



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

November 6, 2018

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

Submitted via e-mail: ETA.OFLC.Forms@dol.gov

Re: OMB Control Number 1205-0509

Department of Labor 60-Day Notice and Request for Comments:
H-2B Temporary Non-Agricultural Labor Certification Program Forms

Dear Mr. Thompson:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-Day Notice and request for comments published in the Federal Register on September 7, 2018.¹ The notice of information collection solicits comments on proposed changes to the H-2B temporary non-agricultural labor certification program forms, which includes Form ETA-9142B; Appendix A, B, C, and D; Form ETA-9165; Form ETA-9155; Seafood Industry Attestation; E-Certification; and applicable instructions.

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We welcome the opportunity to comment on the H-2B temporary non-agricultural labor certification program forms and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views on this matter.

As an initial matter, we appreciate the Department of Labor's (DOL) efforts to streamline the H-2B process by proposing to issue electronic certifications. We believe this action will significantly improve the H-2B process without jeopardizing the integrity of the H-2B program. We also appreciate the DOL's desire to enhance the quality, utility, and clarity of the information

¹ 83 Fed. Reg. 45469 (Sep. 7, 2018).

collected, while minimizing the burden on stakeholders and maintaining a streamlined and efficient application process. It is in this same spirit that we offer the following comments.

FORM ETA-9142B – GENERAL INSTRUCTIONS

Section A: Nature of H-2B Application

We recommend providing further clarification in this section as to whether an employer should respond “yes” if it is filing a petition which may include workers who are exempt from the statutory numerical limit and workers who are not exempt. It is not uncommon for a petitioner to file one Form ETA-9142B which may include both exempt and non-exempt beneficiaries. One option is to instruct employers to indicate “yes” if the application will cover both cap subject *and* exempt H-2B employees.

Section B.1: Temporary Need Information

We recommend that the statement provided in section B.1., which indicates that “The entry in this field must be the same as the job title issued by the Department for the employer’s job opportunity on the prevailing wage determination (PWD) Form ETA-9141”, be modified to provide that “The entry in this field must be the same as the job title issued for the employer’s job opportunity on the prevailing wage determination (PWD) Form ETA-9141 issued by the Department.” This change in language is recommended in order to clarify that the job title is not the Standard Occupational Classification (SOC) occupation job title issued by the Department on a PWD under section B.3.

Section B.8: Temporary Need Information

It is common for employers to provide a payroll summary, gross revenues, occupancy charts, etc. as documentation of temporary need. The Department should clarify in the instructions whether these types of evidence can be provided and/or added to the allotted space on the form in addition to the written brief statement. This suggestion is based on the presumption that the Employer Registration requirement has not been implemented and may still not be implemented once this new Form is effective.

Section F.b.: Place of Employment and Wage Information

We recommend that the statement in section F.b., which provides that “The worksites disclosed in this section of the application, including the worksites disclosed in Appendix A, must be covered by a valid PWD issued by the Department on the Form ETA-9141” be modified to indicate “The worksite disclosed . . .” to reflect that only one worksite should be listed on the Form ETA-9142 and any additional worksites can be listed on Appendix A.

Section F.b.1: Place of Employment and Wage Information

We recommend that the instructions provide guidance that when it is not possible to identify the worksites at the time of completing Form ETA-9142B that the employer must ensure the worksites are located in the area of intended employment pursuant to the prevailing wage determination, Form ETA-9141.

Section F.b.7: Place of Employment and Wage Information

We recommend adding the following verbiage to section F.b.7 “as stated at www.flcdatabcenter.com.”

Section F. b.10a and 10b: Place of Employment and Wage Information

We recommend in section F. b.10a and section F. b.10b. that the instructions not state that “N/A” should be noted since these are optional sections and can be left blank.

FORM ETA-9142B

Section B.4. Temporary Need Information

We recommend retaining the breakdown from the current Form ETA-9142B, which divides the type of workers requested (i.e., new employment, change in employer, etc.)

Section F.a.7. Employment and Wage Information

We recommend adding the following verbiage to section 7, indicate the major(s) and/or field(s) of study required (may list more than one related major and more than one field). If “Other degree” in question 7, specify the diploma/ degree required.

