másH2B
THE H-2B LABOR SPECIALISTS

**November 6, 2018**

William W. Thompson II
Administrator, OFLC
Box PPII 12-200
ETA
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Administrator Thompson:

In accordance with the Friday, September 7, 2018 ***Federal Register*** Notice, the following are comments on the Proposed Revision of a Currently Approved Collection; H-2B Temporary Non-Agricultural Labor Certification Forms (OMB Control Number 1205-0509). We appreciate the opportunity to comment and are available for any follow-up questions or clarifying discussions. We also wish to associate with comments filed by the Hall Law Office PLLC.

**General:** We strongly encourage the Department to make these forms effective post January 1, 2019 as that is the single largest filing day of the year for the H-2B regulated community. Employers and their representatives are extraordinarily busy until after January 1, 2019 gathering and preparing filing materials. To introduce new procedures and data collections would be highly disruptive.

The Friday, September 7, 2018 ***Federal Register*** Notice stated the proposed Form changes included efforts to streamline and make more transparent the process of information collection. We have included specific comments where, in our view, the proposed collection item lacks transparency and/or requires information beyond current collection requirements rendering the item less than streamlined.

**ETA Form 9142B, Application for Temporary Employment Certification**

The Department should prepare and post a list of all proposed changes, by form, and reasoning for the change. The time burden for reviewing each form by line item to determine whether there is any change is significant and not adequately captured. This level of transparency would be consistent with the stated goals of the proposed changes.

**Footer Display: Determination Date** – is this the adjudication date or when the employer, attorney/agent notified?

**Section A. Nature of H-2B Application.** This question lacks sufficient transparency to respond. As USDOL has no statutory responsibility regarding the program's "cap", the Department should display its contemplated intent/disposition of this information and openly seek public comment. For example, is this a possible "new" means by which to allocate staff processing resources? OFLC has already published processing protocols and timing. Is this a new variation i.e., cap exempt applications are not reviewed in submission order, etc.? How can this be a "required field" when the administration of the H-2B program



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"cap" is the responsibility of USCIS? Last, many employers file multiple applications for staggered entry of workers and not 100% of the requested workers on a single application may ultimately be named beneficiaries and exempt from the cap.

**Section B. Statement of Temporary Need**. The form limits the statement to only the space provided, but does not provide additional information as to character limits for this space. The form requests four points be explained in this section and states that evidence should be retained by the employer in the event of a Notice of Deficiency (NOD). The Department fails to acknowledge the receipt of a NOD will effectively eliminate the employer from participation in the program for that six-month period absent having named beneficiaries as USCIS will have received sufficient petitions to meet the cap by the time the NOD is satisfied. Therefore, it is critical adequate space is provided to fully explain any application changes from the previous certification or for first time filers.

Item F.a.4. Job Duties - it is unclear whether the form space expands to all for the "describe, in detail, the job duties.... Specify and describe .... All job duties must be disclosed in the space provided on this form. These exacting requirements are incongruous with a small limited amount of Form space. Equally incompatible is the requirement, "The entry in this field must be the same as the job duties issued by the Department for the employer's job opportunity on the PWD Form ETA-9141."

The ETA Form 9141 and ETA Form 9142B (proposed) have different space allowances with respect to job duties – the Form 9141 allows the filer to fill the specific item space and continue on to additional pages, as necessary. Conversely, the proposed Form 9142B appears to restrict the amount of space while simultaneously requiring the identical information. We suggest that the amount of information sufficient to generate a prevailing wage is less than that necessary to grant a labor certification with respect to job duties. If this proposed change is intended to bolster future Form 9141 Job Duty descriptions, then that policy goal should be addressed in a transparent and public-facing process of notice and comment rulemaking. Otherwise, as drafted the Forms and Instructions are incompatible.

**Section E. Attorney or Agent Information (if applicable)**. The form does not sufficiently accommodate agents that are entities rather than natural persons. Unlike attorneys, the regulations permit corporations, limited-liability companies, and other business entities to serve as the employer's representative. Like the current form, this proposed form assumes that the agent is a natural person. Either the form should be amended to accommodate an entity as the named agent, or alternatively the form instructions should be amended to clarify that the natural person named in Items E.2-E.4 of this section is the individual acting on behalf of the entity (e.g., a manager, officer, or director). Otherwise, the form is misleading as it suggests that the named individual in Items E.2-E.4 is serving as the agent in his or her *individual* capacity, rather than merely the capacity of a corporate signatory. Another solution may be to add an "Item E.22" to this section asking if the Agent marked in Item E.1 is an entity rather than an individual, natural person.

**Section F. Employment and Wage Information. Section a, Item3**. Please provide clarification as to the word "submit". Due to the extremely seasonal nature of H-2B filings, many SWA's request the job order be submitted in advance to allow them time to review and draft the job orders. However since the regulations require a concurrent submission of the job order and 9142, it would appear that the date the job order was transmitted to the SWA would create a NOD if the date on the ETA Form 9142 does not match the ETA Form 9142 submission date.

**Section F. Employment and Wage Information. Section b**. The form appears to be missing the section for additional worksite counties. This appears to be requested in section c, item 2, the Appendix A, but with substantially more information than is currently required. Additionally this form appears to require a prevailing wage number for each location. Is the intent to significantly increase the prevailing wage

requests at NPWC?

**Form ETA-9142B – Appendix A**

The intent of the Form including its instructions, as written, is unclear. Is this Form intended for use exclusively by those employers performing work on an itinerary e.g., entertainment, tree planting and reforestation – work covered by existing special procedures? If not, then it is impractical and an unnecessary proposed collection for example, that a landscaping company list every "worksite" (residential home, etc.) where the requested workers may ultimately perform work. The intent of this collection item is unclear. Proposed areas of intended employment generally at the MSA level, have already been reviewed by the Department and in accordance with the applicable regulation, been issued a prevailing wage. It is unclear why this information requires elaboration at the individual residential or commercial level, particularly when such a collection would be inconsistent with years of practice and current regulations absent formal notice and comment rulemaking.

