

**SUPPORTING STATEMENT FOR REQUEST FOR OMB APPROVAL
UNDER THE PAPERWORK REDUCTION ACT OF 1995, ETA 9141**

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**SUPPORTING STATEMENT
APPLICATION FOR PREVAILING WAGE DETERMINATION
(New Information Collection Request)**

A. Justification

A.1. Circumstances that make the collection of information necessary.

The information collection (IC) is required by sections 203(b)(3); 212(a)(5)(A); 212(m), (n), (t); and 214(c) of the Immigration and Nationality Act (INA) (8 U.S.C. §§1153(b)(3); 1182(a)(5)(A); 1182(m), (n), (t); and 1184(c)) and 8 CFR 214.2(h). The INA requires the Secretary of Labor to certify, among other things, that any foreign worker seeking to enter the United States (U.S.) for the purpose of performing certain skilled or unskilled labor will not, by doing so, adversely affect wages and working conditions of U.S. workers similarly employed. Before the Secretary of Labor can certify that wages for U.S. workers have not been adversely affected, she must ensure that the wages being paid the foreign workers are the same as those being offered and paid to U.S. workers.

The information contained in the ETA Form 9141 is the basis for the Secretary's determination of the wage employers must pay in order to not have an adverse affect on wages by the employment of a foreign worker. Prior to submitting requests for most labor certifications or a labor condition applications to the Secretary of Labor, employers must obtain a prevailing wage for the place of employment in order to ensure that wages are not being adversely affected by paying foreign workers less than a prevailing wage. ETA Form 9141, *Application for Prevailing Wage Determination*, is used to collect the necessary information from employers to enable the Department of Labor (Department) to issue a prevailing wage for the occupation and location of the job offer. The ETA Form 9141 is used in the H-2B, H-1B, H-1B1, E-3, and PERM programs administered by the Department.

On April 8, 2012, OMB approved changes to the 1205-0466 Information Collection Request (ICR) (which contained the ETA Form 9141) in conjunction with recent rulemaking resulting in a final rule published on February 21, 2012 (the 2012 H-2B Final Rule). 77 FR 10038. All comments, documents, and forms related to the information collection approved in conjunction with the 2012 H-2B Final Rule can be found on <http://www.reginfo.gov>. However, a lawsuit was brought in Federal court in the Northern District of Florida, Pensacola Division, against the Department and an order was issued on April 26, 2012 by the court enjoining the Department from implementing the 2012 H-2B Final Rule. (*Bayou Lawn & Landscape Services, et al. v. Hilda L. Solis, et al.*, 12-cv-00183-RV-CJK.) The Department must accordingly revert back to the information collection instruments used in this collection prior to 2012 H-2B Final Rule. The Department received emergency approval to do so from OMB on April 27, 2012 and the ICR now expires on October 31, 2012. The

Department is required to seek notice and comment on the further extension of the appropriate forms.

As a result of the lawsuit, DOL is seeking to use the ETA Form 9141 in effect prior to the injunction in the 1205-0466 ICR. However, the Department is also taking this opportunity to separate out the three different ICs that were formerly all contained in 1205-0466 as well as discontinue 1205-0404 by merging it into the new 1205-0466. Specifically, 1205-0466 will contain forms and most regulatory information collection requirements applicable to the H-2A program. The ETA Form 9142 and Appendix A.2 (to now be referred to only as Appendix A) will be known as the ETA Form 9142A, *H-2A Application for Temporary Employment Certification and Appendix A*. Because 1205-0404 is a small ICR having to do specifically with the notification requirements of the 50 percent rule in the H-2A program, it will be merged with the new 1205-0466. The 1205-NEW1 ICR, will contain forms and most regulatory information collection requirements applicable to the H-2B program. The ETA Form 9142 and Appendix B.1 (to now be referred to only as Appendix B) will be known as the ETA Form 9142B, *H-2B Application for Temporary Employment Certification and Appendix B*. The ETA Form 9141, *Application for Prevailing Wage Determination*, which is applicable to the H-2B, H-1B, H-1B1, E-3, and PERM programs, will go into this ICR, 1205-NEW2.

A.2. How, by whom, and for what purpose the information is to be used.

In order to meet its statutory responsibilities under the INA, the Department must request information from employers seeking to hire and import foreign labor. The Department uses the information collected to determine the appropriate wages that must be paid by an employer to foreign workers in most programs.

A.3. Extent to which collection is automated, reasons for automation, and considerations for reducing impact on burden.

In compliance with the Government Paperwork Elimination Act, the Department allows electronic filing for the form in this collection. The ETA Form 9141 is fully operational as both a fillable and electronically fileable form and is available on the Department's iCert Portal System at <http://icert.doleta.gov/> where it can be accessed by employers who wish to complete and submit it electronically.

A.4. Efforts to identify duplication – why similar information already available cannot be used for purpose described in A.2.

The information requested on the ETA Forms 9141 is sufficiently diverse to avoid duplication of activities within the Department for the H-2B, H-1B, H-1B1, E-3, and PERM programs. However, those employers utilizing the electronic filing option can

save their contact information and other pertinent information in the iCert system for use on another application.

A.5. Efforts to minimize burden on small businesses.

The information collection is required of small businesses who want to hire and import foreign labor. However, the recordkeeping requirements largely involve information that already exists in payroll and other records kept by most employers for other purposes.

A.6. Consequences to Federal program if collection not done or done less frequently and any technical or legal obstacles to reducing the burden.

Employers choose how frequently they apply for benefits. The Department cannot issue such benefits without collecting at least basic information on the employer and the job opportunity being offered foreign workers in order to perform its duties under the law and regulations.

A.7. Special circumstances for conducting information collection.

There are no special circumstances that would require the information to be collected or kept in any manner other than those normally required under the Paperwork Reduction Act, except the regulatory requirement that employers retain the records and supporting documents used to fill in the forms for at least three years for the H-2B program; five years for the PERM program; and one year beyond the validity of the certified Labor Condition Application in the H-1B program, including the H-1B1 and E-3 programs.

A.8. Preclearance notice and summary of public comments.

The public was given 60 days to comment on this collection by way of a Notice published in the Federal Register on August 15, 2012 (Vol. 77, p 49025 et seq). No comments were received.

A.9. Explanation of decision to provide any payment or gift to respondents.

No payments or gifts will be made to respondents.

A.10. Assurance of confidentiality provided to respondents.

The information collected is not exempt from full disclosure under the Freedom of Information Act. No assurance of confidentiality is provided.

A.11. Justification for any sensitive questions.

The information collected does not involve sensitive matters.

A.12. Estimated hourly burden.

Based on recent program experience, the Department estimates it will receive approximately 7,613 submissions for the H-2B program, 21,798 submissions for the H-1B program, and 91,637 submissions a year for the PERM program. The total hourly burden is 398,833 hours. The hourly burdens are separated by program.

I. The H-2B Program

A. Determination of prevailing wages for labor certification purposes

In order to recruit U.S. workers and complete the ETA Form 9142, an H-2B employer must first obtain a prevailing wage determination from the Department (20 CFR 655.10(a)). The regulations require employers to obtain the prevailing wage determination in advance of recruitment or filing by submitting a completed Application for Prevailing Wage Determination (ETA Form 9141) to the NPWC. The Department estimates that employers will spend 45 minutes preparing and submitting the ETA Form 9141 to the NPWC.

The H-2B program allows employers to appeal the prevailing wage determinations made by the NPWC or to submit its own survey to the NPWC for validation if it meets the requirements of 20 CFR 655.10(f). If the NPWC finds the survey provided by the employer unacceptable, the employer may submit supplemental information for the NPWC's consideration. The Department has found that in the past employers challenged the determination and/or submitted supplemental information in approximately 3.5 percent of the prevailing wage determination requests and that it will take employers 45 minutes to prepare such requests. The Department further found that 2.32 percent of those employers appeal the final decision of the Certifying Officer to the Center Director and only one or two annually appeal the Center Director's decision to the Board of Alien Labor Certification Appeals (BALCA). The Department estimates it takes an employer 1 hour each to prepare the appeal to both the Center Director and BALCA. The total annual burden of the prevailing wage determinations is $(7,613 \times 0.75 \text{ hours}) + (7,613 \times 3.5\% \times 0.75 \text{ hours}) + (266 \times 2.32\% \times 1 \text{ hour}) + (2 \times 1 \text{ hour}) = 5,918$ reporting hours.

B. Retention of Supporting Documentation

The Department estimates that employers will spend about 10 minutes per year per application to retain an application and required supporting documentation as required in 20 CFR 655.10(i). This results in an annual burden of 1,269 recordkeeping hours (7,613 applications x 10 minutes ÷ 60 minutes = 1,269 hours).

5,918 Reporting
1,269 Recordkeeping Hours
7,187 Total Hours

Average Time Per Application Process:

ETA Form 9141 – 45 minutes

Total H-2B Responses: 15,500

Total H-2B Respondents: 7,613

II. The H-1B program (including H-1B1 and E-3)

A. Determination of wages to be paid for purposes of approval of a Labor Condition Application.

In order to complete the ETA Form 9035, Labor Condition Application (OMB control number 1205-0310), an employer must determine the appropriate wage to pay the foreign worker. The regulations require employers to determine the appropriate wage in advance of submitting the Labor Condition Application (LCA). Unlike in the H-2B and PERM programs, under the Department's regulations at 20 CFR 655.731, an H-1B, H-1B1 or E-3 employer has the option of requesting a prevailing wage determination from the NPWC using the ETA Form 9141 which includes reviewing the Department's wage information available through the Online Wage Library at <http://www.flcdatacenter.com/OESWizardStart.aspx>. The employer may choose not to request a formal prevailing wage determination and instead rely on the wage information available through the Department's Online Wage Library without requesting a formal prevailing wage determination from the NPWC, or the employer may rely on another legitimate source of wage information such as a collective bargaining agreement or another source. The first option, however, has a distinct advantage of affording the employer a safe harbor, a presumption of the legitimacy of the prevailing wage, in the case of an investigation by the Wage and Hour Division. Whether the employer chooses to request a prevailing wage determination from the NPWC using ETA Form 9141 or uses the OES Library, it will take the employer approximately 45 minutes to complete and file the prevailing wage request with the NPWC using the ETA Form 9141 or perform the research itself. Program experience has shown that at least 90 percent of applicants use the first two methods, and 10 percent rely on another legitimate source of wage

information such as collective bargaining agreements and other sources readily available to the employer without burden hours. The Department receives an average of 361,927 Labor Condition Applications filed on the ETA Form 9035 a year, of which 21,798 request prevailing wage determinations from the NPWC using the ETA Form 9141.

In the H-1B program, the employer may, in the course of requesting a prevailing wage determination from the NPWC, submit its own survey to the NPWC for validation if it meets the requirements of 20 CFR 655.40(g). If the NPWC finds the survey provided by the employer unacceptable, the employer may submit supplemental information for the NPWC's consideration. The Department has found that in the past employers challenged the determination and/or submitted supplemental information in approximately 3.5 percent of the prevailing wage determination requests and that it will take employers 45 minutes to prepare such requests. The Department further found that 2.32 percent of those employers appeal the final decision of the Certifying Officer to the Center Director and only one or two appeal the Center Director's decision to the Board of Alien Labor Certification Appeals (BALCA). The Department estimates it takes an employer 1 hour each to prepare the appeal to both the Center Director and BALCA. The total annual burden of the prevailing wage determinations is $(361,927 \times .90 \times 0.75 \text{ hours}) + (21,798 \times 3.5\% \times 0.75 \text{ hours}) + (763 \times 2.32\% \times 1 \text{ hour}) + (2 \times 1 \text{ hour}) = 244,893$ reporting hours.

B. Retention of Supporting Documentation

The Department estimates that employers will spend about 10 minutes per year to retain the documentation of its compliance with the required wage rate under 20 CFR 655.731, including, if applicable, the prevailing wage determination and any required supporting documentation during the requisite retention period. This results in an annual burden of 60,321 recordkeeping hours $(361,927 \text{ applicants} \times 10 \text{ minutes} \div 60 \text{ minutes} = 60,321 \text{ hours})$.

Total Annual Burden Hours for the H-1B Information Collections:
ETA Form 9141 – 244,893 Reporting Hours
60,321 Recordkeeping Hours
305,214 Total Hours

Average Time Per Application Process:
ETA Form 9141 – 55 minutes

Total H-1B Responses: 688,444
Total H-1B Respondents: 361,927

III. The PERM program

A. Determination of wages to be paid for labor certification

In order to recruit U.S. workers and complete the ETA Form 9089, Application for Permanent Employment Certification (OMB control number 1205-0451), an employer must obtain the appropriate wage in advance of filing the ETA Form 9089 by submitting the Application for Prevailing Wage Determination ETA Form 9141 to the NPWC and receiving a prevailing wage determination. Program experience shows that the majority of employers will accept the NPWC's determination and will, therefore, only spend 45 minutes preparing and submitting the Application for Prevailing Wage Determination (ETA Form 9141) to the NPWC. In the PERM program, the employer has the option of submitting its own survey if it meets the requirements of 20 CFR 656.40(g) for NPWC validation. If the NPWC finds the survey provided by the employer unacceptable, the employer may submit supplemental information for the NPWC's consideration. The PERM program also allows employers to appeal the prevailing wage determination. The Department has found that in the past employers challenged the determination and/or submitted supplemental information in approximately 3.5 percent of the prevailing wage determination requests and that it will take employers 45 minutes to prepare such requests. The Department further found that 2.32 percent of those employers appeal the decision of the Certifying Officer to the Center Director and only one or two appeal the Center Director's decision to the Board of Alien Labor Certification Appeals (BALCA). The Department estimates it takes an employer 1 hour each to prepare the appeal to both the Center Director and BALCA. The total annual burden of the prevailing wage determinations is $(91,637 \times 0.75 \text{ hours}) + (91,637 \times 3.5\% \times 0.75 \text{ hours}) + (3,207 \times 2.32\% \times 1 \text{ hour}) + (2 \times 1 \text{ hour}) = 71,209$ reporting hours.

B. Retention of Supporting Documentation

The Department estimates that employers will spend about 10 minutes per year per application to retain an application and required supporting documentation in the four years following the mandated one year retention for companies subject to Title VII and five years for all other employers. This results in an annual burden of 15,273 recordkeeping hours $(91,637 \text{ applications} \times 10 \text{ minutes} \div 60 \text{ minutes} = 15,273 \text{ hours})$.

Total Annual Burden Hours for the PERM Information Collection related to ETA Form 9141:

ETA Form 9141	–	71,209 Reporting Hours
		<u>15,273 Recordkeeping Hours</u>
		86,482 Total Hours

Average Time Per Application Process
Form 9141 – 55 minutes

Total PERM Responses: 186,557
Total PERM Respondents: 91,637

Totals For All Programs:

Reporting Hours:	321,970
Recordkeeping Hours:	76,863

Total Responses: 890,501
Total Respondents: 461,177

V. Total Hourly Cost

Employers filing applications for temporary and permanent alien employment certification may be from a wide variety of industries. Salaries for employers and/or their employees who perform the reporting and recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. However, 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 (\$52.21), based on the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,¹ and increased it by a factor of 1.43 to account for employee benefits and other compensation for a total hourly cost of \$74.66. This number was multiplied by the total hourly annual burden for the information collection for each foreign labor certification program in order to arrive at total annual respondent hourly costs for all information collections under this extension request. The total annual respondent hourly costs are estimated as follows:

H-2B	7,183 x \$74.66 =	\$ 536,283
H-1B	305,205 x \$74.66 =	\$22,786,605
PERM	86,445 x \$74.66 =	<u>\$ 6,453,984</u>

Total Burden Cost: 398,833 hours \$29,776,871

A.13. *Estimated cost burden to respondents.*

a) Start-up/capital costs: There are no start-up costs. There is no obligation to own a computer to participate in the programs. Anyone without computer

¹ Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2010 National Occupational Employment and Wage Estimates; Management Occupations

access can request the forms from OFLC. However, to participate in the programs employers are required to generate records and retain them. The only necessary supplies needed to store and maintain the records are filing cabinets and filing folders. The Department estimates that the initial cost to employers is minimal because it is a customary and usual business practice for businesses to have storage space.

b) 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.

A.14. Estimated cost burden to the Federal government.

The average Federal Government cost for a year of operation is estimated on an hourly basis multiplied by an index of 1.69 to account for employee benefits and proportional operating costs, otherwise known as Fully Loaded Full Time Equivalent (FLFTE). The index is derived by using the Bureau of Labor Statistics' index for salary plus benefits and the Department's internal analysis of overhead costs averaged over all employees of OFLC. The total cost to the Federal Government for the prevailing wage determinations for H-2B, H-1B, H-1B1, E-3, and PERM is estimated at \$4,943,246 calculated as follows:

I. H-2B program:

<u>Staff Cost for Adjudicating Prevailing Wage Applications</u>	\$294,966
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 45 minutes	
\$51.66 x 7,613 x .75 hours = \$294,966	

<u>Staff Cost for Appealed Required Wage Applications</u>	\$ 16,186
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(3.5% of applications are appealed)
 Supervisor(GS-14, Step 5 x 1.69) @ 45 minutes
 \$72.60 x 267 x .75 hours = \$14,538
 (2.32% of those request Center Director Review)
 Center Director (GS-15 Step 5 x 1.69) @ 2 hours
 \$113.59 x 6 x 2 hours = \$1,363
 (2 applications are appealed to BALCA)
 NPWC staff for preparation of appeal file
 Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1 hour
 \$51.66 x 2 x 1 hour = \$103
 Administrative Law Judge (AL/C3 x 1.69) @ 1 hour
 \$91.00 x 2 x 1 hour = \$182

Estimated Total Cost for H-2B

Staff = **\$311,152**

III. H-1B program (including H-1B1 and E-3):
APPLICATIONS FOR PREVAILING WAGE ONLY

Staff Cost for Adjudicating Prevailing Wage Applications \$844,563
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 45 minutes
 $\$51.66 \times 21,798 \times .75 \text{ hours} = \$844,563$

Staff Cost for Appealed Prevailing Wage Applications \$ 45,919
(3.5% of applications are appealed)
Manager (GS-14, Step 5 x 1.69) @ 45 minutes
 $\$72.60 \times 763 \times .75 \text{ hours} = \$41,545$
(2.32% of those request Center Director Review)
Center Director (GS-15 Step 5 x 1.69) @ 2 hours
 $\$113.59 \times 18 \times 2 \text{ hours} = \$4,089$
(2 applications are appealed to BALCA)
NPWC staff for preparation of appeal file
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1 hour
 $\$51.66 \times 2 \times 1 \text{ hour} = \103

Administrative Law Judge (AL/C3 x 1.69) @ 1 hour
 $\$91.00 \times 2 \times 1 \text{ hour} = \182

Estimated Total Cost for H-1B **\$890,482**

IV. PERM program:

APPLICATIONS FOR PREVAILING WAGE ONLY

Staff Cost for Adjudicating Prevailing Wage Applications \$3,550,204
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 45 minutes
 $\$51.66 \times 91,630 \times .75 \text{ hours} = \$3,550,204$

Staff Cost for Appealed Prevailing Wage Applications \$ 191,717
(3.5% of applications are appealed)
Manager (GS-14, Step 5 x 1.69) @ 45 minutes
 $\$72.60 \times 3,207 \times .75 \text{ hours} = \$174,621$
(2.32% of those request Center Director Review)
Center Director (GS-15 Step 5 x 1.69) @ 2 hours
 $\$113.59 \times 74 \times 2 \text{ hours} = \$16,811$
(2 applications are appealed to BALCA)
NPWC staff for preparation of appeal file
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 1 hour
 $\$51.66 \times 2 \times 1 \text{ hour} = \103
Administrative Law Judge (AL/C3 x 1.69) @ 1 hour
 $\$91.00 \times 2 \times 1 \text{ hour} = \182

<u>Estimated Total Cost for PERM</u>	\$3,741,921 =====
Total Cost to Federal Government	\$4,943,555

A.15. Reasons for any program changes reported in Items 13 or 14 of the OMB Form 83-1.

This ICR is new, but contains some of the burden formerly in 1205-0466.

A.16. Method for publishing results.

OFLC discloses information about employer applicants to the public on its public access webpage at <http://www.flcdatacenter.com/CaseData.aspx>. For the prevailing wage determinations, the employer name and address, work locations, the occupation; and the prevailing wage determination by the Department are all disclosed on the website.

A.17. If seeking approval not to display the expiration date for OMB approval, explain why display would be inappropriate.

The Department will display the expiration date for OMB approval on the forms.

A.18. Explanation of each exception in the certification statement identified in Item 19 "Certification for Paperwork Reduction Act Submissions" on OMB Form 83-1.

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

B. Collection of Information Employing Statistical Methods

This information collection does not employ statistical methods.