

## SUPPORTING STATEMENT

### Criteria and Non-Criteria Agricultural Clearance Order Forms and H-2A Application for Temporary Employment Certification in States and by Employers Covered by Injunction of the Farmworker Protection Final Rule (ICR Number 1205-0NEW)

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**Introduction:** *This information collection request (ICR) seeks to establish a new information collection to reinstate Forms ETA-9142A, ETA-790, ETA-790A, and ETA-790B, only to be used by the plaintiffs who were granted an injunction by the U.S. District Court for the Southern District of Georgia against the enforcement of the final rule “Improving Protections for Workers in Temporary Agricultural Employment in the United States” (Farmworker Protection Rule) in Kansas, et al. v. U.S. Department of Labor (Kansas). The plaintiffs include the following 17 states: Kansas, Georgia, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, Virginia; as well as Miles Berry Farm and Georgia Fruit and Vegetable Growers Association (“the parties”). The remainder of the states and territories not subject to the injunction will continue to use the forms established through Office of Management and Budget (OMB) Control Numbers 1205-0466 and 1205-0134 prior to April 29, 2024. The reinstatement of the forms which were approved and in use prior to the implementation of the Farmworker Protection Rule is the only effective way to implement the injunction while both allowing employers in the enjoined states to continue to submit H-2A applications and implement and enforce the Farmworker Protection Rule in the rest of the country.*

**Please Note:** *While the Department is seeking a new OMB control number for forms associated with 1205-0466 prior to April 29, 2024, the date the Farmworker Protection Rule was published, OFLC will not be able to immediately replace the current OMB control number (1205-0466) currently listed on the forms in its Foreign Labor Access Gateway (FLAG) case processing system. Waiting for OMB to assign a different number to the version of the forms used prior to the Farmworker Protection Rule would effectively prohibit the plaintiffs from filing H-2A applications for several weeks while the change is implemented. Following the approval of this emergency request and within the 6-month period following emergency approval, the Department will seek public comment on the information collection package as provided under 5 CFR part 1320 and the Paperwork Reduction Act and at that point will be able to update the forms in FLAG with the new OMB control number.*

*On April 29, 2024, the Department of Labor (Department) published the Farmworker Protection Rule with an effective date of June 28, 2024. As a result of the rulemaking, the Department updated the H-2A temporary agricultural labor certification program information collection tools to reflect the final revisions to the information collection (IC) activities under the H-2A Foreign Labor Certification Program, covered under Office of Management and Budget (OMB) Control Number 1205-0466 (OMB 1205-0466), Application for Temporary Employment Certification, Form ETA 9142A, and H-2A Agricultural Clearance Order, Form ETA-790/790A. Prior to the publication of the rule, IC 1205-0466 would have expired on November 30, 2025. The current expiration on the approved IC 1205-0466 is July 31, 2027.*

*For employers seeking to employ H-2A workers, the Department subsequently announced that it would process clearance orders (ETA 790A) and associated H-2A applications (ETA 9142A) filed before 7:00 PM Eastern Daylight Time on August 28, 2024, in accordance with 20 CFR part 655, subpart B in effect as of June 27, 2024, and that applications submitted on or after 12:00 AM Eastern Daylight Time on August 29, 2024 would be processed in accordance with the provisions of the Farmworker Protection Rule tied directly to a temporary labor certification.*

*For employers seeking to employ U.S. workers through the Agricultural Recruitment System, the Department instructed state workforce agencies to use the new OMB 1205-0134 Agricultural Recruitment System Forms Affecting Migratory Farm Workers, Agricultural Clearance Form (ETA Form 790B), which is the form associated with ICR Reference No: 202404-1205-006.*

*On August 26, 2024, the United States District Court for the Southern District of Georgia issued a preliminary injunction in the Kansas case prohibiting DOL from enforcing the Farmworker Protection Rule in certain states and with respect to certain entities. Accordingly, consistent with the Kansas Order, the Department will not enforce the Final Rule in these states or with respect to these entities while the Order remains in effect.*

*For IC 1205-0466, the Department is requesting OMB authority to simultaneously implement IC1205-0466 that would have expired on November 30, 2025, and the currently approved IC 1205-0466 which expires on July 31, 2027, under the FLAG System at <https://flag.dol.gov/>. Under the H-2A program, 100 percent of H-2A applications are filed electronically by employers. Once an employer enters into the FLAG System, the filer would be asked to respond to the following question:*

*§ Are you seeking to submit an H-2A Application under any of the following conditions?*

*· All places of employment where work will be performed under the Form ETA-790/790A are located in one or more of the following states:*

*o Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, or Virginia;*

*OR*

*o The legal business name of the employer identified on the Form ETA-790/790A seeking to employ or jointly employ H-2A workers is “Miles Berry Farm;”*

*OR*

*o The legal business name of the employer identified on the Form ETA-790/790A seeking to employ or jointly employ H-2A workers is a member of the “Georgia Fruit and Vegetable Growers Association” as of August 26, 2024.*

*If the filer answers “yes” to the question, they will be directed to the version of the clearance order (ETA 790A) and associated H-2A application (ETA 9142A) associated with the version of 20 CFR part 655, subpart B in effect as of June 27, 2024. If the filer answers “no” to the question, they will be directed to the version of the clearance order (ETA 790A) and associated H-2A application (ETA 9142A) associated with the version of*

*20 CFR part 655, subpart B associated with the Farmworker Protection Rule and in effect as of June 28, 2024. For IC 1205-0466, the Department is requesting a Temporary Emergency Approval for six months.*

**A. Justification.**

*A1. 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.*

The Immigration and Nationality Act (INA) establishes the H-2A nonimmigrant visa classification for a worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services...of a temporary or seasonal nature.” [8 U.S.C. 1101\(a\)\(15\)\(H\)\(ii\)\(a\)](#). Employers must petition the Department of Homeland Security (DHS) to import temporary workers as H-2A nonimmigrants. See [8 U.S.C. 1184\(c\)\(1\)](#). The INA authorizes DHS to permit employers to import nonimmigrant workers to perform agricultural labor or services of a temporary or seasonal nature under the H-2A visa classification only after the employer has applied to the Department for a certification that:

- 1) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and
- 2) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. 1188(a)(1). Under the INA, DOL is also authorized to enforce “employer compliance with terms and conditions of employment” in the H-2A program. 8 U.S.C. 1188(g)(2).

The Secretary of Labor (Secretary) has delegated the responsibility of issuing temporary labor certifications, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA’s OFLC. See [Secretary’s Order 06-2010](#). The Secretary has also delegated responsibility for enforcement of the worker protections to the Administrator of the Wage and Hour Division (WHD). See [Secretary’s Order 01-2014](#). OMB 1205-0466 includes the collection of information related to an employer’s request for nonimmigrant workers, as well as the material terms, wages, and conditions of employment that facilitate the recruitment of U.S. workers and issuance of temporary labor certifications in the H-2A program.

As provided in the Department’s regulations at 20 CFR part 655, subpart B, the information collected through Form ETA-9142A, *H-2A Application for Temporary Employment Certification* (H-2A Application) and Form ETA-790A, *Agricultural Clearance Order*, and all required supporting documentation, constitutes the basis for DOL’s determination that an insufficient number of qualified U.S. workers are available to fill the employer’s job opportunity and that the wages and working conditions of similarly employed workers in the U.S. will not be adversely

affected by the employment of H-2A workers. This determination is required before a petition can be filed with and approved by DHS.

As required by the INA, the Department may not issue a temporary labor certification unless the employer has conducted required recruitment “in addition to, and...within the same time period as, the circulation through the interstate employment service system of the employer’s job offer.” 8 U.S.C. 1188(b)(4). In accordance with the Wagner-Peyser Act of 1933, as amended by Title III of the Workforce Innovation and Opportunity Act, Pub. L. 113-128 (Jul. 22, 2014), the Department has established regulatory standards and procedures governing the Agricultural Recruitment System (ARS), which is administered by State Workforce Agencies (SWAs) facilitating the intrastate and interstate clearance recruitment of U.S. workers for temporary agricultural employment. 20 CFR part 653, subpart F. To access the ARS, the employer must prepare and submit a job order (Form ETA-790/790A) to the SWA serving the area of intended employment describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits that will be offered to prospective workers.

The ARS prescribes requirements that Employment Service (ES) offices and SWAs must follow when placing intrastate and interstate job clearance orders seeking U.S. workers to perform agricultural labor on a temporary, less than year-round basis. 20 CFR 653.500. It is governed by the regulations set forth at 20 CFR part 653, subpart F. ETA has promulgated regulations that require ES offices and SWAs to post agricultural clearance orders on the Form ETA-790 (or a subsequently issued form) and ensure that this form and any required attachments are complete. See 20 CFR 653.501(b)(1). The required contents of these orders are set forth in the regulations at 20 CFR 653.501.

Agricultural clearance orders placed in connection with H-2A *Applications for Temporary Employment Certification* are subject to both the requirements of the ARS and the requirements governing H-2A temporary labor certifications and are known as “criteria” clearance orders. By contrast, agricultural clearance orders that are *not* placed in connection with an H-2A *Application for Temporary Employment Certification* are known as “non-criteria” clearance orders.

Form ETA-790B is only used by employers who submit non-criteria clearance orders requesting U.S. workers for temporary agricultural jobs. If an employer seeks to use the ARS to recruit U.S. workers to perform farmwork on a temporary, less than year-round basis (non-criteria clearance order), it must: 1) complete the Form ETA-790; 2) complete the Form ETA-790B, including its attachments; and 3) submit both forms to the SWA serving the area of intended employment.

**Statutory Authority:** Wagner-Peyser Act of 1933, [29 U.S.C. 49](#) *et seq.*; Immigration and Nationality Act section 101(a)(15)(H)(ii)(a), [8 U.S.C. 1101\(a\)\(15\)\(H\)\(ii\)\(a\)](#), 1184(c), and 1188

**Regulatory Authority:** 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B

A2. *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.*

Under the H-2A program, an employer seeking to employ H-2A workers must file a completed Form ETA-9142A (including all supporting documentation) and a job order (also known as the agricultural clearance order, Form ETA-790/790A) for circulation in the ARS by the SWA serving the area of intended employment and the SWAs in other states, as appropriate to recruit for the job opportunity. These forms and all supporting documentation constitute the H-2A application.

Under the ARS, Form ETA-790 and Form ETA-790B would be used by SWAs, American Job Centers (AJCs), agricultural employers, and farm labor contractors to recruit workers from outside of the local commuting area. Specifically, agricultural employers complete the Form ETA-790 and Form ETA-790B with the assistance of SWA or AJC staff. If there are insufficient workers locally or within the state (intrastate), the appropriate ETA regional office reviews and approves the forms for interstate clearance. The regional office instructs the SWA to send the forms to supply states for further labor recruitment (interstate). This allows the workers in those states to review the exact terms and conditions of the clearance order before making a decision to apply for the job opening. These forms are used to recruit U.S. workers for temporary positions in agriculture. If a sufficient supply of U.S. workers is not available, an agricultural employer can request to bring nonimmigrant foreign workers to the U.S. through the H-2A program to perform agricultural labor or services of a temporary or seasonal nature, using Form ETA-790A.

Specifically, the information collected is used by ETA in the manner described below:

Form ETA-790/790A, H-2A Agricultural Clearance Order

All employers seeking to employ U.S. workers to perform agricultural services or labor on a temporary, less than year-round basis must submit a completed agricultural clearance order (Form ETA-790/790A/790B) for placement in the ARS intrastate and interstate job clearance systems, as set forth in 20 CFR 653.500. An employer filing the Form ETA-9142A must submit to the Department the Form ETA-790/790A for SWA review. *See* 20 CFR 655.121.

The amended Form ETA-790/790A consists of two parts. First, the form has a one-page coversheet (Form ETA-790) that is completed, in part, by the employer and is designed to (1) facilitate the SWA's receipt and processing of the job order through its intrastate and interstate job clearance systems, (2) identify the primary employer of the worker(s) sought for the job opportunity, and (3) designate that the job order will be used in connection with a future Form ETA-9142A for H-2A workers. Second, the employer completes the Form ETA-790A requiring the disclosure of all the material terms and conditions of employment that satisfy the requirements for agricultural clearance orders in 20 CFR part 653, subpart F and the job order content requirements set forth in 20 CFR 655.122. The employer is required to submit the Form ETA-790/790A to OFLC for its coordination with the SWA. At the time of filing the Form ETA-9142A

with the Department, OFLC will review the Form ETA-9142A and the Form ETA-790/790A along with any other supporting documentation.

To summarize, the Form ETA-790A collects information related to the employer's job opportunity, including the job title, number of workers needed, period of intended employment, and a description of the agricultural services or labor to be performed. This information permits OFLC to evaluate whether the employer has a bona fide need for temporary labor and whether the duties to be performed qualify as agricultural services or labor under the H-2A program. To ensure no adverse effect on the wages of similarly employed workers in the area(s) of intended employment, the form collects information on specific crops or agricultural activities, the places of intended employment (i.e., worksites), and the wage rate(s) that will be paid to workers in each crop or agricultural activity, as well as any other conditions or deductions from pay not required by law. In addition, employers are required to disclose the actual minimum qualifications or requirements of the job, including education, training, experience, and any other special requirements. This information is used by the Department to determine whether the job qualifications or requirements are consistent with the normal and accepted qualifications required by U.S. employers who do not use the H-2A program. See 20 CFR 655.122(b).

Because the INA mandates that employers participating in the H-2A program provide housing to workers that meets applicable housing standards prior to occupancy, the form also collects basic information regarding the geographic location, type, capacity, and the applicable inspection standards (i.e., local, state, federal) of the housing for workers who are employed under the agricultural clearance order. See 8 U.S.C. 1188(c)(4). Finally, the employer provides other disclosures required by regulation related to the provision of meals, transportation, and daily subsistence, and any other material terms and conditions of the job offer, as well as referral and hiring instructions. Employers complete Form ETA-790A by reading and then attesting (i.e., signing and dating) to compliance with the required conditions of employment and assurances for H-2A agricultural clearance orders, as set forth under 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B.

#### Form ETA-790A, Addendum A - Additional Crops or Agricultural Activities

In circumstances where work is expected to be performed in different agricultural activities, crops, and/or varieties within a single crop other than what is disclosed on the main Form ETA-790A, the employer must complete the *Addendum A* identifying all crops or agricultural activities for the job opportunity, as well as details about the wages that will be offered, advertised, and paid to workers. OFLC uses this information to ensure that (1) all duties to be performed in the crops or agricultural activities qualify under the H-2A program, (2) all crops and/or agricultural activities are disclosed to prospective workers, and (3) the employer is offering wages that will not create adverse effect on the wages of workers in the U.S. who are similarly employed.

Form ETA-790A, Addendum B - Additional Worksite and/or Housing Information

In circumstances where the employer needs workers to perform the services or labor at worksites other than the primary one identified on the Form ETA-790A and/or additional housing is needed to accommodate all workers under the job order at the worksite location(s), the employer must complete the *Addendum B*. OFLC uses this information to ensure that (1) all worksite locations are compliant with applicable regulatory requirements regarding an area of intended employment, (2) employers filing as H-2ALCs and joint employers (*i.e.*, two or more individual employers or agricultural associations) properly disclose the name(s) and location(s) of all fixed-site agricultural business or association members, and (3) the housing employers will provide is sufficient to accommodate all workers under the job order and meets applicable standards.

Form ETA-790A, Addendum C - Additional Material Terms and Conditions of the Job Offer

*Addendum C* alleviates space limitations on the form and supports full disclosure of material terms and conditions of employment in the job order. This addendum supports full disclosure of job opportunity information within the four corners of the Form ETA-790A and in a standardized format, as opposed to employer-created “attachments.”

Form ETA-790/790B, Agricultural Clearance Order

Employers submitting non-criteria intrastate or interstate agricultural clearance orders must complete Forms ETA-790 and ETA-790B, including attachments to ETA-790B, as applicable. Employers submitting criteria clearance orders, which are placed in connection with an H-2A Application for Temporary Employment Certification (Form ETA-9142A), must not use Form ETA-790B.

Form ETA-232, Domestic Agricultural In-Season Wage Report

SWAs currently conduct surveys of wages employers are paying workers to perform specific crop activities and agricultural activities and report their findings to the Department using Form ETA-232, *Domestic Agricultural In-Season Wage Report*, and Form ETA-232A, *Wage Survey Interview Record*. If the Department accepts the survey as establishing the prevailing wage rate for H-2A program purposes, it becomes one of the sources the Department relies on to ensure no adverse effect on the wages and working conditions of workers in the U.S. similarly employed.

Form ETA-9142A, H-2A Application for Temporary Employment Certification

On Form ETA-9142A, an employer must include information related to its business for the purpose of determining whether the establishment operating in the United States is *bona fide*; the type of application being submitted for processing (e.g., individual employer or agricultural association filing as a joint employer), and contact information for purposes of sending and receiving communications during the course of processing an employer’s H-2A application. For

an employer represented by an agent, the form also collects required compliance documentation for the agent, such as a current agreement or other documentation demonstrating the agent's authority to represent the employer, and a current Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Certificate of Registration identifying the farm labor contracting activities the agent has authority to perform under the application, if applicable.

For employers operating as H-2A Labor Contractors (H-2ALCs), the current form collects additional information, such as the names of fixed-site agricultural businesses where the workers will be placed, and fully executed work contract(s) with each fixed-site agricultural business, which assists OFLC in determining compliance with all application filing requirements for H-2ALCs under 20 CFR 655.132. This information is collected on the job order (Form ETA-790A, Addendum B).

Finally, the employer identifies the Standard Occupational Classification code and title that most clearly corresponds to the agricultural services or labor to be performed, which the SWA assigned on the Form ETA-790 and attaches the Form ETA-790/790A containing all the material terms, wages, and working conditions of employment that will be used for recruiting U.S. workers.

This information collection is also used in post-adjudication audit examinations and/or program integrity proceedings (e.g., revocation or debarment actions) and is requested by the Department's WHD and/or other enforcement agencies during an investigation or enforcement proceedings.

#### Form ETA-9142A, Appendix A - Attorney/Agent/Employer Declarations

The Department's regulations at 20 CFR 655.130(a) and (d) and 655.135 require an employer and, if applicable, their attorneys or agents to submit a completed *Appendix A* attesting to compliance with all of the terms, assurances, and obligations of the H-2A program in order to obtain a temporary labor certification. For two or more employers operating as joint employers, the Form ETA-9142A requires disclosure and submission of a signed and dated *Appendix A* completed by each employer in the joint employment relationship. However, if the application is being filed by an agricultural association operating as a joint employer with its employer-members, the agricultural association is responsible for providing a signed and dated *Appendix A* on behalf of its employer-members. See 20 CFR 655.131.

#### Form ETA-9142A, Appendix B – H-2A Labor Contractor Surety Bond

An employer filing a Form ETA-9142A, *H-2A Application for Temporary Employment Certification* as an H-2ALC must submit a surety bond as proof of its ability to discharge financial obligations under the H-2A program. A certification cannot be issued to an H-2ALC without a compliant surety bond. *Appendix B* standardizes the format of the existing collection and simplifies employer responses by including required terms and language. OFLC will use this information to ensure that the surety bond submitted is enforceable for the coverage required.



Form ETA-9142A, H-2A Approval Final Determination: Temporary Agricultural Labor Certification

Where the employer's application has met all the regulatory requirements, including the criteria for certification in 20 CFR 655.161, the Department will complete and electronically send the new Form ETA-9142A, *H-2A Approval Final Determination: Temporary Agricultural Labor Certification* to USCIS with a copy to the employer and, if applicable, the employer's authorized attorney or agent. This one-page certification form provides the official determination that a sufficient number of qualified U.S. workers have not been identified as being available at the time and place needed to fill the job opportunities for which certification is sought, and the employment of the H-2A temporary workers in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. Upon receipt of the Form ETA-9142A, *H-2A Approval Final Determination: Temporary Agricultural Labor Certification*, the employer may file an H-2A petition with DHS's USCIS.

A3. *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.*

For 1205-0466 and in accordance with 20 CFR 655.130(c)(1), an employer or, if applicable, its authorized attorney or agent, seeking temporary labor certification must submit the Form ETA-9142A and all documentation supporting the H-2A application to OFLC electronically, unless the filer qualifies for one of the exceptions in 20 CFR 655.130(c)(2) or 20 CFR 655.130(c)(3). Since July 2019, the electronic filing of the Form ETA-9142A, ETA-790/790A, and all supporting documentation is maintained in the Department's Foreign Labor Application Gateway (FLAG) system at <https://flag.dol.gov/>. The FLAG System permits an employer or, if applicable, its authorized attorney or agent to efficiently prepare and submit H-2A applications for processing by OFLC. During the preparation of H-2A applications, the system provides employers with a series of electronic data checks and prompts to ensure each required field is completed and values entered on the form are valid and consistent with regulatory requirements. The OFLC website and the FLAG System provide access to the general instructions designed to help employers understand what each form collection item means and what kind of entries are required. Where it is not practical to collect supporting documentation using a standard Office of Management and Budget (OMB)-approved appendix, the system permits an employer to upload documentation supporting the application in an acceptable digitized format (e.g., Adobe PDF, Microsoft Word, .TXT). Examples of the supporting documents currently uploaded electronically include copies of the agent agreement with the employer, fully executed work contracts between the H-2ALCs and fixed-site employers, and MSPA registration(s).

When the employer or, if applicable, its authorized attorney or agent initially enters contact information and establishes a web-based system account, the H-2A Case Preparation Module automatically pre-populates all contact information on the draft Form ETA-9142A, significantly

reducing the time and burden for repeated online data entry. Additionally, the H-2A Case Preparation Module provides employers with an option to reuse previously filed applications, which automatically copies information into a new draft Form ETA-9142A. This option significantly reduces the time and burden for online data entry, particularly for those employers who need to access the program to hire nonimmigrant workers for seasonal jobs that predictably recur each year. OFLC's experience is that the electronic submission of all required documentation, at the time of filing the application, facilitates a more efficient and consistent review of the employer's application, and reduces the incidence of OFLC issuing a NOD to request missing documentation or corrections of errors or inaccuracies.

Similarly, ETA made Form ETA-790/790A, *H-2A Agricultural Clearance Order*, and all addendums available for electronic filing in a manner similar to the Form ETA-9142A. FLAG permits an employer or, if applicable, its authorized attorney or agent to efficiently prepare a completed Form ETA-790/790A using their web-based system account and, after reading all conditions of employment and assurances for the agricultural clearance order and affixing the employer's signature (including digital signature) under Section I, submit the completed job order electronically. For employers that have recurring seasonal job opportunities, the system allows an employer to prepare multiple Form ETA-790/790As and reuse previously filed job orders, which automatically pre-populate information into a new draft Form ETA-790/790A. Similar to the preparation of the Form ETA-9142A, the "reuse" capability significantly reduces data collection time and burden by pre-populating key sections into a new draft Form ETA-790/790A, including all information related to the job opportunity and requirements, crops or agricultural activities, wage offers, worksite and housing locations, and other worker guarantees (e.g., meals, transportation). After the employer has submitted the initial Form ETA-790/790A and is prepared to file the H-2A application, the system will permit the employer to electronically attach the Form ETA-790/790A to the Form ETA-9142A for submission to ETA.

In compliance with the Government Paperwork Elimination Act, ETA will continue to make all forms and appendices approved under this ICR easily accessible on the OFLC website (<https://www.dol.gov/agencies/eta/foreign-labor>) and electronically fillable and fileable.

*A4. 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 specific to avoid duplication of activities. No other government agency collects similar information to adjudicate this type of application.

*A5. If the collection of information impacts small businesses or other small entities, describe any methods used to minimize burden.*

The information collected under this information collection is required of small businesses that need to import temporary nonimmigrant workers under the H-2A visa classification of the INA. Approximately 98 percent of the employers who request H-2A certification are small businesses.

The Department cannot make any exemptions or eliminate forms for small businesses, because the statute and regulations require all employers seeking temporary labor certification to make the necessary attestations and provide the required information. This collection of information is not disproportionately more burdensome for small entities than it is for large ones, because the forms and accompanying appendices are easy to understand and provide all of the attestations and assurances necessary for the filing employer to understand how to request a temporary labor certification and conduct themselves within the agricultural recruitment system. Additionally, this information collection does not impose any extra requirements on small entities; these forms collect from all H-2A employers the minimally required information to determine program eligibility and allow DOL to issue a temporary labor certification determination.

*A6. 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.*

The information collected from employers under this IC will need to be provided at the time an employer needs to submit a job order (*i.e.*, Form ETA-790/790A) and temporary labor certification to employ nonimmigrant workers under the H-2A visa classification. Information collected from SWAs on the Form ETA-232, *Domestic Agricultural In-Season Wage Report*, will need to be provided annually to ensure current prevailing wage information is available for the Department and employers to use in determining the appropriate wage offer to H-2A workers. The Department would be in direct violation of its statutory and regulatory mandates, if this information was not collected in this manner. The information must be collected to enable the Department to meet its obligation to determine whether an insufficient number of qualified U.S. workers are available to fill the employer's job opportunity and the wages and working conditions of similarly employed workers in the U.S. will not be adversely affected by the employment of H-2A workers. Additionally, in the absence of this information collection, the Department would be unable to efficiently enforce the rights and obligations of workers and employers under the H-2A program.

*A7. 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.*

There are no special circumstances that would require the information to be collected or kept in a manner that requires further explanation pursuant to the regulations set forth at 5 CFR 1320.5(d) (2). The Department's regulations, however, require that employers retain applications for temporary employment certifications and all supporting documentation for three years from the date of certification (for approved applications) or date of determination if the application is

denied or withdrawn. See 20 CFR 655.167(b). The Department requires that employers retain and maintain supporting documentation, because it is essential information in post-adjudication audit examinations and/or program integrity proceedings (e.g., revocation or debarment actions) and in the Department's WHD investigations or enforcement proceedings.

*A8. 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, 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.*

Pursuant to OMB procedures established at 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, this IC will be processed as an Emergency Clearance Request in accordance with section 1320.13, Emergency Processing requesting a 6-month approval. Within the 6-month period following emergency approval, the Department will seek public comment on the information collection package as provided under 5 CFR part 1320 and the Paperwork Reduction Act.

*A9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.*

No payments or gifts will be made to respondents in exchange for the information provided in response to this information collection.

*A10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.*

This information collection provides no express assurance of confidentiality. As a practical matter, however, the Agency would only release information that is commonly made available through public access files and/or in accordance with the Freedom of Information Act (FOIA). FOIA has a number of disclosure exemptions including ones that might relate to confidential

business information which could cause substantial harm to a person or that person's business position.

Although the Department does not directly request sensitive personal identifiable information through this IC, the public provides data and documentation that might, in some instances, cause the Privacy Act to be triggered. The collection of data and information under this OMB 1205-0466, is incorporated into the Department's System of Records Notice (SORN) DOL/ETA-7. Employers submit H-2A requests through the electronic filing system that is also the repository of information collected from employers in connection with other labor certification and prevailing wage applications. Part of the information provided by employers is made publicly available, as labor certification programs are programs from which the public may voluntarily choose to benefit.

*A11. 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.*

The information collections tools covered under OMB 1205-0466 do not involve sensitive matters.

*A12. Provide estimates of the hour burden of the collection of information.*

### **I. Burden Related to Non-Criteria (not H-2A related) Clearance Orders**

For employers filing non-criteria clearance orders, the Department is including the burden to the public for the completion of Form ETA-790 and 790B, including its attachments, in this ICR. The estimated burden in this ICR only relates to the identified parties (the 17 states and the employer and association named above). In program year 2022, the identified 17 SWAs reported that they processed 177 non-criteria clearance orders. The chart below provides detailed information regarding the burden to complete and process the Form ETA-790 and the 790B.

For the employers completing both forms and attachments, the combined burden is estimated to be 120 minutes for Forms ETA-790 and 790B.

- ETA-790: 177 multiplied by .33 hours = 58.41 hours
- ETA-790B and attachments: 177 multiplied by 1.67 hours = 295.59 hours
- The total burden hours for both forms = 354 hours
- The annual hours of 354 multiplied by the fully loaded hourly rate of \$57.90 = \$20,496.60 total annual burden cost.

The cost estimate above is based on the Bureau of Labor Statistics data provided in the Occupational Employment Statistics (OES) at [www.bls.gov](http://www.bls.gov). In calculating the cost of completing and processing of the forms, ETA used the median hourly wage of \$36.42 per hour for [Farmers Ranchers, and Other Agricultural Managers 11-9013](#). For private sector occupations, the fringe benefit is calculated at 42% and overhead is calculated at 17% (combined total of 59%). The fully loaded hourly rate is, therefore \$57.90. The total burden cost is calculated in the table below.

For the SWA officials reviewing and processing both forms, the burden is estimated to be 90 minutes for Forms 790 and 790B:

- Reviewing the ETA-790 and 790B, including attachments: 177 multiplied by 78 minutes = 13,806 minutes divided by 60 = 230.10 hours
- Processing and record keeping of ETA-790 and 790B, including attachments: 177 multiplied by 12 minutes = 2,124 divided by 60 = 35.4 hours
- The total burden hours for the SWA review and processing of these two forms = 265.50 hours
- The annual hours of 265.50 multiplied by the hourly rate of \$51.77 = \$13,744.94 total annual burden cost.

The Department used the median hourly wage of \$28.92 for educational, guidance, and career counselors and advisors ([SOC code 21-1012](#)) employed by State governments. For public sector occupations, fringe benefits are calculated at 62% and 17% for overhead (combined total of 79%). The fully loaded hourly rate is therefore \$51.77.

<b>Table I: Burden Related to Non-Criteria (not H-2A related) Clearance Orders</b>							
<b>Activity</b>	<b>Number of Respondents</b>	<b>Number of Responses per Respondent</b>	<b>Total Number of Responses</b>	<b>Time Per Response (in hours)</b>	<b>Total Burden Hours</b>	<b>Hourly Wage Rate*</b>	<b>Total Cost Burden</b>
ETA Form 790 Employer	177	1	177	.33	58.41	\$57.9	\$3,381.94
ETA Form 790B, Including Attachments, Employer	177	1	177	1.67	295.59	\$57.90	\$17,114.66
ETA Form 790 SWA Employee Processing	177	1	177	.4	70.8	\$51.77	\$3,665.32
ETA Form	177	1	177	.1	17.7	\$51.77	\$916.33

790 SWA Employee <b>Record Keeping</b>							
ETA Form 790B, Including Attachments, SWA Employee <b>Processing</b>	177	1	177	.9	159.3	\$51.77	\$8,246.96
ETA Form 790B, Including Attachments, SWA Employee <b>Record Keeping</b>	177	1	177	.1	17.7	\$51.77	\$916.33
<b>Unduplicated Totals</b>	<b>1,062</b>	<b>1</b>	<b>1,062</b>	<b>varies</b>	<b>619.50</b>	<b>varies</b>	<b>\$34,241.54</b>

## II. Burden Related to OMB number 1205-0466 under the H-2A Program

### A. Collection of Information from Employers

The Department is adjusting the hourly burden estimates for this information collection due to its updated reporting estimates for the estimated limited number of respondents and the time burden hours associated with collection tools covered under OMB 1205-0466.

Based on recent program experience, the Department estimates it will receive, on average, a total of 4,376 Form ETA-9142A submissions and 4,376 Form ETA-790/790A submissions from *Kansas* plaintiffs for the H-2A program.<sup>1</sup> All actions associated with the collection vary depending on nature and complexity of the employer’s job opportunity and need for temporary nonimmigrant workers, as well as the employer’s familiarity with the program. The estimated reporting burden is calculated using the number of expected responses to each element and the estimated time to complete each element. Please see the Time Reporting **Burden Tables below**

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<sup>1</sup> The numerical estimation of 14,586 is derived from the average submissions of all H-2A applications from three previous full fiscal years based on the Department’s experience implementing the 2010 and 2022 H-2A Final Rules. The Department estimates that 14,586 respondents will submit, on average, 467,843 responses. As *Kansas* plaintiffs make up thirty (30) percent of the states and territories governed under the H-2A program, 30 percent of submission (for purposes of this IC) will now equate to 4,376 respondents will submit, on average, 140,410 responses.

for a detailed breakdown of time reporting burden estimates for the *Kansas* plaintiffs under the H-2A program.

<b>Table II: Burden Related to OMB number 1205-0466 under the H-2A Program</b>							
<b>Activity</b>	<b>Number of Respondents</b>	<b>Number of Responses per Respondent</b>	<b>Total Number of Responses</b>	<b>Time Per Response (in hours)</b>	<b>Total Burden Hours</b>	<b>Hourly Wage Rate*</b>	<b>Total Cost Burden</b>
A. Agents and recruiters	3,005	1	3,005	.42	1,262	\$83.59	\$105,490.58
B. H-2A Agricultural Clearance Order	4,376	1	4,376	.67	2,932	\$83.59	\$245,079.19
C. H-2A Application for Temporary Employment Certification	4,376	1	4,376	.55	2,407	83.59	\$201,201.13
D. Recruitment of U.S. Workers	4,376	1	4,376	4.30	18,817	83.59	\$1,572,913.03
E. Worker Guarantees & Rights	17,527	6.35631	111,407	.11272	12,558	83.59	\$1,049,715.70
F. Retention Requirements	4,376	1	4,376	.17	744	83.59	\$62,184.27
G. Post-adjudication requirements	8,474	1	8,474	1.73	14,660	83.59	\$1,225,429.40
H. Integrity measures	20	1	20	1	20	83.59	\$1,671.80
<b>Unduplicated Totals</b>	<b>4,376*</b>	<b>-</b>	<b>140,410*</b>	<b>Varies</b>	<b>53,400</b>		<b>\$4,463,685.10</b>

*\*The column representing the number of respondents and number of responses that complete the collection of information steps described in this table cannot be added up as not all employers or agents complete each one of the steps described. The Department estimates for the Kansas plaintiffs, that on a yearly average, 4,376 respondents will provide on average 140,410 responses in connection with this information collection.*

### **Total Hourly Cost Estimates**

The Department receives applications requesting temporary labor certification under the H-2A visa program from employers operating across a wide spectrum of agricultural activities and commodities in the U.S. economy. While it is difficult to estimate the costs involved, the Department believes that in most companies, a Human Resources Manager will perform these activities. In estimating employer staff time costs, the Department used the national cross-industry mean hourly wage rate for a Human Resources Manager (\$64.70), as published by the



Department's Occupational Employment Statistics survey,<sup>2</sup> and increased it by a factor of 1.292 to account for employee benefits and other compensation for a total hourly cost of \$83.59.<sup>3</sup> The total compensation is \$83.59 ( $\$64.70 \times 1.292$ ) for a Human Resources manager. The Department estimates the total cost by multiplying the compensation for a Human Resources manager by the total time to complete and retain the forms and supporting documentation in the amount of 13,321.83 hours.<sup>4</sup>

## B. Collection of U.S. Worker Wage Information from SWAs

Based on recent program experience, the Department estimates it will receive, on average, approximately 223 Form ETA-232 submissions annually.<sup>5</sup> All actions associated with the collection vary depending on whether the SWA uses another state agency's survey or conducts its own survey, as well as the SWA's familiarity with the survey methodology requirements. The estimated reporting burden is calculated using the number of expected responses and the estimated time to complete each response.

### Total Annual Burden Hours for the H-2A Information Collection from SWAs:

Total Burden Hours	13,110
Total Responses	69
Total Respondents	6

### Total Hourly Cost Estimates

SWAs are funded under reimbursable annual grants. The grants allow for costs related to the preparation and submission of all required financial and programmatic reports, including the surveying and submission of prevailing wage results using Form ETA-232, *Domestic In-Season Agricultural Wage Report*. The average hourly wage for Compensation, Benefits, and Job Analysis Specialists, who the Department believes are likely to perform these functions, is \$34.91.<sup>6</sup> Including benefits averaging 42 percent of total employee compensation, the estimated average hourly compensation for a Compensation, Benefits, and Job Analysis Specialist is \$49.57 ( $\$34.91 \times 1.42$ ).<sup>7</sup> At an estimated 1,190 total hours to complete, validate, and submit

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2 Source: Bureau of Labor Statistics May 2020 National Occupational Employment and Wage Estimates; Management Occupations. <https://www.bls.gov/oes/current/oes113121.htm>.

3 In estimating employer staff time costs, DOL used the national cross-industry mean hourly wage rate for a Human Resources Manager (\$64.70), as published by DOL's Occupational Employment Statistics survey (*Employer Costs for Employee Compensation – September 2021*, DOL, BLS, [www.bls.gov/news.release/archives/ecec\\_12162021.pdf](http://www.bls.gov/news.release/archives/ecec_12162021.pdf)), and increased it by a factor of 1.292 to account for employee benefits and other compensation, for a total hourly cost of \$83.59.

4 Total estimate number is rounded.

5 This estimate is the average number of surveys received in FY2020 and FY2021; DOL received 217 ETA-232s in FY2020 and 229 ETA-232s in FY2021 for all of the H-2A program. For purposes of this IC, specifically the Kansas plaintiffs, the Department estimates that it will receive 69 responses from 6 states. At an estimated 1,190 total hours to complete, validate, and submit information on the Form ETA-232, the Department estimates that the total burden hours are 13,110 (69 responses X 1,190 hours = 13,110) total burden hours.

6 *Occupational Employment and Wages, May 2020: 11-3121, Compensation, Benefits, and Job Analysis Specialists*, DOL, BLS, [www.bls.gov/oes/current/oes131141.htm](http://www.bls.gov/oes/current/oes131141.htm).

information on the Form ETA-232, the total estimated annual cost of these activities is \$17,697.30.

### III. Total Annual Burden

<b>Table III: Total Annual Burden</b>							
<b>Activity</b>	<b>Number of Respondents</b>	<b>Number of Responses per Respondent</b>	<b>Total Number of Responses</b>	<b>Time Per Response (in hours)</b>	<b>Total Burden Hours</b>	<b>Hourly Wage Rate*</b>	<b>Total Cost Burden</b>
Burden Related to Non-Criteria (not H-2A related) Clearance Orders	1,062	1	1,062	varies	619.50	varies	\$34,241.54
Burden Related to OMB number 1205-0466 under the H-2A Program	4,376	1	140,410	Varies	53,400	83.59	\$4,463,706
<b>Unduplicated Totals</b>	<b>5,438</b>	<b>1</b>	<b>141,472</b>	<b>varies</b>	<b>54,019.5</b>	<b>varies</b>	<b>\$4,497,947.54</b>

A13. 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. There is no obligation to own a computer to participate in the program. Anyone without computer access can request the form from OFLC to file an application. To participate in the program, the employer is required to generate records and retain them. Employers may retain these records in the manner they regularly choose to retain employment records, including electronic format.
2. Annual Costs: There are no annual costs involved with operation and maintenance because ETA will be responsible for the annual maintenance costs for the free downloadable forms and the web-based data collection and reporting system. ETA will also make the Form ETA-790A available in Spanish.

7 Employer Costs for Employee Compensation – June 2021, U.S. Department of Labor, Bureau of Labor Statistics, [https://www.bls.gov/news.release/archives/ecec\\_09162021.htm](https://www.bls.gov/news.release/archives/ecec_09162021.htm).

*A14. 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.*

The Department estimates that the annual costs to administer the H-2A program for the *Kansas* plaintiffs amount to \$7,929,659. This total is comprised of \$3,061,979 in federal administration costs and \$4,867,680 in state-level costs funded by federal grants.

Federal administrative costs include expenses for the staff who process H-2A applications; IT systems that support application-filing and case-processing operations; rent; supplies; equipment; and agency indirect costs, which include support for human resources, financial and administrative oversight, and grants and contracts management. Estimated annual costs for the federal administration of the H-2A program are \$10,206,598. For purposes of the *Kansas* plaintiffs (estimated 30 percent of the H-2A program), the federal administration costs equate to 30 percent of the H-2A program which is 3,061,979. This estimate is based on recurring annual costs to administer the program in recent fiscal years and does not include costs associated with funding appropriated on a one-time occurrence basis. Based on past obligations and expenditures, the table below provides a detailed breakdown of the annualized costs associated with federal administration of the H-2A program by major cost category.

For the H-2A program, there are 54 SWA respondents, including the 50 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.<sup>8</sup> Funding for these grants is provided through annual appropriations. The estimated annual cost for the H-2A portion of these activities is \$16,225,600. For purposes of these state *Kansas* plaintiffs (17 states are an estimated 30 percent of the H-2A program), the federal administration costs equate to 30 percent of the annual cost of the H-2A program which is 4,867,680. State-level H-2A activities include, but are not limited to: reviewing and placing job orders to recruit U.S. workers; receiving and processing required notifications from employers and the Department; providing assistance to employers in the effective recruitment of U.S. workers; conducting safety inspections of employer-provided housing for H-2A agricultural workers; and performing prevailing practice and wage surveys used to set the wages and working standards for a number of occupations within the state.

There are no costs to the Federal Government for the Forms ETA-790 and ETA-790B, when used for non-criteria clearance orders.

*A15. Explain the reasons for any program changes or adjustments reported on the burden worksheet.*

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<sup>8</sup> These respondents receive funding under the Wagner-Peyser Act. The Commonwealth of the Northern Mariana Islands is not covered by the Act.

The total number of responses, burden hours, and monetized costs associated with all collections under this ICR differ from previous estimates. The answer provided to A.12 provides more information regarding this burden increase. The chart below shows the changes in burden requested under this ICR, by showing the burden last approved by OMB in connection with OMB 1205-0466 as of October 12, 2022, for which approval is sought through this IC. All estimates have been rounded up to the nearest dollar.

OMB Control Number (1205-0466)	Currently Approved Estimates Under OMB 1205-0466 (As of 10/12/2022)	New Burden Estimates (As reported in this IC)	Change In Burden Estimate
Annual Responses	467,843	140,410	- 327,433
Burden Hours	102,865	13,321.83	- 90,543.17
Cost of Time	\$8,103,367	\$2,431,010	- \$5,672,357

There has been a decrease of total burden hours. The reason why the estimated numbers of annual responses, burden hours, and monetized cost of respondent time associated with this ICR decreased from the previously approved burden due to the fact that the Department is calculating the burden of the *Kansas* plaintiffs (which include 17 states, 1 employer and 1 agricultural association) not the original 54 states and territories used in previous calculations.

*A16. 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.*

No collection of information will be published.

*A17. If seeking approval not to display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

The Department displays the expiration date for OMB approval on the form and instructions.

*A18. Explain each exception to the topics of the certification statement identified in “Certification for Paperwork Reduction Act Submissions.”*

The Department is not seeking any exception to the certification requirements.

Criteria and Non-Criteria Agricultural Clearance Order Forms and H-2A Application for Temporary Employment Certification in States and by Employers Covered by Injunction of the Farmworker Protection Final Rule  
OMB Control No. 1205-0NEW  
Expiration: XX/XX/XXXX

**B. Collections of Information Employing Statistical Methods**

This information collection does not employ statistical methods.