

November 6, 2018

*Submitted via email to* [ETA.OFLC.Forms@dol.gov](mailto:ETA.OFLC.Forms@dol.gov)

William W. Thompson II  
Administrator, Office of Foreign Labor Certification  
Box PPII 12–200  
Employment and Training Administration, U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Agency Information Collection Activities; Proposed Revision of a Currently Approved Collection; Request for Comments; H–2B Temporary Non-Agricultural Labor Certification Program Forms (OMB Control Number 1205–0509)

Dear Administrator Thompson,

I am writing on behalf of Justice in Motion, in response to the Department of Labor (DOL) Notice of Proposed Revision published in the Federal register on September 7, 2018, to suggest several improvements for the proposed form H–2B Temporary Non-Agricultural Labor Certification Program.

Justice in Motion is a US based NGO dedicated to protecting migrant rights by ensuring justice across borders. We have been intimately involved in monitoring the H–2B Temporary Non-Agricultural Labor Program, supporting litigation on behalf of H-2B workers, and advocating for changes in the H-2B program to provide increased protections for program participants. The current proposal will benefit from the suggested changes described below.

For the reasons detailed in the comments that follow, the Employment and Training Administration of the U.S. Department of Labor should incorporate the changes suggested by Justice in Motion and others in order to ensure that employers will fulfill their obligations to contracted H-2B workers, and are providing the appropriate information to the government in order to establish applicability of important worker protections.

Please do not hesitate to contact Justice in Motion for further information.

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**DETAILED COMMENTS regarding Agency Information Collection Activities; Proposed Revision of a Currently Approved Collection; Request for Comments; H-2B Temporary Non-Agricultural Labor Certification Program Forms (OMB Control Number 1205-0509)**

**H-2B Application for Temporary Employment Certification Form ETA-9142B, Section C**

I. Section C currently requires employers to provide basic information about themselves, including contact information. The previous version of the form also requested information regarding the company hosting the H-2B workers. In the previous version of the form, questions 14, 15, and 16 requested:

- 14. Number of non-family full-time equivalent employees
- 15. Annual gross revenue
- 16. Year established

In the proposed form, there are no similar questions that obtain this information. Having answers to these questions would be material for DOL Wage and Hour enforcement including jurisdiction under the FLSA. This information is important in enforcing wage and hour violations and needs to be obtained with these omitted, or some similar questions.

***Suggestion:***

We request that the following questions requesting information about the business hosting H-2B workers be added to Section C of the proposed ETA-9142B form:

- 1. Number of non-family full-time equivalent employees
- 2. Annual gross revenue
- 3. Year established

II. This form would also benefit from additional questions that could help determine if employers are likely to commit wage and hour violations. The suggested addition of question number 2 below would also provide information about employers that manipulate the H-2B system through the number of workers they recruit each year. Often, employers request more workers than actually needed. They do this for multiple reasons including to loan them out other employers, to send complaining workers home while having replacement workers already present. Registering the number of workers year to year may help reduce the abusive practice of over-asking for nefarious purposes.

***Suggestion:***

We request that the following questions requesting information about the business hosting H-2B workers be added to Section C of the proposed ETA-9142B form:

1. During the past five (5) years has the employer been a debtor in bankruptcy proceedings?

If so, identify the Bankruptcy Court District and docket number and describe the current or final status of that proceeding. The employer shall notify DOL if it becomes a debtor in bankruptcy proceedings during the period of the requested labor certification.

2. For each of the past three years identify the ETA Case number for applications for labor certification which were submitted for the occupation and location covered by this application for labor certification and specify the number of H-2B workers hired pursuant to each prior approved labor certification.

ETA Case #: \_\_\_\_\_ Number of H-2B workers Hired: \_\_\_\_\_

ETA Case #: \_\_\_\_\_ Number of H-2B workers Hired: \_\_\_\_\_

ETA Case #: \_\_\_\_\_ Number of H-2B workers Hired: \_\_\_\_\_

3. Has the employer been sued in the past for wage payment issues, or has a wage and hour complaint been lodged against the employer? Y/N

If Yes, explain:

### **H-2B Application for Temporary Employment Certification Form ETA-9142B, Section F**

Section F, 5 and 6, requests information about the expected work schedule of the H-2B workers. It currently reads:

5. Number of hours of work per week

Basic: \_\_\_\_\_ Overtime: \_\_\_\_\_

6. Hourly work schedule

A.M. (h:mm): \_\_\_\_\_ : \_\_\_\_\_ P.M. (h:mm): \_\_\_\_\_ : \_\_\_\_\_

The proposed form does not specify the expected number of days per week of work or schedule per day. Employers have an incentive to understate hours of work to avoid payment of  $\frac{3}{4}$  guarantee. A better model can be found in Form ETA-790, Job order for H-2A Agricultural workers. The proposed Form ETA-9142B should include similar fields requesting the projected work schedule for each day of the week. Instructions should also specify that a worker cannot be penalized for refusing to work more hours in a day or in a week than the number of hours specified on Form ETA-9142B.

### ***Suggestion:***

Section F, questions 5 and 6 of Form ETA-9142B should be replaced by the following:

Number of hours of work per week:

Basic: \_\_\_\_\_ Overtime: \_\_\_\_\_

Number of hours of work per day:

Sunday: \_\_\_\_\_

Monday: \_\_\_\_\_  
Tuesday: \_\_\_\_\_  
Wednesday: \_\_\_\_\_  
Thursday: \_\_\_\_\_  
Friday: \_\_\_\_\_  
Saturday: \_\_\_\_\_

### **H-2B Application for Temporary Employment Certification Form ETA-9142B – Appendix A**

The proposed Form ETA-9142B – Appendix A, appropriately ties wage and place of employment information to the approved ETA 9141 and requires identification of each related PWD Case number. However, the instructions appear to allow an employer to report payment of required minimum prevailing wages on a weekly basis even where such wages are determined on the PWD to be on an hourly basis. This is particularly a problem for the mobile entertainment industry, in particular SOC Codes 35-3022 Counter Attendants, Cafeteria, Food Concession, and 39-3091 Amusement and Recreation Attendants.

In FY18 4,418 H-2B positions were authorized in these two SOC Codes with payment on a weekly basis rather than an hourly basis. Since historically the mobile entertainment industry has not accurately tracked hours worked this is particularly consequential. All employers should be required to pay minimum wages on the same hourly basis as the PWD determination where the PWD determination is on an hourly basis, and this should be made clear in the instructions.

### **H-2B Application for Temporary Employment Certification Form ETA-9142B – Appendix C**

Appendix C currently requests the following information:

1. Recruiter's Last (family) Name
2. First (given) Name
3. Middle Name(s)
4. Name of Employer/Recruiting Organization
5. City
6. State
7. Postal Code
8. Country
9. Province

#### ***Suggestion:***

Two (2) fields should be added to each recruiter information box, such that the result would request the following:

1. Recruiter's Last (family) Name
2. First (given) Name
3. Middle Name(s)
4. Name of Employer/Recruiting Organization
5. City
6. State
7. Postal Code
8. Country
9. Province
10. Is the recruiter registered as a recruiter in the country of recruitment? Y/N
11. Is a subcontractor used in recruitment? Y/N  
(If yes, please provide an addendum containing the contact information required for recruiters in questions 1-10 here.)