The collection burden estimates are extraordinarily low and no benefit articulated. Many employers will not know at this early point in the season final customer lists as lists are fluid and can change throughout the entire period of employment (within approved areas of employment).

The proposed requirement that …. "The employer must complete as many additional Appendix A forms as are necessary to list all intended worksites for this application." This proposed requirement is not authorized by statute or the IFR implementing the H-2B program. This proposed requirement conflicts with the OFLC H-2B FAQ regarding episodic employment and the instruction provided to employers when completing the ETA Form 9141 that states, "The NPWC finds that Items D.c.7 and D.c.7a, which ask for information about multiple worksites, routinely cannot be used because they are too general. For instance, listing "the San Francisco area" is an inadequate response because the San Francisco area has nine counties. The employer must provide enough geographic detail about each area of intended employment to cover all known worksite locations *by indicating each county (or independent city/town/township/borough/parish, as appropriate) and the corresponding state where the employee will work. However, the NPWC does not require employers to list the physical address for each worksite to receive a prevailing wage determination for that worksite*" (emphasis added).

This listing requirement implies that unless an individual worksite (not defined in regulation) is listed on this Appendix, H-2B workers may not perform work at that location. To do otherwise, would be a violation of program requirements and Assurances even though the job duties are allowable and the work performed within an approved area of intended employment. The Form and instructions should clarify/address this concern in a transparent fashion.

The employer-incurred cost of such an implication was not included in the benefit-cost analysis accompanying the IFR and a Form is not the proper vehicle for proposing new restrictions on employer revenues absent formal notice and comment rulemaking.

At a minimum, the proposed form should not make the worksite city a mandatory field. The form should be designed to accept a county in lieu of a city, and vice-versa.

**Form ETA-9142B – Appendix B**

**A. Attorney or Agent Declaration.** The form does not sufficiently accommodate agents that are entities rather than natural persons. Unlike attorneys, the regulations permit corporations, limited-liability companies, and other business entities to serve as the employer's representative. Like the current form,

this proposed form assumes that the agent is a natural person. The form should either be amended to accommodate an entity as the named agent, or alternatively the form instructions should be amended to clarify that the natural person named in Items 1-3 of this section is the individual acting on behalf of the entity (e.g., a manager, officer, or director). Otherwise, the form is misleading as it suggests that the named individual in Items 1-3 is serving as the agent in his or her *individual* capacity, rather than merely the capacity of a corporate signatory.

**B. Employer Declaration.**

**General:** Please provide an explanation of why employer initials are now required in addition to their signature.

5. Introduction of new language - *If, after the issuance of a prevailing wage determination, the Department issues a new or revised prevailing wage determination that is assigned to the employer's application or certified period of employment, the employer must offer a wage that equals or exceeds the highest of the new prevailing wage or the applicable Federal, State, or local minimum wage, unless notified otherwise by the Department.*

This new wage obligation lacks an authority citation legally binding employers to pay a new higher wage. 20 CFR 655.655.10 Determination of prevailing wage for temporary labor certification purposes does not prescribe procedures for subsequent prevailing wage issuances and there has been no notice and comment rulemaking on this issue or benefit-cost analysis. The proper vehicle for the introduction of new binding and potentially costly wage requirements is not via a Form change. Such a policy proposal should be formally proposed through notice and comment rulemaking.

**Form ETA-9142B – Appendix C**
The instructions appear to indicate that the Department will require every "Foreign Labor Recruiter" along with each member of their staff to be disclosed on the appendix. Many of the larger "Foreign Labor Recruiters" have 20 or more employees during the peak processing time. By requiring all of the individuals to be disclosed, this will put an added burden on employers to determine this information to be accurate at time of filing, as well as the extended data entry on the form. It would appear this can be limited to just the owner(s)/ primary management for the foreign entity.

**Form ETA-Form 9155**
Does the inclusion of this form for revision indicate that the Department intends to utilize it for filings going forward? If so, when it the planned filing date for which it will be required? If it does intend to be used, section B, item 7 appears to have a different requirement for the specificity of the additional worksite than the proposed ETA Form 9142. To lessen the risk for confusion, can these forms be identical in their requirements of employers?

Explanation of relationship, if any, between the USDOL Registration for H-2B Temporary Employment Certification and USCIS' required Detailed Statement of Need for I-129 Petition applications. Can the maximum 3 years of Registration validity satisfy USCIS temporary need review, if not completely partially? In the instance of a three-year approved registration, would Detailed Statement of Temporary Need be required assuming any changes in dates of need and requested workers fall below the regulatory thresholds?

Under Section B. Temporary Need Information. No. 9 Clarification of what constitutes "or Other Temporary Need" as this term is not found in the H-2B IFR.

**Approval of H-2B Temporary Labor Certification**

- Explicit written acknowledgement from USCIS that this revised Form is acceptable for purposes of meeting I-129 and H Supplement filing requirements.

- For USCIS I-129 filing purposes, will a copy of the Form ETA 9142B be required for Service Center adjudication or will this new one page certification suffice when the original labor certification is a filling requirement?

- Discussion of what, if any, security measures will accompany the e-mailing of the certified labor certification and process for replacement if not received.

We appreciate the opportunity to comment on the proposed H-2B Form changes. Should we be able to provide any additional assistance, please feel free to call upon us.

Sincerely,

Elizabeth D. Whitley, President
másLabor