APPENDICES A-D

The Department proposes to add three (3) new Appendices, Appendix A (Additional Worksite and Wage Information), Appendix C (Foreign Labor Recruiter Information), and Appendix D (Employer-Client Information). The Department concedes in its Public Burden Statement that completion of the additional 3 Appendices will take 2 hours and 10 minutes, which is an hour and 10 minutes longer than the current form. While we understand the need for transparency, we believe that this information can be collected by adding specific questions to Form ETA-9142B, rather than creating three (3) additional forms and burdening the public with completion of these additional forms.

Notwithstanding the above concerns, we address the substance of Appendix A and Appendix B individually.

Appendix A (Additional Worksite and Wage Information)

AILA is concerned about Items 6, 7, and 8 of Appendix A. Item 6 requests information about the total workers needed for each additional worksite. Items 7 and 8 request information about the specific start date and end date for each worksite. These requests present a substantial burden to job contractors and employers who are impacted by unpredictable events such as weather and market conditions. Employers in industries such as landscaping, seafood, hospitality, and forestry require flexibility in determining the number of workers for each worksite, as well as the date that work will be begin and end—something that is almost always influenced by weather and market demand. Consequently, determining the total number of workers needed and the exact dates of need at a specific work site with any degree of precision is impossible. We propose that the Department eliminate Items 6, 7, and 8 from Appendix A regarding the total number of workers and the specific start dates and end dates for each worksite.

We also recommend adding a text field that permits employers to discuss additional worksites that have not yet been identified at the time of the filing but are within the area of intended employment such as “Additional worksites will be in the area of intended employment pursuant to 20 CFR 655.5 and pursuant to the locations identified in the corresponding Form ETA-9141.”

Appendix B (Attorney/Agent/Employer Declaration)

Section A. Attorney or Agent Declaration

The italicized language in Section A of the Appendix B form relating to the attorney or agent declaration should be modified as follows to more accurately state the law as provided in 18 U.S.C. Sections 2, 1001, 1546, and 1621: “I understand that to knowingly *and/or willfully* furnish materially false information”

Section B. Employer Declaration

In item 3 of the employer declaration section, AILA appreciates the added language “until 21 days before the date of need” and supports its inclusion in this subpart.

In item 5 of the employer declaration section, AILA objects to the inclusion of the following proposed 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.”

20 CFR section 655.10 does not include a provision that allows the Department to issue a second supplemental prevailing wage with the exception of an employer's request for a supplemental wage determination based on an employer-provided survey. Employers must be able to rely on a single prevailing wage determination issued by the Department prior to filing an H-2B labor certification application.² The proposed language, as written, would permit the Department to issue a post-filing and/or post-certification prevailing wage determination at any time resulting in enhanced exposure to litigation and back wages. Most importantly, the inclusion of this provision in a proposed form change involves a serious and substantive policy decision that requires notice and comment rulemaking and the Department's forms cannot expand or alter regulatory obligations, including already existing compliance rules as set out in 29 CFR 503 et seq.

Employer Declaration Under Penalty of Perjury

Furthermore, AILA objects to the inclusion of the following proposed language under the employer declaration section on Page B.3, "**including every page of the Form ETA-9142B and supporting documentation**" (bold and underline is in the proposed Appendix B). This language is unnecessary and superfluous in that the employer declares that it has read the application in the immediately preceding language of this paragraph. At a minimum, the Department should include the language "and supporting documentation" and remove the language "including every page of the Form ETA-9142B."

Furthermore, the italicized language should be modified as follows to more accurately state the law as provided in 18 U.S.C. Sections 2, 1001, 1546, and 1621: "I understand that to knowingly *and/or willfully* furnish materially false information. . . ."

FORM ETA-9155 – GENERAL INSTRUCTIONS

Section B. 2-3. Temporary Need Information

We recommend that a statement be added that the SOC code and corresponding job title do not have to correlate with the SOC code and title on the submitted Form ETA-9142B as long as the job title and duties on the Form ETA-9142B match exactly the job title and duties on the Form ETA-9155. This will avoid confusion if the Form ETA-9141 PWD is issued by the Department of Labor for the same position with the exact same duties but with a different SOC code and job title designation.

² See *Island Holdings, LLC*, 2013-PWD-00002 (December 3, 2013).

Section B.17a. Temporary Need Information

We applaud section B, item 17.a. for allowing employers to “identify each geographic places(s) of employment with as much specificity as possible,” as it is consistent with the regulatory requirement.

Conclusion

We appreciate the opportunity to comment on the proposed changes to the H-2B temporary non-agricultural labor certification program forms and applicable instructions. We look forward to a continuing dialogue with the Department of Labor on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION