigations. Therefore, the Department seeks to publish this 30-day FRN to invite public comments in connection with extending the validity of all information collection activities covered OMB control number 1205-0554, as required under the PRA.

OTHER DOL AGENCIES INVOLVED

OFLC worked collaboratively with WHD to create and implement this form, as part of the regulatory drafting process. ETA has further collaborated and consulted with the Employment and Training Legal Services and Fair Labor Standards Divisions of the Office of the Solicitor in the preparation and review of this ICR.

OTHER FEDERAL AGENCIES INVOLVED

The Department previously coordinated with DHS to create and implement this information collection, as part of the TFR's rulemaking process.

CONGRESSIONAL INTEREST

There has been significant congressional interest in this rule due to the importance of H-2B visas to seasonal employers in several industries and the potential harm to those industries from the lack of sufficient workers in those industries. H-2B visas are a priority for certain members of

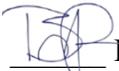
Congress who represent constituents that depend on H-2B workers. ETA coordinates with the Office of Congressional and Intergovernmental Affairs in determining the need for and nature of any Congressional notifications regarding inquiries related to this TFR. ETA will also coordinate with the Office of the Chief Information Officer to ensure this FRN is timely published in the *Federal Register* in order to submit the ICR to OMB prior to the expiration of this information collection.

DUE DATE FOR APPROVAL

Friday, June 2, 2023.

It is imperative that this FRN is published as soon as possible. To ensure employers can continue to access supplementary visas without suffering further irreparable harm, the Department has to ensure the timely publication of this 30-day FRN publish this TFR as soon as possible.

EXPEDITED APPROVAL REQUEST

 I acknowledge that I am requesting expedited approval by Friday, June 2, 2023, which does not meet the Office of the Secretary's (OSEC) required 30-day timeframe and will, therefore, require expedited Departmental clearance and OSEC review and approval. Submission of this PRA package was delayed because substantial updates were necessary and extensive coordination with SOL was required. Expedited clearance is needed because any delay in DOL clearance of this request to approve the FRN for publication would cause the information collection to expire and such expiration will result in employers suffering further irreparable harm not being able to request visas under the TFR.

CONTACT

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ATTACHMENTS

- *Attachment 1: 30-Day Federal Register Notice*
- *Attachment 2: Supporting Statement for Information Collection Request*
- *Attachment 3: 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.*
- *Attachment 4: General Instructions*
- *Attachment 5: Comments from Public*

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RECOMMENDED COURSE OF ACTION: Approve publication of the 30-day PRA FRN.

Approved: 

Date: May 23, 2023

Let's Discuss: _____

Date: _____

COMMENTS: