

**Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage
Determination Request Based on a Non-OES Survey
1205-0516
October 2015**

**SUPPORTING STATEMENT
UNDER THE PAPERWORK REDUCTION ACT OF 1995**

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OMB CONTROL NUMBER 1205-0516
Employer-Provided Survey Attestations to Accompany
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(20 CFR 655.10)

A. Justification

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

The information collection is required by sections 101(a)(15)(H)(ii)(b) and 214(c) of the Immigration and Nationality Act (INA) (8 U.S.C. 1011(a)(15)(H)(ii)(b) and 1184(c)), and implementing regulations at 20 CFR 655.10 and 8 CFR 214.2(h). Before an employer may petition for any temporary or permanent skilled or unskilled foreign workers, it must submit a request for certification to the Secretary of Labor containing the elements prescribed by the INA and the Department of Labor's (Department) implementing regulations, which differ depending on the visa program under which the foreign workers are sought.

The H-2B visa program enables employers to bring nonimmigrant foreign workers to the U.S. to perform nonagricultural work of a temporary or seasonal nature as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). For purposes of the H-2B program, the INA and governing federal regulations require The Secretary of Labor to certify, among other things, that any foreign worker seeking to enter the United States (U.S.) temporarily for the purpose of performing certain unskilled labor will not, by doing so, adversely affect wages and working conditions of U.S. workers similarly employed. The Secretary must also certify that there are not sufficient U.S. workers available to perform such skilled or unskilled labor.

Prior to submitting labor certification applications to the Secretary of Labor, employers must obtain a prevailing wage for the occupation in the area of intended employment in order to ensure that wages are not being adversely affected by paying foreign workers less than a prevailing wage. Form ETA-9141, *Application for Prevailing Wage Determination* (OMB Control Number 1205-0508) is used to collect the necessary information from employers to enable the Department to issue a prevailing wage for the occupation and location of the job offer.

Under the regulations, employers may choose to submit an employer-provided survey to establish the prevailing wage for an occupation as long as they meet the criteria set forth in the regulations at 20 CFR 655.10(f). In order to strengthen the reliability and validity of employer-provided surveys, the Department, in the Final Rule, *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program* (80 FR 24146), has prohibited reporting wages based on skill levels in employer provided surveys and codified the standards it uses to assess employer provided surveys that may be relied on to set the prevailing wage. The Department has established a new

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information collection, the Form ETA-9165, *Employer-Provided Survey Attestations to Accompany H-2B Prevailing Wage Determination Request Based on a Non-OES Survey*, in order to increase compliance with the new standards applicable to employer-provided surveys and to assist the Department in reviewing those surveys.

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

In order to meet its consultative responsibilities under the INA, the Department must request information from employers seeking to hire and import foreign labor and must ensure that the wages being paid will not adversely affect U.S. workers. The Department uses the information collected to determine the adequacy of the data provided and validity of the methodology used in conducting the survey submitted by an employer in the H-2B nonimmigrant temporary nonagricultural worker program.

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 has made the instrument in this collection an electronically fillable PDF at <http://www.foreignlaborcert.doleta.gov/form.cfm>. The form is filed electronically, but only as a scanned attachment to the employer-provided survey because it must be signed by the employer prior to submission.

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 Form ETA-9165 is sufficiently unique to avoid duplication of activities within the Department for the H-2B program.

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

The information collection is required of small businesses which want to hire and import foreign labor if they are within an eligible category for submission and choose to submit an employer-provided survey. However, the information requested involves information that already exists in the survey voluntarily being submitted at the election of the employer.

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

Without the information collection, the Department is unable to adequately determine that the methodological standards imposed in the regulations governing employer-provided surveys are met. Employers choose whether to submit employer-provided

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surveys. The Department ensures that surveys meet regulatory requirements without expending inordinate resources in verifying compliance with the 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.

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

The Department is published a 60-day notice of the extension of this information collection in the *Federal Register* on July 16, 2015 (80 FR 42124). Comments could be submitted until September 14, 2015. The Department received two comments, one of which was not germane to this information collection. Below is an analysis of the comments received and the Department's response.

Comment Table

Section or line #	Comment/request	DOL response
D.1 Title of job(s) included in the survey * D.2 Duties of the job(s) included in the survey (submit an attachment if more space is required): *	The commenter requests that DOL replace the term 'job(s)' with 'occupation' for these questions.	The Department declines to adopt this requested change for the following reasons. The purpose of question D.1 is to have the surveyor provide a list the job titles it received in responses or explicitly included in the survey instrument. The purpose of question D.2 is to have the surveyor provide the duties it explicitly used in the survey instrument. The information the surveyor provides to these questions gives the NPWC the ability to determine if the survey includes wages from similarly employed workers.
Same D.1 and D.2 as above; E.1, E.2, E.3, E.5, E.6, E.9, and E.11	The commenter requests clarification in the instructions that the "occupation" which is be surveyed is different from and must be broader than the employer's job opportunity. The commenter recommends	DOL is not making the requested changes because they are inconsistent with the 2015 H-2B Final Wage Rule. In addition, the commenter's requested interpretation of similar employment is inconsistent with a court decision.

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	<p>that similar employment be assessed based on whether the survey covers all work requiring the same or similar skills.</p> <p>The commenter requests that the form require the identification of the source of the survey taxonomy in all circumstances and that in cases that the survey does not use the SOC Code “occupation,” the ETA-9165 require the surveyor to identify the “occupation”¹ being surveyed either with reference to a published list of occupational definitions specifying the tasks and skills related to the occupational classification (e.g. a reference to the specific Dictionary of Occupational Titles code used if that is the source of the occupational classification), or in the absence of a published occupational definition, the surveyor should be required to explain the definition and the tasks and skills related to the occupational classification that the state related surveyor is proposing constitutes a separate occupation and how it differs in terms of “substantially similar level of comparable skills” from the broader SOC Code classification which otherwise would be appropriate. In the commenter’s view, such</p>	<p>DOL determines whether a worker is similarly employed for purposes of establishing the prevailing wage based on comparison of the job duties to be performed under the labor certification with the job duties performed by workers under the occupational taxonomy of the survey. For employer-provided surveys, this comparison is based on the job duties of the occupational taxonomy used in the submitted survey, and, under DOL’s regulation, the duties performed by workers under the survey are not required to be broader than those performed under the job opportunity. This analysis is consistent with DOL’s approach across the non-agricultural prevailing wage programs, including under the predecessor H-2B rule, and is described in the preamble to the 2015 H-2B Final Wage Rule. 80 Fed. Reg. 24146, 24170-24173 (Apr. 29, 2015). The source of the occupational taxonomy is irrelevant to DOL’s determination.</p> <p>Because the duties of workers included in the survey are provided under question D.2, the NPWC can use that information to determine if the survey includes wages from similarly employed workers. The NPWC may ask for additional documents if further information is needed to make this assessment in a particular case.</p> <p>In addition, DOL is barred from</p>
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¹ While the commenter refers to information being provided on the form by the surveyor, it is the responsibility of the employer to complete the Form ETA-9165 and sign the required declaration under the 2015 H-2B Final Wage Rule. See 80 Fed. Reg. at 24172-24173.

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	<p>surveyors should further be required to identify each of the industries utilizing persons in that occupation and why it is appropriate to exclude similarly employed individuals working in industries which they have excluded from their occupational definition.</p>	<p>considering whether the surveyed job includes a <u>“substantially similar level of comparable skills”</u> as part of our <u>assessment of whether an employer-provided survey covers similarly employed workers as we did under the 2008 H-2B rule at 20 CFR 655.10(c)</u> because use of skill levels to assess H-2B wage rates is prohibited by the Third Circuit’s decision in <i>Comite’ de Apoyo a los Trabajadores Agrícolas v. Perez</i>, 774 F.3d 173 (Dec. 5, 2014). The effect of this decision on DOL’s evaluation of employer-provided surveys is explained in the preamble to 2015 H-2B Final Wage Rule. 80 Fed. Reg. at 24171-24172.</p>
Section D	<p>The commenter requests that DOL add an item to require identification of the industries employing workers in the occupation</p>	<p>The Department will not be implementing this requested change because Item E.2 already requires a description of the sources used to identify the number of employers employing workers in the occupation and in the area surveyed, item D.2 requires a list of the job duties included in the survey, and item E.6 is an explicit attestation that the wages were collected across industries. In most circumstances, this information will be sufficient for ETA to determine if the survey was conducted across industries. If the form and survey do not provide sufficient information to make this assessment in a particular case, the NPWC may request additional information from the employer or may reject the survey.</p>
Section C	<p>The commenter requests that the form should require the employer to indicate whether the survey was employer commissioned, and whether it</p>	<p>The Department will not be making the requested change because there is no regulatory restriction on the employer paying a bona fide third party to produce a survey meeting the</p>

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	<p>was in whole, or in part, employer financed (either directly or indirectly through a trade group or other association of which the employer is a member), including in circumstances where the survey was conducted by a state agency.</p>	<p>standards in the regulation or prohibiting the states from choosing how to finance any survey they elect to produce. See 80 Fed. Reg. at 24174 fn. 73 (the rule “does not bar an employer from paying an otherwise bona fide third party to conduct the survey.”) Although DOL noted in the H-2B Final Wage Rule our understanding that states ordinarily provide such surveys free of charge, there is no regulatory requirement that they be so provided. <i>Id.</i> at 24170.</p>
<p>C.6</p>	<p>The commenter requests that DOL require additional contact and identifying information for the third-party surveyors and state officials approving a survey.</p> <p>The commenter requests that DOL require that the data in the survey was collected by a bona fide third party and that no data was collected by any H-2B employer or H-2B employer’s representative, attorney, or agent for state-conducted surveys.</p>	<p>The Department is not making the requested change for additional surveyor contact and identifying information because it is the employer’s obligation, not the surveyor’s, to provide sufficient information to permit the Department to assess whether the survey is an appropriate source to set the prevailing wage. In a particular case, the NPWC may ask for documentation from the employer if more detail is needed to make this assessment or may reject the survey.</p> <p>DOL is not making the requested change for additional assurances for state surveyors because the employer is already required to attest at C.4a that a state survey was “independently conducted and issued,” which provides sufficient protection. As discussed in the 2015 H-2B Final Wage Rule, DOL has determined that state conducted surveys are “generally reliable.” 80 Fed. Reg. at 24170.</p>

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

No payments or gifts are being made to respondents.

A.10. Assurance of confidentiality provided to respondents.

The Department offers no assurances of confidentiality to those responding to this information collection. The information collected is not exempt from full disclosure under the Freedom of Information Act. Generally, however, the Department is required under the Privacy Act to withhold the disclosure of personally identifiable information to the extent such information is supplied in response to the information collection.

A.11. Justification for any sensitive questions.

The information collected does not involve sensitive matters.

A.12. Estimated hourly burden.

Based on previous program experience, the Department estimates it will receive approximately 9,253 requests for prevailing wage determinations in the H-2B program each year under the regulation, 3 percent of which will be eligible to submit and will request the use of an employer-provided survey or a State survey and will need to attach the Form-ETA 9165. That amounts to a total of 278 Form ETA-9165s being filed each year. The total hourly burden for this information collection is 116 hours and explained below.

I. Prevailing Wage Requirements (20 CFR 655.10)

A. Requests for Prevailing Wage Determinations (20 CFR 655.10(c))

The burden for this section of the regulation is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

B. Employer-provided wage surveys (20 CFR 655.10(f))

An employer may choose to submit an employer-provided survey to establish the prevailing wage for an occupation in the area of intended employment. The regulation requires that any employer who submits an employer-provided survey attest that the survey meets the requirements listed therein. The attestation is made on Form ETA-9165. Any employer submitting a wage survey must report on Form ETA-9165 specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a

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determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey.

The Department expects to receive approximately 278 employer-provided surveys each year and that it will take respondents an average of 25 minutes to complete the Form ETA-9165 for approximately 116 reporting hours. The Department views the burden on respondents to complete the Form ETA-9165 as a two-step process. First, third-party surveyors will compile the information necessary for the employer to complete Form ETA-9165 and are viewed as a cost to the employer and accounted for in number 13 below. Second, we estimate that employers will take, on average, 25 minutes to complete and sign Form ETA-9165 once the third-party surveyor supplies the necessary information.

C. Submission of supplemental information by employer (20 CFR 655.10(g) and 655.13)

Employer-provided surveys are filed with the Department's National Prevailing Wage Center (NPWC). If the NPWC informs the employer its survey is not acceptable, the employer may submit supplemental information to the NPWC by requesting a review under 20 CFR 655.13. The burden for this section of the regulation is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

D. Appeals (20 CFR 655.13)

An employer who does not agree with a prevailing wage determination may apply for a new wage determination, appeal under 20 CFR 655.13, or acquiesce to the initial PWD. The burden calculations for applying for a new wage determination and appealing under 20 CFR 655.13 are accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508).

E. Retention of documentation (20 CFR 655.10(j))

The employer must retain the Prevailing Wage Determination for 3 years from the date of issuance or the date of a final determination on the Application for Temporary Employment Certification, whichever is later. The burden calculation for the retention requirement is accounted for in the Information Collection for the Prevailing Wage Determination form ETA-9141 (OMB Control number 1205-0508). The employer is not required to retain the survey or the Form ETA-9165.

II. Total Annual Burden Hours

116 Reporting Hours
0 Recordkeeping Hours

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0 Third Party Disclosure Hours

116 Total Burden Hours
 278 Total Responses
 278 Total Respondents

Estimated Time Reporting Burden Per Form ETA-9165 is 25 minutes

III. Total Hourly Cost

Employers filing applications for temporary employment certification for foreign workers may be from a wide variety of industries. For purposes of this estimate, the DOL assumes each filing is made by a unique respondent. Salaries for employers and/or their employees who perform the reporting 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 itself. We estimate that an employer's Human Resources Manager (SOC code 11-3121) will spend, on average, 25 minutes to complete the form and sign it. In estimating employer staff time costs, the Department used the national cross-industry mean hourly wage rate for a Human Resources Manager (\$53.45), based on the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,² and increased these wages by 1.43 percent to account for employee benefits and other non-wage compensation. Therefore, the total hourly cost of a Human Resources Manager is \$76.43. This compensation number was multiplied by the total hourly annual burden (as pro-rated above) for the information collection for the H-2B foreign labor certification program in order to arrive at total annual respondent hourly costs for all information collections under this extension request. The resulting cost estimate for all respondents to complete the Form ETA-9165 is \$8,866. (116 hours x \$76.43).

Burden Table

Activity	Number of Respondents	Frequency	Total Annual Responses	Time Per Response	Total Annual Burden (Hours)	Hourly Rate*	Monetized Value of Respondent Time
Human Resource Manager	278	Once	278	25 min.	116	\$76.43	\$8,866
Unduplicated Totals	278		278		116		\$8,866

* See Section 12, subsection III.

² Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2013 National Occupational Employment and Wage Estimates; Management Occupations located at http://www.bls.gov/oes/2013/may/oes_nat.htm#11-0000.

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 program. Anyone without computer access can request the form from the Department's Office of Foreign Labor Certification.

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. However, employers who choose to commission private surveys will incur costs. The cost of conducting a wage survey by a third party can vary widely depending on various factors, such as the scope of the survey, the survey methodology used, the number of respondents, and the nature of the sample. After reviewing pricing information provided by some survey service providers, DOL estimates that it would take a manager (SOC code 11-0000) 8 hours at \$76.00 per hour to review and a survey researcher (SOC code 19-3022) a total of 40 hours at \$36.58 per hour to randomly select at least 3 employers and 30 employees (8 hours), collect their wage data (16 hours), calculate the hourly average wage (8 hours), and write a report and provide it to the employer (8 hours). Therefore, the direct cost of conducting a wage survey by a third party is estimated at \$2,071.20 ($= \$76 \times 8 + \36.58×40). DOL also adds 10 percent to \$2,071.20 to account for a profit for the third party surveyor. The full cost of conducting a wage survey is \$2,278.32 ($= \$2,071.20 \times 1.1$). Because surveys are valid for two years and some employers will use state produced surveys, DOL assumes that 93 employers will conduct a private wage survey by a third-party each year that is valid for two years. The cost to the employers will be \$211,884 annually ($\$2,278.32 \times 93$).

In addition, the employer will be requesting surveyors to provide the information needed to complete the Form ETA-9165. We estimate that the surveyors will cost employers \$5,639 annually. This is based on an estimate that a Survey Researcher (SOC code 19-3022) will spend, on average, 50 minutes to compile the information necessary to provide the information needed to complete the new form and transmit it to the employer. In estimating employer staff time costs, the Department used the national cross-industry mean hourly wage rate for a Survey Researcher (\$25.58), based on the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics survey wage data,³ and increased these wages by 1.43 percent to account for employee benefits and other non-wage compensation. The total hourly cost of a Survey Researcher is thus \$36.58. However, we estimate that one-third of the employers that will provide surveys will utilize state-provided surveys and will incur no cost. Therefore, the total cost to employers is calculated as follows: $\$36.58 \times 50 \text{ minutes} \div 60 \times 185 \text{ employers} = \$5,639$.

³ Source: Bureau of Labor Statistics. Occupational Employment Statistics: May 2013 National Occupational Employment and Wage Estimates; Management Occupations located at http://www.bls.gov/oes/2013/may/oes_nat.htm#11-0000.

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The Total Cost to employers is \$217,523

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

The average Federal Government cost⁴ 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 that contain employer-provided wage surveys in the H-2B program is estimated at \$3,216 and is calculated as follows:⁵

Staff Cost for Reviewing the Form ETA-9165	\$3,248
Staff (GS-12, Step 5 x 1.69 FLFTE) @ 10 minutes	
$\$41.48 \times 1.69 \times 278 \times 10 \text{ minutes} \div 60 = \$3,248$	

TOTAL COST TO FEDERAL GOVERNMENT **\$3,216**

A.15. Reasons for any program changes reported in Items 12 or 13.

This information collection request is a new information collection that was approved under emergency procedures on April 29, 2015. However, upon further review, the agency realized the burden associated with surveyors should be accounted for as a cost item instead of as a time burden. Therefore, the burden hours are decreasing by 232 from 348 to 116. The number of respondents is decreasing by 278 from 556 to 278. The number of responses is also decreasing by 278 from 556 to 278. The costs are increasing from \$211,884 to \$217,523

On December 18, 2015 Congress passed the Consolidated Appropriations Act, 2016 (the Act). Congress added specific prohibitions on funding of certain portions of the U.S. Department of Labor's H-2B non-agricultural temporary labor certification program. (The pertinent sections of the new law are attached in ROCIS under supplemental documentation.) The new requirements from Congress mean that the Form ETA-9165

⁴ The Federal Government cost estimates are based on the U.S. Office of Personnel Management 2015 Salary Tables. Please see: <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/#url=2015>. The cost estimate for the adjudication of prevailing wage applications with private surveys in the H-2B program uses wage data from the locality pay schedule for the Washington-Baltimore-Northern Virginia, DC-MD-VA-WV-PA area to reflect the locations of ETA's National Prevailing Wage Center.

⁵ The Department expects that its cost of evaluating employer-provided surveys will decrease as a result of the new Form ETA-9165. However, the Department did not assess its cost in evaluating employer-provided surveys in 2008 (73 FR 29942 (NPRM); 73 FR 78020 (final rule)), the first time regulations permitting the submission of employer-provided surveys were established. As a result, we are unable to assess the cost-savings that we expect as a result of the new Form ETA-9165.

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and the instructions for the form must be amended to comply with the congressional mandate. Specifically §112 within Div. H , Title I in the Act now mandates OFLC accept any privately-sourced, employer-submitted wage survey that it determines is statistically supported, even where OES wage data for the occupation is sufficient to assign an accurate prevailing wage to the job for which the employer seeks certification. The change necessary to comply with this new mandate is deleting several questions from the form. The Department is not making any regulatory changes and these additional changes to the form do not contribute to any burden changes as calculated above.

A.16. Method for publishing results.

The information from the Form ETA-9165 will not be published.

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

The Department displays the expiration date for OMB approval on all affected forms.

A.18. Explanation of each exception in the certification statement.

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.